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PRACTICAL ISSUES OF THE PROCEDURAL PROCEDURE FOR APPEALING AGAINST THE DECISIONS OF INVESTIGATING JUDGES OF THE FIRST INSTANCE ON THE CHOICE OF A PREVENTIVE MEASURE IN THE FORM OF DETENTION OR THE EXTENSION OF THE TERM OF DETENTION

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Abstract. The article analyzes the judgment of the European Court of Human Rights “Case of Sotnikov and Pavelko v. Ukraine” (Applications nos. 39110/23 and 40281/23) of December 12, 2024, which recognized as admissible the requirements set out in the application regarding the failure to ensure the possibility of reviewing the decision to apply a preventive measure during its validity, which directly indicates a violation of Article 5, paragraph 4, of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Based on a specific example, the author highlights the main problems of the practice of applying the provisions of the criminal procedure law regarding the delay in consideration of appeals against the decision of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term of detention.

The author proposes to improve the Code of Criminal Procedure with regard to filing appeals against the decision of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term of detention to the court of appeal.

We believe that the proposed clarification in para. 2 of Part 1 of Art. 395 of the CPC of Ukraine will in reality eliminate formal grounds for delaying the review of the first instance court decision on imposition of a preventive measure in the form of detention or extension of the term of detention, as well as the refusal of the court of appeal to cancel the decision due to the expiry of the term of consideration and/or the validity of the next decision on extension of the term of detention at the time of consideration.

Keywords: *right to liberty and security of person, criminal proceedings, appeal, detention.*

Introduction. Article 55 of the Constitution of Ukraine guarantees everyone judicial protection of their rights and freedoms and the opportunity to appeal to the court against decisions, actions and inaction of state authorities, local self-government bodies, public associations and officials [1].

The Fundamental Law of Ukraine formulates one of the main principles of judicial proceedings as ensuring the right to appeal against a case and, in cases determined by law, to cassation appeal against a court decision (clause 8 of Article 129) [1].

The importance of an adequate response of the highest court to appeals, their consideration and appropriate verification of the legality, validity and fairness of judicial acts is to enable the highest courts to identify errors and shortcomings in the law enforcement activities of lower courts and law enforcement agencies.

Thus, one of the general principles of criminal proceedings enshrined in Article 7 of the Criminal Procedure Code of Ukraine (CPC of Ukraine) is implemented - ensuring the right to appeal against procedural decisions, actions or omissions [3].

According to Art. 24 of the CPC of Ukraine, such a right is guaranteed to everyone, and the right to review a verdict, court ruling concerning the rights, freedoms or interests of a person is guaranteed by a higher court in the manner prescribed by this Code, regardless of whether such a person participated in the trial [3].

Analysis of recent publications and research. The general issues of appealing against decisions of investigating judges of first instance in the court of appeal have been studied at different times by O.K. Antonovych, I.V. Hloviuk, I.I. Zareva, L.M. Kyrii, V.I. Letuchykh, P.S. Morozov, O.V. Noskova, V.V. Sidorov, A.R. Tumanyants, H.F. Fedotova, L.V. Cherechukina, O.G. Shylo and others.

After the amendments to the CPC of Ukraine were made in connection with the enforcement of the decision of the Constitutional Court of Ukraine on appealing against the court ruling on the extension of the term of detention, the problematic issues were paid attention to by V.A. Zavtur, O.M. Kaluzhna, O.Y. Kostiuchenko, V.V. Rogalska, G.K. Teteriatnyk, M.I. Shevchuk, O.G. Yanovska and others.

The scientific community did not ignore the issue of non-compliance with the criminal procedural law regarding the delay in consideration of appeals against decisions of the investigating judge of the first instance regarding the choice of a preventive measure in the form of detention or extension of the term of detention in the context of the application of the decisions of the European Court of Human Rights

(ECHR) regarding non-compliance with Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). This problem was studied by A.P. Bushchenko, K.D. Volkov, S.V. Davydenko, V.V. Korol, M.E. Korotkevych, V.I. Maryniv, V.G. Uvarov.

