

CURRENT TRENDS FOR ACCESS TO JUSTICE FROM THE PERSPECTIVE  
OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS<sup>i</sup>

Let me start by expressing recognition to the organisers for their initiative and effort accomplished permitting to hold this conference. It provides a unique opportunity for an open-minded exchange, by a large number of legal experts from different States, on issues related to access to justice for all regardless of borders and difference in legal systems. That issue is an indispensable element of ensuring respect for the rule of law – a principle inherent in all the constitutional systems of the members States of the Council of Europe and the European Union.

Both the Council of Europe, through the mechanism under the European Convention of Human Rights, and the European Union contributed to a large extent to defining and promoting European standards as regards practical and effective access to a court and the guarantees of a fair hearing. That common achievement is well reflected in the Handbook on European law relating to access to justice. I am particularly glad that its Slovak version will be presented in the context of the present Conference.

Our common goal at this event has been to examine the current trends and challenges in this area. I'd like to contribute to such exchange by, firstly, highlighting certain particularly relevant aspects of the recent case-law of the European Court of Human Rights ("the Court"), and, secondly, by invoking several features of the ongoing reform of the system of the European Convention on Human Rights ("the Convention") with possible bearing on the ongoing effort, both within the Council of Europe and the European Union, to bring justice closer to everybody.

As to the developments in the practice under the Convention which are subsequent to the publication of the aforesaid Handbook, it is noteworthy that almost one third of the judgments adopted by the Grand Chamber of the Court during the last twelve months concern the right to a fair hearing. Those judgments deal with particular aspects of fairness of a criminal trial, such as admission to evidence of the statements of absent witnesses<sup>ii</sup>; admission and use of incriminating conclusions of an absent expert<sup>iii</sup> or irretrievable prejudice to defence rights as a result of the accused person's inability to make informed choice of lawyer at the very beginning of investigation<sup>iv</sup>. Of particular importance in this context is the judgment in the case of *Ibrahim and Others*<sup>v</sup> addressing the issue of delaying access to a lawyer during police questioning. In that case the Court clarified the two stages of the test established under its earlier case-law<sup>vi</sup> for determining the impact of a restriction of the right of access to a lawyer on the right to a fair trial under Article 6 of the Convention. In particular, it considered necessary to assess, firstly, whether there were "compelling reasons" for such restriction and, in the second place, the impact of that restriction on the overall fairness of the proceedings. While there was no absolute rule to the effect that the absence of compelling reasons was

sufficient to find a violation; such absence weighed heavily in the balance when assessing overall fairness.

As to the civil limb of Article 6 of the Convention, and in the context of cross-border justice, in its judgment in the case of *Avotins*<sup>vii</sup> the Court examined alleged breach of the applicant's right to a fair hearing in the context of recognition and enforcement of a foreign judgment. The national court's judgment in issue was delivered in the country of origin, without summoning the defendant to appear and without securing his defence rights. The Court's judgment develops the case-law concerning the presumption of equivalent protection of fundamental rights by European Union law (also referred to as „Bosphorus presumption“). It applies that presumption to the mutual recognition mechanisms which are founded on the principles of mutual trust between the European Union member states and are designed to be implemented practically in an automatic manner. While acknowledging the legitimacy of such mechanisms of mutual recognition, in its judgment the Court considered it its duty under the Convention to satisfy itself, in the spirit of complementarity, that their operation does not leave any particular situation rendering the protection of the Convention rights manifestly deficient. Hence the action domestic courts are expected to take in that context in order to comply, in line with that case-law, with their obligations under the Convention: where a serious and substantiated complaint is raised before them about manifest deficiency in the protection of the Convention rights and where such situation cannot be remedied by European Union law, domestic courts should not refrain from examining such complaint by merely relying on the fact that law of the European Union falls to be applied.

In a different recent judgment<sup>viii</sup> the Court found that the very essence of the right of access to a court had been impaired in that the applicants, whose assets had been frozen pursuant to a UN Security Council resolution providing for sanctions against the former Iraqi regime, had been prevented from submitting appropriate evidence to a domestic court, to seek to show that their inclusion on the sanctions lists had been arbitrary. Legal interest of this judgment lies also in the Court's addressing the question as to whether there was a conflict between the Security Council resolution in issue and Article 6 of the Convention, in which case Article 103 of the UN Charter (which provides for primacy of obligations under the Charter over obligations under other international agreements) might come into play.

