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LEGAL BASIS OF JUDICIAL PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE

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INTRODUCTION

The Constitution of Ukraine, while protecting a person, his or her life, health, honour and dignity, provides for the possibility of judicial recourse for the protection of violated rights to: the court and relevant international judicial institutions to which Ukraine is a party.

The essence of judicial protection of women from domestic violence is the state-guaranteed right of women to apply to the court in case of violation of their rights, interests or freedoms by domestic violence and to eliminate such violations through a court decision.

The advantages of judicial protection of women against domestic violence are:

1) the binding nature of the court decision;

2) protection is provided by a special body – the court

3) a clearly regulated procedure for determining and verifying factual circumstances and making a decision;

4) defence is carried out by qualified specialists – impartial judges.

The disadvantages of judicial protection are:

1) the lengthy duration of the dispute;

2) litigation can be emotionally and financially costly.

The ways of judicial protection of women from domestic violence are as follows:

1) issuing a restraining order against the abuser;

2) consideration of a case of domestic violence under Article 173^2 of the Code of Administrative Offences and bringing the perpetrator to administrative responsibility;

3) referring the offender to a programme for offenders;

4) applying a non-custodial measure of restraint to the perpetrator with the imposition of obligations under Article 194 of the Criminal Code of Ukraine;

5) consideration of a case on the commission of a criminal offence under Article 126^1 of the Criminal Code of Ukraine «Domestic Violence» and bringing the offender to criminal liability;

6) applying restrictive measures to the perpetrator under Section $XIII^1$ of the Criminal Code of Ukraine.

[1] Кодекс України про адміністративні правопорушення від 07 грудня 1984 р. № 80731-X. URL: http://surl.li/cmaen.

1. Application of a restraining order against an abuser as a means of judicial protection of women from domestic violence

Article 1(7) of the Law on Domestic Violence defines a restraining order against an abuser as a measure of temporary restriction of rights or imposition of obligations on the abuser established by a court and aimed at ensuring the safety of the victim». According to I.A. Gorbach-Kudri, this interpretation is incomprehensible, as it contradicts Article 24 of the same law («Special Measures to Combat Domestic Violence»), which states that a restraining order refers to special measures to combat domestic violence, and is not considered a measure of temporary restriction of rights or imposition of obligations. Moreover, the issue of ensuring the safety of the victim in this sense becomes abstract, since any domestic violence is inherently dangerous – «the physical or mental health of the victim could be or has been harmed»[2].

The Resolution of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation of the Supreme Court of 05.09.2019 in case No. 756/3859/19 states that by its nature, a restraining order is not considered a punishment, but in fact belongs to temporary measures that perform a preventive and protective function, as well as aimed at preventing the commission of violence and ensuring timely safety of persons, taking into account the risks[3].

In our opinion, a restraining order against an abuser should be defined as a special judicial measure to combat domestic violence aimed at eliminating the danger to the life and health of victims and preventing the recurrence of such violence.

The case of issuing a restraining order is subject to consideration in a separate proceeding, and therefore is regulated by the provisions of the Civil Procedure Code of Ukraine[4]. It should be noted that this case appeared in the Code of Civil Procedure of Ukraine among the list of cases of separate proceedings only after the entry into force of the Law on Domestic Violence. The expediency of conducting the proceedings under the rules of civil proceedings is due to the provision of the Code of Civil Procedure regarding the consideration of all cases that are not considered in other proceedings (part 1 of Article 19 of the Code of Civil Procedure of Ukraine). Moreover, the issuance of a restraining order under the rules of special proceedings is based on the provision that the main purpose of such proceedings is to create conditions for the exercise of personal non-property or property rights by a person (part 7 of Article 19 of the Code of Civil Procedure of Ukraine)[5].

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[2] Кодекс України про адміністративні правопорушення від 07 грудня 1984 р. № 80731-X. URL: http://surl.li/cmaen.

[3] Постанова Верховного Суду від 05 вересня 2019 р. у справі № 756/3859/19. URL: http://surl.li/cbzxi.

[4] Цивільний процесуальний кодекс України від 18 березня 2004 р. №1618-IV. URL: http://surl.li/lolf.

[5] Рекуненко Т., Удалова Н. Відповідальність кривдника в адміністративному процесі. Підприємництво, господарство і право. 2021. №2. С. 123.

As noted by V.V. Komarov and H.O. Svitlychna, special proceedings on the subject matter of the trial and the object of judicial protection are based on the absence of a dispute about law, and the object of judicial protection is primarily an interest protected by law, the subject matter of judicial activity is the establishment of certain legal facts and further exercise of subjective rights by the interested parties, as well as specific judicial proceedings[6].

