Artículo de investigación

Review of Court Decisions: ¿Does Ukraine Guarantee the Right to a Fair Trial in Appeal?

Апеляційний перегляд судових рішень:
¿чи гарантує Україна право на справедливий розгляд?

Revisión de las decisiones de la corte:
¿Ucrania garantiza el derecho a un juicio justo en la apelación?

Recibido: 6 de agosto del 2019 Aceptado: 23 de septiembre del 2019

Written by:
Prof. Dr. Prytyka Yurii[272]
ORCID ID http://orcid.org/0000-0001-5992-1144
Dr. Kravtsov Serhij[273]
ORCID ID http://orcid.org/0000-0002-8270-193X

Abstract

The right to appeal to the court of appeal instance and cassation instance was enshrined in the 1996 Constitution of Ukraine, which formed the basis for the creation of special courts of cassation in 2010, making the four-levels structure of judiciary review in Ukraine. At the same time, this did not help to solve the problem of the number of cases brought annually to the courts of cassation. Currently, we have a three-levels structure according to the provisions of amended Constitution 2016 and the reformed legislation, though, the same problem of overcrowded court of cassation despite the existing restrictions and the role of court of cassation exists.

The main object of this article is the following question – does Ukraine develop the national system of appeal the judicial decisions, ensuring the right to a fair trial, given the citizens an access to justice and right to appeal to the court of higher instances, or not? We are trying to answer, using *the methods* of investigating the legal doctrine and generalizing the national judicial practice, as well as the case-law of the European court of Human Rights (ECtHR).

In conclusion we found out the right answer on the question, chosen for our research, and proposed to regulate strictly the possible objects available for appeal by parties, according to the principle of rei judicata in line with the conception of a fair trial.

Анотація

Право на оскарження судового рішення до судів апеляційної та касаційної інстанції було закріплено Конституцією України 1996 року, яка стала основою для створення спеціальних касаційних судів у 2010 році і запровадження чотирирівневу структуру судової влади в Україні. У той же час це не допомогло вирішити проблему кількості справ, які щорічно передаються до касаційних судів. Наразі впродовж реформ 2015-2017 років у нас в країні було створено трирівнева судову структуру відповідно до положень зміненої Конституції 2016 та реформованого законодавства, однак однакова проблема переповненого заявами касаційного суду, незважаючи на існуючі обмеження та роль касаційної інстанції, залишається.

Основним об'єктом цієї статті є таке питання про те, чи розвиває Україна національну систему оскарження судових рішень, забезпечуючи право на справедливий суд і надаючи громадянам доступ до правосуддя та право на оскарження рішення суду до вищої інстанції, чи ні. Ми намагаємось відповісти на це питання, використовуючи такі методи дослідження як аналіз юридичної доктрини та узагальнення національної судової практики, а також судової практики Європейського суду з прав людини (ЄСПЛ).

У висновку ми запропонували правильну відповідь на питання, обране для нашого

[272] Dr. Sc., Professor, Law Faculty, Taras Shevchenko National University of Kyiv, Ukraine.
[273] PhD, Associate Professor of Civil Procedure Department, Yaroslav Mudryi National Law University, Kharkiv, Ukraine.

Keywords: Access to justice, right to a fair trial, right to appeal, civil procedure.

дослідження, і запропонували чітко врегулювати всі можливі об'єкти, доступні для оскарження сторонами, за принципом rei judicata відповідно до концепції справедливого судового розгляду.

Ключові слова: доступ до правосуддя, право на справедливий суд, право на апеляцію, цивільний процес.

Resumen

El derecho de apelar ante el tribunal de apelación y la instancia de casación se consagró en la Constitución de Ucrania de 1996, que formó la base para la creación de tribunales especiales de casación en 2010, haciendo la estructura de cuatro niveles de revisión judicial en Ucrania. Al mismo tiempo, esto no ayudó a resolver el problema del número de casos presentados anualmente a los tribunales de casación. Actualmente, tenemos una estructura de tres niveles de acuerdo con las disposiciones de la Constitución enmendada 2016 y la legislación reformada, sin embargo, existe el mismo problema de hacinamiento en la corte de casación a pesar de las restricciones existentes y el papel de la corte de casación.
El objetivo principal de este artículo es la siguiente pregunta: ¿Ucrania desarrolla el sistema nacional de apelación de las decisiones judiciales, garantizando el derecho a un juicio justo, otorgando a los ciudadanos acceso a la justicia y derecho a apelar ante el tribunal de instancias superiores, o ¿no? Estamos tratando de responder, utilizando los métodos de investigación de la doctrina jurídica y generalizando la práctica judicial nacional, así como la jurisprudencia del Tribunal Europeo de Derechos Humanos (TEDH).
En conclusión, encontramos la respuesta correcta a la pregunta, elegida para nuestra investigación, y propusimos regular estrictamente los posibles objetos disponibles para la apelación de las partes, de acuerdo con el principio de rei judicata en línea con la concepción de un juicio justo.

