Oksana Mayba , NGO “The All Ukrainian European Foundation “The League of Law”

Statement on the case of Ivan Sherstyuk

Dear Mr. Moderator, honorable representatives of OSCE country states and colleagues from civil society!

I represent the Ukrainian human rights organization “The League of Law”. We have been closely monitoring the developments in the area of reforms of law enforcement authorities and judiciary in for the last three years..

Every year we speak about numbers of violations in the area of criminal justice in Ukraine. But numbers are just the statistics, nobody takes it personally. This year is different, I am going to speak about one particular case where a person is simply failed by the state of Ukraine (by its law-enforcement authorities) and no action has yet been taken to restore the justice and fix the major prosecution and judicial mistakes.

The person I am referring to is Ivan Sherstyuk - a Ukrainian human rights defender, civic activist, a graduate of Lublin Catholic University and lecturer in Warsaw University, co-founder of a few non-profit foundations, a candidate for local council elections in 2010.

Ironically enough he was sitting at the very same table on annual HDIM in Warsaw 8 years ago speaking about human rights violation in the post-soviet countries. However, since then Ivan has been persecuted by the Ukrainian law-enforcement authorities accusing him of the most ridiculous crimes starting from hooliganism and ending with preparation to murder organization. As soon as the previous accusation had fallen apart, the new one started. Ivan has been in custody without a final court verdict since 2012, almost 6 years.

Ladies and Gentlemen, I am asking you think for a moment about this term. 6 years in pre-trial detention without final court decision on his guilt or innocence. Staying for such a long time in the Ukrainian pre-trial custody is considered as a torture as well inhuman and degrading treatment by most well respected human rights organizations and European court of human rights. At least 5 times Ivan’s arrest was prolonged without his, or his lawyers presence basically making the trial declarative.The court proceedings have been constantly canceled or postponed while Ivan was held in prison.The main witness was avoiding his testimonies at the court for 3,5 years and later turned out to be an police officer who had been operating without the court authorization. This effectively made any and all evidence collected inadmissible. Also, according to the latest rulings of the Supreme Court, such official actions by the police is nothing else but provocation and office abuse by the police and prosecution. However, to be able to appeal these actions, one needs to have the final court verdict and Ivan Shersyuk has not been provided one. These are major violations of the right to fair trial within reasonable time by the impartial tribunal.

Therefore, we urge the Ukrainian law enforcing authorities to stop the office abuse and ensure the right of Ivan Sherstyuk as well as other illegally accused to a fair trial within a reasonable time and freedom from illegal criminal prosecution and imprisonment. Also we urge OSCE state members to monitor the developments in Ivan's case and express the concern regarding the human rights violations in this case in particular. Ivan has been defending human rights all his adult life, however now he needs others to defend his before it is too late.

Thank you.

NGO “All-Ukrainian European Foundation “The League of Law”

Commission of Protection of the Illegally Accused

Report

Rule of law in Ukraine: Human Rights in the Criminal Proceedings

Prepared for

Human Dimension Implementation Meeting
2018 OSCE / ODIHR, Warsaw, Poland

This report has been prepared by two human rights organizations: NGO All-Ukrainian European Foundation "League of Law", and NGO "Commission of the Protection of the Illegally Accused", which are public non-profit, non-political associations of like-minded people who are looking for and fighting for human rights in Ukraine.

The main objectives of the organizations are to protect the human rights and fundamental freedoms, ensure their exercising, and establish justice in accordance with the effective Ukrainian legislation and international human rights standards.

Our civil society organizations are constantly monitoring the state of compliance with the rule of law principle, ensuring the right of a person to a fair trial and the possibility of exercising the rights of individuals in the courts of Ukraine at the time of the long-awaited reform of the judiciary, the transition from the Soviet standards of justice to European ones. We have analyzed key issues that still take place when implementing the right to a fair trial, including, but not limited to, legislation that significantly affects this right.

In our report, we summarize the results of our monitoring, present the most high-profile criminal cases that are at the trial stage and give our recommendations for the Ukrainian authorities (the official delegation).

Introduction

The ratification by Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"), as well as the commitment to comply with the standards defined by the OSCE member states in the human dimension, places on our state the obligation to strictly adhere to these obligations. This, in turn, requires from our state the need to organize its legal system in such way as to ensure a real guarantee of the right to legal defense, to create equal conditions of access to justice.

During the Revolution of Dignity in Ukraine, civil society has declared its aspiration to European standards of development in all spheres of life. Taking into consideration this desire, our state has taken a sharp course on a number of reforms including in the area of justice.
This report summarizes the monitoring carried out in the implementation of the rule of law principle in the following areas:

- Access to justice, including monitoring of organizational work in the courts;
- Ensuring the right to defense in criminal proceedings;
- Independence of the judiciary and institute of independent lawyer;
- Reasonable time for criminal trial in courts;
- Analysis of legislation in the field of justice.

Each section provides recommendations to public authorities to address existing challenges and problems.

The right to an independent and just trial

By Oksana Mayba, All Ukrainian European foundation “The League of Law”

In accordance with Part 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to a fair trial of his case by an independent and impartial trial established by law, which resolves a dispute over his rights and obligations, or establishes the validity of any criminal prosecution against him.

At present, for Ukraine, in the framework of reforms in the area of justice, it is very important to ensure and guarantee to every citizen his right to an "independent and impartial court". At present, trust in the courts in Ukraine is greatly undermined in society; therefore, an extremely important stage is the renewal of the judicial branch of power that was still formed in Soviet times, the elimination of undemocratic stereotypes in the approach to the administration of justice, which manifests itself in close cooperation between courts and public prosecutors, through taking on the court, the unusual functions of the prosecution.

In order to implement the European standards of justice in 2012, the new Criminal Procedure Code of Ukraine was adopted, which based on the basic rights guaranteed by the Convention, such as ensuring the right to a fair trial, and the basic principles for ensuring a person's prompt, impartial hearing of the case. However, taking into account the stagnation of the judiciary that was formed in Soviet times, the norms of the new Code of Criminal Procedure were not immediately implemented and there are still a number of obstacles to the literal application of European standards of justice. For example, in order to guarantee the impartiality of the court, the new Criminal Procedure Code provides a provision for the transfer to the judicial panel only of the indictment and the register of pre-trial investigation materials, and the prohibition of provision of other materials before the beginning of trial (Art. 291 CPC Ukraine). Also in accordance with Article 23 of the Criminal Procedure Code of Ukraine the principle of the directness of consideration of testimonies, evidence and documents by the judicial panel is confirmed, for the purpose of preventing of getting beforehand opinion on the case until the moment of studying the evidence in court and forming his own opinion on the case.

However, there have been rare cases when the judge, on his own initiative, in violation of the requirements of the Code, ordered prosecutor to provide materials of the criminal case at preparatory hearing, thereby violating the principle of impartiality of the court.

At present, there are frequent cases when the courts violate the right to a fair trial, in particular, through the lack of clarification, in some cases, of the person's right to hear his/ her case by a court of jurrors, which is guaranteed by Art. 384 of the Criminal Procedure Code of Ukraine, that stipulates "the prosecutor, the court are obliged to explain to the defendant charged with a crime, which may have maximum punishment in the form of life imprisonment, the possibility and peculiarities of the hearing of criminal case against him by a jury trial. At the same time, the prosecutor's written explanation is added to the indictment and the register of pre-trial investigation materials, which are trandfered to the court ".

