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APPLICATION OF PRACTICE THE EUROPEAN COURT OF HUMAN RIGHTS IN PROVIDING TEMPORARY ACCESS TO ITEMS AND DOCUMENTS

Аліна Гаркуша, Віолета Рец. ЗАСТОСУВАННЯ ПРАКТИКИ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ ЩОДО НАДАННЯ ТИМЧАСОВОГО ДОСТУПУ ДО РЕЧЕЙ І ДОКУМЕНТІВ. Досліджено проблеми застосування судової практики Європейського суду з прав людини (далі – ЄСПЛ) національними судами і сторонами кримінального провадження під час підготовки клопотань про надання тимчасового доступу до речей і документів. Встановлено, що застосування практики Європейського суду та дотримання Конвенції про захист прав людини і основоположних свобод має позитивний вплив на ефективність та справедливість досудового розслідування та правосуддя під час розгляду відповідних клопотань.

Тимчасовий доступ до речей і документів у кримінальному процесі розглядається як засіб, за допомогою якого здійснюється збір фактичних даних в рамках кримінального провадження. До того ж, цей захід передбачає певний ступінь обмеження прав особи. Слідчий суддя ухвалою про надання тимчасового доступу до речей і документів фактично змушує володільця речі або документу слідчому або іншій, зазначеній в ухвалі уповноваженій службовій особі, надати належне майно для ознайомлення , виготовлення копій тощо. Сьогодні переважна більшість науковців висловлюють позицію стосовно того, що дане обмеження прав володільця недооцінюється та не повною мірою висвітлюється у Кримінальному процесуальному кодексі України.

Зазначено на необхідності усунення прогалин і колізій у національному законодавстві та впровадження вивчення правозастосовної практики ЄСПЛ не лише для судів, але й для уповноважених службових осіб, які звертаються із клопотаннями до слідчих суддів. Звернення до практики ЄСПЛ повинно стосуватися не лише правосуддя, але й сторони обвинувачення, зокрема слідчого, оскільки саме він здебільшого готує клопотання про надання тимчасового доступу до речей і документів.

Ключові слова: *тимчасовий доступ до речей і документів, судова практика, права і свободи людини, Європейський суд з прав людини.*

Relevance of the research. Regarding the conflicts and gaps in national legislation, there is a need to refer to the case law of the European Court of Human Rights in order to regulate a single standard of observation of rights of the man and the citizen at the national level. Today, when investigating judges examine requests for temporary access to items and documents, there are many cases of non-compliance with the legality and unfoundedness of the decision, which further leads to citizens applying to the ECtHR. The problem in this case is mainly the unfounded need for temporary access to items and documents at the investigator's request. That is why the generalization of the case law of the ECtHR should be known and applied in the preparation of procedural documents, especially for practitioners in the course of their professional activities.

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Recent publications review. Research of certain issues of application of the measure of ensuring criminal proceedings in the form of temporary access to items and documents were carried out by such scholars as M.P. Klymchuk, I.V. Hlovyuk, S.V. Andrusenko, S.V. Smokov and others. In addition, this issue was concerned about by V.I. Farynnyk, M.A. Pohoretskyy, O.O. Yukhno. However, at the level of scientific doctrine, the issue of compliance of the procedure of application of temporary access to items and documents to the case law of the ECtHR has not been resolved.

The article's objective is to generalize the case law of the Purpose: to generalize the case law of the ECtHR on the consideration of requests for temporary access to items and documents and to make recommendations for compliance with the requirements when the investigator requests a temporary access to items and documents.

Discussion. The institute under study in the Criminal Procedural Code of Ukraine (hereinafter – the CPC of Ukraine) has a separate section - "Measures to ensure criminal proceedings". This institution does not have a separate legislative definition, but in accordance with the position expressed by the Higher Specialized Court of Ukraine for Civil and Criminal Cases, measures to ensure criminal proceedings should be understood as coercive measures provided by the CPC of Ukraine, which are applied in the presence of grounds and in the manner prescribed by law, in order to prevent and overcome negative circumstances that prevent or may interfere with the solution of criminal proceedings, ensuring its effectiveness [1].

The legal meaning of the term "ensuring measure" is aptly revealed by the interpretation of terms. "Provide" is defined in the sense - to create reliable conditions for the implementation of something; to guarantee something [2]. It is obvious that the criminal-legal content corresponds to the above content, as enforcement measures are primarily designed to create conditions for effective and efficient criminal proceedings, to ensure such a legislative procedure that will restore the violated rights and bring the perpetrators to justice. In our opinion, the main feature that fills the meaning of the concept of " ensuring measures" should be the presence of state coercion.

According to art. 131 of the CPC of Ukraine, one of the types of measures to ensure criminal proceedings is temporary access to items and documents. "Temporary access to items and documents" is an element of a fairly large institution in criminal proceedings, which is called "measures to ensure criminal proceedings." This set of measures is a new approach to the systematization of individual components in one institution, and therefore today among scientists there are discussions about the concept and procedural order of application of each measure to ensure criminal proceedings. Among them, the case law distinguishes temporary access to items and documents as the most common.

