

Review of Court Judgements on Newly Discovered Circumstances and Access to Court

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Abstract

The article addresses the issue of identifying the persons entitled to initiate reviews of court decisions on newly discovered circumstances, as it has emerged in the Supreme Court practice. The author employs methods of analysis and synthesis, as well as systemic-structural and logical-legal methods, in addition to teleological and evolutionary interpretations of the European Convention on Human Rights (ECHR) practice. The article is structured in two parts. The first part analyzes the approaches developed in the practice of the European Court of Human Rights regarding the content of the right of access to court (Article 6, paragraph 1 of the ECHR). It concludes that this right is not absolute and may be subject to restrictions that comply with the principle of proportionality. This right encompasses not only the right to lodge a claim, but also the ability to initiate a review of a court decision. The ECHR recognizes appeal review as the minimum standard, while other types of review (cassation, review of court decisions on newly discovered or exceptional circumstances) are extraordinary, and therefore may be subject to more stringent restrictions. Legitimate restrictions include, for example, time limits for appeals, requirements for the content and form of such appeals, and a limited scope of individuals who are entitled to initiate the relevant type of review. The second part of the article examines the legitimacy of restricting access to court within the review of court decisions on newly discovered circumstances for persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court. It is argued that excluding these individuals from those who can initiate the relevant review is proportionate. However, where such persons have joined the proceedings at the appeal or cassation stage, acquiring participant status in the case, they should also be granted the right to initiate a review based on newly discovered circumstances.

Keywords: access to court; right to a fair trial; European Convention on Human Rights; European Court of Human Rights; review of court decisions on newly discovered circumstances; civil proceedings.

Перегляд судових рішень за нововиявленими обставинами та доступ до суду

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Анотація

Стаття присвячена проблемі визначення суб'єктного складу осіб, які мають право ініціювати перегляд судових рішень за нововиявленими обставинами, що виникла у практиці Верховного Суду. Використано методи аналізу та синтезу, системно-структурний та логіко-юридичний методи, а також методи телеологічного та еволюційного тлумачення практики ЄСПЛ. Структурно стаття складається з двох частин. У першій частині здійснено аналіз підходів, які склалися у практиці ЄСПЛ щодо змісту права на доступ до суду (п. 1 ст. 6 ЄКПЛ). Сформульовано висновок, що право на доступ до суду не є абсолютним, а може підлягати обмеженням, що мають відповідати принципу пропорційності. Це право охоплює не лише право на звернення до суду, але й можливість ініціювати перегляд судових рішень. Мінімальним стандартом у цьому випадку ЄСПЛ визнається апеляційний перегляд, водночас інші види перегляду (касаційний, перегляд судових рішень за нововиявленими або виключними обставинами) є екстраординарними, тому до них можуть встановлюватися більш суворі обмеження. До легітимних обмежень, зокрема, належать встановлені в законі строки оскарження, вимоги до змісту та форми апеляційної або касаційної скарги, обмежене коло осіб, які можуть ініціювати відповідний вид перегляду. У другій частині розглядається питання легітимності обмеження права на доступ до суду під час перегляду судових рішень за нововиявленими обставинами для осіб, які не брали участь у справі, однак суд вирішив питання про їх права, свободи, інтереси або обов'язки. Доводиться, що виключення зазначених осіб із кола суб'єктів, які можуть ініціювати відповідний вид перегляду, є пропорційним. Проте у випадках, коли такі особи вступили у провадження на стадії апеляційного або касаційного перегляду, набувши статус учасника справи, їм має надаватися також право ініціювати перегляд за нововиявленими обставинами.

Ключові слова: *доступ до суду; право на справедливий судовий розгляд; Європейська конвенція про захист прав людини і основоположних свобод, Європейський суд з прав людини; перегляд судових рішень за нововиявленими обставинами; цивільне судочинство.*

Introduction

A review of a court decision on newly discovered or exceptional circumstances is an extraordinary type of review of decisions that have become *res judicata*. Applications for a review of a court decision on newly discovered circumstances, as defined in paragraphs 1-3 of Part 1 of Art. 424 of the Civil Procedure Code of Ukraine (hereafter – CPC) may only be submitted by the participants of the case. According to Art. 42 of the CPC participants of the case as a group of persons, who have some interest (substantive and/or procedural one) in civil proceedings, include parties, third parties, authorities, and persons granted by law the right to apply to the court in the interests of other persons (e.g. the prosecutor, the ombudsman, state authorities, etc.). Therefore, a strict interpretation of Part 1 of Art. 424 of the CPC suggests that the group of persons who can apply for a review of a court decision on newly discovered circumstances is more limited than those who can file appeals and cassation complaints. The latter group includes not only the parties of the case but also persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court (Part 1 of Art. 352 and Part 1 of Art. 389 of the CPC).

