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The right to a fair trial in the ECHR judicature

Abstract

The right to a fair trial is a fundamental human right. It is all the more important when the right to a fair trial is infringed more and more frequently in various regions of the world. Therefore, selected ECHR judgments were analysed.

Keywords: trial, right to a fair trial, ECHR

1. Introduction

The reactivation of natural rights in international communities started in 1948 when the Universal Declaration of Human Rights was announced. It sanctioned three types of human rights: civil liberties, political rights and social rights.

However, the new concept of human rights put the emphasis on the extremely important aspects such as:

1. innate human rights resulting from human dignity
2. universality, i.e. all inhabitants of the world, regardless of race, birth, social status, origin, place of residence, wealth, etc. are entitled to them
3. need for absolute protection by law.

The introduction of new solutions and effective mechanisms that protect natural rights was to be made through the development of separate pacts of political and social, economic and cultural rights, as well as regional human rights conventions, which could introduce means of protecting rights under international law that were better than the previous ones. Constant emphasis on adapting internal ordinary legislation and constitutions of individual states to international human rights standards and their unification, as well as the constant pressure on their observance, was to be the next element of protection. One of such elements of protection was to be a complaint to an independent European

institution. Importantly, the institution was to be independent of national law. This construction has proved to be extremely important many times, especially in the case where the national judiciary refused protection for various reasons.

As one of the fundamental human rights, the right to a fair trial requires special attention in the era of increasingly frequent violations of its scope as evidenced not only by press reports but also opponents of this thesis who can easily challenge it. However, the growing number of court decisions stating any violation of fundamental human rights raises concerns. Hence, the author believes that it is necessary to analyze the most important decisions regarding the right to a fair trial.

In the considerations presented, the author shall analyze selected jurisprudence of the European Court of Human Rights in cases that concerned violation of the right to a fair trial. This is despite the fact that a thorough analysis of the right to a fair trial should present deliberations in three planes - constitutional, international and procedural. However, due to the broad scope of the issue, the author shall focus her attention solely on the international aspect, leaving the remaining issues for further analysis. As shall be presented, the violation of the right to a fair trial may take various forms - from the restrictive interpretation of Art. 6 of the ECHR, through an excessive time extension of the proceedings, excessive costs of initiation, to an incorrect appointment of a judge.

The problem is a topical item at the moment not only due to the Polish reform of the judiciary but also due to the focus on the new judges' selection procedure within domestic procedures and the resulting consequences concerning the legality of court decisions.

2. Legal basis of the law to a fair trial

Among others, the right to a fair trial results from Art. 6, sec. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)*". A fair trial is the foundation of a democratic rule of law. Every person has the right to expect the state to respect the right to a fair trial.

What is more, the Constitution of the Republic of Poland of 2 April 1997 states in Art. 45, sec. 1: "*Everyone is entitled to a fair and public hearing without undue delay by a competent, independent, impartial tribunal*"². However, the right

to a fair trial, which is part of the right to a fair trial provided for in Art. 6, sec. 1 of the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, and Art. 45, sec. 1 of the Constitution of the Republic of Poland, cannot be included in the category of personal rights under the Civil Code³. The right to a fair trial and the right to live in a state governed by the rule of law are only public law rights granted to an individual by regulations, the observance of which is vested not only in international, but also specialized national institutions. A guarantee of the rights expressed in the Constitution of the Republic of Poland and the Convention on the Protection of Human Rights is, at least, the rules of two instances of proceedings, as well as the existence of extraordinary means of appeal, possibility of submitting a complaint to reopen proceedings or a complaint for a declaration of unlawfulness of a final judgment, as well as compensation for a wrongful conviction, temporary arrest or detention.

The guarantee of a fair trial is a guarantee of impartiality, i.e. assessment of a case in an objective, independent and impartial manner - this is of great importance for the subject of judgment/settlement of the judiciary. It is an expression of respect for the principles of a democratic state of law. The right to a fair trial is understood as a human right that refers to the principles of equity, as referenced in the quoted Art. 6 of the ECHR. Importantly, the ECHR judicature is dominated by the conviction that the right to a fair trial is not only the rule determining the trial but it is also a guarantee that should be interpreted from the content of this provision.

As emphasized in the Judgement of 17 December 2020 of the ECHR¹: „the right to a fair trial is one of the fundamental principles of democratic society. The right of presence of suspects and accused at trial is derived from that right and should be ensured throughout the European Union”².

Therefore, the state can show the attribute of a democratic state ruled by law formally and practically only if it respects the principle of the right to a fair trial. Failure to implement this principle is dangerous for the state’s stability, which has been repeatedly emphasized by the ECHR, and is also a violation of respect for fundamental human rights.

