

APPLICATION OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD AND THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS DURING THE RUSSIAN WAR IN UKRAINE

STOSOWANIE ZASADY DOBRA DZIECKA A PRAKTYKA EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA W CZASIE WOJNY ROSYJSKIEJ W UKRAINIE

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Abstract

The article analyzes the normative consolidation of the principle of the best interests of the child in international acts and legislation of Ukraine. Emphasis is placed on the application of the principle of the best interests of man in the practice of the ECtHR, it is clarified how the case law has influenced the decisions of Ukrainian courts. The categories of cases in which the ECtHR applies the principle of the best interests of the child are highlighted. The peculiarities of the application of the principle of the best interests of the child during the war between Russia and Ukraine have been studied. It is proved that martial law is not a reason to limit the principle of the best interests of the child.

Keywords: principle, best interests child, ECtHR, war

Abstrakt

Artykuł analizuje utrwalenie normatywne zasady dobra dziecka w aktach międzynarodowych i ustawodawstwie Ukrainy. W artykule położono nacisk na stosowanie zasady najlepiej pojętego interesu człowieka w praktyce ETPC. Wyjaśniono, w jaki sposób jego orzecznictwo wpłynęło na orzecznictwo ukraińskich sądów. Podkreślono kategorie spraw, w których ETPC stosuje zasadę dobra dziecka.

Zbadano specyfikę stosowania zasady dobra dziecka w czasie wojny rosyjsko-ukraińskiej. Udowodniono, że stan wojenny nie jest powodem do ograniczania zasady dobra dziecka.

Słowa kluczowe: zasada, dobro dziecka, ETPC, wojna

Introduction

One of the fundamental legal principles that applies to all relationships involving a child is the principle of the best interests of the child. This principle was enshrined at the international level in the UN Declaration of the Rights of the Child of 20 November 1959,¹ and later in Article 3 of the Convention on the Rights of the Child of 20 November 1989.² According to the Convention on the Rights of the Child, the state has positive obligations, in particular to provide the child with the protection and care necessary for his or her well-being, taking into account the rights and responsibilities of his or her parents or other legal representatives. necessary legislation and take all appropriate administrative measures. In addition, it is the responsibility of the state to ensure that institutions, services and bodies responsible for the care or protection of children comply with the standards established by the competent authorities, in particular in the field of safety and health and in terms of numbers. and the suitability of their staff, as well as competent supervision.

The principle of the best interests of the child is also enshrined in the European Convention on the Exercise of Children's Rights,³ where Article 6 sets out the decision-making process guaranteeing the principle of the best interests of the child. The Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice of 17 November 2010 state that Member States must ensure the effective enjoyment of children's rights so that their best interests are paramount in all

¹ Declaration of the Rights of the Child of 20 November 1959, A/4354, GAOR, 14th sess., suppl. no. 16, Principle 2.

² Convention on the Rights of the Child of 20 November 1989, European Treaty Series, No. 1577.

³ European Convention on the Exercise of Children's Rights of 25 January 1996, European Treaty Series, No. 160.

matters affecting them.⁴ When assessing the interests of involved or affected children: their views and opinions should be given due attention; all other rights of the child, such as the right to dignity, freedom and equal treatment, must always be respected; all relevant authorities should take an integrated approach to take due account of all the interests of the child, including psychological and physical well-being, as well as legal, social and economic interests.

Thus, at the international level, not only the principle of the best interests of the child is established, but also the extremely wide scope of its action is defined, which once again emphasizes the universality of this principle. At the same time, in the conditions of Russia's war in Ukraine, the question arises as to the application of this principle, as well as its significance during martial law or other unforeseen circumstances.

1. Principle of the best interests of the child in the legislation of Ukraine

The principle of the best interests of the child is enshrined in the legislation of Ukraine. Article 7 of the Family Code of Ukraine⁵ stipulates that the regulation of family relations should be carried out taking into account the best interests of the child. In other norms of the Family Code you can find a number of provisions that oblige to take into account the interests of the child not only by parents but also by guardianship authorities and by the court. The interests of children must be taken into account when exercising the right of personal private property by the wife, husband (Part 1 of Article 59 of the Family Code), when concluding, amending and invalidating a marriage contract (Articles 93, 100 and 103 of the Family Code), divorce (Part 2 of Article 112 of the Family Code), when changing the child's surname (Part 5 of Article 148 of the Family Code), when exercising parental rights (Part 2 of Article 155 of the Family Code), when determining the place of residence of a minor child (Part 2 of Article 162 of the Family Code) and others.

