УДК 341.645
DOI: 10.19073/2658-7602-2022-19-1-91-108
EDN: CZMQCQ

Original scientific article

The Right to a Fair Trial in the Area of Russian and Austrian Public Law

D. T. Karamanukyan
Siberian Law University, Omsk, Russian Federation
✉ *davo_lawyer@mail.ru*

P. Chvosta
Austrian Federal Administrative Court, Vienna, Republic of Austria
✉ *peter.chvosta@bvwg.gv.at*

Abstract. The research paper examines the legal category of procedural (proceedings) law "Right to a Fair Trial" as a fundamental element of the European Human Rights Convention and the judicial practice of the European Court of Human Rights. The Authors concentrate mainly on the general part of Article 6 and focus on crucial aspects of the mentioned right which have become significant for the daily legal practice in the Russian Federation, Republic of Austria and other member states. In the domestic Russian legal doctrine, there are sectoral and international legal studies devoted to the Convention for the Protection of Human Rights and Fundamental Freedoms, the functioning of the European Court of Human Rights and the legal nature of its acts (A. Abashidze, E. Alisevich, M. Biryukov, S. Kalashnikova, V. Tumanov, K. Aristova).Along with this, from the standpoint of conventional rights, Russian legal scholars studied the procedural features of the implementation of acts of the European Court of Human Rights and the application of conventional norms in civil, arbitration and criminal cases (I. Vorontsova, T. Solovieva, M. Glazkova, S. Afanasiev, L. Volosatova, E. Iodkovsky, K. Mashkova, etc.).The private-scientific research methods used by the Authors in the presented scientific article, predominantly comparative, require the study of the works of foreign scholars in the field of law, which include P. Leanza, O. Pridal, D. Spielmann, V. M. Zupancic, H. Mosler, A. Buyse. Despite the rather large volume of doctrinal sources on the nature and implementation of conventional rights, the issues of applying the right to a fair trial in administrative disputes and cases arising from public law relations have not become the subject of scientific research. The empirical basis of the study conducted by the Authors is composed of 66 pilot judgments and other acts of the European Court of Human Rights on complaints from individuals against Russia, Austria, France, Finland, the Netherlands, Great Britain, Switzerland and other member states of the Council of Europe; judicial acts of the courts of Russia, Austria and other European countries. It is concluded that the practice of Article 6 of the European Human Rights Convention by the European Court has had a remarkable and sometimes unprecedented impact on public law and law enforcement activities of the European countries that are parties to the Convention. As Russian and Austrian experience shows, the decision of the European Court on behalf of the enforcement of Article 6 in one specific case can induce the state not only to adopt a separate law, but also to carry out serious institutional changes. Many such examples are given below by the Authors, which testify that the decisions of the European Court are able to act as a powerful law-forming force on the national level.

Keywords: European Court of Human Rights; European Human Rights Convention; human rights; right to a fair trial; procedural guarantees; right of access to a court; enforcement of judgements.

For citation: Karamanukyan D. T., Chvosta P. The Right to a Fair Trial in the Area of Russian and Austrian Public Law. *Siberian Law Review.* 2022;19(1):91-108. DOI: https://doi.org/10.19073/2658-7602-2022-19-1-91-108. EDN: https://elibrary.ru/czmqcq

Оригинальная научная статья

Право на справедливое судебное разбирательство в публичном праве России и Австрии

Д. Т. Караманукян
Сибирский юридический университет, Омск, Российская Федерация
✉ *davo_lawyer@mail.ru*

П. Квоста
Федеральный административный суд Австрии, Вена, Австрийская Республика
✉ *peter.chvosta@bvwg.gv.at*

Аннотация. В статье исследуется правовая категория процессуального права на справедливое судебное разбирательство как основополагающий элемент Конвенции о защите прав человека и основных свобод. Авторы акцентируют внимание на ст. 6 Конвенции и важнейших структурных элементах указанного конвенционного права, которые стали необходимы для осуществления повседневной юридической практики в Российской Федерации, Австрийской Республике и других государствах – членах Совета Европы. В отечественной российской юридической доктрине существуют отраслевые и международно-правовые исследования, посвященные Конвенции о защите прав человека и основных свобод, функционированию Европейского Суда по правам человека и правовой природе его актов (А. Х. Абашидзе, Е. С. Алисевич, М. М. Бирюков, С. В. Калашникова, В. А. Туманов, К. С. Аристова). Наряду с этим с позиций конвенционных прав российскими учеными-правоведами изучению подверглись процессуальные особенности реализации актов Европейского Суда по правам человека и применения конвенционных норм по гражданским, арбитражным и уголовным делам (И. В. Воронцова, Т. В. Соловьева, М. Е. Глазкова, С. Ф. Афанасьев, Л. В. Волосатова, Э. В. Иодковский, К. В. Машкова и др.). Используемые авторами частнонаучные методы исследования (в преимущественной степени компаративный) потребовали изучения трудов зарубежных юристов, к которым относятся P. Leanza, O. Pridal, D. Spielmann, B. M. Zupancic, H. Mosler, A. Buyse. Несмотря на достаточно большой объем доктринальных источников по вопросам природы и реализации рассматриваемого конвенционного права, не стали предметом научного исследования вопросы применения права на справедливое судебное разбирательство в административных спорах и делах, возникающих из публичных правоотношений. Эмпирической основой проведенного авторами исследования выступают 66 пилотных постановления и иных актов Европейского Суда по правам человека по жалобам частных лиц против России, Австрии, Франции, Финляндии, Нидерландов, Великобритании, Швейцарии и других стран – участниц Совета Европы; судебные акты органов правосудия России, Австрии и других европейских стран. По результатам проведенного исследования авторы приходят к выводу, что практика применения Европейским Судом ст. 6 Конвенции оказывает заметное, а порой и беспрецедентное влияние на публичное право и правоприменительную деятельность России, Австрии и других европейских стран, являющихся участниками Конвенции. Приводится анализ примеров, свидетельствующих о том, что акты Европейского Суда способны выступать мощной правообразующей силой на национальном уровне. Как показывает российский и австрийский опыт, постановление Европейского Суда по правам человека по конкретному публично-правовому делу может побудить государство не только принять отдельный закон, но и провести серьезные институциональные изменения внутри страны.

Ключевые слова: Европейский Суд по правам человека; Конвенция о защите прав человека и основных свобод; права человека; право на справедливое судебное разбирательство; процессуальные гарантии; право на доступ к суду; исполнение судебных актов.

Для цитирования: Караманукян Д. Т., Квоста П. Право на справедливое судебное разбирательство в публичном праве России и Австрии // Сибирское юридическое обозрение. 2022. Т. 19, № 1. С. 91–108. DOI: https://doi.org/10.19073/2658-7602-2022-19-1-91-108. EDN: https://elibrary.ru/czmqcq

Introduction

Plato already stated 2,000 years ago that "justice is the ability to be *fair"*, a just society would require that the people be "born and live in a *fair* and just way". Since then many philosophers emphasised the connection between justice and fairness and the importance of both for the stability of a human society [1, p. 4]. It seems that justice cannot be done without fairness, id est justice can only be achieved as a result of a fair process. The opposite is not possible: a fair judgement requires a fair proceeding. Since regular courts as we know them exist, it is vital for the public faith in the courts that judgements are understood by the people and are convincing a broader public (at least in general). The way *how* a legal proceeding has been carried out before a judgement is passed by the court can decisively encourage or reduce the acceptance of a judgement among the affected group of persons or the interested public. As the famous phrase says: «Not only must Justice be done; it must also be seen to be done»[1].