¹ Judgment of the Court of Justice of 17 December 2020, C-416/20 PPU, www.eur-lex.europa.eu (accessed on 4.02.2021).

² Directive of the European Parliament and of the Council (EU) on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Journal of Laws EU.L.2016.65.1 of 2016.03.11.

3. Incorrect appointment of a judge and the right to a fair trial

In the judgment of the Grand Chamber of 1 December, the European Court of Human Rights announced that an incorrect appointment of a judge to adjudicate in a court of appeal, contrary to the procedural rules in force at the time, violates the right to a fair trial and threatens to undermine public confidence in the judiciary. The Court was delivered a complaint by an Icelandic citizen who argued that his criminal conviction had violated his right to a fair trial due to an improperly established court. Since 2018, a newly established Court of Appeal has been functioning in Iceland. However, due to doubts as to the correctness of the selection of judges under the new procedure, the Supreme Court confirmed in December 2017 that the administrative procedure had been violated when the current judges of the new court of appeal were being appointed. The violation was committed by the Icelandic Minister of Justice, who failed to provide the Icelandic parliament with information that would allow for a substantive assessment of ministerial candidates for judges, and by the parliament, which voted through the entire list “in one go” rather than separately by each judge as required by national law.

Meanwhile, the complainant in the case was convicted in 2017 of driving without a valid driving license and under the influence of drugs. The complainant appealed against the conviction and his appeal was heard by the new Court of Appeal. The complainant unsuccessfully applied for exclusion of the conviction due to an incorrect appointment. The judgment of the Court of Appeal, issued by a panel with the participation of A.E., was upheld by the Supreme Court. Before the Strasbourg Court, the complainant alleged that the state of affairs violated his right to a fair trial under Art. 6, sec. 1 of the Convention on Human Rights. The Court agreed with the complainant and confirmed the violation of Art. 6, sec. 1 of the Convention by the judgment of the Grand Chamber of 1 December, thus upholding the judgment of the Court of 12 March 2019.

The Tribunal paid attention to the importance of the potential effects of the judicial activity of courts in a situation of doubts as to whether they are impartial and independent in the face of the defectiveness of the procedure for appointing judges and their non-removability. For this purpose, the Tribunal formulated a three-step criterion that allows determining whether irregularities in the procedure of appointing judges are serious enough to determine the violation of Art. 6, sec. 1 of the Convention and the right to a fair trial. First, it must be determined whether there has been a flagrant breach of national law. Second, whether the breach of domestic law concerned any of the fundamental principles

of the judicial appointment procedure. Third, whether the alleged violations of the right to a “tribunal established by law” were successfully investigated and remedied by the domestic courts.

Any adjudication by an incorrectly appointed judge, even if the procedural negligence is irrelevant in the opinion of the Supreme Court, constitutes a “significant” breach of the principle of fairness of the trial and defectiveness of the entire proceedings. This may result in a series of complaints against Poland to the Court, which Poland will not be able to win, plain and simple³.

4. Restrictive interpretation of Art. 6 and the right to a fair trial

In the judgment of 23 October 1990, the ECHR emphasized that “the right to a fair trial occupies such an important place in democratic society that there is no justification for a restrictive interpretation of Art. 6, sec. 1 of the Convention. Conformity with the spirit of the Convention requires the word “adjudication” not to be interpreted too technically, and that it should be given a substantive rather than a formal meaning”.⁴

What is more, in the judgment of the European Court of Human Rights of 28 June 2005, it was emphasized that „the right to a fair trial occupies such a significant place in democratic society that there is no justification for interpreting Art. 6, sec. 1 of the Convention in a restrictive manner (...)”⁵.

Art. 6 of the Convention gives the state the freedom to choose the means to be used when guaranteeing the parties’ rights. Thus, the issue of personal appearance and the form of conducting proceedings - orally or in writing - and the legal representation of the parties are interrelated and must be analysed in a broader context of the „fair trial” guarantee of Art. 6, sec. 1 of the Convention. The Court should establish whether the complainant, as a party to the civil proceedings, had a reasonable possibility to obtain and respond to the arguments or evidence submitted by the other party, and to present his case on conditions which would not place him in a generally less favourable position than the opponent. From the point of view of the Convention, the complainant does not have to show that his presence at the trial resulted in an actual disadvantage or had an effect

³ *Guðmundur Andri Ástráðsson versus Iceland* - judgment of the Grand Chamber of the ECHR of 1 December 2020, application no. 26374/18.