Palabras clave: Acceso a la justicia, derecho a un juicio justo, derecho de apelación, procedimiento civil.

Introduction

The great reforms of judiciary in Ukraine brought the significant changes to its organization, in particular, during last few years a three-tier court system was established, which is the result of rule of law state creation (Izarova I., 2018, Khanyk-Pospolitak R., 2011).

After signing the EU-Ukraine Association Agreement (2014 EU-Ukraine Association Agreement, 2015) the new Strategy of judiciary reforming (2015-2020 Strategy of judiciary, litigation and related areas reforms, 2015) was adopted, according to which the legislation related to judiciary and litigation were amended (On Making Amendments to the Constitution of Ukraine (Concerning Justice) Law, 2016; On the Judiciary and Status of Judges Law, 2016), changed the old four instances of general jurisdiction`s court system, existed under the Law of 2010 (On the Judiciary and Status of Judges Law, 2010), in which the general jurisdiction court system also included the High Specialized Court of Ukraine for Civil and Criminal Cases. According to these acts, the judicial system of Ukraine now consists of three types of courts of general jurisdiction: local courts, appellate courts and the Supreme Court of Ukraine, excluding the High Specialized Court for the considering of civil and criminal cases as a court of cassation.

The current on-going reform of judiciary, in particular, the Law on amendments of the legislative acts No 1008 adopted on 16 of October 2019 by Verkhovna Rada of Ukraine, amend the abovementioned provisions just a few years after the reform of Constitution and judicial and procedural laws proposed to cut the numbers of Justices in Supreme Court, despite the total numbers 192 current Justices, and to modernize its structure, transformed the courts of cassation to chambers of the Supreme Court (Interview of the Head of the Supreme Court, 2019).

At the same time, according to data more than 4 million cases and materials were filed annually in local and appellate courts, most of them are considered in civil proceedings; however, their

number decreases annually, from 40% in 2015 to 32% in 2019 and only 9.5% of the total number of cases that are considered in civil proceedings are appealed. In comparison, for example, 22-23% of the total number of criminal cases are appealed in courts, as well as 35-36% of administrative cases. In Supreme Court, which act as a court of cassation, right now there are more than 70 000 cases and materials under consideration (Generalization of the court practice, 2019; Interview of the Head of the Supreme Court for BBC, 2019a).

Despite Ukraine is one of the biggest states in Europe, what were the grounds for such an overcrowded court of higher instances and will it ensure a right to a fair trial? Let`s look at the legislative provisions, which leave the numerous possible ways to appeal a judgment, creating the uncertainty of the finality of judgment, rei judicata.

Literature and ECtHR case-law overview

Having analysing of the existing civil procedural law doctrine, in particular, the newest research results (Hulko, 2018; Gusarov, 2017; Izarova & Prytyka, 2019; Lesko, 2019; Panych, 2019), we may confirm, that the practice of the ECtHR, according to which a right to access to justice is not absolute, but may be restricted only by national law, without violating the rights of the parties to the appeal, was find out in law of Ukraine.

The ECtHR recalls in its judgment in *Volovik v. Ukraine*, which, in accordance with Article 6 § 1 of the Convention, provides that, if there is an appeal under national law, to ensure, in the proceedings before the courts of appeal, within the jurisdiction of such courts, the fundamental safeguards provided for in Article 6 of the Convention, taking into account the particularities of the appeal proceedings, and the procedural unity of the proceedings before the national court the legal order and its role in the Court of Appeal (see, for example, *Podbielski and PPU Polpure v. Poland*, par. 62).

Moreover, the way in which Article 6 applies to courts of appeal and cassation must depend on the peculiarities of the procedural nature and must take into account the rules of domestic law and the role of the courts of cassation (see, for example, the judgment in 41 *Monnell and Morris v. the United Kingdom* par. 22, § 56, and the judgment in *Helmers v. Sweden*, par. 15, § 31); the requirements for admissibility of the appeal on the merits of the law should be more stringent than for an ordinary appeal (judgment in *Levages Prestations Services v. France*, par. 1544, § 45). But in turn, as outlined in the ECHR *Abramova v. Ukraine*, the right of access to a court was determined by an aspect of the right to a court under Article 6 § 1 of the Convention (see *Golder v. The United Kingdom*, par. 28-36). The Court recognized the right of access to court as an integral part of the safeguards enshrined in Article 6 of the Convention, invoking the rule of law and the prevention of arbitrary power that underlies most of the provisions of the Convention. Therefore, Article 6 § 1 of the Convention guarantees to everyone the right to sue in respect of their rights and obligations in a civil manner.