A fair proceeding assumes certain principles arranging how a fair judgement shall be delivered. Principles ensuring a fair proceeding are not an end in itself but have always a practical purpose to affect the quality of a judgement and to support that a *correct* decision is passed[2].

Historically the archetype of the "Right to a Fair Trial" is believed in *The Magna Charta* sealed by King John in 1215, but there are many provisions developed in the past, which also can be seen as the predecessor of the modern «Right to a Fair Trial» [1, p. 11].

Significance of the Right to a Fair Trial

A tremendous step for the regulation of a fair trial was taken by the European Human Rights Convention (hereinafter – Convention, EHRC), which has revolutionised modern democratic legal systems [2–6]: its Article 6 provides the so called "Right to a Fair Trial" and regulates a certain minimum of procedural guarantees for decisions concerning *civil rights* and *criminal law cases*[3]. Among the other rights of the EHRC Article 6 turned out to be relatively unique in its variety of claims and also in its effect on the judicial practice of all member states of the EHRC: No other Article of the EHRC achieved so many impacts in the national legislation like Article 6.

Every fourth complaint submitted to the European Court of Human Rights (hereinafter – ECHR, European Court) is in one way or another related to violations of the above stated Article of the Convention. So, according to the published statistical report of the ECHR for 2020, out of 41,700 complaints sent to the ECHR, more than 23% relate to violations of Art. 6 of the Convention[4]. More importantly, according to statistical reports of the European

[1] This quote originates from Lord Chief Justice of England and Wales, *Gordon Hewart*, in the Case *R v. Sussex ex parte McCarthy* (1923). This phrase summarises perfectly the jurisdiction of the European Court of Human Rights concerning the impartiality and objectivity of judges and is frequently used also by the Austrian Highest Court. See: *Judgement* of 03.12.2010, Ns 12Ns 93/10p URL: https://hudoc.echr.coe.int/

[2] For example, one of the most important guarantees, the right to be heard, effects the participation of the procedural parties in the finding of facts because these parties usually have knowledge about the relevant circumstances and are able to contribute to determine the correct facts and to avoid possible errors.

[3] To the scope of Article 6 see below.

[4] URL: https://www.echr.coe.int/Pages/home.aspx?p=reports&c

Court, most of the applications, applied to the ECHR, are against the Russian Federation: out of almost 62 000 cases pending, 13 645 (22 %) are against the Russian Federation[5], most of which are complaints about violations of the right to a fair trial.

Remarkably, legislator modifications and amendments caused by the obligations comprised in Article 6 did not become necessary after the entry into force of the Convention in the respective member states, but only decades later – when the European Court of Human Rights issued decisions interpreting Article 6 under the circumstances of the pending case and, thus, constituting precedent law. The right to a fair trial became more the central *gateway* for the influence of the EHRC on the legal system of the member states. The exceeding dynamic of the legal development caused by specific judgements of the European Court of Human Rights, based on Article 6, proved to be astonishing. Its "explosive power" even affected "sacred cows" of the national legal tradition. For example, in Austria several decisions by the European Court of Human Rights led to the most far-reaching reform of the Austrian Constitution within 90 years containing the reconstruction of the whole legal protection system for administrative matters which eliminated the 140-year-old structure of stages of appeal within the administration, approximately 120 administrative bodies had to be resolved[6].

One of the most significant judgments of the ECHR in relation to Russia was the "pilot" on the complaint "Burdov v. Russia" № 217[7], in which violations of Articles 6 and 13 of the Convention, which consist in prolonged non-enforcement of the court's decision and in the absence of legal remedies against untimely execution of judgments in the applicant's favor. It was then that the ECHR pointed out to Russia the need to propose within six months an effective legal mechanism to ensure the timely execution of decisions of Russian courts.

The state's response to this was the adoption a year later of federal laws of April 30, 2010 №68-FZ "On Compensation for Violation of the Rght to Legal Proceedings within a Reasonable Time or the Right to Enforce a Judicial Act within a Reasonable Time" (hereinafter – FZ № 68-FZ)[8] and № 69-FZ "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law" On Compensation for Violation of the Right to Judicial Proceedings within a Reasonable Time or the Right to Execution of a Judicial Act within a Reasonable Time" (hereinafter – Federal Law № 69-FZ)[9]. Thus, the Russian Federation introduced the right to legal proceedings within a reasonable time. In this regard, amendments were made to the Civil and Arbitration Proceedings Codes and the most important category

[5] Only 215 against Austria. See: *ECHR* – Analysis of Statistics 2020. URL: https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf.

[6] In 1875 Austria had implemented a "one-stage-system" with a *limited review* by only one Administrative Court after various stages of appeal within the administration. The so-called Supreme Administrative Court was enabled to examine the completeness of investigations by the administrative authorities but could not investigate by its own. In order to maintain this traditional system, Austria acceded to the ECHR 1958 with a reservation that this structure shall be compatible with Article 6. Many Years later this reservation was declared invalid by the European Court of Human Rights (see: *Case* of Eisenstecken v. Austria (application № 29477/95) : judgement of the ECHR of October 3, 2000. URL: https://hudoc.echr.coe.int/).

[7] *Case* of Burdov v. Russian Federation (application № 33509/04) : judgement of the ECHR of January 15, 2009 (№ 2) // Russian Chronicle of the European Court. 2009. № 4.

[8] *On compensation* for violation of the right to legal proceedings within a reasonable time or the right to execute a judicial act within a reasonable time : federal law of April 30, 2010 № 68-FZ // Rossiyskaya Gazeta. 2010. May 4.

[9] *On Amendments* to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law" On Compensation for Violation of the Right to Proceedings within a Reasonable Time or the Right to execution of the judicial act within a reasonable time : federal law of April 30, 2010 № 69-FZ (as amended of March 8, 2015) // Rossiyskaya Gazeta. 2010. May 4.

"reasonable time for legal proceedings" was introduced to the national procedural legal system, aimed at considering applications for awarding compensation for violation of the right to legal proceedings within a reasonable time. With regard to civil proceedings, in part 1 of Art. 6.1 Civil Proceedings Codes of the Russian Federation it is provided that legal proceedings in courts and the execution of a court order are carried out within *a reasonable time*. The norm providing for a trial within a reasonable time is also enshrined in Part 3 of Art. 2 of the Arbitration Proceedings Code of the Russian Federation. The introduction of the category of a reasonable time into these Codes was an important milestone in the development of the procedural branches of Russian law.

It is not possible to present the extent of Article 6 EHRC in all of its various particularities. In this paper there can be given only a short legal overview of the scope and general procedural guarantees in the area of public and civil law. We will concentrate on the general part of Article 6 and focus on such aspects which became significant for the daily practice in Russia, Austria and other member states.

