



Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights

ANALYSIS

Monitoring of judicial decisions of the Grand Chamber of the Supreme Court adopted from June 2019 to August 2020 in the aspect of the European Court of Human Rights judgments in the cases *Bochan v. Ukraine (No. 2)*, *Yaremenko v. Ukraine (No. 2)* and *Shabelnik v. Ukraine (No.2)*

Executive summary

August 2020, Kyiv

1. The analysis is prepared in the framework of the Council of Europe Project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights” (the Project), which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The author of the analysis is Iryna Kushnir, national consultant of the Council of Europe, Programme Director of the Civil Society Organisation “Ukrainian Institute for Human Rights”.
2. Monitoring of the case law of the Grand Chamber of the Supreme Court (the Chamber) in the cases related to the review of judicial decisions under exceptional circumstances following judgments of the European Court of Human Rights (ECtHR) is a continuation of the monitoring undertaken in May 2019 in the framework of the *Report of the Council of Europe on the execution of judgments of the European Court of Human Rights in Ukraine*. The *Report* was prepared on the basis of the Recommendations of the Committee of Ministers¹ (the CM) and the ECtHR judgments in the cases of *Bochan v. Ukraine (No. 2)*, *Shabelnik v. Ukraine (No.2)* and *Yaremenko v. Ukraine (No. 2)* were outlined in detail.
3. The monitoring is aimed at analysing whether the review cases following ECtHR judgments is in line with the ECtHR case law described in the judgments *Bochan v. Ukraine (No. 2)*, *Shabelnik v. Ukraine (No.2)* and *Yaremenko v. Ukraine (No. 2)*. In the framework of this monitoring, all decisions of the Chamber, which includes 32 decisions in criminal cases and 39 decisions in civil cases delivered between June 2019 and August 2020, were analysed.
4. In general, the mentioned Chamber decisions, adjudicated between June 2019 and August 2020, are in line with CM Recommendation R(2000)2 and no violations were identified so far, similar to those identified by the ECtHR in its judgments *Bochan v. Ukraine (No. 2)*, *Shabelnik v. Ukraine (No.2)* and *Yaremenko v. Ukraine (No. 2)*.
5. The analysis of the Chamber’s case law shows that the tendencies indicated in the previous monitoring remained unchanged between June 2019 and August 2020 and, in particular, the tendency to cancel judgments and refer cases for new proceedings to courts of relevant instances (cases of *Isayev and Others v. Ukraine*, *Yakushchenko v. Ukraine*, *Minak and Others v. Ukraine*, *Golovenko v. Ukraine* and *Malyy v. Ukraine*).
6. The Chamber, while cancelling judgments and referring the respective cases for new proceedings, applies the same grounds as found out by the previous monitoring, namely:
 - A court judgment is not consistent with the ECtHR findings, and the applicant continues to suffer from the negative impact of the violation which should be eliminated by re-opening of the judicial review of the case with due regard to the ECtHR findings.
 - It could be assumed from the nature (content) of the violations, their legal nature and the proceeding stages where the violations were committed, that the violations occurred can be remedied by re-opening of the judicial proceedings in the case.
 - A violation, established by the ECtHR, reveals the need for the re-examination and re-assessment of the case.

Accordingly, the Chamber continues to apply its well-established practice regarding the criteria for assessment of a case to determine whether judicial decisions need to be reviewed. Such practice correlates with CM Recommendation R(2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

¹ Recommendation R(2000) 2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

7. It should also be mentioned that the Chamber does not apply this approach automatically to all cases as to the quashing of judgments and referring cases to a new trial. After considering the circumstances of the case, the Chamber resorted to passing final judgments following the review of judicial decisions, where appropriate, eliminating thus the risks related to the excessive length of proceedings in the applicants' cases if they are referred to a new trial (cases of *M.T. v. Ukraine*, *Batkivska Turbota Foundation v. Ukraine*, *Svit Rozvag, TOV and Others v. Ukraine*). The previous monitoring indicated the existence of a similar approach.
8. The Chamber also consistently applied its well-established practice to the cases which do not require a review of judicial decisions under exceptional circumstances following ECtHR judgments (*Svit Rozvag, TOV and Others v. Ukraine*). According to this practice, the re-opening of proceedings in a case is not required if:
 - violations established by the ECtHR should be eliminated exclusively by applying general measures;
 - an individual who applied for the review of court decisions was not a victim of a violation established by the ECtHR;
 - a case requested to be re-opened was not a subject of the ECtHR judgment;
 - a violation established by the ECtHR consisted in unreasonable length of court proceedings or in lengthy non-enforcement of judicial decisions.