⁴ Judgment of the ECHR in the case of *Moreira de Azevedo v. Portugal* of 23 October 1990, LEX no. 81118.

⁵ Judgment of the European Court of Human Rights of 28 June 2005, LEX no. 166845.

on the outcome of the proceedings, as such a requirement would deprive the guarantees of Art. 6 of their idea. Finally, it should be noted that when making decisions on the issues of fairness of proceedings for the purposes of Art. 6 of the Convention, the Court must take into account the entire proceedings, including the decision of the Court of Appeal⁶.

Pursuant to Art. 6 of the Convention, states may organize their national legal systems in a way that facilitates court proceedings, including the possibility of issuing default judgments, at their own discretion. However, these possibilities may not affect other procedural guarantees. Taking into account that, for example, in Russia, an oral hearing was held at first instance, a less stringent standard applies at the level of appeal where the absence of such a hearing may be justified by specific characteristics of the proceedings in question. Thus, proceedings that are related to the authorization to file an appeal and proceedings related only to legal issues, as opposed to issues of fact, may comply with the requirements of Art. 6, although the appellant did not have the opportunity to be heard in person by the court of appeal or the court of cassation. Domestic courts need to undertake reasonable efforts to summon both parties to a hearing. The parties to the proceedings need to take appropriate actions to ensure the effective receipt of any correspondence that may be sent by national courts to them. Even if the parties show any lack of diligence, the consequences attributed to their behaviour by the domestic courts must be commensurate with the seriousness of negligence, and take into account the superior nature of the principle of a fair trial.

As emphasized in the ECHR's judgments many times: the general concept of a fair trial that includes the basic principle, according to which the proceedings should be adversarial, requires the person against whom the proceedings are brought to be informed of this fact. The documents delivery method is an important issue because if court documents, including summonses to hearings, are not properly served to a party to the proceedings, that party may not be able to defend itself in the proceedings. An example is the Russian civil procedure, which requires courts to hold an oral hearing in all categories of cases. This means that Russian courts cannot adjudicate even in small cases or disputes of a technical nature without conducting a hearing. Each time an oral hearing is to be held, the parties have the right to attend it and make oral statements or to choose a different way of participating in the proceedings, for example, by appointing a representative, or to request the hearing to be adjourned. These rights are only exercised effectively, if

⁶ Judgment of the European Court of Human Rights of 31 May 2016. GANKIN I INNI v. ROSJA LEX no. 2046893.

the parties are informed of the date and place of the trial well in advance to allow sufficient time to arrange their appearance, to act or instruct their representative, or to inform the court of their decision not to be present. The parties' right to be timely notified of the upcoming hearing is therefore an integral part of the right to effective participation in civil proceedings, a right guaranteed by the Russian Code of Civil Procedure and Art. 6 of the Convention. The Court also notes that it is not responsible for indicating the preferred means of communication with the parties to the proceedings and that domestic courts, which benefit from direct knowledge of a situation, are in a more favourable position to assess it in the light of practical considerations, such as reliability of local postal services, location of parties, and availability of technical equipment. What is more, the Court must not abstractly assess the effect which a particular form of notification may have on the parties' right to an effective participation in a civil dispute. The Court's role in such cases is therefore limited to assessing whether the effects of implementing and interpreting the procedural provisions were consistent with the Convention.

It should be further noted that Russian courts have a broad freedom of choice when it comes to choosing the means of notification. The Code of Civil Procedure does not limit the courts' choice of a particular method of notification as long as proof of service is presented. This means that whichever method is chosen to notify the parties, national courts should normally have evidence that the addressee has received the notification. Such evidence should make it possible to national courts to assess whether the summons reach the parties sufficiently early and, if this does not happen, allow the hearing to be adjourned⁷. [...] National courts are obliged to examine the proof of receipt, whether in their possession or not, and to reflect these findings in the wording of the judgment [...].

For their part, participants in the proceedings are obliged to provide up-to-date contact information, and to inform about any changes that may occur in this respect in the course of the proceedings. Unlike in criminal cases, domestic courts cannot be held responsible for failing to locate parties that are absent at civil proceedings, provided that such parties are aware of the civil case pending against them. If a party has chosen such a method of notification that does not provide tangible proof of receipt, the court shall not be able to assess whether the party to the proceedings has been duly notified of the hearing, nor will it be able to inform the party that the hearing is adjourned if such a decision is made. Therefore, national courts should be expected to assess whether a party has expressly agreed

⁷ Judgment of the European Court of Human Rights of 31 May 2016. GANKIN I INNI v. ROSJA LEX no. 2046893.

to a particular means of notification, and whether any updates to the contact details have been taken into account. Such decisions in this regard shall enable the Court to assess whether any lack of confirmation of receipt of the notification or its delay could be attributed to the party's own lack of diligence.