The right of access to a court must be "practical and effective" and not "theoretical or illusory". This remark is especially true of the guarantees enshrined in Article 6 of the Convention, given the important place that a democratic court holds in its right to a fair trial (see *Zubac v. Croatia*, par. 77).

In accordance with the current procedural legislation of Ukraine, judgments in small cases in accordance with paragraph 2 of Part 3 of Art. 389 of the CPC (Civil Procedure Code of Ukraine, 2017) are not subject to cassation appeal, but the application of this criterion is provided by law and cannot be considered as an obstacle to access to justice, as the ECtHR ambiguously noted in its decision in *Azyukovska v. Ukraine*. But the Supreme Court's particularly ambiguous practice in reviewing court rulings in which the court does not decide the merits of the case but resolves only one specific procedural issue, in particular, whether to file a claim or refuse to open.

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In the case under review, the court of first instance partially granted the applicant's claim for securing the claim, that is, such a decision could be appealed on the basis of paragraph 3 of part one of Article 353 of the CPC, and, therefore, could be subject to review by the court of cassation as well. under paragraph 2 of part one of Article 389 of the CPC (Civil Procedure Code of Ukraine, 2017). Thus, the Supreme Court concluded on the basis of a systematic analysis of paragraph 2 of part one of Article 389

of the CPC, which in cassation order may appeal the decision of the court of first instance on securing a claim after its appeal review. The decisive factor in this legal situation is not that which court decision was upheld by the court of appeal, but that the court of appeal was reviewing the decision of the court of first instance on securing a claim, which after appeal may be appealed in cassation.

Methodology

The most proper method for researching the judiciary issues is to generalize practice and overview the data, which may lead us to the appropriate assessment of the legislative changes and national doctrine evolution. The data from Ukrainian court of high instances is amazed: totally, annual the Supreme Court may receive more than 70 000 cases and materials for consideration, bringing the question about right to a fair trial ensuring (Generalization of the court practice, 2019; Interview of the Head of the Supreme Court, 2019). And that is the main question, which is under consideration during the whole period of independence of Ukraine, could not be resolve with the existing instruments and legislative amendments.

During the time of the functioning of the High Specialized Court for the considering of civil and criminal cases as a cassation, only 4% of the civil cases, brought to the courts during 2016, were sent to it. According to the data, during 2015-2016 it received 74,700 cassation complaints, cases, applications and petitions regarding the determination of jurisdiction in civil cases, etc. (in 2015 it was 75,900 cases and materials), 80.5% of which were considered. Of these, 40,000 cassation complaints were filed in civil cases, of which almost 19,300 had been pre-examined. In 5,200 cases, decisions were cancelled (0.5% of civil cases brought to the courts during 2016), of which 2,220 cases were transferred to the court of first instance for a new consideration (0.22% of such cases). From the total number of decisions of local courts, only 4.6% of decisions in the civil justice system were revoked and changed in appeal, which is significantly less than the number of administrative decisions (12.1%) (Generalization of the court practice, 2019; Data review on the state of administering justice, 2018).

Today the court of cassation instance is the Supreme Court, and the Cassation Civil Court acts as a part of it, reviewing the decisions in civil cases. There are two chambers in this court, the first of which contains thirteen judges and the second contains twelve. According to the results of the report for the first half of 2018 (the first six months of work), as of July 1, 2018, 41,202 appeals, cases, and materials filed in civil proceedings came into work, of which there were 27,032 cases and cassation appeals transmitted from the High Specialized Court of Ukraine for consideration of civil and criminal cases. There were also 13,727 new cases and 443 cases and applications transmitted from the Supreme Court of Ukraine. More than 1/4 of these cases were considered by the Court (11,582 cases as of July 1, 2018), and 280 cases were referred to the Grand Chamber of the Supreme Court. Of the above cases, the Court considered on the merits 7,136 civil cases, 70 court decisions of which were changed, 2,049 were canceled, 401 new decisions were made. Accordingly, the load per one judge averaged to 12.5 cases and materials a day, 5 of which were cassation appeals (Generalization of the court practice, 2019; Data review on the state of administering justice, 2018).