The concept and procedural order for implementing the provisions of temporary access is contained in Chapter 15 of the CPC of Ukraine, which covers articles 159-165 of the CPC of Ukraine [3]. Referring to the definition of this concept, specified in part 1 of art. 159 of the CPC of Ukraine, it should be noted that "temporary access to items and documents is to provide the party to the criminal proceedings with a person in possession of such items and documents, the opportunity to read them, make copies and seize them" [3]. Such an explanation represents the measure under investigation as a procedural opportunity to gather evidence, i.e., by obtaining the investigating judge's permission for temporary access to items and documents, the investigator is able to obtain information indicating specific circumstances in criminal proceedings and may theoretically have evidentiary value.

Nevertheless, the vast majority of scholars do not consider temporary access to items and documents to be a tool in gathering evidence. We cannot disagree with this. In particular, temporary access to items and documents is not an initial action during a pre-trial investigation if there is a need to read certain material and specific information is of interest to the pre-trial investigation.

According to the criminal procedural legislation the investigator has the right to empirical activities, which he carries out in order to build a pyramid of evidence. Under part 2 of art. 93 of the CPC of Ukraine "the prosecution party collects evidence by conducting investigative (search) actions and covert investigative (search) actions, demanding and receiving from public authorities, local self-governments, enterprises, institutions and organizations, officials and individuals items, documents, information, conclusions of experts, conclusions of audits and acts of inspections, carrying out other procedural actions provided by the CPC of Ukraine "[3].

Based on this legislative wording of the way of gathering evidence by the prosecution, it should be emphasized that the investigator, prosecutor and other actors of the prosecution have

the right to demand data, necessary for their subjective conviction to prove the guilt or innocence of the person. In the future, the information obtained can be used as evidence or as confirmation of certain circumstances.

That is why temporary access is not a mandatory measure in every criminal proceeding to obtain the necessary information. It is rather a derivative investigator's decision, agreed with the prosecutor, if the person who possesses items or documents of interest to the pre-trial investigation does not voluntarily provide them for review, copying or seizure. Temporary access is included in the system of measures to ensure criminal proceedings, because it provides an authorized official the opportunity to gather evidence properly to conduct a comprehensive investigation of all the facts of a criminal offense.

Today, judges refer to the case law of the ECtHR as an international standard of human and civil rights when resolving any issue, regardless of the field of justice. The same applies to the consideration of motions by investigating judges for the application of measures to ensure criminal proceedings, namely temporary access to items and documents. The ECtHR already has a sufficient number of decisions dealing with the typical mistakes made by judges in ruling on temporary access to items and documents. Similarly, the study and understanding of modern requirements for the application taking into account them is necessary, above all, for practitioners.

Temporary access to items and documents can be considered as a means by which evidence is collected. In addition, this measure provides a certain degree of restriction of individual rights. The investigating judge, by a decision on providing temporary access, actually forces the owner of the item or document to provide the investigator or another official specified in the decision with the appropriate property for acquaintance, etc. Currently, the vast majority of scholars are of the opinion that this restriction of the owner's rights is underestimated and perceived in the Criminal Procedural Code quite lightly.

In particular, this is evidenced by part 1 of art. 309 of the CPC of Ukraine, which states that "during the pre-trial investigation the decisions of the investigating judge may be appealed on:… 10) temporary access to items and documents that allow the seizure of items and documents certifying the exercise of the right to conduct business or others, in the absence of which a natural person-entrepreneur or legal entity is deprived of the opportunity to carry out its activities "[3].

It should be noted that it is not only in these cases that serious human rights violations take place. Article 2 of the Convention on Human Rights stipulates that the state must ensure an independent and impartial investigation that meets certain minimum standards for its effectiveness, and the competent authorities must act with exemplary diligence and promptness to reliably establish the circumstances of the incident [4, p. 206]. In addition, the Convention regulates the protection of human rights in many areas of life, but whether it will be covered by the provisions of the Convention or another area of human rights depends on the items and documents specified in the request, which must be accessed.

Analyzing the case law of the ECtHR in our study, it can be concluded that the ECtHR, like national courts, has repeatedly considered the issue of providing temporary access to items and documents and the legitimacy of such a decision in general. Cases, considered by the ECHR, covered the following types of information:

- access to subscriber connection information (judgment in Malone v. The United Kingdom, application № 8691/79; Ben Faiza v. France, application № 31446/12);
- health information (L.H. v. Latvia, application no. 52019/07 and Avilkina and Others v. Russia, application no. 1585/09);
- banking information (M.N. and Others v. San Marino, application no. 28005/12), etc. [5].

This is a non-exhaustive list of thematic areas provided for consideration of applications, but the study identifies those that appear in the appeals in the vast majority.

If we combine the above decisions, it should be noted that this group of human rights, which are supposed to be limited, are protected by Art. 8 of the Convention for the Protection of Human Rights, namely the right to respect for privacy and family life and the fact that "everyone has the right to respect for his/her privacy and family life, his/her home and his/her correspondence" [6]. In addition, public authorities have the right to intervene in such life, but only in exceptional cases related to the needs of crime prevention, protection of the others' rights and freedoms and on the basis of law.