Bright examples of such violations of the right to a fair trial are the case of Sherstyuk and the case of Gelon.

Case of Sherstyuk

The court ordered the prosecutor to provide the judicial panel with materials of criminal proceedings during the preparatory meeting in violation of Art. 314 of the Criminal Procedure Code of Ukraine, according to which, during the preparatory meeting prosecutor does not provide the court with materials of criminal proceedings, which was also emphasized by the prosecutor.

However, the trial was announced postponed by the court in the preparatory meeting in order for the prosecutor to provide the criminal proceedings materials which the latter did.

In addition, during the hearing of this criminal case, the court ignored the principle of independence, impartiality, by taking the unusual functions of gathering evidence, namely, the information on the person of the accused Sherstyuk, on the basis of which the court made the respective decisions.

During 2017, the victim's side started exercising significant pressure on the presiding judge Lozynsky by organizing paid protest actions against a judge through the public organizations the victim Veremeyenko founded. The protesters called the judge corrupt and demanded to sentence defendant Sherstyuk. These same protesters attacked the lawyers of the accused and his closest relatives. All these actions remained completely without the reaction of law enforcement agencies and the court.

In June 2017, in connection with the leave of one of the judges from the board, he was replaced by another judge. Sherstyuk's lawyers insisted on hearing the case from the beginning, as the new judge was not able to listen to witnesses' testimonies directly, as prescribed by law, ask them questions, and investigate other evidence that had already been investigated in the process. The motion was denied by the court, but it was decided to continue to hear a case with a new judge from the place where the previous judge left.

In addition, after a court hearing on 02.08.2017, the court issued a ruling on bringing defence counselors to disciplinary liability, with a quotation "up to the deprivation of the right to practice law" for allegedly disrespectful behavior towards the court through the active expression of their opinion. This can be considered as a pressure on defenders in connection with their active position in defence of Sherstyuk.

Given of the number of biased facts admitted by the court, and the violation of the person's right to a fair trial and defence Sherstyuk has repeatedly expressed the distrust of such a court order with a motion for recusation in order to guarantee the person the right to a fair trial, which was ignored by the court.

In August 2017, the presiding judge Lozynsky powers of judge expired. Consequently, the case must be referred to the new panel. This means that the trial begins from the beginning.

Thus, Ivan Sherstyuk, lacking the hope of a fair trial of his case by a national court, and in fact, even before the decision in the case, is already serving sentences for no more than four and a half years.

The case of Gelon

During the appeal proceedings, it was established that Prosecutor of the Prosecutor's Office of Lviv Oblast, Dyakov B.Z. did not visit the accused in the pre-trial detention facility, did not hand over the indictment and did not explain the right to hear his case by court of jury.

Due to these violations, the sentence was revoked, the indictment was returned to the prosecutor, and is currently being re-issued.

The risks of judicial impartiality in Ukraine

By Iulia Vasylenko,

NGO "Commission for the Protection of Illegally Accused"

Legislation of Ukraine states that there can be no privileges or restrictions in the procedural rights of the parties to the case in criminal proceedings . In addition, criminal proceedings must be carried out on the basis of competition, which allows to the independent defense and to the prosecution to express their legal positions, and exercise rights, freedoms and legitimate interests in the ways stipulated by the law.

Based on the results of the monitoring in 2018, it was found significant amount of violations of the general principles of criminal proceedings in Ukraine (such as equality of parties before the law and the court, competition of the parties), based on the following.

Failure to present the accused for identification at the stage of the pre-trial investigation

Investigative authorities very often do not conduct such an investigative action at all as presenting the accused for identification to witnesses, victims, both at the pre-trial investigation stage and during the trial in court. Such inaction effectively neutralizes the objectivity of the witness or the victim in the identification of the accused, when he is already on the bench of the defendants. However, it was noted that judges not only ignore such bias, but also contribute to creating an appearance of objectivity.

So in the case of Vladimir Yudin, the judge completely ignored the fact that the investigation authorities failed to present the accused for identification with the witnesses who were invited to the court. As a consequence, the witnesses saw the accused for the first time right on the bench of the defendants. In spite of this, the court, when questioning the witnesses, asked them whether they recognize the person who is sitting on the bench of the defendants. It is natural to speak about the lack of objectivity of such an "identification".

In turn, the prosecution did not even try to establish whether the witnesses would recognize the accused at the stage of pre-trial investigation.

Failure to disclose the evidence to the defense side

At the stage of pre-trial investigation, unfortunately, it is not uncommon for the prosecution not to disclose material evidence to the defense.

Such material evidence can not be brought by the prosecution to the court, because according to the provisions of the Criminal Procedure Code of Ukraine, if the prosecution does not disclose the materials to the defense, the court does not have the right to admit the information contained in them as evidence in the case.

However, in the courts of Ukraine, the legislation is regularly ignored, and in numerous cases the judges accept evidence that has not been disclosed to the defense and base their decisions on the above evidence.

So, in the case of Roman Milentiev, not only the judge accepted and attached materials such as copy of audio record during the consideration of the case, and ignored the objections of the defense, but he also took them as the ground for the conviction.

It is important to note that the Ukrainian legislation allows the parties to the case to disclose the evidence that they are going to submit to the court, both at the pre-trial investigation stage and at the stage of the trial .

Therefore, such a significant violation of the principle of equality and competion by the parties and clear violation of the norms of the law is the evidence that the judje often performs the functions of the prosecution instead of being impartial and unbias.

Exercise of procedural actions by judges which are not stipulated by the law

In the beginning of 2018, we witnessed a case when the judge cancelled his own decision at Primorsky District Court of the city of Odessa.

In one criminal case of this court, the judge withdrew himself from the case in connection with a mistrust motion of the participants of the case. Then the case was passed to automatic distribution system and was transferred to the judge Kushnyarenko.

In accordance with the legislation of Ukraine, each judge before the acceptance the case for consideration is obligated to check whether he has any grounds for declaring a withdrawal in such a case. This case was no exception, and Judge Kushnyarenko on December 19, 2017 makes a court decision on the withdrawal. However, in the future, despite the current court decision on the withdrawal, this judge still takes the case for consideration.

In the court session, Judge Kushnirenko explained that the decision to withdraw him was a mistake, and at the time of the consideration he had already sent appeal to the State Enterprise "Information Judicial Systems" as of December 28, 2017 with a request to exclude the document 71089237 from the Unified State Register of Judicial Decisions (Judge's Decision as of- 19.12.2017), as it was not a judicial decision (ruling).

In addition, we draw the attention to the fact that the Ukrainian legislation does not provide for such procedure of cancellation of court decisions as "appeals to the State Enterprise" Information Judicial Systems "with a request to exclude from the Unified State Register of Judicial Decisions."

Despite the outrageous violation of the norms of criminal legislation, the court refused to withdraw judge Kushnirenko from the case.

Recommendations:

We urge the Ukrainian authorities to ensure implementantion of the existing norms of legislation by all participants in criminal cases, and to bring all persons who violate them to justice, including judges and law enforcement officers.

