Ukraine

Tetyana Antsupova[*]

1. Introduction

This Report focuses on the practice of the newly formed Supreme Court in Ukraine and covers the period from December 2017 to July 2019. The report consists of three main parts: a new philosophy of the Supreme Court, social rights in the context of the armed conflict in Eastern Ukraine, social rights of persons inhabiting the radioactively contaminated zone.

Without aiming to identify the most significant judgments delivered by the Supreme Court for the period considered, I decided to focus on decisions that demonstrate fundamentally new human-centric approaches in the practice of the Supreme Court. Considering that Ukraine is one of the countries with the highest number of cases reviewed under the Convention for the Protection of Human Rights and Fundamental Freedoms over the years, I believe that new approaches in resolving public law disputes will help over time to reduce the number of human rights violations identified by the European Court of Human Rights in cases against Ukraine.

2. A New Philosophy of the Supreme Court

The newly formed Supreme Court in Ukraine started functioning in December 2017. The Supreme Court is the highest court in the court system of Ukraine, which will ensure the sustainability and uniformity of judicial practice.[1] The new composition of the Supreme Court came as a result of the reform of the judiciary and consists of the Grand Chamber, the Administrative Cassation Court, the Civil Cassation Court, the Commercial Cassation Court and the Criminal Cassation Court. The judges of the newly formed Supreme Court have been appointed after a complicated one-year long competition. For the first time in the history of the judiciary of independent Ukraine, academicians and advocates (barristers) took part in such a competition and secured around 30% of vacant positions.

The reform of the judiciary, carried out as part of the legal reforms in the country, brought the unified and prevailing goal for all jurisdictions – to ensure fair trials and effective national judicial remedies for human rights' protection.

* Dr. Habil, Judge of the Supreme Court Grand Chamber (Ukraine).

1 The Parliament of Ukraine has adopted a number of laws, giving rise to a highly anticipated judicial reform. The laws 'On Judicial System and the Status of Judges', No. 4734; 'On Amendments to Constitution of Ukraine (regarding justice)', No. 3524; 'On Bodies and Individuals that Carry Out Enforcements of Judgements and Decisions of other Bodies', No. 2506a have been adopted on 2 June 2016.

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In a global sense, the reform presents a new philosophy of the judiciary in Ukraine, responding to the expectations of society.

What are the main grounds of the new philosophy of the Supreme Court?

The following grounds are essential: sustainability and uniformity of judicial practice, which gives an important result – predictability; contemporary judicial management; zero tolerance for corruption; new communication policy (openness and public-oriented service are important to restore public trust); new structure and quality of judgments.

At the beginning of the Supreme Court's activity, five working groups were created to deal with (1) the sustainability and uniformity of judicial practice, (2) judicial management, (3) the fight against corruption inside the system, (4) the communication policy and (5) the new structure and quality of judgments.[2]

It should be noted that that the new philosophy of the Supreme Court corresponds to the evolution of Ukrainian society and its expectations of implementing European human rights protection standards and best judicial practices.

To ensure the sustainability and uniformity of judicial practice, the Supreme Court can use some new tools and procedures, such as increasing the composition of the Chamber or Panel to overrule previous legal positions or apply the procedure of pilot cases. There are several judicial formations: three or five judges for the panels. Also, there are formations of chamber, joint chamber and Grand Chamber.

The pilot procedure may be applied in administrative cases by the Administrative Cassation Court only, and an appropriate judgment may be reviewed by the Grand Chamber. At present, thirteen pilot judgments on merits have been delivered. This new procedure may be of particular interest because it allows systemic problems in the sphere of public legal relations to be overcome, while at the same time solving the problem of the unity of judicial practice.

3. Social Rights in the Context of the Armed Conflict in Eastern Ukraine

3.1. Pension Payments to Internally Displaced Persons (IDP) – Pilot Case

One of the first pilot judgments (on 3 May 2018) has been delivered by the Administrative Cassation Court in a case concerning pension payments and its resumption for an IDP pensioner.[3]

The judgment in this pilot case will be a model for national administrative courts in cases involving hundreds of thousands of pensioners. The Court stated that at the moment of hearing the case there were 1,500,186 IDPs registered in Ukraine and that as of 1 January 2018, 516,100 IDP pensioners, almost 33,000 fewer people than a year before, were paid a pension.