If we refer to the decision of the ECtHR in "L.H. v. Latvia »application № 52019/07, in

the present case the applicant alleged the collection of her personal medical data by a public authority, which as a result violated her right to respect for privacy, guaranteed by Art. 8 of the Convention [7]. According to the case, the authority acted unlawfully, demanding and receiving information about the applicant's state of health, as this violated the right to respect for privacy. Thus, the complainant emphasizes that obtaining medical information about her health was illegal, as the decision to provide access should be subject to judicial review, and the court ruling should specify the information to which (documents) there is a need to get access.

Given that the case law of the ECtHR contains a number of appeals, which, among other things, indicate the illegality of collecting information about privacy and family life, breach of secrecy, etc., the court issued certain recommendations on petitions and decisions to provide temporary access to items and documents. These rules are more of a recommendation, although they may later become standards, so, as noted above, the measure of ensuring criminal proceedings in the form of temporary access to items and documents is the most common among other ensuring measures.

In addition, the decisions and recommendations of the ECtHR can be sources of law, which are regulated by relevant national regulations. In particular, on February 23, 2006 the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" [8]. According to it, the Convention and the decisions of the ECtHR can be considered sources of law. The Convention is part of national law, and therefore its rules are applied by courts alongside national law and as rules of direct effect [9].

In particular, today, according to the recommendations of the ECtHR, Ukrainian courts are studying the investigator's request for temporary access to items and documents. Thus, the request for temporary access to items and documents must be made according to the provisions of the law, it must be argued for the investigating judge that there are no significant harmful consequences of the application of this measure to ensure criminal proceedings. Along with this, the way in which criminal proceedings are provided is reasonable and proportionate [9].

In "Cormorants v. Russia" and "Friesen v. Russia", the ECtHR has held that achieving a fair balance between the general interest of society and the protection of the fundamental rights of the individual only becomes relevant if it is established that the principle of "legality" was observed and it was not arbitrary. In addition, in "Panteleenko v. Ukraine" the ECtHR concluded that the providing of temporary access to items and documents had not been proved, as this interference with the privacy of specific individuals did not have sufficient legal justification and violated art. 8 of the Convention on protection ofHuman Rights and Fundamental Freedoms [9; 10, c. 150-164].

It follows from the above that information obtained in violation of conventional human rights cannot be further used as evidence. Not only Ukrainian courts, but also investigators when applying for a ensuring measure in the form of temporary access to items and documents must comply with the requirements of the ECtHR, which are put forward, above all, to justify the legality and procedural need to obtain specific documents and things. In case of violation of these requirements, the obtained factual data will be considered inadmissible evidence, as required by national law. In particular, part 1 of art. 87 of the CPC of Ukraine declares inadmissible the evidence obtained as a result of significant violation of human rights and freedoms guaranteed by the Constitution and other numerous legal acts, as well as international treaties, consent to the binding nature of which was given by the Verkhovna Rada of Ukraine [3].

Article 160 of the CPC of Ukraine contains clauses that must be indicated in the request for temporary access to items and documents. Nevertheless, there is a need to emphasize what the legislator did not provide for in the codified law, but what the practice of the ECtHR requires. In particular, it concerns the principles of legality, accessibility, clarity and predictability in terms of the rule of law, the decision to provide temporary access to items and documents is an element of judicial review, and therefore the court's decision must be justified, as well as the investigator's request. In addition, the request should be as clear as possible to the items and documents to which there is a need to access [11, p. 30-31].

In addition, it should be noted that the person who owns items and documents must have guaranteed legal protection means and the opportunity to appeal an unreasonable decision on temporary access, and access should be provided only to the information necessary for the purposes of pre-trial investigation [5].

Conclusions. After analyzing the above information, it should be noted that when con-

sidering requests for temporary access to items and documents, investigating judges pay attention to the case law of the ECtHR, referring to it when making decisions. It is worth noting that this is clearly positive in the course of approaching generally accepted world standards of justice and protection of human rights.

However, adressing to the case law of the ECtHR should concern not only the judiciary but also the prosecution, in particular the investigator, because it is he who overwhelmingly prepares a request for temporary access to items and documents. Accordingly, the application must contain the ECtHR's recommendations concerning the legality and validity of the decision to be taken by the investigating judge.

Thus, there is a need to eliminate gaps and conflicts in national legislation and to introduce a study of the case law of the ECtHR not only for courts but also for authorized officials who apply to investigating judges. Such application of the case law of the European Court and observance of the Convention for the Protection of Human Rights and Fundamental Freedoms will have a positive impact on the efficiency and fairness of pre-trial investigation and justice in considering cases.

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Abstract

The article deals with problems of application of the case law of the European Court of Human Rights by national courts and criminal proceedings parties during the preparation of requests for temporary access to items and documents. The authors have established that the application of the case law of the European Court and compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms has a positive impact on the efficiency and fairness of pre-trial investigation and justice in the consideration of such requests.

***Keywords**: temporary access to items and documents, case law, human rights and freedoms, European Court of Human Rights.*