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РІШЕННЯ ЄСПЛ ПРО ВІДМОВУ У ЗНЯТТІ З ОСОБИ ІМУНІТЕТУ, ПЕРЕДБАЧЕНОГО СТАТТЕЮ 1 ШОСТОГО ПРОТОКОЛУ: ОКРЕМІ ПІДХОДИ ДО РОЗУМІННЯ СУТНОСТІ ТА НАСЛІДКІВ

Анотація. *В Україні на сьогодні ні в національному кримінальному процесуальному законодавстві, ні в теорії кримінального процесу, ні серед суддів, слідчих, прокурорів немає одностайної відповіді на питання щодо сутності та наслідків рішення ЄСПЛ про відмову у знятті з особи імунітету, передбаченого статтею 1 Шостого протоколу. Тому й поставлено перед собою мету спробувати сформулювати окремі підходи для вирішення такої проблематики. Актуальність задекларованої тематики обумовлена її теоретичною та практичною складовими. Перша з них полягає в тому, що наукових розвідок у цій царині вкрай обмаль, а судова практика, серед іншого, потребує певного наукового базису для формулювання власних позицій у їх єдності. Запропонована у назві цієї наукової розвідки дилема також була предметом вирішення членами Науково-консультативної ради при Верховному Суді, до яких зверталися судді Великої Палати для отримання наукових висновків, що підкреслює гостроту та нагальну потребу отримання практиками feedback від представників наукової спільноти. Такі загальнонаукові та спеціальні методи дослідження, як діалектичний, індукція та дедукція, формально-логічний, системно-структурний, метод вибірки, порівняння та правового прогнозування були застосовані для формулювання тих окремих підходів, які складають загалом мету цього дослідження. Доведено, що не дивлячись на ту обставину, що рішення ЄСПЛ про відмову у знятті з особи імунітету, передбаченого статтею 1 Шостого протоколу, яке прийняте його пленарним засіданням відповідно до статті 4 Шостого протоколу до Генеральної угоди про привілеї та імунітети Ради Європи є "процедурним", все ж таки Велика Палата Верховного Суду має повноваження здійснювати провадження за заявою такої особи про перегляд судового рішення саме за виключними обставинами. При цьому підкреслено, що розглядуване рішення ЄСПЛ варто вважати таким, в якому не ставиться мета кінцевої оцінки кримінального провадження, тому воно й не може бути ототожнене з рішенням міжнародної судової установи, яке б констатувало порушення Україною міжнародних зобов'язань при вирішенні справи судом та й порядок його виконання буде різнитися. Звернено увагу на ту обставину, що наслідки рішення ЄСПЛ про відмову у знятті з особи імунітету, передбаченого статтею 1 Шостого протоколу є вкрай важливими. Адже таке рішення ЄСПЛ є тим "дзвоником" для держави Україна, який, серед іншого, може побіжно свідчити й про ймовірність виявлення Судом фактів допущення порушень прав людини*

Ключові слова: *привілеї та імунітети, виключні обставини, права людини, міжнародні зобов'язання, процедурне рішення*

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ECHR DECISION TO REFUSE TO WAIVE THE IMMUNITY OF A PERSON UNDER ARTICLE 1 OF THE PROTOCOL NO. 6: INDIVIDUAL INTERPRETATIONS OF THE ESSENCE AND CONSEQUENCES

Abstract. *In present-day Ukraine, there is no unanimous answer to the question of the essence and consequences of the ECHR decision to refuse to waive immunity under Article 1 of the Protocol No. 6 either in the national criminal procedural legislation, or in the theory of criminal procedure, or among judges, investigators, prosecutors. Therefore, the purpose of the present paper is to try to attempt to formulate individual approaches to address this issue. The relevance of the subject under study is conditioned upon its theoretical and practical components. The former is that there this area is heavily understudied, and judicial practice, among other things, requires a certain scientific basis to formulate individual positions in their unity. The dilemma proposed in the title of this study was also addressed by members of the Scientific Advisory Board of the Supreme Court, who were approached by judges of the Grand Chamber for scientific opinions, emphasising the urgency and necessity of feedback from practitioners. To formulate the individual approaches serving the purpose of this study, the authors employed such general and special research methods as dialectical, induction and deduction, Aristotelian, system-structural, sampling method, comparison, and legal forecasting. Notwithstanding the fact that the ECHR decision to refuse to waive the immunity stipulated in Article 1 of the Protocol No. 6, adopted by its plenary session in accordance with Article 4 of the Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe, is "procedural", it was proven that the Grand Chamber of the Supreme Court has the authority to conduct proceedings on the application of such a person to review the judgment precisely in exceptional circumstances. It is emphasised that the ECHR decision should be considered as one that does not aim at the final assessment of criminal proceedings, so it cannot be equated with the decision of an international judicial institution, which would state Ukraine's violation of international obligations in court and the order of its execution will differ. The authors also address the fact that the consequences of the ECHR decision to refuse to waive the immunity stipulated in Article 1 of the Protocol No. 6 are critical. After all, such a decision of the European Court of Human Rights is the "bell" for Ukraine, which, among other things, may hint at the probability that the Court will identify the facts of human rights violations*