Results and Discussion

The provisions of the national Ukrainian legislation, analysed below, gave us grounds for continuing discussion and reach some results, answering the main question of this article, in conclusion.

It noteworthy, that the grounds for appealing against the decisions of the court in appeal or cassation are the unlawfulness and/or lack of grounds of the decision or decree (incompleteness of establishing the circumstances relevant to the case, and/or the incorrect establishment of circumstances relevant to the case, due to an unjustified refusal in acceptance of evidence, misjudgment or incorrect evaluation, failure to provide evidence for valid reasons and/or incorrect determination in accordance with the circumstances established by the court of legal relations, etc.), which seems very wide grounds for appeal and make improper grounds for numbers of applications (Iaroshenko, I., 2014; Komarov, V., 2012).

The main difference lies in the fact that the appeal proceedings are a review of judicial decisions where court decisions (court orders and court decisions determined by law) of first instance courts that have not come into force are challenged. At the same time, the cassation proceedings are a review of court decisions that were legally valid and reviewed in appeal proceedings or if such review was dismissed,

which are often forgot by the applicants (Gusarov, 2010; Khanyk-Pospolitak, 2011).

The right of appeal and cassation is granted to the participants involved in the case, as well as to those persons who did not take part in the case if the court decided on their rights, freedoms, interests and/or duties. In cassation, the latter may only apply after they have appealed to the court of appeal. At the same time, there is no any specific order of permission to appeal of the court of lower instance, as in other European countries. The procedure for appeal proceedings includes the filing of an appeal directly to the court of appellate instance, its registration and transfer to the judge-rapporteur, who decides on the opening of the appeal proceeding. At the same time, according to the Transiting Provisions, the appeal may be filed through the court of first instance.

Preparation of consideration of a case by a court of appellate instance is done by a judge-rapporteur, who clarifies the question of the composition of participants in the trial; at the request of the parties and other participants of the case decides on the issue of the summon of witnesses, the appointment of an examination, the reclamation of evidence, court orders for the gathering of evidence, involvement of a specialist in the case, involvement an interpreter. Also, after the preparatory actions, he reports on them to the panel of judges, which decides on the additional preparatory actions, if necessary, and the appointment of the case for consideration.

The consideration of the case by the court of appellate instance takes place in a court session with the notification of the participants of the case. During the consideration the court investigates the circumstances and verifies evidence of the parties, hears the report of the judge-rapporteur on the content of the decision (decree) appealed, the grounds of the appeal, the limits set for checking of the decision (decree), establishing the circumstances and examining the evidence. The person who filed the appeal gives his explanation, or, if the appeals were filed by both parties, the first one who provides an explanation is the plaintiff and other participants in the case.

According to the results of consideration of the appeal, the court of appeal has the right to leave the court decision unchanged and to leave the complaint without satisfaction; to cancel the court decision in full or in part and to make a new decision or change the decision in the appropriate part; to declare decision of the court of first instance invalid in whole or in part in cases provided by the CPC and to close the proceedings in the relevant part; to cancel a court decision in whole or in part and in the relevant part, to close the proceedings in full or in part or to leave a claim without consideration in whole or in part; to cancel the court decision and refer the case for consideration to another court of first instance according to the established jurisdiction; to cancel the decision preventing further proceedings in the case and to refer the case for further consideration to the court of first instance; to cancel the decision to open the proceedings and to make a decision to refer the case for consideration to another court of first instance according to the established jurisdiction; in the cases stipulated by the CPC, to cancel its decision (in full or in part) and adopt one of the decisions specified in items 1-7 of the first part of this article.

At the same time, the cancellation of a court decision in whole or in part and the adoption of a new decision in the relevant part or a change in a court decision is done on the following grounds: incomplete clarification of the circumstances relevant to the case; the lack of proof of circumstances relevant to the case, which the court of first instance has acknowledged as established; inconsistency of the conclusions set forth in the decision of the court of first instance to the circumstances of the case; violations of the procedural law or incorrect application of the substantive law.

Incorrect application of substantive law includes the following: incorrect interpretation of a law, or application of a law that is not subject to application or non-application of the law that is subject to application.

Violation of procedural law norms may be the reason for the cancellation or amendment of a decision if this violation has led to an incorrect resolution of the case. This is a compulsory basis for the annulment of the court decision of the court of first instance and the adoption of a new court decision if: the case was considered by the non-authorized court; the judge, to whom the withdrawal was declared, participated in the court decision, and the grounds for his removal were recognized by the appellate court as reasonable; the case (issue) was considered by the court in the absence of any party of the case not properly notified of the date, time and place of the court hearing (if such notification is mandatory), if such participant of the case justifies his appeal on such grounds; the court passed a court decision on the rights, freedoms, interests and/or responsibilities of persons not

involved in the case; the court decision is not signed by any of the judges or signed by the judges not specified in the decision; the court decision was adopted by judges who were not part of the panel that considered the case; the court considered a case that was subject to consideration under the rules of general proceedings in the order of simplified proceedings.

