

CHAPTER 7. PROTECTING THE BEST INTERESTS OF THE CHILD

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DOI: <https://doi.org/10.30525/978-9934-26-213-5-7>

7.1. Evolution of the Principle of the Best Interests of the Child in International Law

The principle of the best interests of the child is a priority and fundamental principle in relations involving children. It is the basis of an effective mechanism of ensuring the rights and freedoms of the child. The “principle of the best interests of the child” category makes it possible to ensure the realization of the interests of the child that are not protected by law. In particular, the priority right of the child to family education, enshrined in the law, does not guarantee the child’s right to a happy family. Despite this, the study of the essence and genesis of this principle in international and national law is very relevant.

Among the scientists the principles of legal protection of children’s rights were investigated by such scientists as B. Andrusyshyn³⁷⁴, ³⁷⁵, N. Onishchenko³⁷⁶, N. Opolska,³⁷⁷ ³⁷⁸, ³⁷⁹ J. Shemshuchenko³⁸⁰. Accordingly, the best

³⁷⁴ Andrusyshyn B., Shymon C. Naukovo-praktychna pidhotovka pravoznavstiv u sferi prav dytyny v NPU imeni M.P. Drahomanova. *Yurydychnyi zhurnal*. 2013. № 2. S. 37–42.

³⁷⁵ Sotsialno-pravovyi zakhyst ditei v Ukraini: monohrafiia/za red. Andrusyshyna B.I. Kyiv : Vydavnytstvo NPU imeni M. P. Drahomanova, 2017. 264 s.

³⁷⁶ Onishchenko N., Lvova O., Suniehin S. Prava i svobody dytyny: vctup do problemy Lavryk H.V. Liudynomirnist polityky spryiania rozvytku kooperatsii. *Chasopys Kyivskoho universytetu prava*. 2013. № 2. S. 13–17.

³⁷⁷ Opolska N. Pryntsypy pravovoho zakhystu dytyny. *Derzhava i pravo*. 2011. № 51. S. 40–45.

³⁷⁸ Opolska N. Prava dytyny v Ukraini: monohrafiia, 2-he vydannia, pereroblene ta dopovnene. Vinnytsia: VNAU. 2019. S. 289.

³⁷⁹ Opolska N. Teoretyko-pravovi zasady zabezpechennia prav i svobod dytyny: monohrafiia. Vinnytsia: PP «Edelveis i K», 2011. S. 226.

³⁸⁰ Aktualni problemy yurydychnoi osvity ta nauky v Ukraini: monohrafiia/za red. Shemshuchenka Yu.S. Kyiv. Vyd-vo NPU imeni M.P. Drahomanova, 2016. S. 322–344.

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interests of the child were considered by such scientists as M. Menjul³⁸¹, J. Petrochko³⁸², J. Tudoltseva³⁸³ and others.

Nowadays, the principle of ensuring the best interests of the child is the basic principle in any relationship involving children. However, in practice, the protection of children's rights and freedoms is not always based on this principle.

The main factor in the regulation of relations for the protection of children's rights, freedoms and interests is international legal acts in the field of protection of children's rights. These include international treaties, resolutions of international organizations, which include: United Nations Organization, International Labor Organization, United Nations Children's Fund-UNICEF; World Health Organization; UN Committee on Education, Science and Culture. The adoption of international treaties on the protection of children's rights was not a matter of principle, but a result of the rapid development of legal protection of children's rights and freedoms.

However, the need for protection of children's rights was due to the fact that with the development of society, children began to take part in legal relations on the same level as adults. First and foremost among these relations was labor, which involved the physical work of young children in factories in Europe and America in the 19th century.

At the same time, the insecurity of children was used by both employers and children's fathers because it was easier to control and coerce children who had not reached physical and psychological maturity and to give them lower wages for the work they performed.

Of course, such work had a negative impact on the health, physical, mental and social development of disabled children.

In order to protect the rights and interests of children, the General Conference of the International Labor Organization on June 29, 1919 adopted the Convention on the Minimum Age for Admission of Children to Work in Industry № 5, The Convention stipulated that children under the age of four

³⁸¹ Mendzhul M. Zmist pryntsyphu naikrashchykh interesiv dytyny ta yoho praktychne zastosuвання. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriya Pravo*. 2019. Vypusk 56. Tom 1. S. 87–91.

³⁸² Petrochko Zh. Naikrashchi interesy dytyny: sutnist i shliakhy zabezpechennia. *Naukovi zapysky NDU im. M. Hoholia*. 2014. S. 70–74.

³⁸³ Tuboltseva Ya. Zabezpechennia naikrashchykh interesiv dytyny pry rozghliadi sudom sprav pro usynovlennia. *Teoriia i praktyka pravoznavstva*. 2018. № 2 (14). S. 1–14.

or twenty-five would not be admitted to work or perform work at any state or private industrial enterprises³⁸⁴.

The adoption of the Minimum Age Convention significantly strengthened the protection of children's rights, because in practice children's work was used without taking into account the needs of the child.

Another reason for the need to resolve the problem of protecting children's rights and freedoms was the First and Second World Wars. As a result of the First World War, a large number of children were left without parental care, shelter, food and other vital necessities of life.

The first step at the international level by which children's rights entered the international legal system was the adoption by the 1924 League of Nations of the Geneva Declaration on the Rights of the Child, which consists of only nine points. In these paragraphs we see the first attempt to consolidate the best interests of the child:

1. The child must receive all the necessities necessary for her normal material and spiritual development.

2. A hungry child shall be cared for; a sick child shall be looked after; a disabled child shall be helped; an orphan or a homeless child shall be sheltered and looked after.

3. In times of trouble, the child is the first to receive help.

4. The child must have the means of subsistence and protection from all forms of exploitation.

5. The child shall be educated with the knowledge that her good qualities are to serve other people³⁸⁵.

As stated in the preamble to the 1959 Declaration of the Rights of the Child, it was the 1924 Geneva Declaration of the Rights of the Child that laid the foundation for the protection of children's rights³⁸⁶.

In 1946, after the end of the Second World War, the International Children's Emergency Fund was established under the United Nations to protect children's rights. The main purpose of the fund was to help children whose lives were in danger and to protect their rights.

³⁸⁴ Konventsiia pro minimalnyi vik pryimannia ditei na robotu v promyslovosti № 5 vid 29.10.1919 roku. URL: https://zakon.rada.gov.ua/laws/show/993_109#Text.

³⁸⁵ Zhenevska deklaratsiia prav dytyny 1924 r. URL: <http://www.un-documents.net/gdrc1924.htm>.

³⁸⁶ Deklaratsiia prav dytyny, pryiniata rezoliutsiieiu 1386 (KhIV) Heneralnoi Asamblei OON vid 20 lystopada 1959 roku. URL: https://zakon.rada.gov.ua/laws/show/995_384#Text.

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Two years later, in 1948, the General Assembly adopted the Universal Declaration of Human Rights. Its provisions, namely Article 25, indicated that motherhood and childhood are entitled to special care and assistance. All children born in wedlock or after wedlock are entitled to the same social protection³⁸⁷.

The Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations in 1959, further developed the best interests of the child, which formulated ten principles to guide the actions of all those responsible for implementing the full range of children's rights, and sought to ensure a «happy childhood.

The current principle of the best interests of the child is based on the Convention on the Rights of the Child.

The Convention on the Rights of the Child was drafted taking into account the guidelines set forth in the 1924 Geneva Declaration of the Rights of the Child¹² and the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959¹³, the Universal Declaration of Human Rights and the Charter of the Rights of the Child, The International Covenant on Civil and Political Rights (Articles 23 and 24 in particular)¹³, the International Covenant on Economic, Social and Cultural Rights (Articles 10 in particular)¹⁴ and the International Covenant on Civil and Political Rights (Articles 12 and 13 in particular) Article 10)³⁸⁸, as well as in the statutes and relevant documents of specialized agencies and international organizations concerned with the welfare of children³⁸⁹.

Thus, the interests of the child were first enshrined in the 1924 Geneva Declaration of the Rights of the Child. The “principle of legal safeguarding of the best interests of the child” was first enshrined in the 1989 Convention on the Rights of the Child³⁹⁰. Ukraine ratified the Convention on the Rights of the Child on 27 February 1991 in accordance with the Decree

³⁸⁷ Zahalna deklaratsiia prav liudyny, pryiniata i proholoshena rezoliutsiieiu 217 A (III) Heneralnoi Asamblei OON vid 10 hrudnia 1948 roku. URL: https://zakon.rada.gov.ua/laws/show/995_015#Text.

³⁸⁸ Mizhnarodnyi pakt pro hromadianski i politychni prava vid 16.12.1966 roku. URL: https://zakon.rada.gov.ua/laws/show/995_043#Text.

³⁸⁹ Mizhnarodnyi pakt pro ekonomichni, sotsialni i kulturni prava vid 16.12.1966 roku. URL: https://zakon.rada.gov.ua/laws/show/995_042#Text.

³⁹⁰ Konventsiiia pro prava dytyny, pryiniata Heneralnoiu Asambleieiu OON 20 lystopada 1989 roku. URL: https://zakon.rada.gov.ua/laws/show/995_021#Text.

№ 789-XII³⁹¹ of the Supreme Council of the Ukrainian Soviet Socialist Republic.

The Convention on the Rights of the Child was the first internationally accepted principle to fully safeguard the interests of the child in all actions concerning children, However, for more than twenty years, the concept of “the principle of legal safeguarding of the best interests of the child” has not been defined in international and national law.

Thus, the Convention on the Rights of the Child is the legal basis for the existence and functioning of the Committee on the Rights of the Child, which monitors the fulfillment by the member states of their obligations under this international treaty and its optional protocols.

The Convention on the Rights of the Child adopted three Optional Protocols thereto:

1. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 25 December 2000³⁹².

2. Optional Protocol to the Convention on the Rights of the Child on the Rights of the Child in Armed Conflicts of 25 June 2000³⁹³.

3. Optional Protocol to the Convention on the Rights of the Child on a Notification Procedure of 19 December 2011³⁹⁴.

Part 3 of Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 June 2000 states that the signatory States shall ensure that That the criminal justice system, when dealing with children who are victims of the abuses set forth in this Protocol, shall give primary consideration to respect for the best interests of the child.

The Protocol also requires participating States to criminalize at the national level unlawful acts against children, to provide for criminal respon-

³⁹¹ Pro ratyfikatsiiu Konventsiiu pro prava dytyny: Postanova Verkhovnoi rady Ukrainskoi RSR vid 27 liutoho 1991 roku № 789-XII. URL: <https://zakon.rada.gov.ua/laws/show/789-12#Text>.

³⁹² Fakultatyvnyi protokol do Konventsiiu pro prava dytyny shchodo torhivli ditmy, dytiachoi prostytutsii i dytiachoi pornohrafii vid 25 travnia 2000 roku. URL: https://zakon.rada.gov.ua/laws/show/995_b09#Text.