2. Procedure for issuing a restraining order against an abuser as part of judicial protection of women from domestic violence

The procedure of issuing a restraining order against the abuser is a secondary measure that is carried out after the implementation of administrative procedures within the competence of the authorised police units, which did not yield the desired result. In the case of systematic domestic violence that threatens a woman's life and health, she or her interested person decides on the need for protection by filing an application with the court for a restraining order.

The peculiarities of a case on issuing a restraining order are as follows:

1) the court's task is to protect the interests of the applicant by confirming the presence or absence of a legal fact – establishing a restrictive order against the offender;

2) the parties to the case are the applicant and the interested parties;

3) the case is considered by a judge alone;

4) the court may, on its own initiative, request the necessary evidence;

5) consideration of cases of special proceedings is carried out by the court in compliance with the general rules of the Civil Procedure Code of Ukraine, without taking into account the provisions on adversarial proceedings and the limits of the trial;

6) the case is not referred to the arbitration court and is not closed due to the conclusion of a settlement agreement;

7) the case is considered with the mandatory participation of the applicant and interested parties who may use legal aid. At the same time, the absence of duly notified interested parties is not an obstacle to the consideration of a case for issuing a restraining order;

8) cases are heard in open court;

9) the absence of such institutes of litigation as recognition of a claim, counterclaim, and dismissal of a claim.

An applicant in a restraining order case is a person in whose interests a case has been filed with the court to issue a restraining order. An application for a restraining order shall be filed:

1) by a woman victim of domestic violence or her representative – in cases stipulated by the Law on Domestic Violence;

[6] Окреме провадження: монографія. За ред. В. В. Комарова. Х.: Право, 2011. С. 32.

2) by a guardian, guardianship and trusteeship authority in the interests of an incapacitated woman who has suffered domestic violence – in cases regulated by the Law on Domestic Violence.

Interested parties are entities that may have an interest in connection with the issuance of a restraining order. Interested parties in cases involving the issuance of a restraining order are the offender, as well as other individuals whose rights and interests are affected by the application for a restraining order, state authorities and local self-government bodies within their competence.

An analysis of court decisions in cases involving the issuance of a restraining order shows that most often the court involved the abuser as an interested party, in some cases – the applicant's husband, against whom the abuser also commits domestic violence (decision of the Kryvyi Rih District Court of Dnipro Region of 22. 02.2022 in case No. 177/296/22)[7], Brovary District Department of the Main Directorate of the National Police in Kyiv Region (decision of the Brovary City District Court of Kyiv Region of 04.02.2022 in case No. 361/10709/21)[8].

In accordance with Article 350[4] of the Code of Civil Procedure of Ukraine, an application for a restraining order must contain, in addition to general information about the applicant and the person concerned, the circumstances that indicate the need for the court to issue a restraining order and the evidence supporting them (if any). Article 3(2)(3)(12-1) and (14) of the Law of Ukraine «On Court Fees» stipulate that no court fee is payable for filing an application for a restraining order. An application for a restraining order is sent to the court located at the place of residence (stay) of the affected person, and if the said person is in an institution belonging to general or specialised support services for affected persons, at the location of this institution.

The entities empowered to issue a restraining order against an abuser are local general courts, which are established in one or more districts or districts in cities, or in a city, or in a district (districts) and city (cities)[9].

The court must consider the case for a restraining order no later than 72 hours after the application for a restraining order is received by the court. However, judges do not comply with this rule. The Unified State Register of Court Decisions shows that cases on the issuance of a restraining order take much longer to be considered.

In order to protect herself from domestic violence, a woman must provide evidence of the violence committed against her. If bodily injuries have been inflicted, a woman must document the beatings by calling an ambulance or visiting a trauma centre. It is important to preserve the correspondence, as a printout of text

[7] Ухвала Криворізького районного суду Дніпропетровської області від 22 лютого 2022 р. у справі N 177/296/22. URL: http://surl.li/dbaju

[8] Рішення Броварського міськрайонного суду Київської області від 04 лютого 2022 р. у справі N 361/10709/21. URL: http://surl.li/dbaka.

[9] Про судоустрій і статус суддів: Закон України від 02 червня 2016 р. № 1402-VIII. URL: http://surl.li/oxnh.

messages or messages in various messengers submitted to the police or court may be the basis for a restraining order[10].

