SPECIFIC FEATURES OF PROVING IN DISPUTES ON RECOGNIZING PERSONS AS REFUGEES: ON THE BASIS OF CASE LAW OF UKRAINIAN SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

The authors of the article have analyzed specific features of proving in disputes concerning the recognition of a person as a refugee according to the case law of Ukrainian Supreme Court and the European Court of Human Rights. The authors have also analyzed and provided the list of the main international and national regulatory legal acts in the field of ensuring the rights of asylum seekers, including those related to the standards of proving in cases of recognizing persons as refugees. The case law of Ukrainian Supreme Court has been analyzed in cases on claims of asylum seekers in Ukraine filed to the State Migration Service of Ukraine for recognition as illegal and reversal of decisions on refusal to recognize them as refugees or persons in need of additional protection. The main problems in the field of proving in cases of recognizing persons as refugees have been provided. The authors of the article have also analyzed the practice of certain judgments of the European Court of Human Rights on proving in cases of recognizing asylum seekers from Afghanistan, Syria and Congo as refugees in Ukraine. The cases of violation of the standards of proving in cases on recognizing asylum seekers as refugees have been presented in the article. The authors have concluded that Ukrainian courts should apply the positive practice of the European Court of Human Rights in order to resolve the problems of proving in cases of recognizing asylum seekers as refugees.

Keywords: Proving, Evidence, Rights of Refugees, Asylum Seekers, Administrative Claim, Action for Recognizing Illegal and Reversal of a Decision, European Court of Human Rights, Administrative Proceedings, Case law

INTRODUCTION

A person in his or her country of origin often faces significant difficulties because of his or her religious, political views and beliefs, because of belonging to a certain social group, nationality, and because of a systematic violation of his or her rights. As a result, the stay of such a person in his or her country of origin does not seem possible due to his or her constant harassment, persecution, torture, inhuman treatment and sometimes the risk of losing his or her life. Due to the dynamics of social relations in Ukraine and in the world, the existence of wars and armed conflicts, a significant number of people is forced to seek protection in foreign countries. Asylum seekers when arriving in

any country and applying for refugee status, he or she faces the challenge of proving that he or she has the conventional characteristics of a refugee. The provisions on refugees enshrined in the Convention relating to the Status of Refugees of 1951 (United Nations, 1951) are not always implemented by States. Amendments in the national legislation of different countries more often impose more strict requirements for granting the refugee status than those enshrined in the Convention, and the rights of refugees are often violated or unjustifiably restricted by different countries. Ukraine is no exception.

Thus, despite a number of international legal acts ratified by Ukraine and national normative legal acts, the rights of asylum seekers who wish to be recognized as refugees are violated in Ukraine.

Refugees belong to a very vulnerable category of the population in Ukraine, since they escaped from the country of their origin and came to Ukraine hoping to find asylum. Asylum seekers in Ukraine by applying for the recognition the status of refugees to the State Migration Service of Ukraine and receiving a refusal, find themselves in a rather stressful situation. They must challenge such a refusal in courts and prove the existence of conventional features of a refugee. Therefore, the issue of proving in disputes on the recognition of a person as a refugee is of great interest both at the national and international levels.

LITERATURE REVIEW

The main international regulatory legal acts regulating the status of refugees are: the Convention Relating to the Status of Refugees of 1951 (United Nations, 1951) ratified by the Law of Ukraine No. 2942-III of January 10, 2002 (Law of Ukraine, 2002), which is interpreted in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, which are binding for national authorities, in particular by virtue of the provisions of the Agreement between the Government of Ukraine and the Office of the United Nations High Commissioner for Refugees of 23 September 1996 ratified by the Law of Ukraine No. 1185-14 of October 21, 1999 (The Government of Ukraine and The Office of the United Nations High Commissioner, 1996); the 1967 Protocol to the Convention ratified by the Law of Ukraine No.2942-III of January 10, 2002 (The United Nation General Assembly, 1967; Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ratified by the Law of Ukraine No. 475/97-VR of July 17, 1997 (Council of Europe, 1950); UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ratified by Laws of Ukraine No. 3484-XI of 26 January 1987 and 234-XIV of 5 November 1998 (UN Convention, 1984); UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (The United Nations High Commissioner for Refugees, 2019), Note on Burden and Standard of Proof in Refugee Claims by UNHCR of 16 December 1998 (The United Nations High Commissioner for Refugees, 1998); Directive of the European Parliament and of the European Council “On common procedures for granting and withdrawing international protection” No. 2013/32/EU of 26.06.2013 (European Parliament and European Council, 2013); European Council Directive “On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted” No. 8043/04 of 27.04.2004 (European Council, 2004).