The first sentence of Article 6 reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Scope of Article 6

The right to a fair trial applies to "*civil rights and obligations*" and "*any criminal charge*". Though the scope of this article seems to be prima vista rather limited, the European Court of Human Rights for decades now has been interpreting these terms "autonomously" and rather extensively, so that legal issues are qualified within the scope of Article 6 although these matters are in accordance with the national legal systems reserved to the jurisdiction of administrative bodies and are usually classified as public law. For example, in Austria the approval for a real estate acquisition by a foreigner was given by an administrative authority and not by a civil court; but the European Court of Human Rights found that the effect of the administrative decision in such matters regards "the relations in civil law" and the proceedings in such cases had to be compliable with the requirements of Article 6[10]. Contrary to its previous jurisdiction[11] the European Court also considers disputes between civil servants and the state as an employer to be a "civil right" according to Article 6 EHRC[12]. Even social security entitlements are qualified as "civil right" because of the "economical nature" as the European Court pointed out[13].

To recapitulate, for the purposes of the applying of Article 6 it is sufficient, that the relevant provisions for the legal dispute contain *a mainly civil-law character* even when they are embedded in public law according to the domestic legal system[14].

[10] Therefore a foreigner had to be entitled to challenge an administrative decision refusing to grant an approval for a real estate acquisition before an "independent and impartial tribunal" (see: *Case* of Ringeisen v. Austria (application № 2614/65) : judgement of the ECHR of July 16, 1971. URL: https://hudoc.echr.coe.int/).

[11] *Case* of Pellegrin v. France (application № 28541/95) : judgement of the ECHR of December 8, 1999. URL: https://hudoc.echr.coe.int/

[12] See for example: *Case* of Eskelinen and others v. Finland (application № 63235/00) : judgement of the ECHR (Grand Chamber) of April 19, 2007 ; *Case* of Melek Sima Yilmaz v. Turkey : judgement of the ECHR of September 30, 2008 (application № 37829/05). URL: https://hudoc.echr.coe.int/

[13] *Case* of Feldbrugge v. the Netherlands (application № 8562/79) : judgement of the ECHR of May 29, 1986. URL: https://hudoc.echr.coe.int/

[14] In the more recent past the scope of the Right to a Fair Trial was extended almost tremendously by the Charter of Fundamental Rights of the European Union which declared Article 6 EHRC applicable for all matters in connection with the law of the European Union. See: Article 48 of the Charter.

In order to assess the applicability of Article 6 concerning the *criminal* aspect, the European Court set out three criteria to be considered alternatively, namely, whether the legal provision defining the offence belongs to criminal law or disciplinary (administrative) law according to the legal system of the member state, *the very nature of the offence* and *the degree of severity of the penalty* that the concerned person risks incurring[15]. Normally, the imposition of custodial sentences will establish the applicability of Article 6. Vice versa, a fine to force a witness, refusing to give evidence, to testify was not qualified as a criminal charge in the sense of Article 6[16]. A ban from a profession, like a suspension of the right to practise medicine as a disciplinary consequence, can be a criminal charge when the ban is not temporary and for a short-term period, but it is even then often qualified as an interference of a civil right pursuant to Article 6.

The Procedural Guarantees In General

Decision by a "Tribunal"

In order to ensure a "fair" proceeding according to Article 6, there has to be an independent and impartial "tribunal". A "tribunal" can be a court (translated in many languages as a "court"), but it does not need to be a court in the common sense of the word: the term "tribunal" in Article 6 is not necessarily to be understood as signifying a court of law of the classic kind. Also, administrative bodies can be classified as "tribunals" as long as these authorities have the characteristics of a "tribunal" within the autonomous meaning of Article 6. It is not required to name the deciding organ a "court". Vice versa, it is possible that also a "court" does not fulfil all criteria of a "tribunal" according to Article 6:

"To meet the criteria of a "tribunal" a decisive body has to deliver a *binding* decision within its competence *on the basis of rules of law* and after *proceedings conducted in a prescribed manner*[17].

An advisory board tendering advices to a minister cannot be qualified as a "tribunal" even when its advices are usually followed in the most cases[18]. The "tribunal" must not be bound by the administrative authority's findings of fact and has to be able to determine the relevant facts by its own. In Austria, the Supreme Administrative Court as a restricted judicial control instance against administrative decisions was only enabled to decide on the basis of the investigations carried out by administrative authorities[19]. As mentioned above, the Austrian Republic had therefore to replace its old "one stage system" with a solely Supreme Administrative Court and had to establish administrative courts of the first instance with *full jurisdiction* accomplishing the criteria of a "tribunal" according to Article 6 EHRC.

A Tribunal "Established by the Law"

The "tribunal" shall be *established by the law*. This expression reflects the principle of the rule of law, which is inherent in the system of protection, established by the EHRC[20]. The legal provisions have to

[15] *Case* of Jussila v. Finland (application № 73053/01) : judgement of the ECHR of November 23, 2006. URL: https://hudoc.echr.coe.int/

[16] *Frowein J., Peukert W.* Europäische Menschenrechtskonvention : EMRK-Kommentar. 2nd ed. Kehl : N. P. Engel Verlag, 1996. P. 182.

[17] *Case* of Belilos v. Switzerland (application № 10328/83) : judgement of the ECHR of April 29, 1988 ; *Case* of Richert v. Poland (application № 54809/07) : judgement of the ECHR of October 25, 2011. URL: https://hudoc.echr.coe.int/

[18] *Case* of Benthem v. the Netherlands (application № 8848/80) : judgement of the ECHR of October 23, 1985. URL: https://hudoc.echr.coe.int/

[19] *Case* of Gradinger v. Austria (application № 15963/90) : judgement of the ECHR of October 23, 1995. URL: https://hudoc.echr.coe.int/

[20] *Case* of DMD Group, A.S. v. Slovakia (application № 19334/03) : judgement of the ECHR of October 5, 2010. URL: https://hudoc.echr.coe.int/

regulate the structure, competence and composition of the judicial organ in order to prevent "courts of exception" established ad hoc for a concrete case[21]. It is not relevant if these legal provisions are implemented in the constitution of the member state or are incorporated in the national legal framework by international treaty norms as long as the legal basis is an Act of Parliament. Especially the rules about the allocation of cases to concrete judges seem to be very delicate: There is a lack of the legal basis of a "tribunal" if exact rules about the selection of lay judges do not exist[22]. The European Court found a violation of Article 6 EHRC in the case *Posokhov v. Russia* because there was no list of lay judges as it was provided by the law, and no legal grounds could be presented for the involvement of the lay judges participating in the appealed decisicion[23].

An "Independent and Impartial" Tribunal

One of the core elements of Article 6 is the expression that the "tribunal" must be *independent* and *impartial*: The independence of a "tribunal" is provided as the judge is able to decide solely according to the law and to his free will. In determining whether a body can be considered to be "independent", the European Court of Human Rights has had regard to the manner of appointment of the members of the organ and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence[24].

In the case *Lauko v. Slovakia* the European Court of Human Rights denied the independence of a district authority because the appointment of the head of the body was controlled by the executive and the head of the body had the status of a salaried employee whereby at the same time there was a lack of any guarantees against outside pressures[25].

In general, the duration of the term of office does not have to be unlimited but enough to provide a certain stability: In that sense, the European Court considered a five-year term of office as sufficient, under special circumstances even three years[26]. The irremovability of judges by the executive during their term of office has to be seen as a corollary of their independence[27]. During this term judges may be removed only due to special circumstances determined in precisely defined offences. The European Court assumed the lack of independence as a judge could be removed by the Minister of Justice at any time during the term of office and that there were no adequate guarantees protecting the judge against the arbitrary exercise of that power by the Minister[28].