As follows from the Supreme Court's Ruling of 28 April 2020 in case No. 754/11171/19, when deciding on the issuance of a restraining order, courts pay attention to fairly obvious signs of domestic violence and are primarily guided by the facts of a previous appeal to the National Police regarding the commission of violent acts of physical, sexual and psychological violence. In this Resolution, the Supreme Court noted that when making decisions on issuing a restraining order, in order to ensure effective and efficient protection, courts should be guided by the risk of a high probability of continuation or recurrence of domestic violence, causing grave or particularly grave consequences of its commission against the victim. Prior to applying to the court for a restraining order, the victim, as stated in the case, had repeatedly applied to police officers with a request to open criminal proceedings, to the Service for Children and Families of the Desnianskyi District State Administration in Kyiv, and to the Centre for Social Services for Families, Children and Youth of the Desnianskyi District State Administration in Kyiv[11]. In other words, prior to applying to the court for a restraining order, the victim had repeatedly used out-of-court mechanisms to protect herself from domestic violence. Taking into account the above conclusions of the court, T.A. Stoyanova and L.A. Ostrovska are of the opinion that it is quite common practice in these cases that the court issues a restraining order when there is evidence of the previous use of extrajudicial mechanisms of protection against domestic violence, and only in case of continued actions or inaction on the part of the abuser, the courts decide to issue a restraining order[12].

The problem of proof in cases of domestic violence, especially in the first cases of such actions, is one of the most pressing, since in most situations only the perpetrator and the victim are present during the commission of domestic violence, which leads to the limitation of proof to the explanations of these persons. The victim is usually unaware of the moment of domestic violence in order to «prepare» for it and make audio or video recordings accordingly. At the same time, in court, the abuser may deny the fact of domestic violence, as well as the victim may exaggerate the actions of the abuser or even slander him/her. In our opinion, in order to eliminate such situations in cases of domestic violence, the most effective means of proof may be a forensic psychological examination with the use of a polygraph. Such an examination of the perpetrator and the victim should be mandatory in the following

[10] Сидорчук Ю. М. Проблематика захисту прав жінок від домашнього насильства в Україні. Юридичний науковий електронний журнал. 2020. № 7. С. 146-148. URL: http://lsej.org.ua/7_2020/38.pdf.

[11] Постанова Верховного Суду від 28 квітня 2020 р.у справі № 754/11171/19. URL: http://surl.li/ccaie.

[12] Стоянова Т. А., Островська Л. А. Перешкоди у застосуванні обмежувального припису як засобу протидії домашньому насильству: національна судова практика та практика Європейського суду з прав людини. Наукові праці Національного університету «Одеська юридична академія». 2021. № 28. URL: http://surl.li/ccaix.

cases: 1) the case contains only the explanations of the abuser and the victim; 2) the abuser denies the fact of domestic violence.

The decision to apply a restraining order or to refuse to apply a restraining order is made based on the results of a risk assessment, which is justified by an assessment of the likelihood of continuation or recurrence of domestic violence, the occurrence of grave or particularly grave consequences of its commission, as well as the death of the victim (Article 1(1)(9) of the Law on Domestic Violence)[13].

3. Consolidated system of risk assessment by courts when considering applications for restraining orders in judicial protection of women from domestic violence

Currently, there is a need to develop a consolidated risk assessment system for courts, as the monitoring conducted by La Strada-Ukraine shows that a formal approach to risk assessment is quite common in the law enforcement practice of courts when considering applications for restraining orders[14]. This is due to the absence of an approved risk assessment system that can be used by judges. Undoubtedly, by analogy with the law, judges may use the form for assessing the risks of domestic violence developed by the Order of the Ministry of Social Policy and the Ministry of Internal Affairs of 13.03.2019 No. 369/180 «On Approval of the Procedure for Conducting a Risk Assessment of Domestic Violence» for police officers in case of establishing the need for an urgent restraining order. However, the approval of a domestic violence risk assessment form for judges would greatly facilitate their work and allow them to assess the situation more objectively.

It was the NGO La Strada-Ukraine that, taking into account the experience of the United States, developed recommended questions in the judicial training programme that should be considered when assessing the risk faced by a victim of domestic violence, namely

1. Does the abuser have access to firearms and does he/she keep them at home?
2. Has the abuser ever used or threatened to use a weapon against the victim?
3. Has the perpetrator ever attempted to strangle or drown the victim?
4. Has the abuser ever threatened or attempted to kill the victim?
5. Has the physical violence become more frequent or severe in the past year?
6. Has the abuser ever forced the victim to have sexual intercourse?
7. Does the abuser try to control most of the victim's actions?
8. Does the perpetrator exhibit persistent or violent jealousy?
9. Has the abuser ever attempted suicide or shown suicidal ideation?

[13] Про запобігання та протидію домашньому насильству: Закон України від 07 грудня 2017 р. № 2229-VIII. URL: http://surl.li/bfchj.

[14] Моніторинг ситуації реагування системи правосуддя на вчинення домашнього насильства та насильства за ознакою статті. Проєкт ЄС «Право-Justice». 2019. URL: https://www.dcaf.ch/sites/default/files/publications/documents/Ukrainian%202019%20PRAVO%20Monitoring%20report.pdf.

10. Does the victim think that the perpetrator will attack or attempt to take her life again? (Note: a «No» answer does not indicate a low level of risk, while a «Yes» answer is considered to be quite high).