⁴ Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice of 17 November 2010, Appendix 6, Item 10.2c.

⁵ Family Code of Ukraine of 10 January 2002, Verkhovna Rada of Ukraine, No. 2947-III [hereinafter: Family Code].

Only in the interests of the child: the court decides on the restoration of parental rights (Part 4 of Article 169 of the Family Code); one of the parents or legal representatives uses alimony (Part 2 of Article 179 of the Family Code); the child's property is managed (Part 1 of Article 177 of the Family Code); the child is adopted (Part 2 of Article 207 of the Family Code); the court decides to grant the right to marry before reaching the age of marriage (Part 2 of Article 23 of the Family Code), to refuse to seize a minor child and transfer it to parents or one of them (Part 3 of Article 163 of the Family Code); the court decides against the opinion of the child (Part 3 of Article 171 of the Family Code).

In addition, guardianship authorities may refuse to grant permission to engage in real estate transactions of a child while requesting a notary to prohibit the disposal of such property, if they find that the transaction will violate the legitimate interests of the child (Part 5 of Article 177 of the Family Code). The court may disagree with the conclusion of the guardianship authority if it is insufficiently justified, contrary to the interests of the child (Part 6 of Article 19 of the Family Code).

At the legislative level in Ukraine, an attempt has been made to consolidate the concept of the principle of the best interests of the child. In particular, in Article 1 of the Law of Ukraine on Child Protection⁶ establishes that ensuring the best interests of the child – are actions and decisions aimed at meeting the individual needs of the child according to his age, sex, health, development, life experience, family, cultural and ethnicity and take into account the opinion of the child, if he or she has reached such an age and level of development that can express it. Moreover, it is declared that the said Law establishes the basic principles of state policy in this area, which are based on ensuring the best interests of the child.

In addition to the provisions of the Family Code, the Law of Ukraine on Child Protection provides that only in the interests of the child a decision can be delivered to separate the child from the family (Article 14), the participation of one parent living separately in up-bringing of a child (Part 3 of Article 15), as well as additional tools to protect the interests of children in difficult life circumstances (Article 23-1).

⁶ Law of Ukraine on Child Protection of 26 April 2001, Verkhovna Rada of Ukraine, No. 2402-III.

There are already a number of decisions in judicial practice, based on the principle of the best interests of the child: decision of the Chervonozavodsky District Court of Kharkiv of 10 October 2019;⁷ decision of the Khmelnytsky City District Court of the Khmelnytsky region of 8 November 2018;⁸ decision of the Kyiv District Court of Kharkiv of 17 September 2019;⁹ decision of the Suvorov District Court of Odessa of 23 November 2018;¹⁰ decision of the Berehovo District Court of the Zakarpattia region of 19 September 2019;¹¹ decision of the Dnieper Court of Appeal of 5 June 2019,¹² decision of the Chernivtsi Court of Appeal of 5 June 2019;¹³ decision of the Transcarpathian Court of Appeal of 14 March 2019;¹⁴ Resolution of the Supreme Court of 21 November 2018;¹⁵ Resolution of the Supreme Court of 28 March 2019.¹⁶

The Family Code does not use the phrase “best interests of the child,” but instead – “with the maximum possible consideration of the interests of the child,” “in the interests of the child.” The term “best interests of the child” is enshrined in the Law of Ukraine on Child Protection, and it has been established in the case law of the European Court of Human Rights and national case law. In this regard, we propose to enshrine in the Family Code the term “best interests of the child.” This is necessary for the use of the same terminology in the legislation of Ukraine, which will also allow to improve the Family Code and bring the terms used in it into compliance with European approaches.

⁷ No. 641/4451/19.

⁸ No. 641/4451/19.

⁹ No. 640/14601/17.

¹⁰ No. 523/13751/18.

¹¹ No. 297/854/19.

¹² No. 208/1504/18.

¹³ No. 715/207/19.

