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Yuriy Pyvovar¹
Olexandr Bazov²**EUROPEAN COURT OF HUMAN RIGHTS AS THE GUARANTOR OF LEGAL PROTECTION
OF A HUMAN IN THE FIELD OF AVIATION ACTIVITIES OF UKRAINE**National Aviation University
Kosmonavta Komarova Avenue 1, 03680, Kyiv, Ukraine
E-mails: ¹pyvovar_yuriy_2008@ukr.net; ²nommennescio@gmail.com**Abstract**

Purpose: The effectiveness of human rights protection in the Council of Europe largely depends on activities of the European Court, which demonstrates high standards of justice, particularly in matters of human rights protection in the field of aviation activities. The article offers a critical assessment of Ukrainian national legislation in terms of its internal legal consistency and compliance with international legal acts. **Methods:** The methods of legal analysis are used to study court decisions in the aviation field; methods of comparative legal analysis, forecasting and dialectical - in the study of problems in the further improvement of Ukrainian legislation. Also in article applied the theory of legal comparative, approaches to applying the analogy of legal and law in process of making decisions on similar court cases. **Results:** The article deals with the analysis of the European Court of Human Rights jurisdiction on cases of protection of human rights in the field of aviation activities. Two groups of cases in which Ukraine is a defendant are identified: a) cases of international concern (in particular the Malaysia Airlines' Boeing 777-200ER crash); b) cases of national character (citizens of Ukraine against the State of Ukraine). The author's position on deciding the cases in the field of aviation activities is based on the principles of respect for the European Convention on Human Rights, 1950. **Discussion:** The conclusion about the necessity of amending some national laws, taking into account the legal positions of the European Court (in particular, regarding the right of airlines workers to strike) is made, and the fact that the issues of States and airlines activities to respect human and civil rights in the field of aviation activities are covered by jurisdiction of the European Court of Human Rights and occupy an important place in its practice is indicated.

Keywords: aviation activities; European Court of Human Rights; human and civil rights; judicial practice; Ukrainian legislation.

1. Introduction

In modern globalization processes the protection of rights, freedoms and interests of individuals and legal entities, particularly in the field of aviation activities, at the international level become increasingly important.

The most effective international association in terms of providing international human rights and civil rights protection is the Council of Europe. Since becoming a member of the Council of Europe Ukraine has undertaken a number of commitments in the field of human rights protection, one part of which is the recognition of the compulsory

jurisdiction of the European Court of Human Rights by the State, which applies to all issues of interpretation and application of the Convention and its Protocols [1], and also the enforcement of the final Court decisions in cases against Ukraine. The European Convention and the Court activities are legally recognized by the State as a source of law. Since 1995 the Joint program of the Commission of the European Communities and the Council of Europe to reform the legal system, local government and improve the system of law enforcement in Ukraine has been carried out, and since 2015 The Plan of Actions for Ukraine for 2015-2017 has been developed by a joint initiative of the Council of

Europe and Ukraine, which aim is to support Ukraine in carrying out its statutory and specific obligations as a member state of the Council of Europe and to help deal with the fundamental issues in the field of human rights and the rule of law.

The effectiveness of human rights protection in the Council of Europe largely depends on activities of the European Court, which demonstrates high standards of justice, particularly in matters of human rights protection in the field of aviation activities.

2. European Court of Human Rights and Ukraine: Court Cases International Value

The analysis of the European Court of Human Rights activities (hereinafter – ECHR) confirms that the issues of human rights protection in the field of aviation activities are relevant. Thus, much attention of the international community is focused on several cases in the ECHR against Russia and against Ukraine related to the events that took place in the east of Donetsk region (Ukraine), where 298 people, including 80 children, three of whom were babies died as a result of Malaysia Airlines' Boeing 777-200ER crash, Flight MH17 from Amsterdam to Kuala Lumpur. The passengers were citizens of 10 countries. The majority of victims (193 persons) were citizens of the Netherlands. The Security Council of the Netherlands released a report on the causes of the Flight MN17 crash on October 13, 2015. It was established that the aircraft had been hit by the anti-aircraft missile system "Buk".