As for national legislation, the main regulatory legal acts regulating the legal status of refugees are: Law of Ukraine “On Enforcement of Judgments and Application of the Case law of the European Court of Human Rights” No. 3477-IV of 23 February 2006, where the Art. 17 stipulates that the provisions of the European Convention and the case law of the European Court of Human Rights is a source of law in Ukraine (Law of Ukraine, 2006); Law of Ukraine “On Refugees or Persons in Need of Additional Protection or Temporary Protection” No. 3671-VI of July 8, 2011

(Law of Ukraine, 2011); Rules for consideration of claims and execution of documents required to resolve the issue of recognition as a refugee or a person in need of additional protection, loss and deprivation of the refugee status and additional protection and cancellation of the decision on recognition of a person as a refugee or a person in need of additional protection approved by the Order of the Ministry of Internal Affairs of Ukraine No. 649 of 7 September 2011 (Ministry of Internal Affairs of Ukraine (2011).; Ruling of the Plenum of the Supreme Administrative Court of Ukraine "On the Case law of Considering Disputes Concerning Refugee Status, Expulsion of Foreigners or Stateless Persons from Ukraine and Disputes Related to the Stay of Foreigners and Stateless Persons in Ukraine" of 25 June 2009 No. 1. (The Supreme Administrative Court of Ukraine (2009).

The works of a large number of foreign researchers are focused on the general problems of the legal status of refugees at the international level. Ukrainian scholars who have studied refugee issues are: V.I. Potapova, M.O. Baimuratova, M.V. Buromenskyi, S.P. Brytchenko, Yu.V. Buznytskyi, I.H. Kovalyshyna, O.R. Poiedynok, K.O. Nesterenko, O.M. Kalashnyk and others. Thus, Orel L. and other researchers emphasized the need for Member States to the Convention to pay special attention to the realization of the right to life of refugees as a particularly vulnerable category of population in the article "Realization of the Right to Life on the Materials of the Practice of the European Court of Human Rights" (Orel, 2020).

MATERIALS AND METHODS

The methodological basis of studying specific features of proving in disputes concerning the recognition of a person as a refugee on the basis of the case law is a set of general scientific and special legal methods of scientific cognition. Thus, the dialectical method assisted to reveal the essence of proving in disputes about the recognition of a person as a refugee. The method of analysis allowed us to study the regulatory base, the works of scholars on the topic of the research and to identify inconsistencies and gaps in the legislation regulating the recognition of a person as a refugee and specific features of proving in cases of recognizing a person as a refugee. The comparative and legal method was used to compare the case law in disputes on the recognition of persons as refugees in Ukraine and the European Court of Human Rights. When researching the provisions of national and foreign legislation, the authors used historical and legal method, and when researching the powers of the Migration Service of Ukraine the authors used formal and legal method. The method of theoretical and legal forecasting was applied in the formation of recommendations for resolving problematic issues of proving in disputes on the recognition of a person as a refugee.

RESULTS AND DISCUSSION

Ukraine has ratified a number of Conventions and international treaties. Therefore, a foreigner, seeking asylum, can apply for protection in Ukraine, and it is his inalienable right. In this regard, the State Migration Service of Ukraine has a corresponding obligation to verify the information provided by the claimant and to comply with the requirements of international and national law. However, there are many difficulties in this regard in practice.

There are specific features regarding the standards of proving in the category of cases of recognizing persons as refugees, which to some extent differ from the generally accepted ones, however, the courts often incorrectly refer to the standard of proving "the applicant has not proved…". There is no need to establish a causal relationship between violence, human rights violations and the personal threat to the life of a refugee in order to determine the refugee status. The applicant must not prove that he is experiencing physical or mental suffering on the territory of

his country of origin. Instead, the State Migration Service of Ukraine should verify the validity of the fears of the asylum seeker to be persecuted and the veracity of his allegations, and the courts should verify the legality of actions of the State Migration Service of Ukraine in relation to a particular asylum seeker.