Keywords: *privileges and immunities, exceptional circumstances, human rights, international obligations, procedural decision*

INTRODUCTION

According to the national criminal procedural "algorithm of actions" when the European Court of Human Rights (hereinafter referred to as "the ECHR", "the Court") finds a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms [1] (hereinafter referred to as "the Convention") and its protocols, applications are submitted to the Grand Chamber on review of a court decision in exceptional circumstances (Part 3, Article 463 of the Criminal Procedural Code of Ukraine (CPCU)). A logical question arises: what is the criminal procedural mechanism for eliminating the consequences of the pre-trial investigation authorities' violation of the immunity guaranteed by Article 1 of the Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe (hereinafter referred to as "the Protocol No. 6") and does it exist at all? This also refers to the so-called "procedural" decisions of the ECHR, which should not be equated with the decisions of an international judicial institution whose jurisdiction is recognised by Ukraine. These include the ECHR decision to refuse to waive the immunity of a person under Article 1 of the Protocol No. 6 (hereinafter referred to as "the ECHR Decision"). This study covers the approaches to interpreting the essence of such decisions and the importance of their consequences. To achieve the stated purpose, the tasks are set as follows: to establish the presence of legal grounds to equate the ECHR Decision

with a decision of an international judicial institution that would state the Ukraine's violation of international obligations upon litigation; to establish the possibility, based on the ECHR Decision, of interfering in the decisions of the investigating judge and the appellate court, adopted in the order of judicial control over the pre-trial investigation of other persons; to establish the presence of procedural mechanisms addressing the consequences of the pre-trial investigation authorities' violation of the immunity guaranteed by Article 1 of the Protocol No. 6 [2]?

Along with the attempt to offer original scientific approaches to solving the declared problems, the authors of the present study do not consider themselves pioneers in this subject area, since several other authors have already conducted corresponding discourses. In particular, those who referred to the source of the review of cases and the resumption of proceedings at the national level in connection with the ECHR decisions, suggested that the Recommendation of the Committee of Ministers of the Council of Europe [3], preceded by the ECHR decision in Papamichalopoulos v. Greece. According to this ECHR decision, if the Court finds a violation, it obliges the respondent state to put an end to such violations, as well as to make commensurate reparations to restore the situation. This enables the implementation of the principle of international law restitutio in integrum [4, p. 232]. Evidently, following such recommendations in the national legislation, the Supreme Court of Ukraine was and is provided with these powers. In turn, upon a thorough analysis of the doctrine of banning the use of "poisonous fruit" and exceptions to it, Judge of the Grand Chamber of the Supreme Court Oleksandra H. Yanovska states that of the 108 applications for review of decisions on exceptional grounds stipulated by Section 2, Part 3, Article 459 of the CPCU, 55 applications with the provided materials were returned to the applicants, proceedings were denied on 32 applications and decisions in 21 cases were reconsidered. There is a practice according to which the Court refuses to initiate proceedings in cases where the application of the restitutio in integrum principle cannot be an adequate way to restore the applicant's rights, violation of which was recognised by the ECHR (for example, see the Judgment of the Grand Chamber of the Supreme Court No. 182/166/15-k, proceedings No. 13-36zvo20 dated May 19, 2020) [5-7]. The authors of this paper believe that such ECHR decisions should separately include the position on to the so-called "procedural" decisions, with a particular emphasis on the refusal to waive the immunity stipulated in Article 1 of the Protocol No. 6 [8].

The authors' "scientific concern" with this issue is caused by its practical side, that according to the data published by the Supreme Court, the Grand Chamber carries out such proceedings [9]. The second important factor for this investigation is to prove the presence of gaps in the current criminal procedural legislation in this subject area, as well as different practical and scientific approaches to interpreting the essence and consequences of the ECHR Decision. Given such context, there are no grounds to contemplate the unity or sustainability of judicial practice, the development of which is an urgent task [10, p.128]. Thus, analysing the conflicting provisions of the current criminal procedural legislation, the authors came to the conclusion that the said ECHR decision renders lawful proceedings against persons covered by immunity under Article 1 of the Protocol No. 6 impossible [11, p.11-15]. Therewith, in the vast majority of cases, it cannot serve as grounds for interfering in the decisions of the investigating judge and the appellate court based on the results of their review, adopted in the order of judicial control over the pre-trial investigation of other persons. However, due to the gaps and conflicts of the current criminal procedural legislation in this area, the authors partially supported Ya. Zeikan's opinion on the approval of the "standard of proof of reasonable suspicion" [12] to avoid unjustified criminal prosecution of persons and preventing indirect measures to ensure criminal proceedings against such persons.