³⁹³ Fakultatyvnyi protokol do Konventsiiu pro prava dytyny shchodo uchasti ditei u zbroinykh konfliktakh vid 25 travnia 2000 roku. URL: https://zakon.rada.gov.ua/laws/show/995_795#Text.

³⁹⁴ Fakultatyvnyi protokol do Konventsiiu pro prava dytyny shchodo protsedury povidomlen vid 19 hrudnia 2011 roku. URL: https://zakon.rada.gov.ua/laws/show/995_160#Text.

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sibility for their commission and to take measures at the national level to protect the rights and interests of children.

In particular, in accordance with Part 3 of Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child prostitution and child pornography of 25 June 2000, the States Parties shall take appropriate steps to protect the rights and interests of child victims of the practices prohibited by the Protocol at all stages of the criminal justice process, including by (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses; (b) Informing child victims of their rights, the role of custody, the terms and conduct of the proceedings and the disposition of their cases; (c) Ensuring that the views, needs, and concerns of child victims are presented and considered in proceedings in accordance with the procedural rules of domestic law in cases where their personal interests are affected (d) Providing child victims with services to provide appropriate support at all stages of the proceedings (e) In appropriate cases, protecting the privacy and identity of child victims and taking steps, in accordance with national law, to prevent the unwarranted dissemination of information that could lead to the identification of child victims (f) In appropriate cases, ensuring the protection of child victims, as well as their families and witnesses acting on their behalf, from intimidation and reprisals; (g) Avoiding excessive delays in adjudicating cases and executing orders and decrees on compensation for child victims¹⁹.

This Protocol, in order to respect the best interests of the child, requires the member states to provide in national legislation and to put into practice the conduct of investigative actions within the scope of criminal proceedings and judicial review of cases involving trafficking in children, child prostitution and child pornography, adapting all procedures to the specificities of children, ensuring confidentiality and speed of conducting both investigative and judicial proceedings in this category of cases. The implementation of these actions must ensure that the best interests of the child are respected.

However, as practice shows, the national authorities when dealing with cases involving children within the scope of the criminal aspect often go to excessive formalism, child specialization of both investigators and judicial authorities generally does not provide for special training, Criminal justice

agencies are not adapted to working with children, there are not enough psychologists and social educators who are trained to work with children in contact with the law, which leads to the violation of the best interests of children.

The provisions of the Optional Protocol to the Convention on the Rights of the Child on Children's Participation in Armed Conflicts of 25 January 2000 are particularly relevant for our country during the war with the Russian Federation. In particular, this protocol declares that the Participating States are convinced that an optional protocol to the Convention, which increases the duration of the possible conscription of individuals into the armed forces and their participation in hostilities, will contribute effectively to the principle that in all actions concerning children the utmost consideration must be given to the best interests of the child²⁰.

Article 3 of the same Optional Protocol stipulates that the participating States shall raise the minimum age for voluntary recruitment of members of their national armed forces in proportion to the age specified in paragraph 3, The Convention on the Rights of the Child, Article 38, paragraph 3, taking into account the principles contained in this article, and recognizing that, in accordance with the Convention, persons under 18 years of age are entitled to special protection.

We believe that this special protection includes not only the existence of national legislation that would protect the rights and freedoms of minors during military conflicts, but also the practical implementation of safeguarding the rights and freedoms of children during military operations.

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure of 19 December 2011 extended the responsibilities of the Committee on the Rights of the Child through communications procedures and investigations.

Accordingly, Article 2 of the Optional Protocol to the Convention on the Rights of the Child on a communication procedure of 19 December 2011 provides that the Committee shall be guided by the principle of the best interests of the child when performing the functions conferred on it by the Protocol. It also takes into account the rights and views of the child, giving due weight to the views of the child in accordance with the age and maturity of the child.

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At the time of ratification of the Optional Protocol to the Convention on the Rights of the Child on the procedure of notification, our state declared the temporary total impossibility of fulfilling its obligations under this protocol in the temporarily occupied territory of Ukraine, as well as in certain areas of Donetsk and Luhansk regions of Ukraine.

The Committee on the Rights of the Child performs a monitoring function. As stated in Article 43 of the Convention on the Rights of the Child, the purpose of this body is to review progress made by the States Parties in fulfilling their obligations under this international treaty. The Committee is composed of 18 experts, who serve in their individual capacity and are elected for three-year terms with the possibility of reconsideration¹⁷.

Accordingly, article 44 of the Convention on the Rights of the Child stipulates that the States Parties shall report to the Committee, through the Secretary-General of the United Nations Organization, on the measures they have taken to give effect to the rights recognized in the Convention and on the progress made in the realization of those rights (a) For two years after the entry into force of this Convention for the State concerned; (b) Thereafter for every nine years. The reports submitted pursuant to this article shall indicate the factors and difficulties, if any, affecting the degree of fulfilment of the obligations under this Convention. The reports also contain sufficient information to ensure that the Committee has a full understanding of the Convention in this country. A State Party which has submitted comprehensive initial information to the Committee does not need to repeat in subsequent submissions under paragraph 1(b) of this article the basic information previously provided. The Committee may ask the States Parties for further information relating to the implementation of this Convention.

Participating States shall give wide publicity to their reports in their own countries¹⁷.

The Committee on the Rights of the Child, after examining the communications, may make recommendations and suggestions of a general nature, which shall be forwarded to any interested Member State and communicated to the General Assembly of the United Nations on the basis of the observations of the participating States, if any. Such observations of the Committee on the Rights of the Child may be used by national courts of Ukraine through the prism of paragraph 11 of the Resolution of the Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases

of 19 January 2014 № 13 “On the application of international treaties by courts of Ukraine in the administration of justice, It stipulates that in case of difficulties with the application of international treaties of Ukraine the courts may use the assets and decisions of international organizations in the administration of justice, The courts of Ukraine, in the course of justice, may use the assets and decisions of international organizations and specialized bodies that have the authority to adjudicate international treaties or adjudicate disputes in relation to the establishment of treaties³⁹⁵.

The Convention on the Rights of the Child and its Optional Protocols are international treaties within the meaning of Article 2(a)(1). “Article 2(1)(a) The Vienna Convention on the Law of Treaties, according to which “treaty” means an international agreement concluded between states in written form and governed by international law, Regardless of whether such an agreement is contained in a single document or in two or more interrelated documents, or regardless of its particular designation³⁹⁶.

Apart from the Convention on the Rights of the Child and its Optional Protocols, the best interests of the child are taken into account in the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950³⁹⁷, the Convention on the Civil Aspects of International Child Abduction of 1980³⁹⁸; The 1993 Convention on the Protection of Children and Cooperation in International Reinforcement³⁹⁹; the 1996⁴⁰⁰ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of the Protection of Children and Child Welfare; and others. At the same time, none of the above international documents does not

³⁹⁵ Postanova Plenumu Vysshchoho spetsializovanoho sudu Ukrainy z rozghliadu tsyvilnykh i kryminalnykh sprav vid 19 hrudnia 2014 roku №13 «Pro zastosuvannia sudamy mizhnarodnykh dohovoriv Ukrainy pry zdiisnenni pravosuiddia». URL: <https://zakon.rada.gov.ua/laws/show/v0013740-14#Text>.

³⁹⁶ Videnska konventsiiia pro pravo mizhnarodnykh dohovoriv vid 23.05.1969 roku. URL: https://zakon.rada.gov.ua/laws/show/995_118#Text.

³⁹⁷ Konventsiiia pro zakhyst prav liudyny i osnovopolozhnykh svobod vid 04.11.1950 roku. URL: https://zakon.rada.gov.ua/laws/show/995_004#Text.

³⁹⁸ Konventsiiia pro tsyvilno-pravovi aspekty mizhnarodnoho vykradennia ditei vid 25 zhovtnia 1980 roku. URL: https://zakon.rada.gov.ua/laws/show/995_188#Text.

³⁹⁹ Konventsiiia pro zakhyst ditei ta spivrobitnytstvo v haluzi mizhnarodnoho usynovlennia vid 29 travnia 1993 roku. URL: https://zakon.rada.gov.ua/laws/show/995_365#Text.

⁴⁰⁰ Konventsiiia pro yurysdyktsiiu, zastosovne pravo, vyznannia, vykonannia ta spivrobitnytstvo stosovno batkivskoi vidpovidalnosti ta zakhodiv zakhystu ditei 19 zhovtnia 1996 roku. URL: https://zakon.rada.gov.ua/laws/show/973_002#Text.

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define the concept and content of the principle of legal protection of the best interests of the child.

Article 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that court decisions shall be pronounced publicly, but the press and the public can be excluded from the courtroom during the whole proceedings or any part thereof in the interests of morals, public order or national security in a democratic society, if the interests of the minority so require²⁴.

Thus, the 1980 Convention on the Legal and Civil Aspects of International Child Abduction stipulates that the States that signed the Convention firmly believe that the interests of children are the most important thing in the matter of child welfare²⁵.

Article 4 of the 1993 Convention on the Protection of the Rights of Children and Cooperation in International Reinforcement stipulates that reinforcement under this Convention can only take place if the competent authorities have the authority to do so, If the competent authorities of the State of residence have determined, after due consideration of the child's eligibility for placement in the State of residence, that the interstate enhancement is in the best interests of the child²⁶.

In accordance with the Convention on Jurisdiction, Applicable Law, Recognition, Recognition and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 1996, The signatories to the Convention reaffirm that the best interests of the child must be a primary consideration. Thus, Article 28 of the aforementioned Convention stipulates that measures taken by one Contracting State are deemed to be executed or registered for the purpose of execution in another Contracting State shall be executed in the latter State as if they had been used by the authorities of that State. The execution shall be carried out in accordance with the law of the Power in which the request was made, insofar as that law so permits, taking into consideration the best interests of the child²⁷.

We believe that the principle of ensuring the best interests of the child is a fundamental principle reflected in international treaties and enshrined in national law, aimed at harmonious development, ensuring its needs and interests, as a broader concept than the rights of the child, taking into account the particularities and peculiarities of each child.

Thus, the best interests of the child are a broader concept of the rights and freedoms of the child enshrined in the law. Therefore, we suggest amending the Children's Protection Law of Ukraine and introducing the concept of "the legal principle of preserving the best interests of the child", i.e., supplementing Article 1 of the Children's Protection Law of Ukraine with paragraph 22 of the following wording "The principle of safeguarding the best interests of the child is a fundamental principle enshrined in international treaties and enshrined in the national legislation, aimed at harmonious development, ensuring its needs and interests, as a broader concept than the rights of the child, taking into account the peculiarities and characteristics of each child.

The author considers it necessary to continue studying international and national legislation, as well as to analyze the practice of the European Court of Human Rights and national courts in order to determine the aspects that can be taken into account when considering a case involving a child for taking into account the best interests of the child.

In summarizing the above, it should be noted that for the first time the principle of the best interests of the child was enshrined in the 1989 Convention on the Rights of the Child. However, for more than twenty years, the international and national legislation lacks a definition and notion of the nature of the principle of legal protection of the best interests of the child. Such a gap in the law leads to legal uncertainty in the consideration of cases involving children by the state and judicial authorities.

