

## Participation of the Prosecutor in Non-Criminal Proceedings: ECtHR Case Law and National Context

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### Abstract

*The article analyses the grounds for the prosecutor's participation in civil, commercial and administrative proceedings in Ukraine through the prism of European standards of fair trial. In the article the author uses the methods of analysis and synthesis, systemic-structural and logical-legal methods, as well as the methods of teleological and evolutionary interpretation of ECHR jurisprudence.*

*Structurally, the article is divided into three parts. In the first part, the author analyses the pan-European approaches to the participation of prosecutors in non-criminal proceedings as reflected in the documents of the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers of the Council of Europe (CoE), the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE). In the second part, the author analyses the participation of prosecutors outside the criminal justice system in the context of certain guarantees of the right to a fair trial as provided for in Article 6(1) of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) on the interpretation and application of this Article. The third part of the article analyses the recent judgment of the ECHR in the case of Shmakova v. Ukraine, which is assessed from the perspective of the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the ECHR).*

*The article concludes that the current trend in Ukrainian judicial practice towards an expanded interpretation of the grounds for prosecutor's participation in civil, commercial and administrative proceedings is not fully consistent with the European standards of the right to a fair trial (Article 6(1) ECHR) and the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the ECHR).*

**Keywords:** *prosecutor; participation of a prosecutor in civil proceedings; grounds for participation of a prosecutor in civil proceedings; right to a fair trial; equality of arms, right to peaceful enjoyment of possessions.*

### Участь прокурора в некримінальних провадженнях: практика Європейського суду з прав людини та національний контекст

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### Анотація

*У статті проведений аналіз підстав участі прокурора у цивільному, господарському та адміністративному судочинстві України крізь призму європейських стандартів справедливого судочинства. У статті використані методи аналізу та синтезу, системно-структурний та логіко-юридичний методи, а також методи телеологічного та еволюційного тлумачення практики Європейського суду з прав людини (ЄСПЛ). Структурно стаття складається із трьох частин. У першій частині автором проаналізовані загальноєвропейські підходи до участі прокурора у некримінальних провадженнях, які відбиті у документах Парламентської асамблеї Ради Європи (ПАРЄ), Комітету міністрів Ради Європи (КМРЄ), Венеціанської комісії, Консультативної ради європейських прокурорів (КРЄП) і Консультативної ради європейських суддів (КРЄС). У другій частині*

*автором аналізується участь прокурора поза сферою кримінальної юстиції у контексті окремих гарантій права на справедливий судовий розгляд, що впливають із п. 1 ст. 6 Європейської конвенції з прав людини (ЄКПЛ) та практики Європейського суду з прав людини (ЄСПЛ) з питань тлумачення та застосування цієї статті. У третій частині статті аналізується нещодавнє рішення ЄСПЛ у справі “Shmakova v. Ukraine”, яке оцінюється з точки зору права на мирне володіння майном (ст. 1 Протоколу № 1 до ЄКПЛ). У статті робиться висновок, що помітна нині у судовій практиці тенденція до розширеного тлумачення підстав для участі прокурора у цивільному, господарському та адміністративному судочинстві не повною мірою узгоджується із європейськими стандартами права на справедливий судовий розгляд (п. 1 ст. 6 ЄКПЛ) та права на мирне володіння майном (ст. 1 Протоколу № 1 до ЄКПЛ).*

**Ключові слова:** прокурор; участь прокурора у цивільному судочинстві; підстави участі прокурора у цивільному судочинстві; право на справедливий судовий розгляд; рівноправність сторін, право на мирне володіння майном.

## **Introduction**

The legal regulation of the prosecutor’s participation in civil, commercial and administrative proceedings has undergone significant changes as a result of the constitutional reform of the judiciary in 2016 and further amendments to procedural legislation in 2017, which resulted in a reduction of the prosecutor's powers in the non-criminal proceedings (Article 56 of the Civil Procedure Code of Ukraine, Article 53 of the Commercial Procedure Code of Ukraine, Article 53 of the Code of the Administrative Procedure of Ukraine).

The current legal regulation of the grounds for the prosecutor’s participation in the non-criminal sphere is in connection with the adoption of the Law of Ukraine “On Amendments to the Constitution of Ukraine (Regarding Justice)” № 1401-VIII of 02 June 2016, which updated the regulation of the constitutional status of the public prosecutor’s office. According to Article 131-1 of the Constitution of Ukraine, the public prosecutor’s office is responsible for: 1) assisting the prosecution in court; 2) organising and conducting pre-trial investigations, resolving other issues in criminal proceedings in accordance with the law, supervising undercover and other investigative and detective activities of law enforcement agencies; 3) representing the interests of the state in court in exceptional cases and in accordance with the procedure established by law. The organisation and activities of the prosecutor’s office are regulated by law.