Ultimately, it is necessary to appeal to the fact that the Grand Chamber of the Supreme Court appealed to the members of the Scientific Advisory Board of the Supreme Court to obtain relevant scientific opinions on a certain list of issues [2]. Such conclusions were prepared by researchers, expressing their personal opinions [13], but so far, the decision of the Grand Chamber is absent. This only emphasises the urgency of the issues raised in this paper and the necessity of developing scientific ways to address them. Admittedly, in this discussion, the authors priorities the judges of the Grand Chamber of the Supreme Court because the ECHR categorically approaches the importance of judicial practice and repeatedly emphasises that the relevant established judicial practice cannot be ignored [10, p.133].

1. MATERIALS AND METHODS

Thus, this study will attempt to offer the scientific community a systematic review of sound conclusions and recommendations of leading specialists in procedural and international law, professors, including O.V. Butkevych [14], A.M. Drozdov [15], O.V. Kaplina [16; 17], L.M. Loboiko [4], O.H. Shylo [10; 18], O.H. Yanovska [6; 7; 19], who, considering their individual scientific interests, expressed their opinions on the issue of observance of conventional and constitutional human rights and freedoms, application of ECHR

practices, etc. at the monographic level. Such a review has become possible and informative as a result of applying an inductive approach and a system-structural method, which allowed considering human rights and the need to track their violations through the lens of the entire system of issues concerning the consequences and the specific features of executing the ECHR Decision. In addition, the applied system-structural and comparative methods allowed concluding that the implementation of the ECHR Decision, due to its inherent procedural features, should be carried out according to the rules of Part 3, Article 463 of the CPCU on review in exceptional circumstances, even though this study proved that the ECHR Decision should not be equated with the decision of an international court referred to in Part 3, Article 463 of the CPCU.

Using the comparative method and the method of sampling, the authors carried out an excursion to the judicial practices of both Ukrainian courts and the ECHR. As a result, the study identified the gaps and shortcomings in the Law of Ukraine "On Enforcement of Judgments and Application of the Judicial Practice of the European Court of Human Rights". In particular, the authors highlighted the inaccuracy of the wording of basic concepts, such as "ECHR practices", "ECHR decision", used in the Ukrainian legislation, which does not contribute to the stability and unity of judicial practice. Admittedly, a similar issue is inherent not only in the category of decisions that are the subject of this study, but is generally inherent in the implemented terms, as well as situations where conventional approaches to the definition of certain concepts are abandoned [20, p. 162].

Legal forecasting allowed modelling a set of negative legal consequences, including human rights violations, the admission and/or non-recognition of which are foreseeable and highly probable given the narrow and limited interpretation of the ECHR Decision by lawyers. Using sampling and the Aristotelian method, the authors of the present study selected the court decisions placed in the Unified State Register of Judgments that are of scientific and practical interest and/or can serve as an illustrative example to identify and emphasise the urgency and practical need for the development of original approaches to interpreting the essence and consequences of the ECHR Decision. Furthermore, in a separate legal situation, which is a consequence of the ECHR Decision, the Aristotelian method allowed proposing a certain logic of application of the current CPCU to eliminate the consequences of pre-trial investigation authorities' violation of immunity guaranteed by Article 1 of the Protocol No. 6.

Dialectical approaches and sampling methods have formed the basis for the assumption that the Law of Ukraine "On Enforcement of Judgments and Application of the Judicial Practice of the European Court of Human Rights" and the current CPCU do not fully define the appropriate mechanism and effective means to remedy the applicant. As a result, the application of these methods further developed the scientific opinions of researchers on supplementary individual measures [21] that are the key to effective and rapid implementation of the ECHR Decision and, accordingly, a guide to restore the applicant's condition that they had been in prior to the violation committed against them [13, p.14-17].

The authors of the present study are eagerly awaiting a scientific discussion since the scale of the subject matter is significant and the dilemma itself is very ambiguous, and this issue is generally understudied. From the standpoint of a practical approach [4] the authors applied a research-to-practice investigation providing for three logically interconnected blocks.

