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QUALIFICATION FEATURES OF THE CIRCUMSTANCES INTRODUCING ACTIVITY FOR PROTECTION OF THE PARAGRAPH "B" CLAUSE 3 ARTICLE 35 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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В статті проаналізовано умову прийнятності індивідуальних заяв до Європейського суду з прав людини, що була запроваджена Протоколом №14 до Конвенції про захист прав людини і основоположних свобод – «суттєва шкода, якої зазнав заявник», а також обставини, що вводять у дію застереження пп. «b» п. 3 ст. 35 Конвенції про захист прав людини і основоположних свобод, та їх кваліфікаційні ознаки.

З'ясовано, що Європейський суд з прав людини, навіть припускаючи, що заявник не зазнав суттєвої шкоди, не може оголосити неприйнятною будь-яку індивідуальну заяву, яка порушує питання: застосування права, тлумачення норм Конвенції про захист прав людини і основоположних свобод, національного права. Встановлено, що повага до прав людини, навіть якщо є припущення, що заявник не зазнав суттєвої шкоди, вимагає оголошення Європейським судом з прав людини прийнятною таку індивідуальну заяву оскільки в ній були порушені питання загального характеру щодо дотримання норм Конвенції про захист прав людини і основоположних свобод:

1) необхідність уточнити зобов'язання держав згідно з Конвенцією;

2) примусити державу-відповідача вирішити структурну проблему, яка зачіпає інтереси інших осіб, що знаходяться у такому ж становищі, що й заявник.

Виділено такі умови, за наявності яких повага до прав людини не вимагає розгляду заяви Європейським судом з прав людини:

1) відповідне національне законодавство та практику його застосування було змінено, а подібні питання вже було вирішено в інших справах, які розглянув Європейський суд з прав людини;

2) відповідний закон було скасовано, а заява мала лише історичний характер;

3) Європейський суд з прав людини або Рада Міністрів вже розглянули це питання як комплексну проблему

***Ключові слова**: індивідуальна заява, умови прийнятності індивідуальної заяви, застереження, суттєва шкода*

1. Introduction

During the years of existence of the control system of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (the "Convention") [1] has applied definite changed. The purpose was to improve the procedure envisaged by the Convention (Protocol No. 9 to the Convention [2]), to ensure and increase the effectiveness of the protection of human rights and fundamental freedoms, mainly due to the increase in the number of statements (applications) to the European Court of Human Rights and members of the European Council (Protocol No. 11 to the Convention [3]).

In view of the urgent need to amend certain provisions of the Convention in order to preserve and improve the effectiveness of the control system over a long period mainly in the light of the increasing dependence of the European Court of Human Rights (hereinafter - the Court) and the Committee of Ministers of the European Council, and in particular, taking into account the necessity to provide the Court with the opportunity to continue to play its leading role in protecting human rights in Europe, it has undergone changes in the international legal mechanism for accessing to the European Court of Human Rights which one of the elements is the conditions for individual statements (Protocol No. 14 to the Convention [4]).

2. Literary review

The introduction of a new condition for the admissibility of individual applications – substantial harm – has become an impetus for the intensification of discussions among scholars about the role of the new condition for the admissibility of an individual statement by the Court in the international legal mechanism for access to the Court (J. Gerards, L. Glas [5]), as well as with respect only to the general criteria for assessing (measuring) its availability or absence, regardless of the subject of the application (B. Rainey, E. Wicks and C. Ovey [6], N. Vogiatzis [7]). Despite a great number of fundamental scientific investigations by domestic and foreign scholars on the eligibility of individual statements to the European Court of Human Rights (Y. Bisaga [8], V. Mytsyk [9], etc.), comprehensive scientific studies on the eligibility conditions introduced by Protocol No. 14 to the Convention, the circumstances that provide warning in Par. "B" clause 3 of Art. 35 of the Convention, are absent.

Taking it into account, the research of the abovementioned questions is relevant and expedient.

3. Purpose and tasks of the research.

The purpose of the article is to implement a comprehensive analysis of the circumstances introducing

the caveat clauses: par. "B" clause 3 of Art. 35 of the Convention.

Tasks:

1) To find out, that any issues raised in an individual statement, the European Court of Human Rights cannot declare such an application inadmissible even assuming that the applicant has not suffered material damage.

2) In the case of questions of general character regarding compliance with the provisions of the Convention raised in an individual statement, respect for human rights requires the declaration of such an individual statement by the European Court of Human Rights even if it is assumed that the applicant has not suffered material damage.

3) Identify the conditions under which respect for human rights does not require consideration of an individual statement by the European Court of Human Rights.

4. Circumstances that enter into force clauses: par. "B" clause 3 of Art. 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms

In accordance with the amendments to the Convention for the Protection of Human Rights and Fundamental Freedoms, by Protocol No. 14 of 13th May, 2004 and Protocol No. 15 dated June 24th, 2013, the Court declares inadmissible any individual statement filed under Art. 34, if considering that the applicant has not suffered material damage, and if only respect for human rights guaranteed by the Convention and the protocols thereto do not require the substantive consideration of a statement (par. "b" clause 3of Article 35 of the Convention).