Beside the aspects of the independence in appearance, Article 6 also provides the subjective independence or impartiality of the judicial organ. The affected person shall be able to be confident that the judicial

[21] *Grabenwarter C., Pabel K.* European Human Rights Convention : Commentary. 6th ed. München : C. H. Beck, 2016. P. 486.

[22] *Case* of Pandjikidze and others v. Georgia (application № 30323/02) : judgement of the ECHR of October 27, 2009. URL: https://hudoc.echr.coe.int/

[23] *Case* of Posokhov v. Russia (application № 63486/00) : judgement of the ECHR of March 4, 2003. URL: https://hudoc.echr.coe.int/

[24] See for example: *Case* of Campbell and Fell v. the United Kingdom (application № 7819/77) : judgement of the ECHR of June 28, 1984. URL: https://hudoc.echr.coe.int/

[25] *Case* of Lauko v. Slovakia (application № 26138/95) : judgement of the ECHR of September 2, 1998. URL: https://hudoc.echr.coe.int/

[26] *Case* of Sramek v. Austria (application № 8790/79) : judgement of the ECHR of October 22, 1984. URL: https://hudoc.echr.coe.int/

[27] *Case* of Henryk Urban and Ryszard Urban v. Poland (application № 23614/08) : judgement of the ECHR of November 30, 2010. URL: https://hudoc.echr.coe.int/

[28] *Grabenwarter C., Pabel K.* Op. cit. P. 488.

organ decides objectively without prejudice or bias[29]. In the case *Micallef v. Malta* the European Court of Human Rights considered a violation of Article 6 ECHR because the judges were not legally bounded to declare themselves partial: An applicant was faced with a panel of three judges, one of whom was the uncle of the opposing party's advocate and the brother of the advocate acting for the opposing party; the Court had the opinion that the close family ties between the opposing party's advocate and the Chief Justice sufficed to objectively justify fears that the presiding judge lacked impartiality.

In relation to Russian administrative law, attention should be paid to the peculiarities of the application of Art. 6 of the Convention on cases, regarding administrative offenses.

As is known, if the national law qualifies a prohibited act as a crime, the European Court automatically refers it to the scope of Art. 6 of the Convention. At the same time, the term "criminal charge", enshrined in the specified Convention norm, is autonomous in nature, cannot depend on national legal qualifications alone and, from the point of view of the case law of the European Court, should also be applied to some cases of administrative offenses.

The character and degree of severity of the potential punishment are of decisive importance for the characterization of a particular offense as a criminal one. So, the punishment should have a punitive nature, and not be just a deterrent, at the same time, the insignificant nature of the offense still does not take it beyond the scope of Art. 6 of the Convention.

Earlier in its practice, the European Court has already established that Art. 6 of the Convention applies to administrative offenses punishable by a fine (Judgment of 19 November 2015 in the case of Mikhailova (Mikhaylova) v. Russia, application no. 46998/08[30]). The European Court has no doubts even if an administrative offense involves the possibility of applying such a punishment as an administrative arrest, which in its essence is a deprivation of liberty (for example, Judgment of October 3, 2013 in the case of Kasparov and Others v. Russia", application no. 21613/07[31]).

In the case of Karelin v. Russia[32], the applicant was detained by a police officer and a protocol was drawn up against him for committing Disorderly Conduct under Art. 20.1 of the Code of the Russian Federation on Administrative Offenses[33], which provides two types of alternative punishments – a fine of up to 1000 rubles or administrative arrest for up to 15 days.

On March 29, 2012, the Russian court of first instance began trialon the abovementioned case. The applicant pleaded not guilty to the offense imputed to him. A police officer was also present at the trial-hearing and made a legal statement. The court found the applicant guilty of using obscene language in the presence of other people, which constituted a breach of public order, and imposed an administrative fine on him. The applicant further applied to the European Court, pointing out that the non-participation of the prosecutor in the administrative case against him resulted in a violation of Art. 6 of the Convention.

The authorities of the Russian Federation disagreed with the applicant's complaint, considering that, firstly, he had not suffered "significant harm", and, secondly, argued that

[29] *Case* of Micallef v. Malta (application № 17056/06) : judgement of the ECHR of October 15, 2009. URL: https://hudoc.echr.coe.int/

[30] URL: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5220658-6472664&filename=Judgments%20and%20decisions%20of%2012.11.15.pdf

[31] URL: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-8954&filename=002-8954.pdf&TID=ihgdqbxnfi

[32] URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB&n=480232

[33] URL: http://pravo.gov.ru/proxy/ips/?docbody&nd=102074277

the criminal procedural component of Art. 6 of the Convention was inapplicable, since the severity of the potential sanction, in their opinion, was not commensurate with the severity of the criminal punishment.

The Court agreed that the fine imposed on the applicant was small, but concluded that the case raised the important issue of the prosecutor's non-participation in administrative proceedings. The European Court, relying on its case-law, found Art. 6 of the Convention violated and declared the complaint admissible. In accordance with the Code of the Russian Federation on Administrative Offenses the proceedings are initiated by a non-judicial body (in the Karelin case, by the police). At the same time, the Code of the Russian Federation on Administrative Offenses gives prosecutors broad discretionary powers to initiate proceedings on an administrative offense, and in cases where it is initiated, to take part in it. At the same time, domestic law does not require the participation of the prosecutor in the court session and does not provide for any special consequences in connection with the fact that the prosecutor does not participate in the court session.

The European Court emphasized that Art. 29.4 of the Code of Administrative Offenses of the Russian Federation does not provide national courts with the opportunity to require the presence of a prosecutor in cases initiated by other authorities. The European Court noted that the procedure for drawing up a report on an administrative offense does not imply an adversarial nature that would allow taking into account the objections or position of the defense, and also that the police at this stage do not act in the role of a "court".

Furthermore, the European Court came to the conclusion that the police officer who drew up a protocol on an administrative offense is also not considered by the Code of the Russian Federation on Administrative Offenses as a party to the case – for example, he is deprived of the authority to file petitions with the court of first instance, which is an integral feature of a fair trial. In this regard, the European Court concluded that the policeman is not a "prosecuting authority" and his competence does not include the presentation and defense of the prosecution on behalf of the state. It was also pointed out that the non-participation of the prosecutor in the case affects the operation of the presumption of innocence during the trial and, as a result, the impartiality of the court.

It was concluded, that in such circumstances, the European Court accepts that the trial court had no alternative but to assume the task of the prosecution during the oral hearing of the case.

In the European Court's view, it is the presence of a prosecutor during a trial, whose task it is to present and substantiate a criminal charge in order to make the dispute adversarial with the defense, that is generally necessary in order to avoid legitimate doubts that may arise as to the impartiality of the court. Also noted was the fact, that neither the police officer nor the prosecutor submitted any written arguments to the second-instance court in response to the applicant's complaint.

Thus, a violation of paragraph 1 of Art. 6 of the Convention was defined regarding the requirement of impartiality of the court.

