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The European Court of Human Rights on the guarantee of the rights of suspects on prejudicial inquiry

Abstract: Considering the example of the European Court of Human Rights decisions, made on Ukraine, the article focuses on the Court position in regard to the guarantee of rights of suspects on prejudicial inquiry. It is illustrated that prolonged prejudicial inquiries and court proceedings are violations of Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Keywords: the Universal Declaration of Human Rights; the Convention for the Protection of Human Rights and Fundamental Freedoms; the European Court of Human Rights; prejudicial inquiry; criminal proceedings; reasonable time.

Nowadays it is generally assumed that the guarantee and protection of rights should not be considered as an internal affair of some countries but a common concern of all mankind. Thus, according to the Universal Declaration of Human Rights, dated 1948, "Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"; however it is specified that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

The concept of international guarantee of human rights was further developed in the Convention for the Protection of Human Rights and Fundamental Freedoms, dated 1950. In the Convention preamble it is stressed, that the governments, who signed the Convention are "…resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals,

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freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"

The Convention provides for the creation of the European Court of Human Rights as an efficient instrument of practical protection of human rights. Thus, according to Article 19 of the Convention "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis". According to item 1 of Article 46 of the Convention "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". Thus it seems evident, that the Court decisions, made on a particular country, are to be fulfilled in this country [2, 3].

However, according to item 1, Article 32 of the Convention "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47". Therefore any Court decisions should be applied in the law enforcement activity of government bodies as official provisions of the Convention, which are equally effective for all Member States of the Convention.

As far as the decisions on a specific country are usually widely known within this country, it may be interesting to analyze the Court decisions on other countries. Some of the questions of the topic in focus were tackled in papers [1-5 etc.].

Recently the Court made some decisions concerning Ukraine, which dealt with the guarantee of the rights of suspects on prejudicial inquiry and rights of accused in criminal proceedings. For example, in the "Borisenko v. Ukraine" case decision, dated 12 January 2012 (complaint № 25725/02), the Court held that the violation of item 3 of Article 5 and item 1 of Article 6 of the Convention took place, based upon the following circumstances.

On 17July 1999 the criminal proceedings were instituted against the applicant, in the course of which the detention as a pre-trial restraint was imposed.

On 30 December 1999 the District Court found the applicant guilty and sentenced him to imprisonment in labor colony, which was due to terminate on 18 July 2003. While the accused was serving a sentence of 30 December 1999, the prejudicial inquiry was instituted against him on other charges. Therefore on 1 February 2001 the Public Prosecution approved of the applicant's transference to the Temporary Detention Unit (SIZO), where he stayed till the judgment of conviction.

Later the detention period was prolonged by the Town Court, which gave no justifications and didn't specify the terms of such detention. On 26 April 2005 the Town Court rejected the applicant's request to change the measure of restraint because of the inconsistence and absence of grounds for such a change. On 1 June 2005 the Town Court convicted the applicant and sentenced him to imprisonment. On 20 January 2006 the Court of Appeal upheld the applicant's sentence. On 14 November 2006 the Supreme Court of Ukraine rejected the applicant's appeal in cassation against this judgment.

Thus, the criminal proceedings against the applicant lasted more than seven years. In the European Court decision for this case it is specified that [6]:

"35. The Government alleged that for the purposes of Article 5 § 3 of the Convention the applicant's detention on remand had not started until 18 July 2003. The period between 1 February 2001 and 18 July 2003 should not be taken into account, as the applicant had concurrently been serving his sentence pursuant to the judgment of 30 December 1999 and could not have been released from custody in any event. Consequently, his detention during the above period fell under Article 5 § 1(a) and not Article 5 § 1(c). Article 5 § 3 could therefore not be applied to the period in question. They further contended that the period of the applicant's detention on remand had ended on 1 June 2005, when he was convicted by the Dokuchayevsk Town Court. It had therefore lasted one year and nearly eleven months."

36. The applicant contended that the period of his pre-trial detention had commenced on 1 February 2001, when the order was issued to remand him in custody in connection with the criminal proceedings pending against him, and lasted until his transfer to the colony. Concerning the nature of his detention between

1 February 2001 and 18 August 2003, he noted, in particular, that his placement in the SIZO had significantly worsened his situation compared to that of a convicted prisoner. In particular, the unit lacked facilities for a long-term stay; the possibilities of receiving visits and parcels from relatives were extremely limited and, moreover, the applicant had lost his reasonable expectations of an amnesty or an early release from serving the sentence of 1999.