The author proposes to fix at the legislative level the definition of the principle of legal protection of the best interests of the child and the aspects which can be taken into account when hearing a case involving a child to take into account the child's best interests.

7.2. Protecting the Best Interests of the Child in Civil Proceedings of Ukraine

The principle of the best interests of the child is the top priority of the legal state. However, in practice, a correct assessment of the child's best interests by the state and judicial authorities is complicated by a wide range of circumstances, factors and elements that are inexhaustible and different in any particular case involving a child. In this context, the study of the case

law of national courts in the sphere of the best interests of the child is of particular relevance.

Important issues of protection of children's rights were investigated by such scholars as B. Andrusishin⁴⁰¹, N. Onishchenko⁴⁰², N. Opolska^{403, 404}, Y. Shemshuchenko⁴⁰⁵, S. Bobrovnik⁴⁰⁶, N. Parkhomenko⁴⁰⁷, S. Stetsenko⁴⁰⁸. Consideration by national courts of the best interests of the child during court disputes was investigated by M. Kornienko⁴⁰⁹, M. Menjul⁴¹⁰.

National laws and regulations reinforce the obligation of state and judicial authorities to apply the principle of the best interests of the child in all cases involving children. However, the concept of this principle is not defined in the national legislation.

B.I. Andrusyshyn fully substantiates the fact that the national legislation on the protection of children's rights has stopped developing after 2011²⁸. We believe that the improvement of national legislation on the protection of children's rights should also concern the consolidation at the legislative level of the concept of the principle of protection of the best interests of the child.

We agree with Opolskoy N.M. about the fact that the rights of children, depending on their age characteristics can be divided into the rights

⁴⁰¹ Sotsialno-pravovi zakhyst ditei v Ukraini: monohrafiia / za red. Andrusyshyna B.I. Kyiv : Vydavnytstvo NPU imeni M. P. Drahomanova, 2017. 264 s.

⁴⁰² Onishchenko N., Lvova O., Suniehin S. Prava i svobody dytyny: vctup do problemy Lavryk H.V. Liudynomirnist polityky spryannia rozvytku kooperatsii. *Chasopys Kyivskoho universytetu prava*. 2013. № 2. S. 13–17.

⁴⁰³ Opolska N. Pryntsypy pravovoho zakhystu dytyny. *Derzhava i pravo*. 2011. № 51. S. 40–45.

⁴⁰⁴ Opolska N. Prava dytyny v Ukraini: monohrafiia, 2-he vydannia, pereroblene ta dopovnene. Vinnytsia : VNAU. 2019. S. 289.

⁴⁰⁵ Shemshuchenko Yu. Aktualni problemy yurydychnoi osvity ta nauky v Ukraini: monohrafiia / za red. Yu.S. Shemshuchenka. Kyiv. Vyd-vo NPU imeni M.P. Drahomanova. 2016 r. S. 322–344.

⁴⁰⁶ Bobrovnyk S. Rol prava v dosiahenni kompromisu ta vyrishenni pravovykh konfliktiv. Diia prava: intehratyvnyi aspekt: monohrafiia. Kyiv, 2010.

⁴⁰⁷ Parkhomenko N. Rozvytok zakonodavstva Ukrainy v konteksti konstytutsionalizatsii, yevrointehratsii ta zabezpechennia prav liudyny: monohrafiia. Kyiv: In-t derzhavy i prava im. V.M. Koretskoho NAN Ukrainy, 2016. 254 s.

⁴⁰⁸ Stetsenko S. Suchasne ukrainske medychne pravo: monohrafiia / Za zah.red. S.H. Stetsenka. Kyiv: Atika, 2010. 496 s.

⁴⁰⁹ Korniienko M. Pryntsyp dotrymanna naikrashchykh interesiv dytyny ta yoho zastosuvannia u tsyvilnomu sudochynstvi Ukrainy. *Yurydychnyi visnyk*. 2020. № 1. S. 398–404.

⁴¹⁰ Mendzhul M. Zmist pryntsypu naikrashchykh interesiv dytyny ta yoho praktychne zastosuvannia. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriya Pravo*. 2019. Vypusk 56. Tom 1. S. 87–91.

of young children (under 14 years), the rights of adolescents (from 14 to 16 years) and the rights of persons of a young age (from 16 to 18 years). Along with this, we believe that the implementation of the principle of the best interests of the child also depends on the age specifics of their personality.

According to Article 3 of the Family Code of Ukraine (hereinafter – the Family Code of Ukraine) the family is the primary and basic community, the child belongs to the family of his or her parents even when he or she does not live together with them⁴¹¹.

Article 163 of the Family Code of Ukraine stipulates that fathers have the primary right to have their minor child live with them. Fathers have the right to demand the removal of their minor child from their custody by any person who does not take her in custody on the basis of the law or a court order. The court may refuse to remove a minor child and hand her over to her parents or one of them, if it is found to be contrary to her interests.

According to Articles 11 and 12 of the Law of Ukraine “On Protection of Childhood,” the family is a natural environment for the physical, spiritual, intellectual, cultural and social development of the child and her material provision, and is responsible for creating the proper conditions for this. Each child has the right to live in the family together with her parents or in the family of one of them and to be cared for by her parents. Parents and mothers have equal rights and obligations towards their children. The subject of the main activity and the main duty of the fathers is to safeguard the interests of their child⁴¹².

Family education is a legitimate interest of the child. However, the principle of the best interests presupposes ensuring the education and development of the child in a happy family, which makes it incumbent on the authorities and the courts to study the conditions of living in a family, as well as the compliance of these conditions with the above principle.

Therefore, educating the child in a happy family is an essential part of ensuring the principle of the best interests of the child. In order to uphold this principle, the authorities support the parents and the persons who

⁴¹¹ Simeinyi kodeks Ukrainy: Zakon Ukrainy vid 10.02.2002 roku № 2947-III (v redaktsii vid 01.01.2021). URL: <https://zakon.rada.gov.ua/laws/show/2947-14#Text>.

⁴¹² Pro okhoronu dytynstva: Zakon Ukrainy vid 26.04.2001 roku № № 2402-III (v redaktsii vid 17.03.2021). URL: <https://zakon.rada.gov.ua/laws/show/2402-14#Text>.

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replace them in their proper performance of their duties in the education of the children.

In the opinion of M. Menjul, the principle of the best interests of the child means the priority consideration of the interests of the child by the parents, legal representatives of the child, the authorities, the court and other persons when taking actions or making decisions, The child's interests are not affected by the law, but by the authorities, the court and other special interests of the child when acting or taking decisions by them³⁷.

We agree with the opinion of B.I. We agree with the opinion of B.I. Andrusishin, who notes that in today's Ukraine the child must be ensured the possibility of exercising their rights prescribed by the Constitution of Ukraine, the Convention on the Rights of the Child, the Civil Code of Ukraine and other legal acts recognized in Ukraine²⁸.

According to part one of Article 14 of the Law of Ukraine "On Protection of Childhood" children shall not be separated contrary to their will, except in cases where such separation is necessary in the interests of the child and this is required by a court decision, which has gained legal force³⁹.

The preamble to the UN Convention on the Rights of the Child of 20 December 1989, ratified by Decree of the Supreme Council of Ukraine No. 789- XII of 27 February 1991 (hereafter – the Convention on the Rights of the Child), states that a child needs to grow up in a family environment for full and harmonious development. In accordance with paragraph one of Article 18 and paragraph one of Article 27 of the Convention on the Rights of the Child, the States Parties shall make all possible efforts to ensure that the principle of universal but equal responsibility for the education and development of the child is recognized. Parents or, in appropriate cases, legal guardians are primarily responsible for the education and development of the child. The best interests of the child are the subject of their primary care. The member states recognize the right of every child to a standard of living necessary for the physical, mental, spiritual, moral and social development of the child⁴¹³.

The first part of Article 9 of the Convention on the Rights of the Child stipulates that the member states shall ensure that the child shall not be separated from his or her parents against their will, except in cases where

⁴¹³ Konventsia pro prava dytyny, pryiniata Heneralnoiui Asambleieiu OON 20 lystopada 1989 roku. URL: https://zakon.rada.gov.ua/laws/show/995_021#Text.

When the competent authorities, following a court decision, determine in accordance with the applicable law and procedures that such separation is necessary in the best interests of the child. Such a determination may be necessary in one or another case, for example, when the fathers mistreat the child or do not declare her, or when the fathers live separately and it is necessary to make a decision about the child's place of residence¹⁷.

The European Court of Human Rights (hereinafter referred to as the European Court) holds that there must be a fair balance between the interests of the child and the interests of the parents and, while pursuing this balance, special attention must be paid to the most important interests of the child, which by their nature and importance must take precedence over the interests of their parents (decision in the case "Hunt v. Ukraine" of March 07, 2006)⁴¹⁴.

Two conditions must be taken into account when determining the child's main interests in each case: First, it is in the child's best interest to maintain his or her ties with the family, except when the family is particularly unhappy or clearly dysfunctional; Otherwise, it will be in the child's best interest to ensure that she grows up in a safe, secure and stable environment that is not dysfunctional (decision in the case "Mamchur v. Ukraine" of June 16, 2015)⁴¹⁵.

By the judgment of 11 June 2017 in the case "M. S. v. Ukraine, the European Court of Justice stated that in determining the best interests of the child in each particular case two aspects must be taken into account: First, the interests of the child are best served by maintaining her ties with her family, except when the family is particularly unhappy or dysfunctional; Second, it is in the child's best interest to ensure that she grows up in a safe, secure and stable environment that is not unsupervised⁴¹⁶.

In the judgment of the European Court of Justice of 02 February 2016 in the case "N.T.S. and Others against Georgia" it is noted that the obliga-

⁴¹⁴ Rishennia YeSPL u spravi «Khant proty Ukrainy» vid 07 hrudnia 2006 roku. URL: https://zakon.rada.gov.ua/laws/show/974_126#Text.

⁴¹⁵ Rishennia YeSPL u spravi «Mamchur proty Ukrainy» vid 16 lypnia 2015 roku. URL: https://zakon.rada.gov.ua/laws/show/974_a93#Text.

⁴¹⁶ Rishennia YeSPL u spravi «M. S. proty Ukrainy» vid 11 lypnia 2017 roku. URL: <https://bh.en.court.gov.ua/sud2501/pres-centr/news/%20405888>.

tion of national authorities to take steps to facilitate the separation, but it is not absolute. A parent's relationship with a child who has been living with others for some time may not be realized immediately and may require some preparatory steps to be taken. The nature of such training depends on the circumstances of each case, but the understanding and cooperation of all parties involved will always be an important component. Although the national authorities must do everything possible to facilitate such cooperation, any obligation to use the *primus* in this sphere must be limited, because the interests as well as the rights and freedoms of all concerned must be taken into account, especially the best interests of the child and her rights. If contacts with the parents may interfere with these interests or infringe on these rights, the national authorities must respect a fair balance between them (see Hokkanen, p. 58).

