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## Note

# THE CONTRIBUTION OF FORENSIC EXAMINATION TO ENSURING THE RIGHT TO A FAIR TRIAL WITHIN ECtHR CASE-LAW

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**Summary:** 1. Introduction. – 2. Issues of Regulating the Legal Application of Expert Opinions in the Conventional Protection of the Right to a Fair Trial. – 3. Issues of Law Enforcement within ECtHR Case-law. – 4. Conclusions.

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## CONFLICTS OF INTEREST

The authors declare no conflict of interest of relevance to this topic.

## DISCLAIMER

The authors declare that their occupation in National Scientific Center Hon. Prof. M. S. Bokarius Forensic Science Institute does not impact the views and opinions discussed.

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The authors contributed jointly to this study and its results and take responsibility for the content of the paper. The content of the paper was translated with the participation of third parties under the authors' oversight.

# THE CONTRIBUTION OF FORENSIC EXAMINATION TO ENSURING THE RIGHT TO A FAIR TRIAL WITHIN ECTHR CASE LAW

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**A**bstract In this note, the authors study legal and procedural cases of the application of forensic research in the observance of the common European procedural guarantee ensuring the balance of justice during a trial: Art. 6 of the European Convention on Human Rights (right to a fair trial). Based on the current legislation of the European Union and Ukraine, peculiarities of legal regulation and application of forensic expert research during court proceedings are analysed. It is emphasised that established the approaches and practice of applying specific expertise in the countries of the European Union have some peculiarities. It is established that one of the ways to ensure the fairness of a court decision is using forensic science. While comparing the legal framework for providing justice in Ukraine and the European Union, the authors stressed the need to develop a separate policy guideline (strategy, concept, etc.), such as the Vision for European Forensic Science Area used in EU countries. Detailed analysis of the ECtHR case-law on the application of Art. 6 has made it possible to illustrate the specifics of applying forensic science by complying with the fair trial requirement. It is concluded that the adoption of a fair court decision becomes possible when: 1) the practice of law enforcement and legal provisions related to the dispute context are taken into account; 2) the circumstances of the case are established with the use of content and reference to evidence; 3) non-legal phenomena are taken into account, such as ethical, social, moral requirements accepted in society, etc.

**Keywords:** right to a fair trial, forensic science, forensic examination, European Forensic Science Area, European Court of Human Rights

*'Forensic science is but the handmaiden of the legal system'.<sup>1</sup>*

## 1 INTRODUCTION

The field of forensic justice support covers various and dynamic fields of scholarship and uses advanced methods to solve complex legal issues. Thanks to new technological solutions, scientific developments, and methodological achievements, forensic science is in constant development. The outcome of a trial usually depends entirely on the conclusion set out in the forensic expert research that contributes to a successful trial – the acquittal of innocent people and conviction of criminals.

It is worth noting that the achievements of various branches of science in the field of forensic support for justice have influenced the development of forensic science and testified to its undeniable success in identifying criminals, especially through the use of DNA technology. However, the practice of law enforcement proves that in some cases, evidence obtained, for example, by forensic science institutions from law enforcement agencies in violation of their storage conditions, leads to errors in forensic research. This demonstrates the potential danger of inaccurate or erroneous expert testimony, which sometimes contributes to the recognition of misleading evidence by courts.

At various stages of the trial, an assessment of the probative value of scientific opinions or forensic interpretation, as it is called, is a very important topic in terms of ensuring the right to a fair trial. In general, we share the approach of A. Biedermann, C. Champod, and S. Willis, who emphasise that the evaluation challenges that are an integral part of practical proceedings relate primarily to specific case circumstances, but it is necessary to adhere to organisational and educational dimensions for a more complete and detailed review of the subject.<sup>2</sup>

In the conventional protection of the right to a fair trial (Art. 6 of the European Convention on Human Rights, hereafter ECHR), issues of the application of expert opinions are considered by the European Court of Human Rights (hereafter, ECtHR) as one of the tools to establish the truth in cases.<sup>3</sup>

The present research aims to establish the value of forensic research through the prism of the implementation of the convention right to a fair trial.

