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Protection of the Rights, Freedoms and Interests of Ukrainian Citizens in Court Proceedings During the War*

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Abstract.
The article aims to reveal access to justice during wartime in cases related to protecting citizens' rights, freedoms and interests. Active hostilities are taking place in most regions of Ukraine, making it impossible to deliver justice in administrative courts. However, the High Council of Justice has resolved this issue properly, so access to justice in Ukraine during wartime in cases related to protecting citizens' rights, freedoms and interests is currently possible following the Constitution of Ukraine. Courts are obliged to administer justice even under martial law, and their powers are not suspended. To ensure access to the Court, the Supreme Court changed the territorial jurisdiction of about one hundred courts in Ukraine. In connection with the introduction of martial law in Ukraine, all procedural terms shall be renewed, consideration of cases shall not be stopped, and excessive formalism on the part of judges shall not allowed. The methodological basis of the research is presented as comparative-legal and systematic analysis, formal-legal method, interpretation method, hermeneutic method, and methods of analysis and synthesis. The article analyzes the Decision of the ECtHR, and based on this, the author concludes that the ECtHR considers financial costs as an obstacle to accessing justice. Access to Court is adequate only when a person will have a real opportunity to challenge wrongful actions in practice. According to the ECtHR, the construction of Article 6 of the Convention is effective only if the case is considered in Court. The ECtHR singles out the right to access the Court as a component of the right to a fair trial. Attention is drawn to the fact that courts must take all measures to restore violated rights.
Keywords: Access to Justice; Court; Electronic Justice; Subject of Public Authorities; The War (Wartime); Protection of Rights; Freedoms and Interests of Citizens

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A. INTRODUCTION

An essential issue of today in the conditions of martial law consists in ensuring adequate access to justice, guaranteed by Articles 55, 124, 129 of the Constitution of Ukraine, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms. In accordance with Article 124 of the Constitution of Ukraine, justice in Ukraine is administered exclusively by the courts. The delegation of the courts' functions and the appropriation of these functions by other bodies or officials shall not be permitted. Courts are obliged to administer justice even under martial law. It should be noted that two days before the start of the war, the activities of the High Council of Justice were suspended. Still, despite this, the judicial branch of government managed to find a way out of the situation. It took all measures to ensure the constitutional right to judicial protection was not limited during the war.

Access to justice is integral to the right to a fair trial. This is the position of the ECtHR. According to P.D. Huivan, "...the Convention is aimed at guaranteeing not theoretical or illusory rights, but rights realized in practice and effective rights. This particularly refers to access to justice in light of the importance of the right to a fair trial in a democratic society. So the Convention protects the right to have cases heard, so the right to justice includes the possibility of access to the Court as its element. At the same time, access is postulated as an unimpeded opportunity to appeal to the Court without special permits, burdensome pre-trial means of dispute settlement, special procedures, etc. For example, a direct violation of the authority to access the Court consists in the need to obtain special permits to apply to the Court or the obligation of a person (before applying to the Court with a claim) to exhaust the methods of pre-trial settlement of the dispute provided for by the law or the internal system of filing complaints." (Huivan, 2019: 133)

A.V. Zavidnyak notes: "Unlike various types of epidemics or pandemics being the basis for the introduction of a state of emergency, the administration of justice in conditions of martial law is complicated by potential threats to the life and health of judges on the part of the aggressor country as well as by threats of occupation of the territory. In particular, such a complication can be caused not only by considerations concerning the loss of effective control executed by the government over certain territories of Ukraine but also by the gradual loss of the concept of the rear area, which is associated with the intensified use of missiles and aviation to bombard the country's territory along its entire perimeter. Under such conditions, new forms and means required for justice

delivery should be determined; the main form of this justice is the concept of a court session and the adoption of a decision on the merits." (Zavydniak, 2023: 219)

In addition, separate issues related to the problems of implementing the right to education are covered in the scientific works by such present-day Ukrainian scientists as Halaburda *et al*. (Halaburda *et al*., 2021). These works constitute a scientific basis for further research of the specified instruments and initiate a scientific discussion regarding prospects for their legislative improvement.

At the same time, it is worth noting that at the current stage, electronic judicial procedure is quite relevant as an element of access to justice regarding the protection of the rights of individuals.

B. METHODS

The research is based on the works of foreign and Ukrainian researchers on access to justice during wartime in cases related to the protection of rights, freedoms, and interests of military personnel and conscripts. The epistemological method was used to clarify peculiarities of access to justice during wartime in cases related to the protection of rights, freedoms and interests of military personnel and conscripts, etc.; thanks to the logical-semantic method, the conceptual apparatus was deepened, the peculiarities of access to justice during the wartime were determined in cases related to the protection of rights, freedoms and interests of military personnel and conscripts, etc. Thanks to the existing methods of law, we analyzed the peculiarities of access to justice during wartime in cases related to the protection of rights, freedoms and interests of military personnel and conscripts, etc.