The review of a court decision in the order of cassation proceedings occurs taking in account the peculiarities of this court instance and the necessity to ensure the final decision and legal certainty. The opening of the cassation proceeding is based on the submitted cassation appeal, which is registered and transferred to the judge-rapporteur, if he concludes that the cassation appeal filed is substantiated. After this, the decision on the opening of proceedings is carried out by a permanent panel of judges, which includes a judge-rapporteur. The decision to open proceeding is approved if at least one judge from the board came to conclusion that it is necessary to open it.

The decision to refuse to open cassation proceedings should contain motives from which the court concluded that there were no grounds for opening a cassation proceeding, which are very important for ensuring the single judicial practice in Ukraine (Hulko, 2018; Lesko, 2019). During the preparation of the case for cassation proceedings, the parties of the case have the right to submit to the court of cassation a reference to a cassation appeal in writing within the time limit set by the court of cassation in the decision to open the cassation proceedings.

Cassation proceedings are also staged, initially preparing a case for cassation proceedings, during which the judge-rapporteur prepares a report in which he describes the circumstances necessary for the decision of the court of cassation; then the preliminary consideration of the case is conducted by a panel of three judges in the form of written proceedings without notice to the participants of the case, which resolves the issue of leaving the cassation without satisfaction or appointing a case to trial in the absence of grounds for the above-mentioned decisions.

Consideration of the case by the court of cassation according to the rules of consideration of the case by the court of first instance in the form of simplified proceedings without notice of the participants of the case happens only if it is necessary to provide explanations in the case, and the decision (ruling) passed from the moment of its proclamation comes into power.

The jurisdictions of the court of cassation include the following: to leave the court decisions of the courts of first instance and appellate instance unchanged, and to leave the complaint without satisfaction; to cancel the court decisions of the courts of the first and appellate instances in full or in part and to transfer the case in full or in part for a new hearing, in particular, in accordance with established jurisdiction or to continue the consideration; to cancel the court decisions in full or in part and take a new decision in the relevant part or change the decision without transferring the case for a new hearing; to cancel the decision of the court of appellate instance in whole or in part and maintain the decision of the court of first instance in the relevant part; to cancel the court decisions of the court of the first and appellate instance in the relevant part and close the proceedings in the case or leave the claim without consideration in the relevant part; to declare in whole or in part the court decisions of courts of the first and appellate courts invalid and to close the proceedings in the relevant part; to cancel its ruling (in whole or in part) and adopt one of the decisions mentioned above.

In modern legal doctrine of Ukraine, the necessity of so-called procedural filters was discussed widely (Gusarov, 2017; Hulko, 2018; Izarova & Prytyka, 2019; Lesko, 2019; Panych, 2019). Though, the single possibility of minimize the appeals in court of cassation, which was introduced in legislation, is small claims or small significance claims, if we are trying to be very close to the right term, used in Constitution of Ukraine and CPC.

Conclusions

Today Ukraine is making great efforts to create a truly constitutional democratic state, becoming a member of the Council of Europe in 1995 and stands firmly on the path to European integration. The Association Agreement, signed by Ukraine and the EU in 2014, testifies the desire for further movement towards the Community, in particular, approximation of legislation. The reforms taking place in the light of the European integration process reflect our aspirations and comprehensively cover various areas of legal regulation. In particular, in 2015-2017 new legislation in the field of judicial system, legal proceedings and enforcement of judgments, was approved in Ukraine.

In the course of this reform, traditional approaches and institutions have been substantially updated, and new effective mechanisms have been introduced into national legislation. In particular, a three-instance court system, which includes general courts, appellate courts and the Supreme Court as a court of cassation, has again been established in Ukraine. This reform should contribute to a more efficient implementation of the judicial power. General and simplified procedures have been introduced in the sphere of civil procedure, which aims to simplify access and speed up the resolution of small claims, as well as to limit the cases, which may be appealed to the court of higher instances. At the same time, the right to a fair trial gives the citizens an access to justice and right to appeal to the court of higher instances, therefore, the state should organize it in a proper way, in particular, strictly regulate the possible objects available for appeal by parties, according to the principle of rei judicata.

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