The above-mentioned scholars in their scientific works reveal the shortcomings assumed by law enforcers regarding the procedural procedure for appealing against the decision of the investigating judge of the first instance to impose custody. However, there is an urgent need to study the problems of delaying the consideration of appeals against the decision of the investigating judge of the first instance to impose a preventive measure in the form of detention in the context of ECHR decisions.

Objective. The purpose of the article is to highlight the practical problems of delay in consideration of appeals against decisions of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term of detention, and to make an attempt to propose improvements to criminal procedure legislation in this regard.

Results of the study. Depending on the type of court decision and the need to verify its legality and validity, part 1 of Article 395 of the CPC of Ukraine provides for filing an appeal

- against court decisions passed by the court of first instance - through the court that passed the court decision

- against the investigating judge's rulings or court rulings on the imposition of a preventive measure in the form of detention, on changing another preventive measure to a preventive measure in the form of detention or on extending the term of detention, issued during the trial in the court of first instance before the court decision on the merits is made, - directly to the court of appeal [3].

The legislator has provided that in order to verify the legality and validity of a court decision as quickly as possible, an appeal against the decision of an investigating judge shall be considered no later than three days after it is received by the court of appeal (part 2 of Article 422 of the CPC of Ukraine) [3].

However, in practice, there are well-established cases of abuse and delay in the review of appeals, which violates not only national legislation but also Article 5 of the Convention.

We would like to draw attention to the most recent ECHR judgment 'Case of Sotnikov and Pavelko v. Ukraine' (Applications nos. 39110/23 and 40281/23) of 12 December 2024 [4], which recognised as admissible the requirements set out in the application regarding the failure to ensure the possibility of reviewing the decision to apply a preventive measure during its validity, which directly indicates a violation of Article 5, paragraph 4, of the Convention.

The main abuses of the improper organisation of the court proceedings for review by the appellate instance of the decision of the court of first instance to apply a preventive measure in the form of detention include

- untimely receipt of court materials from the court of first instance to the court of appeal;

- excessive duration of the trial due to the workload of the appellate judges.

In practice, due to workload or subjective reasons, court materials are sent from the first instance court with a long delay. It is not possible to specify the reasons for the delay in sending the materials, but all participants in the criminal proceedings understand that after the first (three-day) date set for the court hearing on review of the first instance court decision, the hearing will not take place due to the failure to receive the materials.

The appellate court does not receive the materials in time because: the first instance court sends them once a week; the office of the judge who considered the motion for the application of a preventive measure of detention or extension of the detention period does not have time to prepare the case for sending; if political or social influence is used during the criminal proceedings.

Here is a real-life example on the basis of which the ECtHR judgement in the case of Sotnikov and Pavelko v. Ukraine was made. Thus, on 04.02.2023, the investigating judge issued a ruling to satisfy the prosecutor's request for a preventive measure in the form of detention for up to 60 days, namely until 01.04.2023.

Only on 06.03.2023 the Court of Appeal dismissed the defence's appeal against the first instance decision to impose a preventive measure in the form of detention on the applicant.

In order to extend the term of the preventive measure, on 27.03.2023 the investigating judge decided to extend the term of the preventive measure in the form of detention for the applicant until 01.05.2023.

The defence filed an appeal with the Kyiv Court of Appeal within 5 days.

Contrary to the legal requirements, the appeal was considered on 27.06.2023 (three (3) months later), upholding the investigating judge's ruling of 27.03.2023, which granted the prosecutor's motion to extend the term of detention and extended it until 01.05.2023, and dismissed the appeal of the defence counsel acting in the applicant's interests.

The peculiarity of this criminal proceeding is the imperfection of the provisions of the criminal procedure law. Thus, in the period from 27.03.2023 to 27.06.2023, when the term of detention was in force, which was appealed to the appellate court but was not considered - in relation to the applicant - on 26.04.2023, the investigating judge made the following decision to extend the term of detention until 25.06.2023. Without

waiting for the trial on the previous appeal, the defence counsels appealed the decision to the Court of Appeal, which on 25 May 2023 decided to dismiss the appeal in the applicant's interests.

