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THE EUROPEAN COURT OF HUMAN RIGHTS INTERPRETATION OF MIGRANTS CASES: BASIC DOCTRINAL APPROACHES

Abstract. The doctrinal substantiation of the practical consideration of precedents in relation to ensuring and violating the migrants' rights is in sight of the representatives of various field of science. It is also a subject of complex international legal, political, historical, economic, demographic, anthropological and social studies. However, a rapid dynamic development, caused by various factors in migration processes, and its institutionalization requires picky and thorough scientific analysis of some important issues such as the migration problem, the impact of the right to migrate, political and rational incentives for migration, consideration of the interpretation of such cases by the European Court of Human Rights (ECtHR) for a further and comprehensive settlement of migration policy on both European and national level. Although particular steps are being taken to create a sustainable regulatory framework for the recognition and assurance of human rights in response to current challenges and to systemic drawbacks of the national human rights mechanism – the problems of migration and asylum are very urgent and thorny.

The purpose of the article is to analyse doctrinal approaches and legal positions of the ECtHR in the process of interpretation in the field of migration.

The use of the research methodology was caused by the specifics of the study subject. The comprehensive approach to analysis, which combines a wide range of philosophical, general scientific, special scientific and legal methods, served as a research basis. Thus, the dialectical method has allowed substantiating a regular nature of the formation of an evolutionary approach to the interpretation of ECtHR judgments. The anthropological approach emphasized on the place and role of man in the process of legal interpretation. With the help of the hermeneutic method, the concept of the categories "migrant", "migrants' rights", "asylum", as well as the content of the doctrinal approaches and legal positions of the Court were disclosed, while a systematic method reflected the interrelationship between them. The statistical method made it possible to quantitatively synthesize the case law of the ECtHR in the field of migration and asylum. The use of the comparative method allowed to carry out a comparative analysis of doctrinal approaches employed by the Court in considering various categories of migration issues in different periods of its activities.

It is proved that the ECtHR uses many doctrinal approaches, the Court emphasizes on the need to adhere to the principle of wide margin of appreciation. In cases of deportation of foreigners convicted of a criminal offense, the Court is guided by the principle of proportionality. Most of the cases examined by the ECtHR concerning migrants are related to the provision of asylum. The interpretation activities of the Court are focused on identifying barriers to asylum and formulating the principle of prohibition of dismissal, if the asylum seeker was forced to leave his country caused by various circumstances such as humanitarian crisis, non-selective violence, real threat / danger, denial of justice, or unlawful detention or conviction by a manifestly unfair trial in country of residence, or procedural violations against migrants and etc. The ECtHR has also focused on assessing the risks of not granting asylum, in particular, harsh treatment and has formulated the predominance principle of the child's extraordinary vulnerability, which prevails over the status of the illegal stay presence as a foreigner on the territory of the state

Keywords: European Court of Human Rights; doctrinal basic approaches; interpretation; cases of migrants.

The global crisis of forced displacement, which lasted for the last decade and especially escalated in Europe in 2015–2016, in connection with armed conflicts in Syria, has actualized the process of proposing solutions for migrants' issues both at the practical and theoretical levels. In Ukraine, the requirement of bringing the national legislation in the field of migration into conformity with the requirements of Article 8 of the European Court of Human Rights (right to respect for personal and family life) by consolidating mechanisms for regulation of the legal status of foreigners, in particular, in the Law of Ukraine "On Immigration" and in the Law of Ukraine "On Legal Status of foreigners and stateless persons" (the most critical of which is the question of deportation from the territory of Ukraine, including in the context of Ukraine's obligations under international treaties on defence) does not seem already to be a secondary requirement.

Although the European Convention on Human Rights of 1950 (further – the Convention or ECHR) does not directly regulate the protection of migrants' rights, except in case of their presence in the territory of the states for which the Convention is mandatory, the European Court of Human Rights (ECtHR) considers cases concerning the realization of migrants' rights and fundamental freedoms as provided for by the Convention. Issues relating to the rights of illegal migrants who normally do not have the legal residence status in the country of residence and are deprived of most elementary economic and social rights are particularly problematic. The doctrinal substantiation of the practical consideration of precedents for securement and violations of the migrant's rights is under constant review of the representatives of various fields of science. It is also the subject of complex international legal, political, historical, economic, demographic, anthropological, social studies. However, the rapid

dynamic development of migration process, caused by various reasons, and their institutionalization requires more throughout scientific analysis of the problem of migration, the impact of the right to migrate, political and rational incentives for migration, consideration of the interpretation of such cases by the ECtHR for a further regulation of migration policy, on European and national levels as well. C. Brettell and J. Hollifield thus evaluate the state of theoretical understanding of migration problems:

> Legal scholars are less concerned with theory building and hypothesis testing, and more inclined to use the eclectic techniques of analysis in social science to argue for specific types of policy reforms. Equally, they draw on detailed understandings of institutional and practical realities (mostly costs) to debunk general theories[1].