2. RESULTS AND DISCUSSION

2.1. Analysis of the legal grounds for identifying the ECHR Decision with the decision of an international judicial institution [7]

The current state of both Ukrainian and international law is described by new trends in the optimisation of mechanisms aimed at ensuring decent protection of human rights and freedoms in any state [22]. The development of each country as a democratic and legal state requires the protection of the rights of all population categories [23]. Implementation of measures to protect human rights at the national level is possible only by harmonising Ukrainian legislation, its adaptation to European Union law, including criminal procedural legislation, specifying the aspects of such adaptation, thereby creating proper theoretical grounds for future legislative innovations [18, p. 110].

Appealing to national strategies relating to the observance of human rights to a certain extent, considering law enforcement activities, Yu.M. Chornous states that there is an urgent need to increase the efficiency of criminal investigations in accordance with international standards and the judicial practice of the ECHR [24, p. 269]. Contrary to the conciseness of this scientific opinion, its content is extensive, as it covers not only such a cumbersome stage of criminal proceedings as pre-trial investigation, but also stages of appeal, which will have their individual course in case of human rights violations committed upon pre-trial investigation, as well as consideration in the ECHR in case of relevant grounds. Furthermore, it is worth emphasising the fact of a decades-long fruitful scientific discussion on those components of legislative activity,

personal qualities and competencies of "professional participants in criminal proceedings" [25, p. 286], which in their symbiosis capable of immensely improving the state of investigation and trial, adding quality to such activities. At present, Ukraine has numerous "international doors" to fulfil its national potential in various areas, as Ukraine is a member of the United Nations, a member of the Organisation for Security and Cooperation in Europe, the Council of Europe, the International Monetary Fund, The World Bank and other international intergovernmental organisations. This level of participation which imposes on the state of Ukraine – a sovereign subject of international law – the corresponding obligations [26, p. 120-122]. Numerous laws and resolutions of the Cabinet of Ministers of Ukraine have been adopted to effectively perform these obligations. In the case under study, the authors focus on one of them, such as the Law of Ukraine "On Enforcement of Judgments and Application of the Judicial Practice of the European Court of Human Rights" No. 3477-IV of February 23, 2006 (hereinafter reffered to as "the Law", "the Law of Ukraine").

Researchers fairly emphasise that Ukraine is one of the few Council of Europe states that has directly regulated the practice of enforcing ECHR decisions by a separate Law of Ukraine. However, this Law, as argued by O.V. Butkevych, has several conflicts and gaps [14, p. 12], which will be closely considered below. The analysis of the preamble to this Law of Ukraine suggests that one of the parties in these relations must be the state of Ukraine, against which a complaint has been filed in the form of a violation of fundamental rights or fundamental freedoms protected by the Convention and its Protocols. Furthermore, Ukraine is therefore obliged to eliminate the causes of violations of the Convention and its Protocols [27]. Under Section 1, Article 35 of the Convention, the Court accepts applications only after all internal remedies have been exhausted. That is, one should first turn to the national courts to, including the relevant higher court, within whose jurisdiction the one's case falls, to protect their violated rights they intended to remedy through the Court. It is necessary to comply with national procedural rules, especially the legislatively provided time limits. The Court may consider only those allegations of violations of the rights that are guaranteed by the Convention and its Protocols [28]. These include Article 2 "Right to life", Article 3 "Prohibition of torture", Article 5 "Right to liberty and security of person", Article 6 "Right to a fair trial", Article 8 "The right to respect for private and family life", Article 10 "Freedom of expression", Article 11 "Freedom of Assembly and Association", Article 13 "Right to an effective remedy" and others of the Convention [26, p. 120-123]. As for some of these violations of Ukraine's international obligations found by the ECHR during the pre-trial investigation and trial, there are extensive studies and even guidebooks translated by Ukrainian proceduralists to update such issues as the way to avoid such violations of the Convention and minimise them [15].