11. Is there a restraining order, criminal or civil proceedings against the abuser?[15]

In our opinion, the following questions should be added to these:

1. Does the perpetrator have access to domestically produced devices for firing cartridges equipped with rubber or similar non-lethal projectiles?

2. Has the offender been subject to an urgent restraining order before?

3. Has the perpetrator been prosecuted for animal cruelty?

4. Is the offender characterised positively at the place of work (study)?

Undoubtedly, judicial discretion is an important component for judges dealing with domestic violence cases, as it «allows for the application of mostly general legal instruments to the specific nuances of individual cases». At the same time, judicial discretion «can be (and often is) influenced by stereotypes that can be detrimental to the safety of the victim and the responsibility of the perpetrator»[16].

4. Safety guarantees for women victims of domestic violence

One of the most pressing issues is the issue of guarantees of the safety of the victim in the courtroom and the court premises, as stressed by Article 56(1) of the Istanbul Convention. Complementing the conventional provisions, the EU Victims of Crime Directive of 2012 emphasises the guarantees of protection of victims from intimidation, retaliation and other harm by the accused or suspect, as well as from harm caused during criminal prosecution and court proceedings, and requires states to make sufficient arrangements to prevent contact between victims and their family members (if necessary) and the offender on the territory of the court where criminal proceedings are being conducted, unless such contact is necessary[17].

Typically, courts of first instance in Ukraine have narrow corridors, which means that the victim has to cross paths with the perpetrator both before and during the court hearing, which can lead to repeated trauma. This is also caused by the actual absence of court bailiffs in the court administration who could provide the necessary protection measures in the courtroom. As rightly noted by L. Mann and T. Buhaiets, these shortcomings can be eliminated by: conducting remote hearings via videoconference with the victim in another courtroom; providing the victim with a police escort to the courtroom and home; hearing the victim and the offender individually to avoid their meeting; placing partitions in the courtroom[18].

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[15] Верховний Суд Міннесоти, Комітет гендерної рівності (Комітет із питань рівноправ'я та правосуддя). Процесуальний посібник для персоналу суду. 2009. С. 56.

[16] Запобігання домашньому насильству щодо жінок і боротьба з цим явищем: навчальний ресурс для підготовки правоохоронців та працівників суду. 2016. С. 37.

[17] Directive 2012/29/eu of the european parliament and of the council of 25 October 2012. Official Journal of the European Union. URL: http://surl.li/cfkrd.

[18] Манн Л., Бугаєць Т. Стандарти й методика оцінки ризиків для різних зацікавлених сторін в Україні: подальші кроки реалізації міжнародних стандартів щодо гарантування безпеки постраждалих від насильства стосовно жінок та домашнього насильства. 2020. С. 29-30. URL: http://surl.li/cfkrl.

In our opinion, the most acceptable form of guaranteeing the safety of the victim, which can be implemented in Ukrainian judicial proceedings, is to hold court hearings in domestic violence cases via videoconference in the following order: the offender is present in the courtroom, and the victim participates in the case via videoconferencing from the courtroom or outside the courtroom, for example, using the Easycon service.

After considering the application for a restraining order, the court is obliged to decide to satisfy the application or to refuse to satisfy it. If the application is granted, the court issues a restraining order in the form of one or more measures to temporarily restrict the rights of the perpetrator of domestic violence, as set out in Article 26(2) of the Law on Domestic Violence, for a period of one to six months.

If the offender has not reached the age of majority on the day the order is issued, the court may not impose restrictions on the right to reside or stay in the place of his or her permanent residence or stay.

After the court decision is announced, a copy of it shall be handed to the parties to the case present at the court hearing. A copy of the court decision shall be sent by registered mail with acknowledgement of receipt immediately, but not later than the next day after the day of the decision.

The judge informs the authorised units of the National Police at the victim's place of residence (stay) about the issuance of a restraining order against the offender in order to register him or her for preventive monitoring, and also notifies the district, district in the cities of Kyiv and Sevastopol state administrations and executive bodies of village, settlement, city, district in cities (if established) councils at the victim's place of residence (stay).

Based on the results of the risk assessment, the court may extend the restraining order for a period not exceeding six months after the expiry of the period determined by the court decision. However, the term may be extended only once.

5. Application of the programme for perpetrators as a way of judicial protection of women from domestic violence

The Istanbul Convention explicitly states the need to introduce or support programmes that would be applied to perpetrators. The Convention distinguishes between two types of such programmes: one programme is aimed at teaching perpetrators of domestic violence non-violent behaviour in interpersonal relationships in order to prevent further violence and change violent behaviour; the second programme is characterised as therapeutic and should be aimed at preventing recidivism by offenders, especially by perpetrators of sexual offences[19].