¹⁴ No. 303/3338/18.

¹⁵ No. 703/297/17.

¹⁶ No. 592/9430/17.

2. Application of the principle of the best interests of the child of the ECtHR

The European Court of Human Rights, in cases concerning the protection of children's rights, applies the principle of the best interests of the child in various cases, including: establishing the parental relations – *Kautzor v. Germany* of 24 September 2012;¹⁷ family reunification – *Olsson v. Sweden* of 25 March 1988,¹⁸ *Olsson v. Sweden* of 30 October 1992,¹⁹ *Amanalachioai v. Romania* of 26 May 2009,²⁰ *Haase v. Germany* of 8 April 2004;²¹ the relationship between the adopter and the adopted child – *Pini and Others v. Romania* of 22 June 2004,²² *Kurochkin v. Ukraine* of 20 May 2010;²³ contact with the child and the right to communicate with him/her from the parents living separately or other relatives – *Hokkanen v. Finland* of 23 September 1994;²⁴ deprivation of parental rights – *Hunt v. Ukraine* of 7 December 2006.²⁵

The analyzed case law of the European Court of Human Rights in cases of protection of children's rights made it possible to identify certain groups of cases in which the principle of the best interests of the child is applied.

First, the ECtHR is guided by the principle of the best interests of the child when considering paternity cases. In particular, in the decisions of the ECtHR justifies that in accordance with Article 8 of the Convention, when considering a paternity complaint, the courts must pay particular attention to the interests of the individual child.²⁶

¹⁷ No. 23338/09.

¹⁸ No. 10465/83.

¹⁹ No. 13441/87.

²⁰ No 4023/04.

²¹ No. 11057/02.

²² Nos. 78028/01, 78030/01.

²³ No. 42276/08.

²⁴ No. 19823/92.

²⁵ No. 31111/04.

²⁶ See *Jevremović v. Serbia* of 17 July 2007, *Jevremović v. Serbia*, No. 3150/05; *Kalacheva v. Russia* of 7 May 2009, No. 3451/05; *Kautzor v. Germany* of 24 September 2012, No. 23338/09.

Secondly, a significant number of judgments of the European Court of Human Rights have been handed down in family reunification cases. In the case of *Olsson v. Sweden* of 25 March 1988, the fact of violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms is not the decision to take three children from their parents under state care, but the way in which this decision is implemented (separation of children and their placement at long distances from each other parents and among themselves). In the case of *Olsson v. Sweden* of 30 October 1992 the applicants challenged the social service's ban on the removal of two young children from their foster families, which prevented family reunification. In considering this case, the ECtHR took into account that children's contacts with their biological parents were very rare (they had not met their mother since 1984 and had seen their father once), and the children became very attached to foster families, accustomed to environment and expressed a desire to stay in foster care. In this case, guided by the interests of children, no violation of Article 8 of the Convention was established.

In the decision *Amanalachioai v. Romania* of 26 May 2009, the ECtHR noted that the interests of children require that family ties be broken only in "particularly exceptional circumstances, and that all measures be taken to preserve personal ties and, if necessary, to family reunification." In this case, the court also emphasized: "the fact that the child could have been placed in a more favorable environment for his upbringing does not in itself justify his removal from the care of his biological parents." In the present case, the reasons given by the national courts for the child's refusal to return to his father could not be regarded as "particularly exceptional" circumstances justifying the severance of family ties. The ECtHR has repeatedly stated that Article 8 of the Convention includes the right of parents to take measures to reunite with their children, as well as the obligation of national authorities to take all necessary measures to do so.

Analysis of the practice shows that the interests of the child may prevail over the interests of the parents. For example, in the judgment in the case of *Haase v. Germany* of 8 April 2004, the Court stated: "if children were long ago separated from their biological parents and stay with foster parents (live in the new family), unwillingness of children to change their family

situation may be a more important factor than the interest of biological parents to return back their children.”

In para. 76 of the decision *M.S. v. Ukraine* of 11 July 2017²⁷ the ECtHR, based on the judgment in *Mamchur v. Ukraine* of 16 July 2015,²⁸ noted that in establishing the best interests of the child in a particular case, account should be taken of: 1) the best interests of the child; his/her family relationships, except when the family has been shown to be unfit or manifestly dysfunctional; 2) in the best interests of the child to ensure its development in a safe, secure and stable environment that is not dysfunctional.