37. The Court reiterates that Article 5 of the Convention is in the first rank of the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4 (see McKay v. the United Kingdom [GC], no. 543/03, § 30, ECHR 2006-X). On this latter point, it should be recalled that Article 5 § 3 applies solely in the situation envisaged in Article 5 § 1 (c), with which it forms a whole. It ceases to apply on the day when the charge is determined, even if only by a court of first instance, as from that day on the person is detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) (see, among many other authorities, Labita v. Italy [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV). Furthermore, a person who has cause to complain of continuation of his detention after conviction because of delay in determining his appeal, cannot avail himself of Article 5 § 3 but could possibly allege a disregard of the "reasonable time" provided for by Article 6 § 1 (see Solmaz v. Turkey, no. 27561/02, §§ 24 to 26, 16 January 2007, with further references).

38. The Court further reiterates that the applicability of one ground listed in Article 5 § 1 of the Convention does not necessarily preclude the applicability of another and detention may be justified under more than one sub-paragraph of that provision (see, among many others, Brand v. the Netherlands, no. 49902/99, § 58, 11

May 2004, and Johnson v. the United Kingdom, 24 October 1997, § 58, Reports of Judgments and Decisions 1997-VII). Therefore, the Court is called upon to decide whether in such circumstances Article 5 § 3 is applicable to the period in question too.

41. Turning to the circumstances of the present case, the Court notes that the applicant was detained within the framework of two different sets of criminal proceedings. By a judgment of 30 December 1999 the applicant was sentenced to four year's imprisonment for robbing a store. His sentence under the said judgment was due to expire on 18 July 2003. While serving his sentence, the applicant was further charged in a different set of criminal proceedings and transferred to a SIZO on 1 February 2001 and ultimately convicted on 1 June 2005. There is no argument between the parties as to the applicability of Article 5 § 3 of the Convention to the period between 18 July 2003, when the applicant's original sentence was due to expire, and 1 June 2005, when the applicant was convicted of a new crime.

42. The issue arises, however, as to the applicability of Article 5 § 3 to the period between 1 February 2001 and 18 July 2003, when the applicant's deprivation of liberty could be argued to have fallen within the ambit of both sub-paragraphs (a) and (c) of Article 5 § 1. In this regard the Court notes that despite the fact that on 1 February 2001 the prosecution authorities issued an order for the applicant's detention in the SIZO in connection with the new set of criminal proceedings against him, no formal decision on suspending or terminating the applicant's original imprisonment under the judgment of 30 December 1999 was taken at that time. Nor could it be seen from the relevant domestic law referred to by the courts (see paragraphs 27, 30, 31 and 32 above) that the applicant's transfer to the SIZO and the selection of that preventive measure in a different set of proceedings implied automatic suspension of the original sentence. Therefore, during the period in question there were no objective grounds to consider that the applicant stopped serving his prison sentence on 1 February 2001 and that his continued detention required any additional justification prior to 18 July 2003. Therefore, the applicant's

detention during the period in question was justified under Article 5 § 1 (a) of the Convention.

44. Indeed, the Court finds it difficult to see any practical purpose in requesting the State authorities to justify the applicant's detention under Article 5 §§ 1 (c) and 3 of the Convention in the circumstances, when such detention was justified under Article 5 § 1 (a). Any request for release would thus be limited to the purely hypothetical question whether the person could be released if he was not already serving a prison sentence. Therefore, even if the applicant's continuing detention within the meaning of Article 5 § 1 (c) ceased to be reasonable, it would not automatically cease to be lawful and justified under Article 5 § 1 (a). In short, the applicant cannot argue that while serving his prison sentence, he was "entitled ... to release pending trial" in the parallel judicial proceedings which did not concern his original conviction. Accordingly, Article 5 § 3 of the Convention does not apply to the applicant's detention between 1 February 2001 and 18 July 2003, which amounted to "lawful detention after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention.

45. As to the applicant's arguments that in the pre-trial detention centre he was placed in harsher conditions of detention that he would have in a colony, the Court considers that such harsher conditions of detention, as well as restrictions on family visits and on correspondence could effect the applicant's rights under Articles 3, 8 or 9 of the Convention (see, for example, Visloguzov v. Ukraine, no. 32362/02, §§ 59 and 60, 20 May 2010; Shalimov v. Ukraine, no. 20808/02, §§ 89 and 91, 4 March 2010; and Poltoratskiy v. Ukraine,no. 38812/97, §§ 170 and 171, ECHR 2003-V), but all these considerations cannot, in the Court's opinion, affect the classification of the applicant's detention for the purposes of Article 5 § 1.

46. Accordingly, the period to be taken into consideration started on 18 July 2003 and ended on 1 June 2005. It therefore lasted one year and ten and a half months.

50. The Court notes that the applicant's pre-trial detention lasted one year and ten and a half months. This period can not be considered excessive per se. However,

throughout the period in question the courts simply stated that the previously ordered preventive measure was correct, although under Article 5 § 3, after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty, and the judicial authorities should give other grounds for continued detention. Those grounds, moreover, should be expressly mentioned by the domestic courts (see Yeloyev v. Ukraine, no. 17283/02, § 60, 6 November 2008). No such reasons were given by the courts in the present case.