In turn, the national criminal procedural "algorithm of actions" in the ECHR's finding of violation of the Convention and its Protocols by Ukraine, is prescribed, albeit not flawlessly. Thus, based on the fact of ECHR's finding of violation of international obligations by Ukraine upon delivering justice, the Grand Chamber of the Supreme Court must consider the materials of criminal proceedings (criminal case) under the rules of proceedings in exceptional circumstances in accordance with Chapter 34 of the CPCU [26, p. 120-123]. The authors of this study believe that the phrase "…upon delivering justice" employed by the legislator has a substantial semantic load. Firstly, it a priori determines that procedural decisions made during pre-trial investigation and the conclusions obtained must be reviewed by a court. Moreover, it is no longer just a matter of trial at first instance, but a priori it is assumed that the available Ukrainian appeal mechanisms have already been exhausted. Therewith, the attention to the violations committed during the pre-trial investigation is not reduced in any way, although in comparison with the Civil Procedural Code of 1960 the current CPCU slightly shifted the emphasis towards the importance and juxtaposition of pre-trial and trial stages of criminal proceedings. Legal literature contains scientific publications, the authors of which tend to believe that the pre-trial investigation has currently lost its flagship [29, p. 153; 30, p. 151-156]. This opinion is highly controversial, especially among practitioners – prosecutors, interrogators, and investigators, who justifiably defend their professional positions, appealing to the provisions of the current CPCU, which only emphasise the importance of criminal proceedings in the first stage of criminal procedure. The authors of this study believe that pre-trial investigation and trial cannot be compared, equated, or dominate over each other because they are separate stages of criminal procedural activity with their participants, terms, procedure, procedural decisions, etc. Proceduralists have repeatedly addressed this both under the Civil procedural Code of 1960 [31, p. 122-126] and the current CPCU [4, p. 21-23]. Stages, forming a single system of proceedings, replacing each other, should ultimately solve the problems of criminal proceedings, regulated by Article 2 of the CPCU. The overarching goal is to establish the truth (although some researchers, as well as the legislator, who virtually "bypassed" such a principle of criminal proceedings in the current CPCU, do not share this goal) [32, p. 161-173]. Given the stages and importance of each, only the court has a duty to directly investigate the decisions, procedural actions and conclusions that took place during the pre-trial investigation. Based on this, the court formulates a conclusion about their pertinence, admissibility, truthfulness, and sufficiency [33, p. 53]. This is

the content of the eponymous principle of criminal proceedings, stipulated by Article 23 of the CPCU and the establishment and development of which in Ukrainian legislation was directly influenced by the ECHR decisions [16]. Therefore, as a general rule, those pieces of evidence that have not been directly examined by a court cannot acquire the status of appropriate, admissible, or truthful. Conversely, only the court ultimately finds the evidence to be inadequate, inadmissible, and untrue.

Secondly, based on the above, it is illogical to state the number and nature of violations of the Convention and its Protocols at the stage of pre-trial investigation, as the collection and verification of evidence by investigators and prosecutors is ongoing and will continue. Only after the completion of the pre-trial investigation, at the trial, judges have the right to evaluate the existing violations of both the current CPCU and the Convention. Judges may also commit such violations in their activities and/or fail to properly evaluate the violations that occurred during the pre-trial investigation. It is worth remembering that in criminal proceedings, justice is delivered exclusively by a court, and refusal to deliver justice is prohibited (Parts 1-2, Article 30 of the CPCU) [34]. A person has the right to file a complaint against the state of Ukraine to the ECHR only after exhausting all national mechanisms of appeal [28].

In turn, the ECHR decision to waive the person's immunity under Article 1 of Protocol No. 6 is initiated by a party and adopted (or refused) by the plenary session of the Court at the stage of pre-trial investigation or at the stage of including information in the Unified Register of Pre-trial Investigations (this is a very debatable issue that can be discussed in a separate study). At none of these stages is it possible at all to contemplate a final assessment of the evidence in criminal proceedings, which is performed only at the trial stage. The authors of the study believe that this is why the question of the final evaluation of evidence in criminal proceedings as such should not be raised in the first place. Admittedly, the interim evaluation has some relevance and its presence affects the prudence and objectivity of the decision to waive immunity or refuse to do so. Therewith, the Court first considers the fact that privileges and immunities are granted to judges not for their personal benefit, but to ensure their independence in the performance of their duties. The plenary of the Court shall waive the immunity of a judge in all cases where, in its opinion, the immunity interferes with the delivery of justice and when it may be revoked without prejudice to the purposes for which it was granted (Article 4 of Protocol No. 6) [35].

Therefore, the ECHR decision to waive the immunity of a person should be considered procedural, interim, which gives the pre-trial investigation authorities the possibility of opening criminal proceedings against one of the judges, their spouses or both, their minor children and carrying out any investigative, coercive measures, interrogation of them as witnesses. Similarly, the ECHR interim decision refusing to waive the person's immunity, taken by its plenary session, should be described as procedural in accordance with Article 4 of Protocol No. 6.