The Constitution of Ukraine establishes the fundamental tenets governing the prosecutor’s involvement in civil, commercial, and administrative proceedings. Primarily, it stipulates that the prosecutor may represent solely the interests of the state, thereby limiting the scope of their authority beyond the domain of criminal proceedings. This legal regulation has resulted in a narrowing of the scope of the prosecutor’s representation in non-criminal proceedings. This is primarily due to the influence of the provisions of para 1 of Article 6 of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR), as well as general trends towards reducing the powers of the prosecutor in the non-criminal sphere in European countries.

The Civil Procedural Code of Ukraine, the Code of Commercial Procedure of Ukraine and the Code of Administrative Procedure of Ukraine contain identical provisions regarding the grounds and forms of the prosecutor's participation. In cases specified by law, the prosecutor may take the following actions:

- a) file a claim to the court and participate in the consideration of cases on the basis of such a claim;
- b) enter into a case in which proceedings have been initiated by another person before the commencement of the consideration of the case on the merits, on his or her own initiative;
- c) file an appeal, a cassation appeal, or an application for review of a court decision due to newly discovered or exceptional circumstances.

A prosecutor who applies to the court in the interests of the state is required to provide a detailed and well-reasoned argument in support of such an application. The application should include a clear and concise statement of the specific violation of the state's interests, the necessity to protect them, and the grounds for the prosecutor's application to the court as defined by law. Additionally, the prosecutor should indicate the specific state authority empowered to perform the relevant functions (part 3-4 of the Article 56 of the Civil Procedure Code of Ukraine, part 3-4 of the Article 53 of the Commercial Procedure Code of Ukraine and part 3-4 of the Article 53 of the Code of Administrative Procedure of Ukraine). The specifics of the exercise of the prosecutor's powers in the non-criminal area are enshrined in the Law of Ukraine "On the Public Prosecutor's Office" No. 1697-VII of 14 October 2014. Conversely, an examination of the most recent case law of the ECHR reveals that the practice of prosecutors participating in non-criminal proceedings may, in certain circumstances, contravene the stipulations pertaining to the right to a fair trial and the right to the peaceful enjoyment of property.

The present article seeks to analyse the national case law in civil, commercial and administrative proceedings in terms of para 1 of the Article 6 of the European Convention on Human Rights (ECHR) and Article 1 of the Protocol No. 1 to the ECHR, as well as the case law of the European Court of Human Rights (ECtHR).

### **Materials and methods**

In the literature the issues of participation of prosecutors in civil, commercial and administrative proceedings were examined by many authors, among which special attention should be paid to the studies of S.O. Belikova [1], O.V. Glushkov [2], K.A. Huze [3], M.V. Rudenko [4], I.V. Soboleva [5] and others. At the same time, these studies do not reflect the most recent practice of the ECHR in cases involving prosecutors in the non-criminal sphere. This determines the relevance of the chosen topic of the article and its methodology. In the article the author uses the methods of analysis and synthesis, systemic-structural and logical-legal methods, as well as the methods of teleological and evolutionary interpretation of ECHR jurisprudence. Structurally, the article consists of three parts, the first of which is devoted to a general description of the European standards on the participation of the public prosecutor in judicial proceedings outside the criminal justice system, the second - to an analysis of the case-law of the ECtHR on the participation of the public prosecutor in terms of the guarantees of the right to a fair trial enshrined in para. 1 of Article 6 of the ECHR, and the third - is an analysis of one of the most recent judgments of the ECHR in the case of "Shmakova v. Ukraine", which raises the issue of the legitimacy of the prosecutor's application on the State interests in the context of Article 1 of the the Protocol No. 1 to the ECHR.

### **Results and Discussion**

#### ***European Standards of Prosecutor's Participation in the Non-Criminal Proceedings: Common Core***

The participation of the prosecutor in the non-criminal proceedings has been addressed in the documents of many international institutions, including the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers of the Council of Europe (CoE), the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE), etc.