## 2 ISSUES OF REGULATING THE LEGAL APPLICATION OF EXPERT OPINION IN THE CONVENTIONAL PROTECTION OF THE RIGHT TO A FAIR TRIAL

Convention protection of the right to a fair trial enshrined in Art. 6 of the ECHR<sup>4</sup> is guaranteed

1 DL Faigman, MJ Saks, J Sanders, EK Cheng, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West Publishing 2017) 6.

2 A Biedermann, C Champod, S Willis, 'Development of European standards for evaluative reporting in forensic science: The gap between intentions and perceptions' (2017) *The International Journal of Evidence & Proof*, Special issue on Proof in Modern Litigation: Selected Essays of the 5th International Conference on Evidence Law and Forensic Science 14-29.

3 European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (2021) 77 <[https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf)> accessed 27 September 2021.

4 Convention for the Protection of Human Rights and Fundamental Freedoms dated 17 July 1997 (as amended of 2 October 2013) <[https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text)> accessed 27 September 2021.

by the countries through national judicial and law enforcement institutions, thus facilitating the observance by states of their obligations as contracting parties. V. Komarov and T. Tsvina emphasised that the right to a fair trial is guaranteed in national law, so is guaranteed in the well-established case-law of the ECtHR and the decisions of the Supreme Court, which contain practical guidelines for the application of certain provisions of Art. 6 para. 1 of the ECHR.<sup>5</sup>

Fair trial is a unique ability to prevent miscarriages of justice that is an integral part of ensuring justice balance in society. Guilt or innocence should be determined in a fair, independent, and efficient trial. It is even difficult to imagine a trial without the use of specific expertise, the results of which depend on the final conclusion of the court and fairness of such a decision, respectively. It is important to note that judges and lawyers do not have sufficient relevant knowledge in the field of forensic science and methodology used in forensic research and therefore cannot assess evidence at an appropriate level during the trial.<sup>6</sup>

There is no doubt that the field of forensic support for justice is covered by a fairly extensive system of regulations, both at the national and international levels. In Ukraine, the appointment of forensic examinations to forensic experts, their duties, rights and responsibilities, the management of forensic examinations, and the registration of their results are carried out in the manner prescribed by the Law of Ukraine no. 4038-XII 'On Judicial Examination', dated 25 February 1994,<sup>7</sup> the Law of Ukraine no. 1404-VIII 'On Enforcement Proceedings', dated 2 June 2016,<sup>8</sup> the Criminal Procedural Code of Ukraine, the Civil Procedural Code of Ukraine,<sup>9</sup> the Commercial and Procedural Code of Ukraine,<sup>10</sup> the Code of Administrative Proceedings of Ukraine,<sup>11</sup> the Code of Ukraine on Administrative Offences,<sup>12</sup> the Customs Code of Ukraine,<sup>13</sup> the Order of the Ministry of Justice of Ukraine no. 3505/5 'On approval of the Instruction on the peculiarities of forensic activities by certified forensic experts who do not work in state specialized forensic science institutions', dated 12 December 2011,<sup>14</sup> the Order of the Ministry of Justice of Ukraine no. 53/5 'On approval of the Instruction on appointment and conduct forensic examinations and expert research and Scientific and methodological recommendations on