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НЕПРОФЕСИОНАЛЬНОСТЬ ОРГАНОВ ОБВИНЕНИЯ и СУДЬИ, ВЫПОЛНЯЮЩИЕ ФУНКЦИИ ОБВИНЕНИЯ

Василенко Юлия, ОО «Комиссия защиты незаконно обвиненных»

Законодательством Украины предусмотрено, что в уголовном процессе не может быть привилегий или ограничений в процессуальных правах сторон дела. Кроме того, уголовное производство должно осуществляется на основе состязательности, что предусматривает самостоятельное отстаивание стороной обвинения и стороной защиты их правовых позиций, прав, свобод и законных интересов способами, предусмотренными законодательством.

По результатам мониторинга соблюдения прав граждан в Украине в 2018 году, было установлено нарушение общих принципов уголовного производства Украины (таких как равенство сторон перед законом и судом, состязательность сторон), что проявилось в следующем.

Не предъявление обвиняемого для опознания

Следственные органы очень часто вообще не проводят такое следственное действие как предъявление обвиняемого для опознания свидетелям, потерпевшим, как на стадии досудебного расследования, так и во время рассмотрения дела в суде. Такое бездействие фактически нивелирует объективность свидетеля или потерпевшего при опознании обвиняемого, когда он уже находится на лаве подсудимых. Однако было зафиксировано, что судьи не только игнорируют такую необъективность, но и содействуют в создании видимости объективности.

Так в деле Владимира Юдина судья, полностью проигнорировал, что с приглашенными в суд свидетелями следствием так и не было произведено предъявление обвиняемого для опознания. Как следствие свидетели первый раз увидели обвиняемого сразу на лаве подсудимых. Не смотря на это, суд, при допросе свидетелей начал их опрашивать узнают ли они человека, который сидит на лаве подсудимых. Естественно говорить об объективности такого «опознания» не приходится.

В свою очередь сторона обвинения даже не пыталась установить узнают ли свидетели обвиняемого.

Не предъявление (не открытие) доказательств стороне защиты

На стадии досудебного расследования, к сожалению, не редкость случаи, когда стороной обвинения не открываются стороне защиты вещественные доказательства, а производится подмена процедуры открытия таких доказательств путем составления и открытия защите протокола об осмотре таких доказательств и довольно часто даже без понятых.

Такие вещественные доказательства не могут быть поданы стороной обвинения суду, так как в соответствии с положениями уголовного процессуального кодекса Украины, если обвинение не осуществит открытие материалов стороне защиты, суд не имеет права допустить сведения, содержащиеся в них, в качестве доказательств по делу.

Однако в судах Украины было зафиксировано игнорирования данного требования законодательство и в многочисленных делах судьи принимают не открытые стороне защиты доказательства в основу своих решений.

Так, в деле Милентьева Романа судья при рассмотрении дела приобщил к материалам дела и принял во внимание поданные стороной обвинения копии аудио файлов не открытые стороне защиты, а многочисленные возражения защиты и требования ознакомить с данными доказательствами просто игнорировались.

Важно обратить внимание, что украинское законодательство позволяет сторонам дела, как обвинения, так и защиты, ознакомить вторую сторону с доказательствами, что планируются подаваться суду, как на стадии досудебного расследования, так и на стадии уже самого рассмотрения дела в суде.

Соответственно, столь грубое нарушение судьей норм законодательства свидетельствует как минимум о фактически выполнении судьей функций обвинения.

Осуществление судьями процессуальных действий, не предусмотренных законодательством

В начале 2018 года в Приморском районном суде города Одессы был зафиксирован случай отмены судьей собственного решения. Как это было.

В одном уголовном деле данного суда судья взял самоотвод в связи с заявленным к нему недоверием участниками дела. Далее дело было передано на автоматическое распределение и попало на судью Кушняренка Ю.С..

В соответствии с законодательством Украины каждый судья до принятия дела к рассмотрению обязан проверить нет ли у него оснований для заявления самоотвода по такому делу. Данный случай не стал исключением, и судья Кушняренко Ю.С. 19.12.2017 года выносит судебное решение о самоотводе. Однако, в дальнейшем, несмотря на действующее судебное решение о самоотводе данный судья все равно принимает дело к рассмотрению!!!

В судебном заседании судья Кушниренко Ю.С. пояснил, что решение о самоотводе было им принято ошибочно, а на момент рассмотрения им уже направлено обращения в ГП «Информационные судебные системы» от 28.12.2017 года с просьбой исключения из Единого государственного реестра судебных решений документа с номером 71089237 (решение судьи о самоотводе от 19.12.2017), поскольку ОН НЕ ЯВЛЯЕТСЯ СУДЕБНЫМ РЕШЕНИЕМ.

Дополнительно обращаю внимание, что законодательством Украины не предусмотрена такая процедура отмены судебных решений как «*обращения в ГП «Информационные судебные системы» с просьбой исключения из Единого государственного реестра судебных решений*».

Несмотря на вопиющее нарушением норм уголовного законодательства судом было отказано в отводе судьи Кушниренко Ю.С..

http://reyestr.court.gov.ua/Review/71462287

Рекомендации:

Соблюдение существующих норм законодательства всеми участниками уголовных дел, а нарушителей – привлекать к ответственности, в том числе судей, правоохранителей.

Provocation of the crime by the law-enforcing authorities

By Tetiana Maleryk, All Ukrainian European foundation “The League of Law”

Unfortunately, during the period of the law-enforcing reforming campaign in Ukraine, the law enforcement system, despite its reformation and renewal, has not been changed from the inside, but remained on the same foundation that has been laid since the Soviet era, namely the measurement of the results of its activities by quantitative indicators that have nothing to do with efficiency and quality of work. Thus, in pursuit of the indicators and artificially created visibility of an effective fight against crime, it is acceptable to resort to provocation of crimes: to provoke bribery; provocations in criminal offenses connected with illegal drug trafficking; and even to the provocation of the criminal offenses connected with murders.

The judicial review of individual cases involving the provocation of a crime reveals that such provocations by law enforcement agencies were apparently carried out "by order" of influential persons.

One of the most resonant cases, which has obvious signs of a provocation of a crime, is the case brought against the deputy chief of the Lviv Regional Hospital Natalia Van Doyoveren-Got.

On November 26, 2016, police officers arrested the Deputy Chief Doctor of the Lviv Regional Hospital, Natalia Van Doyoveren-Got, allegedly when trying to get a bribe for hospitalization of the "sick patient". Besides the testimony of the so-called victims, no evidence to confirm the receipt of unlawful benefit by the doctor has not been received by the pre-trial investigation authority. As it was later discovered that one of the law enforcement officers involved in the case was the victim’s relative, and "sick patient" - was actually found not to be ill at all. Also, it was interesting to note that during the trial of this criminal proceeding, one of the witnesses admitted that he falsified his testimonies against Mr. Natalia Van Doeveren-Got at the request of police officers.

Subsequently, in this case, a number of interesting and very significant details appeared which revealed the chain of cases initiated on the basis of the provocation of the crime by the same, so-called applicants. Persons who reported the facts of the extortion of unlawful benefits to law enforcement authorities were discovered to be applicants in similar cases concerning the provocation of a crime in the field of corruption.

As it is observed in cases of this category, there are quite a few persons who are under the influence of law enforcement officers and systematically follow their instructions in order to avoid punishment for their offenses .