The Court also carefully examined the question of the status of an internally displaced person. It should be noted that, according to the international law and

2 Five working groups were approved *by the Resolution of the Plenum of the Supreme Court No. 1 of 30 November 2017*.

3 Supreme Court, Judgment of 3 May 2018 in case No. 805/402/18, available at: http://reyestr.court.gov.ua/Review/73869341 (last accessed 1 July 2019).

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international organizations (in particular, UNHCR), IDP is not a status, since a status is usually granted and can be denied by authorized bodies. Internal displacement is a fact that an authority can only confirm.

Regarding this issue, the Court expressed the following legal position:

> The special status of an internally displaced person does not coincide with and cannot replace any of the constitutional and legal statuses of the person stated in the Constitution of Ukraine and is not a separate constitutional and legal status of a person. However, the registration of a person as one being internally displaced provides state authorities with a possibility to take into account his/her special needs. These special needs include access to appropriate housing and legal aid, access to special state programs, in particular targeted programs for internally displaced persons, etc. It is obvious that the status of an internally displaced person grants the person special, additional rights (or "other rights", as stated in Article 9 of the Law No. 1706-VII), without limiting the extent of constitutional rights and freedoms of the person and creating additional guarantees of their enjoyment.

As for the main question (whether it was lawful to terminate the pension payments to the applicant), the Court stated the following:

> According to the constitutional norms, the Cabinet of Ministers of Ukraine is not empowered to resolve issues that are within the exclusive competence of the Verkhovna Rada (i.e. Parliament) of Ukraine, as well as to adopt legal acts that substitute or contradict the laws of Ukraine.

According to paragraph 6, Part 1 of Article 92 of the Constitution of Ukraine, only the laws of Ukraine define, in particular, forms and types of pension benefits and protection. Particular attention should be paid to the fact that in the preamble to the Law No. 1058-IV it is stated that the change of conditions and norms of compulsory state pension insurance is carried out exclusively by amending this Law.

The Constitutional concept 'Law of Ukraine', in contrast to the concept 'legislation of Ukraine', is not subject to a broad interpretation. Law of Ukraine is a regulatory legal act adopted by the Verkhovna Rada of Ukraine within the limits of its powers. The Law is amended according to the established procedure by the Verkhovna Rada of Ukraine by means of adopting a law on amendments. Regulatory legal acts of the Cabinet of Ministers of Ukraine are subordinate and therefore cannot restrict the right of citizens established by laws.

> [...] In this case, since the Claimant has a status of an internally displaced person, he, in contrast to other citizens of Ukraine, shall take additional actions not provided for by the laws on pension benefits, in particular, identify a person, submit an application to resume pension payments, which were terminated by the Pension Fund body without legal grounds.

The Court also stated that such actions violate the Convention and concluded that the termination of pension payments to the Claimant from 1 April 2017 was not carried out in the manner prescribed by Law No. 1058-IV, and that from the point of view of the provisions of Art. 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, there was an interference with the Applicant's right to possessions, and such interference was not lawful.

One of the additional issues, which were of concern to the lawyers in this case, was the application of a six-month time limit for applying to the court for the protection of rights established by Article 122 of the Administrative Procedure Code of Ukraine. Some courts have applied this article, dismissing the claims for resumption of pension payments for a period of more than six months preceding the application to court, despite the fact that the special law (Part 2 of Article 46 of Law No. 1058-IV) establishes that pensions not received due to the fault of the body that grants and pays pension are to be paid for the past period without any time limit.

However, the Supreme Court applied this rule, stating that:

> […]since the Applicant appealed to the court with a claim for the resumption of pension payments, the right to which is not denied by the Defendant, and the accrual of which continued after the termination of its payment, however, which was subjected to formal limitations, on the grounds and in the manner contrary to the requirements of the Constitution and laws of Ukraine, the payment of pension to the Applicant is subject to resumption from the moment of its termination in accordance with Part 2 of Article 46 of the Law No. 1058-IV.