C. RESULT AND DISCUSSION

The Constitutional Court of Ukraine notes: "Part 1 of Article 55 of the Constitution of Ukraine should be understood in such a way that everyone shall be guaranteed protection of his/her rights and freedoms in Court. The Court cannot deny justice if a citizen of Ukraine, a foreigner, or a stateless person believes that their rights and liberties have been violated or are being violated, that obstacles have been (or are being) created for the implementation of these rights, or other violations of the rights and liberties have occurred.

Court's refusal to accept claims and other statements and complaints filed following the current legislation is a violation of the right to judicial protection, which (according to Article 64 of the Constitution of Ukraine) cannot be limited (clauses of the substantive part of the Decision made by the Constitutional Court of Ukraine in the case of the constitutional appeal of citizens Raisa Mykolayivna Protsenko, Polina Petrivna Yaroshenko and other citizens regarding the official interpretation of Articles 55, 64, 124 of the Constitution of Ukraine (the case based on the appeal of residents of the city of Zhovti Vody) dated December 25, 1997 No. 9- zp/1997) *(*Decision of the Constitutional Court of Ukraine in the case of the constitutional appeal of citizens Raisa Mykolaivna Protsenko, Polina Petrivna Yaroshenko and other citizens regarding the official interpretation of Articles 55, 64, 124 of the Constitution of Ukraine, 1997*).*

Following international and European human rights law, the concept of access to justice obliges states to guarantee the right of any person to apply to Court (or to an alternative dispute resolution body, under certain circumstances) to obtain legal protection if a person's rights have been violated. Thus, it is also a law that helps a person to realize his/her rights. (Drozdov, 2022)

Currently, only the courts operate in the territory controlled by Ukraine, since following Article 10 of the Law of Ukraine "On the Legal Regime of Martial Law", the powers of the courts shall not be suspended during the period of martial law. According to Article 12-2 of this Law, in the conditions of the legal regime of martial law, courts act exclusively based on and within the limits of their powers and in the manner determined by the Constitution of Ukraine and the laws of Ukraine, and their powers provided for by the Constitution of Ukraine can not be limited in conditions of the legal regime of martial law.

The right of access to the Court must exist and be practical and effective. The mere existence of a right in the access law is not sufficient. For example, it can be affected by the following factors:

First: The high cost of the proceedings because of the financial capabilities of the person, for example, due to a hefty court fee *("Kreuz v. Poland"* (No1), No 28249/95, Decision dated June 19, 2001), although in general the requirement for a court fee or association of the court fee to the amount of the claim in civil cases is not a violation of access to Court. *("Urbanek v. Austria");*

Second: Lack of legal assistance. Thus, in the above-mentioned *"Airey v. Ireland"*, the claimant could not pay legal fees. Therefore, she was essentially deprived of access to the Court since, according to the national order, she could not appeal to a higher court in her civil case. The ECtHR recognized that the

participation of a legal representative was necessary for practical consideration, and the needy person could not pay for that. At the same time, the ECtHR emphasized that providing legal aid in a civil process is not mandatory as it is in a criminal process. However, in the opinion of the Court, the provision of such assistance is necessary in cases where the person cannot represent his/her interests himself/herself or in instances where the national law recognizes legal representation to be mandatory;

Third: Existence of procedural obstacles that prevent or reduce the possibility of going to Court (too strict interpretation by national courts of the procedural norm (excessive formalism), which can deprive claimants of the right to access the Court *("Perez deRada Cavanilles v. Spain»,* No 2809095, decision dated October 28, 1998) etc.

The COVID-19 pandemic has changed the lives of Ukrainians. It has made adjustments to activities performed by the judicial branch of government, but the war has forced us to look at the world differently, and courts are obliged to protect human rights even during the war. For the administrative courts, the case of the application of the Security Service of Ukraine regarding the inclusion of natural persons, legal entities and organizations in the list of persons connected with the conduct of terrorist activities or about which international sanctions have been applied, the exclusion of natural persons, legal entities and organizations from such a list and provision of access to assets related to terrorism and its financing, proliferation of mass destruction weapons and its financing (Article 284 of the Code of Administrative Procedure (CAP)). In addition, significant importance is being gained by matters regarding the guaranteed provision of defence needs (Article 282 of the CAP), cases on the removal of obstacles and the prohibition of interference in exercising the right to freedom of peaceful assembly (Article 281 of the CAP), cases on establishing restrictions concerning execution of the right to freedom of peaceful assembly (Article 280 of the CAP), cases of administrative lawsuits regarding the forced return or forced deportation of foreigners or stateless persons outside the territory of Ukraine (Article 288 of the CAP), cases of administrative lawsuits regarding detention of foreigners or stateless persons (Article 289 of the CAP).