The best interests of the child must be paramount and, depending on their nature and seriousness, may override the rights of their parents (see, among others, Olsson (no. 2), § 90, Ignaccolo-Zenide, § 94, Plaza v. Poland, no. 18830/07, n. 71, 25 September 2011, I Manic, § 102)⁴¹⁷.

We believe that the severance of a child's family relationship with his or her biological parents means that the child is deprived of his or her roots; therefore, such measures may be taken by the state authorities and national courts only in exceptional circumstances in order to protect the best interests of the child.

Analyzing the norms of the given national legislation and the case law of the European Court of Justice, we can conclude that the education of the child in the family, natural environment for the child's development corresponds to the child's best interests, and the child's ties with the family may be severed only when the family is particularly unlovable or unreliable.

According to the first part of Article 152 of the Family Code, a child's right to appropriate parental education is ensured by the system of state control established by law³⁸.

According to Article 8 of the Law of Ukraine "On Protection of Childhood," every child has the right to a standard of living sufficient for her physical, intellectual, moral, cultural, spiritual and social development.

⁴¹⁷ Rishennia YeSPL u spravi «N.TS. ta inshi proty Hruzii» vid 02 liutoho 2016 roku. URL: http://www.aimjf.org/storage/www.aimjf.org/Jurisprudence_EN/European_Court_of_Human_Rights/CASE_OF_N.TS._AND_OTHERS_v._GEORGIA.pdf.

Parents or persons replacing them are responsible for creating the conditions necessary for the full development of the child, in accordance with the laws of Ukraine³⁹.

According to national court practice, the child is the most vulnerable party in a family conflict, since she suffers the most and loses the most. The examination of a family dispute involving children is extremely difficult, since the results of the examination of such a court dispute decide the child's share, and, therefore, the court decision must protect, first and foremost, the best interests of the child.

According to national court practice, the child is the most disadvantaged party in a family conflict, since she suffers the most. Consideration of the family dispute involving children is extremely difficult, since the results of the consideration of such a court dispute decides the share of the child, and therefore the court's decision should protect the best interests of the child in the first place.

One of the most common categories of cases involving children is court disputes over the determination of the child's place of residence. Until recently, national authorities have applied in such cases the presumption of "a child living with his or her mother" by referring to the Declaration of the Rights of the Child of 20 November 1959.

However, the ruling of the Grand Chamber of the Supreme Court of 17 June 2018 in case № 402/428/16-z (case № 14-327цс18) made a conclusion, The Declaration of the Rights of the Child is not an international treaty within the meaning of the Vienna Convention on the Law of Treaties of 23 June 1969 and Law No. 1906-IV, and also does not contain provisions for its ratification. Therefore, the Declaration of the Rights of the Child does not require a certificate of validity from the Supreme Council of Ukraine and is not part of the national legislation of Ukraine. Meanwhile, the provisions of the Convention on the Rights of the Child of 20 December 1989, ratified by the Supreme Council of Ukraine on 27 February 1991, stipulate that in all actions concerning children, regardless of whether they are carried out by public or private institutions dealing with issues of social welfare, the courts, the administrative and administrative authorities, and the law courts, The interests of the child must be protected as a matter of priority (art. 3) and must comply with the norms of the Constitution of Ukraine and the laws of Ukraine, and these norms must be

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taken into account by all courts of Ukraine when they hear cases related to children's rights⁴¹⁸.

Part three of Article 51 of the Constitution of Ukraine states that the family, children, maternity and parenthood are protected by the state⁴¹⁹.

According to Article 161 of the Family Code of Ukraine, if the mother and the father, who live separately, have not agreed on which of them will live with the minor child, the dispute between them can be resolved by the child welfare authorities or the court. When resolving a dispute over the place of residence of a minor child, the parents' commitment to fulfilling their responsibilities as parents, the individual involvement of the child in each of them, the age of the child, the health of the child and other circumstances that are of particular importance are taken into consideration³⁸.

The decision of the Supreme Court composed of the panel of judges of the Second Judicial Chamber of the Court of Civil Procedure of 14 February 2019 in case No. 377/128/18 (proceeding No. 61-44680sv18) states that "the interpretation of the first part of Article 161 of the Family Code of Ukraine indicates that when resolving a dispute regarding the place of residence of a minor child, the attitude of the parents to the child is taken into account, When resolving a dispute over the place of residence of a minor child, the parents' commitment to fulfilling their responsibilities as parents, the personal involvement of the child in each of them, the age of the child, the health of the child and other circumstances that are of particular importance are taken into account. Other circumstances that are of significant importance include, among others: personal qualities of the fathers; relations that exist between each of the fathers and the child (how the fathers fulfill their fatherly duties in relation to the child, how they take into account her interests, whether there is an understanding between each of the fathers and the child); the possibility of creating conditions for the child's education and development⁴²⁰.

⁴¹⁸ Postanova Velykoi Palaty Verkhovnoho Sudu vid 17 zhovtnia 2018 roku u spravi № 402/428/16-ts. URL: <https://reyestr.court.gov.ua/Review/77361954>.

⁴¹⁹ Konstyutsiia Ukrainy: Zakon Ukrainy vid vid 28.06.1996 roku № 254k/96-VR (v redaktsii vid 01.01.2020). URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁴²⁰ Postanova Verkhovnoho Sudu v skladi kolehii suddiv Druhoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 14 liutoho 2019 roku v spravi №377/128/18. URL: <https://reyestr.court.gov.ua/Review/79846507>.

Thus, in family disputes over the determination of the place of residence of the child, the national courts believe, and the author supports this position, that to ensure the principle of the best interests of the child it is not mandatory for the child to live together with the mother, and the implementation of this principle is to ensure the right of communication between the child and the father, parental intercourse and the due protection of the rights and interests of the child by the father and the mother.

A similar is the decision of the Supreme Court Resolution № 654/4307/19 of September 04, 2021 on the petition of the father of a minor child for the removal of her from her grandmother and her transfer to her father. The Supreme Court, in refusing to uphold the request of the father to permanently remove the child, drew the attention of the competent authorities to the obligation to ensure a system of follow-up checks in the context of the relationship of the father with the child in order to prevent a negative impact on the child, stating: “Taking the principle of the best interests of the child as the basis for resolving this dispute, the Supreme Court focuses on the fact that negligent removal of a child who is infirm at birth will not be conducive to ensuring a peaceful and stable environment for the child, will be emotional stress, will not be taken into account and her views, which together comprise the components of the principle. Living with a young child together with his or her mother and grandfather makes for a wonderful family environment at birth. Taking into account the proportionality of intrusion into the right of the person to respect for his family life, guaranteed by Article 8 of the Convention, and the norms of the third part of Article 163 of the Family Code, the father’s refusal to relinquish his child is allowed, which is necessary in this situation⁴²¹.”

Thus, when considering the fathers’ requests for the transfer of their child to them by other persons from whom they have the right to request her return, national courts, in order to protect the best interests of the child, must take into account: 1) the child’s relationship to the parents and the persons in whom the child is staying; 2) the relationship between the parents and the child; and 3) the possibility that the parents and other persons may create appropriate conditions for the child’s education. Accordingly, in a

⁴²¹ Postanova Verkhovnoho Sudu u skladi kolehii suddiv Druhoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 04 serpnia 2021 roku u spravi №654/4307/19. URL: <https://reyestr.court.gov.ua/Review/98911478>.

situation where the child is not adapted to live with her parents, the court cannot make a decision on their behalf until the authorities take steps to renew the relationship between the child and the parents and prepare the child to live together with the parents.

According to part 7 of Article 7 of the Family Code of Ukraine, a child must be provided with the opportunity to exercise her rights established by the Constitution, the Convention on the Rights of the Child, and other international treaties of Ukraine, including communication with her father, grandmother and grandfather³⁸.

Article 141 of the Family Code of Ukraine stipulates equal rights and obligations of both fathers towards the child, regardless of whether they were in love with each other. Breaking the relationship between the fathers or living separately from the child does not affect the scope of their rights or relieve them of their obligations in respect of the child³⁸.

Article 150, parts 1 and 2 of the Family Code of Ukraine stipulates that parents are obliged to educate their child to respect the rights and freedoms of other people, to love their family and home, their people, and their Motherland. Fathers are obliged to take care of their children's health and their physical, spiritual and moral development³⁸.

According to Article 151 of the Family Code of Ukraine, fathers have the primary right to have their children raised privately before other persons. The rights of fathers regarding the upbringing of the child are considered as a way for them to fulfill their duties towards the child³⁸.

According to Article 153 of the Family Code of Ukraine, mother, father and child have the right to communicate with each other without interference, except in cases where such right is limited by law³⁸.

Article 157 of the Family Code of Ukraine stipulates that the child's upbringing is decided by the parents together. The father, who lives separately from the child, is obliged to participate in her upbringing and has the right to talk to her privately. The parent with whom the child lives does not have the right to interfere with the father who lives alone to communicate with the child, as long as such communication does not interfere with the normal development of the child³⁶³.

According to part 1 of Article 159 of the Family Code, if the father with whom the child lives obstructs the father who lives alone from communicating with the child and her education, In particular, if he or she refuses

to obey the decision of the child welfare authority, the other parent has the right to appeal to the court for the removal of the disadvantage³⁸.

According to Article 15 of the Law of Ukraine “On Protection of Childhood”, a child who lives separately from her parents or one of them has the right to maintain regular personal contacts and direct contact with them. Parents who live separately from the child are required to participate in her education and have the right to communicate with her, if the court finds that such communication does not interfere with the normal education of the child³⁸.

The national legislation stipulates that when the court establishes the method of communication between the child and a parent who does not live together with the child, there must be a reasonable balance of participation by each of the fathers in the education of the child, which will not interfere with her normal development and will ensure her best interests.

Thus, the Supreme Court composed of the panel of judges of the First Trial Chamber of the Court of Civil Procedure in its ruling of 09/10/1920 (case number 753/9433/17), satisfying the claim of the child’s father for the removal of disadvantages in the communication with the child and determining the way of participation in her education, noted: “The emotional state of the child is not conditioned by the presence of the father in her life, but by the intense conflictual relations between the fathers, who use the child for the image of one another, denying the right of the son to a peaceful and happy childhood and harmonious development of the personality. Conflicts between fathers must not interfere with the interests of the child⁴²².”

In the judgment of 01 June 2020 (case № 138/96/17) the Supreme Court composed by the panel of judges of the First Trial Chamber of the Court of Civil Procedure stated, That the minor son did not express his opinion about his father’s participation in the communication with him and in his upbringing, the court did not establish, based on relevant and admissible evidence, that the psychological and mental state of the child is indicative of that communication with her father at his request did not meet the best interests of the child, and the findings of the trial court, which were accepted by the court of appeals, the possibility and feasibility of establishing the father’s

⁴²² Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 01 lypnia 2020 roku u spravi №138/96/17. URL: <https://reyestr.court.gov.ua/Review/90411045>.

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method of participation in communication with the child and in the child's education solely at the child's request r are based on assumptions not supported by relevant and admissible evidence⁴²³.

