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THE PROBLEM OF ACCESS TO THE RESULTS OF COVERT INVESTIGATIVE (DETECTIVE) ACTIONS: THE ECtHR CASE-LAW OVERVIEW AND NATIONAL ASPECT OF THE ISSUE

The following theses are devoted to research of the problem of access to the results of covert investigative (detective) actions in Ukraine through the ECtHR case-law overview. Based on the results of the research the key amendments to the Criminal Procedure Code of Ukraine were suggested.

Key words: *adequate facilities, European Court on Human Rights, covert investigative (detective) actions, access to case file, case law.*

One of the most important principle in criminal justice is that measures applied for the protection of victims and witnesses must be consistent with the rights of the accused. Article 6 (3) b of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as

Convention) guarantees that every accused shall have «adequate facilities» to prepare his/her defence. It includes, inter alia, access to documents and evidence that the prosecution intends to use against the accused in court as well as any exculpatory evidence that would assist accused and his / her legal counsel in the defence. The case materials access issue directly affects compliance of the fundamental principles of equality of arms and proportionality.

In the criminal proceedings of Ukraine the above is of particular importance in the aspect of access to the results of covert investigative (detective) actions, access to which should be considered based on ECtHR case law on the disclosure of case file in the light of the above principles.

Despite the general rule providing that the prosecution authorities shall disclose to the defence all material evidence in their possession for or against the accused (*Rowe and Davis v. the United Kingdom* [GC], § 60), the European court of human rights (hereinafter referred to as ECtHR) not once emphasized that this right of the accused is not absolute and might be restricted.

For instance, in *Dowsett v. the United Kingdom* case (App no 39482/98) [1] the Court found the violation of Article 6(1) in conjunction with Article 6(3)(b) of the Convention. The applicant alleged that his right to a fair trial was violated when the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds, inter alia, of public interest immunity (para 44). The ECtHR stated that in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 of the Convention. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (para. 42). In any case, in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6 § 1 (*Natunen v. Finland*, §§ 47-49; *Matanović v. Croatia*, §§ 158, 181- 182) [2, p. 132/109, para 151].

Moreover, in many cases where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the relevant interest involved against that of the accused without having sight of the material. It must therefore scrutinize the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (*Dowsett v. the United Kingdom*) [2, p. 132/109, para 153].

In the case of *Yakuba v. Ukraine* (App. no 1452/09) [3] Court referred to the case of *Leas v. Estonia* (App. no no. 59577/08), and stated that failure to

disclose to the defence material evidence which contains such particulars as could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention.

In addition, Court determined that counterbalancing factors to compensate for the handicap under which the defence labored were not sufficient. As for non-disclosure of the video recording and its treatment by the domestic courts, the Court pointed out that procedure was such, that it permitted the prosecution to determine the meaning of that incriminating material outside of any scrutiny, not only by the defence but also by the domestic courts. The summary of the video used in the proceedings was prepared by the investigator rather than by an independent party under judicial supervision. The domestic courts showed no consideration for the interests of the defence, and based the applicant's conviction, in part, on undisclosed material which the prosecution alone was allowed to see and the meaning of which the prosecution was allowed to determine outside of any control (para 51). The above considerations were sufficient for the Court to conclude that the proceedings overall were not fair.

In aforementioned case of *Leas v. Estonia* [4] the applicant argued that he had not been given access to the totality of the information gathered as a result of the application of the surveillance measures. In his submission, access to the surveillance information had been required, firstly, since the defence wished to make its own choice of evidence to be relied on in the criminal proceedings, in addition to the choice made by the prosecutor. Secondly, access to the surveillance information would have allowed the defence to assess whether it had been obtained lawfully, that is to challenge the admissibility of the evidence adduced by the prosecution (para 72).

The foregoing positions of the Court clearly indicate that the right of access to the case file is not absolute. At the same time, the prosecution and the court should maintain a balance between the rights of the defence and the prosecution, should properly assess the case file provided to the defence from the perspective of its sufficiency. This in turn will indicate compliance with the principle of equality of arms and proportionality in case of file access issues.

The application of Art 255 (right of a prosecutor by his decision to destroy materials of covert investigative actions if he does not recognize them necessary) in conjunction with Art. 290 of the Criminal Procedure Code of Ukraine (hereinafter referred to as CPC of Ukraine) frequently causes the violation of right to have adequate facilities (access to the results of the covert investigative (detective) actions) for the accused and his legal counsel to prepare for the defence where it should be applicable. Under p. 2 of Art. 290 of the CPC of Ukraine provides that a prosecutor or an investigator under his authority is obliged to give access to the materials of the pre-trial investigation which is at his disposal, including any evidence which, by themselves or in combination with other evidence, can be used for proving

the innocence or a lesser degree of guilt of the accused, or facilitating the mitigation of punishment.

It follows from the above legal norms that the prosecution is entitled to decide on the fortune of the results of the covert investigative (detective) actions that may potentially be the materials helping the defence to prove their position in case.

For this reason it is highly important to reconstruct both of the aforementioned articles of the CPC of Ukraine to provide an appropriate mechanism for balancing of public interest in the detection of criminal offenses, preserving the confidentiality of information about secret operations and the interest and the right of the suspect and accused to have adequate facilities for the defence.

In view of the above, the following amendments [5, pp. 54-56] are required:

- the preservation of the results obtained by the covert investigative (detective) actions should be ensured till the entry into force of a court decision that resulted in criminal proceedings or the decision to close the criminal proceedings (amendment to art. 255 of the CPC of Ukraine).
- part 2 of Art. 290 should be agreed with the Art. 255 of the CPC of Ukraine; in case of the amendment of the wording of Part 1 of Art. 255 of CPCs of Ukraine the prosecution will be obliged to provide access to results of covert investigative (detective) actions.
- a judicial procedure to decide on the need to disclose these results of covert investigative (detective) actions should be provided. For this reason in Part 5 of Art. 290 of CPC of Ukraine the legislator should formulate the powers of the investigating judge / the court to carry out a test on the need to disclose the above results [5].

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