In Ukraine, legislation provides for the possibility of completing the first type of programme. The Law on Domestic Violence provides for a programme for perpetrators, which includes a set of measures based on the results of a risk assessment and is aimed at correcting the perpetrator's violent behaviour,

[19] Конвенція Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу із цими явищами. URL: http://surl.li/bfccq.

developing a new, non-aggressive psychological pattern of behaviour in private relationships, taking responsibility for their actions and their consequences, including child-rearing, and eliminating discriminatory views about the social role and responsibilities of women and men.

The methodological principles and specific features of the programme are reflected in the Model Programme for Offenders, approved by Order of the Ministry of Social Policy of Ukraine No. 1434 of 1 October 2018.

The procedural aspects of referring offenders to the programme for offenders are contained in the Code of Administrative Offences, the Criminal Code and the Criminal Procedure Code. Thus, the court has the opportunity to apply this special measure both in criminal proceedings and in proceedings on administrative offences.

As enshrined in Article 39^1 of the CAO, the possibility of applying such a measure is provided for alongside the imposition of a penalty for an administrative offence in the case of domestic or gender-based violence, i.e. for an offence under Article 173^2 of the CAO. Pursuant to Article 194 of the CPC, the court may, in the interests of a woman victim of a domestic violence crime, apply a restrictive measure to a person suspected of committing the above criminal offence, such as referral to a programme for abusers.

Thus, in comparison to proceedings on administrative offences, in which the judge is authorised to refer the offender to the programme only in the case of domestic or gender-based violence, i.e. if the person is found guilty of an offence under Article 173^2 of the Code of Administrative Offences. At the same time, in criminal proceedings, the court is authorised to do so in relation to a person suspected of committing a domestic violence offence, even before the person's guilt is established in court[20].

In our opinion, the right of the court to refer a person who is only suspected of committing domestic violence to a programme for abusers is premature and negates the principle of presumption of innocence of a person in committing a crime until the person's guilt is established by a court decision. We believe that a woman's right to protection from domestic violence should be balanced with the right of a person suspected of committing domestic violence to be protected from trumped-up charges. Unfortunately, appeals to law enforcement agencies and courts are used not only as a defence mechanism when physical and/or psychological violence is actually committed, but also as a means of manipulation and further use of a decision in a domestic violence case to restrict parent-child contact and deprive parents of parental rights.

In practice, it is not uncommon for women to file reports with law enforcement agencies about a criminal offence of domestic violence in order to manipulate and harm their husbands' image or business. For example, a woman, having divorced

[20] Берендєєва А. І., Томіна В. Ю. Направлення кривдника на проходження програми для кривдників у контексті боротьби з домашнім насильством в Україні. Юридичний науковий електронний журнал. 2022. № 1. С. 172.

her husband and having a financial interest in his property and business, threatened to deprive him of everything after repeated quarrels. To implement her intention, she filed a report with the police about domestic violence against her, attaching all the supporting medical certificates that allegedly indicated that she had been injured. After entering the information about the criminal offence into the Unified State Register of Pre-trial Investigations, the woman could not imagine that her plot would be revealed later. Despite the fact that law enforcement agencies are generally reluctant to investigate these cases, investigators conducted a number of active investigative (search) actions in the situation described. In the course of the investigation, it was established that the man was actually on a business trip abroad during that time period, as evidenced by the following evidence[21].

The scope of the restraining order and its comparison with other similar institutions is rightly considered one of the most difficult issues for law enforcement. Simultaneously with the Law on Domestic Violence, the Law «On Amendments to the Criminal and Criminal Procedure Codes of Ukraine to Implement the Provisions of the Istanbul Convention» was adopted[22], which supplemented Article 194 of the CPC of Ukraine with a new part that enshrined the possibility of the court to apply, in addition to its general duties, restrictive measures in the process of considering a motion for a preventive measure against a person suspected of committing a criminal offence related to domestic violence.

These types of restrictive measures include

– a ban on staying in a place of joint residence with a person who is a victim of domestic violence;

– Restrictions on communication with a child in cases where domestic violence has been committed against the child or in the child's presence;

– prohibition to approach within a specified distance to a place where a person who is a victim of domestic violence may permanently or temporarily reside, systematically or temporarily stay for work, study, treatment or other reasons;

– prohibition of telephone conversations, correspondence with a person who is a victim of domestic violence, other contacts by means of communication or electronic communications in person or with the assistance of third parties;

– referral to treatment for alcohol, drug or other addictions, diseases that are dangerous to others, referral to a programme for offenders.

These obligations are imposed by the court for a period of up to two months and, if necessary, may be extended at the request of the prosecutor.