Among many scientific papers devoted to migration, most of the time, the study of migratory processes and their models (especially transnational) is the most common. The most popular themes are immigration control, border security, issues of legal harmonization, international labour migration, legal aspects of EU migration policy, their social adaptation and the role of the diaspora in these processes, socialization and integration of migrants into the society of the host country, the nature of the individual's motivation, as well as the incentives and effectiveness of their actions on the potential immigrant, multiculturalism and so on. The case law of the ECtHR in this area, having fragmentary character, is being studied a bit fewer. However, interpretive approaches are studied in the context of the principles and approaches of interpretation in general. The transnational theory of migration and the concept of belonging to the country of origin concerning the issue of migrants are studied by Sylvie Da Lomba[2], a number of works on migration, citizenship and identity belong to Stephen Castles[3]. The ECtHR case study on migrants' issues is being observed by M.-B. Dembour[4], H. Lambert analyses the situation of foreigners regarding the Convention[5]. A number of scholars are making researches on the integration of immigrants into European society in the context of respect for human rights, citizenship, the right to work etc.[6].

[1] Caroline B Brettell and James F Hollifield (eds), *Migration Theory: Talking Across the Disciplines* (2000) <https://estvitalesydemografia.files.wordpress.com/2013/04/introduccic3b3n-migration-theory-talking-across-disciplines.pdf> (accessed: 12.05.2019).

[2] Lomba Da Sylvie, 'Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR' [2017] 6(32) Laws, https://doi.org/10.3390/laws6040032.

[3] Stephen Castles, *Migration, Citizenship and Identity: Selected Essays* (Edward Elgar Publishing 2017) 448.

[4] Marie-Bénédicte Dembour, *When Humans Become Migrants, Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

[5] Hélène Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (Council of Europe Publishing 2007).

[6] Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014), DOI:10.1093/acpro:oso/9780198701170.001.0001.

The Ukrainian scholars (both international and legal theorists) have intensified their researches on the problem of defining the content of doctrines developed by the European Court of Human Rights, as well as on the impact on the legal interpretation within the national legal order. In this context, it is worth highlighting the works of such scholars as M. Baimuratov, V. Butkevych, M. Buromenskiy, O. Grinenko, D. Hudyma, L. Huseynov, S. Dobrianskiy, T. Dudash, M. Koziubra, I. Kretova, S. Maksymov, O. Merezhko, V. Mitsik, V. Paliyuk, P. Rabinovych, S. Rabinovych, O. Soloviov, O. Tragniuk, S. Fedyk, A. Fedorova, T. Fuley, G. Khrystova, S. Shevchuk, etc.

However, despite an increased interest in the interpretative work of the Court, it can be argued that the doctrines created by the ECtHR in case of interpreting the law are not yet sufficiently developed, and the problems of interpreting the ECtHR migration laws are generally ignored by researchers.

Signed on June 27, 2014, The Ukraine – European Union (EU) Association Agreement, ratified by the Verkhovna Rada of Ukraine and the European Parliament on September 16, 2014 (in force since September 1, 2017) obliges the Government of Ukraine to implement a number of EU normative documents especially in the context of the Action Plan for the EU visa liberalization dialogue with Ukraine[7]. A number of ECtHR's judgments help to concrete these normative documents and avoid gaps in national legislation and law-enforcement practices, which increases the topicality of the examined problem.

Purpose of the article: to find out theoretical and doctrinal approaches to the interpretation of the ECtHR in cases of migrants, as well as to disclose the main directions of doctrines' influence on the Ukrainian national legal order in relation to the settlement of migration issues.

The interpretative rules that apply to international treaties generally are also acceptable to human rights treaties, as well as the unquestionable application in such cases of the principles of interpretation provided by Art. 31 and 32, 26 of the Vienna Convention on the Law of Treaties (VCLT). Namely, the principle of conscientiousness (the treaty must be interpreted "in good faith"), the principle of literality (the treaty must be interpreted in accordance with the usual meaning of the terms of the contract, in their context), the principle of system (in other words systematically looking at the whole treaty) and teleological principle (in other words according to the object and the purpose of the treaty).

However, the interpretation of human rights treaties requires a special approach and taking into account the specific characteristics of these treaties.

[7] 5-й звіт Європейської Комісії щодо прогресу виконання Україною Плану дій з лібералізації візового режиму від 8 травня 2015 р. <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/fifth_progress_report_on_the_implementation_by_ukraine_of_the_action_plan_on_visa_liberalisation_en.pdf> (дата звернення: 12.05.2019).