In its Recommendation 1604 (2003) 1 of 27 May 2003 on «The Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law», PACE expressed its concern about a number of features inherent in the national practice of different States in the process of exercising various functions of the public prosecutor's office outside the criminal justice system, with regard to their compliance with the basic principles (subpara V, para. 7). On this basis, PACE proposed that the governments of the Council of Europe member states should ensure the implementation of the following recommendations on the functions of public prosecutors outside the criminal justice system in order to:

- a. that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights;*
- b. that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and*
- c. that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions»<sup>1</sup>.*

In para 29 of its Opinion No. 3 (2008) “The Role of Prosecution Services Outside the Criminal Law Field” of 21 October 2008, the CCPE stated that the activities of the public prosecutors outside the criminal justice system are primarily determined by society's need for adequate protection of human rights and public interests; there are no general international legal rules and regulations governing the tasks, functions and organisation of the work of the public prosecutor’s office outside the criminal justice system, as the State has the sovereign right to determine its institutional and legal procedures for the exercise of its defence functions. In para 34 of this Opinion, the CCPE called on participating States where the public prosecutor’s office performs functions outside the criminal law to ensure that they are carried out in accordance with the following principles:

- a. the principle of separation of powers should be respected in connection with the prosecutors’ tasks and activities outside the criminal law field and the role of courts to protect human rights;*
- b. the respect of impartiality and fairness should characterise the action of prosecutors acting outside the criminal law field as well;*
- c. these functions are carried out “on behalf of society and in the public interest”, to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;*
- d. such competencies of prosecutors should be regulated by law as precisely as possible;*
- e. there should be no undue intervention in the activities of prosecution services;*
- f. when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms);*
- g. the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court;*
- h. the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law;*
- i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured;*
- j. the developments in the case-law of the Court concerning prosecution services’ activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments.»<sup>2</sup>*

Para 66 of the Opinion No. 12 (2009) of the CCJE and the Opinion No. 4 (2009) of the CCPE draws the attention of the Council of Europe to the relationship between judges and prosecutors in a democratic society, which contains the Bordeaux Declaration on Judges and Prosecutors in a Democratic Society: *«According to the rule of law in a democratic society, all these competences of public prosecutors as well as the procedures of exercising these competences have to be precisely*

<sup>1</sup> Recommendation 1604 (2003) the Parliamentary Assembly of the Council of Europe (PACE) on the role of the public prosecutor's office in a democratic society governed by the rule of law. URL: <https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17109&lang=en>

<sup>2</sup> Opinion No 3(2008) of the Consultative Council of European Prosecutors on the role of prosecution services outside the criminal law field. URL: <https://rm.coe.int/16807474ee>.

*established by law. When prosecutors act outside the criminal law field, they should respect the exclusive competence of the judge or court and take into account the principles developed in particular in the case-law of the European Court of Human Rights as follows: i. the participation of the prosecution in court proceedings should not affect the independence of the courts; ii. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field, on the one hand, and with the role of courts to protect human rights, on the other hand; iii. without prejudice of their prerogatives to represent the public interest, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms principle); iv. the action of prosecutors' services on behalf of society to defend the public interest and the rights of individuals shall not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court».*<sup>3</sup>

According to paragraphs 2-3 of the Council of Europe Recommendation CM/Rec (2012)11 on the role of public prosecutors outside the criminal justice system of 19 September 2012, the duties and powers of a prosecutor outside the criminal justice system are to represent the general and public interest, to protect human rights and fundamental freedoms, and to uphold the rule of law (para. 2). At the same time, the duties and powers of the prosecutor outside the criminal justice system should always be established and clearly defined by law in order to avoid any ambiguity (para. 3). Prosecutors should also exercise their duties and powers in accordance with the principles of legality, objectivity, fairness and impartiality (para. 4).<sup>4</sup>

#### ***Participation of Public Prosecutors in Non-Criminal Proceedings in terms to the Right to a Fair Trial (Para 1 of the Article 6 of the ECHR)***

Para 1 of the Article 6 of the ECHR enshrines that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The right to a fair trial has a complex structure and consists of a number of components directly enshrined in para 1 of the Article 6 of the ECHR and developed in the case law of the ECtHR, including access to a court, an independent and impartial tribunal established by law, publicity, a reasonable time for a trial and a fair hearing (which includes equality of arms and adversarial proceedings, legal certainty, *res judicata*, enforcement of court judgements, prohibition of legislative interference in the administration of justice, prohibition of imposing an excessive burden of proof on a party, etc.)<sup>5</sup>

In its case law, the ECtHR has addressed the participation of the prosecutors in non-criminal proceedings in terms of various aspects of para 1 of the Article 6 of the ECHR, in particular the right of access to a court, equality of arms and the *res judicata*. In 2008, the ECHR first published a study on the participation of prosecutors in the non-criminal sphere, an updated version of which was published in 2011<sup>6</sup>. However, the practice of the ECHR with regard to the participation of public prosecutors in non-criminal proceedings has been developed.

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<sup>3</sup> Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) on “Judges and prosecutors in a democratic society”. URL: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cfebd](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cfebd)

<sup>4</sup> Recommendation CM/Rec (2012)11 adopted by the Committee of Ministers of the Council of Europe on 19 September 2012 on the role of public prosecutors outside the criminal justice system. URL: <https://rm.coe.int/16807096c5>.