The European Court of Human Rights began to consider an complaint against Ukraine in the case of Malaysian Airlines' Boeing-777 crash in Donbas on July 17, 2014. The Court issued a decision on communication of the complaint on the case "Ioppa and others against Ukraine" online [2]. The applicant parties are German citizen Elena Ioppa, a resident of Australia Tim Lauschet and Chris and Denise Kenke. The applicant parties complain about a violation of Article 2 of the European Convention on Human Rights, 1950, which guarantees the right to life. According to the preliminary report of the European Court of Human Rights released on the case on August 5, 2016 relatives of the dead claim they want to get just satisfaction from Ukraine. Media reports that applicant parties call on Ukraine a compensation in the amount of 1 million euros. In their complaint they claim as if [2]:

Relying on Article 2 of the Convention, the applicants claim that the Ukrainian authorities failed

to protect the relatives' life by not completely closing the airspace above the ongoing armed conflict in the region through which the MH17 flight passed. In particular, the applicants complain that failure to close the airspace was intentional, that the authorities knew of the danger of flights above the military conflict zone but undertook no action to close the airspace. The applicants submitted that the Ukrainian authorities' intentional failure to close the airspace above the military conflict zone resulted in death of the applicants' relatives.

A similar lawsuit of relatives of MN17 victims against the Russian Federation has not been considered by the Court yet.

As it is known, the results of an official investigation by international experts have not yet been made public. Ukraine believes that the aircraft MN17 was hit by the ground-to-air missile by the combatants of so-called "Donetsk People's Republic" from the anti-aircraft missile system "Buk" received from Russia. The Russian Federation has denied any involvement in the tragedy and along with the combatants of so-called "DNR" blames Ukraine. At the same time, in January 2015 the results of journalistic investigation of CORRECT!V organization became known, which indicated that the Malaysia Airlines' Boeing 777, Flight MN17, was hit by the system "Buk" M1 delivered from Russian city of Kursk by the members of the 53rd air-defense missile brigade of the armed forces of the Russian Federation.

In these circumstances, it should be noted that in addition to control and judicial mechanism of the European Convention, there are other international legal mechanisms for bringing the guilty party to justice: the International Court of Justice, the International Criminal Court, the Permanent Court of International Justice, ad hoc arbitration, ICAO procedures and others. In particular, ICAO has the international mechanism for bringing the States to justice for a long time – the Council of the International Civil Aviation Organization (ICAO), the member of which is the Russian Federation. As it is known, in accordance with Article 3 of the Chicago Convention on International Civil Aviation of December 7, 1944 "each State should refrain from the use of weapons against civil aircraft in flight." [6]. Jurisdiction of the ICAO Council is determined in Article 84 of the Convention. We believe that we should agree with an international lawyer, a professor at Cambridge University Thomas Grant, who believes that the ICAO Council will try to avoid

difficult issues, especially those that will apply to what exactly happened, and possible legal liability of the Russian Federation for the actions of people who shot from the anti-aircraft missile system "Buk". However, if the Council refuses to clearly and unequivocally answer the question whether the States that have submitted the case for consideration consider the Council's answers wrong, these States can offer arbitration. Only if Russia refuses such arbitration, the States may apply to the International Court of Justice.

3. European Court of Human Rights and Ukraine: Court Cases National Value

3.1. Judicial Practice of Aircraft Accidents

Another aviation accident that occurred on the territory of Ukraine and drew the attention of European justice is the tragedy of July 27, 2002. During an air show at Lviv airport "Sknyliv" military aircraft Su-27UB crashed, resulting in killing 78 people, including 28 children and more than 290 people were injured. Only in 14 years, on September 1, 2016, the European Court of Human Rights declared the decision in the two cases "Mikhno family against Ukraine" [5] and "Svitlana Atamanyuk and others against Ukraine" [3] concerning Sknylivska tragedy.

Pursuant to the case materials, a married couple Sergey and Tatyana Mikhno from Lviv and four members of Mykchaylo family – Natalia, Andriy and their daughters Natalia and Adriana – were at the epicenter of the disaster, which occurred on July 27, 2002. They died at the scene.

Claims to the European Court of Human Rights were filed by the relatives of the victims of this disaster. The plaintiffs believed that the State of Ukraine had not ensured the right to life and the investigation (Art. 2 of the European Convention on Human Rights) and their right to a fair trial within a justifiable time period (paragraph 1, Art. 6 of the Convention), and the right to an effective legal remedy (Art. 13 of the European Convention on Human Rights).

The proceedings at the European Court of Human Rights lasted exactly for 10 years – complaints of relatives of the victims were filed in ECHR on August 30 and September 1, 2006.

The European Court of Human Rights decided that the complaint against the State in this case was not justified because Ukraine did not hide the

incident and conducted a full investigation of the disaster. In its decision, the Court noted that "in both cases the investigation of the incident was sufficiently independent, adequate and fast, and the applicant parties had sufficient access to the process." It was noted that Ukraine had not violated Article 2 of the European Convention on Human Rights.

