МІЖНАРОДНИЙ ДОСВІД

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EUROPEAN COURT OF HUMAN RIGHTS PRACTICE IN THE AREA OF INDUSTRIAL SAFETY

The European Court of Human Rights decisions concerning the protection of certain labor-related human rights have been considered. Legal positions regarding the state positive obligations to ensure the protection of the right to life against industrial risks, right for industrial (manufacturing) risks information, expediency of criminal proceedings involving hazardous activities have been analyzed.

Keywords: European Court of Human Rights, practice, production safety, criminal proceedings, criminal legal qualification, investigation.

The European Court of Human Rights (ECHR), as the International Court of Justice, is considered to be the highest court for all member States of the Council of Europe, which have ratified the Convention on the Protection of Human Rights and Fundamental Freedoms (47 countries).

The ECHR has the right to:

1) consider individual and inter-state complaints filed before the ECHR against one or more member States of the Council of Europe or against the European Union;

2) accept the fact that the right of the applicant has been violated;

3) award the applicant with further compensation;

4) interpret the Convention on the Protection of Human Rights and Fundamental Freedoms;

5) establish the fact that any violation in a particular state is a massive phenomenon due to the endemic problems, therefore to require the state concerned to take relevant actions;

6) consider the enquiry of the Committee of Ministers of the Council of Europe in regards to whether the respondent state has violated its obligation for the execution of ECHR judgments (decisions);

7) interpret a previously passed decision on the request of the Committee of Ministers of the Council of Europe;

8) make advisory opinions on the interpretation of the Convention on Human Rights and Fundamental Freedoms in matters not related to the consideration of cases [1].

According to statistics, at the beginning of 2017 the largest number of complaints filed to ECHR were against Ukraine (18 131 complaints). For comparison, the same figures for Turkey comprised 12600 complaints, Hungary – 8950 complaints, RF – 7400 complaints respectively [2].

The largest number of complaints against Ukraine concerns the non-implementation of national courts and the ECHR's orders (65 %); complaints from the persons who suffered losses, primarily of private property (Eastern Ukraine) – 22 %; a new category of cases brought before the European Court of Human Rights from Ukraine – the lustration cases [3].

Recourse to the practice of the ECHR has shown that case decisions of human rights violations in the area of industry safety (criminal proceedings) are occasional.

During the preparation of this article the subject of our focus were the decisions reflecting the position of the Court upon the results of complaints' consideration on human rights violations to safe and healthy working conditions for which criminal liability is provided. But the study of the criminal legislation of some foreign countries to the extent of liability for violation of labor protection rules and safety norms, professional duties, etc., made it clear that mentioned laws lack the relevant independent norms and there is a clear trend towards unification of liability norms for violations of various safety rules in diverse fields of industry in connection with professional duties and other violations.

For example, in the CC of Sweden, Belgium, Austria, Norway, etc., harm is the consequence of the safety rules violation covered

by the general rule, which is available in the Chapter (section) on crimes against life and health.

By way of comparison, several articles of the Criminal Codes of various countries provide liability for crimes against industry safety (the legislative scheme of the Criminal Code of Ukraine is used).

Article 222-20 (France) provides liability for safety rules violation, resulted in the harm to health of another person, which led to a loss of labor capacity for up to three months.

Article 383 of the Turkish CC states that if the actions of a person as a result of negligence, inattention, inexperience in professional or craft activities, non-compliance with the rules, orders and instructions caused the fire, explosion, and destruction that threaten common security, then such person shall be punishable by deprivation of liberty for a term up to thirty months or a monetary fine.

Paragraph 319 of the Criminal Code of Germany «Causing danger during construction works» states that «(1) Whosoever in the planning, management or execution of the construction or the demolition of a structure violates generally accepted engineering standards and thereby endangers the life or limb of another person shall be liable to imprisonment... (2) Whosoever in engaging in a profession or trade violates generally accepted engineering standards in the planning, management or execution of a project to install technical fixtures in a structure or to modify installed fixtures of this nature and thereby endangers the life or limb of another person shall incur the same penalty. (3) Whosoever causes the danger negligently, shall be liable to imprisonment… (4) Whosoever in cases under subsections (1) and (2) above acts negligently and causes the danger negligently shall be liable to imprisonment...» [4, p. 358].