Principle of Equality of Arms

The main feature of a judicial proceedings before a court is the fact that there are two opponents acting to pursue their rights and interests equally ranked under basically (more or less) similar conditions and with the same procedural means. This is typical for a civil litigation as well as a penal procedure whereas the prosecuting authority is facing the defendant. A proceeding without this characteristic equality of the opponents in front of the court would hardly be qualified as *fair* by anyone. The principle of "equality of arms" is the core of procedural guarantees provided by Article 6 and contains especially the right *to be heard*, the right of *access to the file* and the right to a *reasoned* judgement.

It is a basic requirement of a fair hearing that in a civil litigation the claimant and the defendant as well as in a criminal proceeding the prosecuter and the defendant have both a sufficient, fair and equal opportunity to give their views regarding all relevant facts. It violates the principle of a fair hearing to give one party a more advantageous procedural position than the other one and a lack of a fair balance between the parties is provoked[34]. The concept of a fair hearing implies the right to *adversarial* proceedings: Parties to criminal or civil proceedings must in principle have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations submitted, with a view to influencing the decision of the court[35]. These are fundamental rights which cannot be reduced or softened by certain circumstances like the fact that the evidence deprived is neutral or even favourable to the defendant: It is a matter for the defence to assess whether a submission deserves a reaction or not[36]. In particular in criminal preceedings it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, measures restricting the rights of the defence are only permissible when it is strictly necessary[37]. Moreover, in order to ensure that the accused person receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities[38]. Even business secrets of companies can be the reason for excluding certain evidence material in a civil litigation like a contract award procedure, in order to prevent the access to business secrets among competitors[39].

Although the principle of equality of arms applies for civil proceedings as well as criminal procedures, the intensity of the several procedural guarantees is differing in detail and is less comprehensive in civil proceedings: For example the right to take part in the hearing is seen as a fundamental element of a fair hearing for every person charged with a criminal offence[40], but it is not guaranteed absolutely for procedures concerning civil rights. Though in certain constellations when the personal impression by the court is relevant the principle of a fair hearing will require even a personal appearance, as it was expected by the European Court in a proceeding to declare a person incapable[41] or in a civil proceeding concerning defamation and an action for damages because of defamation[42].

[34] *Case* of Feldbrugge v. the Netherlands (application № 8562/79) …

[35] *Case* of Lobo Machado v. Portugal (application № 15764/89) : judgement of the ECHR of February 20, 1996 ; *Case* of Zagrebačka banka v. Croatia (application № 39544/05) : judgement of the ECHR of December 12, 2013. URL: https://hudoc.echr.coe.int/

[36] *Case* of Göc v. Turkey (application № 36590/97) : judgement of the ECHR of July 11, 2002. URL: https://hudoc.echr.coe.int/

[37] *Case* of Rowe and Davis v. the United Kingdom (application № 28901/95) : judgement of the ECHR (Grand Chamber) of February 16, 2000. URL: https://hudoc.echr.coe.int/

[38] *Case* of Van Mechelen and Others v. the Netherlands (application № 21363/93) : judgement of the ECHR of April 23, 1997. URL: https://hudoc.echr.coe.int/

[39] *Case* C-450/06 of Varec v. Belgium : judgement of the Court of Justice of the European Union of February 14, 2008. URL: https://hudoc.echr.coe.int/

[40] The accused person has the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and – as the European Court pointed out – it would be difficult to see how the defendant could exercise all these rights without being present. See: *Case* of Colozza v. Italy (application № 9024/80) : judgement of the ECHR of February 12, 1985. URL: https://hudoc.echr.coe.int/

[41] *Case* of Winterwerp v. the Netherlands (application № 6301/73) : judgement of the ECHR of October 14, 1979. URL: https://hudoc.echr.coe.int/

[42] *Case* of Helmers v. Sweden (application № 11826/85) : judgement of the ECHR of October 29, 1991. URL: https://hudoc.echr.coe.int/

There are some unique features regarding the above mentioned in the Russian legal practice. Thus, in the case of "Galich v. Russia" (judgment of May 13, 2008)[43] the Court stated that "the requirements for a fair trial in civil cases are less stringent than in criminal cases. Nevertheless, civil proceedings must be fair, fairness implies the existence of an adversarial procedure, which, in turn, requires that the court does not base its decision on evidence that has not become available to one of the parties."

At the same time, it follows from the fundamental positions of the ECHR that the establishment of requirements for real equality of arms in the consideration of a particular category of cases, as well as the ratio of the activity of the court and the parties in the field of proof, is within the scope of the national legislator. In addition, national procedural systems often establish non-adversarial procedures (various simplified proceedings, procedures for making judgments in absentia, analogues of Russian order proceedings, etc.), which in themselves are not incompatible with the Convention. The Court assesses the compatibility of these procedures with the criterion of fairness enshrined in the Convention. Equity is determined through the observance of the principle of procedural equality of the parties, including in the field of presentation of evidence, and the right to present their explanations in response to the arguments of the other party.

In particular, in the case of Khuzhin v. Russia: "In both criminal and civil matters, this principle provides that each party should be given a reasonable opportunity to know and comment on objections or evidence provided by the other party, and to present their case on terms that do not put one party at a substantially more disadvantageous position in comparison with her opponent"[44].

In regard to legislative implementation of the positions of the European Court the Code of Administrative Judicial Procedure of the Russian Federation[45] (hereinafter – CAS RF), in our opinion, has been designed with a very high legal quality, using not only the main international and European standards in the field of ensuring human rights, but also modern methods and means of legal technology. So, in order to ensure the adversarial nature and equality of parties in administrative proceedings, occupying an unequal legal position in public relations and having, in connection with this, unequal opportunities in proving the circumstances in an administrative case, paragraph 7 of Art. 7 of the CAS RF provides "adversarial and equal rights of the parties to administrative proceedings with an active role of the court." By implementing this principle, in accordance with part 2 of Art. 15 and part 1 of Art. 65 CAS RF, the domestic court, by analogy with the American quasi-judicial bodies (administrative agencies and administrative judges), has the right, on its own initiative, to demand the necessary evidence. When checking the legality of regulatory legal acts, decisions, actions (inaction) of the public administration, the court has the right to go beyond the requirements contained in the administrative statement of claim.

As the analysis of the practice of the Court in Russian cases shows, the violation of Article 6 of the Convention due to the failure to ensure the procedural equality of the parties is mainly ascertained by the European Court in relation to the consideration of criminal cases, in respect of which the Court has developed a true corpus juris.

The right of a person to be promptly notified of the commencement of a trial against him is one of the fundamental guarantees in the administration of justice. All parties must receive notice of any court hearing to be held,

[43] URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB&n=94453#8LgmwrStpmWMHsF6
[44] URL: https://base.garant.ru/12167514/
[45] URL: http://www.consultant.ru/document/cons_doc_LAW_176147/

any document to be presented at the hearing, any witness summoned, any changes in the claims and objections of either party, and any other document that may be used in legal proceedings. A violation of this principle has been established by the Court in a number of Russian cases. They are mainly related to the failure to ensure the appearance of the defendants at the second instance in criminal proceedings, but the violation of Art. 6 in connection with non-observance of the right to due notification was also found by the Court in a number of civil cases (for example, Yakovlev v. Russia[46], Groshev v. Russia[47] and others). Thus, in the Yakovlev case, the summons for the cassation consideration of the case was sent to the applicant on the day of the court of the cassation instance, and was received 4 days after the hearing. In its judgment of July 6, 2005 the Court recalled that under Art. 6 § 1, the right to a public hearing necessarily implies the right to an "oral hearing", but the right to a public hearing is not absolute.