In its turn, the Strasbourg Court also rejected as groundless the complaint on the article prohibiting torture.

However, on one of the complaints ECHR found a violation of the Convention on Fair Compensation because the Mikhno family could not obtain compensation from the State for a long time, despite the decisions of national courts in their favor. The European Court of Human Rights stated that Ukraine had violated Articles 6 and 13 of the Convention on the basis of duration of considering claims for compensation (consideration of the claim of Mrs Mikhno for compensation of material damage in Ukraine lasted for 10 years), and on the basis of lack of legal means in Ukraine for acceleration of the proceedings. The Court held that the State of Ukraine had to compensate the Mikhno family 3600 euros of nonmaterial damage and 360 euros to cover court costs.

3.2. Judicial Practice of the Labor Disputes in Aviation

Some attention should also be paid to the European Court of Human Rights decision in the case "Veniamin Tymoshenko and others against Ukraine" of November 13, 2014 [4]. The case started with the application submitted to the ECHR against Ukraine on the basis of Article 34 of the European Convention on Human Rights by five citizens of Ukraine. The applicant parties complained about the absolute prohibition of strikes by government agencies on the sole basis that they work in the sector of passenger traffic. Complainants relied on Article 11 of the Convention, which provides for the right to freedom of peaceful assembly and to freedom of association with others, including the right to form trade unions and join them to protect their interests. These rights are not subject to any restrictions except those prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorders or crime, for the protection of health or morals or for the protection of the rights and

freedoms of others. The applicant parties claimed 2,400,000 euros as compensatory damages. According to their calculations, this was the amount of company management wages debt for 404 members of the Directorate of service passengers on board of the airline "AeroSvit" for the period from 2008 to 2012. The applicants also claimed 1.6 million euros in nonmaterial damage. In this regard, they referred to the bankruptcy proceedings begun by the company's management allegedly illegally, and which, in their view, could be prevented by a strike. According to the applicant parties, the company "AeroSvit" grossly violated the law of the State, illegally fired workers without paying their salaries.

Taking into account the requirements of the Law of Ukraine "On the procedure for settling collective labor disputes (conflicts)" [10] a labor dispute was registered at the National Service on Mediation and Reconciliation and conciliation procedures lasted for about six months and ended with the adoption of agreed solutions between the employer and the trade union. However, the employer – the company "AeroSvit" was not going to follow them. That is why, the employees of the company had no choice but to opt for decisive actions: on September 9, 2011 general meeting of trade union was held, where it was decided to declare a strike on September 28, 2011. Both the employer and the government agencies were warned about the strike. However, the decision of Boryspil City Court of Kyiv region prohibited the strike. Boryspil City Court relied on Article 44 of the Constitution of Ukraine [8], Article 18 of the Law of Ukraine "On Transport" [7], according to which strikes related to the transport of passengers, service of continuously operating plants are prohibited, and also when a strike is a threat to life and health of an individual, and on article 24 of the Law of Ukraine "On the procedure for settling collective labor disputes (conflicts)", which prohibits strikes if they threaten the life and health of individuals.

During the hearing of the case in Strasbourg the Government of Ukraine admitted that the prohibition of strike of "AeroSvit" employees interfered with the applicant parties rights under Article 11 of the Convention. However, the government argued that the interference was based on the provisions of the Constitution of Ukraine, the Law of Ukraine "On Transport" and the Law of Ukraine "On the procedure for settling collective labor disputes (conflicts)." The government has also drawn

attention of the European Court of Human Rights to the fact that Boryspil City Court of Kyiv region with its decision of September 29, 2011 banned the strike, the beginning of which was scheduled for the September 28, 2011. Accordingly, the Government of Ukraine maintained that nothing prevented the applicants from strike on September 28, 2011. Finally, the Government of Ukraine with reference to the findings of the national courts maintained that if a strike was held, it would put at risk the lives and health of passengers whose flights would have been canceled.

ECHR in its decision unanimously declared the application admissible and held that there was a violation of Article 11 of the European Convention on Human Rights, 1950. But it mentioned that it did not observe any cause-and-effect relationship between the violation and the material damage and therefore refused to comply with the claim. However, the Court awarded the applicant parties jointly 20,000 euros as a nonmaterial damage. Within three months of the date on which the decision became final in accordance with paragraph 2, Article 44 of the Convention, Ukraine, as the respondent State was to pay the applicant parties this amount of nonmaterial damage, which should be converted into the national currency rate at the date of settlement. With the end of the mentioned three months period to the final settlement on the above amount simple interest equal to the marginal lending rate of the European Central Bank, which will remain in effect during the default period, will be charged and three percentage points will be added.