Obviously, there was a motive behind the provocation against N. Van Doyoveren-Got. Earlier, in May 2015, an interview of Natalia Van Doyoveren-Got was published in the Dutch newspaper, which revealed how corruption system in the healthcare sector works, inver alia laundering of

budget funds on the example of the Lviv Regional Hospital. Soon, somewhere in June 2015, Van Doeveren began to receive threats after this publication. She was called from an unknown number and threatened. The deputy chief doctor filed threats to the prosecutor's office.

There are also a number of other examples of real cases - provocations of committing a criminal offense in the form of obtaining improper benefits:

– A patient who was extorted a bribe which a doctor rdemands for the treatment of lungs. The doctor is arrested, the police and prosecutors report on the fight against bribery, and in some time it turns out that this patient’s lings are healthy, and the doctor did not demand a bribe at all..

- A person who has ban on traveling abroad in connection with the charge in a criminal case claims extortion of a bribe for speeding up the production of a international passport. Employees of the Migration Service were arrested, and the applicant never applied to get the international passport again.

- A person goes to the lawyer to represent his/her interests, the parties agree on the remunaration, sign a contract, and the police receives the file about extortion of a bribe. The pseudo-claimant insists that the money she has given to the lawyer - in fact was meant for the judge, although the lawyer never said that, and the claimant did not even ask about it.

Claimants usually submit a few extortion files in a short period of time, and they are being investigated by the police, for example, for official forgery, robbery, kidnapping, fraud, etc. And after a while, "with active assistance to law enforcement authorities," the cases of such applicants-agents go down the brakes, re-qualify without sufficient legal grounds for less severe, the prosecutor asks the court to give a minimum penalty.

Thus, such anticorruption activity of the current authorities in Ukraine is limited to:

1. fighting against uncomfortable people and / or removing them from office (more than once, there were breaking news anbout the corruption of public servants who were in a rigid opposition to the authorities and systematically exposed the abuse of top officials);

2. arrests on grounds of provocations (when the applicant communicates several times with the official regarding the procedure for obtaining a certain benefit, at the same time he files a complaint regarding the extortion; and when an official refuses to solve the applicant's request for the money, the latter simply puts a certain amount on the table. Although the provocation of the corruption and the artificial creation of a crime is strictly forbidden by the Ukrainian law and the

practice of the European Court of Human Rights - in Ukraine this is a new branch of criminal business.

2. In Ukraine provocation of a crime takes place not only in the field of detection of corruption acts, but also in the field of creating the visibility of exposure of grave and especially grave crimes.

Thus, almost sixth years the trial of the criminal cases against Ivan Sherstyuk has been considered in Frankivsk District Court of Lviv. Ivan is accused of prepaaration of the murder organization of a local businesman.

Ivan Sherstyuk - a Ukrainian human rights defender, civic activist, a graduate of Catholic University of Ivan Paul II, PhD student in Psychology and lecturer in Warsaw School of Social psychology (2006-2010), co-founder of a few non-profit foundations. In 2010 he was a candidate for local council elections in Kyiv region.

There are only 6 witnesses in the case, however, the trial lasts for six years already. For five years, Sherstyuk and his lawyers have tried to restore his right to a fair trial, as at the Sherstyuk constantly demanded the consideration of his case by the court of jurors, which is allowed in accordance to the Ukrainian legislation. Hoewer the judge deliberately ignored the request of Sherstyuk to consider his case by a jury for 5 years and later we found out why. Given the course of court sessions, the case is obviously has nature of the order – to provoke a crime to prosecute Sherstyuk.

3. In the past, between Sherstyuk and so-called the victim - a businessman was a conflict in the criminal case against Sherstyk on charges of the committing fraudulent actions against the wife of this businessman.

At first he was arrested by the police at home in Lviv and demanded to admit a loan of $ 100,000 from Veremeenko wife. After a night of torture in prison, he was sent to court on charges of hooliganism. Without any evidence of such hooliganism, the court acquitted Ivan and released from custody. In 4 months, Ivan is arrested again, accused of committing fraud with regard to Veremeenko wife.Without any witness or proof of Ivan's guilt, the investigation would accuse him of fraud having used the hypnosis. In a year and a half of imprisonment in the SIZO (pre-trial detention facility), Ivan is released with the second acquittal. Veremeenko perceives it as a personal defeat. In another six months, Ivan is arrested on charges of preparation of a murder of Veremeenko. What is the motive for Ivan Sherstyuk to order the murder of a businessman, if in the previous case he was acquitted by a court ?! Obviously, the discrediting of Sherstyuk (accusing the latter of a more serious crime) in the eyes of the court, the public, is beneficial to the businessman himself in order to achieve the desired result in the previous case.

4. Another interesting fact in this case is that, as an agent for the role of Killer, who turned out to be an officer under cover and had been operating without the court authorization. Despite the obvious facts of the provocation of the crime, the trial has been lasting for six years, and since December 2012 Ivan Sherstyuk is in custody. The final decision in this case has not yet been delivered.

A similar situation occurs in another yet no less resonant case.
So, in December 2013, the police reported that a criminal grouping based on "ethnic ties" (as indicated in the indictment) was disclosed in the Lviv region. There were two accused Roma women who were involved in the sale of drugs. As stated in the indictment, the activities of such a criminal group consisting of two women, whom the investigators took as the organizers, and two male executors, were documented for a year and a half and unlawful activities included 96 episodes of drug sales. Such facts immediately raise doubts and questions from third-party observers: that is, for a year and a half, the law-enforcers were passively watching illegal activities and the spread of drug substances in 96 episodes? It became clearer that there was no objective evidence of such activity at all, the facts that would prove that women of Roma nationality are involved in the abovementioned episodes at all. Witnesses in this case are drug addicts who have been repeatedly prosecuted.
Over time, employees of the Security Service of Ukraine arrested police officers who worked in the area of combating illegal drug trafficking on the territory of the Lviv region, and disclosed the facts of incitement of persons of Roma nationality to the illicit trafficking of narcotic substances.under the threat of criminal prosecution.

This case is under consideration in the court for the fourth year. Under the obvious facts of the provocation of a crime, the court has not yet ruled the final decision.

Recommendations:

1. To stop the office abuse by the law-enforcing authorities and ensure the accountablility of persons responsible for provocations of crimes;
2. To ensure the real fight against the corrupition instead of investigation of fake crimes;
3. To ensuring the creation of the High Anticorruption court in the nearest time and transparent competion to it.

Preventive measure in the context of the right to a fair trial

By Oksana Mayba, All Ukrainian European foundation “The League of Law

Human rights defenders are deeply concerned about to preservation of the impartiality and independence of investigating judges and the court when considering a motion of prosecutor about application of a preventive measure.
Thus, the Criminal Procedural Code of Ukraine provides for the following preventive measures:

personal commitment, personal guarantee, bail, house arrest, detention. Very often there are instances of unreasonable use of such strict preventive measure, in violation of the procedure for its consideration. In such cases, the courts or investigating judges appear to be biased, actually acting as part of a public prosecution.

Such facts often occur, for example, in the case of the detention of a foreigner who does not have a permanent residence in Ukraine.

There are also obvious violations by the courts of the requirements regarding the procedure for reviewing the motion for arrest of a person, as well as the procedure for extending the term of detention, as court rulings on these issues do not contain sufficient justification as required by the Ukrainian Criminal Procedure Code.