At the same time, according to Part 3 of the Art. 352 and Part 4 of the Art. 389 of the CPC after the opening of appeal/cassation proceedings on the basis of an appeal/cassation complaint filed by a person who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, such person shall enjoy the procedural rights and bear the procedural obligations of a participant of the case. This provision of the procedural legislation has given rise to inconsistent interpretations in the Supreme Court's case law. On the one hand, persons who did not participate in the case but whose rights, freedoms, interests, and/or obligations were determined by the court, are not included among those entitled to seek review on newly discovered circumstances (Part 1 of Art. 424 of the CPC). On the other hand, once such persons enter the proceedings at the appellate or cassation stage, they acquire procedural rights and bear duties of a participant of the case (Part 3 of Art. 352 and Part 4 of Art. 389 of the CPC), and one of such rights is to submit an application for a review of court decisions on newly discovered circumstances.

It is important to acknowledge that there has been some discussion in the scientific literature on this issue. Authors such as O. Zeldina [1], V. Lavrov [2], D. Menyuk [3], R. Kolesnik [1], M. Oprysko [4], O. Rudenko [5], S. Stepanov [6], S. Senik [4] and others have contributed to this discussion.

An analysis of the literature reveals at least three approaches to the problem. According to the first approach, persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, have the right to file a corresponding application only if they have joined the proceedings during the appeal or cassation stage [3, pp. 128-131]. Consequently, V. Lavrov's interpretation is that individuals who have participated in appeal or cassation review should be granted the right to file an application for review of court decisions on newly discovered circumstances. The reason for this is that granting the rights and obligations of a participant of the case to this group of persons also results in their being granted the status of a participant of the case [2, p. 162].

According to the second approach, advocated by some authors, the persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, should be given the opportunity to file such an application regardless of whether they participated in the appeal or cassation proceedings [1, p. 94; 6, pp. 52-53; 4, p. 24].

The third approach advocates limiting the circle of persons who can file applications for review of court decisions on newly discovered circumstances to the participants of the case. Thus, O. Rudenko concludes that it is inappropriate to expand the circle of persons who have the right to file an application for review on newly discovered circumstances, emphasizing that it should be limited exclusively to the participants of the case [5, p. 56].

Despite the attention devoted to these issues in the literature, the problem remains unresolved at the level of the Civil Cassation Court's practice within the Supreme Court. Accordingly, the prevailing jurisprudence of the Supreme Court, granting persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, the rights and obligations of a participant of the case do not mean recognizing them as participants of the case in terms of Part 1 of Art. 424 of the CPC. Consequently, such individuals should be precluded from filing applications for the review of court decisions on newly discovered circumstances, even if they have become involved in the proceedings at the appeal or cassation level [7]. The matter has been referred to the Joint Chamber of the Civil Cassation Court within the Supreme Court [8], thus prompting a re-examination of the subject and the presentation of further arguments.

Materials and Methods

From a theoretical point of view, the question of whether certain persons should be granted the right to lodge a claim to the court or the right to initiate ordinary or extraordinary types of review of court decisions lies within the scope of international standards of the right of access to a court in terms of Paragraph 1 of the Art. 6 of the ECHR. Therefore, the teleological and evolutionary methods of interpretation employed by the ECtHR in its case law are key to this study, as the ECtHR has extended the guarantees of the right of access to court not only to first-instance courts but also to procedures for reviewing court decisions.

The systemic-structural method enabled the author to analyze and categorize the scientific views available in the literature on procedural law regarding the possibility of exercising the right to file an application for review of a court decision on newly discovered circumstances by persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court. The method of analysis and synthesis was employed to consolidate the Supreme Court's jurisprudence, as well as to categorize the precedents of the ECtHR concerning access to court. The logical-legal method was employed in interpreting the provisions of national procedural law that govern the procedure for reviewing court decisions on newly discovered circumstances. This article is also based on the scientific and advisory opinion of the author as a member of the Scientific Advisory Council to the Supreme Court in the case No. 205/5860/21 [8].

The article is divided into two parts. In the first part, the author conducts an analysis of the approaches developed in the practice of the ECHR regarding the content and limitations of the right of access to court (Paragraph 1 of the Art. 6 of the ECHR), with a particular focus on the possibility of initiating ordinary and extraordinary types of review of court decisions, including review on newly discovered circumstances. In the second part of the article, the author puts forward the argument that the exclusion of persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, from the circle of persons, who may initiate the review of court decisions on newly discovered circumstances, pursues a legitimate aim and is proportionate. Further arguments are proffered in support of the position that the entry of such persons into the proceedings at the appeal or cassation stage should also grant them the derivative right to initiate a review on newly discovered circumstances. The legitimacy of this position is predicated on three factors. Firstly, it is necessary to consider the status of the relevant persons at the stage of appeal or cassation review. Secondly,

it is essential to examine the powers of the court in cases where the court determines that the relevant persons have no interest in the consideration of the case. Thirdly, it is crucial to ensure the principle of equality of arms and the adversarial principle for such persons in comparison with other participants of the case.