As a rule, the plaintiff provides all the information he has, but the court often incorrectly imposes the burden of proving entirely on the applicant, arguing that the latter does not provide other evidence other than personal explanations. However, the asylum seeker does not have to prove anything, but instead he has to justify his request. The plaintiff has a "duty to provide evidence" at his disposal (as provided in the UNHCR Handbook of 2019), and a "duty of proving" is a completely different concept, and such an obligation rests with the defendant (the State Migration Service of Ukraine), who must refute the evidence provided by the plaintiff. The applicant's explanation is already evidence (often the only one) that the State Migration Service of Ukraine must verify and refute in case of doubt. The standard of proving in such cases is a "balance of probabilities". Therefore, the court's findings that the plaintiff did not prove anything are inadmissible in this category of cases. However, the State Migration Service of Ukraine sometimes does not provide any arguments to refute the information provided by the plaintiff, except for the personal doubts of an employee of the State Migration Service of Ukraine, set out in the conclusion of refusal (in most cases from incorrect application of the UNHCR standards of proving).

Based on the provisions of Part 2 of the Art. 77 of the Code of Administrative Proceedings of Ukraine (Law of Ukraine, 2005), readings set out in paragraph 9 of the Ruling of the Plenum of the Supreme Administrative Court of Ukraine No. 3 of March 16, 2012 "On amending the Ruling of the Plenum of the Supreme Administrative Court of Ukraine of 25 June 2009 No. 1 "On the Case law of Considering Disputes Related to the Refugee Status, Expulsion of Foreigners or Stateless Persons from Ukraine and Disputes Related to the Stay of Foreigners and Stateless Persons in Ukraine", as amended by the Plenum of the Supreme Administrative Court of Ukraine of June 20, 2011 No. 3", courts while hearing cases must take into account that the obligation to prove the legality of the decision, action or omission rests with the subject of authoritative powers within administrative cases of illegality of decisions, actions or omission of the subject of authoritative powers. Therefore, it is inadmissible to refuse to satisfy a claim in this category of cases due to failure of a foreigner or a stateless person to prove the illegality of decisions, actions or omission of the subject of authoritative powers (The Supreme Administrative Court of Ukraine, 2012).

The scope of examined evidence in court is minimal. The main (often the only one) evidence in this category of cases is information about the country of origin (hereinafter – COI). The Country of Origin Information (COI) is information that covers the situation in the applicant's country of origin. The COI must be relevant; reliable and balanced; accurate and consistent with the current situation in the world.

The COI may include: reports from international human rights organizations; reports of governmental and non-governmental organizations; national law of the applicant's country of origin; information from the media; scientific articles, etc.

The relevant COI can be obtained, in particular, by the following links: "Refworld" (http://www.refworld.org/); "Amnesty International" (www.amnesty.org); "Council of Europe" (www.coe.int); "Human Rights Watch" (www.hrw.org); "Freedom House" (www.freedomhouse.org); "The United States Department of State" (https://www.state.gov/).

In this regard, there is the legal position of the Supreme Court, which is embodied in its Rulings in cases No. 820/2380/17 and No. 820/4974/16. Thus, "confirmation of fears of persecution is carried out by various reliable sources of information (for example, UN Security Council Resolutions, documents and communications of the Ministry of Foreign Affairs of Ukraine, information collected and analyzed by the State Migration Service of Ukraine, the Office of the UN High Commissioner for Refugees, Rules of considering applications and execution of documents

required to resolve the issue of recognition as a refugee or a person in need of additional protection, loss and deprivation of the refugee status and additional protection and cancellation of the decision on recognizing a person as a refugee or a person in need of additional protection approved by Order of the Ministry of Internal Affairs of Ukraine of 7 September 2011 No. 649, other international, governmental and non-governmental organizations, from publications in the media, as well as from media distributed by the Regional Office of the United Nations High Commissioner for Refugees in Belarus, Moldova, Ukraine. In order to fully establish the circumstances in such cases, as a rule, more than one source of information about the country of origin should be used" (The Supreme Court, 2018a; The Supreme Court, 2019b).

Other evidence in addition to the COI may be used in the case, in particular: screenshots of social media pages; video/audio files; photographs; correspondence screenshots; other written and electronic evidence; testimony of witnesses (relatives, citizens of the country of origin, party members, etc.).

However, the State Migration Service of Ukraine often ignores the provisions of paragraph 43 of the Handbook to Procedures and Criteria for Determining the Refugee Status under the 1951Convention relating to the Status of Refugees, namely: "Concerns do not necessarily have to be based on the applicant's personal experience. The facts happened, for example, to other members of the same social or religious group may be evidence that his fears of being persecuted sooner or later are well-founded".