Thus, for example, the court often uses as a basis for the extenstion of detention of a person that, in the case of dismissal, the suspect (the defendant) could evade the investigation and impede the establishment of the truth without indicating circumstances of the case that led him to reach such a conclusion;
- the lack of the analysis of the relevance of risks, which were grounds for detention at the beginning of the investigation (given that the risks of the taking of the person in custody at the initial stage of the investigation were reduced with the course of effective investigation of the case). Accordingly, every subsequent decision to extend the term of detention must contain a detailed justification of the remaining risks and their analysis as grounds for further interference with the right to freedom of the person;
- the absence of analysis of the possibility to apply to a person other preventive measures than taking a person in custody;
- failure to secure the right of the detainee to "immediately" appear before a court, which will decide on the lawfulness of his detention. This norm is constantly ignored by investigating judges, they are self-diverting from the exercise of their direct authority, and especially during judicial control at the stage of pre-trial investigation.

At the same time, judges completely ignore the precedents of the ECHR and in their decisions to motivate the need for the most severe preventive measure in the form of detention.

Recommendations:

1. Ensure the proper response of law enforcement agencies in detecting the unlawful pressure on the court.
2.The courts should be more responsible when addressing the issue of the application of preventive measures in the context of ensuring the right to a fair trial.

Analysis of legislation in the field of justice

Law No 2033a

1. Human rights activists of Ukraine are concerned about another aspect of the legislation in the field of human rights. The fact is that in 2010 the Code of Criminal Procedure of 1960 of Ukraine was amended and chapter on the review procedure of verdicts under exceptional circumstances was excluded. Thus, the innocent persons convicted in accordance with the Code of Criminal Procedure of 1960 in whose cases is the evidence of their innocence, are unable to obtain justice

in court.

According to the data provided by human rights acvists[1], there are currently 100 people in Ukraine who were unlawfully sentenced by courts. This number only refers to people who were sentenced to life imprisonment. People, who were unlawfully sentenced to life imprisonment, are deprived of review of verdicts in their cases, which were delivered on the basis of inadmissible evidence or even their total lack when the repressive Code of Criminal Procedure of Ukraine of 1960 had been still in effect. Many of those people were tortured and forced to confess to crimes they had not committed. Unfair court sentences were the result of proceedings fabricated by investigative agencies and pretrial investigation bodies, tortures used against the detainees, forced acknowledgement of guilt, violated right to defence, etc. Ukraine currently has no mechanisms or procedure for reviewing the criminal cases, in which an unfair/ ill-judged/ arbitrary/ unlawful judgment was delivered.

Therefore, for almost two years, human rights activists are calling the alarm. Draft law №2033a has been prepared and it has already passed the first reading in the Verkhovna Rada of Ukraine. However, despite the fact that draft law №2033a is ready for the second reading and even included in the agenda, the MP's lack political will at the moment to pass it. Meanwhile, innocent persons sentenced to life imprisonment are serving sentences for crimes they never committed. These are people like Volodymyr Panasenko, Olexander Rafalskyy, Maxym Dmytrenko, Maxym Orlov, Vyacheslav Polishko, Merab Suslov, Stanislav Levenets, Olexander Oshchepkov, Ihor Vovkodav and others .Conclusions on fabricated criminal cases against them, and on the illegal detention and custody made by the former Ombudsman for human rights Nina Karpachova, such international organizations as Amnesty international, the UN High Commissioner for Human rights. Nevertheless, the proper response by the Government of Ukraine has not been provided.

The purpose of the Draft law is to introduce at the national level the temporary mechanism for reviewing judgments delivered in criminal cases when the persons were found guilty of particularly serious crimes without sufficient evidence base and are still servicing sentence. The mechanism is proposed to be introduced to provide such persons with the right to legal sentence and restoration of their rights.

We support the Draft law №2033a because we believe that the procedure provided by this Draft law is necessary for people whose rights have been severely violated in trial without a chance for justice. There is a reason for the draft law being called "bill of last resort".

Review of cases by the Courts of Appeal for newly discovered circumstances

By Orest Shevchuk

Another area of concern regarding the right to access to justice is a series of conflicts in the Ukrainian criminal procedure legislation, in particular the lack of the possibility of reconsideration of court decisions for newly discovered circumstances.

Based on the results of monitoring of the exercising the right to a fair trial in Ukraine, the Commission for the Protection of Unlawfully Accused in 2018 identified the following violations. The subject of monitoring were court decisions taken by the appellate courts as courts of first instance. In the period from 01.09.2001. to 11.06.2011. the appellate courts considered criminal

1 NGO "Kharkiv Human Rights Group", Reanimation Package of Reforms, NGO "The centre of Information about human rights"

cases for which life imprisonment punishment can be applied This category of citizens was taken as a monitoring subject for the reason that the price of a judicial mistake is maximum: life imprisonment punishment. The second reason for choosing this particular subject for monitoring: by declaring the possibility of eliminating a judicial error committed asa result of ignorance of the existence of certain circumstances, the state (represented by the legislature) did not create a legal mechanism for reviewing decisions.

It is difficult to establish the number of persons sentenced to life imprisonment by the appellate courts as courts of first instance due to changes in statistical reporting in different periods, as well as for other reasons. However, it was possible to establish that in the period from 2006 to 2011, appeallate courts, as courts of first instance, sentenced 715 persons to life imprisonment. In the period from 2001 to 2006, there were no statistics on the verdicts passed by the appellate courts. The number of people sentenced to life imprisonment in the period 2003-2006 is 605 people. In total, between 2003 and 2011, 1320 people were sentenced by the verdicts of the appellate courts as first-instance courts.

The Criminal Procedure Code of Ukraine provides for the possibility of reviewing court decisions in criminal cases (sentences) on newly discovered circumstances. The procedure for reviewing court decisions is regulated by Part 4 of Art. 33 and part 1 of Art. 463 of the Code of Criminal Procedure of Ukraine.

In accordance with art. 6 of the Constitution of Ukraine, state power is exercised on the grounds of its division into legislative, executive and judicial. Legislative, executive and judicial bodies exercise their powers in the limits established by this Constitution and in accordance with the laws of Ukraine.

According to Part 2 of Art. 19 of the Constitution of Ukraine, public authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine. Analyzing the norms of the Constitution of Ukraine and the relevant laws of Ukraine, regulating the issues of legal proceedings and criminal procedural legislation, the we found that the judges of the district courts do not have the authority to cancel the decisions of the appellate courts as courts of first instance. Moreover, the Criminal Procedure Law (Article 467 of the Code of Criminal Procedure) only outlines the names of decisions that can be adopted based on the results of criminal proceedings on newly discovered circumstances.

It was established that the number of decisions to review court decisions on newly discovered circumstances is either very low, or there are no such decisions at all. During the monitoring we have not managed to locate any of such decisions, nor persons released due to review of court decisions on newly discovered circumstances.

Currently, the Commission thoroughly studies and participates in three cases that are at different stages of judicial review: the case of Vyacheslav Poleshko (collection of documents for filing a motion); the case of Stanislav Serbayev (the case has been started); the case of Igor Volkodav (a decision to deny the motion was made, currently at the stage of appeal). All these cases have in common the existence of grounds for reviewing sentences, and at the same time - the absence of the possibility of repealing court decisions.

