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### ON SEPARATE ISSUES OF JUDICIAL PROTECTION IN AFFAIRS ASSOCIATED WITH DISCRIMINATION BY AUTHORITIES

The article analyzes the separate issues of judicial protection in affairs associated with discrimination by authorities. The practice of the European Court of Human Rights related the prohibition of discrimination is considered. The administrative courts domestic judicial practice concerning the recognition the unlawfulness of decisions, actions or inactivity of authorities and obligations to perform specific actions as a result of committing by them the acts of discriminatory nature is described.

*Key words: administrative courts, discrimination, authorities, non-discrimination principle, the European Court of Human Rights*

#### **Петков С.В., Золотарьова М.К. ОКРЕМІ ПИТАННЯ СУДОВОЇ ЗАХИЩЕНОСТІ У СПРАВАХ, ПОВ'ЯЗАНИХ З ДИСКРИМІНАЦІЄЮ ОРГАНІВ ВЛАДИ**

У статті аналізуються окремі питання судової охорони у справах, пов'язані з дискримінацією влади. Розглянута практика Європейського суду з прав людини щодо заборони дискримінації. Описано національну судову практику адміністративних судів щодо визнання незаконності рішень, дій чи бездіяльності органів влади та зобов'язань щодо виконання конкретних дій у результаті вчинення ними дискримінаційних дій.

*Ключові слова: адміністративні суди, дискримінація, органи влади, принцип недискримінації, Європейський суд з прав людини*

**Problem statement.** Signs of discrimination in various spheres of social life, including relationship “authorities-citizen” is a complex issue that is mentioned at various levels, however it is too early yet to speak about implementation of effective actions in the state aimed at preventing it. The list of international legal acts directed at elimination of all forms of discrimination become a part of domestic legislation, a specialized anti-discrimination law has been adopted, yet, in fact, a paradoxical situation has arisen when legal mechanism introduced against social inequality does not allow an ordinary citizen to effectively protect his rights, including when applying to court instances. In confirmation, particularly, we will quote a statement of the European Court of Human Rights about refusal to consider 12 143 applications from “Chernobyl victims”, the nature of which is reference of complainants to the violation in terms of payment of the corresponding compensations, despite court decisions on their recovery. The European Court of Justice noted that such a case had already been considered within the framework of the pilot decision in the case “Yuriy Mykolayovych Ivanov v. Ukraine” (Petition N 40450/04) [1] and the court is taking a risk of becoming a part of the Ukrainian judicial system and replacing the Ukrainian authorities. And in the future, settlement of such cases should be covered by follow-up activities that shall be implemented by Ukraine under supervision of the Cabinet of Ministers of the Council of Europe [2]. Fair enough the rhetorical question arises: whether non-fulfillment of court decisions adopted towards a separate category of citizens is discrimination on the part of state?

**Analysis of recent publications on issues.** The issue of prevention of various forms of discrimination, including on the part of state authorities and self-governing authorities is a study subject for such domestic scholars as: N.P. Korobenko, A.M.Kutsa, I.V. Lagutina, S.M. Prylypko, I.S.Saharchuk, O.V. Tyshchenko, M.V. Chichkan, L.P. Shumna and others.

Separate aspects of implementation of antidiscrimination administrative legal measures in the light of implementation of

basic principles of the law, rights and freedoms of man and citizen were considered by many scholars, such as: V.B. Averyanov, O.F. Andriyko, S.M. Alfyorov, V.M. Bevzenko, Y.P. Bytyak, I.L. Borodin, G.V.Gryanka, V.O. Ivantsov, V.L. Kovalenko, T.O. Kolomojets, V.K. Kolpakov, A.T. Komzyuk, O.V. Kuzmenko.

**The statement of basic materials.** At the legislative level the definition of discrimination is enshrined in the Law of Ukraine "About the principles of prevention and counteraction of discrimination in Ukraine", where it means "the situation when person and/or group of persons on the basis of their signs of race, skin colors, political, religious and other convictions, gender, age, disability, ethnic and social origin, nationality, marital and property status, residence, language or other signs which were, are, may be valid or implied experiences restrictions in recognition, realization or use of the rights and freedoms in any manner prescribed by this Law except cases when such restriction has a legitimate, objectively reasonable goal, the methods of which are proper and necessary [3]. In addition the definition of discrimination on the basis of gender, both action or inaction that express any distinction, exception or privilege on the basis of gender status, in case they are aimed at restricting or preventing the recognition, use or enjoyment of rights and freedoms on equal grounds for women and men is specifically provided by the Law of Ukraine "About ensuring equal rights and opportunities for women and men" [4]. As to discrimination of business entities, there are references in the Commercial Code of Ukraine [5] and determination principles of tax discrimination are set by the Tax Code of Ukraine [6].