<sup>5</sup> Див.: Цувіна Т. А. Право на суд у цивільному судочинстві: монографія. Харків: Слово, 2015. 281 с.; Сакара Н. Ю. Проблема доступності правосуддя у цивільних справах: монографія. Харків: Право, 2010. 256 с.; Комаров В. В., Сакара Н. Ю. Право на справедливий судовий розгляд у цивільному судочинстві: навчальний посібник. Харків: Нац. юрид. акад. України, 2007. 42 с.

<sup>6</sup> The role of public prosecutor outside the criminal law field in the case-law of the European Court of Human Rights. Council of Europe / European Court of Human Rights, March 2011. URL: <https://www.refworld.org/pdfid/4ee1d8361a.pdf>.

A) *Equality of arms* is recognised as one of the guarantees of the right to a fair trial<sup>7</sup>. Thus, the ECtHR notes that equality of arms implies a fair balance between the parties to the proceedings. In the legal sense, this means that each party should be given the opportunity to present its arguments on terms that do not put it at a disadvantage compared to its procedural opponent<sup>8</sup>. The ECtHR further elaborates that the onus is on the parties to evaluate whether a particular procedural application warrants a response, underscoring the principle of reciprocity in procedural rights. The ECtHR asserts that it is unacceptable for one party to file an application with the court without the knowledge of the other, as this would effectively prevent the other party from commenting on such application<sup>9</sup>.

In terms of ensuring procedural equality of arms, the ECtHR pays particular attention to the issue of the prosecutor's involvement in non-criminal proceedings<sup>10</sup>. It refers to the incompatibility with the requirements of equality of arms and independence of judges of the situation in which the prosecutor, for example, had the right to be present during the discussion and adoption of the court judgement, regardless of whether such participation in the discussion was active or passive<sup>11</sup>.

The examination of the jurisprudence of the ECtHR pertaining to para 1 of the Article 6 of the ECHR enables the differentiation of cases wherein the prosecutor: a) engages in court proceedings as a representative of one of the parties involved; or b) functions as an autonomous participant in the proceedings, acting in the interest of the public<sup>12</sup>.

In the first case, the prevailing stance of the ECtHR can be summarised as follows:

*«since a prosecutor or comparable officer, in undertaking the status of a procedural plaintiff, becomes in effect the ally or opponent of one of the parties, his participation was capable of creating a feeling of inequality in respect of one of the parties [...]. while the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances [...]. That the fact that a similar point of view is defended before a court by several parties or even the fact that the proceedings were initiated by a prosecutor does not necessarily place the opposing party in a position of "substantial disadvantage" when presenting her case. It remains to be ascertained whether, in the instant case, in view of the prosecutor's participation in the proceedings, the "fair balance" that ought to prevail between the parties was respected. [...]. The Court does not exclude that support by the prosecutor's office of one of the parties may be justified in certain circumstances, for instance for the protection of vulnerable persons who are assumed to be unable to protect their interests themselves, or where numerous citizens are affected by the wrongdoing concerned, or where identifiable State assets or interests need to be protected. The Court notes in that connection that the applicant's opponent in the proceedings in question was a State-owned organisation»<sup>13</sup>.*

The ECtHR operates under the assumption that a prosecutor in non-criminal proceedings may represent the interests of the state, the public interest, or the interests of vulnerable groups within society. In each instance, the ECtHR assesses whether the grounds for such participation were justified.

In the "*Menchinskaya v. Russia*" case, the prosecutor, who had not participated in the proceedings at the court of first instance, intervened in the trial at the second instance by filing an appeal on behalf of the Employment Centre, a party to the case. Despite the appeal being directed towards the

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<sup>7</sup> *Dombo Beheer B.V. v. the Netherlands*, № 14448/88, 27 October 1993. URL: <https://hudoc.echr.coe.int/eng?i=001-57850>; *Menchinskaya v. Russia*, № 42454/02, 15 January 2009. URL: <https://hudoc.echr.coe.int/eng?i=001-90620>; *Batsanina v. Russia*, № 3932/02, 26 May 2009. URL: <http://hudoc.echr.coe.int/eng?i=001-92667>.

<sup>8</sup> *Nideröst-Huber v. Switzerland*, № 18990/91, 18 February 1997. URL: <http://hudoc.echr.coe.int/eng?i=001-58199>.

<sup>9</sup> *APEH Üldözötteinek Szövetsége and Others v. Hungary*, № 32367/96, 31 August 1999. URL: <https://hudoc.echr.coe.int/eng?i=001-58843>.