During the monitoring we have concludes the following:

1. In the period from 2001 to 2011, criminal cases for which life imprisonment could be applied were considered by the appellate courts as first instance courts. The review of decisions on newly discovered circumstances was carried out by the Supreme Court of Ukraine.
2. In 2011, cases for which life imprisonment punishment could be applied, began to be considered by district courts. The review of court decisions on newly discovered circumstances since 2011 is carried out by the court that made the decision subject to review.
3. District courts (courts of first instance) are not authorized to cancel decisions of appeal courts, as courts of first instance.
4. There is no order and mechanism for reviewing court decisions on newly discovered circumstances. There is a declarative norm, but there is no legal mechanism for cancellation of decisions.

5. There is a conflict of jurisdiction, namely: according to Part 4 of Art. 33 of the Criminal Procedure Code of Ukraine - a criminal proceeding for newly discovered circumstances is carried out by a court that made a decision subject to review; Art. 463 of the Code of Criminal Procedure of Ukraine - the motion for review of the court decision is submitted to the court of the instance that was the first to make a mistake due to ignorance of the existence of newly discovered circumstances.
6. Decisions of the courts of first instance (if any) on reviewing the decisions by the appellate courts (as courts of first instance) are appealed to the same court of appeal, which ruled the canceled decision. That is, in fact, the appellate courts are reviewing their own decisions in the order of appeal, or rather, even the cassation.

To collect information on the existence of decisions of the courts of appeal (as courts of first instance), the Commission made inquiries to the courts (the Supreme and Appeal Courts), the Ministry of Justice of Ukraine and directly to penitentiary facilities. The responses contained information of different kind and quality: information was provided in a generalized form (general statistics on civil and criminal cases), information on the number of cases, without indicating the dates of adoption and decisions of which courts was reviewed. The information that there are no decisions regarding the review of the decisions of the appellate courts (as courts of first instance).

Table 1

Number of people convicted to life imprisonment according to the information provided by State Court Administration		
year	Number of convicted people	
	Total	By the appellate courts
2003	223	No information
2004	214	No information
2005	168	No information

2006	137	133
2007	149	140
2008	127	124
2009	160	155
2010	135	123
2011	116	40

The responses from the penitentiary facilities proved the fact that no people sentenced to life imprisonment between 2001 and 2011 were released as a result of reviewing sentences for newly discovered circumstances.

Number of people serving life imprisonment punishment			
Facility	Total number of people serving life imprisonment punishment	Convicted to life imprisonment by the appelate courts from 01.09.2001 to 11.06.2011	Number of released people serving life imprisonment punishment
State Vinnytsya prison (№1)	364	117	0
State Zhytomer prison (№ 8)	No information provided	No information provided	No information provided информации
State Kachaniv prison (№ 54)»	19	11	0
State Sofia prison (№ 55)»	65	43	0
State Roman prison (№ 56)»	No information provided	No information provided	No information provided
State Zamkiv prison (№ 58)»	99	83	0
State Temniv prison (№ 100)»	60	40	0
Total	607	294	0

We do not know the reasons why the norm on the possibility of reviewing a court decision on newly discovered circumstances is present in the legislation, but there is no legal mechanism for its

implementation. Perhaps, among those sentenced to life imprisonment, there are people who committed serious crimes and are absolutely fairly serving sentences in penitentiary facilities. But there are probably also those who are convicted as a matter of judicial error, due to ignorance of the existence of important circumstances at the time of the decision.
The very possibility of reviewing court decisions is provided by law. More precisely, the right to review is claimed, but it is practically impossible to exercise this right. One of the reasons may be that, thus, the legislator has established a certain barrier for judges, in order to prevent ruling of decisions on the release of persons sentenced to life imprisonment.
Recommendations: to implement the right to fair trial by canceling the judicial error via reviewing court decisions on newly discovered circumstances. It is necessary to improve the mechanism of such revision. To this end, judges should have the authority to review decisions, and also to have statutory grounds and procedures for deciding whether to cancel or amend earlier decisions. It is also necessary to specify the procedure for the trial during the revision, the rights of the judge, the applicant, the opposing party (the prosecution or the defense). Particular attention should be paid to decisions taken by the appellate courts as first instance courts. The lower court (district) does not have the authority to review the decision of the appellate courts. Either the same court of appeal or another appellate court should consider the case for review. The problem can be solved either by amending the law, or by appealing to the Constitutional Court of Ukraine for the abolition of illegal provisions, or clarifying the norms of the Constitution of Ukraine.

Rus

«Невозможность пересмотра приговоров апелляционных судов (как судов первой инстанции) по вновь открывшимся обстоятельствам»

Орест Шевчук, ОО «Комиссия защиты незаконно обвиненных»

По результатам мониторинга соблюдения прав граждан на справедливый суд в Украине, Комиссией защиты незаконно обвиненных в 2018 году были установлены такие нарушения.

Предметом мониторинга были судебные решения, принятые апелляционными судами как судами первой инстанции. В период с 01.09.2001г. по 11.06.2011г. апелляционные суды рассматривали уголовные дела, по которым предусмотрено наказание до пожизненного лишения свободы. Эта категория граждан была взята в качестве предмета мониторинга по той причине, что цена судебной ошибки является максимальной: пожизненное лишение свободы. Вторая причина избрания именно этого предмета для мониторинга: декларируя возможность устранения судебной ошибки, совершенной вследствие незнания о существовании обстоятельств, государство (в лице законодательной власти) не создало правового механизма пересмотра решений.

Установить количество лица, осужденных к пожизненному заключению апелляционными судами как судами первой инстанции, установить сложно в связи с изменениями в статистической отчетности в разные периоды, а также по другим причинам. Однако, удалось установить, что в период с 2006 г. по 2011 г., апелляционными судами, как судами первой инстанции, к пожизненному лишению

свободы было осуждено 715 лиц. В период 2001 – 2006 год отдельно по приговорам, принятым апелляционными судами, статистика отсутствует. Количество осужденных к пожизненному лишению свободы в период 2003-2006 составляет 605 человек. Всего в период с 2003 г. по 2011 г. осуждено по приговорам апелляционных судов, как судов первой инстанции 1320 человек.

Уголовным процессуальным кодексом Украины предусмотрена возможность пересмотра судебных решений по уголовным делам (приговоров) по вновь открывшимся обстоятельствам. Порядок пересмотра судебных решений регулируется ч. 4 ст. 33 и ч. 1 ст. 463 УПК Украины.

В соответствии ст. 6 Конституции Украины, государственная власть осуществляются на основаниях ее разделения на законодательную, исполнительную и судебную. Органы законодательной, исполнительной и судебной власти осуществляют свои полномочия в установленных этой Конституцией пределах и в соответствии с законами Украины.

Согласно ч. 2 ст. 19 Конституции Украины, органы государственной власти и органы местного самоуправления, их должностные лица обязаны действовать только на основании, в пределах полномочий и способом, предусмотренными Конституцией и законами Украины.

Проанализировав нормы Конституции Украины и профильных законов Украины, регулирующих вопросы судопроизводства и уголовного процессуального законодательства Комиссией было установлено, что судьи районных судов не имеют полномочий на отмену решений апелляционных судов как судов первой инстанции. Более того, Уголовным процессуальным законодательством (ст. 467 УПК Украины) лишь в общих чертах описаны названия решений, которые могут быть приняты по результатам уголовного производства по вновь открывшимся обстоятельствами.