Consequently, the criminal legislation of chosen countries differs markedly and when compared with national – significantly. O. O. Bakhurynska proposed a classification of labor rights violations based on peculiarities of national legislation. Namely, the violation of human and civil labor rights, which does not involve the infringement on life and health, and violation of labor protection rules and industrial safety which poses a threat to the person's life and health [5, p. 25–29].

If to use this classification, we'll review the decision of the ECHR concerning right violations referred to the second group.

The criminal regulation diversity of liability for human rights violations in the area of industry safety as well as mechanisms of

determining and reparation as a result of accidents influenced the formation of the Court's position. In the case of «Kolyadenko and others v. Russia» it is stated that the Court shall consider the specific circumstances of the case, taking into account, among other things, the legality of the government actions and internal decision-making process, including the appropriate investigation and analysis as well as the complexity of the issue. In paragraph 159 of the mentioned decision, it is said that if the threat to life or to personal integrity was not intentional (an accident – author), the positive obligation in establishing an effective judicial system does not necessarily involve criminal proceedings in each case and can be executed if the victims have access to civil, administrative or disciplinary remedies. However, with regard to unsafe activities, the Court considers it necessary to conduct an official criminal investigation, since the public authorities are sometimes the only competent bodies who are able to understand the complex processes which could have caused the incident. The Court found that if one or another government official endangered the person's life, realizing the probable consequences and disregarding the powers entrusted on him/her, had not taken measures that were necessary and sufficient to prevent the risks associated with unsafe activities, and thus he/she was not charged with a criminal offence and was not prosecuted, it is interpreted as violation of Article 2, irrespective of any legal remedies which these persons (here unto «the applicants» – author) can make advantage on their own initiative [6].

Consequently the Court deals with the potential application of various remedies depending on domestic legislative norms, stance of authorities and other factors, however it lays emphasis on the expediency of a criminal investigation when it comes to unsafe activities (in the event of the death or danger to life when performing unsafe activities) and complexity of determining the circumstances of the offense (activity of authorized bodies, regulatory system, persons involved in the offence). These particular conditions are typical for a criminal legal qualification and crime investigation against industry safety in national law enforcement practice.

It is important to note that the Court separates the unsafe activities associated with industrial (manufacturing) risks, the protection against which must be ensured by the state, and unsafe activities on the part of a human being. In the case decision «Prylutskyi v. Ukraine» paragraph 32 indicates that positive

obligations should not be unduly affected by the paternalistic interpretations in the area of unsafe activities, taking into consideration that the notion of personal autonomy is an important principle which formed the basis of the Convention Guarantees (especially those related to private life). Certain vital steps the person takes in accordance with his/her own rational choice, may also include the possibility of carrying out activities which both physically or mentally perceived as harmful or unsafe to a particular person, and an improper state intervention in the personal choice may lead to the contradictions with the provisions of the Convention [7].

As for the legal positions of the ECHR on the safety issues (within the meaning of national legislation), such positions are reflected in a few decisions, main among which are: «Öneryıldız v. Turkey»; «Vilnes and others v. Norway»; «Brincat and others v. Malta»; «Budaeva and others v. Russia»; «Kolyadenko and others v. Russia»; «Kosmata v. Ukraine».

Therefore, despite the small number of cases and short-term judicial practice, it can be stated that industrial safety (labor protection, industrial safety) is a relatively new subject matter in the ECHR and therefore deserves special attention.

The dissemination of the provisions of Article 2 of the Convention in the area of productive activities has become an important step in the development of human rights in this area. In the case of «Kolyadenko and others v. Russia» the Court notes that the provisions of Article 2 of the Convention relate not only to the cause death in the result of force used by the state agents, but also the first sentence of its first paragraph provides for a positive obligation of the countries to take appropriate steps within the scope of their authority (p. 121). A positive obligation to take appropriate steps for life protection under Article 2 stipulates the obligation of authorities to provide a legislative and administrative framework for ensuring an effective protection against threats to the right to life (p. 127). The Court considers that this circumstance needs to be referred to within the context of certain activities, regardless of whether it is public or not, in which the right to life may be violated, and in the case of activities associated with industrial facilities deemed unsafe by their nature. In the case of such unsafe activities, special attention should be paid to the regulatory documents which take into account the special characteristics of the activities under consideration, especially the level of potential threats to human life (p. 128) [6].