<sup>10</sup> *Borgers v. Belgium*, № 12005/86, 30 October 1991. URL: <http://hudoc.echr.coe.int/eng?i=001-57720>

<sup>11</sup> *Martinie v. France*, № 58675/00, 12 April 2006. URL: <https://hudoc.echr.coe.int/eng?i=001-73196>.

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<sup>13</sup> *Batsanina v. Russia*, № 3932/02, 26 May 2009. URL: <http://hudoc.echr.coe.int/eng?i=001-92667>.

applicant, who was afforded the opportunity to respond to the prosecutor's arguments, the ECtHR determined a violation of para 1 of Article 6 of the ECHR due to a violation of the principle of equality of arms. The ECtHR judgement was based on the fact that, in this case, the prosecutor was representing the state and his arguments were similar to those in the Employment Centre's appeal, which means that the prosecutor's involvement violated the right to a fair trial<sup>14</sup>.

The ECtHR reached similar conclusions in *Korolev v. Russia (no. 2)*. In this case the applicant filed a claim for compensation for material and non-pecuniary damage caused by the refusal of the military department to reimburse the cost of the plane ticket, as well as for termination of the contract between the airline and the Ministry of Defence. In his complaint to the ECtHR, the applicant claimed interference by the prosecutor at the appeal stage. In its judgment, the ECtHR noted that the applicant's opponents in the proceedings were state authorities whose interests were defended by their representatives, at least one of whom was a lawyer. The prosecutor also supported their position in the appeal proceedings. In view of the above, the ECtHR noted that it found no grounds that would justify the prosecutor's participation in this ordinary civil case. It does not follow from the circumstances of the case that the prosecutor intended, for example, to protect any state property or interests under threat. Although it is undisputed that the prosecutor limited his participation in the proceedings to a simple statement of approval of the first-instance court's decision, the ECtHR sees no reason to assume that such intervention could have had an impact on the course of the proceedings. However, it considers that the prosecutor's mere repetition of the defendants' arguments on points of law, unless it was intended to influence the court, made no sense. Based on the above, the ECtHR concluded that the principle of equality of arms was violated in this case.<sup>15</sup>

On the contrary, the ECtHR concluded that the participation of the prosecutor was justified in the case of *Batsanina v. Russia*, where the prosecutor acted in defence of the public interest on behalf of the Oceanological Institute, a state institution, and a private person against the applicant and her husband in a suit to evict them from their apartment. In this case, the ECtHR concluded that the participation of the prosecutor, even alongside two private parties, was justified, as the prosecutor acted in the public interest, and the applicant and her husband were represented by lawyers and could make oral and written statements on the merits of the case. In view of the above, the ECtHR noted that in this case the groundlessness of the prosecutor's application to the court was not proved, so the principle of equality of arms, which requires a fair balance between the parties, was respected.<sup>16</sup>

Interesting in this context is also the case of *Mukiy v. Ukraine*, in which the applicant raised the question of the legality of the prosecutor's participation in the case of the authorities' refusal to privatise the applicant's apartment located in the territory of the nature reserve. In that case, the applicant complained about the prosecutor's interference in the case in view of the latter's appeal against the first instance court's judgement in favour of the applicants. The prosecutor's actions were justified by the need to protect the economic and social interests of the state related to the protection of the reserve area. In its judgement, the ECtHR noted that the prosecutor's interference, which the applicant complained about, did not put him in a 'significantly disadvantaged position' compared to the other party. The ECtHR saw nothing to indicate any privileged treatment by the domestic courts of the prosecutor's statements or any procedural advantages granted to him in this case. When deciding whether the prosecutor's intervention in the case was excessive, the ECtHR noted that the intervention in question was obviously in favour of the applicant's procedural opponent – the reserve administration – and, moreover, helped to ensure that the decision that was not in its favour was subject to appeal, given that the appeal of the reserve itself was denied on procedural grounds.<sup>17</sup>

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<sup>14</sup> *Menchinskaya v. Russia*, № 42454/02, 15 January 2009. URL: <https://hudoc.echr.coe.int/eng?i=001-90620>.

<sup>15</sup> *Korolev v. Russia (№ 2)*, № 5447/03, 01 April 2010. URL: <https://hudoc.echr.coe.int/?i=001-98016>.

<sup>16</sup> *Batsanina v. Russia*, № 3932/02, 26 May 2009. URL: <http://hudoc.echr.coe.int/eng?i=001-92667>.

<sup>17</sup> *Mukiy v. Ukraine*, № 12064/08, 21 October 2021. URL: <https://hudoc.echr.coe.int/eng?i=001-212436>

Acting on the side of one of the parties, the prosecutor is endowed with the procedural rights of the party. In the context of practical implementation of procedural rights, a violation of para 1 of the Article 6 of the ECHR in terms of equality of arms was recognised in cases where case files and information were disclosed to the prosecutor, but not to a party to the case (*Lilly France v. France*)<sup>18</sup>, or when the time limits were suspended for the state (whose interests were represented by the prosecutor) during court adjournments, but continued to run for other parties (*Karapanagiotou and Others v. Greece*)<sup>19</sup>.