51. Furthermore, in reply to the request for release lodged by the applicant on 26 April 2005, the Dokuchayevsk Town Court not only gave no reasons for the applicant's continued detention but rejected his request for release as unsubstantiated. In the Court's opinion, the domestic court's decision requesting the detainee to justify his right to liberty runs contrary to the very essence of Article 5 § 3, which enshrines the presumption in favour of liberty and requires the authorities to justify detention.

52. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

53. The applicant next complained that the length of the criminal proceedings against him had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

57. The Court observes that Article 6 § 1 applies throughout the entirety of proceedings for "the determination of ... any criminal charge" (see Phillips v. the United Kingdom, no. 41087/98, § 39, ECHR 2001-VII). It considers that the period to be taken into consideration in the present case began on 17 February 1999, when the criminal proceedings were initiated, and ended on 14 November 2006, when the final judgment was taken by the Supreme Court. However, the period during which the applicant was on the run (23 March to 17 July 1999) should be excluded from the overall length of the proceedings (see Girolami v. Italy, judgment of 19 February 1991, Series A no. 196-E, § 13, and Smirnova v. Russia,nos. 46133/99 and 48183/99, § 81, ECHR 2003-IX). At the same time, from 17 July 1999 the applicant was in the

hands of the authorities and he could not be held responsible for any further delay in the resumption of the criminal proceedings in question. The period to be taken into account thus lasted seven years and some five months before the investigating authorities and the courts at three levels of jurisdiction.

58. The Court observes that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case and the conduct of the applicant and the relevant authorities (see, among many other authorities, Pélissier and Sassi v. France [GC], no. 25444/94, § 67, ECHR 1999-II). It further considers that an accused in criminal proceedings should be entitled to have his case conducted with special diligence, particularly, where he is kept in custody (see Nakhmanovich v. Russia, no. 55669/00, § 89, 2 March 2006, and Yurtayev v. Ukraine, no. 11336/02, § 37, 31 January 2006).

60. On the other hand, the Court observes that nearly two-thirds of these hearings were eventually adjourned for various reasons, including some seventeen adjournments in connection with the prosecutor's failure to appear and some fifteen in connection with the authorities' failure to ensure the delivery of the defendants, who were in custody, for the hearings. It further notes that according to the case-file materials no investigative activities were carried out in the case between March 1999 and November 2000 (one year and eight months), apparently because the applicant was unavailable. In the meantime, the applicant's whereabouts were established no later than 17 June 1999, when he was arrested and subsequently detained and charged with a new crime. Another significant delay (one year and two months) can be observed in the period from June 2001, when the case was transferred to the court, to September 2002, when the hearings eventually started taking place.

61. The Court has frequently found violations of Article 6 § 1 of the Convention in cases where the authorities were responsible for repeated adjournments of hearings and significant periods of unjustified inactivity (see, among other authorities, Kobtsev v. Ukraine, no. 7324/02, § 71, 4 April 2006; Antonenkov and Others v. Ukraine, no. 14183/02, § 46, 22 November 2005; and Mazurenko v. Ukraine, no. 14809/03, § 47, 11 January 2007).

62. Having regard to the material submitted to it and to its case-law on the subject, the Court considers that the Government have not provided sufficient explanation for the delay in the present case. The Court considers therefore that the duration of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement.

63. There has accordingly been a breach of Article 6 § 1.

As a result of the mentioned judicial examination, the Court held that there had been a violation of Article 5 § 3 and a violation of Article 6 § 1 of the Convention.

The Court also awarded a redress of EUR 1.700, the sum, which is, in the author's opinion, insufficient. It should be mentioned, that in the case of the illegal arrest of ex-minister of the Interior of Ukraine Yuriy Lutsenko the Court awarded a redress of EUR 15.000. At that the Court held that there had been not only a violation of 5 § 3, but also a violation of Article 18 of the Convention – use of the restrictions of freedom - such as arrest - for purposes other than those for which they have been prescribed.

Thus, upon the European Court of Human Rights decision for "Borisenko v. Ukraine" case and related decisional law the following conclusions can be drawn:

1. Despite the Court's opinion that the practical purpose of the applicant's detention for two reasons at a time is not evident, if one of them is lawful, there is no need to discuss the lawfulness of the other.

2. The Court is convinced that the detention, even with the court sanction, is illegal until the court proves such detention necessary.

3. The Court is convinced that the detainee (suspect, accused) should not prove his right for freedom. In the Court's opinion, the domestic court's decision requesting the detainee to justify his right to liberty runs contrary to the very essence of Article 5 § 3, which enshrines the presumption in favour of liberty and requires the authorities to justify detention.

4. The Court is convinced that the duration of the criminal proceedings is dated from the start of prejudicial inquiry to the final disposition of case, provided that the government bodies bear responsibility for repeated delays of court hearings and long

periods of unreasonable omission to act.

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