Another important conclusion is formulated in the case decision «Vilnes and others v. Norway» (2013). The content of the applicants' complaints was that while they were working as divers they lost their labor capacity in the result of diving into the North Sea for oil companies during the initial period of oil investigation operation (1965–1990). All the applicants complained that Norway did not take the necessary measures to protect the life and health of deep-sea divers while working in the North Sea and, in respect of the three applicants in the test facilities. They also argued that the state did not provide them with sufficient information about the risks associated with deep-sea diving and diving for conducting the investigation.

The Court held that there was a violation of Article 8 of the Convention due to the fact that the Norwegian authorities did not provide the applicants with the necessary information on risk assessment to health and life caused by the use of the tables of rapid decompression [8].

In the case decision «Brincat and others v. Malta» (2014) the Court indicates the state's obligation to establish a legislative and administrative mechanism capable of providing an effective counteraction against threats to the right to life. This obligation arises undoubtedly in the context of unsafe activities, where, in addition, special attention should be paid to the provision focused on peculiarities of certain activity, in particular the level of potential threat to human life. These rules must govern the licensing, organization, operation, security and supervision of the relevant activities, and also oblige all those involved to take practical measures with a view to ensure the effective protection of the citizens whose lives might be under the threat of associated risks.

Special attention should be paid to the analysis of the ECHR decision in the case of «Kosmat v. Ukraine». It's the only decision, until that time, regarding the problem under study, where Ukraine is a party.

Detailed circumstances of the case. The applicants are respectively the mother and sister of K., who worked at the mill owned by the company «O». On March 4, 2006, when K. was cleaning the extruding machine, an unknown person turned on the electricity that powered the machine, as a result of which K. suffered from a great bodily injures. On March 9, 2006 K. died from the received injuries in hospital.

Special investigation and trial. The Commission on investigation of the accident on production due to the uncertainty of the nature of

the relationship between the parties (the fact of employment relations between K. and the company) decided that the special investigations procedure did not apply to K., as he was not an employee and being an independent contractor, he did not pay contributions to the social insurance fund against industrial accidents. Accordingly, the Commission decided not to conduct a special investigation and just to provide the local public administration and prosecutor's office with the collected materials.

The nature of legal relationships as labor was introduced to a legal process at the suit of the applicants.

In compliance with the court order, another Commission on investigation of the accident in industries was appointed, according to the results of which the act was drew up and the conclusion that the accident was not related to work was reached. The management did not give K. the task to repair the extruder and even forbade him to do it. According to the findings, being in the state of alcoholic intoxication, K. turned on electrical power willfully and started cleaning the extruder with a vacuum cleaner. The extruder pulled the edge of K's clothing, in consequence of which the abruption of his upper extremities happened and he got other injuries which turned out to be lethal. Prior to this act B. (the Commission member) had added a separate opinion in which she indicated that the Commission did not consider the organizational causes of the accident, namely, the absence of the safety management system of labor protection on the territory of the mill, failure to train K. safety rules and failure to comply with technical standards and requirements.

Criminal proceeding. During 2006–2011 the District Prosecutor's Office repeatedly refused to initiate criminal proceedings, and the regional one – cancelled such decisions (at that time the crime investigation against industry safety belonged to the investigative jurisdiction of the Prosecutor's Office, acting CPC of 1960).

On March 1, 2011 the Regional Prosecutor's Office denounced the decision of February 16, 2011 and opened a criminal case concerning the officials of the enterprise «O» on suspicion of statutory non-compliance on labor protection, which resulted in death. In particular, it was noted in the decision that the previous pretrial investigation was superficial. It was also noted that the lower prosecutors did not take into account B.'s opinion, added to the act of the second Commission, and she was not questioned. In addition, it was stated that the case raised a number of issues, including the issues pointed out by B., which required

expert studies, in particular, the question as to who was responsible for the labor protection at the mill.

On December 27, 2011 under the results of the appointed technical expertise by the investigator, the conclusion about the causes of the accident was drawn. The expert concluded that K. turned on the extruder in order to speed up the cleaning process, and as a result received injuries that led to his death. The expert also concluded that the company's management had violated a number of legislative provisions on labor protection, in particular, due to the fact that K. was allowed to work with the extruder without an appropriate training on the issues of labor protection and that he was illegally allowed to access to the machine's electrical supply switch and allowed to operate with a broken and partially disassembled machine.

On March 30, 2012 the claim with a violation of legislation requirements on work safety during execution of the high-threat work resulting in death was charged.