Проведенным мониторингом было установлено, что количество решений о пересмотре судебных решений по вновь открывшимся обстоятельствам либо ничтожно мало, либо такие решения отсутствуют вообще. Во время проведения мониторинга таких решений установить не удалось, как и лиц, освобожденных вследствие пересмотра судебных решений по вновь открывшимся обстоятельствам.

Комиссией в данное время осуществляется детальное изучение и сопровождение трех дел, которые находятся на разных стадиях судебного рассмотрения: дело Вячеслава Полешко (сбор документов для подачи заявления); дело Станислава Сербаева (начато рассмотрение дела); дело Игоря Волкодава (принято решение об отказе, стадия апелляционного обжалования). Все эти дела объединяет наличие оснований для пересмотра приговоров, и одновременно – отсутствие возможности отмены судебных решений.

Во время проведения мониторинга было установлено следующее.

- В период с 2001 г. по 2011 г. уголовные дела, по которым предусматривалось наказание в виде пожизненного лишения свободы, принимались апелляционными судами, как судами первой инстанции. Пересмотр решений

по вновь открывшимся обстоятельствам осуществлялся Верховным Судом Украины.

- В 2011 году дела, по которым предусмотрено наказание в виде лишения свободы, начали рассматриваться районными судами. Пересмотр судебных решений по вновь открывшимся обстоятельствам с 2011 г. осуществляется тем судом, который принял решение, подлежащее пересмотру.
- Районные суды (суды 1й инстанции) не наделены полномочиями отмены решений апелляционных судов, как судов первой инстанции.
- Отсутствует порядок и основания для отмены судебных решений по вновь открывшимся обстоятельствам. Название нормы есть, но отсутствует правовой механизм отмены решений, их пересмотра.
- Существует коллизия подсудности, а именно: согласно ч. 4 ст. 33 УПК Украины – уголовное производство по вновь открывшимся обстоятельствам осуществляет суд, который принял решение, подлежащее пересмотру; ст. 463 УПК Украины – заявление о пересмотре судебного решения подается в суд той инстанции, который первым допустил ошибку вследствие незнания о существовании вновь открывшихся обстоятельств.
- Решения судов первой инстанции (в случае принятия таковых) о пересмотре решений апелляционных судов (как судов первой инстанции) обжалуются в тот же апелляционный суд, который принимал отмененное решение. То есть, по сути, апелляционные суды пересматривают свои же решения в порядке апелляции, а точнее даже кассации.

Для сбора информации о наличии решений апелляционных судов (как судов первой инстанции) Комиссией было сделано запросы в суды (Верховный и апелляционные суды), Министерство юстиции Украины и непосредственно в учреждения исполнения наказаний. В ответах на обращения содержалась информация разного рода и качества: предоставлялась информация в обобщенном виде (общая статистика по гражданским и уголовным делам), информация о количестве дел, без указания дат принятия и решения каких судов пересматривалась. Много информации о том, что решения о пересмотре решений апелляционных судов (как судов первой инстанции) отсутствует.

Информация от Государственной судебной администрации Украины в отношении лиц, о осужденных к пожизненному лишению свободы		
год	Количество осужденных лиц	
	Всего	в том числе апелляционными судами
2003	223	информация отсутствует
2004	214	информация отсутствует
2005	168	информация отсутствует

2006	137	133
2007	149	140
2008	127	124
2009	160	155
2010	135	123
2011	116	40

Результатом обращений в учреждения исполнения наказаний есть получение информации о том, осужденные к пожизненному лишению свободы в период с 2001 по 2011г.г., в результате пересмотра приговоров по вновь открывшимся обстоятельствам, не освобождались.

Количество заключенных, отбывающих наказание в виде пожизненного лишения свободы			
Название учреждения	Общее количество заключенных пожизненно	В том числе, осужденные апелляционными судами в период с 01.09.2001 по 11.06.2011	Количество лиц, освобожденных в связи с пересмотром дел по вновь открывшимся обстоятельствам
Винницкое учреждение исполнения наказаний (№1)	364	117	0
Житомирское учреждение исполнения наказаний (№ 8)	отказ в предоставлении информации	отказ в предоставлении информации	отказ в предоставлении информации
Государственное учреждение «Качановская исправительная колония (№ 54)»	19	11	0
Государственное учреждение «Софиевская исправительная колония (№ 55)»	65	43	0
Государственное учреждение «Роменская исправительная	отказ в предоставлении информации	отказ в предоставлении информации	отказ в предоставлении

колония (№ 56)»			информации
Государственное учреждение «Замковая исправительная колония (№ 58)»	99	83	0
Государственное учреждение «Темновская исправительная колония (№ 100)»	60	40	0
Всего:	607	294	0

Нам не известны причины, по которым норма о возможности пересмотра судебного решения по вновь открывшимся обстоятельствам присутствует в законодательстве, но отсутствует правовой механизм ее реализации. Возможно, среди лиц, осужденных к пожизненному лишению свободы, есть те, кто совершили тяжкие преступления и находятся в местах лишения свободы абсолютно законно. Но есть, вероятно, и те, кто осужден по ошибке, из-за незнания о существовании важных обстоятельств в момент принятия решения.

Сама возможность пересмотра судебных решений предусмотрена законом. Точнее, заявлено право на пересмотр, но реализовать это право практически невозможно. Одной из причин может быть та, что таким образом законодатель установил некий барьер для судей, с целью не допустить принятия решений об освобождении лиц, осужденных к пожизненному лишению свободы. Возможно, законодатель настолько не уверен в моральных и профессиональных качествах судей, что не предоставил им полномочий для отмены судебных решений.

Рекомендации: для реализации права на исправление судебной ошибки путем пересмотра судебных решений по вновь открывшимся обстоятельствам необходимо усовершенствовать механизм такого пересмотра. Для этого судьи должны иметь полномочия осуществлять пересмотр решений, а также иметь предусмотренные законом основания и порядок принятия решений об отмене или изменении ранее принятых решений. Также необходимо детально прописать порядок судебного разбирательства во время осуществления пересмотра, права судьи, заявителя, противоположной стороны (обвинения или защиты). Особое внимание необходимо уделить решениям, принятым апелляционными судами как судами первой инстанции. Нижестоящий суд (районный) не имеет полномочий на пересмотр решения апелляционного суда. Либо дела о пересмотре должен рассматривать тот же апелляционный суд, либо определить другой суд. Проблема может быть решена либо путем внесения изменений в закон, либо путем обращения в Конституционный Суд

Украины для отмены незаконных положений, либо разъяснения норм Конституции Украины.

Impossibility to bring judges to justice for the ruling of knowingly unjust decisions

During monitoring, the Commission identified an issue regarding the possibility of judges to bear criminal accountability for the ruling of knowingly illegal and unreasonable decisions. The essence of the problem is that the judge can be held accountable for making a lawful decision, exactly at the very same way as one may not be liable for an absolutely illegal and unreasonable decision. Art. 375 of the Criminal Code of Ukraine constitues the criminal offence for the rulling of a knowingly unjust decision.

First of all, the wording of the article allows you to interpret it as widely as possible, and as narrowly as possible. The term "knowingly unjust" decision has an evaluative nature, and the investigating authority interprets the norm as it likes. In case of political necessity, a judge may be held accountable for making an reasonable decision, and in the event of an absolutely unlawful decision with regard to ordinary citizens, it is impossible to bring a judge to justice. An example of illegal decisions and the absence of consequences for judges are judicial decisions taken by the judge of the Frankivsk District Court of Lviv – Bohdan Lozynskyy. Judge ruled on the case about 10 illegal decisions, which have no legal or factual basis. For each illegal decision of the judge was an appeal to the law enforcement agencies.