The domestic legislation, in general terms, provides a conceptual framework of discrimination which is based on international law acts ratified by Ukraine. However, it is worth noting that legislation in this area is not particularly dynamic. For around two years the draft Law about amendments to certain legislative acts of Ukraine (regarding harmonization of legislation in the field of prevention and counteraction of discrimination with the European Union law) (adopted in the first reading on Feb. 16, 2016) No. 3501 dd 20.11. 2015 [7] is under consideration in the Verkhovna Rada of Ukraine. This draft Law is, in a certain way, aimed at driving from the dead-lock the issue of elimination of actual gaps in the legislation associated with the liability for violation of legislation in the area of prevention and counteraction of discrimination in Ukraine, introduction of administrative liability for violations related to discrimination, against the background of decriminalization of corresponding actions.

The realities of today show that discrimination by the authorities can be considered as a systemic problem faced by more and more segments of the population. In the general context, the causes of discrimination have different backgrounds. In particular, it is a neglect of principle of legal certainty, the approach to which is defined by the practice of the European Court of Human Rights. This principle has different manifestations. In particular, it is one of the defining principles of "good governance" and "proper administration" (establishment of the procedure and compliance to it), partly coincides with the principle of legality (clarity and foreseeability of the law, requirements to the "quality" of the law) [8, p.62]. Based on the constitutional principle of equality of all before the law, failure to ensure conditions of certainty, clarity and unambiguity of the legal norm, that prompts unlimited discretion of the authorities in the process of law enforcement, is a prerequisite, including for discriminatory acts. On the other hand, regulatory legal act themselves may have discriminatory provisions, despite obligation of conducting an anti-discriminatory examination of draft regulatory legal acts. In turn, the prosecution of discriminatory acts, currently, has no its applicational significance due to absence of viable legal regulation.

The prohibition of discrimination is, undoubtedly, recognized as a general principle (measure), which is the basis for relevant regulatory directions and the practice of their implementation. However, at practical level, issues of proper jurisdictional protection against discrimination are of primary importance.

According to the Article 14 of the Law of Ukraine "About principles of prevention and counteraction of discrimination in Ukraine" it is formally stated that a person who presumes that there has been discrimination in relation to him/her, has a right to address the complaint to state authorities, authorities of the Autonomous Republic of Crimea, local self-governing authorities and their officials, Authorized Representative of the Verkhovna Rada of Ukraine for Human Rights and/or to the court in the manner prescribed by the Law; the enforcement of this right can not be a ground for a biased attitude and also can not cause any negative consequences for the person that has used this right, as well as other persons [3]. Quite simplified, as we can see, is the approach in determining the principles of appealing decisions, action or inaction on issues of discrimination from the point of view of obligations assumed by the state on introduction of remedies for discrimination that would meet the criteria of "efficiency" in the sense of Article 13 of the Convention about protection of human rights and fundamental freedoms (hereinafter - the Convention) [9], both from practical and legal point of view.

At present, judicial protection is actually the only effective way of protecting against discrimination in the field of public relations. An existing institute of the Authorized Representative of human rights of the Verkhovna Rada of Ukraine, established as an independent and autonomous, state specialized agency that shall complement the existing means of protecting the constitutional rights and freedoms of man and citizen through implementation of set specific forms of response to the facts of violations in the part of human rights and freedoms by representatives of the state, does not play a significant role today, since it does not have the appropriate administrative powers. At that, arises situation when most domestic regulatory legal acts provide for prohibition of discrimination, a specialized law is in force, but in fact the whole legal mechanism of countering inequality in society in the analyzed sphere is of formalized character. Authorized human rights Representative of the Verkhovna Rada of Ukraine, Authorized Representative of the President of Ukraine on

the rights of people with disabilities and the Governmental Commissioner on the rights of persons with disabilities basically perform a monitoring function and organize a certain interaction with the public authorities [10, p.155].

Analyzing the practice of the European Court of Human Rights, we will note, that the European Court substantiates whether the differences were lawful, permissible and whether it can be argued that there was discrimination and inappropriate attitude [11, p. 662]. Thus, as to non-discrimination principle important is a case law pointing to the fact that the European Court of Human Rights adopts a decision on violation of non-discrimination in the presence of combination of the following factors:

- committed violation is within the scope of the conventional law;
- indeed, there are differences in the attitude towards subjects that are in the same situation;
- inadmissibility of waiving the right of being free from discrimination;
- provided no evidences of objective causes that would justify differences in the use of rights by different persons in the same situation [12, p.80-81]

According to the results of the analysis of the administrative courts domestic judicial practice, there is a dynamics of increase in the number of decisions on recognition the unlawfulness of decisions, actions or inactivity of authorities and obligations to perform specific actions as a result of committing by them the acts of discriminatory nature. In most cases it goes about indirect discrimination and mainly relates to settlement of disputes about calculation, setting, recomputation, payment, provision, receipt of pension benefits, social benefits for disabled citizens and other social benefits, in particular, based on appeals from internally displaced persons, former employees of Internal Affairs Agencies, persons discharged from military service, persons with disabilities.