At the same time, the establishment of more restrictive time limits for appealing against a decision for a party than for the prosecutor (*Ewert v. Luxembourg*)<sup>20</sup> or the availability of certain types of appeals only for the prosecutor (*Blanco Callejas contre l'Espagne*)<sup>21</sup> was not recognised as a violation of para 1 of the Article 6 of the ECHR. Thus, in the case of *Guigui and SGEN\_CFDT v. France*, the ECtHR noted that although the ten-day period for filing an appeal was short, it was not so short as to deprive the applicants of the opportunity to effectively use this remedy. The fact that this time limit is much shorter for private individuals than for the Prosecutor General, whose position is also different, cannot, in the ECtHR's view, put the former at a 'significant disadvantage' compared to the Prosecutor, even if it is acknowledged that the Prosecutor General may be regarded as their 'opponent'<sup>22</sup>. The prosecutor's right to reimbursement of court costs should also not be regarded as putting one of the parties at a greater disadvantage than the other, which is explained in terms of protection of public order (*Stankiewicz v. Poland*)<sup>23</sup>.

In the second case, at the level of national legal orders, the prosecutor may participate in the case not as a party, but as an independent participant in the process representing the state or public interest, who is involved to give an opinion in the case. In case *Kramareva v. Russia* after the termination of the employment contract, the applicant filed a lawsuit against her former employer, demanding that the termination of this contract be declared unlawful, that she be reinstated, that she be compensated for the amount of lost earnings, non-pecuniary damage and that the company be obliged to provide her with copies of documents related to her work. In accordance with the national legislation, the prosecutor in this category of cases was involved as an independent state official whose participation was required in terms of representing the interests of the state to ensure compliance with the legality. In this case, the ECtHR stressed that there was nothing to suggest that the prosecutor acted as an opposing party in the case or more than his powers. His role was limited to providing an oral opinion in the case, according to which the prosecutor requested that the applicant's claims be partially satisfied. Following the hearing, the national court granted the applicant's claim partially, including for copies of documents and non-pecuniary damage, but found that the termination of her employment contract was lawful. The applicant argued that the prosecutor's influence in this case violated the guarantees of para 1 of the Article 6 of the ECHR. The ECHR, having considered the application in this case, noted that the applicant's argument that the improper influence of the prosecutor's opinion on the court was of particular importance was not true and was not supported by any specific and convincing evidence, as well as by references to the relevant legal provisions. In addition, in the context of full compliance with the requirements of adversarial proceedings, the ECtHR stressed that the prosecutor's opinion was expressed publicly, on the record, and the parties were aware of its content, so they had a real and effective opportunity to express their objections in response to such an opinion. In view of the above, the ECtHR found no violation of para 1 of the Article 6 of the ECHR.<sup>24</sup>

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<sup>18</sup> *Lilly France v. France*, № 20429/07, 25 November 2010. URL: <https://hudoc.echr.coe.int/eng?i=001-101897>.

<sup>19</sup> *Karapanagiotou and Others v. Greece*, № 1571/08, 28 October 2010. URL: <https://hudoc.echr.coe.int/eng?i=001-101360>

<sup>20</sup> *Ewert v. Luxembourg*, № 49375/07, 22 July 2010. URL: <https://hudoc.echr.coe.int/eng?i=001-100049>.

<sup>21</sup> *Blanco Callejas contre l'Espagne* (dec.), № 64100/00, 18 June 2002. URL: <https://hudoc.echr.coe.int/?i=001-43580>.

<sup>22</sup> *Guigui and SGEN\_CFDT v. France* (dec.), № 59821/00, 06 January 2004. URL: <https://hudoc.echr.coe.int/?i=001-67568>.

<sup>23</sup> *Stankiewicz v. Poland*, № 29386/03, 04 March 2008. URL: <https://hudoc.echr.coe.int/eng?i=001-77525>.

<sup>24</sup> *Kramareva v. Russia*, № 4418/18, 01 February 2022. URL: <https://hudoc.echr.coe.int/eng?i=001-215357>.



However, in the case of *Yvon v. France*, the ECtHR recognised that the participation of a prosecutor in an expropriation case, who acted both as an expert and as a party to the case, combining two procedural statuses, caused a harmful imbalance in relation to the other party to the proceedings, incompatible with the requirement of equality of arms<sup>25</sup>.