The mentioned judgment came into force on 4 September 2018 after the defendant exercised its right to appeal to the Grand Chamber. The Grand Chamber left unchanged the judgment delivered by the panel of judges of the Administrative Court of Cassation from 3 May 2018.[4]

3.2. The Right to Receive an Early Age Pension for Direct Participants in Hostilities in the Anti-terrorist Operation

In its judgment on 6 November 2018 the Supreme Court concluded that participants in hostilities, who protected the independence, sovereignty and territorial integrity of Ukraine and directly participated in the Anti-Terrorist Operation (ATO) and ensured its lawful conduct shall have the right to receive an early age pension from the moment of their appeal.

4 The final judgment of the Grand Chamber of the Supreme Court as of 4 September 2018, available at: www.reyestr.court.gov.ua/Review/76945461 (last accessed 1 July 2019).

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That was a judgment of the Supreme Court sitting as a Panel of the Administrative Cassation Court and having considered a case under the claim against the Pension Fund.[5]

A Ukrainian citizen, who participated in the ATO and ensured its lawful conduct, the protection of the independence, sovereignty and territorial integrity of Ukraine on the territories of the city of Mariupol (Donetsk region), in the Donetsk region (sector 'B'), in the cities of Marinka and Avdiivka (Donetsk region) and is a participant in hostilities, asked the Pension Fund to grant him an early age pension.

The Department of the Pension Fund of Ukraine refused him for the reason that he participated in the ATO but not in the hostilities, and stated that he shall therefore not enjoy the right to have an early age pension as provided for by paragraph 6, Item 3, Chapter XV 'Final Provisions' of the Law of Ukraine 'On Mandatory State Pension Insurance'.

While assessing arguments of the parties in the case and the decisions of courts of the first and appeal instances, the Supreme Court noted the relevance of the Certificate of direct participation in the ATO. Therefore, when asking the Pension Fund to grant him an early pension, he submitted all the necessary documents, in particular the veteran identification card and the certificate on his direct participation in the ATO, which acknowledge his participation in hostilities, that is good enough for granting him an early age pension according to paragraph 6, item 3, Chapter XV 'Final Provisions' of the Law of Ukraine 'On Mandatory State Pension Insurance' and Article 16 of the Law of Ukraine 'On Pension Provision'.

So the decision of the Department of the Pension Fund of Ukraine to refuse to grant a citizen as a participant of military activities an early age pension was recognized to be illegal and was reversed. The respondent was obliged to grant the plaintiff an early age pension in his capacity of participant in hostilities from the moment of his appeal, as prescribed by Article 16 of the Law of Ukraine 'On Pension Provision' and paragraph 6, item 3, Chapter XV 'Final Provisions' of the Law of Ukraine 'On Mandatory State Pension Insurance'.

While summing up this part of the Report it is necessary to mention that Ukraine is one of the countries with the most cases before the European Court of Human Rights. According to the Press country profile, the total number of pending applications as of 1 July 2019 is 8,442. To date there are over 4,000 individual applications before the Court that are apparently related to the events in Crimea or the hostilities in Eastern Ukraine.[6] Thus, this statistic shows that half of all pending applications related to the events in Crimea or the hostilities in Eastern Ukraine.

5 Supreme Court, Judgment of 6 November 2018 in case No. 591/3086/16-a, available at: http://reyestr.court.gov.ua/Review/77665164 (last accessed 1 July 2019).

6 European Court of Human Rights. Press country profile. Ukraine, available at: www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf (last accessed 1 July 2019).

The Supreme Court is prioritizing the resolution of systemic legal problems that are causing the violations of social or property rights in the context of armed conflict.

4. Social Rights of Persons Inhabiting the Radioactively Contaminated Zone

4.1. Non-working Pensioners Inhabiting the Radioactively Contaminated Zone Have a Right to Increase in Pensions – Pilot Case

By the judgment of 17 July 2018, from the moment of its adoption, the Constitutional Court of Ukraine renewed, pursuant to Article 39 of the Law 'On the Status and Social Protection of Citizens, Who Suffered from the Chernobyl Disaster' of 28 February 1991 (Law No. 796-XII), the right of non-working pensioners inhabiting radioactively contaminated territory – zone of guaranteed voluntary evacuation, to get an increase in pensions at the rate determined by the Resolution of the Cabinet of Ministers of Ukraine No. 1210 of 23 November 2011.