As the International Court of Justice has stated that treaties should be interpreted and applied within the legal framework that existed at the time of the interpretation, and not during the preparation or adoption of the text, then it would be pointless to speak of the need to duly clarify the intentions of their creators. Sometimes the ECtHR's judgments go against the intentions of the creators. The judge of the ECtHR, V. Butkevich, states: 'It is true that the Convention and its Protocols must be interpreted in the light of the conditions that exist today, but the Court cannot, for the sake of evolutionary interpretation, exclude from the Convention the law that was not included therein at first'[8].

The ECtHR has repeatedly emphasized that it adheres to the interpretative principles of the VCLT. In its interpretative case law, the Court uses VCLT in different ways: sometimes in latent form as a custom. But the same case law shows that the Court uses its own methodology for interpretation, based on the consensus method, namely, the combination of the interpretation of international treaties (European Convention on Human Rights) with the practice of the Member States (the national legal system), the use of fairly broad standards and the analysis of constitutional interpretations. The method of consensus undoubtedly is a disclosure of the evolutionary approach in the work of the Court, which is especially important for the Member States with similar problems, although it limits the scope of the state's free discretion.

Among the reasons for using the consensus method, the judges of the ECtHR singled out the following[9]:

1) strengthening the legitimacy of the Convention in the event of an evolutionary interpretation;

2) the need to persuade the Contracting Parties and the rendition of made judicial decisions;

3) avoiding arbitrary decision-making (for example, when judges prefer their own moral views);

4) determination of freedom of discretion;

5) assisting the Court in resolving new questions of interpretation (of the Convention), or issues of particular importance or controversial ones[10].

Most ECtHR judges are convinced that 'the flexible and non-automatic approach of the Court to a European consensus can provide a sufficient guarantee against the abuse of majority logic in the ECtHR case law'. They

[8] В Буткевич, 'Європейська конвенція з прав людини і основних свобод: ґенеза намірів і права' (2010) 10 Право України 82-3.

[9] According to the results of the interview by the method of personal interview 50 judges of the ECHR during 2008-2014.

[10] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 184.

supported the conceptualization of the European consensus 'as a rebuttable presumption that can be neglected if there are good reasons for doing so'[11].

Another feature of the interpretation of the Convention by the Court is the use of an autonomous self-employed method, based 'primarily on the Member States' domestic law and their international obligations', which is not limited to the meaning of individual concepts within national legal systems, but is based on their content within the framework of the Convention, which can significantly expand their content. At the same time, the Court uses the "balancing" technique in the following cases:

1) if the Court stated the interference in the right, it determines whether such interference was justified (proportionality of purpose and requirements);
2) when the Court decides whether the discrimination is unjustified in the application of Art. 14 of the Convention with other articles;
3) if the Court finds that certain rights also have a positive dimension in the sense that they not only guarantee the absence of state interference but also oblige the state to protect these rights;
4) the court from time to time defines the content of very indefinite terms by the balancing process[12].

The peculiarity of interpretive activity of the ECtHR is the propensity for "judicial activism". This term is used since 1947, and today it has become entrenched in the scientific-categorical apparatus of researchers of international and European law. As a rule, it is used to criticize judges who do not simply interpret or apply the legal text in an active way but decide cases, without taking into account the norm of law that they intend to apply. Or this term is used to convict judges who do not adhere to the principle of integrity in a decision-making process.

W. Marshall outlines such characteristics of judicial activism: 1) contramajoritarianism, when courts abrogate decisions taken by representative bodies; 2) the refusal of the courts to comply with the law; 3) the refusal of the courts to follow existing precedents; 4) the refusal of the courts to follow the established limits of their jurisdiction; 5) the creation of new doctrines and rights; 6) use of the judiciary to establish new responsibilities for other branches of government; 7) use of the judiciary to promote own interests[13].

The phenomenon of "judicial activism" in international legal proceedings has its own peculiarities. First, regardless of whether the interpretation can be

[11] Dzehtsiarou (n 10) 204.
[12] Christian Djeffal, *Static and evolutive treaty interpretation: a functional reconstruction* (Cambridge University Press 2016) 279.
[13] William Marshall, 'Conservatives and the Seven Sins of Judicial Activism' (2002) 73 University of Colorado Law Review, http://dx.doi.org/10.2139/ssrn.330266.