- 5 V Komarov, T Tsvina 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' 2021 1 (9) *Access to Justice in Eastern Europe* 88-89. DOI: 10.33327/AJEE-18-4.1-a000047 accessed 25 September 2021.
- 6 'Strengthening Forensic Science in the United States: A Path Forward: summary' Committee on Identifying the Needs of the Forensic Science Community, Committee on Science, Technology, and Law Policy and Global Affairs, Committee on Applied and Theoretical Statistics, Division on Engineering and Physical Sciences (2009) 27 <<https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>> accessed 25 September 2021.
- 7 Law of Ukraine dated 25 February 1994 no 4038-XII 'On Judicial Examination' (as amended of 1 January 2021) <<https://zakon.rada.gov.ua/laws/show/4038-12#Text>> accessed 25 September 2021.
- 8 The Code of Ukraine dated 13 April 2012 no 4651-VI 'Criminal Procedure Code of Ukraine' (as amended of 21 July 2020) <<https://zakon.rada.gov.ua/laws/show/4651-17>> accessed 25 September 2021.
- 9 The Civil Procedural Code of Ukraine dated 18 March 2004 no 1618-IV (as amended of 5 August 2021) <<https://zakon.rada.gov.ua/laws/show/1618-15>> accessed 25 September 2021.
- 10 Commercial and Procedural Code of Ukraine dated 6 November 2021 no 1798-XII (as amended of 5 August 2021) <<https://zakon.rada.gov.ua/laws/show/1798-12>> accessed 25 September 2021.
- 11 The Code of Administrative Proceedings of Ukraine dated 6 July 2005 no 2747-IV (as amended of 5 August 2021) <<https://zakon.rada.gov.ua/laws/show/2747-15>> accessed 25 September 2021.
- 12 The Administrative Offences Code of Ukraine dated 7 December 1984 no 80731-X (as amended of 8 August 2021) <<https://zakon.rada.gov.ua/laws/show/80731-10>> accessed 25 September 2021.
- 13 The Customs Code of Ukraine dated 13 March 2012 no 4495-VI (as amended of 21 July 2021) <<https://zakon.rada.gov.ua/laws/show/4495-17>> accessed 25 September 2021.
- 14 The Order of the Ministry of Justice of Ukraine dated 12 December 2011 no 3505/05 'On Approving the Regulations about licensed non-state forensic science practitioners' (as amended of 18 June 2021) <<http://zakon2.rada.gov.ua/laws/show/z1431-11>> accessed 25 September 2021.

appointment preparing and forensic examinations and expert research', dated 8 October 1998,<sup>15</sup> etc.

The guarantee of the right to a fair trial is reflected in national regulations. Thus, the Law of Ukraine no. 1402-VIII 'On the Judiciary and the Status of Judge', dated 2 June 2016, defines the judiciary's management and administration of justice in Ukraine, which operates on the basis of the rule of law in accordance with European standards and ensures the right of everyone to a fair trial.<sup>16</sup> It should be noted that while administering justice, judges are obliged to increase the authority of the judiciary, ensure the binding nature of court decisions through fair, impartial, and timely consideration and resolution of court cases, observe the judge's oath, provide and a proper legal response to the facts of pressure on them, interference in judicial activities, and other unlawful encroachments on justice.<sup>17</sup>

One way to ensure the fairness of a court decision is to use a tool such as forensic examination. As a general rule, a forensic examination is appointed only in the case of a real need for specific expertise to establish factual data that are part of the evidence subject, i.e., when the expert opinion cannot be replaced by other means of proof.<sup>18</sup>

A broader approach to the need to appoint forensic examinations and recognise their degree of probative value is supported in European and American legal thought. The National Academy of Sciences has prepared a report entitled 'Strengthening Forensic Science in the United States: A Path Forward', in which they identified questions that could be considered legitimate in criminal cases and ensure that they can be referred to during the evidentiary process. The first question establishes the extent to which a particular type of forensic examination corresponds to scientific methodology, which allows someone to accurately carry out an expert opinion on evidence obtained and properly report the results. The second question establishes whether a practicing expert can, while forming an expert opinion, make a mistake due to human fallibility that can threaten the impartiality and validity of the opinion.<sup>19</sup> It should be noted that these important issues are not always reflected in court decisions concerning the admissibility of forensic evidence.

Ensuring the efficiency of justice is one of the main activities of the Council of Europe. This is why it is reflected in relevant legal documents, such as conventions, resolutions, and recommendations adopted under the auspices of the Council of Europe in the field of improving access to justice. Even so, there is no doubt that the European legal approach to regulating the field of forensic support for justice has its peculiarities. These are caused primarily by well-established approaches and practices of applying specific expertise in the countries of the EU.

Among the main documents governing the development of the field of forensic support for justice in the EU are: 'Guidelines on the role of court-appointed experts

15 The Order of the Ministry of Justice of Ukraine dated 8 October 1998 no 53/5 'On Approving the Regulations about appointing and conducting forensic examinations' <<http://zakon2.rada.gov.ua/laws/show/z0705-98>> accessed 27 September 2021.