Thus, the applicant may not necessarily have evidence of personal persecution, very often the main evidence is information about the country of origin, which indicates what happened to members of the same social group as the plaintiff (a similar legal position of the Supreme Court set out in its Ruling in case No. 820/2380/17) (The Supreme Court, 2019b).

The Ruling of the Supreme Court in the case No. 826/1053/17 of 4 December 2019 in the case of the asylum seeker from the Democratic Republic of the Congo contains conclusions that the defendant has a duty to examine the applicant's documents, to verify the circumstances that give grounds to refer the person to the categories of persons in need of additional protection or to establish the affiliation of the application as being of an abusive nature. At the same time, it should be noted that the applicant, in turn, is not obliged to substantiate every circumstance of his case with incontrovertible material evidence and must prove the plausibility of his arguments and the accuracy of the facts, which are the basis of the application for granting the refugee status, since persons seeking for the refugee status are deprived of the opportunity to provide evidence in support of their arguments due to various circumstances. Failure to provide documentary evidence of oral allegations may not preclude an application's registration or a positive decision to grant the refugee status, if such allegations coincide with known facts and the overall plausibility of which is sufficient. Credibility is established, if the applicant has submitted an application that is logically consistent, plausible and does not contradict well-known facts and is therefore credible.

Thus, depending on certain circumstances, obtaining and providing documents that may prove the conditions for recognition as a refugee or a person in need of additional protection, a person applying for the refugee status may not be possible at all, so such a circumstance is not the ground for recognizing. the absence of conditions in the presence of which the refugee status is granted or recognizing a person in need of additional protection (The Supreme Court, 2019a).

The Supreme Court in its Ruling in the case No. 826/26196/15 of 24 October 2018, noted the need for administrative courts to apply the judgment of the European Court of Human Rights in the case "S.K. v. Russia" (The Supreme Court, 2018b) while hearing cases on recognizing Syrian citizens as refugees in Ukraine.

In this regard, the European Court of Human Rights in the case "S.K. *vs.* Russia" pointed out that the humanitarian situation and the security situation, as well as the nature and dynamics of the military conflict in Syria have intensified significantly between the arrival of S.K. to Russia in

October 2011 and the issuance of an expulsion order in February 2015; it is also possible to trace the deterioration of the situation from the time of the order to the rejection of the applicant's application for asylum. According to reports, despite the ceasefire agreement signed in February 2016, the parties to the conflict continue to use methods of warfare that could lead to civilian casualties. It is confirmed by reports of chaotic shelling and attacks on civilians. At the same time, the Court pointed out that the Government had not substantiated the argument that the security of S.K. would be guaranteed by the fact that he would be sent to Damascus, and that he would be also safe when moving to his hometown or other part of Syria. The Government did not provide any confirmation that S.K. would be provided with a sufficient level of security in Damascus or that he would be able to leave Damascus for a safe region of Syria.

The Supreme Court Ruling in the case No. 826/14671/16 of 31 October 2018 (The Supreme Court, 2018c) represented by the panel of judges noted that failure to provide documentary evidence of oral allegations should not be an obstacle to register the application or taking an objective decision on the status of a refugee and a person in need of additional or temporary protection taking into account the principle of formality, if such allegations coincide with known facts and the overall plausibility of which is sufficient.

The Ruling of the Supreme Court in the case No. 520/12078/19 of 31 March 2021 (The Supreme Court, 2021) defines well-known facts about the country of origin that do not require proving. Thus, the assertion that there is a protracted armed conflict in Syria, which is accompanied by shelling and bombing of settlements and social infrastructure facilities, and that the situation in this country is extremely dangerous and difficult, is a well-known fact. Armed clashes between Syrian official forces and opposition militants have engulfed much of the country and its population making the situation very tense and dangerous to the lives and safety of those living there. Numerous media outlets are reporting on the events in Syria and the situation in that country is being discussed by international organizations, so these circumstances do not need to be proved in this case.

Analyzing the facts established by the courts, the Supreme Court agrees with the appellate court's conclusion that there are well-known official documents confirming the justification of the threat to the plaintiff's life, security or liberty in the country of origin and the defendant's failure to properly assess the fact that the situation in the plaintiff's country of origin at the time of the plaintiff's application for the refugee status or a person in need of additional protection, remains aggravated, and therefore did not clarify the nature of the plaintiff's objective fears, in particular how the conflict in the plaintiff's country of origin would threaten his life, health and freedom in case of return home.