At the same time, the decision of the ECHR to refuse to remove a person's immunity is the “bell” for the state of Ukraine, which, among other things, signals not only the existence of a well-formed belief of the court, which sat in plenary sessions, that the cancellation of the granted immunity is not possible without prejudice to the purposes for which it was granted, but can also casually indicate the likelihood that the court will detect human rights violations in the process of studying the materials provided to it. After all, it is logical that those materials, including criminal proceedings, that are sent to the ECHR to resolve the issue of immunity under Article 1 of protocol no. 6, are aimed at convincing the court that the person has committed (continues to commit) illegal activities that fall under the qualification under a certain article(we) of the Criminal Code of Ukraine and there is a need to apply certain measures to this person to ensure criminal proceedings. As for the status of this person as a participant in criminal proceedings, it is logical that if there is the specified immunity, she cannot be legally recognized as a suspect(we are talking about drawing up such a procedural document as a notice of suspicion), because this will automatically indicate a violation of the immunity guaranteed to her. Moreover, even the fact of carrying out certain procedural actions against this person, which, according to the current provisions of the Criminal Procedure Code of Ukraine, will themselves determine his status as a suspect (we are talking about his detention on suspicion of committing a criminal offense), is unacceptable without a positive decision of the issue by the plenary session of the ECHR to lift this person's immunity.

But this state of affairs is a partially idealized training case, which does not exclude those negative trends in the investigation process that may take place and, in their final result, have every chance of leading to a violation of the rights of individuals. In this regard, we partially support the position of Ya. Zeikan regarding the urgency of developing a “standard for proving reasonable suspicion” [12] in order to exclude the indirect adoption of measures to ensure criminal proceedings against individuals. We are inclined to agree that such a standard should also be reserved for such unacceptable criminal procedural activities, the results of which may de facto indicate that the subjects authorized for pre-trial investigation treat a person as a suspect, considering him such. At the same time, we cannot support the arguments and the statement itself as an absolute author's

fact of the fact that "despite the fact that investigative judges and courts of Appeal are obliged to check whether a reasonable suspicion is proved, but in practice investigative judges check only the fact of reporting a reasonable suspicion, and not its content" [12]. We do not share our position on the totality of such egregious manifestations, based on our analysis of investigative and judicial practice, although we have no reason to object that in some cases such situations can actually take place.

So, despite the fact that we adhere to such positions, which cannot be identified with the decision of an international judicial institution that would State a violation of Ukraine's international obligations when deciding a case by a court, the decision of the ECHR to refuse to lift a person's immunity under Article 1 of protocol no. 6, because it should be considered procedural, intermediate, such that the aim of the final assessment of evidence in criminal proceedings is not set, but still the Grand Chamber of the Supreme Court has the power to carry out proceedings in exceptional circumstances if there is an application from a person in respect of whom the lifting of immunity provided for in Article 1 of protocol no is refused. 6. this suggests only one clarification that the legislator should make appropriate additions to Paragraph 2 of Part 3 of Article 459 and Part 3 of Article 463 of the Criminal Procedure Code of Ukraine. In this situation and these circumstances, in each specific case, using the provided criminal procedural mechanisms, it is very important in the activities of the Grand Chamber of the Supreme Court not only to clarify the existence of human rights violations, but also to stop the violation of Rights, restore the position of the applicant.

2.2. Can the adoption of such an act by the ECHR be grounds for interfering with the decisions of the investigating judge and the court of appeal based on the results of their review, adopted in the order of judicial control over pre-trial investigations against other persons? [2]

We fully agree with such a scientific position that the law does not specify what should be attributed to the practice of the ECHR, whether these are decisions that relate to Ukraine, or the entire practice of the ECHR, as well as whether we are talking about Case Law (own decisions on cases) or the entire practice of the ECHR (administrative and procedural decisions) [14, p. 12-14]. Although leading processalists also reasonably emphasize that "given that Ukraine recognizes the jurisdiction of the ECHR in all matters concerning the interpretation and application of the convention, its application by courts should be carried out with mandatory consideration of the practice of the ECHR not only in relation to Ukraine, but also in relation to other states" [36, p. 745]. And it is based on this that scientists and practitioners, respectively, in their scientific research [37, p. 383-384; 38, p. 551] and professional activities, rely on the decisions of the ECHR not only in relation to Ukraine and operate with them. At the same time, we fully agree that, unfortunately, there is no legislative clarity on this issue.

The question of whether the decisions of the Chamber of the court or the president of the Chamber of the court belong to this practice also remains open. It would be worth noting here the types of case-law decisions of the court (which constitute the concept of "case-law of the Court"). More relevant is the concept of the court's "case-law": a decision on bringing to the attention of the government, on admissibility, a decision on the merits. In general, speaking about the significance of ECtHR decisions in the law enforcement practice of Ukraine, we can note a not sufficiently correct interpretation of the concept of "ECtHR decisions" in the law of Ukraine "on the execution of decisions.", because these are not only those decisions that recognize the violation of the ECHR by Ukraine, since the standards and principles of the court for the protection of human rights can also be contained in decisions on the inadmissibility of the case. Decisions against Ukraine with a finding of a violation but without just satisfaction must also be enforced (for example, decisions in Savinsky v. Ukraine, no. 6965/02, 28 February 2006), as well as judgments in which the court finds no violation of the convention (judgment in Gennadiy Naumenko v. Ukraine, no. 42023/98, February 10, 2004) [14, p.12-14].