Thus, in cases where the fathers request that the way of participation in the child's upbringing be determined in order to ensure the child's best interests, the courts must take into account the emotional state of the child, Their wishes and thoughts, as long as the child's age permits, and respect a reasonable balance of each parent's participation in the child's upbringing that will not interfere with her normal development.

According to parts two and four of Article 155 of the Family Code of Ukraine, parental rights cannot be exercised contrary to the interests of the child. Parents' evasion from fulfilling their parental duties is a basis for imposing on them the liability established by law³⁸.

According to part one of Article 164 of the Family Code of Ukraine, the mother or father may be deprived of parental rights by the court if he or she Have not removed their child from the shelter or other health care facility without an important reason, and have not demonstrated parental custody of her for six months; evade their duties to educate the child; Abusive treatment of the child; chronic alcohol or drug addiction; giving in to any kind of exploitation of the child, coercion to molestation or vagrancy; convicted for committing a homicidal criminal offense against the child³⁸.

Examining the practice of national courts in cases of deprivation of parental rights, in the context of adherence to the principle of preserving the best interests of the child, we can see that that national courts are on the side of the fathers and give them time and power to change the attitude towards the education of children by placing the child welfare authorities in charge of monitoring their performance of parental duties.

One of such decisions is the decision of the Supreme Court in the collegium of judges of the Second Judicial Chamber of the Court of Civil Procedure in the case № 300/908/17 of 24 June 2019, in which the court, in denying the guardianship and foster care authority of the district state administration in satisfaction of the appeal to the children's mother for deprivation of parental rights, stated the following: "The rights of the

⁴²³ Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 01 lypnia 2020 roku u spravi №138/96/17. URL: <https://reyestr.court.gov.ua/Review/90411045>.

fathers concerning the child are akin to the rights and interests of the child for harmonious development and proper education, and, first of all, the interests of the child must be identified and taken into account, proceeding from the objective circumstances of the dispute, and only then the rights of the fathers. The Supreme Court believes that the avoidance of parents from fulfilling their duties occurs when they do not pray for the physical and spiritual development of the child, her education, preparation for independent living, including: Do not provide necessary nutrition, medical supervision, medical treatment of the child, which negatively affects its physical development as part of education; do not communicate with the child to the extent necessary for its normal self-awareness; Do not give the child access to cultural and other spiritual values; do not encourage him or her to acquire general moral standards; do not show interest in his or her inner world; do not create conditions for him or her to receive an education. These factors, both individually and in the aggregate, can be considered as a deviation from the education of the child only on condition of the guilty behavior of the parents, clear neglect of their duties. Considering that deprivation of parental rights is an extreme measure, the court may, in exceptional cases, if the guilty behavior of one of the parents or both of them is proved, taking into account the nature of the case, the personality of the father and mother, as well as other specific circumstances of the case, dismiss the petition for deprivation of these rights by advising the respondent of the need to change his or her attitude toward the upbringing of the child (children) and by placing the child welfare authorities in charge of monitoring the child's fulfillment of his or her parental responsibilities. Having taken such a decision, the court has the right to decide on the removal of the child from the care and custody authority (if this is required by her interests), but does not have to identify a specific institution⁴²⁴.

Similar is the decision of the Supreme Court composed of the collegium of judges of the First Judicial Chamber of the Court of Civil Procedure of 06 June 2020 in case № 641/2867/17-z about the deprivation of parental rights of the child's father. While upholding the ruling of the courts of the first and appellate instances without changes on the denial of satisfaction

⁴²⁴ Postanova Verkhovnoho Sudu u skladi kolehii suddiv Druhoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 24 kvitnia 2019 roku u spravi №300/908/17. URL: <https://reyestr.court.gov.ua/Review/81394213>.

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of the petition for revocation of paternity rights, the Supreme Court stated That termination of paternity rights is a last resort, and the court may, in exceptional cases, if the guilty conduct of either parent is proven, taking into account the nature of the case, the person of the father and mother, as well as other specific circumstances of the case, to refuse to approve the petition for relinquishment of these rights, After informing the respondent about the need to change his/her attitude towards the upbringing of the child (children) and leaving it up to the child welfare authorities to monitor his/her fulfilment of parental responsibilities⁴²⁵.

In Case № 712/10623/17 the Grand Chamber of the Supreme Court departed from the previous court practice regarding the priority of the principle of equal rights of the parents for the child in cases concerning the granting of permission for a minor child to travel abroad without the consent of the father. In this case the Grand Chamber of the Supreme Court concluded that the provisions on the equality of rights and duties of the parents in the upbringing of the child cannot affect the interests of the child, and that an hourly visit of the child abroad (specifying the specific period) with the assistance of the parent, with whom her place of residence has been designated and who ensures that the child enjoys the standard of living necessary for her full development, cannot indefinitely mean that the other father of the child is prohibited by law from taking part in her education and communication. In this category of cases, a generalized and formal approach is unacceptable because the very fact that one of the parents has the right to refuse to grant permission for the child to travel abroad for an hour with the other parent is a significant instrument of influence, especially in relations with former friends, which may not be used in the best interests of the child. Each case requires a detailed study of the situation, taking into account the various factors that can influence the interests of the child, including her opinion, if she is able to form her own views according to her age⁴²⁶.

The precedent of the above decision lies in the Supreme Court's critical assessment of the generalized and formal approach of the courts of the first

⁴²⁵ Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 06 travnia 2020 roku u spravi №641/2867/17. URL: <https://reyestr.court.gov.ua/Review/89131002>.

⁴²⁶ Postanova Velykoi Palaty Verkhovnoho Sudu vid 04 lypnia 2018 roku u spravi №712/10623/17. URL: <https://reyestr.court.gov.ua/Review/75266002>.

and appellate instances to the consideration of cases involving children, which can be interpreted as a violation of the best interests of the child. Since the right of one of the fathers to refuse to give permission for the child to travel abroad for an hour by another parent in most cases is not in the best interests of the child.

As a result of the conducted research, we can conclude that the approach of national courts to the consideration of cases involving children has changed and has become focused on the principle of protecting the best interests of the child.

The Supreme Court relates the protection of the best interests of the child to the observance by the judiciary of a reasonable balance of participation of each parent in the education of the child during the consideration of cases involving children, which will not interfere with her normal development and taking into account the emotional state of the child, her desires and thoughts, as long as she is able to form her own views according to her age.

An analysis of decisions of national courts in the context of upholding the principle of the best interests of the child makes it possible to summarize the case law of the Supreme Court in the protection of children and to identify the basic approaches used by national courts to uphold the best interests of the child:

1. Destroying a child's family ties with his or her biological parents means stripping the child of her roots, which is why such measures may be taken by the state authorities and by the national courts only in exceptional circumstances in order to protect the best interests of the child.

2. In family disputes over the determination of the place of residence of the child, in order to ensure the principle of the best interests of the child, it is not mandatory that the child and the mother reside together, but the implementation of this principle consists in ensuring the right to communicate with the child's parents and to have cuddles on the mother's side.

3. In cases where the fathers request that the child be handed over to them by other persons from whom they have the right to request the return of the child, the following shall be taken into account: The child's relationship to the parents and other persons with whom she is staying; the relationship between the parents and the child; the possibility of creation by the parents and other persons of appropriate conditions for the education of the child.

4. In cases concerning the establishment of the order of communication between the child and the father who does not live with the child, a reasonable balance must be maintained between each of the fathers' participation in the child's upbringing, which will not interfere with the child's normal development and will safeguard the child's best interests.

7.3. The Best Interests of the Child in the Practice of the European Court of Human Rights

The principle of the best interests of the child is enshrined in low international treaties, which are part of the national legislation of Ukraine. However, practice shows that the interpretation of this principle by national judicial and state authorities is not always correct.

In cases involving children, respect for the principle of the best interests of the child is ensured by the European Court of Human Rights (henceforth referred to as the European Court of Justice), whose decisions have precedent character for the member states.

The jurisdiction of the European Court of Justice in all matters concerning the best interests of the child is mandatory. The European Court judgments reveal approaches to the principle of the best interests of the child, which are essential in a democratic society. In this context, the study of the practice of the European Court of Justice in the sphere of the best interests of the child gains particular relevance. Among scientists, the principles of legal protection of children's rights were investigated by scientists such as B. Andrusyshyn⁴²⁷, N. Onishchenko⁴²⁹, N. Opolska^{430,431,432},

⁴²⁷ Andrusyshyn B., Shymon S. Naukovo-praktychna pidhotovka pravoznavstsv u sferi prav dytyny v NPU imeni M.P. Drahomanova. *Yurydychnyi zhurnal*. 2013. № 2. S. 37–42.

⁴²⁸ Sotsialno-pravovyi zakhyst ditei v Ukraini: monohrafiia/za red. Andrusyshyna B.I. Kyiv : Vydavnytstvo NPU imeni M. P. Drahomanova, 2017. 264 s.

⁴²⁹ Onishchenko N., Lvova O., Suniehin S. Prava i svobody dytyny: vctup do problemy Lavryk H.V. Liudynomirnist polityky spriyannia rozvytku kooperatsii. *Chasopys Kyivskoho universytetu prava*. 2013. № 2. S. 13–17.

⁴³⁰ Opolska N. Pryntsyipy pravovoho zakhystu dytyny. *Derzhava i pravo*. 2011. № 51. S. 40–45.

⁴³¹ Opolska N. Prava dytyny v Ukraini: monohrafiia, 2-he vydannia, pereroblene ta dopovnene. Vinnytsia: VNAU. 2019. S. 289.

⁴³² Opolska N. Teoretyko-pravovi zasady zabezpechennia prav i svobod dytyny: monohrafiia. Vinnytsia: PP «Edelveis i K», 2011. S. 226.

Y. Shemshuchenko⁴³³, S. Bobrovnik⁴³⁴, N. Parkhomenko⁴³⁵, S. Stetsenko⁴³⁶. Approaches of the European Court of Justice to the principle of ensuring the best interests of the child in the context of Article 8 of the Convention on the Protection of Rights and Fundamental Freedoms were examined by M. Kornienko⁴³⁷, M. Menjul⁴³⁸.

Pursuant to article 3, paragraphs 1 and 2, of the Convention on the Rights of the Child, in all actions concerning children, whether carried out by public or private institutions, Social welfare agencies, courts of law, administrative or legislative bodies, the utmost attention is given to ensuring that the interests of the child are protected as much as possible. In particular, such protection and care as is necessary for her well-being (while taking into account the rights and responsibilities of her parents, The child's guardian or other persons legally responsible for her), and for this purpose use all appropriate legislative and administrative measures⁴³⁹.

Moreover, other articles of the Convention on the Rights of the Child stipulate that the best interests of the child are protected, namely:

(1) Article 9 establishes that the member states shall ensure that the child is not separated from the parents against their will, except in cases where the competent authorities, in accordance with a court decision, determine, in accordance with the applicable law and procedures, that such separation is necessary in the best interests of the child¹.