To ensure access to justice in cases related to protecting the rights, freedoms and interests of military personnel and conscripts, the Supreme Court has changed the territorial jurisdiction of those courts that cannot carry out their activities due to occupation or hostilities. Thus, by its orders, the Supreme Court has changed the territorial jurisdiction of approximately 100 courts. Consideration of cases cannot be stopped in connection with the war, and all

procedural terms must be renewed. The claim, alongside all attachments, should be sent by e-mail and signed using the electronic digital signature or the "Electronic court" subsystem. (Horbalinskiy *et al.*, 2023)

Natalia Mysnyk notes: "Therefore, based on the normative acts that have been adopted today, the mode of operation of each specific Court shall be determined separately. The work of the Court depends on the situation in the region where this Court is located. Therefore, it is necessary to carefully follow the updates that are published on the courts' websites. In case of impossibility to arrive at the court session, a person shall have the right to submit a request to postpone the court session or to hold a video conference. Courts must treat such requests with respect and, if possible, they should grant them. In the same way, courts should be careful about missing procedural deadlines, avoiding excessive formalism." (Mysnyk, 2022)

At present, distance justice has been introduced in Ukraine. Although there are many sceptics about such an innovation, we believe human life should be wartime's priority. The main thing is that justice should be done, and not delayed, because the Roman maxim engraved on the door of the Supreme Court of Great Britain says: "Justice delayed is justice denied." Therefore, in our opinion, the priority should be the safety of both court employees and participants in the court process, and daily shelling of the entire territory of Ukraine does not allow the court process to take place in total. Therefore, despite the unfavourable position of the sceptics, the Supreme Council of Justice receives complaints about the remote consideration of cases. (Leheza *et al.*, 2022)

The State Judicial Administration has developed a procedure for video conferencing during a court session with the parties' participation outside the courtroom. During the quarantine, such online participation in court sessions was a good thing for participants in legal processes in cases related to the protection of rights, freedoms and interests of military personnel and conscripts because justice was carried out, and participants in cases were able to remotely participate in the legal process without being exposed at risk. However, the war has shown us a different reality because currently, there is no safe place in Ukraine. Frequent air alerts lead to multiple interruptions during announcements of air alerts, as all personnel shall take shelter. We believe that remote work for all court employees is the best option during wartime as far as it allows saving their lives, and remote justice should only improve in accordance with the conditions of our lives. (Leheza *et al.*, 2022)

While administering justice, courts should not violate the requirements of Article 6 of the Fair Trial Convention. They should not forget that shortening or

speeding up any form of judicial proceedings in martial law is prohibited. (Leheza *et al*., 2022) In the case "Bellet v. France" " the Court noted that "Article 6 §1 of the Convention contains guarantees of a fair trial with access to Court being one of the aspects of these guarantees. The level of access provided by national legislation should be sufficient to ensure a person's right to a court, considering the principle of the rule of law in a democratic society. For access to be effective, a person must have a clear, practical opportunity to challenge actions that constitute an interference with his/her rights" (ECtHR, 1995) (Decision of the ECtHR dated December 04, 1995, in the case "Bellet v. France)." (Application No. 23805/94, 1995)

The Decision made by the ECtHR in the case "Zustović v. Croatia" is interesting". Due to the loss of working capacity, Nysveta Zustović applied to the pension fund to award her a disability pension. Still, she was refused, and she won the dispute by filing a lawsuit in the Administrative Court of Rijeka to cancel the pension fund's refusal. (Kyrychenko *et al*., 2021) Her lawyer son represented her interests. An expert examination was conducted, but while the trial took place, amendments were made to the law "On Administrative Procedures". "The rule on placing all legal costs, including services of a lawyer, on the losing party was abolished. Now, the costs were to be shared equally. At the same time, a new payment scale for lawyer's services came into effect. (Matviichuk *et al*., 2022)

So, even after winning the dispute with the state body, the woman still had to pay a considerable amount as a court fee for the services of a lawyer and the expert examination. Attempts to appeal the Decision regarding the distribution of court costs did not yield results." Filing of a constitutional complaint regarding the violation of the right to a fair trial did not yield any results, as the Court found the complaint inadmissible. In her appeal to the ECtHR, "the applicant insisted that the rule on the distribution of court costs, which was in effect at the time of filing the lawsuit, should have been applied to her case. Therefore, the applicant believed that the refusal to collect from the defendant the costs of the applicant's services and expert opinions that played an important role in her case indicated a violation of the right to a fair trial. After all, she was denied access to the Court and put in a disadvantageous position." (Zhukova *et al*., 2023)