As we can see, the author of the above thorough scientific and practical discourse does not resort to considering and describing such a decision of the ECHR as refusing to remove the immunity provided for in Article 1 of protocol no. 6, which we consider procedural. And this is not surprising, because our own scientific search has established that solutions like the ONE analyzed are isolated in all practice during the existence of the ECHR, and, obviously, for this reason, there is practically no scientific intelligence on these problems in domestic science, including Criminal Procedure. At the same time, we hope that our international colleagues and processalists will respond very thoroughly to the stated issues, because they are relevant. The sixth protocol to the general agreement on privileges and immunities of the Council of Europe was ratified on May 15, 2003 by law of Ukraine No. 800-IV , so it is part of the national legislation of Ukraine (Article 9 of the Constitution of Ukraine, Part 1 of Article 19 of the law of Ukraine "On International Treaties of Ukraine").

In the case under consideration, as was already stated during the consideration of the previous issue, the decision of the ECHR to refuse to remove the immunity provided for in Article 1 of protocol no from a person. 6 is one that, as a result, does not allow the pre-trial investigation authorities to initiate criminal proceedings

against one of the judges, their spouses or both, their young children and to carry out any investigative actions, coercive measures, questioning them as witnesses, that is, it makes it impossible for such procedural activities legally in respect of the listed persons who are subject to the immunity provided for in Article 1 of protocol No. 6.

At the same time, Article 2 of the code of Criminal Procedure imposes certain obligations on the investigator, prosecutor, court to protect the person, society and the state from criminal offenses and bring to justice those responsible, and by virtue of such a basis of criminal proceedings as publicity, the prosecutor, the investigator are obliged, within their competence, to start a pre-trial investigation in each case of direct detection of signs of a criminal offense (except in exceptional cases), as well as to take all measures provided for by law to establish the event of a criminal offense and the person who committed it (art. 25 of the Criminal Procedure Code of Ukraine). In turn, the principle of legality also imposes on the prosecutor, the head of the pre-trial investigation body, and the investigator the obligation of a high-quality and impartial investigation of the circumstances of criminal proceedings (Part 2 of Article 9 of the Criminal Procedure Code of Ukraine). It follows from the above that despite the existence of such a circumstance as the existence of an ECtHR decision, which legitimately makes certain procedural activities impossible in respect of persons covered by the immunity provided for in Article 1 of protocol no. 6, such a decision of the ECHR cannot be considered as an obstacle to the performance of all those tasks defined in Article 2 of the Criminal Procedure Code of Ukraine. Unlike persons covered by the immunity provided for in Article 1 of protocol no. 6, in relation to other persons who are participants in criminal proceedings and to whom this and other immunities do not apply, the legal procedure provided for by the current Criminal Procedure Code of Ukraine should also be applied. At the same time, the investigating judge, whose powers in accordance with paragraph 18 of Part 1 of Article 3 the code of Criminal Procedure of the Russian Federation is supposed to exercise, in accordance with the procedure provided for by the code of Criminal Procedure of the Russian Federation, judicial control over the observance of the rights, freedoms and interests of persons in criminal proceedings, must exercise these powers, including in relation to those participants in criminal proceedings to whom immunities do not apply.

It is worth listening to the recommendations of experts on the expediency and urgency of making amendments and additions to the law of Ukraine “on the implementation of decisions and application of the practice of the European Court of human rights”, in particular, among other things, already proposed by well-known international researchers [14, p. 25] and mentioned above, to highlight the practice of implementing the decision of the ECHR on refusal to remove immunity from a person, which was adopted by its plenary session, in accordance with Article 4 of protocol no. 6 to the general agreement on privileges and immunities of the Council of Europe and on the removal of immunity from a person.

2.3. Are there procedural mechanisms for remedying the consequences of a violation by pre-trial investigation authorities of the immunity guaranteed by Article 1 of protocol no. 6? [2]

It has already been noted that despite the fact that the payment of compensation to the applicant, the adoption of measures of a general nature are ways of implementing the ECtHR decision provided for by the Basic Law of Ukraine, the adoption of additional measures of an individual nature (reopening of the proceedings and re-examination of the case in a domestic court instance) is capable not only of correcting the violation of the convention committed by the state of Ukraine, but is also a way of bringing the applicant's condition into the same state as he was before the violation of the convention (restitutio in integrum) .Also additional measures of an individual nature, according to Paragraph “B” of Part 2 of Article 10 of the law, there are “other measures provided for in the decision”.