regarded as judicial activism, it is clearly connected with the text of the treaty itself. Secondly, when an international judge decides on a case, he must, at his own discretion, interpret the treaty, but, at the same time, not depart from the general principles of interpretation of the international treaty. Thirdly, international judges should have limitations on the exercise of their powers. Such requirements include a fair interpretation of the text of the international treaty that is being applied and its implementation. But at the same time, in the context of understanding the true nature of judge's discretion, the interpretation of international treaties should not be limited to the mere interpretation of the "letter" of the text of the treaty. The judge may (and should) use the opportunity to fill the gap in the regulation of the international treaty if it is necessary to ensure its action. In this issue, as in any other, prudence is needed. We share Zhang -fa Lo's position that it is inappropriate to use the term (the concept) of "judicial activism" only negatively, because its non-recognition may lead to a situation where an international judge cannot interpret the treaty properly, as a result of which there will be an unfulfillment of the gap and, finally, non-performance of the treaty. It is also not recommended to overestimate judicial activism and thus make it impossible to apply external restrictions that are essential for the performance of the treaty[14].

Table 1 illustrates the quantitative indicator in the ECtHR cases on migration and asylum. Analysing the data in Table 1, it should be noted that, out of 475 cases concerning migrants, the Court adopted resolutions in 364 cases and delivered a judgment in 111 cases (mainly judgments are made by the Chamber of the Court.

Table 1

The total number of ECtHR's cases concerning migrants[15]

Court case law – 475			
Resolutions	*364*	*Decisions*	*111*
Grand Chamber	102	Grand Chamber	0
Chamber	254	Chamber	84
Committee	8	Committee	12
		Commission	15

Table 2 illustrates the ECtHR's cases handling of migration and asylum affairs: cases against states, Articles of the Convention, key words of Articles of the Convention and examples of the violations.

[14] Walter F Dodd, 'Review: Interpretations of Legal History by R. Pound' [1923] 17(4) The American Political Science Review 656-8.
[15] Composed by: HUDOC database <https://hudoc.echr.coe.int> (accessed: 12.05.2019).

Table 2

ECtHR's cases handling of migration and asylum affairs[16]

Against states	*Articles of the Convention*	*Key words*	*Violations*
Greece (69)	1 (45)	(Art. 1) Obligation to respect human rights (45)	2 (14)
Russia (67)	2 (38)	(Art. 2) Right to life (38)	2-1 (6)
France (50)	2-1 (12)	(Art. 3) Prohibition of torture (239)	3 (145)
Italy (47)	2-2 (1)	(Art. 4) Prohibition of slavery and forced labour (11)	3+13 (1)
UK (38)	3 (241)	(Art. 5) Right to liberty and security (137)	4 (6)
Belgium (37)	3+13 (4)	(Art. 6) Right to a fair trial (46)	4-1 (5)
The Netherlands (29)	4 (11)	(Art. 7) No punishment without law (8)	4-2 (4)
Turkey (26)	4-1 (9)	(Art. 8) Right to respect for private and family life (170)	5 (99)
Switzerland (20)	4-2 (5)	(Art. 9) Freedom of thought, conscience and religion (7)	5+5-5 (2)
Austria (16)	5 (138)	(Art. 10) Freedom of expression-{general} (17)	5-1 (69)
Germany (15)	5+5-5 (2)	(Art. 11) Freedom of assembly and association (9)	5-1-e (2)
Bulgaria (14)	5-1 (97)	(Art. 12) Right to marry (2)	5-1-f (40)
Denmark (12)	5-1-a (2)	(Art. 13) Right to an effective remedy (168)	5-2 (23)
Malta (12)	5-1-c (3)	(Art. 14) Prohibition of discrimination (51)	5-3 (2)
Cyprus (7)	5-1-e (5)	(Art. 15) Derogation in time of emergency (1)	5-4 (77)
Hungary (6)	5-1-f (79)	(Art. 16) Restrictions on political activity of aliens-{general} (1)	5-5 (7)
Spain (4)	5-1-f+5-4 (1)	(Art. 17) Prohibition of abuse of rights (10)	6 (14)
Lithuania (4)	5-2 (29)	(Art. 18) Limitation on use of restrictions on rights (1)	6-1 (9)
Estonia (2)	5-3 (3)	(Art. 19) Establishment of the Court (10)	6-2 (3)
Portugal (3)	5-5 (8)	(Art. 34) Individual applications (98)	6-3-d (1)
Romania (3)	6 (47)	(Art. 35) Admissibility criteria (199)	7 (2)
Ukraine (3)	6-2 (4)	(Art. 38) Examination of the case-{general} (11)	8 (64)
Azerbaijan (2)	6-3-b (1)	(Art. 41) Just satisfaction-{general} (196)	8-2 (9)

Table 2 shows that most cases concerning migration and asylum in the Court are filed against countries such as Greece, Russia, France, Italy, Great Britain, and Belgium. In the first place, this is caused by the priority of the directions

[16] Composed by: HUDOC database <https://hudoc.echr.coe.int> (accessed: 12.05.2019).