Decision "Within a Reasonable Time"

The most important decision and also a judgment of high quality is not worth much as the concerned parties have to wait too long for the decision. The member states are obliged to provide court proceedings to be finalized within a reasonable time [7]: The defendant in a criminal proceeding should not kept in uncertainty for too long. Also, a civil proceeding must not take so much time so that the applicant does not need the decision any more.

The requirement of "consideration of the case within a reasonable time" established by Article 6 of the Convention reflects the change in public requests for the administration of justice, which are no longer limited to the observance of the rights of the parties during the trial. This requirement also presupposes the effectiveness of justice, i.e. assessment of its results not only from the point of view of the process itself and the correctness (legality, validity) of the decision, but also from the point of view of the timely resolution of the case, which is no less important.

The European Court stated in many cases that Article 6 ECHR was violated by the length of the proceeding regardless of whether the final judgement was lawful or not. There is no fixed time limit for a proceeding, and in general the reasonableness of the duration of proceedings covered by Art. 6 § 1 must be assessed in each case according to its circumstances. The Court examines the entirety of the proceedings in question, including appeal proceedings[48]. In its case-law the European Court generated certain criteria to assess the length of the proceedings, namely the degree of *complexity of the case*, the *behaviour of the applicant*, the *conduct of the competent courts* and the overall assessment, *what was at stake for the applicant* in the dispute[49].

The more important the outcome of a proceeding is for the applicant the less it is accepted a long period of time for the proceeding: A special importance for the applicant will be taken in criminal proceedings when the defendant is imprisoned or in civil litigations when the livelihood of the applicant is affected[50]. For example,

[46] URL: https://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/yakovlev-protiv-rossii-postanovlenie-evropejskogo-suda/

[47] URL: https://base.garant.ru/2563877/

[48] *Case* of König v. Germany (application № 6232/73) : judgement of the ECHR of June 28, 1978. URL: https://hudoc.echr.coe.int/

[49] *Case* of Deumeland v. Germany (application № 9384/81) : judgement of the ECHR of May 29, 1986 ; *Case* of Comingersoll S.A. v. Portugal (application № 35382/97) : judgement of the ECHR of April 6, 2000. URL: https://hudoc.echr.coe.int/

[50] *Case* of Frydlender v. France (application № 30979/96) : judgement of the ECHR of June 27, 2000. URL: https://hudoc.echr.coe.int/

a proceeding relating an employment dispute lasting more than 6 years was qualified as exzessive because the case affected the formalisation of the applicant's dismissal without which he was seriously disadvantaged in finding a new employment[51]. Even the high age of the applicant can be a relevant aspect for the assessment of the length of the proceedings[52]. The factual or legal complexity of a case or even the behaviour of the applicant can justify a long proceeding: Concerning a criminal procedure that took more than 4 years, the European Court took into account that the proceedings went through three levels of jurisdiction, that the applicant was also responsible for certain delay, three accused persons were involved and the examination of many witnesses and voluminous documentary material was necessary[53]. In contrast, an action of the applicant against his former employer to pay outstanding emoluments, discharge and leave allowances was qualified as an ordinary employment dispute without any complexity so that it could not justify the length of the proceeding[54].

A temporary backlog of court business is accepted by the European Court as a reason for a long proceeding, but only if the contracting state takes appropriate remedial action with the requisite promptness [8, p. 72][55]. A chronic overload cannot justify an excessive length of proceedings[56]. The European Court stated that the member states are obliged to organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time[57].

As the reasonable length of proceeding has been exceeded, an infringement of Art. 6 is not constituted by the European Court when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded *redress* by reducing the sentence in an express and measurable manner[58].

The Right of Access to a Tribunal

The European Court of Human Rights emphasized in his jurisdiction the requirement that the provisions of the EHRC must be interpreted in a way to give practical and effective protection to individuals. Although the first sentence of Article 6 does not state a right of access to a court or tribunal in express terms, the European Court came to the conclusion that Art. 6 §1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. The "right of access" would only constitute one aspect of the "right to a court" embodied by Art. 6[59].

Further more, the right of access to a court shall not be "*theoretical* or *illusory*" but "*practical* and *effective*", as the European Court repeated in its settled case law

[51] *Case* of Kormacheva v. Russia (application № 53084/99) : judgement of the ECHR of January 29, 2004. URL: https://hudoc.echr.coe.int/

[52] *Case* of Süßmann v. Germany (application № 20024/92) : judgement of the ECHR of September 16, 1996. URL: https://hudoc.echr.coe.int/

[53] *Case* of Zaprianov v. Bulgaria (application № 41171/98) : judgement of the ECHR of September 30, 2004. URL: https://hudoc.echr.coe.int/

[54] *Case* of Kormacheva v. Russia (application № 53084/99) : judgement of the ECHR of January 29, 2004. URL: https://hudoc.echr.coe.int/

[55] *Janice M., Kay R., Bradley F.* European Human Rights Law (practice and commentary). M., 1997. P. 486–487.

[56] *Case* of Klein v. Germany (application № 33379/96) : judgement of the ECHR of October 26, 2000. URL: https://hudoc.echr.coe.int/

[57] *Case* of Kormacheva v. Russia (application № 53084/99) …

[58] *Mitterbauer* v. Austria (application № 2027/06) : decision of the ECHR of February 12, 2009. URL: https://hudoc.echr.coe.int/

[59] *Case* of Golder v. the United Kingdom (application № 4451/70) : judgement of the ECHR of February 21, 1975. URL: https://hudoc.echr.coe.int/

for many times[60]. The member states have to require a legal protection system to ensure that persons within its jurisdiction can really enjoy before a court the fundamental guarantees in Art. 6[61]. Unlike the wording of Art. 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, there is no *general* obligation under the Convention to make legal aid available for *all* disputes in civil proceedings[62]. The decision in the case *Airey v. Ireland* concerned the situation of the wife of an alcoholic who frequently threatened her and occasionally subjected her to physical violence: Mrs. Airey had been endeavouring to obtain a decree of judicial separation on the grounds of her husband's alleged physical and mental cruelty to her and their four children, but she had been unable, in the absence of legal aid and not being in a financial position to meet herself the costs involved, to find a solicitor willing to act for her. The consequence that Mrs. Airey had to remain wife of her husband, led to the decision that Ireland infringed the right of access because she did not receive legal aid for the purpose of petitioning for a decree of judicial separation[63].

In general the member states have a free choice of the means to be used to ensure an effective right of access to the courts and Article 6 only compels to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered *compulsory* or by reason of the *complexity* of the procedure or of the case[64]. Although the decision in the case of *Airey v. Ireland* has been passed by the Court many decades ago, the judgement still has a lasting effect: In 2015 the Austrian Constitutional Court abolished legal provisions avoiding legal aid to be granted in administrative court procedures dealing with "civil rights and obligations": referring to the decisionin the case of *Airey v. Ireland*, the Constitutional Court conceded that in many cases the procedural obligations of the Administrative Courts to establish facts ex officio will be sufficient to meet the guarantees of Article 6 EHRC, but the *total* prohibition withouth to grant legal aid even in extraordinary cases with a high complexity of the case would breach Article 6.