The bord of Judges, chaired by Lozynskyy. it was decided with violations of the criminal procedure legislation. In particular, the court decided to change the measure of restraint for arrest in the absence of the accused and the defenders. In connection with these violations, a complaint was filed with the Supreme Council of Justice, but there are no results of the complaint at this time. Subsequently, on the initiative of Lozynskyy. the composition of the court was changed. In accordance with the norms of the criminal procedure code of Ukraine, a criminal case (proceedings) is considered first. However, the panel of judges under the chairmanship of Lozynskyy it was decided to refuse to hear the case first. According to the results of the violation, a corresponding statement was made about the crime committed by the judges.

In the future, the same collegium of judges adopted about 10 decisions on bringing lawyers to disciplinary responsibility, up to and including deprivation of the right to engage in advocacy. These court actions are nothing more than pressure on lawyers, impeding the activities of lawyers. Due to the fact that the court's decisions were illegal and unjustified, an application was filed for the crime to the General Prosecutor's Office, for each illegal decision of the court. Based on the results of allegations of a crime, a pre-trial investigation into five criminal proceedings, namely: ERDR No. 42018000000000293; No. 42018000000000738, No. 42018000000000739; No. 42018000000000498; 42018000000000951, 42018000000000952.

Despite the presence of a crime, the presence of a person who has taken unlawful decisions has not yet been brought to criminal responsibility. He did not even get a suspicion about any criminal proceedings.
Of course, judging should have the right to apply the rules governing certain social relations. Similarly, a judge has an unquestionable right to evaluate evidence. The narrowing of the rights of a judge can have negative consequences for all participants. At the same time, the judge must clearly know what he is prohibited from doing by law, for what kind of actions he can be held to account. The term "knowingly unjust", which does not have a clear definition, can be applied to any decision of a judge. A judge can be brought for an absolutely legal decision, in particular for political and other reasons. At the same time, if an absolutely illegal and absolutely unreasonable decision is taken, the judge may not be held accountable, for what is "a deliberately unjust decision" is decided by the investigator and the prosecutor in each specific case.

Recommendations: the judge should be responsible, including criminal, if he makes an illegal and unreasonable decision. At the same time, the provisions of Art. 375 of the Criminal Code of Ukraine need to be finalized. It is necessary to formulate more clearly the objective and subjective side of the crime, namely what actions of the judge are criminal. The term "knowingly unjust decision" should be replaced with "illegal and unjustified decision", or another more accurately reflecting the essence of the wrongful act.

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«Невозможность привлечение судей к ответственности за принятие заведомо неправосудных решений»

Орест Шевчук, ОО «Комиссия защиты незаконно обвиненных»

При проведении мониторинга, Комиссией была выявлена проблема с привлечением судей к уголовной ответственности за принятие заведомо незаконных и необоснованных решений. Суть проблемы состоит в том, что судью могут привлечь к ответственности за принятие законного решения, ровно как и в случае принятия абсолютно незаконного и необоснованного решения судья может не нести ответственности.

Ст. 375 Уголовного кодекса Украины предусмотрено привлечение судьи за принятие заведомо неправосудного решения.

В первую очередь, формулировка статьи позволяет трактовать ее как максимально широко, так и максимально узко. Термин «заведомо неправосудное» решение имеет оценочную природу, и орган расследования трактует норму так, как ему удобно. В случае политической необходимости, судью могут привлечь к ответственности за принятие неугодного решения, а в случае принятия абсолютно незаконного решения в отношении обычных граждан – привлечение судьи к ответственности невозможно.

Примером принятия незаконных решений и отсутствие последствий являются судебные решения, принятые судьей Франковского районного суда г. Львов –

Лозинским Б.М. Судьей было принято по делу порядка 10 незаконных решений (определений), не имеющих под собой ни законных, ни фактических оснований. По каждому незаконному решению судьи было обращение в правоохранительные органы.

Коллегией судей под председательством Лозинского Б.М. было принято решения с нарушениями уголовно-процессуального законодательства. В частности, судом было принято решение об изменении меры пресечения на арест в отсутствии обвиняемого и защитников. В связи с этими нарушениями было подано жалобу в Высший совет правосудия, однако результатов рассмотрения жалобы на данный момент нет.

Впоследствии, по инициативе Лозинского Б.М. был изменен состав суда. В соответствии с нормами уголовного процессуального кодекса Украины, уголовное дело (производство) рассматривается сначала. Однако, коллегией судей под председательством Лозинского Б.М. было принято решение об отказе в рассмотрении дела сначала. По результатам нарушения было подано соответствующее заявление о совершенном судьями преступлении.

В дальнейшем той же коллегией судей было принято порядка 10 решений о привлечении адвокатов к дисциплинарной ответственности, вплоть до лишения права на занятие адвокатской деятельностью. Эти действия суда являются ничем другим, как давлением на адвокатов, препятствование осуществлению деятельности адвокатов. В связи с тем, что решения суда были незаконны и не обоснованы, было подано заявления о преступлении в Генеральную прокуратуру, по каждому незаконному решению суда.

По результатам заявлений о преступлении, начато досудебное расследование по 5 уголовных производствах, а именно: ЕРДР № 42018000000000293; № 42018000000000738, № 42018000000000739; № 42018000000000498; 42018000000000951, 42018000000000952.

Не смотря на наличие состава преступления, наличие лица, принявшего незаконные решения, до сих пор судью к уголовной ответственности не привлечено. Ему даже не огласили подозрение ни по одному уголовному производству.

Безусловно, судья должен иметь право применять нормы, регулирующие те или иные общественные отношения. Так же судья имеет неоспоримое право на оценку доказательств. Сужение прав судьи может иметь негативные последствия для всех участников. В то же время, судья должен четко знать, что ему запрещено делать по закону, за какие именно действия его могут привлечь к ответственности. Термин «заведомо неправосудное», который не имеет четкого определения, может быть применен к любому решению судьи. Судья может быть привлечен за абсолютно законное решение, в частности по политическим и другим основаниям. В то же время, при принятии абсолютно незаконного и абсолютно необоснованного решения судья

может быть не привлечен к ответственности, ибо что такое «заведомо неправосудное решение» решает следователь и прокурор в каждом конкретном случае.

Рекомендации: судья должен нести ответственность, в том числе и уголовную, в случае принятия им незаконного и необоснованного решения. В то же время, положения ст. 375 Уголовного кодекса Украины нуждаются в доработке. Необходимо более четко сформулировать объективную и субъективную сторону состава преступления, а именно какие действия судьи являются преступными. Термин «заведомо неправосудное решение» должен быть заменен на «незаконное и необоснованное решение», или другой более точно отражающий суть противоправного деяния.

The report was prepared by Oksana Mayba, Tetiana Maleryk, Olesia Zhyvko, Orest Shevchuk, Iuliia Vasylenko, Ihor Humenetskyy with the assistance of Tetiana Panasenko and on the basis of materials provided by the NGO "Kharkiv Human Rights Protection Group", the Reanimation Package of Reforms, NGO "Human Rights Information Center».