of active external displacements, as well as by the geopolitical position of these states. Secondly, the analysis of applications filed against states on migration issues reflects the ability of states to use efficiently mechanisms for regulating the legal aspects of migration (for example, taking into account that Germany accepted large number migrants, relatively few cases were filed – 15). But, the most important thing for our research is legal positions that the Court formulates and applies. Based on the data in Table 2, one can conclude that the Court often applies in substantiating its legal positions to such Articles as Art. 3 (Prohibition of torture) – in 239 cases, Art. 35(Admissibility criteria) – in 199, Art. 35 (Admissibility criteria) – in 199, Art. 41 (Just satisfaction-{general}) – in 196, Art. 13 (Right to an effective remedy) – in 168, Art. 5 (Right to liberty and security) – in 137.

The ECtHR interpretation concerning migrants is primarily related to the specification of the jurisdiction of such cases, as the European Convention on Human Rights does not have articles that protect their rights directly. A "migrant" is understood as a person moving from one place, region, or country to another. If he seeks international protection, he is considered to be an "asylum seeker"[17]. If he does not claim to be a victim of persecution in his country because of his affiliation to race, religion, nationality, membership to a particular social group or political beliefs as a refugee, whose status is regulated by the Geneva Convention Relating to the Status of Refugees (1951)[18], European states can admit that such a person needs additional protection and asylum, but since the Convention does not have such a right, the states themselves regulate the process of immigration control regarding the entry, the residence, and the expulsion of non-citizens[19]. However, neither the Convention nor its protocols do not grant the right to political asylum[20]. In the *Abdulaziz, Cabales and Balkandali v. the United Kingdom case* (28 may 1985) the ECtHR confirmed the UK's right to control the entry of non-nationals into its territory and supported the adoption of anti-immigration legislation (1970) to reduce "primary immigration"[21], to protect the labour market in times of high unemployment[22] and to protect settled migrants and indigenous people,

[17] Рада Європи. Притулок <https://www.echr.coe.int/Documents/COURTalks_Asyl_Talk_UKR.PDF> (дата звернення: 12.05.2019).

[18] Convention and protocol relating to the status of refugees. (1951) 28 July (Art. 1) <https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47> (accessed: 12.05.2019).

[19] *Saadi v. Italy*, no. 37201/06 (28 February 2008) para 124-5.

[20] *Vilvarajah and Other v. the United Kingdom,* judgment of 30 October 1991, Series A no. 215, para 102; *Ahmed v. Austria,* judgment of 17 December 1996, Reports 1996-VI, para 38.

[21] *Abdulaziz, Cabales and Balkandali v. the United Kingdom),* no. 9214/80; 9473/81; 9474/81 (28 May 1985) para 67 <https://www.lawschool.cornell.edu/womenandjustice/upload/Abdulaziz.pdf> (accessed: 12.05.2019)

[22] Ibid para 85.

since the influx of immigrants has caused tension in society[23]. At the same time, the ECtHR emphasizes on the need to respect the ECHR with due regard to the needs and resources of the EU community for such individuals, but it also stresses the need to respect *the principle of wide margin of appreciation* of the state when determining such means[24]. In the case of the deportation of foreigners convicted of committing a criminal offense[25], the court is guided by the principle of proportionality. In particular, such interference should be justified by an overriding public need for crime prevention and by a proportionate legitimate aim, as well as it should correlate with respect to a private and family life of the immigrant[26]. If the states have disregarded or not foreseen the risks for the aggrieved migrants, then the European Court of Human Rights provides for the possibility to bring them to justice[27].

However, the policy on migration and asylum in the European Union has always been a "painful" issue, which is a manifestation of the strong reluctance of Member States to make a joint decision on the situation with foreigners <...> this topic is considered as an issue lying in the heart of national sovereignty[28]. The EU states independently determine which migrants will be granted asylum and will obtain international protection, but the control of the borders of sovereign states should not violate the ECHR and modified owing to interpretative practice standards and principles of observance of human rights.

Most of the cases examined by the ECtHR concerning migrants are related to granting asylum. The interpretation activities of the Court are focused on identifying barriers to asylum and formulating the principle of prohibition of dismissal, if the asylum seeker was forced to leave his country caused by various circumstances such as humanitarian crisis, non-selective violence[29], real threat/ danger[30], denial of justice, or unlawful detention or conviction by a manifestly unfair trial in country of residence, or procedural violations against migrants[31] etc. The ECtHR has also focused on assessing the risks of not granting asylum in particular: severe behaviour that should be "real", "predictable", "personal"