The right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired[65]. The European Court of Human Rights accepted legal provisions limiting the access to a court when their aim was the protection against abusive litigations or against overburdening the courts by cases of minor significance[66]. Generally a limitation will not be

[60] *Case* of Tolstoy Miloslavsky v. the United Kingdom (application № 18139/91) : judgement of the ECHR of July 13, 1995 ; *Case* of Hornsby v. Greece (application № 18357/91) : judgement of the ECHR of March 19, 1997 ; *Case* of Del Sol v. France (application № 46800/99) : judgement of the ECHR of February 26, 2002 ; *Case* of Bertuzzi v. France (application № 36378/97) : judgement of the ECHR of February 13, 2003 ; *Case* of Staroszczyk v. Poland (application № 59519/00) : judgement of the ECHR of March 22, 2007 ; *Case* of Ibrahim and others v. the United Kingdom (application № 50541/08) : judgement of the ECHR (Grand Chamber) of September 13, 2016. URL: https://hudoc.echr.coe.int/

[61] *Case* of Del Sol v. France (application № 46800/99) …

[62] *Case* of Airey v. Ireland (application № 6289/73) : judgement of the ECHR of October 9, 1979. URL: https://hudoc.echr.coe.int/

[63] *Case* of Airey v. Ireland (application № 6289/73) …

[64] *Case* of Gnahore v. France (application № 40031/98) : judgement of the ECHR of September 19, 2000. URL: https://hudoc.echr.coe.int/

[65] *Case* of Ashingdane v. the United Kingdom (application № 8225/78) : judgement of the ECHR of May 28, 1985 ; *Case* of Khamidov v. Russia (application № 72118/01) : judgement of the ECHR of November 25, 2007 ; *Case* of Baka v. Hungary (application № 20261/12) : judgement of the ECHR (Grand Chamber) of June 23, 2016. URL: https://hudoc.echr.coe.int/

[66] *Case* of Bayar and Gürbüz v. Turkey (application № 37569/06) : judgement of the ECHR of November 27, 2012. URL: https://hudoc.echr.coe.int/

compatible with Art. 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved[67]. In that sense the European Court qualified procedural requirements or the obligation to be represented by a lawyer usually as proportional[68]. The rules on time-limits for lodging an appeal have also been accepted by the Court when they were designed to ensure the proper administration of justice and legal certainty, providing that the applicant could foresee the end of the time-limit and had enough time to prepare the remedy[69]. The inadmissibility of applications because of clerical errors the applicant coul not be held liable for was, however, qualified as excessively formalistic and as a denial of the right of access to a court in respect of the applicant's claim[70].

For example, the payment of court fees as a condition of admissibility of a legal action does not breach Article 6 § 1 as long as the level of the fee is not unproportional: In the case *Kreuz v. Poland* the applicant sueing a Municipality for damages had to pay procedure fees which were equal to an average annual salary in Poland. Bearing in mind that the applicant could not pay the fee and had to desist from his claim the European Court concluded that excessive court fees impaired the very essence of the right to access to a court[71]. In the recent past the "right of access" became more and more a universal instrument to review all kind of factual obstacles to the access to courts, like for example even technical barriers, illustrated by a Slovakian case: The ordinary courts refused to register several actions recorded on DVD on the ground of a lack of technical equipment to process the actions by the courts although the possibility of electronic filing had been incorporated in Slovakian law some years before[72].

Thus, in the case of "Sergey Smirnov v. Russia" (judgment of December 22, 2009)[73] the European Court found a violation of Art. 6 § 1 of the Convention in the context of the applicant's right to access a court. It was expressed in the fact that the courts of general jurisdiction (first and second instance) refused to accept for consideration the statements of claim filed by Mr. Smirnov due to his lack of registration at the place of residence. This case demonstrates a vacuum of legal protection for individuals who do not have registration at their place of residence in Russia. The applicant in this case tried to perform ordinary actions (rent property, register a mobile phone number), which he was denied due to lack of registration. Complaints filed in court against such a refusal were also not accepted due to the lack of registration at the place of residence.

In this case, the European Court noted that "the right to initiate legal proceedings in a civil case constitutes only a part of the right to a court, however, it is this part that makes it possible to use the additional guarantees that are laid down in paragraph 1 of Art. 6 (see the judgment in the case of "Teltronic-CATV company v. Poland", dated

[67] *Case* of Markovic and Others v. Italy (application № 1398/03) : judgement of the ECHR (Grand Chamber) of December 14, 2006 ; *Case* of Stanev v. Bulgaria (application № 36760/06) : judgement of the ECHR of January 17, 2012 ; *Case* of Baka v. Hungary (application № 20261/12) … URL: https://hudoc.echr.coe.int/

[68] *Grabenwarter C., Pabel K.* Op. cit. P. 500.

[69] *Case* of Melnyk v. Ukraine (application № 23436/03) : judgement of the ECHR of March 28, 2006. URL: https://hudoc.echr.coe.int/

[70] *Case* of Zwazek Nauczycielstwa Polskiego v. Poland (application № 42049/98) : judgement of the ECHR of September 21, 2004. URL: https://hudoc.echr.coe.int/

[71] *Case* of Kreuz v. Poland (application № 28249/95) : judgement of the ECHR of June 19, 2001. URL: https://hudoc.echr.coe.int/

[72] *Case* of Lawyer Partners, A.S. v. Slovakia (application № 54252/07) : judgement of the ECHR of June 16, 2009. URL: https://hudoc.echr.coe.int/

[73] URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-3217%22]}

January 10, 2006[74])". The court noted that "the requirement to indicate the place of residence of the plaintiff does not in itself violate Article 6 § 1. It pursues the legitimate aim of the proper administration of justice, since it allows the courts to keep in touch with the plaintiff and serve him summons or court decisions. However, in this case the applicant, who did not have a definite place of residence, could not comply with the court's requirements, but he offered an alternative – he named the address for correspondence."

Noting that the rules of jurisdiction did not prevent the courts from accepting the claim, since it was brought at the location of the defendant, the Court pointed out that "the domestic courts not only punished the applicant for failing to comply with the formal requirement, but also imposed significant restrictions on him, preventing consideration... his claims. ... This violated the very essence of the right of access to a court ... Such a strict application of a procedural norm without considering special circumstances cannot be considered compatible with the provisions of paragraph 1 of Article 6."

If the indication of the place of residence of the plaintiff in the statement of claim is necessary mainly for the purposes of communication between the court and the plaintiff, then certain steps are also possible to establish alternative mechanisms for such communication, as is done, for example, in the Arbitration Procedure Code of the Russian Federation, article 125 of which as amended, entered into force from November 1, 2010, requires the indication of the plaintiff's email address in the statement of claim. This creates an alternative to the traditional method of sending court notices in courts of general jurisdiction – in cases similar to those considered in the case of Sergei Smirnov. This case demonstrates the formal approach of the courts to the application of procedural norms, when law enforcement practice is guided not by their initial goal (in this case, the communication of the court with the plaintiff), but only by following the letter of the law.