Such general conclusions are consistent with CM Recommendation R(2000) 2, and mentioning of these conclusions in the Chambers' decisions to the establishment of the appropriate case law and to the reduction of ill-founded applications to the Chamber.

9. It should be noted that the Chamber also provides assessment as to how the cancellation or change of an applicant's influence on the substantiation of decisions delivered against co-participants in a crime who were not the applicants to the ECtHR. Such positive developments in the practice of the Chamber indicate that the recommendations made by the previous monitoring were considered (*Alakhverdyan v. Ukraine*).
10. The current monitoring indicated the need to thoroughly examine and discuss possible approaches, to be embraced by the Grand Chamber of the Supreme Court, to the consideration of cases where the ECtHR established violations of Article 6 §§ 1 and 3(c) of the ECHR, in particular, with regard to the violation of the right to legal advice, where, as a result, "the overall fairness of the criminal proceedings was irretrievably prejudiced". In particular, the ECtHR established in the case of *Alakhverdyan v. Ukraine* that Article 6 §§ 1 and 3(c) of the ECHR had been violated because of the breach of the right to defence at the first stage of the investigation (taking depositions of the applicant as a witness) and the violation had not been remedied in the course of the proceedings. The analysis of the ECtHR judgment in the applicant's case suggests that despite taking into account the presence of serious evidence (witness testimonies) of the applicant's guilt other than those having been appealed against, the lack of direct reference by a national court to the appealed testimony as to the evidence of guilt, and the fact that the applicant continued to admit his guilt in the presence of a defence counsel for a certain period of time, the ECtHR, however, concluded that the proceedings had been unfair in general.
11. While reviewing the application to quash the judicial decision in the case *Alakhverdyan v. Ukraine* following the ECtHR judgment, the Grand Chamber of the Supreme Court decided to amend the sentence by excluding, as evidence, references to the admission of guilt, the crime scene reconstruction protocol involving the applicant as a witness and the number of other evidence which, in the view of the Chamber, had been obtained as a result of the violation of the applicant's right to defence. The Chamber held that the other evidence, namely, the testimonies of the witnesses, was sufficient for the rest of the judgment to remain unchanged and, in particular with regard to the applicant's conviction. Such a conclusion of the Chamber

may raise problems as the ECtHR indicated that the Government failed to demonstrate that the overall fairness of the criminal proceedings had not been irretrievably prejudiced by the restriction of the access to a lawyer.

12. The Chamber consistently applies its approach considering, in the cases where the violation of Article 6 §§ 1 and 3(c) of the ECHR were found, the need to quash judgments through the examination of the sufficiency of evidence for the verdict of guilt except for the evidence in relation to which violations of the said provisions were found (judgments *Golovenko v. Ukraine* and *Malyy v. Ukraine*). Such approach needs to be discussed in detail and examined with due regard to the ECtHR case law in the judgments *Ibrahim and Others v. the United Kingdom* and *Beuze v. Belgium* according to which the examination of the overall fairness of proceedings includes ECtHR assessment of the sufficiency of evidences taken without violation of the right to defence for the purpose of Article 6.
13. The conducted monitoring of the Chamber's ~~in civil and criminal~~ cases, which were re-examined in the period from October 2017 to August 2020 shows that:
 - the general measures, taken by Ukraine to execute the judgments in the cases *Bochan v. Ukraine (No. 2)*, *Shabelnik v. Ukraine (No.2)*, and *Yaremenko v. Ukraine (No. 2)*, have been effective;
 - the Chamber's practice ~~CM sRecommendation on the re-wi t h~~ examination of national judicial decisions following ECtHR judgments;
 - no further violations have been detected, similar to those identified in the ECtHR judgments *Bochan v. Ukraine (No. 2)*, *Shabelnik v. Ukraine (No.2)*, and *Yaremenko v. Ukraine (No. 2)*.