[23] *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* no. 9214/80; 9473/81; 9474/81 (28 May 1985) para 76.
[24] Ibid para 67.
[25] *Boujlifa v. France,* 122/1996/741/940, judgment of 21 October 1997, Reports of Judgments and Decisions (1997-VI) para 42.
[26] Ibid para 43.
[27] *Soering v. the United Kingdom,* judgment of 7 July 1989, Series A no. 161, para 90-91; *H. L. R. v. France,* judgment of 29 April 1997, Reports (1997-III) para 34; *Jabari v. Turkey,* no. 40035/98, para 38, (2000-VIII); *Salah Sheekh v. the Netherlands*, no. 1948/04, para 135(11 January 2007).
[28] Anja Wiesbrock, *The evolution of EU migration policies* (Oxford university press 2016) 165, https://dx.doi.org/10.1093/acprof:oso/9780190211394.003.0008.
[29] *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* 9214/80 (n 23) para 67; *Saadi v. Italy* (n 19) para 12405.
[30] *Hirsi Jamaa and Others v. Italy,* 27765/09 (23 February 2012).
[31] *Mamatkulov and Askarov v. Turkey,* 4682/99 and 46951/99 (2005-I).

and age, gender, health of the asylum seeker[32]. In this case, the limit of cruelty taking Art. 3 of the ECHR intro account applies both to the expelling country and to the country of residence. Regarding the admission of an age group of underage foreigners (with or without adults) in the case of Rahimi v. Greece (5 April 2011)[33] The ECtHR has formulated the predominant principle of the child's extraordinary vulnerability, which prevails over the status of the illegal presence as a foreigner on the territory of the state. An Afghan teenager who was detained and arrested for two days on the territory of Greece (Lesvos Island) belonged to the category of "most vulnerable members of society", and therefore the host state, who left him on his fringe after his release, was required to act appropriately in accordance with Art 3 of the Convention. Only the assistance of a non-governmental organization saved him from excessive exhaustion. However, in a few years this principle was developed in the case against France. For example, case Khan v. France (28 Février 2019) of an Afghan citizen concerned a humiliating attitude towards immigrants who sought to reach the United Kingdom at Calais Point. Several thousand people, including many juveniles, were in difficult conditions in the camp at the so-called "swamp". Material (one-off nutrition for 2 500 migrants from 6 000, lack of drinking water, accommodation in tents of a tree or a tarpaulin, poor living conditions) and sanitary conditions of stay (rats, sewage, "wild" toilets), as well as instability, post-traumatic syndromes, violence, police pressure and lack of medical care were recognized by the ECtHR as conditions "close to survival"[34] With regard to art. 3 of the ECHR and 'characterized by inhuman or degrading treatment which testifies about a serious and obviously unlawful interference with fundamental freedom'[35]. The applicant, when he arrived from Afghanistan to France to relocate with his family in the United Kingdom, was 11 years old, was among the other 316 underage immigrants in the camp near Calais, and in fact had no information about the possibilities that they had under Art. 28 of the Dublin Regulation No. 604/2013[36]. Violence, the risk of human trafficking, sexual abuse, prostitution, the possibility, risky behaviour (alcohol abuse), mental health disorders – this is an incomplete list of conditions of a moral environment of a teenager who lost the roof over his head as a result of the destruction of the southern part of the camp by the authorities and for six months lived in inappropriate conditions in a tent in winter in the slums of Calais heath. The authorities did not comply with the Boulogne Sur

[32] Рада Європи. Притулок (н 17).
[33] *Rahim v. Greece*, No. 8687/08 (5 April 2011) para 109; *N. T. P. and others v. France* (application 68862/13) 24 May 2018 <https://www.asylumlawdatabase.eu/en/content/ntp-and-others-v-france-application-no-6886213-no-violation-article-3-echr-24-may-2018> (accessed: 14.05.2019).
[34] *Khan v. France*, no. 12267/16 (28 February 2019) <https://www.refworld.org/cases,ECHR,5c78080b4.html> (accessed: 14.05.2019).
[35] Ibid.
[36] Ibid.

Mer district court decision on February 22, 2016, and therefore the presence of a teenager in an 'unsuitable for a child's condition environment, whether in terms of safety, housing, hygiene, or access to food and care, in an unstable the situation is unacceptable in view of the young age', as well as non-compliance with the judge's order is a ground for recognizing humiliating behaviour.

Of great importance to the resolution of the migrants' problems is the definition by the Court of vulnerable groups among them, namely the various minorities that are being brutally abused, or groups with special needs, such as children, pregnant women, the disabled, and the elderly[37].