2) Article 18 stipulates that parents or, in appropriate cases, legal guardians are primarily responsible for the upbringing and develop-

⁴³³ Aktualni problemy yurydychnoi osvity ta nauky v Ukraini: monohrafiia / za red. Shemshuchenka Yu.S. Kyiv. Vyd-vo NPU imeni M.P. Drahomanova. 2016. S. 322–344.

⁴³⁴ Bobrovnyk S. Rol prava v dosiahnenni kompromisu ta vyrishenni pravovykh konfliktiv. Diia prava: intehratyvnyi aspekt: monohrafiia. Kyiv, 2010.

⁴³⁵ Parkhomenko N. M. Rozvytok zakonodavstva Ukrainy v konteksti konstytutsionalizatsii, yevrointehratsii ta zabezpechennia prav liudyny: monohrafiia. Kyiv: In-t derzhavy i prava im. V.M. Koretskoho NAN Ukrainy, 2016. 254 s.

⁴³⁶ Stetsenko C. Suchasne ukrainske medychne pravo: monohrafiia / Za zah. red. Stetsenka S.H. Kyiv : Atika, 2010. 496 s.

⁴³⁷ Kornienko M. Pryntsyv dotrymanna naikrashchykh interesiv dytyny ta yoho zastosuvannia u tsyvilnomu sudochynstvi Ukrainy. *Yurydychnyi visnyk*. 2020. № 1. S. 398–404.

⁴³⁸ Mendzhul M. Zmist pryntsyvu naikrashchykh interesiv dytyny ta yoho praktychne zastosuvannia. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriya Pravo*. 2019. Vypusk 56. Tom 1. S. 87–91.

⁴³⁹ Konventsiiia pro prava dytyny, pryiniata Heneralnoiui Asambleieiu OON 20 lystopada 1989 roku. URL: https://zakon.rada.gov.ua/laws/show/995_021#Text.

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ment of the child. The best interests of the child are the subject of their primary care¹⁷;

(3) Article 20 stipulates that a child who is temporarily or permanently deprived of a family home or who in her own best interests cannot remain in such a home shall be entitled to special protection and assistance provided by the state¹⁷;

(4) According to Article 21, the reinforcement system must ensure that the best interests of the child are taken into account as a matter of priority¹⁷;

(5) Article 37(c) declares a humane attitude toward each child's loss of will and respect for the humanity of her person, taking into account the needs of her age. In particular, any child who has been deprived of his or her liberty shall be separated from the parents, unless it is considered in the best interests of the child that this should not be done, and shall have the right to maintain contact with his or her family through visits and correspondence, except in special circumstances³⁹¹.

(6) Article 40, paragraph 2 (b), entitles any child believed to have infringed the criminal law or to be guilty or found guilty of infringement to have the decision of the competent authority not impartially determined, An independent and impartial authority or judicial body in a fair hearing in accordance with the law in the presence of a lawyer or other appropriate person and, if it is not deemed to be so, contrary to the best interests of the child, taking into account her age or the status of her parents or legal guardians;

The 1980 Convention on the Legal and Civil Aspects of International Child Abduction enshrines that the States that signed the Convention firmly believe that the interests of children are of the utmost importance in child welfare⁴⁴⁰.

Paragraph 2 of Article 1 of the European Convention on the Exercise of Children's Rights of 1996, It is in the best interests of children to support their rights, to provide children with procedural rights and to facilitate their exercise of those rights by ensuring that children are informed and allowed to participate in judicial proceedings concerning them, either individually or through other persons or organizations⁴⁴¹.

⁴⁴⁰ Konventsiia pro tsyvilno-pravovi aspekty mizhnarodnoho vykradennia ditei 1980 roku. URL: https://zakon.rada.gov.ua/laws/show/995_188#Text.

⁴⁴¹ Yevropeiska konventsiia pro zdiisnennia prav ditei 1996 roku. URL: https://zakon.rada.gov.ua/laws/show/994_135#Text.

Thus, international normative legal documents stipulate the obligation to respect the best interests or the best interests of the child, but no international document enshrines the notion of the principle of legal protection of the best interests of the child.

According to the European practice in cases of recognition of paternity, deprivation of paternity rights, determination of the child's place of residence, removal of disadvantages in communication with the child, granting access to communication with the child, as well as in cases concerning the application of the provisions of the Convention on the Legal Aspects of International Child Abduction, the European Court of Justice has stated that the best interests of the child must be protected as a matter of priority.

The European Court found a violation of Article 8 of the Convention, in view of the failure of the authorities to take any substantive steps to ensure that the applicant has access to his child and the opportunity to participate in her education⁴⁴².

Thus, in this case the Ukrainian courts decided to refuse to return the applicant – the child's father – to the custody of his daughter, who lived with her grandmother after her mother's death, having disregarded the applicant's arguments that the child's living with her father would be in her best interests, noting that there was no evidence that the child's living with the guardian would interfere with her interests.

However, in the opinion of the European Court of Justice, the courts' opinions concerning the fact that the guardian fulfilled his duties and the applicant did not demonstrate that it is in the best interests of the child to have her living with him, are considered to be more or less supportive environment for the child's upbringing, which is not sufficient by itself to justify taking such extreme measures as separating the child from one of the parents (see, e.g., the decision to remove the child from the father's care is not enough to justify the removal of the child from the father's care). For example, the judgment in the case of *J.S. v. the United Kingdom*, cited above, para. 134⁶⁹.

Also in the case *Mamchur v. Ukraine* (judgment of 16 June 2015, application № 10383/09), the European Court stated that two conditions must be taken into account when determining the main interests of the child in

⁴⁴² Rishennia YeSPL u spravi «Mamchur proty Ukrainy» vid 16 lypnia 2015 roku. URL: https://zakon.rada.gov.ua/laws/show/974_a93#Text.

each specific case: First, it is in the child's best interest to maintain his or her ties with the family, except when the family is particularly unhappy or clearly dysfunctional; Second, it is in the child's best interest to ensure that she grows up in a safe, secure and stable environment that is not dysfunctional⁶⁹.

Therefore, the European Court of Justice considers that the principle of preserving the best interests of the child in proceedings concerning the determination of her place of residence is based on preserving the ties between the child and her family, as long as these ties ensure a safe and secure environment for her.

The European Court of Justice in its ruling of 11 June 2017 in the case "M. S. v. Ukraine" demonstrated a consistent approach in the protection of family life, the definition of "the interests of the child" and their place in the relationship between the parents, Having found a violation of Article 8 of the Convention in determining the applicant's child's place of residence and the lack of effective investigation into the verified separation of the applicant's child⁴⁴³.

This case concerned the applicant, the child's father, who, after the deterioration of relations with his spouse and separation, was denied a place of residence for the child by the Ukrainian courts, without having taken into account or duly considered the applicant's claim that the child was at risk of physical and sexual abuse next to her mother, who lives with another man.

However, the European Court, relying on the fact that the applicant's claim about the risk of physical abuse was serious and deserved more in-depth examination to determine whether there were increased risks of protection and safety of the child while living with his mother, stated that the principle set forth in the UN Declaration of Non-Detrminability of Mother and Child Separation may not be considered problematic as such, provided that it does not interfere with the decision-making process in determining the best interests of the child. However, this is what happened in this case. Due to the presumption in favor of the mother, the national courts made the scope of their assessment, limited themselves to determining the absence of "inconclusive circumstances" and did not consider further "non-inconclusive" circumstances, which could be decisive in ensuring the best interests of the child⁷⁰.

⁴⁴³ Rishennia YeSPL u spravi «M. S. proty Ukrainy» vid 11 lypnia 2017 roku. Zaiava № 2091/13. URL: <https://bh.cn.court.gov.ua/sud2501/pres-centr/news/%20405888>.

In examining the case, the European Court of Justice also looked at Article 14 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which stipulates that if the parents or persons child has a history of sexual exploitation or sexual abuse in relation to the child, the intervention procedures set forth in Article 11, paragraph 1, of this Convention shall be followed: The possibility of removing an alleged perpetrator; the possibility of removing the victim from his or her family unit. The conditions and duration of such removal are determined according to the best interests of the child⁴⁴⁴.

In addition, the European Court of Justice in its ruling of 11 June 2017 in the case “M.S. v. Ukraine” stated that today there is a broad consensus, including in international law, in support of the idea that all rulings that concern children should be safeguarded. In international law, in support of the idea that in all decisions concerning children, safeguarding their best interests must be paramount. The best interests of the child depending on their nature and seriousness can exceed the interests of their parents. In deciding matters concerning her life, a child who is able to form her own views shall be assured the right to express those views freely in all matters that concern her, the views of the child being given due weight according to her age and maturity⁷⁰.

In both cases involving Ukraine, the European Court found a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms through the failure of the judicial authorities to take into account the principle of the best interests of the child. The rulings in these cases have completely changed the approach of national courts to the consideration of cases, the subject of which is the determination of the child’s place of residence.

The case “O. C. I. AND OTHERS v. ROMANIA concerned the return of the applicant’s children on the basis of the decisions of the Romanian judicial authorities to their father, who resided in Italy, without taking into account the applicant’s arguments and evidence about the domestic violence of the father over the children. Moreover, the rulings of the national courts indicated that there was no danger of recognition of the father’s violence,

⁴⁴⁴ Konventsiiia Rady Yevropy pro zakhyst ditei vid seksualnoi ekspluatatsii 25.10.2007 roku. URL: https://zakon.rada.gov.ua/laws/show/994_927#Text.

but the national courts of Romania believed that the Italian authorities could protect the children from violations of their rights.

However, the European Court of Justice, drawing the attention of the participating states that the existence of mutual trust between the child protection authorities does not mean that the state to which the children were mistakenly returned is obliged to return them back to their families, where there is a serious risk of domestic violence due to the fact that the authorities in the state where the child was habitually resident are able to solve cases of violence against children in the home⁴⁴⁵.

Accordingly, the European Court of Justice stated that the best interests of children, which irrevocably include respect for their rights and dignity, are the cornerstone of children's protection from corporal punishment. Children cannot be subjected to corporal punishment and the State must explicitly and universally prohibit it in law and practice (see the judgment in *D.M.D. v. Romania*, §§ 50-51). In this context, the risk of domestic violence against children cannot be regarded as a mere disadvantage linked to the experience of return (see *Decision X against Latvia*, § 116)⁷².

Analysing the judgment of the European Court of Justice in the case "*O. C. I. AND OTHERS v. ROMANIA*", it should be noted that family contact between parents and children is a central part of family life, and the measures that interfere with the satisfaction of these needs must necessarily meet a general social need, which is being followed, and not to upset the fair balance that must be achieved between the respective competing interests, with priority given to the best interests of the child.

From the position of prioritizing the best interests of the child in the case "*AJic vs. Croatia*", the European Court defended the applicant. In this case, Croatian national courts refused to allow the U.S. citizen applicant to return the child to the United States after the child's mother, a Croatian citizen, took the child to Croatia. Thus, the national courts made a decision without holding any court hearing, having received an expert's opinion on whether the child would be psychologically harmed if she was returned to the States without the applicant's participation.