16 The Law of Ukraine dated 2 June 2016 no 1402-VIII 'About Judicature and Judges' Legal Status' (as amended of 5 August 2021) <<https://zakon.rada.gov.ua/laws/show/1402-19>> accessed 25 September 2021.

17 The Supreme Court of Ukraine plenum resolution dated 13 June 2007 no 8 'About the Independence of Judicial Authority' (not amended) <<https://zakon.rada.gov.ua/laws/show/v0008700>> accessed 25 September 2021.

18 The Superior Commercial Court of Ukraine plenum resolution dated 23 March 2012 no 4 (as amended of 10 July 2014) 'About Some Practice Matters for Appointing a Forensic Examination' <<https://zakon.rada.gov.ua/laws/show/v0004600-12>> accessed 25 September 2021.

19 Strengthening Forensic Science in the United States, (n 7).

in judicial proceedings of Council of Europe's Member States,<sup>20</sup> approved by the European Commission for justice efficiency at the 24th Plenary Session (Strasbourg, 11-12 December 2014) and 'Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe', approved by the Council of the European Union at the 3135th meeting of the Council of Justice and Domestic Policy (Brussels, 13-14 December 2011,<sup>21</sup> etc.

Special attention should be paid to European documents of a strategic nature, in particular, the 'Vision for European Forensic Science Area by 2020 (EFSA)' and the 'Vision of the European Forensic Science Area 2030 – Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies'.

The member states of the EU recognising the importance of the EFSA have developed and proposed the following set of actions for consistent application: 1) ensure the accreditation of forensic laboratories; 2) develop unified best practice guides for their application by experts during the preparation of expert opinions in laboratories; 3) implement a set of measures aimed at professional development, joint exercises, and exercises on certain types of expert research at the European and international levels; 4) determine the optimal means for the creation, dissemination, updating, and use of forensic databases.<sup>22</sup>

The European Network of Forensic Science Institutes (hereafter ENFSI)<sup>23</sup> was appointed as the main coordinator for the implementation of the provisions of the EFSA. According to decision of the ENFSI Council and at the request of the ENFSI Law Enforcement Working Group, the EFSA project was completed at the end of 2020. Given the importance to society of the development of justice in Europe and in accordance with the provisions of the concept paper on the functioning of EFSA, ENFSI has prepared a new strategic document based on experience: the 'Vision of the European Forensic Science Area 2030 – Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies'.<sup>24</sup>

The Vision of the European Forensic Science Area 2030 took into account the conclusions of the Serious and Organized Crime Threat Assessment (SOCTA) 2021<sup>25</sup> and Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022-2025.<sup>26</sup> The purpose of the Vision is to support the harmonised and balanced

20 European Commission for the Efficiency of Justice, 'Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States' (2014) <<https://rm.coe.int/168074827a>> accessed 25 September 2021.

21 Council of the European Union, 'Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe' (2011) <[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/126875.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126875.pdf)> accessed 25 September 2021.

22 Council of the European Union, 'Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe' (2011) <[http://efic.pl/pliki/dokumenty/EU\\_Vision.pdf](http://efic.pl/pliki/dokumenty/EU_Vision.pdf)> accessed 27 September 2021.

23 European Network of Forensic Science Institutions. Official Website <<https://enfsi.eu>> accessed 25 September 2021.

24 'Vision of the European Forensic Science Area 2030 – 'Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies' (2021).

25 SOCTA – Serious and Organised Crime Threat Assessment (published 12 April 2021) <[https://www.europol.europa.eu/sites/default/files/documents/socta2021\\_1.pdf](https://www.europol.europa.eu/sites/default/files/documents/socta2021_1.pdf)> Serious and Organised Crime Threat Assessment> accessed 27 September 2021.