The court also has the right, along with the restrictive measures that may be applied by the court to an abuser who is solely a suspect in the commission of a domestic violence crime, to apply identical restrictive measures to a convicted

[21] Рішення ЄСПЛ стосовно застосування домашнього насильства в Україні та інших країнах. URL. http://surl.li/cdivu.

[22] Про внесення змін до Кримінального та Кримінального процесуального кодексів України з метою реалізації положень Конвенції Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу з цими явищами: Закон України від 06 грудня 2017 р. № 2227-VIII. URL: http://surl.li/hsvg.

person for a domestic violence crime, imposing a punishment that does not involve imprisonment or in the case of his or her release from criminal liability or punishment.

As noted by A.M. Yashchenko, restrictive measures of a criminal law nature are currently provided for by the criminal legislation of the vast majority of European countries. For example, they are regulated by the criminal laws of the French Republic, the Kingdom of Spain, the Republic of Poland and many other countries[23].

It is impossible to ignore the fact that according to the disposition of Article 91[1] of the Criminal Code of Ukraine, the court has the right to apply restrictive measures, but it has no obligation to do so, and therefore certain subjective factors may be involved[24].

Restraining orders can only be applied in criminal proceedings. This is the difference between them and restraining orders, which can be applied in civil proceedings. From the point of view of the victim, the difference is that for a court to apply a restraining order, an application to the court by the victim or his or her representative is required. Restraining orders, moreover, may be applied without the victim's application. This is particularly important for the protection of victims of domestic violence that has reached the level of a crime. Pre-trial investigations and court proceedings can take a long time, so the issue of stopping ongoing violence is extremely serious, as it is not uncommon for women victims to be unable to apply for a restraining order on their own for a variety of reasons[25].

We fully support the scientific opinion that restraining orders are virtually identical to restrictive orders, which are applied to a person who is a suspect or who has committed a crime related to domestic violence in the event of a non-custodial sentence or release from criminal liability or punishment. In other cases, a restraining order is applied. These cases include bringing the perpetrator to administrative responsibility and situations where he or she has not yet been brought to justice at all or has not been notified of suspicion of committing a criminal offence[26].

6. Practice of international judicial bodies in cases of on domestic violence

A special place is given to the practice of international judicial and quasi-judicial bodies in cases of domestic violence, namely, the decisions of the UN Committee

[23] Голіна В. В. Запобігання та протидія домашньому насильству: стан і перспективи його подолання в Україні. Організаційно-правові засади запобігання домашньому насильству: реалії та перспективи: матеріали круглого столу (31 травня 2019 р.). Запоріжжя: КПУ, 2019. С. 40-43.

[24] Полянська Є. А. Обмежувальні заходи, що застосовуються до осіб, які вчинили домашнє насильство. Матеріали V Міжнародної науково-практичної конференції «Реформування правової системи в контексті євроінтеграційних процесів» (Суми, 21–22 травня 2020 року) у 2 частинах. Ч. 2. С. 356.

[25] Довгунь К. В. Адміністративно-правові засади діяльності суб'єктів, що здійснюють заходи у сфері запобігання та протидії домашньому насильству»: дис. на здобуття наук. ступеня канд. юрид. наук: 12.00.07. Київ. 2021. С. 131.

[26] Рекуненко Т., Удалова Н. Відповідальність кривдника в адміністративному процесі. Підприємництво, господарство і право. 2021. №2. С. 123.

and the decisions of the ECHR. The UN Committee is an expert body of the United Nations formed to monitor compliance with the provisions of the UN Convention on the Elimination of All Forms of Discrimination against Women. The UN Committee is composed of independent experts – universally recognised specialists in the field of human rights – who are «nominated and elected by States Parties, taking into account equitable geographical distribution and representation of the various forms of civilisation and of the underlying legal systems». One of the functions of the UN Committee is to receive and consider communications (individual complaints) from or on behalf of individuals (citizens) or groups of individuals claiming to be victims of a violation by a State party of the rights set forth in Articles 1-7 of the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination against Women, and to investigate grave or systematic violations of these rights, provided that there is reliable information that they have been committed.

The UN Committee considers communications in two stages: the admissibility stage and the merits stage. At the admissibility stage, the UN Committee determines whether the complaint meets the general requirements that it must meet. The merits stage is completed by the UN Committee's decision on whether there has been a violation of the rights under the Convention on the Elimination of All Forms of Discrimination against Women.

Ukraine's ratification of the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination against Women has enabled every person under the jurisdiction of Ukraine to apply to the UN Committee and defend violated rights at the international level in case of ineffective protection of a person from domestic violence and exhaustion of all national remedies.

The UN Committee has not yet considered any cases against Ukraine, but it has considered several cases of domestic violence against women, the conclusions of which should not be ignored by the courts when considering cases related to domestic violence: A.T. v. Hungary (Communication no. 2/2003); Shahide Gökçe v. Austria (Communication no. 5/2005); Irfan Yildirim v. Austria (Communication no. 6/2005); N.S.F. v. the United Kingdom (Communication no. 10/2005).