In this context, the question also arises as to the distinction between the concepts of ‘equality of arms’ and ‘adversarial trial’, which are closely related elements of the right to a fair trial in terms of Article 6(1) ECHR. The ECHR notes that the concept of a ‘fair trial’ implies an adversarial trial, during which the parties to a civil case are informed of all evidence attached to the case or provided by the other party and may provide their explanations in relation to it. A party to the proceedings should generally be guaranteed free access to the observations of the participants in the civil proceedings, as well as a real opportunity to comment on those observations. ‘Adversarial’ means that the relevant materials and evidence should be available to both parties<sup>26</sup>. Thus, a violation of the adversarial principle was recognised, for example, when the parties were denied access to reports of executive bodies that were of exceptional importance in a child custody case, but which were nevertheless examined by the court and became the basis for the court judgement.<sup>27</sup>

In a number of judgments, the ECtHR distinguishes between the concepts of ‘equality of arms’ and ‘adversarial trial’. Thus, in the case of *Krcmar and Others v. the Czech Republic*, where the court judgment was based on evidence collected on the court’s initiative, it was noted that in this case there was no violation of equality of arms, as the parties did not participate in the formation of the evidence base. At the same time, the requirement of an adversarial trial was violated since the parties did not have the opportunity to submit their objections to the collected evidence<sup>28</sup>. The ECtHR drew attention to the difference between the guarantees of equality of arms and adversarial trial in *Niderost-Huber v. Switzerland*, where it found a violation of the requirement of equality of arms because one of the parties did not have access to written evidence in the case, and therefore the rights of the claimant and the defendant were unequal. The ECtHR emphasised that this situation should be distinguished from cases where both parties are unable to obtain the necessary information about the evidence to which the judge has access, which is a violation of the principle of adversarial trial<sup>29</sup>. Thus, in general, it can be noted that in the context of para 1 of the Article 6 of the ECHR, the adversarial nature of civil proceedings is to ensure that the parties are informed of the evidence in the case and have real access to such evidence. Meanwhile, the requirement of equality of arms is to provide equal procedural opportunities to the claimant and the defendant to present their position in the case. As we emphasized in our previous publications, adversariality occurs in the ‘court’ – ‘parties’ interaction, while equality of arms exists in the ‘court’–‘claimant’ and ‘court’– ‘defendant’ interaction.<sup>30</sup>

In the context of the prosecutor’s involvement in the non-criminal sphere, the ECtHR emphasises the need to ensure that the parties to the proceedings have the opportunity to review all the evidence and comments on their case, even if they are submitted by an ‘independent member of the national legal service’, including the prosecutor, with the aim of influencing the court's decision<sup>31</sup>. This principle was originally developed in criminal cases, but later extended to the non-criminal sphere<sup>32</sup>.

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<sup>25</sup> *Yvon v. France*, № 44962/98, 24 April 2003. URL: <http://hudoc.echr.coe.int/eng?i=001-61053>.

<sup>26</sup> *Ruiz-Mateos v. Spain*, № 12952/87, 23 June 1993. URL: <https://hudoc.echr.coe.int/eng?i=001-57838>.

<sup>27</sup> *McMichael v. the United Kingdom*, № 16424/90, 24 February 1995. URL: <https://hudoc.echr.coe.int/eng?i=001-57923>.

<sup>28</sup> *Krcmar and Others v. the Czech Republic*, № 35376/97, 03 March 2000. URL: <https://hudoc.echr.coe.int/eng?i=001-162573>.

<sup>29</sup> *Niderost-Huber v. Switzerland*, № 18990/91, 18 February 1997. URL: <https://hudoc.echr.coe.int/eng?i=001-58199>.

<sup>30</sup> Цувіна Т. А. Право на суд у цивільному судочинстві: монографія. Харків: Слово, 2015. С. 174-175.

<sup>31</sup> *Kress v. France* [GC], № 39594/98, 7 June 2001. URL: <https://hudoc.echr.coe.int/eng?i=001-59511>.

<sup>32</sup> *Lobo Machado v. Portugal*, № 15764/89, 20 February 1996. URL: <http://hudoc.echr.coe.int/eng?i=001-57978>; *K.D.B. v. The Netherlands*, № 80/1997/864/1075, 27 March 1998. URL: <https://hudoc.echr.coe.int/eng?i=001-58148>; *Goc v. Turkey*, № 36590/97, 11 July 2002. URL: <http://hudoc.echr.coe.int/eng?i=001-60597>; *Ruiz-Mateos v. Spain*, № 12952/87, 23 June 1993. URL: <https://hudoc.echr.coe.int/eng?i=001-57838>; *Vermeulen v. Belgium*, № 19075/91, 20 February 1996. URL: <https://hudoc.echr.coe.int/eng?i=001-57985>; *Van Orshoven v. Belgium*, № 20122/92, 25 June 1997. URL: <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-58055&filename=001-58055.pdf>; *Kress v. France*