Despite the fact that the Convention does not define the concept of "substantial damage", according to Art. 32 of the Convention, the jurisdiction of the Court extends to all questions of interpretation and application of the Convention and the protocols thereto submitted to it for consideration in accordance with Articles 33, 34, 46 and 47 of the Convention. This is also relevant to the conditions of acceptability "the applicant has not suffered material damage" and the circumstances entering into action the reservation clauses (par. "B" clause 3 of Art. 35 of the Convention).

According to N. Sevostyanova, the category of "material damage" has not been yet concretized through the Court's interpretation and can be considered as a limiting factor for the effective realization of the right of an individual to apply the statement to the European Court of Human Rights. Considering the first decisions of the Court after the entry Protocol No. 14 into action, the author sets out main elements of the new eligibility criterion: the direct monetary loss should be related to the applicant's financial situation; the concept of "respect for human rights" is defined in relation to the provisions of the national legislation of the State party to the Convention [10]. The Applicants' guide to the admissibility of applications made by the Department of Legal Counsel at the European Court of Human Rights draws attention to the Court's decision in the case of Schaefer vs. Russia, in which the Court noted that, although there is no formal hierarchy between the three elements of paragraph 3 (b) Article 35, the issue of absence of material damage is a key to the new criterion. In most cases, a hierarchical approach is used, according to which each element of the new criterion is considered in turn order [11].

The practice of the European Court of Human Rights testifies that the main element of the acceptability criterion is the question whether the applicant was inflicted on a violation of his right or fundamental freedom of "significant damage". The criterion of "substantial damage" which is based on the idea that violation of law, irrespective to the extent whether this violation has materialized character from the legal point of view, must reach a minimum degree of its severity for being considered by the International Court [12].

Paragraph 80 of the Explanatory Commentary to Protocol No. 14 affirms that the contracting parties expect the Court to establish an objective criterion for the application of the new rule through the gradual development of case-law [13]. On the 1st of February, 2019 the European Court of Human Rights adopted this criterion into more than 25 cases and rejected in its application in more than 30 cases. Among these cases, there are cases against Ukraine either.

The analysis of the judgments of the European Court of Human Rights shows that the criteria for assessment on the material damage suffered by the applicant are as follows:

1) financial damage to the applicant; 2) public interest and the nature of the law, the violation of which is claimed by the applicant;

3) the subjective attitude of the applicant towards the violation of his rights and/or fundamental freedom and issues that are objectively relevant to him in one case or another;

4) the severity of the consequences of the alleged violation for exercising of the right and/or the possible consequences of such a violation for the applicant's personal situation [14].

As it has been already noted, the par. "B" clause 3 of Art. 35 of the Convention contains the following warning: The European Court of Human Rights cannot declare inadmissible any of individual statement if respect for human rights requires the substantive consideration. In 2016 the European Court of Human Rights applied the par. "B" clause 3 of Art. 35 of the Convention in 2 cases (the case of Kiril Zlatkov Nikolov vs. France of 10th November 2016 [15], the case of C.P. vs. the United Kingdom of 6th September 2016 [16]). In 2018 the European Court of Human Rights applied it to 1 case (the case of Brazzi vs. Italy of 27th September 2018 [17]).

The warning hypothesis forms an indication of the circumstances in which the Court undertakes to declare any individual statement acceptable.

Thus, in the Korolev vs. Russia judgment the European Court of Human Rights, assuming that the applicant did not suffer material damage notes, referring to the report of the Commission in the case of Thayerer vs. The United Kingdom of 14th December, 1976 [18], that further consideration of the case is necessary if it concerns issues of general nature which affect the observance of the Convention.

The analysis of these decisions as well as the judgment of the European Court of Human Rights in the case of Finger vs. Bulgaria of May 10th, 2011 [19], allows us to conclude that such a circumstance as respect for human rights is enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. Fundamental freedoms and protocols thereto, even if there is a presumption that the applicant has not suffered material damage, requires the admissibility of such an individual statement by the Court, since it raised issues of general character with regard to the observance of the rules of the Convention:

1) the necessity to clarify the obligations of the State in accordance with the Convention;

2) to compel the respondent State to resolve structural problem affecting the interests of other individuals being in the same position as the applicant.

In the Živić vs. Serbia judgment of September 13th, 2011 [20], the Court noted that even assuming that the applicant had not suffered material damage, the matter concerns questions of public interest and it is to be considered due to inconsistencies in the judicial practice of the Belgrade County Court regarding the right to fair wages and fair payment for the same job, that is the right to equal payment increase should be applied for all police officers belonging to the same category (p. 36–42) [21].

Consequently, even assuming that the applicant has not suffered material damage, the European Court of Human Rights declares acceptable individual application (statement) because in the case:

1) issues on public interest are raised;

2) the issue of non-conformity of national court practice with the requirements of the Convention are raised;

3) the question raised as to the existence of structural problem affecting the interests of other individuals who are in the same position as the applicant and the State is to resolve it.