In all these cases, the UN Committee came to the same conclusion about the need to hold states accountable for the actions of individuals if they (states) fail to properly prevent human rights violations, investigate and punish cases of domestic violence, and provide compensation to victims of such violence. The principles of combating domestic violence, enshrined in law, should be supported in their practical activities by judicial, law enforcement and other state bodies that implement the relevant obligations of the state. It should be noted that the decisions of the UN Committee adopted in relation to other countries are not binding for Ukraine, but the principles of preventing and combating domestic violence defined in them are the initial guidelines for state policy and law enforcement.

In the ECHR case law, domestic violence is recognised as a violation of the right to life, the right to be free from inhuman or degrading treatment, the right to respect for private and family life, the right to an effective remedy, and the right to be free

from discrimination, in particular on the grounds of gender and age. The state is found guilty for allowing violations of fundamental human rights by individuals, for failing to fulfil its positive obligations to respect these rights and for failing to act with due diligence towards persons under its jurisdiction in order to prevent domestic violence. Violations of human rights in situations of domestic violence established by the ECtHR in the decisions of A. v. the United Kingdom (1998), Kontrova v. Slovakia (2007), Bevakva and S. v. Bulgaria (2008), Branko Tomasik and others v. Croatia (2009), Opuz v. Turkey (2009), E. S. and others v. Slovakia (2009), A. v. Croatia (2010), Hajduova v. Slovakia (2010), Talpis v. Italy (2017), Volodina v. Russia (2019), Buturuga v. Romania (2020) and others. Art. 17 of the Law of Ukraine «On the Execution of Judgments and Application of the ECHR Practice» allows national courts to apply the European Convention on Human Rights and the ECHR practice as a source of law in the course of consideration of cases[27].

For the first time, the problem of domestic violence in Ukraine, in particular against women, was highlighted in the ECHR judgment of 03 September 2020 in the case of Levchuk v. Ukraine. The applicant gave birth to three children and received social housing. After some time, her husband began to abuse alcohol and physically abuse her. As a result, the Levchuks divorced, but lived together in an apartment. Levchuk, continuing to be subjected to violence, appealed to the police for protection, but this had no positive result. Eventually, the applicant tried to evict her ex-husband from the social housing on the grounds that he had violated the rules of cohabitation. The court of first instance upheld the claim, but the appellate court overturned this decision and dismissed the claim. The appellate court noted that Levchuk had failed to prove the circumstances of her ex-husband's systematic violation of the cohabitation rules. The cassation instance upheld the decision of the court of appeal.

Having failed to obtain protection of her rights at the national level, Levchuk applied to the ECtHR and complained that the Ukrainian courts had taken a too formal approach to her case, as it appeared that individuals such as her ex-husband could commit violence with impunity. Ultimately, the ECtHR concluded that the applicant's right to respect for private and family life had been violated and found that the state had failed to fulfil its obligations to adequately protect the applicant from domestic violence. The Court concluded that by rejecting the applicant's claim for the eviction of her ex-husband, the domestic judicial authorities had failed to carry out a comprehensive analysis of the situation and the risk of further psychological and physical violence faced by the applicant and her children. The Court also pointed out that the proceedings had been carried out for more than two years at three levels of jurisdiction, during which the applicant and her children had been under the threat of ongoing violence. Therefore, a fair balance had not been struck between all the competing private interests. The reaction of the civil courts to

[27] Про виконання рішень та застосування практики Європейського суду з прав людини: Закон України від 23 лютого 2006 р. № 3477-IV. URL: http://surl.li/umbl.

the applicant's action for the eviction of her previous husband was not consistent with the State's positive obligation to ensure that the applicant was adequately protected from domestic violence...». The Court also emphasised that the problem of domestic violence, which can have various manifestations – from physical violence to sexual, economic, emotional or verbal abuse, goes beyond the circumstances of a particular case. It is considered to be a general problem that affects all Member States in one way or another, and which is not always on the surface, as it is often reflected in personal relationships or closed chains[28]. The ECHR awarded Levchuk non-pecuniary damage in the amount of EUR 4,500 and EUR 1,150 in legal costs.

This decision of the ECtHR has once again drawn attention to the issue of combating domestic violence and made the discussion about the importance of ratification of the Istanbul Convention by Ukraine relevant. However, compared to most cases related to domestic violence, Levchuk v. Ukraine is not about investigating cases of ill-treatment, but about eviction[29].