The intensity and tension of the situation in the Syrian Arab Republic poses a risk to the plaintiff, if he returns, since the parties to the conflict use methods and tactics of war that increase the risk of civilian casualties, the conflict is pervasive and the number of killed and wounded is too high.

The European Court of Human Rights in the case "Sufi and Elmi *vs.* The United Kingdom" (Applications nos. 8319/07 and 11449/07) of 28 June 2011 noted that the return of a person to a civil war situation may pose a threat of torture, inhuman or degrading treatment or punishment (paragraphs 217-241). The Court noted that the criteria for assessing the intensity/tension of general violence in a country with a military conflict are: whether the parties to the conflict use methods or tactics of war that increase the risk of civilian casualties or that are directly aimed against the civilian population; whether the use of such methods and/or tactics has been used by all the parties to the conflict; whether the conflict was localized or pervasive; the number of people killed, wounded or displaced as a result of the struggle (European Court of Human Rights, 2011).

Thus, there are generally accepted official documents that confirm the fact that there is an ongoing military conflict in the plaintiff's country of origin and that there is a situation of widespread violence, which, in turn, may threaten the plaintiff's life, security or liberty.

In respect to the above, the Supreme Court finds correct the conclusions of the courts that at the time of the defendant's decision, the situation in Syria in terms of intensity and tension posed a risk to the person deported to that country, the defendant did not take into account the current and relevant information about the country of origin of the plaintiff, instead preferring the absence of the facts that the plaintiff and members of his family were not persecuted; the appeal to the agencies of the migration service was connected only with the desire for temporary legalization on the territory of Ukraine, and not with the military actions that take place in the country of citizenship; the conclusion of the Main Directorate of the State Migration Service of Ukraine in Kharkiv region does not contain a proper analysis of the situation in Syria, the possibility of threatening the life of the plaintiff, his safety or freedom in the country of origin in case of return is not denied, which does not meet the requirements of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits the deportation of persons to a country where they may be subjected to persecution, torture, inhuman or degrading treatment.

CONCLUSION

Despite the significant number of international and national regulatory legal acts and important research of scholars, Ukraine still has problems with proving in cases of recognizing asylum seekers as refugees. To address these issues, the courts of Ukraine should apply the positive practice of the European Court of Human Rights when considering cases of recognizing asylum seekers as refugees.

The State Migration Service of Ukraine has currently the obligation to verify the circumstances that give grounds to classify a person as a refugee while reviewing the applicant's documents, or to establish the affiliation of the application as being an abuse. In this case, the applicant, in turn, is not obliged to substantiate each circumstance of his case with incontrovertible material evidence and must prove the plausibility of his arguments and the accuracy of the facts, which are the basis of the application for the refugee status, since persons seeking the refugee status are deprived the opportunity to provide evidence to support their arguments under certain circumstances. Failure to provide documentary evidence of oral allegations may not preclude an application's registration or a positive decision to grant the refugee status, if such allegations coincide with known facts and the overall plausibility of which is sufficient. Thus, depending on certain circumstances of obtaining and providing documents that may prove the existence of conditions for recognizing as a refugee of a person applying for the refugee status may not be possible at all, so such a circumstance is not the ground for recognizing the absence of conditions, under which the refugee status is provided. Thus, confirmation of the validity of fears of persecution (through information on the possibility of such persecution in the country of origin of the refugee) can be obtained from a person seeking the refugee status and independently from various reliable sources of information.

The testimony of a person seeking the refugee status and the evidence supporting the threat of persecution must be satisfactory because it is admissible to consider it "possible within reasonable limits" or plausible, *i.e.,* the applicant is not obliged to substantiate every circumstance of his case with incontrovertible material evidence and must prove the plausibility of his arguments and the accuracy of the facts, which are the basis for the application for the refugee status.

The availability of corroborating evidence enhances the plausibility of the applicant's allegations, but cannot be a mandatory element of his evidence base. Thus, given the special

situation of persons seeking the refugee status, they do not need to provide all the necessary evidence.

Thus, by denying the asylum seekers in satisfying the administrative claim based on unproven circumstances, in particular regarding the danger in the country of origin, without examining the applicant's COI, the courts violate the requirements of the Art. 77 of the Code of Administrative Proceedings of Ukraine, contrary to the clarifications provided in the Resolution of the Plenum of the Supreme Administrative Court of Ukraine, the legal positions of the Supreme Court and the recommendations of the UNHCR.

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