Regarding the importance of taking into account the views of the child, the ECtHR in the case of *Pini and Others v. Romania* of 22 June 2004 concluded that the interest of children was to take into account their opinion, as they have already reached the required age when such a child’s opinion should be taken into account – under Romanian law, this age is considered to be 10 years. In this regard, the refusal they have consistently declared after reaching this age is a weighty circumstance.

Third, the ECtHR considers that the relationship between an adoptive parent and an adopted child is generally of the same nature as the family relationship protected by Article 8 of the Convention, and if the relationship arises from lawful and sincere adoption, it can be considered a sufficient condition for the application to them of the same safeguards as Article 8 of the Convention provides for family life.²⁹ The decision to take such a measure must be based on sufficiently convincing and well-founded arguments in the best interests of the child. National courts alleging that the applicant had not exercised authority and had not demonstrated his ability to ensure the proper upbringing of the child. confirm the findings of the domestic courts on the applicant’s inability to provide for the child’s upbringing *Sprava*.

Fourth, quite often under Article 8 of the Convention, the ECtHR addresses the issue of contact with a child and the right to communicate with him or her from a parent living alone or from other relatives. For example, *Hokkanen*, a Finnish citizen, deliberately restricted his contact with his

²⁷ No. 2091/13.

²⁸ No. 10383/09.

²⁹ See *Pini and Others v. Romania* of 22 June 2004, para. 140 and 148.

daughter, who was raised by her parents after his wife's death. In its judgment of *Hokkanen v. Finland* of 23 September 1994, the ECtHR stated that "the obligation of national authorities to take measures to facilitate family reunification is not absolute, as the reunification of parents with a child who has lived with others for some time may not be carried out immediately and may require preparatory measures." At the same time, the Court reiterated the need to take into account the best interests of the child and his rights under Article 8 of the Convention, and noted that "where contact with parents may jeopardize or interfere with these interests, national authorities must strike a fair balance between them" (Article 58).

Fifth, the ECtHR is dealing with cases relating to the deprivation of parental rights. In the case of *Hunt v. Ukraine*, the ECtHR found a violation of Article 8 of the Convention, as the applicant was not involved in the proceedings for deprivation of parental rights to the extent sufficient to protect his interests, and the public authorities went beyond their discretion and did not strike a balance between the applicant and others. In para. 54, the Court recalled that there must be a fair balance between the interests of the child and the interests of the parents, and that such a balance should pay special attention to the best interests of the child, which should prevail over the interests of the parents. In particular, Article 8 of the Convention does not entitle parents to take measures that may harm the health or development of the child.³⁰

In addition, we should also mention the decision of the Grand Chamber, in which, when considering the case on mandatory vaccination, it was considered whether there was a violation of Article 8, this decision once again emphasized the approach that in all cases related to the rights of children, the best interests of the child should be taken into account first and foremost, and this should be a priority.³¹

³⁰ See *Johansen v. Norway* of 7 August 1996, No. 17383/90, para. 78.

³¹ "Court's first judgment on compulsory childhood vaccination: no violation of the Convention." file:///C:/Users/User/Downloads/Grand%20Chamber%20judgment%20Vavricka%20and%20Others%20v.%20Czech%20Republic%20-%20obligation%20to%20vaccinate%20children%20against%20diseases%20that%20were%20well%20known%20to%20medical%20science.pdf [accessed: 23.11.2022].

The European Court of Human Rights has repeatedly emphasized that there is a broad consensus, including in international law, to support the idea that all decisions concerning children should be based on their best interests.³² Thus, in the case law of the European Court of Human Rights, the principle of the best interests of the child is constantly being put into practice. Moreover, the interests of the child, depending on their nature and importance, may outweigh the interests of the parents.

3. Application of the principle of the best interests of the child in wartime

In the period of war, the question of the importance of the principle of the best interests of the child becomes particularly relevant. As on March 24, 2022, 135 children were killed and more than 180 were injured in the criminal actions of the Russian aggressors [Gabadava 2022]. As of April 13, the number of children killed had risen to 191 and the number of injured to 349. As of August 22, 373 children have died, and the number of injured is over 723. It is clear that the number of victims will increase, including among children. The official press reports the disappearance of children without parental care and even their illegal removal to the aggressor state. Undoubtedly, these crimes are not only officially condemned by the international community, but will receive the appropriate legal qualifications.