26 Council of the European Union, 'Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022 – 2025' (2021) <<https://data.consilium.europa.eu/doc/document/ST-8665-2021-INIT/en/pdf>> accessed 27 September 2021.

development of forensic science and its role, which significantly contributes to making law enforcement in Europe more efficient and effective.<sup>27</sup>

However, the issues of the development of forensic science activity in Ukraine have not been reflected in a separate guiding document of state policy. At the same time, certain functioning aspects of the field of forensic support for justice are either outlined in various acts of a program nature or regulated in the guiding documents of the state policy of law enforcement agencies and state borders of other bodies under which there are forensic science institutions (Development Strategy, Expert Services of the Ministry of Internal Affairs of Ukraine, Development Strategy of the State Border Guard Service, etc.). We are confident that development in the field of forensic support for justice will allow us to solve urgent issues in the current state of activity of forensic institutions of Ukraine and determine prospective directions of future development in accordance with European and international standards.<sup>28</sup>

Detailed analysis of legal issues revealed that ENFSI is a powerful association that influences the development of justice in Europe and its legal and organisational support. We are convinced that the development of forensic science both in Ukraine and in Europe will contribute to the completion of three important tasks. Firstly, it will help law enforcement officials in investigations to identify criminals more quickly. Secondly, further improving the practice of forensic science will reduce the number of convictions by courts that increase the risk that real offenders continue to commit crimes and innocent people serve sentences improperly. Thirdly, any improvements in the field of expertise will undoubtedly strengthen the ability of individual states to address national security.

### 3 ISSUES OF LAW ENFORCEMENT WITHIN ECtHR CASE-LAW

Motivation and reasonableness are basic requirements for court decisions and an important element of the right to a fair trial. For example, Art. 6 of the ECHR guarantees the obligation of states to promote efficient judicial procedures by ensuring the functioning of an independent and impartial national judicial system. The fulfilment of this duty becomes real when judges are given an effective opportunity to administer justice fairly and appropriately on the basis of their factual opinions and with respect for the rights of citizens.

The application peculiarity of Art. 6 is that it does not apply in proceedings where there is no dispute between the parties, in unilateral proceedings where there are not two parties to the dispute, and in cases of a lack of rights as the subject matter of the dispute<sup>29</sup> (*Alaverdyan v. Armenia*<sup>30</sup>). The dispute should indicate signs of authenticity and seriousness (*Sporrong and Lönnroth v. Sweden*).

We share the views of V. D. Yurchyshyn, who emphasised that the ECtHR has developed certain generally accepted approaches (European legal standards) to the procedure for appointing and conducting forensic examinations in criminal proceedings and assessing the reliability and validity of expert opinions that comply with the Convention. The ECtHR, when

27 'Vision of the European Forensic Science Area 2030' (n 25).<sup>49</sup>

28 O Agapova, 'In Regard to Need for Working Out the Concept of Development of Expert Ensuring of Justice in Ukraine', *The Journal of VN Karazin Kharkiv National University* (Pravo 2020) 14-29 <<https://periodicals.karazin.ua/law/article/view/15602/14930>> accessed 25 September 2021.

29 European Court of Human Rights, 'Guide on Article 6" (n 4).

30 *Tigran Alaverdyan v Armenia* App no 4523/04 (ECtHR, 24 August 2010) <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100411>> accessed 27 September 2021



considering complaints, pays attention to observance of human rights when appointing and conducting forensic examinations. In our opinion, this is because the ECtHR provides for compliance with the relevant rules on the involvement of forensic experts in the complaints of individuals and legal entities.<sup>31</sup>

The 'Opinion of the Advisory Council of European Judges to the Committee of Ministers of the Council of Europe on the efficiency of judgments' no. 11, dated 18 December 2008, states that a high-quality judgment is a decision that achieves the correct result, as far as content provided by judges in a fair, fast, clear, and unambiguous way.<sup>32</sup>

As a rule, the achievement of the correct result and the adoption of a fair court decision becomes possible by taking into account the following requirements: 1) to take into account the practice of law enforcement and legal provisions that directly relate to the dispute context; 2) to establish all case circumstances with reference to the evidence obtained during proceedings; 3) while making a decision, to focus on non-legal phenomena, such as ethical, social, and moral requirements adopted in society, etc.