The ECtHR ruled in favour of the applicant and ordered compensation for 3,500 euros in material damages, 3,000 euros in moral damages and 2,500 euros in court costs. The Court noted that the applicant's dispute concerned a dispute with the pension fund. That is, it was a dispute against the state. The problem is

that the national courts recognized the applicant's right to a pension but refused to reimburse her for court costs. (Leheza *et al.*, 2022) The ECtHR also acknowledged that the amendments to the Law "On Administrative Disputes" did not pursue any legitimate goal, as the Constitutional Court of Croatia "recognized that the provision regulating the distribution of court costs was unconstitutional and that it limited the right of access to the court." (Leheza *et al.*, 2023)

"Monetary barrier", i.e. financial expenses, is considered by the ECtHR in its practice as interfering with the right of access to the Court. Therefore, "the European Court once again emphasized that the refusal to reimburse the Court costs to the party *ex poza ſacio* may indicate a restriction of access to the Court or interference with the property right. Especially when it comes to a lawsuit against the state, whose authorized bodies committed human rights violations and caused material or moral losses" (Refusal to reimburse court costs limits access to Court. Practice of the ECtHR. (Ukrainian Aspect, 2022)

In general, the Court considers the payment of money as an obstacle to accessing justice. Thus, in the Decision dated February 15, 2000, "Garcia Manibar v. Spain", it is noted that in practice, the need to deposit large sums of money into the court deposit hinders the applicant's access to justice. We also agree with this and propose to generally exempt internally displaced persons and relocated enterprises from paying court fees to ensure access to justice and protect their rights. High court fee rates are an obstacle to access to Court. (Leheza *et al.*, 2019)

In the decision "Holder v. Great Britain," the ECtHR drew attention to the fact that the very construction of Article 6 of the Convention guaranteeing the right to a fair trial would be meaningless and ineffective if it did not protect the right to have the case heard at all (Kyrychenko *et al.*, 2021). But suppose the Court assesses the Filing of a lawsuit as an abuse of the procedural right and leaves the lawsuit without consideration or returns it. In that case, it will thereby deprive the applicant of the right to a fair trial with the right of access to the Court being its component (The Decision of the ECtHR of February 21, 1975, in the case "Holder (Soigieg) v. the United Kingdom" (application No. 4451/70, 1975). (Zadyraka *et al.*, 2023)

Judge of the Administrative Cassation Court within the Supreme Court, Jan Bernaziuk, views the right to access legal protection in compliance with the deadlines for appeals to the Court. He concludes that when deciding to extend the term of appeal to the Court, it is necessary to determine the criteria "according to which the Court can recognize the reasons for missing the term as valid, and the grounds for its renewal as justified to achieve a fair balance

between the general interests of society and the requirements for the protection of individual's fundamental rights. (Kobrusieva *et al*., 2021)

In particular, the analysis of ECtHR practice allows us to single out the following fundamental justifications in favor of making a decision to renew the missed period of appeal to the Court: 1) the level of access provided by the national legislation must be sufficient to ensure a person's right to a court, taking into account the principle of the rule of law in a democratic society; for access to be effective the individual must have a clear practical opportunity to challenge actions that constitute an interference with his/her rights (Belle v. France); 2) restrictions on the exercise of the right to judicial protection cannot be established in such a way or to such an extent that the very essence of the right is violated; these restrictions must pursue a legitimate goal, and there must be a reasonable degree of proportionality between the means used and the goals set ("Mushta v. Ukraine" case); 3) a strict application of the time limit without taking into account the circumstances of the case may be disproportionate to the goal of ensuring legal certainty and the proper administration of justice, and it can also hinder the use of available legal remedies (Staño v. Belgium)." (Bernaziuk, 2023)

It should be noted that in case No. 500/1912/22, dated September 29, 2022, the Supreme Court of Justice stated that if, during the war between the Russian Federation and Ukraine, the administrative courts strictly apply the procedural terms regarding addressing the Court (filing claims, appeals and cassation complaints) then this can be considered as an unjustified restriction of access to the Court. (Leheza *et al*., 2022)

D. CONCLUSIONS

In connection with the armed aggression of the Russian Federation against Ukraine, electronic justice has become relevant; it ensures full access to justice in cases related to the protection of rights, freedoms and interests of military personnel and conscripts. The war has created an even greater demand for remote justice, as it is possible to remain safe, reduce financial and time costs, and improve access to Court in cases related to the protection of rights, freedoms and interests of military personnel and conscripts since there is an opportunity to participate in a court hearing on outside the Court.

We believe that in martial law conditions, the missed deadlines should be renewed by administrative courts because disputes arise with subjects of authority. Therefore, protecting the rights of individuals and legal entities

should be adequate if these rights were violated due to illegal decisions, actions or inaction of officials.

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