The state of war is not a reason to limit the principle of the best interests of the child. At present, there has been a partial simplification of the procedure for registering the birth of a child. Parents of a child born on the occupied territories or in shelters may apply to any office of state registration of civil status of Ukraine and submit either a medical birth certificate or equivalent certificate drawn up by a medical professional, which is issued for each case of childbirth and can be issued without a seal. Simplifying the formalities to establish the fact of the birth of a child and giving the right to any medical worker to issue it is a demand of modern realities and challenges. It is positive that Ministry of Health has not established

³² See *Neulinger and Shuruk v. Switzerland* of 6 July 2010, No. 41615/07, para. 135; *X v. Latvia* of 26 November 2013, No. 27853/09, para. 96.

the time limits, e.g. a woman may ask doctor to issues such medical certificate when she is safe with her child.

During the evacuation of children, the state is primarily responsible for their safety, proper care, creating conditions for family reunification. In order to guarantee the principle of the best interests of the child, a decision was made at the governmental level on the possibility of temporary placement of children without parental care during war period in foster families or family-type orphanages.³³ At the same time, simplifying the adoption procedure will not be in the best interests of the child during the war. This is because hostilities do not allow for proper examination of the case when children may have lost their parents, and such parents or relatives may be alive.

In addition, it is possible for some mothers to abuse their rights and take their children out of Ukraine without the consent of the child's father. In the interests of children and to ensure safety, women were given the right to travel abroad during the period of war without the consent of father and on the basis of an internal national passport (for mothers) and birth certificates (for children). Obviously, after the end of the war, such mothers and children must return to Ukraine, in case of refusal and lack of consent of the father to keep the children outside the state, we can talk about the violation of parental rights.

In the conditions when the legislation of Ukraine was not ready for the challenges and threats of war, the principles of law are the tool that allows us to fill the gaps and regulate social relations. At the same time, the practice of the ECtHR, which has already developed and developed clear positions on the application of the principle of the best interests of the child, including the approach that the interests of children can prevail over the interests of parents, can help national courts and administrative bodies. Unfortunately, the war can be protracted, children who went abroad with their mothers can get used to life in a new place, to new conditions of study, and acquire social ties. Unfortunately, the war separated

³³ "V Ukrayini tymchasovo sprostyly protseduru oformlennya opiky nad dit'my, yaki zalyshylys' bez bat'kiv." <https://www.ukrinform.ua/rubric-society/3437884-v-ukraini-timcasovo-sprostili-proceduru-oformlenna-opiki-nad-ditmi-aki-zalisilis-bez-batkiv.html> [accessed: 23.11.2022].

families, as a general rule, men between the ages of 18 and 60 cannot leave Ukraine, with certain exceptions. In the event that the child's mother does not want to return to Ukraine and there is a dispute with the child's father, then taking into account according to the practice of the ECtHR, the courts can decide not to return the child if it would be against the child's interests, while taking into account the priority of the child's best interests.

Conclusions

Thus, the principle of the best interests of the child is one of the fundamental principles enshrined in international instruments and national legislation of Ukraine, found its essential content in the practice of the ECtHR and applied by national courts. In our opinion, the principle of the best interests of the child means that parents, legal representatives of the child, authorities, courts and other persons take into account the interests of the child when taking actions or decisions aimed at meeting any individual needs of the child according to his or her age, state of health and peculiarities of development.

In conditions of war, the principle of ensuring the best interests of the child becomes especially important. The state has additional obligations not only to guarantee the life and safety of children, but also to create conditions for the realization of each child's basic rights, the state must create simplified and transparent conditions for state registration of children born in shelters and temporary occupation.

It is the principle of the best interests of the child during the war, when the parliament does not have time to make the necessary changes to the legislation of Ukraine, that can help resolve disputes between parents and other relatives regarding children. At the same time, the establishment of approaches in the practice of the ECtHR to understanding the essence of the principle of the best interests of the child is important.

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