In this case, the European Court found that the applicant was not sufficiently involved in the decision-making process in this case, to ensure the

⁴⁴⁵ Rishennia YeSPL u spravi «O. C. I. AND OTHERS v. ROMANIA» vid 21 travnia 2019 roku. [https://www.familylaw.co.uk/docs/pdf-files/oci-and-others-v-romania-\(application-no49450_17\).pdf?sfvrsn=d12506e_a_2](https://www.familylaw.co.uk/docs/pdf-files/oci-and-others-v-romania-(application-no49450_17).pdf?sfvrsn=d12506e_a_2).

necessary protection of his interests The Court considers that his involvement was particularly important in view of the fact that these courts temporarily refused to return his son. Moreover, there is nothing to say that the applicant's participation in the expert evaluation would be against the best interests of the child. On the other hand, it could have helped to establish what is in the interests of the child. Thus, the procedural requirements of Article 8 of the Convention were not fulfilled⁴⁴⁶.

The precedence of this decision lies in the critical assessment of the actions of national courts, which did not ensure a confidential examination of the case, which is a violation of Article 6, paragraph 1 of the Convention, which provides for the right to "public examination", and caused the failure to comply with the principle of the best interests of the child. Since the national courts must ensure a sufficient level of capacity to ensure the rights of the parties to the proceedings in cases involving the return of the child to the state of permanent residence for the protection of the child's best interests, including the examination of the presence of risks of a psychological school for the child by such return.

A similar is the decision of the European Court of Justice in the case "VLADIMIR USHAKOV v. RUSSIA" on the application of the provisions of the Hague Convention due to the fact that the applicant's former spouse took their twin child to another country without any intention of her further return⁴⁴⁷.

This case concerned an applicant, a citizen of the Russian Federation, who lived in Finland under a permanent residence permit and was united with a female citizen of the Russian Federation, who had a child together. However, in the future, after the separation and deterioration of their health, a woman with the child arrived in Russia without the applicant's consent. The national courts of Russia inhibited the applicant from returning the child to Finland by formally stating that the child was integrated into the Russian society, and that the child's illnesses could cause physical harm to her if she was returned to Finland.

The European Court, finding a violation of Article 8 of the Convention, noted that in the context of an application for return, filed in accordance

⁴⁴⁶ Rishennia YeSPL u spravi «ADZhYCh PROTY KhORVATII» vid 02 travnia 2019 roku. URL: <https://www.echr.com.ua/wp-content/uploads/2019/05/rishennia-espl-adjich-proti-horvatiitekst.pdf>.

⁴⁴⁷ Rishennia YeSPL u spravi «VLADIMIR USHAKOV v. RUSSIA» vid 18 chervnia 2019 roku. URL: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-193878%22%5D%7D>.

with the Hague Convention, which, accordingly, differs from the child welfare procedure, the concept of the best interests of the child is to be assessed in the light of the notions The Convention on the Rights of the Child (art. 12), the conditions of application of the Convention (art. 13 (a)) and the existence of “grave risk” (art. 13 (b)), as well as respect for the guarantees of article 8 of the Convention⁷⁴.

In examining this case, the European Court also referred to the Explanatory Note to the Hague Convention prepared by Elisa Perez-Vera and published by the Hague Conference on International Private Law (HCCH) in 1982 (“Explanatory Note”), which stipulates the following: 1. The notion of the “best interests of the child. At first glance, the legal standard of the “best interests of the child” is so unambiguous that it seems to look more like a sociological paradigm than a specific legal standard⁷⁴.

Analyzing this decision, we can conclude that to ensure the concept of “the best interests of the child,” it is necessary to adhere to the principle of fair balance, which must exist between competing interests: The interests of the child, the two parents and the public order, with priority given to the best interests of the child. The above decision indicates that the assessment of the best interests of the child on the basis of beliefs and gender expectations is not in accordance with her interests.

Therefore, the European Court of Justice, when examining cases on the grounds and procedure for the application of the Convention on the Legal Aspects of the International Extradition of Children, determines the effectiveness of the work of the authorities in charge, The Convention for the Protection of Human Rights and Fundamental Freedoms is mandated to implement the provisions of the Convention, with priority given to the best interests of the child.

The case “M.T. v. Ukraine” concerned the applicant’s claim for recognition of his paternity, which was rejected by the national courts on the grounds of having missed the statute of limitations, without taking into account the importance of the reasons for missing the statute. However, the European Court noted that, according to the national legislation, the courts had the right to renew the time limit for the presence of valid reasons for this. When petitioning for the renewal of the time limit, the applicant argued that he had missed it for important reasons, including that he did not want to disrupt the family life of the child, who was the legal parent, until he was

prevented from having regular contact with the child. Notwithstanding the complicated factual situation of the child, which required the presence of an imaginary biological father, the legal father and the stepfather, The child's actual relationship with these three men remained completely unanalyzed and no consideration was given to whether it was in the best interest of the child to renew the statute of limitations for the applicant's claim and to examine it on its merits⁴⁴⁸.

According to the European Court of Justice, in disputes about parenthood initiated by alleged biological fathers, regardless of the freedom of judgment granted to national authorities in this area, The biological parent must not be completely excluded from his or her child's life, unless adequate reasons for protecting the best interests of the child so require.

At the same time, it should be noted that the European Court of Justice adheres to the position that, in cases concerning parenthood, the freedom of judgment of national judicial bodies must not violate the principle of preserving the best interests of the child. The European Court of Justice gives special attention to such cases as to whether the national authorities have considered the best interests of the child in order with the interests of the biological parent and other interested parties.

Examining the practice of the European Court of Justice in the context of upholding the principle of the best interests of the child, it can be seen that the latter has repeatedly upheld the right of the biological mother to see the child and the right to contact her to protect the best interests of the child.

One of these is the judgment of the European Court in *STRAND LOBBEN AND OTHERS v. NORWAY*, in which the court found a violation of Article 8 of the Convention, when national authorities decided to deprive the applicant of her custodial rights and to allow the adoptive fathers to reinforce her son.⁴⁴⁹

For example, the European Court of Justice stated that the replacement of a foster family with more far-reaching measures, such as the removal of parental duties and a permit for reinstatement, which are the result of a residual severance of ties between fathers and the child shall be used only under exceptional circumstances and may be justified only in the event that

⁴⁴⁸ Rishennia YeSPL u spravi «M.T. proty Ukrainy» vid 19 bereznia 2019 roku. URL: https://zakon.rada.gov.ua/laws/show/974_d46#Text.

⁴⁴⁹ Rishennia YeSPL u spravi «STRAND LOBBEN AND OTHERS v. NORWAY» vid 10 veresnia 2019 roku. URL: <https://lovdata.no/static/EMDN/emd-2013-037283-2.pdf>.

they were motivated by the main goal, which is the best interests of the child. The reinforcement is only possible if there is no realistic prospect of rehabilitation or family reunification, because it is in the interest of the child to be permanently placed with a new family (see *R. and H. v. the United Kingdom*, Application no. 35348/06, § 88, 31 February 2011)⁷⁶.

A similar decision of the European Court of Justice in the case of *Monika ANTKOV'YAK and Patrik ANTKOV'YAK v. Poland* of 22 June 2018, in which the applicants, the child's guardians, rescinded the decision of the national court to release the child to her biological fathers, which, in their opinion, violated their right to family life under Article 8 of the Convention.

In this case, the European Court of Justice, dismissing the complaint of the applicants due to its obvious unreasonableness, took the side of the biological parents of the child, stating, that in this case the authorities took steps aimed at encouraging family reunification so that the child would develop a bond with her biological parents. Although the Court acknowledges the emotional difficulties that a judgment of a national court may have little effect on applicants, their rights cannot take precedence over the best interests of the child (see, among others, *Görgülü v. Germany*, no. 74969/01, § 43, 26 February 2004) p)⁴⁵⁰.

Accordingly, the European Court of Justice in its decision referred to the General Comment No. 14 (2013) of the Committee on the Rights of the Child, which contains, among others, the following recommendations:

“36. The best interests of the child must be of paramount importance after all steps to be taken have been taken. The words “shall be” impose a strong legal obligation on the authorities and mean that the authorities cannot determine at their own discretion whether the children's best interests should be assessed and whether they should be given due weight as a primary consideration for any action.

37. The phrase “primary consideration” means that the child's best interests cannot be considered on the same level as other considerations. Such a strong position is justified by the special status of the child: dependence, maturity, legal status and most often the absence of a voice. Children have less opportunity than adults to argue their interests, and those involved in making decisions that affect them must be clear about their interests. If chil-

⁴⁵⁰ Rishennia YeSPL u spravi «Monika ANTKOV'YaK ta Patrik ANTKOV'YaK proty Polshchi» vid 22 travnia 2018 roku. URL: <https://laweuro.com/?p=7695>.

dren's interests are not emphasized, they are often not taken into account⁷⁷. As a result of this research we can conclude that in the European legal tradition the principle of the best interests of the child is widely used in cases involving children. Accordingly, national courts are the bodies that most frequently determine the observance of the best interests of the children and make decisions that are decisive for children and their parents.

The European Court of Justice links the best interests of the child to the observance by national judicial bodies of a fair balance, which must be achieved between the respective competing interests: the interests of the child, the two parents and public order, with priority given to the best interests of the child.

An analysis of the decisions of the European Court of Human Rights on the violation of Article 8 of the Convention makes it possible to summarize the case law of the European Court in the field of child protection and to identify its main approaches, which are used by the European Court of Justice to implement the principle of ensuring the best interests of the child:

1. In proceedings where the child's place of residence is determined, respect for the principle of the best interests of the child consists in preserving the child's ties with his or her family as long as such ties ensure a safe and secure environment for the child.

2. Family contact between fathers and children is a central component of a happy family life and of ensuring the child's best interests, and the measures that interfere with meeting these needs must necessarily meet a general social need.

3. In custody and parental care proceedings, the right of the biological mother to see the child and have contact with the child is a guaranteed part of protecting the best interests of the child.

4. In cases concerning parenthood, the principle of the best interests of the child shall not be violated by the freedom of judgment of the national judicial authorities.

5. In cases of deprivation of parental rights, the interests of guardians and parents cannot take precedence over the best interests of the child.

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The monograph provides a historical and legal and theoretical generalization and new solution to the scientific problem, which consists in conceptualizing the phenomenon of human rights and freedoms under conditions of democratic development by analyzing and theoretically conceptualizing their essence and content. Recognized the general principles and practical problems of genesis and legal security of human rights and freedoms. Produced recommendations for improving the efficiency of protection of children's rights and freedoms and improvement of legislation.

The idea of human rights has been formed over thousands of years and depended on the cultural, religious, socio-economic, political and other conditions of the development of society.

People's rights have known a long historical path: from the time of their mythological awareness – to the theoretical and scientific understanding. Rights of the first, second and third generations are differentiated according to their origin time. The first generation rights include civil and political rights. The rights of the second generation are socio-economic and cultural. Moreover, scientists argue for the existence of a group of «third generation» rights, the rights of «solidarity» – for peace, a clean environment, equal enjoyment of shared human assets, etc. The consolidation of three generations of human rights is by no means certain, but at the same time it demonstrates the successive evolution in the development of this institution, the historical link between the epochs, and the general progress in this sphere.