The Supreme Court, represented by the panel of judges of the Administrative Cassation Court, issued a judgment in a pilot case where the plaintiff was asking the court to find that the defendant, the Ovruch Integrated Management Office of the Pension Fund of Ukraine (PFU) in the Zhytomyr region, was in violation of its legal obligation to implement a pension increase by failing to take steps to calculate the additional amount to be paid and proceed with the payment.[7]

The plaintiff is an individual who suffered from the Chernobyl disaster (1st category) and is registered in the PFU Office as a beneficiary of an invalidity pension. The plaintiff lives in Ovruch, in the Zhytomyr region, which pursuant to the List of Localities Referred to the Radioactively Contaminated Territories after the Chernobyl Disaster, is a zone of guaranteed voluntary evacuation.

Until 1 January 2015 the plaintiff had been receiving an increased pension as a non-working pensioner who inhabited the said territory, pursuant to Article 39 of Law No. 796-XII 'On the Status and Social Protection of Citizens, Who Suffered from the Chernobyl Disaster'.

However, after 1 January 2015, the payment was terminated owing to the adoption of the Law of Ukraine No. 76-VIII of 28 December 2014 'On Amendments to and Recognition of Certain Legislative Acts of Ukraine as Invalid', by which, in particular, Article 39 of Law No. 796-XII was excluded.

The Constitutional Court of Ukraine by its Judgment No. 6-p/2018 of 17 July 2018 recognized these amendments as unconstitutional.

The plaintiff submitted a claim to the PFU Office, where he asked whether the payment of the increase in pensions for him had been renewed, pursuant to Article 39 of Law No. 796-XII. The defendant informed that the increase in pension for him was not calculated and paid.

Considering such inactivity of the PFU Office unlawful, the plaintiff applied to court with this administrative claim.

7 Supreme Court, Judgment of 21 January 2019 in case No. 240/4937/18, available at: http://reyestr.court.gov.ua/Review/79388117 (last accessed 1 July 2019).

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The defendant motivated its actions by the fact that the Law of Ukraine No. 987-VIII of 4 February 2016 'On Amendments to the Law of Ukraine "On the Status and Social Protection of Citizens, Who Suffered from the Chernobyl Disaster"' entered into force on 1 January 2016. With this law, Law No. 796-XII was amended with Article 39, which states: "Additional payment shall be fixed for citizens working in the exclusion zone in the amount and according to the procedure established by the Cabinet of Ministers of Ukraine." In the defendant's opinion, the Constitutional Court of Ukraine did not analyse the text of Law No. 796-XII as of the date of the adoption of Judgment No. 6-p/2018 in July 2018, i.e. the Court recognized the exclusion of Article 39 of Law No. 796-XII as unconstitutional.

The Supreme Court represented by the panel of judges of the Administrative Cassation Court remarked that the Constitutional Court of Ukraine by its Judgment No. 6-p/2018 of 17 July 2018 re-established the wording of Article 39 of Law No. 796-XII, which had been valid until 1 January 2015. The wording of this article resumes social payments to those individuals whose right to supplementary payment has not been resumed on the basis of Article 39 of Law No. 987-VIII.

The Supreme Court also noted that the Cabinet of Ministers of Ukraine had been authorized to determine the rate and procedure of the payment of exemptions, compensations and guarantees established by Law No. 796-XII.

The Constitutional Court of Ukraine, by its Judgment No. 20-рп/2011 of 26 December 2011, recognized as constitutional the regulation of the level of social benefits and care, funded by the State Budget of Ukraine, by the Cabinet of Ministers of Ukraine.

The Supreme Court concluded that since 17 July 2018 the plaintiff had the right to an increased pension as a non-working pensioner inhabiting radioactively contaminated territory – zone of guaranteed voluntary evacuation on the grounds of Article 39 of Law No. 796-XII at the rate determined by the Resolution of the Cabinet of Ministers of Ukraine No. 1210 of 23 November 2011.