So, in this decision, as well as in several other decisions against Ukraine, the European Court of Human Rights draws attention to the existence of systemic / structural problems in the legal system of the State, including imperfection of national legislation, existence of conflicting provisions in different regulatory legal acts. In the legal decision in the case "Veniamin Tymoshenko and others against Ukraine" the European Court of Human Rights noted that some issues limiting the right to strike in the State are regulated by both the Law of Ukraine "On Transport" of November 10, 1994, № 232/94-VR and the Law of Ukraine "On the procedure for settling collective labor disputes (conflicts)" of March 03, 1998, № 137/98-VR". The contradiction of these regulatory legal acts reflected in the fact that the Law of Ukraine "On Transport" provides more restrictions on the right to strike than the Law of Ukraine "On the procedure for settling

collective labor disputes (conflicts)”, which came into force later and assumes the regulation that other laws and regulatory legal acts should be applied only to the part in which they do not contravene this Law.

Having examined the complaints the European Court noted that although the final provisions of the Law of Ukraine “On the procedure for settling collective labor disputes (conflicts)” provide that other laws and regulations should be applied only to the extent to which they do not contravene this Law, and that they should be brought into conformity with this Law, the Law of Ukraine “On Transport”, which provides more restrictions on the right to strike, however, still continues to be used without amendments. On this basis, the European Court concluded that the interference with the applicant parties’ rights under Article 11 of the Convention was not based on sufficiently defined and anticipated legal acts and therefore a violation of the relevant provision took place.

It is necessary to pay attention to the fact that during proceedings national courts in their decisions made reference primarily to the provisions of Article 18 of the Law of Ukraine “On Transport” of November 10, 1994, № 232/94-VR, which among other issues regulate legal relations connected with tariff agreements. This article, entitled “Transport Strikes”, provides that the work stoppage (strike) in transport enterprises may take place in the case of disregard of tariff provisions by the enterprise authorities, except cases specified by the law. But such agreements, as we know, are now replaced by collective agreements. At the same time it did not prevent the courts from making the decision to ban the strike. In addition, as we see, the Law of Ukraine “On Transport” was passed before the adoption of the new Constitution of Ukraine.

In view of this, provisions of the Law of Ukraine “On transport” should be coordinated and aligned with the requirements of the Constitution of Ukraine and the Law of Ukraine “On the procedure for settling collective labor disputes (conflicts)”, in particular in terms of respect for human and civil rights and freedoms, and the right to strike.

4. Conclusion

In pursuance of Article 46 of the European Convention on Human Rights, point 1 of the Law of Ukraine “On Ratification of the European Convention on Human Rights, 1950, Protocol №1 and Protocols №2, 4, 7 and 11 of the Convention” of

July 17, 1997, №475 / 97-VR [9] concerning the recognition of the jurisdiction of the European Court of Human Rights compulsory and without special agreement in all matters regarding the interpretation and application of the Convention, Article 17 of the Law of Ukraine “On Execution of Judgments and Application of Activities of the European Court on Human Rights” of February 23, 2006, №3477-IV [11] concerning the application of the Convention and the Court activities as a source of law, the unity of national courts activities in Ukraine should be carried out taking into account the legal positions of the European Court.

So, the issues of States and companies activities concerning the respect of human and civil rights in the field of aviation activities fall within the jurisdiction of the European Court of Human Rights and occupy an important place in its practice.

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Ю.І. Пивовар¹, О.В. Базов²

Європейський суд з прав людини як гарант правового захисту людини в авіаційній діяльності України

Національний авіаційний університет, проспект Космонавта Комарова 1, Київ, Україна, 03680