Results and Discussion

The right of access to court and its legitimate restrictions in the review of court judgments on newly discovered circumstances

Pursuant to Paragraph 1 of Art. 6 of the ECHR, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of their civil rights and obligations or of any criminal charge against them. An inherent component of the right to a fair trial is the right of access to a court, as repeatedly affirmed by the ECtHR. As early as *Golder v. the United Kingdom*, where the ECHR derived the right of access to a court from Art. 6 of the ECHR, it stressed that *"it would be inconceivable, in the opinion of the Court, that Article 6 para 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public, and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings"* [9].

In its subsequent case-law, the ECtHR, when elaborating on the content of the right of access to a court, has observed that it encompasses not only the possibility of instituting proceedings before a competent court, but also – where provided for under the procedural law of the respondent State – the possibility of seeking review of court decisions [10]. Such provisions should also be interpreted in a broader sense of the access to justice approach [11–13].

An analysis of the ECHR's case-law further suggests that appellate review is often treated as a minimum standard of review of court decisions that should be ensured under domestic law, whereas cassation review, review on the newly discovered or exceptional circumstances, and comparable remedies, where they exist in national legal systems, are extraordinary forms of review, access to which may be subject to stricter limitations in light of their specific nature. A key issue in this context concerns the legitimacy of restricting access to specific forms of review in light of the principle of proportionality. In its classic formulation, the proportionality test for restrictions on access to a court involves examining: (a) whether the restriction is prescribed by law; (b) the aim pursued by the restriction; (c) whether there is a reasonable relationship of proportionality between

the means employed and the aim pursued; and (d) whether alternative avenues for exercising the right of access to a court remain available notwithstanding the restriction [14]. At the same time, when assessing restrictions on access to a court in court review procedures, the ECtHR has developed some additional criteria. In particular, in *Zubac v. Croatia*, in the context of access to cassation proceedings, the ECtHR held that, beyond the classic proportionality assessment, it is also necessary to take into account: (a) the foreseeability of the restriction; (b) who should bear the adverse consequences of errors committed in the course of the proceedings – state or the parties of the case; and (c) the avoidance of "excessive formalism" [10].

In its case law, the ECtHR has accepted as legitimate, inter alia, the imposition of time limits for lodging appeals and cassation complaints, as well as formal and content requirements governing appeals and cassation complaints, rules of territorial jurisdiction [15; 16], etc. In its judgement *Industrial Financial Consortium Investment Metallurgical Union v. Ukraine* the ECtHR found a violation of Paragraph 1 of Art. 6 of the ECHR because the domestic courts reopened the proceedings on newly discovered circumstances at the request of a person who had not participated in the case, even though Ukrainian law allowed such applications to be lodged exclusively by participants of the case. It follows that, for the purposes of Paragraph 1 of Art. 6 of the ECHR, the national legislature may impose more strict restrictions on access to review mechanisms, particularly in the context of extraordinary ones. Accordingly, the mere fact of limiting the circle of eligible applicants cannot, as such, be regarded as a violation of the right of access to a court [17; 18].

Persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court as applicants for review of a court decision on newly discovered circumstances

As noted above, pursuant to Part 3 of Art. 352 of the CPC, once appellate proceedings are opened on the basis of an appeal lodged by a person who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, that person acquires the procedural rights and assumes the procedural duties of a participant of the case.

A systematic interpretation of the CPC suggests that, at the stage of the opening of appellate proceedings, the appellate court's powers are limited. Once the court receives an appeal from a person who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, at the stage of deciding whether to open

appellate proceedings the court should not examine whether the decision in fact infringed that person's rights, freedoms or interests, i.e. whether the person has a legal interest in the case. If the appeal is duly drafted and lodged in compliance with the legislative requirements, the appellate court must open appellate proceedings. In our view, it is from that moment that a person whose rights, freedoms, interests, and/or obligations were determined by the court, acquires the capacity to exercise the procedural rights and assume the procedural duties of a participant in the case. Prior to the opening of appellate proceedings, such a person cannot, in practice, perform procedural acts or invoke the procedural rights of a participant of a case. If, after appellate proceedings have been opened, the appellate court finds that the impugned decision did not affect the rights, freedoms, or interests of such a person, it must close the appellate proceedings pursuant to Paragraph 3 of Part 1 of Art. 362 of the CPC. If, conversely, the court of first instance delivered a decision determining the rights, freedoms, interests, and/or obligations of such a person, this constitutes grounds for setting aside the decision of the court of first instance and adopting a new decision by the court of appeal under Para 4 of Part 3 of Art. 376 of the CPC.