4.2. Maintaining the Status of Victim of the Chernobyl Disaster

The Supreme Court, represented by the Judicial Chamber on cases on Social Rights Protection of the Administrative Cassation Court, expressed its opinion regarding maintaining the status of victim of the Chernobyl disaster in its judgment of 20 March 2019.[8]

By 1 January 2015, categories of radioactively contaminated zones had been defined in Article 2 of the Law of Ukraine No. 796-XII of 28 February 1991 'On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster'. Pursuant to this article, the following zones were referred to as radioactively contaminated zones: zone of alienation, zone of unconditional (compulsory) evacuation, zone of guaranteed voluntary evacuation and zone under the closest radiological environmental monitoring. On 1 January 2015 the Law of Ukraine No. 76-

8 Supreme Court, Judgment of 20 March 2019 in case No. 697/121/17, available at: www.reyestr.court.gov.ua/Review/80632873 (last accessed 1 July 2019).

VIII of 28 December 2014 'On Amending and Recognizing as Invalid Certain Legislative Acts of Ukraine', by which Article 2 of the Law of Ukraine 'On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster' was excluded from the list of zones under the closest radiological environmental monitoring (sub-item 1 of item 4).

The plaintiff permanently lived on the territory of the zone under the closest radiological environmental monitoring and continues living there. Since 1993 she has had the status of a victim of the Chernobyl disaster of the 4th category; this fact is confirmed by certificate. In 2016 she was permanently assessed with 1st degree disability, the disease connected with the impact of the Chernobyl disaster.

The plaintiff applied to the Office of Social Protection of the Population with a claim on processing and sending to the Department of Social Protection of the Population of the Regional State Administration her motion on granting her the status of the 1st-degree victim of the Chernobyl disaster and issuing the relevant certificate.

The Department refused, since pursuant to the Law of Ukraine 'On Amending and Recognizing as Invalid Certain Legislative Acts of Ukraine' the zone under the closest radiological environmental monitoring is not included in the list of radioactively contaminated zones.

The plaintiff applied to court. Court of first and appeal instances satisfied the claim. The courts dismissed the defendant's reference to legislative amendments, since no changes in the legal regulation of the status of victims of the Chernobyl disaster in the Law of Ukraine 'On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster' occurred.

The Judicial Chamber on cases on Social Rights Protection of the Administrative Cassation Court upheld the judgments and formulated its legal opinion regarding the application of sub-item 1 of item 4 of the Law of Ukraine 'On Amending and Recognizing as Invalid Certain Legislative Acts of Ukraine': the exclusion of the zone under the closest radiological environmental monitoring from the list of radioactively contaminated zones since 1 January 2015 shall not deprive individuals, who previously, by 31 December 2014, had been granted the status and had received the certificates of victims of the Chernobyl disaster, from this status. An individual who has received the lifetime certificate of a citizen permanently living on the territory of the zone under the closest radiological environmental monitoring (4th category), with the purpose of application of item 1 of part 1 of Article 14 of the Law of Ukraine 'On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster', shall be considered a victim of the Chernobyl disaster. This legal opinion made by the Chamber upholds the previous one, which has been formulated in the judgment delivered by the panel of judges of the Administrative Cassation Court on 25 May 2018.[9]

9 Supreme Court, Judgment of 25 May 2018 in case No. 802/1445/17-a, available at: www.reyestr.court.gov.ua/Review/74335855 (last accessed 1 July 2019).

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5. Summary

Since the Supreme Court has started its work, it has faced a host of challenges such as overloading (around 100,000 pending cases at present); new rules of the procedural codes; systemic deficiencies in the legal system; unsustainability of judicial practice; outdated legal positions, which need overruling and so on. Gradually, by its everyday practice, the Supreme Court finds solutions to these challenges.

As the President of the Supreme Court remarked: "One of the challenges before the Supreme Court was represented by jurisdictional conflicts, which significantly destabilized case-law, produced legal uncertainty and threatened to violate the fundamental right to access to trial. However, during the first year of work, the Supreme Court Grand Chamber managed to elaborate certain approaches to their solution, particularly, by means of unification of the criteria of referring a case to the jurisdiction of a particular court."[10]

The procedure of a pilot case had proven its efficiency; a judgment even in one such case had an impact on a significant number of similar cases and led to the prompt and final solution of certain legal conflicts of a systemic nature.

Further steps should focus on ensuring the stability of new approaches in the practice of the Supreme Court and the interaction of all branches of power in solving the problem of the execution of final domestic judgments.

10 Speech of Valentyna Danishevska at the Conference 'Uniformity of Case Law: Opinions of the European Court of Human Rights and the Supreme Court' on 14 June 2019, Kyiv.