E-mails: ¹pyvovar_yuriy_2008@ukr.net; ²nommennescio@gmail.com

Мета: Ефективність захисту прав людини в Раді Європи багато в чому залежить від діяльності саме Європейського суду, який демонструє високі стандарти здійснення правосуддя, зокрема, і у питаннях захисту прав людини у сфері авіаційної діяльності. В статті пропонується критичний аналіз українського національного законодавства з точки зору його внутрішньо-правової узгодженості та відповідності міжнародно-правовим актам. **Методи:** У роботі використані методи юридичного аналізу судових рішень, порівняльно-правового аналізу; методи прогнозування й діалектичний метод – при дослідженні проблем подальшого вдосконалення українського законодавства. У дослідженні також використані теорія правової компаративістики, підходи застосування аналогій закону і права в ході прийняття рішень з аналогічних судових справ. **Результати:** Наведено загальний аналіз судової практики Європейського суду з прав людини щодо розгляду справ про захист прав людини у сфері авіаційної діяльності. Виділено дві групи справ, відповідачем в яких виступає Україна, а саме: а) справи міжнародного значення (зокрема, щодо авіакатастрофи літака Boeing 777-200ER компанії Malaysia Airlines); б) справи національного характеру (громадяни України проти держави Україна). Авторська позиція щодо вирішення судових справ у сфері авіаційної діяльності ґрунтується на принципах дотримання Конвенції про захист прав людини і основоположних свобод 1950 року. **Обговорення:** Робиться висновок про необхідність внесення змін до деяких національних законів з урахуванням правових позицій Європейського суду (зокрема, щодо забезпечення права працівників авіакомпаній на страйк), а також вказується, що питання діяльності держав та авіакомпаній щодо дотримання прав людини і громадянина у сфері авіаційної діяльності підпадають під юрисдикцію Європейського суду з прав людини та займають важливе місце в його практиці.

Ключові слова: авіаційна діяльність; Європейський суд з прав людини; права людини і громадянина; судова практика; українське законодавство; юрисдикція.

Ю.И. Пивовар¹, О. В. Базов²

Европейский суд по правам человека как гарант правовой защиты человека в авиационной деятельности Украины

Национальный авиационный университет, проспект Космонавта Комарова 1, Киев, Украина, 03680

E-mails: ¹pyvovar_yuriy_2008@ukr.net; ²nommennescio@gmail.com

Цель: Эффективность защиты прав человека в Совете Европы во многом зависит от деятельности именно Европейского Суда, который демонстрирует высокие стандарты осуществления правосудия, в том числе в вопросах защиты прав человека в сфере авиационной деятельности. В статье предлагается критический анализ украинского национального законодательства с точки зрения его внутренне-правовой согласованности и соответствия международно-правовым актам. **Методы:** В работе использованы методы юридического анализа судебных решений, сравнительно-правового анализа; методы прогнозирования и диалектический метод – при исследовании проблем дальнейшего усовершенствования украинского законодательства. В исследовании также использованы теория правовой компаративистики, подходы применения аналогий закона и права при вынесении решений по аналогичным судебным делам. **Результаты:** Осуществлен общий анализ судебной практики Европейского Суда по правам человека, касающейся рассмотрения дел о защите прав человека в сфере авиационной деятельности. Выделены две группы дел, ответчиком в которых выступает Украина, а именно: а) дела международного значения (в частности, по авиакатастрофе самолета Boeing 777-200ER компании Malaysia Airlines) б) дела национального характера (граждане Украины против государства Украина). Авторская позиция по решению судебных дел в сфере авиационной деятельности основывается на принципах соблюдения Конвенции о защите прав человека и основных свобод 1950 года. **Обсуждение:** Предлагается мнение о необходимости внесения изменений в национальные законы Украины с учетом правовых позиций Европейского Суда (в частности, по обеспечению права сотрудников авиакомпаний на забастовку), а также отстаивается позиция о том, что вопросы деятельности государств и авиакомпаний по соблюдению прав человека и гражданина в сфере авиационной деятельности подпадают под юрисдикцию Европейского Суда по правам человека и занимают важное место в его практике.

Ключевые слова: авиационная деятельность; Европейский суд по правам человека; права человека и гражданина; судебная практика; украинское законодательство; юрисдикция.

Yuriy Pyvovar. Ph.D, Associate Professor.

Head of Department of Constitutional and Administrative Law of Educational and Research Institute of Law of National Aviation University, Kyiv, Ukraine.

Education: National Academy of Internal Affairs of Ukraine, Kyiv, Ukraine (1997).

Research area: legal regulation of public finances.

Publications: 90.

E-mail: pyvovar_yuriy_2008@ukr.net

Olexandr Bazov. Ph.D. Lecturer.

Department of Constitutional and Administrative Law of Educational and Research Institute of Law, National Aviation University, Kyiv, Ukraine.

Education: Taras Shevchenko National University of Kyiv, Kyiv, Ukraine (2006).

Research area: International Law, jurisdiction of the European Court of Human Rights, Constitutional Law, International Criminal Law.

Publications: 10.

E-mail: nommencescio@gmail.com