Clear wording by the Court of the conditions for the reception of asylum-seekers, the identification of the "special situation of the applicants"[38], terms of their stay contributes to the solution of the problem ensuring the proper conditions for migrants in accordance with the norms of the Convention and the unification of norms concerning the migrants' stay and also procedural norms not only in the form of EU standards but also in national legislation. In particular, under the influence of the judgment in Lokpo and Touré v. Hungary, 8 March 2012 case[39], in which the ECtHR recognized the order which provides the possibility of early release of foreigners from the point of migrants' detention due to the lack of a close prospect of realization of expulsion only on the initiative of the executive body in a manner contrary to the requirements of Art. 5 (4) of the ECHR, the Cabinet of Ministers of Ukraine amended a number of normative acts regarding the legal status of foreigners and stateless persons and norms of their illegal stay in Ukraine[40]. Such actions of Ukrainian authorities correspond to the systemic approach of the ECtHR, namely to the national legal system on migrants as a combination of both legislative and practical tools, as well as the formation of a system of communication between authorities and migrants (informing, the presence of interpreters, access to legal assistance)[41].

The realities of contemporary political life set the task to the ECtHR of the interpretation of the Convention, not only articles of vital importance to migrants, where the prohibition of dismissal is absolute (Article 3). Table 2 provides a brief list of examples of the most violated articles on migrants. But separate affairs concerning articles of political importance are important

[37] *M. S. S. v. Belgium and Greece* [GC], 30696/09 (21 January 2011).
[38] *Tarakhel v. Switzerland* [GC], 29217/12 (4 November 2014).
[39] *Lokpo and Touré v. Hungary,* no. 10816/10 (20 September 2012).
[40] Part 4, Article 30, Part 17, Clause 4 and Part 15, Clause 5 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", p. 1.8 and 2.2. Instructions on compulsory return and forced removal from Ukraine of foreigners and persons without Citizenship, approved by the Order of the Interior Ministry, Administration of the SBGS and SBU No. 353/271/150 dated 23.04.12, as well as paragraph 15 of the Model Provision on the Temporary Accommodation of Foreigners and Stateless Persons who are illegally staying in Ukraine.
[41] *Gebremedhin [Gaberamadhien] v France,* 25389/05 (26 April 2007).

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both for the quality and the democracy of the society of the receiving state. In particular, the case of the Open Society Institute-Budapest v. Hungary (25 September 2018), which is only accepted for consideration by the ECtHR, sets the task to the Court to identify violations concerning the functioning of a NGO, the Open Society Institute in Hungary (the head and founder of the Open Society Foundation Network is George Soros), whose charter aside from the other purposes provides for the protection of migrants' rights and applies to Art. 10, 11, 13, 18, P 1 (1) and calls into question the possibility of functioning of civil society and the proportionality of measures taken by the government. The fact is that in Hungary in 2018 two laws were passed (the Section "Stop Soros Package" section 253 of Act XLI of 2018), which seemed to be directed against groups or individual persons who promote "illegal migration", and which also provide the 25 % taxation of donations or financing of any groups that "facilitate migration"[42]. The ECtHR took into account the fact that prosecution under the first law could lead to the dissolution of the entire organization, even if its activities relate to migrants only tangentially while imposing such a high tax rate would lead to "silence" of civic organizations in cases of violations of the migrants' rights[43]. Namely, the Court once again faces the evolution of the government's policy of sustained pressure on democratic institutions and the disproportionate nature of the government's decision to employ migrants. The government's strategy is not thus aimed at reducing or prohibiting all forms of migration, but at "fighting international organizations" through laws that have "a strong deterrent effect". Especially if in Hungary it is impossible to appeal to the Constitutional Court on the protection of tax legislation, which confirms the preceding conclusion of the court, any means of legal protection of NGOs that may exist in theory are not effective and accessible in practice[44].

Conclusions. The ECtHR interpretation concerning migrants is primarily related to the specification of the jurisdiction of such cases, as the ECHR does not have articles that protect their rights directly. In interpreting cases concerning migration and asylum, the ECtHR uses many doctrinal approaches to justify its legal position. The Court emphasizes on the need to adhere to the principle of wide margin of appreciation of the state in determining such means. In case of the deportation of foreigners convicted of a criminal offense, the Court is guided by the principle of proportionality. However, we emphasize that such intervention should be justified by an urgent public need for crime prevention and should be proportionate to the legitimate aim and also be proportionate to the respect for the migrant's private and family life. If

[42] *Open Society Institute–Budapest v Hungary* (25 September 2018) para 50, 51.
[43] Ibid para 29.
[44] *Akdivar and Others v. Turkey* 21893/93 Judgment (16 September 1996).

the states have disregarded or not foreseen the risks for the aggrieved migrants, then the European Court of Human Rights provides for the possibility to bring them to justice. Most of the cases examined by the ECtHR concerning migrants are related to the provision of asylum. The interpretation activities of the Court are focused on identifying barriers to asylum and formulating the principle of prohibition of dismissal, if the asylum seeker was forced to leave his country caused by various circumstances such as humanitarian crisis, non-selective violence, real threat / danger, denial of justice, or unlawful detention or conviction by a manifestly unfair trial in country of residence, or procedural violations against migrants and etc. The ECtHR has also focused on assessing the risks of not granting asylum.