Regardless of whether the proceedings are criminal or civil, the national court's primary task is to assess general justice. The requirement of a fair trial means that the courts are obliged to conduct a trial, not on the basis of an examination of a particular aspect or a specific incident but by taking into account all the circumstances of the proceedings as a whole. The general requirements of justice contained in Art. 6 of the ECHR apply in both civil and criminal proceedings, regardless of the type of offence or crime in question. However, the main factor for determining the proceedings to be fair is the provision of public interest in decision-making.<sup>33</sup>

Thus, establishing stage of case circumstances with the use of content and reference to evidence cannot bypass the use of such a tool as forensic science.

The case-law of the ECtHR on the criminal procedure aspect of Art. 6 of the ECHR clarifies the specifics of applying forensic science through compliance with a fair trial requirement. It should be noted that the requirement of a fair trial does not require the court of the original jurisdiction to request an expert opinion or conduct any other investigative action or measure through a specific expert if the party has made a request. If the defence insists that the court hear a witness or accept other evidence (such as an expert opinion), national courts must decide whether it is necessary or appropriate to accept that evidence for consideration at the hearing. In this case, the national court is free, subject to the terms of the Convention, to refuse to call witnesses proposed by the defence.<sup>34</sup> The importance of the compliance of forensic science with the requirement of a fair trial demonstrated in *Huseyn and Others v. Azerbaijan*, § 196,<sup>35</sup> *Khodorkovskiy and Lebedev v. Russia*, §§ 718 and 721,<sup>36</sup> and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, § 95.<sup>37</sup>

31 VD Yurchyshyn, 'Forensic Examination in the Activities of the European Court of Human Rights: Issues of Theory and Practice' (2021) *Pravo i suspilstvo* 240-245 <[http://www.pravoisuspilstvo.org.ua/archive/2021/2\\_2021/35.pdf](http://www.pravoisuspilstvo.org.ua/archive/2021/2_2021/35.pdf)> accessed 27 September 2021.

32 Consultative Council of the European Judges, 'Opinion no. 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions' (2008) <[https://www.courtexcellence.com/\\_data/assets/pdf\\_file/0023/4919/ccje.pdf](https://www.courtexcellence.com/_data/assets/pdf_file/0023/4919/ccje.pdf)> accessed 27 September 2021.

33 European Court of Human Rights, 'Guide on Article 6' (n 4) '7-8.

34 'Ibid (n 4) '35.

35 *Huseyn and others v Azerbaijan* App nos 35485/05, 45553/05, 35680/05 and 36085/05 (ECtHR, 26 July 2011) <<http://hudoc.echr.coe.int/eng?i=001-105823>> accessed 27 September 2021.

36 *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) <<http://hudoc.echr.coe.int/eng?i=001-122697>> accessed 27 September 2021.

37 *Poletan and Azirovik v the Former Yugoslav Republic of Macedonia* App nos 26711/07, 32786/10 and 34278/10 (ECtHR, 12 May 2016) <<http://hudoc.echr.coe.int/eng?i=001-162704>> accessed 27 September 2021.



The application peculiarity of Art. 6 is also that the role of the ECtHR, as a rule, is not to determine whether a certain expert opinion obtained by a national court was reliable or not. A national court judge usually has a wide range of powers to choose between conflicting expert opinions and select those he or she deems most credible. However, this does not mean that the defence is deprived of the right to appeal the expert opinion by providing an alternative expert opinion. As long-term practice demonstrates, only in certain circumstances can a refusal to accept an alternative examination as evidence be regarded as a violation of Art. 6 § 1. As an example, we can mention such cases as *Stoimenov v. the former Yugoslav Republic of Macedonia*, § 38,<sup>38</sup> *Matytsina v. Russia*, § 169,<sup>39</sup> and *Khodorkovskiy and Lebedev v. Russia*, § 187,<sup>40</sup> indicating that it can be difficult to challenge an expert opinion without the assistance of another expert in the relevant field.