A systematic interpretation of Part 3 of Art. 352, Para 3 of Part 1 of Art. 362, and Para 4 of Part 3 of Art. 376 of the CPC suggests that, taking into account Ukraine's mixed model of appeal, where an appeal is lodged by a persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, the appellate court is limited to two courses of action: a) to close the appellate proceedings if it is established that the judgement did not affect that person's rights, freedoms, or interests (Para 3 of Part 1 of Art. 362 of the CPC); or b) to set aside the judgement of the court of first instance and deliver a new decision if the court of first instance determined that person's rights, freedoms, interests and/or obligations (Para 4 of Part 3 of Art. 376 of the CPC).

At the same time, in a case referred to the Joint Chamber of the Civil Cassation Court within the Supreme Court, the court of appeal, after reviewing the court judgement on the merits, upheld the judgement of the court of first instance [8]. In our view, this approach should be criticized. Once the appellate court had established that the judgement of the first instance court did not affect the rights, freedoms, or interests of the appellant, it was required to close the appellate proceedings, rather than to review the first-instance judgment and leave it unchanged.

In such circumstances, the persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, may exercise the procedural rights of a participant of the case

only from the moment the appeal is lodged until the appellate proceedings are closed. Those procedural rights should not have effect after the appellate proceedings are closed; they must be exhausted at the appellate level.

Moreover, in case where the court of appeal upholds the judgement of the court of first instance, the person in fact lodge an application on newly discovered circumstances against the judgement of the court of first instance. Accordingly, persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, should not be entitled to seek review of the first-instance court judgement on newly discovered circumstances, because they were not participants of the case at the court of first instance. The court should not permit a review on newly discovered circumstances merely because the applicant temporarily exercised the rights and duties of a participant of the case during the appellate stage, where the appellate court ultimately upheld the first-instance decision and thus confirmed the absence of any legal interest of the applicant.

At the same time, in our view, such a person is entitled only to seek review of the appellate court's decision on newly discovered circumstances. If the court of first instance delivered a judgement determining the rights, freedoms, interests and/or obligations of a person who did not participate in the case, and – following that person's appeal – the appellate court set aside the first-instance court judgement and adopted a new decision, that person should subsequently be entitled to apply for review of the appellate court's decision on newly discovered circumstances. Pursuant to Part 2 of Art. 425 of the CPC, such a review must be conducted by the appellate court itself. Any contrary approach would result in disproportionate restrictions of the procedural rights of such persons, whose legal interest was effectively confirmed by the appellate court through its appellate review and the adoption of a new decision in the case.

Limiting the circle of eligible applicants in this manner is justified, as it helps prevent situations in which non-parties – who merely assert that a judgment has affected their rights, freedoms, or interests – file an appeal in order to obtain procedural standing and thereby create an additional avenue for extraordinary review, including with the aim of delaying proceedings. Such strategic behaviour is incompatible with the principle of legal certainty and with the case-law of the ECtHR, which treats review on newly discovered circumstances as an exceptional type of review.

Conclusions

This article has examined the interplay between the extraordinary nature of review on newly discovered circumstances and the right of access to a

court under Paragraph 1 of the Article 6 of the ECHR, with a particular focus on the question of standing for persons who did not participate in the case but whose rights, freedoms, interests and/or obligations were determined by the court. The analysis demonstrates the CPC narrows the circle of applicants entitled to initiate the review on the newly discovered circumstances. This approach is generally consistent with the case law of the ECtHR on access to extraordinary types of review. At the same time, in our opinion, the list of persons who can lodge an application for review of a court decision on newly discovered circumstances should still be expanded to include persons who did not participate in the case, but whose rights, freedoms, interests, and/or obligations were determined by the court, if such persons entered to the proceedings at the appeal or cassation stage. This approach will ensure that the rights of such persons are respected, assuming that they have a genuine interest in the outcome of the case, and will also guarantee them the right to a fair trial within the meaning of Article 6(1) of the ECHR.

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Suggested Citation: Tsvina, T.A. (2025). Review of Court Judgements on Newly Discovered Circumstances and Access to Court. *Theory and Practice of Jurisprudence*, 2(28), 22-32. <https://doi.org/10.21564/2225-6555.2025.28.347612>.

Submitted: 21.10.2025

Revised: 27.11.2025

Approved: 18.12.2025

Published online: 25.12.2025