Thus, the European Court of Human Rights, even assuming that the applicant has not suffered material damage, cannot declare inacceptable any individual statement which raises the following questions: application of the Law, the interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, National Law. In so far as it concerns the issue of the interpretation of domestic law, the role of the European Court of Human Rights is to ensure that the effects of such an interpretation are compatible with the Convention. The problem of the interpretation of domestic legislation must be resolved precisely by the national authorities of the country.

The approach according to which the Court in any event undertakes to declare acceptable any individual statement and to submit it under the substantive consideration if it requires respect for the rights of the public (paragraph 3 (b) of Article 35 § 3 of the Convention) is inappropriate and the one that does not correspond the subject and purpose of the new Provision. Taking into research such cases as of Ken vs. Austria of September 30th, 1985 [22], Leger vs. France, dated March 30th, 2009 [23]; Rinck vs. France of 19th October, 2010 [24], Fedotov vs. Russia of 13th April, 2006 [25], "Ionescu vs. Romania" of 2nd November, 2004 [26] the Court noted that respect for Human rights provided in the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols do not require the Court to consider individual statements in substance if it concludes that the general problem identified in the case has been eliminated or similar legal issues have been resolved by the Court in other cases. In Vasilchenko vs. Russia judgments of September 23rd, 2010 [27]; Burov vs. Moldova dated June 14th, 2011 [28]; Havelka and others vs. Czech Republic of November 2nd, 2004 [29] as well as considering the case Koroliov vs. Russian Federation as required by paragraph B of clause 3 of Art. 35 of the Convention, and referring to its previous decisions in the cases of Hornsby vs. Greece of March 19th, 1997 [30], Burdov vs. Russia dated May 7th, 2002 [31], the Court does not consider as profound requirements ones of public order (*ordre public*), which would justify the substantive considerations because:

1) the court on several occasions resolved similar issues to those arising in the present case and set out in detail the obligations of the State under the Convention in that regard;

2) both the Court and the Committee of Ministers of the European Council have addressed to the systemic problem of non-implemented national court decisions in the Russian Federation and the necessity for general measures to prevent new violations in this regard.

Thus, the analysis of the practice of the European Court of Human Rights regarding the application of paragraphs "B" clause 3 of Art. 35 suggests that respect for human rights does not require consideration of the statement in the Court, if:

1) the relevant national law and the practice of its application have been changed, and similar issues have already been resolved in other cases that were considered by the Court;

2) if the relevant law was abolished and the complaint had only a historical character;

3) if the Court or the Council of Ministers has already considered the issue as a complex problem.

The Convention does not guarantee the protection of theoretical and illusory rights, but guarantees the protection of the rights of specific and effective (judgment decision of the European Court of Human Rights in Artico vs. Italy dated May 13th, 1980).

Thus, the principle of respect for human rights covers over the violation of the principle of proper administration of justice. The European Court of Human Rights, even assuming that the applicant has not suffered material damage, cannot declare inacceptable any individual statement (claim) filed under Article 34 of the Convention, if the respect for human rights guaranteed by the Convention and the protocols thereto require the substantive consideration of the case.

5. Results of the study

The article analyzes the condition for the admissibility of individual applications to the European Court of Human Rights, which was introduced by Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, the "substantial damage to which the applicant suffered" as well as the circumstances that introduce into the reservation of paragraph "B"

clause 3 of Art. 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms and their qualifications.

When found that any issues raised in an individual statement, the European Court of Human Rights, even assuming that the applicant has not suffered material damage, cannot declare such statement (application) as inacceptable. It is founded that in the presence of any general questions regarding the observance of the norms of the Convention, raised in an individual statement, respect for human rights requires the announcement by the European Court of Human Rights of individual statement as acceptable, even if there is a presumption that the applicant has not suffered material damage. The conditions under which respect for human rights does not require consideration of an individual statement by the European Court of Human Rights are distinguished.

6. Conclusions

1. It has been found out that the European Court of Human Rights, even assuming that the applicant has not suffered material damage, cannot declare inacceptable any individual statement (claim) that raises the following question: the application of law, interpretation of the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms, National Law.

2. It has been established that respect for human rights, even if there is a presumption that the applicant has not suffered material damage, requires the admissibility of such an individual statement by the Court, since it raised issues of general character with regard to compliance with the provisions of the Convention:

1) the need to clarify the obligations of the State in accordance with the Convention;

2) to compel the respondent State to resolve structural problem affecting the interests of other individuals being in the same position as the applicant.

3. The following conditions, in the presence of which respect for human rights does not require the consideration of the statement in the Court, have been distinguished:

1) the relevant national legislation and the practice of its application have been changed, and similar issues have already been resolved in other cases which the Court has considered;

2) the relevant law was abolished and the complaint had only a historical character;

3) The Court or the Council of Ministers have already considered this issue as a complex problem.

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