Equally important is the appointment of experts in the proceedings in terms of compliance with the principle of equality of arms. There are cases when one of the parties considers the proceedings unfair= when relevant experts are hired by the other party. The ECtHR has clarified that although this may raise concerns about the neutrality of experts, such concerns are not decisive. However, the position of the experts throughout the proceedings, how they perform their functions, and how the judges assess the expert opinion are crucial. In determining the procedural position of experts and their role in the proceedings, the ECtHR considers whether the opinion given by any expert appointed by the court is of great importance in the court assessment of issues within the expert's competence,<sup>41</sup> as in *Shulepova v. Russia*, § 62,<sup>42</sup> and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, § 94.<sup>43</sup>

It should be noted that establishing all the circumstances of the case through the prism of the conventional protection of the right to a fair trial belongs exclusively to the judge's competence, and expert evidence often avoids the adoption of unfair court decisions.

The US Supreme Court approach to evaluating expert opinions is noteworthy. In order to assist judges in the preliminary assessment of expert opinions and help them to understand whether the methodology or theory underlying forensic expert testimony is scientifically sound and in which case it is appropriate to apply expert opinions to the impugned facts, the Supreme Court has identified the following five conditions: 1) that the scientific methodology or theory used by the expert in forming the expert opinion be tested; 2) that whether the expert correctly applies the scientific methodology (methods and methodical recommendations, scientific articles, etc.) has been tested and reviewed; 3) that the probability of error while choosing a specific methodology or theory as an expert is clear; 4) that there are standards that control the application of the methodology or theory used by the forensic expert; 5) that the chosen methodology and theory is generally accepted in a particular expert or scientific community.<sup>44</sup>

38 *Stoimenov v the Former Yugoslav Republic of Macedonia* App nos 17995/02 (ECtHR, 05 April 2007) <<http://hudoc.echr.coe.int/eng?i=001-80035>> accessed 27 September 2021.

39 *Katytsina v Russia* App no 58428/10 (ECtHR, 27 March 2014) <<http://hudoc.echr.coe.int/eng?i=001-141950>> accessed 27 September 2021.

40 *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) <<http://hudoc.echr.coe.int/eng?i=001-122697>> accessed 27 September 2021.

41 European Court of Human Rights, 'Guide on Article 6' (n 4) '35.

42 *Shulepova v Russia* App no 34449/03 (ECtHR, 11 December 2008) <<http://hudoc.echr.coe.int/eng?i=001-90093>> accessed 27 September 2021.

43 *Poletan and Azirovik v the Former Yugoslav Republic of Macedonia* App nos 26711/07, 32786/10 and 34278/10 (ECtHR, 12 May 2016) <<http://hudoc.echr.coe.int/eng?i=001-162704>> accessed 27 September 2021.

44 *Daubert v Merrell Dow Pharmaceuticals* no 92-102 (SCOTUS, 28 June 1993) <<https://supreme.justia.com/cases/federal/us/509/579/case.pdf>> accessed 28 September 2021.

We consider this approach to the evaluation of expert evidence to be rational and suggest it could be applied in Ukrainian judicial practice.

## 4 CONCLUSIONS

Given research results, it should be noted that the Ukrainian and European practice of applying expert research in court cases is an important condition for ensuring the right to a fair trial. Thus, the case-law of the ECtHR has been substantiated with the help of expert evidence. Expert research in the context of the conventional protection of the right to a fair trial in the case-law of the ECtHR plays a leading role in providing it with comprehensive, complete, objective research and takes into account the principle of equality of arms. Direct analysis of the case-law of the ECtHR indicated that there are specifics of applying forensic science through the observance of the right to a fair trial enshrined in Art. 6 of the ECHR (cases of the right of the court to choose alternative expert opinions, etc.). At the same time, it was found that the conceptual issues of forensic development in Ukraine have not been reflected in a separate guiding document of state policy (strategy, concept), a situation that negatively affects the process of the harmonisation of legislation and standards of Ukraine with the norms EU legislation and standards in the field of forensic support for justice, as well as the formation of common approaches to the use of expert evidence. Research on the case-law of the ECtHR allows us to testify to the fact of the influence of forensic science on making fair decisions and to note the common approach of Ukrainian experts to the resolution of expert opinions with the European forensic expert community.

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