In Ukraine, human rights are based on the Russian Pravda, international treaties and other legal acts of the Kievan Rus'. The notion of human rights and freedoms developed significantly in the era of the kozatstvo. The Covenants and Constitutions of the Laws and Freedoms of the Zaporizhian Army of 1710 by clearly man Philip Orlik, the newly elected Hetman of the Zaporizhian Army, and between the senior officers, colonels and also called the Zaporizhian Army of 1710, include articles about the protection of the law and freedoms; The right of ownership not only of the Hetman but also of the cenchmen, priests, destitute ouds, elected and ordinary Cossacks, servants of the court and private individuals; About the

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right to elect Cossack and common squad officers, and especially colonels by free will and voting; On the right of the survivors of the Cossacks, their friends and sire children, and wives, whose husbands are at war or on military service, to be exempt from the general duties and payment of taxes.

The next important step in the proclamation of people's rights in Ukraine was the addition of the Ukrainian People's Republic and the Western Ukrainian People's Republic. The third unit of the Ukrainian Central Council voted for «freedom of speech, friendship, faith, assembly, unions, strikes, non-transcendence of persons and residence, the right and possibility of co-existence of local languages in relations with all institutions».

The period when Ukraine was a part of the USSR was not marked by great progress in the development of people's rights and freedoms. The constitutions of the URSR of 1937 and 1978 included some chapters on fundamental rights and duties of citizens, but their placement after the chapters on the principles of the state order and politics showed the priority of the state, the society over the person, the citizen. Economic and cultural rights were also pronounced.

A significant step in the development of the Ukrainian terminology of human rights was the adoption of the Constitution of Ukraine on June 28, 1996, which included Chapter 2 «Rights, Freedoms and Duties of the Individual and the Citizen,» which is fully consistent with international treaties on human rights. The 42 articles of this section directly define the rights and freedoms of people and citizen, and, as stated in Article 22, they are not exhaustive.

Examining the types of human rights and freedoms, it should be noted that most often they are divided by the sphere of their implementation in everyday life.

Human (individual) rights often include the abilities of people necessary to ensure their physical and moral-psychological (spiritual) individuality. Accordingly, individual rights are divided into physical and spiritual rights. Physical rights and freedoms: to life, personal autonomy and autonomy of private life, freedom of movement, choice of place of residence, safe natural environment, housing, etc. Spiritual rights and freedoms: the name, honor and truth, freedom of thought (worldview), freedom of speech.

Political rights and freedoms are abilities (freedoms) of a citizen to take an active part in the management of the state and in public life, to

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influence the activities of various state bodies and public organizations of political orientation. These are the right to elect and be elected to the representative bodies of state power and local self-government, the right to establish community associations and participate in their activities, the right to appeal to state bodies, freedom of demonstrations and meetings, the right to information, freedom of the press, radio and television broadcasting, etc.

Economic rights and freedoms are the abilities (freedoms) of people and a citizen to own, use and dispose of the objects of consumption and the main economic activities: property (the right to property) and its labor force (the right to choose the type of employment), to use these independently or under a labor contract (the right to work), to exercise entrepreneurship and initiative in realizing their abilities and acquiring means of subsistence by taking part in the production of material and other goods (freedom of enterprise).

Social rights and freedoms – abilities (freedoms) of people and citizen to be socially protected by the state: the right to receive adequate wages (stipends); the right to social security in case of illness, disability, loss of a year old; the right to health care and medical aid; the right to protection of motherhood and childhood; the right to social insurance; the right to vacation, the right to an adequate standard of living; the right to strike, etc.

Cultural (humanitarian) rights and freedoms – opportunities (freedoms) to preserve and develop people's national identity, access to the spiritual achievements of mankind, their appropriation, use and participation in the further development. These include the rights to: education; free choice of language of communication, education, learning and creativity; access to cultural values; use of cultural institutions; use of domestic and world achievements of culture and art; free scientific, technological and artistic creativity; protection of intellectual property; information about cultural life.

Under the conditions of the development of civil society, the right to freedom of creativity is of particular importance.

The subjective right to creative freedom is the measure (measure) of possible (permitted) behavior of an individual in the sphere of literary, artistic, scientific, technical and other types of creativity, with the aim of the best possible expression of the creative abilities of the individual, ownership, use and disposal of the results of creative activity, which

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is ensured by the measures of instructive state and non-state influence. The structure of subjective right to creativity includes the following main powers: right to property actions (right-behavior), right to another's actions (right-violation), right to protection (right-claim).

Possibility of own actions in the structure of subjective right to creativity means that an individual within the limits of the submitted subjective right can: engage in all kinds of creative activities in accordance with their interests and abilities both on a professional and non-professional basis, without any restrictions other than those established by law for the protection of public interests; simultaneously choose one or more kinds of creative activities; independently choose ideas of creative activity; independently choose means for self-fulfillment in the creative process; independently choose means for external expression of creative result; learn achievements of other creators in any field of creative activity; Join creative unions with other artists; choose the legal form of organization and form of creativity; determine their legal status in the process of creative activity; choose an image, a pseudonym, or anonymity at their own discretion; make a choice between publishing, making public the results of the creative activity or its withdrawal; give permission for the continuation of the creative idea, or its change; according to the amount of civil activity, distribute the rights to the results of the creative activity, etc.

The content of the right to other people's actions in the structure of subjective right to creativity includes the following powers: the right to create conditions for creative activity; the right to create conditions for the realization of the results of creative activity on a legal basis; the ability to use the support of the state in the implementation of creative activity and the realization of its results; the ability to receive art education; the right to independent, free, uncontrolled by the state and other structures to carry out creative activities, except in cases established by law to protect public interests; inaccessibility of use or dissemination of the results of creative activity of an individual without his/her permission, except for the cases established by law; possibility of access to the creativity of others in the composition of the cultural reserves of the nation, state, world; equal protection of rights to the results of creative activity, etc.

The right to protection in the structure of subjective right to creativity means the possibility to appeal with the help of state apparatus, and in

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some cases to the community for: to stop the infringement; to renew the legal status; to enforce the legal obligation; to bring the infringers to legal responsibility; to compensate for moral, material damage, etc.

The right to freedom of creativity is closely connected with three generations of human rights. Its connection with the first generation of human rights is manifested in the juxtaposition of the right to freedom of creativity with political rights. The right to freedom of creativity is connected with the right to unite in community organizations, the right to participate in the process of making and implementing political decisions. Mittsi, scientists can form community-based scientific organizations, creative collaborations, influence on political decision-making, protect their rights, establish contacts with other community-based organizations of other countries, join international associations, etc. Of particular importance is the link between the right to freedom of creativity and individual rights. It is manifested through the juxtaposition of the right to life and the right to respect for human dignity, the right to freedom of expression.

The right to freedom of creativity belongs to the other generation of human rights. The relationship to other second-generation rights is manifested in the fact that creativity and education are intrinsically linked to the development of science and form the basis for social progress, the right to freedom of creativity has close links with the right to education. It is one of the means of ensuring the right to freedom of literary, artistic, scientific, technological creativity and one of the ways of its realization. Acquisition of new knowledge, the development of skills and natural talent people in the process of obtaining education. Thus, the right to education is a means of ensuring creative activity, development of creative skills. In the process of education a person can be engaged in creative activity in the form of scientific research work, teaching, artistic or other creativity, that is, to realize the right to freedom of creativity. In this case, the right to education is one of the ways to realize the right to freedom of literary, artistic, scientific and technological creativity.

The relationship between the right to creative freedom and social rights is manifested through the right to work and leisure time. As the creation of an intellectual product is included in the labor function of the employee, the right to creative activity is transformed into a labor duty. The right to leisure

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time enables an employee to engage in creative or any other activity on a full-time basis. The right to a sabbatical leave is an additional guarantee of creative freedom, as the employee is temporarily released from his or her main job to complete his or her dissertation to achieve a scientific degree, write a textbook, a monograph, an anthology or other scientific work while saving his or her wages.

Among the economic rights and freedoms of people, the investigated right is closely connected with the right to the results of creative activity, the right of intellectual property, which belongs to the economic rights and freedoms. As a consequence of the right to freedom of creativity, the right to the results of creativity, the right of intellectual property can arise. The right to freedom of creativity is always superior to the right to the results of intellectual activity. On the other hand, the right to the results of creative activity and intellectual property is designed to promote initiative in the development and implementation of creative abilities of people through the ability to obtain the means to exist.

The relationship between the right to freedom of creativity and the third generation of human rights is manifested in the relationship between the right to freedom of creativity and the right to enjoy the cultural potential of humanity. As a result of providing access to the cultural resources of humanity, joint efforts of scientists create new results of creativity, objects of intellectual property, scientific and technological progress. The right to freedom of creativity is closely connected with the right of the community to cultural self-identification. Of primary importance in this process is traditional knowledge as part of the culture of the community, nation, people. The right to freedom of scientific creativity is the basis of all rights, which are consolidated by scientists as the rights of the fourth generation, indicating their interconnectedness.

In examining the system of human rights and freedoms, special attention was paid to the study of children's rights and freedoms. The monograph defines the mechanism of security for children's rights and freedoms as a system of general social and legal factors, means and steps that, interacting with each other, create the proper conditions for the realization, protection and defense of children's rights and freedoms. Its structure includes the subjects, objects, legal framework, forms, methods, guarantees, goals, legal education and legal socialization of the child.

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The most important factor in the real security of children's rights and freedoms in order for them to be recognized, respected and respected is the guarantee. Guarantees of the rights and freedoms of the child give all elements of the mechanism of security for the rights and freedoms of the child a real value for the possibility of their smooth implementation, protection from unlawful encroachments and protection from unlawful infringements. Mechanism for ensuring the rights and freedoms of the child is a prerequisite for the implementation of their guarantees, because the guarantees function through a system of bodies that are focused on protecting the interests of the child. The efficiency of functioning of the mechanism reflects the level of guaranteeing the rights and freedoms of the child. These notions are interconnected and mutually interdependent.

Guarantees of the rights and freedoms of the child is a system of well-established social, economic, political, cultural (spiritual) and legal conditions, means and methods that ensure the constant improvement of children's rights and freedoms, their protection, actual implementation and protection in case of violation (cancellation).

In the system of protection of the rights and freedoms of the child, the principle of the best interests of the child is of great importance. For the first time, the principle of the best interests of the child was enshrined in the 1989 Convention on the Rights of the Child. However, for more than twenty years international and national legislation has lacked a definition of the meaning of the principle of legal protection of the best interests of the child. Such a gap in the legislation leads to legal uncertainty in the consideration of cases involving children by state and judicial authorities.

Therefore, in Ukraine's court practice the Supreme Court relates ensuring the best interests of the child to the judicial authorities' observance of a reasonable balance between each parent's participation in the child's upbringing during the hearing of cases involving children, which will not interfere with her normal development and taking into account the emotional state of the child, her desires and thoughts, as long as she is able to form their own views according to age.

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