In this category of cases, the ECtHR examined whether, for example, the opinions of the prosecutor acting as an independent third party were communicated to the parties and whether the parties had the opportunity to respond to them. In cases where the parties were able to comment at least in writing on such conclusions of the prosecutor, the ECtHR found no violation of para 1 of the Article 6 of the ECHR. Therefore, violations of the adversarial nature in cases of involvement of the prosecutor and submission of certain conclusions or evidence in the case relate primarily to those cases when the prosecutor does not act on the side of one of the parties to the case but enters the proceedings in the public interest as an *amicus curiae*.<sup>33</sup>

### ***Latest Ukrainian context: case “Shmakova v. Ukraine” and grounds for prosecutor’s participation in non-criminal cases***

In case *Shmakova v. Ukraine* the applicant alleged an unlawful deprivation of her property rights. She claimed that, following the reorganisation of the original title holder (a factory), the factory could no longer retain its title to the permanent use of the land and that the deprivation of her property lacked a legitimate aim and was disproportionate. She argued that she had acquired the land in good faith, with all the necessary permits and documentation, and that the deprivation did not respect her rights under Article 1 of Protocol No 1 to the ECHR. On the national level the prosecutor argued that the applicant's title to the land had been illegally granted and sought its revocation in order to return the land to state ownership. The prosecutor claimed that the land was intended for public use, specifically for the construction of a school and a kindergarten. However, the ECtHR found that the Government had failed to demonstrate the necessity or urgency of using the land for the stated purposes. In particular, the land had been unused for many years and there was no evidence of an urgent social need for the proposed projects. The ECtHR held that the deprivation of the applicant's property constituted a violation of Article 1 of Protocol No. 1. While accepting that the deprivation was lawful and based on detailed analyses by domestic courts, it found that the Government had failed to strike a fair balance between the requirements of the public interest and the applicant's right to peaceful enjoyment of her possessions. The applicant, as a *bona fide* acquirer of the land, was disproportionately burdened by the revocation of her title without any compensation or adequate reparation. The Court emphasised that a deprivation of property without adequate compensation normally violates the fair balance required by Article 1 of Protocol No 1. It also noted that the public prosecutor’s claim, although ostensibly in the public interest, did not sufficiently consider the practical impact on the applicant's rights or the lack of continuity with the intended public use of the land. The Court concluded that the expropriation did not strike a fair balance and therefore violated Article 1 of Protocol No 1. This case underscores the importance of ensuring that claims made in the interest of the State, by prosecutors, are accompanied by concrete and timely public benefits and are balanced against the property rights of individuals. States have an obligation to provide compensation or other reparation when they interfere with property rights to ensure that the principle of “good governance” is upheld<sup>34</sup>.

Although this case deals with the issue of violation of Article 1 of the First Protocol to the ECHR in the context of the right to property, in our opinion, this case allows for a broader discussion also in the context of procedural grounds for the participation of prosecutors in civil, commercial and administrative proceedings. The analysis of the Supreme Court's case law leads to the conclusion that today the grounds for prosecutor's participation are interpreted quite broadly, which allows for a fairly wide discretion of the court at the stage of admitting prosecutors to participate in such proceedings.

These figures are quite impressive, especially given that the Supreme Court's practice has repeatedly emphasised that, given the grounds and forms of participation of the prosecutor, the latter's

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[GC], No 39594/98, 7 June 2001. URL: <https://hudoc.echr.coe.int/eng?i=001-59511>; *Emine Araç v. Turkey*, No 9907/02, 23 September 2008. URL: <https://hudoc.echr.coe.int/eng?i=001-88564>.

<sup>33</sup> The role of public prosecutor outside the criminal law field in the case-law of the European Court of Human Rights. Council of Europe / European Court of Human Rights, March 2011. P. URL: <https://www.refworld.org/pdfid/4ee1d8361a.pdf>.

<sup>34</sup> *Shmakova v. Ukraine*, no. 70445/13, 11 January 2024. URL: <https://hudoc.echr.coe.int/rus?i=001-229926>.

participation in non-criminal proceedings is not an alternative but a subsidiary form of defence, and, accordingly, the prosecutor should not replace public authorities, which are primarily responsible for protecting the interests of the state in certain legal relations<sup>35</sup>. At the same time, the recent case law of the ECtHR suggests the need to find new approaches to the prosecutor's participation in non-criminal proceedings, which would allow to move away from the legacy of the function of comprehensive 'supervision over the rule of law', which was inherent in the prosecutor's office in the past, to new foundations of subsidiarity and extraordinary participation.

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