National courts need to identify any flaws in terms of notifications before examining the merits of a given case. The analysis expected by the Court in domestic decisions should go beyond the sole information that the summons have been sent, and should use as best as possible the available evidence to assess whether the absent party was, in fact, informed of the upcoming hearing well in advance. The answer to this question should make it possible to the courts to decide whether the hearing must be adjourned until the parties are properly notified. The courts cannot conclude that an absent party to the proceedings waived its right to appear in person at the trial without examining whether that person had been informed of the very existence of that right, and therefore of the trial in question. Finally, it should be pointed out that whenever national courts examine the issues of a timely notification of a party absent to a trial, they need to put particular importance to a party's right to an effective presentation of its case to a court under conditions which are not generally less favorable than the conditions of its opponent. Thus, the Tribunal's responsibility shall be to judge, on the basis of court decisions and their justification, whether the proceedings as a whole were fair in the light of Art. 6 of the Convention.

5. The right to a court judgement and the right to a fair trial

The right to a fair trial, which is guaranteed in Article 6, sec. 1, should also be considered in the light of the rule of law, which requires both parties to a dispute to have access to an effective legal measure that would enable them to assert their civil rights. Everyone has the right to a court judgement, which means that everyone has the right to a substantive examination of a given case at least twice. However, in the context of the right to a fair trial, the possibility of bringing a case to court, both civil and administrative, is of great importance. The right to a fair trial may be subject to certain limitations, obviously. The European Court of Human Rights in the *Delcourt v. Belgium*⁸ case emphasized the particular meaning of this law. It indicated that a narrow interpretation of Art. 6, sec. 1 of the ECHR is unacceptable, as such an interpretation shall correspond neither to the purpose

⁸ ECHR judgment in *Delcourt v. Belgium* of 23 July 1968, application no. 1474/62.

nor the nature of the provision. The right of access to a court must be “practical and effective”⁹. Thus, an individual must “have a clear and practical opportunity to challenge the act that is an interference with its rights”¹⁰. Therefore, procedural laws of states must ensure a correct administration of justice that would take into account the guidelines resulting from the ECHR and full compliance with the principle of legal certainty. Moreover, parties must have the right to expect that the laws are followed¹¹, whereas the public nature of the process protects the parties against a closed manner of administration of justice, without the participation of social control. This was also the case with the Court in *Pretto and Others v. Italy*¹²; this is one method of building trust in courts. The transparency of the judiciary is in favour of the implementation of the principle of a fair trial.

The ECHR has indicated on several occasions that one of the reasons is, for example, the high cost of initiation of court proceedings, which may make it impossible to exercise the right to a fair trial. Hence, the state must foresee such circumstances that shall constitute an exception to the principle of a paid initiation of proceedings. Despite such indications, in the case of *Ait-Mouhoub v. France*¹³ it decided that the cost of protection for costs was too high in the context of the application to join the criminal proceedings as a civil party, similarly to that in *Garcia Manibardo v. Spain*¹⁴. Another violation of the principle of the right to a fair trial was exorbitant court costs - this is what the ECHR stated in the *Kreuz v. Poland* case¹⁵, and also in the case of *Podbielski and PPU PolPure v. Poland*, and *Weissman and Others v. Romania*¹⁶.

Another issue observed by the ECHR in the context of the state’s violation of the right to a fair trial is case examination due to time. In the case of *Melnyk v. Ukraine*¹⁷ it was stated that the time taken to examine the appeal, leading to finding it unacceptable was abnormally long. In contrast, in *Yagtzilar and Others v. Greece*¹⁸ the Court stated that „the fact that the complainants had been informed

⁹ Judgment of the ECHR in *Bellet v. France* of 4 December 1995, Series A, no. 333-B, complaint no. 40886/06.

¹⁰ ECHR judgment in the case of *Bellet v. France* of 4 December 1995, series A, no. 333-B, application no. 40886/06, op. cit.

¹¹ Judgment of the ECHR in the case of *Cañete de Goñi v. Spain* of 15 October 2002, Chamber (Section) IV, application no. 55782/00.

¹² ECHR judgment in the case of *Pretto and Others v. Italy* of 8 December 1983, Series A, No. 71, complaint no. 7984/77.

¹³ ECHR judgment in the case of *Ait-Mouhoub v. France*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

¹⁴ Judgment of the ECHR in the case of *Garcia Manibardo v. Spain*, no. 38695/97, ECHR 2000-II.