The last two examples are indicative of situations recurring in the previous years where the Court was called upon to address the interaction between the Contracting States' obligations under the Convention and their undertakings under other rules of international law. It transpires from the Court's jurisprudence that the way domestic courts dealt with such situations may result in limitations on the right of access to the court, as guaranteed by Article 6 of the Convention. In such cases the Court has considered it its role to examine whether similar limitations restrict or reduce the access to a court left to an individual in such a way or to such an extent that the very essence of that right is impaired.

Another example of a similar situation, which the Court addressed earlier, constitutes the body of case-law under Article 8 of the Convention (right to respect for family life) in the area of international child abduction. There the Contracting States are also bound by the requirements of the Hague Convention on the Civil Aspects of International Child Abduction of 1980. In that context the Court has sought a „combined and harmonious“ application of the international instruments concerned in a way permitting to perform its task in full, namely „to ensure the observance of the engagements by the Contracting Parties (...), by interpreting and applying the Convention provisions in a manner that renders its guarantees practical and effective“. It held, in particular, that Article 8 imposed on the domestic authorities a procedural obligation when assessing an application for a child’s return, namely to duly consider allegations of a grave risk for the child in the event of return and indicate sufficient reasons for their decisions<sup>ix</sup>.

Among the cases currently pending before the Court, one is indicative of the variety of situations which may give rise to an issue as regards access to courts, also in the context of cross-border justice<sup>x</sup>. In that case, within divorce proceedings initiated by the applicant’s husband, domestic court accepted his allegation that he did not know where the applicant (national of a different State) resided notwithstanding that he admitted to be in telephone contact with her. After vainly convoking the applicant by means of publication in the official gazette, the marriage was dissolved in her absence. In this context the Court is called upon to address the obligations incumbent on and diligence required from courts and different stakeholders involved when an argument is made that the defendant’s place of residence is unknown, in particular when the subject-matter of the proceedings involves a person’s civil status.

The second part of my presentation touches upon the other two areas under the spotlight at the present conference: mutual trust and mutual recognition among national legal practitioners, and better information and targeted guidance to improve rights awareness and access to justice.

It is well known that, since 2010, four high-level conferences have been held on the future of the Court and implementation of the Convention. One of the aims of the ongoing reform has been generically referred to as „bringing human rights home“ under the premise that it is primarily the responsibility of the Contracting Parties to ensure the application and effective implementation of the Convention.

In that context an important task has been assigned to the Court by adoption of Protocol No. 16 to the Convention, also referred to as „protocol of judicial dialogue“. Its aim is to further interaction and co-operation between the Court and the national courts in the interests of the effective implementation of the Convention at the domestic level. In particular, it will allow the highest domestic courts to request the Court to give advisory opinions on questions of principle relating to the interpretation and application of the rights and freedoms guaranteed by the Convention or its protocols.

The Court in Strasbourg has advanced in preparing itself for implementation of that Protocol once it has entered into force. In September 2016 it adopted amendments to its Rules addressing the practicalities of the implementation of such advisory opinion procedure. It is noteworthy that, prior to that, the proposals were forwarded to the representatives of the Governments and of the interested NGOs for comments.

In parallel, in October 2015, the Court officially launched the Superior Courts Network. Its objective has been to enrich dialogue and the implementation of the Convention beyond the limited scope of the advisory opinions procedure set out in Protocol No. 16. The operational objective of the Network is to set up and operate a practical and useful means of exchanging relevant information on Convention case-law and related matters. Presently, the European Court of Human Rights and the Network's member courts exchange, via a restricted-access website, by means of providing information and responding to formal requests for information. Even though the Network is not called upon to co-ordinate communication between national courts, the contact details of all the Network's member courts and their Focal Points are accessible on the Network's Intranet site to all of the member courts.

In conclusion, I would also like to mention the now well established practice of involvement of a larger scope of legal practitioners from different States, mainly members of the judiciary, in the operation of the Convention mechanism. Thus in the course of 2015 a total number of 118 study visitors had the possibility of getting acquainted *in situ* with the functioning of the Court and the case-law under the Convention. This has been possible, to a great extent, thanks to agreements between the Court and interested institutions, among which the European Judicial Training Network has held an importance place.

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<sup>i</sup> Responsibility for the information and views set out in this contribution lies entirely with the author.

<sup>ii</sup> *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015

<sup>iii</sup> *Constantinides v. Greece* [GC], 76438/12, 6 October 2016

<sup>iv</sup> *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015

<sup>v</sup> *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, ECHR 2016

<sup>vi</sup> *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008

<sup>vii</sup> *Avotiņš v. Latvia* [GC], no. 17502/07, ECHR 2016

<sup>viii</sup> *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, ECHR 2016

<sup>ix</sup> *X. v. Latvia* [GC], no. 27853/09, ECHR 2013

<sup>x</sup> Application no. 22493/05