Based on the above, we believe that the foresight in the ECtHR decision on refusal to remove immunity from a person of such additional measures of an individual nature is the key to its effective and rapid implementation and, accordingly, a pointer to bringing the applicant's condition to the same state in which he was before the violation committed against him [11, p. 14-17]. However, in the situation we are considering, there are no such clarifications regarding additional individual measures in the ECHR decision.

Since the decision provided for in Paragraph 2 of Part 3 of Article 459 of the Criminal Procedure Code of Ukraine and the decision of the ECHR to refuse to remove a person's immunity under Article 1 of protocol no. 6 differ in essence, then their execution will obviously have certain differences. If existing violations of the rights of persons covered by the immunity provided for in Article 1 of Protocol No are found. 6, and / or breach by the pre-trial investigation authorities of the immunity guaranteed by Article 1 of protocol no. 6, then such persons, among other things, have the right to raise questions and demand compensation for the damage caused to them in civil proceedings, if there are appropriate grounds for this. At the same time, damage caused by illegal decisions, actions or omissions of a body carrying out operational search activities, pre-trial investigation, prosecutor's office or court is compensated by the state at the expense of the state budget of

Ukraine in cases and in accordance with the procedure provided for by law, and having compensated for such damage, the state applies the right of reverse claim to these persons in cases provided for in Part 2 of Article 130 of the code of Criminal Procedure of Ukraine. As for the grounds and conditions for imposing civil liability for the damage caused on the state, the explanation was provided by the Grand Chamber of the Supreme Court in a decision of September 3, 2019 [39]**.**

CONCLUSIONS

Despite the fact that the ECtHR's decision to refuse to lift a person's immunity is "procedural" and refers to those decisions in which, among other things, the ECtHR does not summarize a violation of the convention "which would be directly related to the ongoing judicial proceedings and the judicial decisions taken as a result of them" [2;3], nevertheless, the Grand Chamber of the Supreme Court has the power to conduct review proceedings for exceptional circumstances (Part 3 of Article 463 of the code of Criminal Procedure of Ukraine) if there is an application from a person in respect of whom the immunity provided for in Article 1 protocol no. 6. In order to avoid different perceptions of the provisions of the current code of Criminal Procedure of Ukraine regarding the powers of the Grand Chamber of the Supreme Court to carry out these procedural activities, the legislator should make appropriate additions to Paragraph 2 of Part 3 of Article 459 and Part 3 of Article 463 of the code of Criminal Procedure of Ukraine. It would be advisable to provide for a separate paragraph of the powers for consideration by the Grand Chamber in relation to other decisions of the ECHR, which, although "procedural", should also be recognized as exceptional circumstances at the level provided for in Paragraph 2 of Part 3 of Article 459 of the Criminal Procedure Code of Ukraine.

Unlike persons covered by the immunity provided for in Article 1 of protocol no. 6, in relation to other persons who are participants in criminal proceedings and to whom this and other immunities do not apply, the legal procedure provided for by the current Criminal Procedure Code of Ukraine should also be applied. The decision under consideration may be the "bell" for the state of Ukraine, which, among other things, signals possible violations of human rights identified by the court in the course of studying the materials provided to it, despite the fact that the purpose of the ECHR's decision to refuse to lift a person's immunity under Article 1 of protocol no. 6 is not a general assessment of criminal and judicial proceedings.

Proven violation of the rights of persons subject to immunity under Article 1 of protocol no. 6, and / or breach by the pre-trial investigation authorities of the immunity guaranteed by Article 1 of protocol no. 6th creates, among other things, prerequisites for resolving the issue of compensation (compensation) for damage caused by illegal decisions, actions or omissions of the body carrying out operational search activities, pre-trial investigation, prosecutor's office or court, based on the provisions of Article 130 of the code of Criminal Procedure of the Russian Federation.

We sincerely hope that our scientific research will understand the essence and consequences of the ECHR's decision to refuse to remove a person's immunity under Article 1 of protocol no. 6, which was adopted by its plenary meeting in accordance with Article 4 of protocol no. 6 to the general agreement on Privileges and immunities of the Council of Europe will be useful for continuing scientific discussion in this area, and final judgments can at least partially withstand both scientific discussion and well-deserved reasoned criticism, both from fellow scientists and judges and other practicing lawyers.

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