As of April 8, 2014 the production was still going on (the judgment was delivered on February 25, 2016. PERSON_4 was convicted of the crime under part 2 of Article 271 of the Criminal Code of Ukraine and appointed punishment in the form of restricting freedom for the term of 3 years with the appointment of additional punishment in the form of deprivation of the right to occupy the position of the Director of SE «Orbita-N» and also other positions connected with implementation of organizational/management functions for the period of 3 years [9] – author).

Arguments of the parties. The applicants argued that the investigation had been inefficient. They noted that the investigation was slow and that it was marked by numerous orders to dismiss criminal complaint which then were cancelled. They argued that national authorities had not identified the person who turned on the machine and caused in such a way bodily injury to K., and they also were mistakingly determining the cause of the accident, unreasonably arguing that it happened due to the alcohol intoxication of K.

The government claimed that the investigation into the death of K. satisfied the requirements of Article 2 of the Convention. Law enforcement agencies initiated the investigation on the day of the accident, questioned the witnesses, and appointed the expert evidence. Duly appointed commissions had conducted the investigation and came to the conclusion that K. was in a state of alcoholic intoxication, willfully, without having the instructions, turned

on the machine and thus caused the accident. The applicants took an active part in the investigations. The authorities had taken all measures to determine the persons responsible for the death of K. The government argued that certain issues of this case were complex, and therefore they required the conduction of technical expertise, which resulted in prolongation of the criminal investigation.

Evaluating of the case circumstances, the Court has consistently adhered to the positions stated in the abovementioned decisions (cases of «Öneryıldız v. Turkey», «Brincat and others v. Malta»), also notes that, in general, states must have the discretion to address issues of development and implementation of legislation on the protection of the right to life. However, the most important is that, whatever the investigation method, available remedies in their entirety should compose legal arrangements capable of establishing the facts, bringing to justice those responsible and ensuring an appropriate reimbursement. Any deficiency in the investigation which will prevent its ability to determine the cause of death or of the persons bearing responsibility for it can lead to the statements of failure to comply with the requirement of the Convention. This implies the requirement regarding the timeliness of investigations and the absence of undue delays.

General conclusion of the Court. As of April 8, 2014, i.e. more than eight years and one month from the time of the accident, the cognizance against Z., who concerns the circumstances connected with the death of K., the subject of which is the identifying the circumstances of the death of K., is still being continued. Accordingly, it is impossible to conclude that the total duration of the investigation was justified by the circumstances of the case.

The previously mentioned considerations are sufficient for the Court to come to the conclusion that there has been a violation of the procedural aspect of Article 2 of the Convention [10].

The given decision is of particular interest, against the background of the fact that demonstrates basic defects and shortcomings of statutory regulation on industry safety issues and criminal proceedings in respect of such crimes. Namely: 1) gaps in legislation, permitting to cover up the fact of the employment relations through a tender contract for the purpose of the employer's evasion from the obligation to carry out statutory activities on labor protection, and in the case of the accident to avoid liability; 2) facts of industrial accidents concealment; 3) unfounded recognition of the

accidents unrelated to the industry; 4) latency of crimes against industrial safety; 5) ineffective pre-trial investigations; 6) the duration of the investigation, etc.

Also it is worth noting that having acquainted with the contents of the judicial decisions in proceedings on crimes against industrial safety, made it impossible to figure out in what context and exactly what kind of the ECHR legal positions are used by national courts, due to the lack of such examples.

In the end, it should be emphasized that the use of the ECHR decisions by national courts, regardless of whether Ukraine was a disputing party, is one of the important conditions of the legality and validity of the judicial decisions. It is also advisable to bring the position of the Court regarding the fact that the national authorities should not under any circumstances admit such a possibility, at which a human life will be endangered with impunity. This is necessary for maintaining public trust and ensuring statutory compliance and prevention of any tolerance as for illegal actions [11].

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Практика Європейського суду з прав людини у сфері безпеки виробництва

Розглянуто рішення Європейського суду з прав людини, що стосуються захисту деяких трудових прав людини. Проаналізовано правові позиції щодо позитивного зобов'язання держави забезпечити захист права на життя від промислових ризиків; права людини на інформацію про промислові (виробничі) ризики; доцільності кримінального провадження, якщо справа стосується небезпечних видів діяльності.

Ключові слова: Європейський суд з прав людини, практика, безпека виробництва, кримінальне провадження, кримінально-правова кваліфікація, розслідування.