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**IMPACT OF DECISIONS OF THE EUROPEAN COURT
OF HUMAN RIGHTS ON THE SELECTION OF PREVENTIVE MEASURES
IN THE CONTEXT OF PRE-TRIAL INVESTIGATION**

Key words: *decisions, human rights, pre-trial investigation, preventive measure.*

In accordance with clause 5 of Article 9 of the Criminal Procedural Code of Ukraine, the criminal procedural law of Ukraine is applied taking into account the practice of the European Court of Human Rights. However, in most cases, domestic judges do not apply the privilege of the European Court of Human Rights or ignore it at all when deciding to choose a preventive measure within the framework of a criminal proceeding.

In accordance with paragraph 2 of Article 177 of the Criminal Procedural Code of Ukraine, the grounds for the application of a preventive measure are the existence of a reasonable suspicion of a person committing a criminal offense, and also the existence of risks which give sufficient grounds to the investigating judge, the court to consider that the suspect, the accused, the convict may carry out the actions provided for by part one this article.

The overwhelming majority of the decisions of the investigating court about the selection of a preventive measure justify the suspicion only of the gravity of the crime committed by the suspect and neglected the practice of the European Court of Human Rights. Since, as is apparent from the judgment of the European Court of Human Rights in the case of *Nikolov v Bulgaria*, the gravity of the crime itself, in the conduct of which the suspect is a person, can not be an unconditional ground for electing a preventive measure in the form of detention. In accordance with the decision of the European Court of Human Rights in the case *Affaire Boicenco v Moldova* §§143-145 In the present case, the Court notes that both the first-instance court and the Court of Appeal, when ordering the applicant's detention and the prolongation thereof, have cited the relevant law, without showing the reasons why they considered to be well-founded the allegations that the applicant could obstruct the proceedings, abscond or re-offend. Nor have they attempted to refute the arguments made by the applicant's defence. Thus, the circumstances of this case are similar to those in *Becciev v. Moldova*, §§ 61-62 and *Sarban*, §§100-101, cited above, in which this Court found violations of Article 5 § 3 of the Convention on account of insufficient reasons given by the courts for the applicants' detention. Since the Government presented no reasons for distinguishing this case from the above cases, the Court considers that the same approach should be adopted in the present case. In the light of the above, the Court considers that the reasons relied on by the Buiucani District Court and by the Chişinău Court of Appeal in their decisions

concerning the applicant's detention on remand and its prolongation were not "relevant and sufficient". There has accordingly been a violation of Article 5 § 3 of the Convention in this respect. A similar decision was made in case of *Bykov v. Russia* §§ 65-67 turning to the instant case, the Court observes that the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings. Moreover, from September 7, 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial. As regards the Government's argument that the circumstances of the case and the applicant's personality were self-evident for the purpose of justifying his pre-trial detention, the Court does not consider that this in itself absolved the courts from the obligation to set out reasons for coming to this conclusion, in particular in the decisions taken at later stages. It reiterates that where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention. The Court therefore finds that the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, eight months and 15 days. There has therefore been a violation of Article 5 § 3 of the Convention.

So the decision of the European Court of Human Rights was adopted in the case of *Mamedova v. Russia* § 80 The Court further observes that the decisions extending the applicant's detention had no proper regard to her personal situation. In most decisions the domestic courts used the same summary formula and stereotyped wording. The District Court's decisions of July 19 and August 2, 2005 gave no grounds whatsoever for the applicant's continued detention. It only noted that «the applicant should remain in custody». It is even more striking that by that time the applicant had already spent a year in custody, the investigation had completed and the case had been referred for trial. There has therefore been a violation of Article 5 § 3 of the Convention.

Consequently, to date, active judges in the vast majority of cases are prosecuted and, in determining the validity of the suspicion of a crime, indicated in the petition of the investigator and agreed by the prosecutor. Perhaps this tendency will change when new judges will come to justice, who will gain this status in the order of a reformed system of selection for the judicial system.

References:

1. Case of *Affaire Boicenco v Moldova*, judgment of the European Court of Human Rights, 11.07.2006, Application no 41088/05// [http:// hudoc.echr.coe.int](http://hudoc.echr.coe.int).
2. Case of *Bykov v Russia*, judgment of the European Court of Human Rights, 10.03.2009, Application no 4378/02// [http:// hudoc.echr.coe.int](http://hudoc.echr.coe.int).
3. Case of *Mamedova v Russia*, judgment of the European Court of Human Rights, 01.06.2006, Application no 7064/05 // [http:// hudoc.echr.coe.int](http://hudoc.echr.coe.int).

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WAYS OF USING THE LAWYERS OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS WHEN CHOOSING PREVENTIVE MEASURES

Key words: *preventive measures, European Court of Human Rights, criminal proceeding, offences, advocacy practice.*

In accordance with the current legislation, the purpose of a preventive measure in the criminal process is to ensure the execution of the suspect, the accused of the procedural duties entrusted to him. Part 1 of Article 177 of the Criminal Procedural Code of Ukraine defines a clear list of risks that may be committed by a suspect, accused, namely:

- 1) to abscond from the bodies of pre-trial investigation and / or court;
- 2) destroy, conceal or distort any of the things or documents that are essential for establishing the circumstances of the criminal offense;
- 3) illegally affect the victim, witness, other suspect, accused, expert, specialist in the same criminal proceeding;
- 4) impede criminal proceedings in another way;
- 5) commit another criminal offense or extend the criminal offense in which the suspect is accused. Each of these risks should be grounded on the prosecution side, which should pay attention to the lawyer.

When preparing a lawyer for a defense counsel for a trial, a lawyer should choose to apply for a preventive measure to the weight of the practice of the European Court of Human Rights.

Concerning the risk of hiding from pre-trial investigation bodies and / or courts, attention should be paid to the decisions of the European Court of Human case *Rights Punzelt v Czech Republic*, who is about, what as regards the risk of the applicant's absconding, the Czech courts noted, in particular, that the applicant had earlier absconded from the criminal proceedings in Germany, that he had numerous business contacts abroad and that he risked a relatively heavy penalty. In the Court's view, this reasoning is «sufficient» and «relevant» and it outweighs the arguments put forward by the applicant.