The ECtHR has formulated the predominance principle of the child's extraordinary vulnerability, which prevails over the status of the illegal stay presence as a foreigner on the territory of the state.

The realities of contemporary political life set the task to the ECtHR of the interpretation of the Convention, not only articles of vital importance to migrants but also play a role of the indicator of the quality and democratic nature of the society of the receiving state. It is equally important that the legislative provisions and enforcement practices in Ukraine still neglect the important fact that, as a result of the Court's consideration of numerous cases, it is not merely a precedent case law that emerges – the ECtHR forms a number of fundamental principles and doctrines defining approaches to resolving issues about observance of certain rights and freedoms by the state. Accordingly, the interpretation of the law concerning the Court's case law requires not only the use of the legal position of the Court in relation to specific rights and freedoms but also the consideration of the Court's doctrines as well.

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ІНТЕРПРЕТАЦІЯ ЄВРОПЕЙСЬКИМ СУДОМ З ПРАВ ЛЮДИНИ СПРАВ МІГРАНТІВ: ОСНОВНІ ДОКТРИНАЛЬНІ ПІДХОДИ

Анотація. Доктринальне обґрунтування практичного розгляду прецедентів щодо забезпечення та порушення прав мігрантів перебуває у полі зору представників різних галузей науки. Воно також є предметом комплексних міжнародно-правових, політичних, історичних, економічних, демографічних, антропологічних і соціальних досліджень. Однак стрімкий динамічний розвиток, обумовлений різними факторами міграційних процесів, та його інституціоналізація вимагають прискіпливого і ретельного наукового аналізу деяких важливих питань, таких як міграційна проблема, вплив права на міграцію, політичні та раціональні стимули для міграції, розгляд інтерпретації таких справ Європейським судом з прав людини (ЄСПЛ, Суд) для подальшого і всебічного врегулювання міграційної політики як на європейському, так і на національному рівня. Хоча робляться конкретні кроки для створення міцної нормативної бази для визнання і забезпечення прав людини у відповідь на нинішні виклики і системні недоліки національного правозахисного механізму, проблеми міграції та надання притулку є досить актуальними й гострими.

Метою статті є аналіз доктринальних підходів і правових позицій ЄСПЛ при наданні інтерпретацій у галузі міграції.

Використання методології дослідження було обумовлено специфікою предмета дослідження. Основою дослідження став комплексний підхід до аналізу, що поєд-

нує в собі широкий спектр філософських, загальнонаукових, спеціальних наукових і правових методів. Таким чином, діалектичний метод дав змогу обґрунтувати закономірний характер формування еволюційного підходу до тлумачення рішень ЄСПЛ. Антропологічний підхід акцентував увагу на місці й ролі людини в процесі правового тлумачення. За допомогою герменевтичного методу розкрито поняття категорій "мігрант", "права мігрантів", "притулок", а також зміст доктринальних підходів і правових позицій Суду, а системний метод відобразив взаємозв'язок між ними. Статистичний метод дав змогу кількісно узагальнити практику ЄСПЛ у сфері міграції та надання притулку, а порівняльний метод – провести порівняльний аналіз доктринальних підходів, використаних Судом при розгляді різних категорій питань міграції в різні періоди його діяльності.

Доведено, що ЄСПЛ використовує багато доктринальних підходів, при цьому він наголошує на необхідності дотримуватися принципу широкої свободи розсуду. У справах про депортацію іноземців, засуджених за кримінальний злочин, Суд дотримується принципу пропорційності. Більшість справ, що розглядаються ЄСПЛ щодо мігрантів, пов'язані з наданням притулку. Інтерпретаційна діяльність Суду спрямована на виявлення перешкод до надання притулку та формулювання принципу заборони відмови, якщо прохач притулку був змушений покинути свою країну внаслідок різних обставин, таких як гуманітарна криза, невибіркове насильство, реальна загроза/небезпека, відмова в правосудді або незаконне затримання чи засудження у результаті явно несправедливого судового розгляду в країні проживання, або процесуальних порушень відносно мігрантів тощо. ЄСПЛ також зосередився на оцінці ризиків ненадання притулку, зокрема жорстокого поводження, і сформулював принцип переваги надзвичайної вразливості дитини, який превалює над статусом незаконного перебування іноземця на території держави.

Ключові слова: Європейський суд з прав людини; доктринальні підходи; інтерпретація; справи мігрантів.