The ECHR judgment in Levchuk's case served as the basis for a national review of her case by the Grand Chamber of the Supreme Court, which on 27 April 2021 ruled to partially satisfy the application (taking into account the ECHR's findings) and sent the case to the appellate instance to correct the deficiencies in the assessment of the factual circumstances of the case. The decision of the Rivne Court of Appeal of 08 February 2022 upheld the decision of the Rivne City Court of Rivne Region of 04 April 2017, which evicted a man who had been committing domestic violence for a long time from his apartment without providing other housing.

Effective access to justice is therefore a fundamental right enshrined in numerous instruments within the universal human rights framework. The UN Committee has formulated six interrelated elements of access to justice, which are considered key to the justice system. These are: justiciability; availability; accessibility; good quality; accountability; and provision of remedies to victims.

Thus, the ways of judicial protection of women from domestic violence allow to protect the rights and interests of victims. These measures are aimed at correcting the offender by making him/her think about his/her behaviour towards the victim and preventing him/her from committing new violent crimes. The existence of problematic issues in judicial practice regarding the understanding and application of measures to combat domestic violence calls for further theoretical and practical development of ways to improve them.

CONCLUSIONS

The author substantiates that the essence of judicial protection of women against domestic violence is the possibility of women guaranteed by the State to apply to

[28] Рішення Європейського Суду з прав людини від 03 вересня 2020 р. справі «Левчук проти України» (Заява № 17496/19). URL: http://surl.li/cdiil.

[29] Фулей Т. Застосування судами застарілих законодавчих норм як перешкода для забезпечення доступу до правосуддя. Підприємництво, господарство і право. 2021. № 2. С. 186.

court in case of violation of their rights, interests or freedoms by domestic violence and to eliminate such violations through a court decision.

The definition of «restraining order against the offender» as a special judicial measure to combat domestic violence aimed at eliminating the danger to the life and health of victims and preventing the recurrence of such violence has been improved.

The author identifies the existence of a problem of proof in cases involving the issuance of a restraining order, since during the commission of domestic violence only the offender and the victim are usually present, which leads to the limitation of proof to the explanations of these persons. It is determined that one of the most effective means of proof in such cases may be the conclusion of a forensic psychological examination with the use of a polygraph, which should be mandatory in the following cases: 1) the case contains only the explanations of the abuser and the victim; 2) the abuser denies the fact of domestic violence.

It is stated that the regulatory approval of the form for assessing the risks of domestic violence by judges when considering the issue of a restraining order, which is currently absent, would help to eliminate the formal approach of judges in determining such risks. The author formulates her own questions which are proposed to be included in the list of questions in this form, namely: 1. Does the offender have access to domestically produced devices for firing cartridges equipped with rubber or similar non-lethal projectiles? 2. Has the offender been subject to an urgent restraining order before? 3. Has the perpetrator been prosecuted for animal cruelty? 4. Is the abuser positively characterised at the place of work (study)?

In order to guarantee the safety of a woman victim of domestic violence during the trial, as stressed by Article 56(1) of the Istanbul Convention, it is argued that the most acceptable form is to hold a court hearing via videoconference in compliance with the following procedure: the abuser is present in the courtroom, and the victim participates in the case via videoconferencing from another court or outside the courtroom, for example, using the Easycon service.

In administrative offence proceedings, the judge is entitled to refer the offender to a standard programme aimed at changing violent behaviour, generating socially acceptable norms and humanistic values only if the offender is found guilty of an offence under Article 173^2 of the Code of Administrative Offences. At the same time, in criminal proceedings, the court may apply similar powers to the offender before establishing his/her guilt in a court decision. The author substantiates that the right of a court in criminal proceedings to refer a person who is only suspected of committing domestic violence to a standard programme for offenders is premature and negates the principle of presumption of innocence.

SUMMARY

The article examines the essence of judicial protection of women from domestic violence, which is defined as the possibility of women to apply to court guaranteed by the State in case of violation of their rights, interests or freedoms by domestic violence and elimination of such violations by means of a court decision. The author identifies the advantages and disadvantages of such a process. The ways of judicial

protection of women from domestic violence are outlined. The author improves the definition of «restraining order against the offender» as a special judicial measure to combat domestic violence aimed at eliminating the danger to the life and health of victims and preventing the recurrence of such violence. The author identifies the existence of a problem of proof in cases involving the issuance of a restraining order, since during the commission of domestic violence only the offender and the victim are usually present, which leads to the limitation of proof to the explanations of these persons. It is determined that one of the most effective means of proof in such cases may be the conclusion of a forensic psychological examination with the use of a polygraph, which should be mandatory in the following cases: 1) the case contains only the explanations of the abuser and the victim; 2) the abuser denies the fact of domestic violence. It is stated that the statutory approval of the form for assessing the risks of domestic violence by judges when considering the issue of a restraining order, which is currently absent, would help to eliminate the formal approach of judges in determining such risks. The author formulates her own questions which are proposed to be included in the list of questions in this form.

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