The Enforcement of Judgements

It would be inconceivable if Article 6 § 1 described in detail procedural guarantees afforded to litigants in order to be granted a fair proceeding without protecting the implementation of judicial decisions. The restriction of Article 6 exclusively to the aspect of the access to a court would lead to situations incompatible with the principle of the Rule of Law, as the European Court stated[75]. The execution of a judgement given by any court must be regarded as an integral part of the trial for the purposes of Art. 6.

The principle of unconditional execution of a judicial act is mentioned not only in the Convention, but also in the recommendation of the Committee of Ministers of the Council of Europe of September 9, 2003 № 17 "On Compulsory Execution". In accordance with this recommendatory act, the enforcement procedures must be proportionate to the claim, the amount of the claim and the interests of the defendant.

In the very first decision of the European Court concerning the Russian Federation, the applicant Mr. Burdov was awarded compensation for his poor health as a result of his involvement in emergency operations at the site of the Chernobyl nuclear plant disaster, but although his legal actions against the Social Security Service succeeded before the Shakhty City Court, the compensation had not been paid on the ground that the Social Security Service and the Regional Ministry of Labour and Social Development were under-

[74] URL: https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/48140-99-teltronic-catv-v-polska-decyzja-europejskiego-520244762

[75] *Case* of Hornsby v. Greece (application № 18357/91) … ; *Case* of Burdov v. Russia (application № 59498/00) : judgement of the ECHR of May 7, 2002. URL: https://hudoc.echr.coe.int/

funded[76]. The European Court noted that the Shakhty City Court's decisions remained unenforced wholly or in part for many years and underlined that it would not be open to a state authority to cite lack of funds as an excuse for not honouring a judgment debt. By failing for years to take the necessary measures to comply with the final judicial decisions, the European Court came to the conclusion that the state authorities deprived the provisions of Art. 6 § 1 of all useful effect.

Several Russian cases concerned the fact that a judicial decision by a Russian Court that had become *final* and *binding*, was subsequently quashed or even amended by a higher court on an application by a state official[77]. The European Court ruled out that one of the fundamental aspects of the Rule of Law is the principle of *legal certainty*, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question but enforced without any unreasonable delay. As the European Court ruled out legal certainty presupposes respect for the principle of *res judicata*, i.e. the principle of the finality of judgments. No party should be entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.

In the Russian national legislation, this principle has also found its confirmation. So, in the Federal Law of October 2, 2007 № 229-FZ "On Enforcement Proceedings" (Part 5 of Art. 4)[78], one of the principles of enforcement proceedings is the correlation between the volume of claims of the claimant and enforcement measures.

Conclusion

On the one hand, many critics articulate the view that the impact of the jurisdiction of the European Court of Human Rights on the legal system of the member states has been emerged too strong and the Court would smash decade-long traditions of the member states with no or with very little restraint. This might be true and can be observed in particular on the basis of the case law concerning the guarantees of Art. 6. But on the other hand, there is no doubt that the influence of the jurisdiction of the European Court after all has improved enormously the standards of the legal protection systems of all member states. The continuous optimization of the effectivity of the legal system dealing with such issues is strengthening the rule of law and is the most important accomplishment of the EHRC. Definitely, nobody would like to return to the lower standards before the EHRC came into force. This will be true above all for the concept of a "fair trial" as an ideal to be treated as an individual by the state authorities when decisions will be issued about his most important subjects, namely the individual's "civil rights and obligations" and any "criminal charge against him". In the end, the procedural guarantees of Article 6 have no other purpose than to ensure that a just and fair judgment is passed, in other words that a proceeding leads to a correct decision.

[76] *Case* of Burdov v. Russia (application № 59498/00) …

[77] *Case* of Ryabaykh v. Russia (application № 52854/99) : judgement of the ECHR of July 24, 2003 ; *Case* of Sardin v. Russia (application № 69582/01) : judgement of the ECHR of February 12, 2004 ; *Case* of Pravednaya v. Russia (application № 69529/01) : judgement of the ECHR of November 18, 2004 ; *Case* of Gladyshev and others v. Russia (application № 20430/04) : judgement of the ECHR of February 7, 2008 ; *Case* of Magomedov v. Russia (application № 20111/03) : judgement of the ECHR of December 4, 2008. URL: https://hudoc.echr.coe.int/

[78] URL: http://www.consultant.ru/document/cons_doc_LAW_71450/

References

1. Leanza P., Pridal O. *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights*. Alphen aan den Rijn: Wolters Kluwer; 2014. 276 p.

2. Spielmann D. The European Convention on Human Rights. The European Court of Human Rights. In: Oliver D., Fedke J. (Eds.). *Human Rights and the Private Sphere. A Comparative Study*. London, New York: Routledge-Cavendish, 2007. P. 427–464.

3. Zupančič B. M. On the Interpretation of Legal Precedents and of the Judgments of the European Court of Human Rights. In: Miller R. A., Zumbansen P. C. (Eds.). *Annual of German and European Law. Vol. II/III (2004/2005)*. New York, Oxford: Berghahn Books, 2007. P. 156–170.

4. Mosler H. Problems of Interpretation in the Case Law of the European Court of Human Rights. In: Kalshoven F. (Ed.). *Essays on the Development of the International Legal Order. In Memory of Haro F. Van Panhuys*. Alphen aan den Rijn: Sijthoff & Noordhoff, 1980. P. 149–167.

5. Buyse A. The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges. *Nomiko Vima (The Greek Law Journal)*. 2009;57:1890-1902.

6. Føllesdal A. Peters B., Ulfstein G. (Eds.). *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*. Cambridge: Cambridge University Press, 2013. 442 p.

7. Ksenofontova N. G. "Reasonable time" in the Judgments of the European Court of Human Rights. In: *Russian and European Human Rights Systems: Correlation and Problems of Harmonization*. Nizhny Novgorod: Open Society Institute; 2003. P. 403–410.

8. Neshataeva T. N. Consideration of a Dispute About Civil Rights Within a Reasonable Time. *Bulletin of the Supreme Arbitration Court of the Russian Federation*. 1999;7:72.

About the Authors

David T. Karamanukyan, Provost of Siberian Law University (12 Korolenko st., Omsk, 644010, Russian Federation), Candidate of Legal Sciences, Associate Professor; ORCID: https://orcid.org/0000-0003-3401-9298; e-mail: davo_lawyer@mail.ru;

Peter Chvosta, Judge of the Austrian Federal Administrative Court (192-196 Erdbergstraße, Vienna, 1030, Republic of Austria), Doctor of Law; ORCID: https://orcid.org/0000-0003-1902-4128; e-mail: peter.chvosta@bvwg.gv.at

Информация об авторах

Давид Тониевич Караманукян, первый проректор Сибирского юридического университета (ул. Короленко, 12, Омск, 644010, Российская Федерация), кандидат юридических наук, доцент; ORCID: https://orcid.org/0000-0003-3401-9298; e-mail: davo_lawyer@mail.ru;

Петр Квоста, судья Федерального административного суда Австрии, (Эрдбергштрассе, 192-196, Вена, 1030, Австрийская Республика), доктор права; ORCID: https://orcid.org/0000-0003-1902-4128; e-mail: peter.chvosta@bvwg.gv.at

Поступила | Received 04.02.2022

Поступила после рецензирования и доработки | Revised 04.02.2022

Принята к публикации | Accepted 07.02.2022