¹⁵ Judgment of the ECHR in the case of *Kreuz v. Poland* (no.1) No. 28249/95, ECHR 2001-VI.

¹⁶ Judgment of the ECHR in the case of *Weissman and Others v. Romania*, no. 63945/00, ECHR 2006-VII

¹⁷ ECHR judgment in the case of *Melnyk v. Ukraine*, no. 23436/03, 28 March 2006.

¹⁸ ECHR judgment in the case of *Yagtzilar and Others v. Greece*, 41727/98, ECHR 2001-XII.

that their acts became time-barred at such a late stage in the proceedings, in which they had acted with due diligence and in good faith, had definitively deprived them of any opportunity to assert their rights”.

6. Conclusions

As has been shown, the right to a fair trial is a fundamental human right which results from the fact that it is an inherent human right, resulting from human dignity. It benefits from the value of universality, and therefore belongs to every human being, regardless of race, birth, social status, origin, place of residence, wealth, etc. Moreover, this right is absolutely protected by law. However, as has been proven, there are violations of the right to a fair trial.

As stated, violations committed by states against individually designated persons may result from the restrictive interpretations of Art. 6 of the ECHR. The narrowing of interpretation is as harmful as its excessive extension. Moreover, there is the issue of duration of the procedures under the conducted proceedings. The ECHR has repeatedly indicated that excessively long procedures lead to a violation of the right to a fair trial.

Another problem is the excessively high fees for initiating court proceedings, which prevents individuals from the possibility of pursuing their rights in court. This, in turn, violates the right to a fair trial. Unfortunately, this type of violation has been found in Poland in recent years.

One of the last problems when following the principle of the right to a fair trial is the defectiveness of judge selection procedures, which disqualifies the entire trial.

Therefore, the adjudicated amounts, which are not analyzed in terms of amount justification, and are only to establish the correctness and the fact of the violation, should raise justified concerns as to the deteriorating status of respecting the European Convention on Human Rights.

Bibliography

1. ECHR judgment in *Delcourt v. Belgium* of 23 July 1968, application no. 1474/62.
2. ECHR judgment in the case of *Pretto and Others v. Italy* of 8 December 1983, Series A, No. 71, complaint no. 7984/77.
3. Judgment of the ECHR in the case of *Moreira de Azevedo v. Portugal* of 23 October 1990, LEX no. 81118.

4. Judgment of the ECHR in *Bellet v. France* of 4 December 1995, Series A, no. 333-B, complaint no. 40886/06.
5. Judgment of the ECHR in the case of *Kreuz v. Poland* (no.1) No. 28249/95, ECHR 2001-VI.
6. Judgment of the ECHR in the case of *Garcia Manibardo v. Spain*, no. 38695/97, ECHR 2000-II.
7. ECHR judgment in the case of *Aït-Mouhoub v. France*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.
8. ECHR judgment in the case of *Yagtzilar and Others v. Greece*, 41727/98, ECHR 2001-XII.
9. Judgment of the ECHR in the case of *Weissman and Others v. Romania*, no. 63945/00, ECHR 2006-VII.
10. Judgment of the ECHR in the case of *Cañete de Goñi v. Spain* of 15 October 2002, Chamber (Section) IV, application no. 55782/00.
11. Judgment of the European Court of Human Rights of 28 June 2005, LEX no. 166845.
12. ECHR judgment in the case of *Melnyk v. Ukraine*, no. 23436/03, 28 March 2006.
13. *Gankin I.*, Judgment of the European Court of Human Rights of 31, "Rosja Lex" no. 2046893.
14. Directive of the European Parliament and of the Council (EU) on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Journal of Laws EU.L. 2016.65.1 of 2016.03.11.
15. *Guðmundur Andri Ástráðsson versus Iceland* - judgment of the Grand Chamber of the ECHR of 1 December 2020, application no. 26374/18.
16. Judgment of the Court of Justice of 17 December 2020, C-416/20 PPU, www.eur-lex.europa.eu (accessed on 04.02.2021).

Prawo do rzetelnego procesu sądowego w orzecznictwie ETPCz

Streszczenie

Prawo do rzetelnego procesu jest fundamentalnym prawem człowieka. Ma ono tym większe znaczenie, gdy coraz częściej w różnych regionach świata dochodzi do naruszenia prawa do rzetelnego procesu. Wobec tego poddano analizie wybrane orzeczenia ECH.

Słowa kluczowe: proces, prawo do rzetelnego procesu, ETPCz