In this case the study conducted allows to define the following characteristics of judicial practice with regard to application of non-discrimination principle in the following category of disputes:

- fairly large number of suchlike disputes;
- along with the application, when substantiating, the norms of direct effect of the Constitution of Ukraine, the use of judicial practice of the European Court of Human Rights as a source of law;
- provided a subsidiary nature of discrimination norms taken with the reference to the Article 1 of the First Protocol to the Convention, which states that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law [9];
- when ascertaining discrimination there is no requirement for a “ standard for comparison”, as is apparent from the practice of the European Court of Human Rights;

- There are numerous examples of formal use of the practice of the European Court of Human Rights without considering subsidiary nature of norms about non-discrimination. A showcase decision, in this context, is the decision of Prymorskyi District Court of Mariupol city in Donetsk region in the case № 266/4932/17 dd Dec.26,2017, in which the court, justifying the legality of claims of the person classified as internally displaced, about recognizing unlawful the actions of Pension fund agency and the obligation to undertake specific actions on restoration of the right for payment of old-age pension, made, in particular, the following conclusions: “From the analysis of resolutions of the Cabinet of Ministers of Ukraine № 365 dd Jun. 08, 2016, № 509 dd Oct.01,2014, № 637 dd Nov.05,2014, № 595 dd Nov. 07,2014 it follows that they have established a special procedure for payment of insurance benefits for persons that have temporarily moved from the area of anti-terrorist operation, i.e. the peculiarities of pension payment for internally displaced persons.

However, specified government rules and regulations are not the laws, and therefore they can not change to narrower side the rights of citizens, which are established by regulatory legal acts of higher legal force ... ”

Subsequently, the court refers to the practice of the European Court of Human Rights in cases on prohibition of discrimination and emphasizes the necessity in implementation of such decisions by Ukraine. And as a result, the following was stated: "The description given testifies that sub-s 2 of s.2 about The procedure for monitoring the implementation of social payments to internally displaced persons at the place of their actual residence / stay, approved by the resolution of the Cabinet of Ministers of Ukraine # 365 dd Jun.08,2006, does not contribute to the fulfillment by the state of a positive obligation to pay pensions due to citizens or other types of social payments and benefits at a level not lower than minimum subsistence amount established by the law, but, on the contrary, it prevents it. Under such circumstances, the plaintiff as an internally displaced person residing in the territory of Prymorskyi District of Mariupol city in Donetsk region (this fact is supported by the relevant certificate), has the right to renew the payment of old-age pension [13]."

**Conclusion.** It is worth mentioning that at present it is impossible to speak about existence of consistent judicial practice of administrative courts in terms of development of the same approach towards examining the cases related to discrimination committed by authorities. This circumstance may be explained by insufficiency and vagueness of relevant legal regulation, current absence of case law analysis in the category of cases, inability to properly provide factual grounds for legal claims by practicing lawyers. At the same time, fundamental changes to the current administrative-procedural legislation, and particularly the establishment of the institute of typical and model cases in force from Dec.15,2017, may become a step towards ensuring effective judicial protection of individuals and / or groups that have experienced discrimination on the part of public authorities or local self-government.

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## УДК 321

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### **ОРГАНІЗАЦІЙНО-ПРАВОВЕ ЗАБЕЗПЕЧЕННЯ ФІНАНСОВО-ЕКОНОМІЧНОЇ САМОСТІЙНОСТІ МІСЦЕВИХ ОРГАНІВ ВЛАДИ В УМОВАХ ДЕЦЕНТРАЛІЗАЦІЇ**

У статті досліджено цілі та завдання системи місцевих фінансів. Розкрито основні принципи їх організації, які закріплені в нормах Бюджетного кодексу України, Конституції України, Законі України «Про місцеве самоврядування в Україні» та Європейській хартії про місцеве самоврядування. Розглянуто інститути даної системи, до яких слід віднести громадські послуги, місцеві бюджети, інститут місцевого оподаткування, цільові фонди, комунальний кредит, комунальну форму власності, фінанси комунальних підприємств.

*Ключові слова:* місцеві органи влади, місцеве самоврядування, фінанси, бюджети, оподаткування.

### **Zolotonosha O. V. ORGANIZATIONAL AND LEGAL SUPPLY OF FINANCIAL AND ECONOMIC SELF-GOVERNMENTALITY OF LOCAL AUTHORITIES IN THE CONDITIONS OF DECENTRALIZATION**

The article explores the goals and objectives of the local finance system. The basic principles of their organization, which are enshrined in the norms of the Budget Code of Ukraine, the Constitution of Ukraine, the Law of Ukraine "On Local Self-Government in Ukraine" and the European Charter on Local Self-Government, are disclosed. The institutions of this system are considered, which should include public services, local budgets, local taxation institute, trust funds, municipal loans, communal ownership forms, finances of communal enterprises.

*Key words:* local authorities, local self-government, finance, budgets, taxation.

**Постановка проблеми.** Соціально-економічні і політичні трансформації, які розпочались в Україні з проголошенням незалежності, сприяли активізації процесу демократизації суспільства та держави. У результаті даних перетворень було почато розбудову європейської моделі місцевого самоврядування, яка є інструментом розв'язання локальних проблем, надання суспільних благ та послуг, реалізації інтересів територіальних громад.

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