This problem is not identical, since the failure to consider appeals against the decision of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term of detention within the statutory three-day period, or not to consider them at all within the period of validity of the said preventive measure, is systemic.

In the case of Sotnikov and Pavelko v. Ukraine, the applicants' complaints were identical, and therefore the claims were merged and found admissible on the merits.

The ECtHR has commented on the constant violation of the ‘right to a trial’ in the context of the review of prolonged detention in accordance with Article 5, paragraph 4, of the Convention. Thus, detainees have the right to access to a procedure by which the issue of their continued detention can be promptly reviewed, taking into account their particular situation and personal situation (judgements in the cases of: ‘Buryaga v. Ukraine, Application no. 27672/03; Vitruk v. Ukraine, Application no. 26127/03; Tretyakov v. Ukraine, Application no. Ukraine, Applications no. 16698/05); Komar and Others v. Ukraine, Applications no. 36684/02, 15811/03, 26867/03, 37203/03, 38754/03, 1181/04.

We draw attention to paragraph 7 of the ECHR judgement in the case of Sotnikov and Pavelko v. Ukraine": the Court reiterates that in accordance with Article 5 § 4 of the Convention, arrested or detained persons have the right to have their case reviewed in the light of the procedural and substantive conditions essential to the “lawfulness” within the meaning of the substantive conditions essential to the “lawfulness”, within the meaning of the Convention, of their deprivation of liberty (judgment in the case of Lietzow v. Germany, Applications no. 24479/94, § 44, ECHR 2001-I). It is true that

the provision in question does not apply to persons in detention and does not oblige States Parties to establish a second level of jurisdiction to review the lawfulness of detention and to consider applications for release. Nevertheless, the State introducing such a system should, in principle, provide detainees with the same guarantees of appeal as in the first instance (judgment in the case of Fodale v. Italy, Applications no. 70148/01, § 39, ECHR 2006-VII) [4].

We emphasise that upon receipt of an appeal against the decision of the investigating judge, the judge-rapporteur shall immediately request the relevant court materials from the court of first instance and notify the person who filed it, the prosecutor and other interested parties of the time, date and place of the appeal hearing no later than one day in advance (part 1 of Article 422 of the CPC of Ukraine) [3].

As already noted, the law provides for three days for consideration of an appeal against a decision of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term of detention.

We believe that the imperfection of these provisions of the CPC of Ukraine should be brought to the realities of today's restart of the judiciary.

In order to eliminate delays in the review of court decisions of the first instance on the selection of a preventive measure in the form of detention or extension of the term of detention by the court of appeal due to the untimely receipt of court materials, we believe it necessary to amend the CPC of Ukraine.

Thus, in part 1 of Art. 395 of the CPC of Ukraine, in paragraph 2, instead of filing an appeal '.... directly to the court of appeal.', replace it with filing an appeal '.... through the court that issued the court decision.'.

In this case, an appeal against the decision of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term

of detention will be filed in accordance with the provisions of Article 397 of the CPC of Ukraine together with the criminal proceedings to the court of appeal.

Therefore, under these conditions, upon receipt of an appeal against the decision of the investigating judge of the first instance to impose a preventive measure in the form of detention or to extend the term of detention with the criminal proceedings, the appellate judges will immediately consider the appeal for the legality and validity of the decision no later than three days later.

Conclusion. Unfortunately, the example of delaying the adoption of a lawful and reasoned decision by the court of appeal in the case of Case of Sotnikov and Pavelko v. Ukraine is not an isolated one.

The main conclusion of the ECtHR judgment in the case of Sotnikov and Pavelko v. Ukraine is that the court found violations in respect of issues similar to those considered in the leading case of Kharchenko v. Ukraine (case of Kharchenko v. Ukraine, Applications no. 40107/02, §§ 84-87, 10.02.2011), however, violations continue to exist, which results in violations of constitutional and conventional human rights and freedoms [4].

We believe that the proposed clarification in para. 2 of Part 1 of Art. 395 of the CPC of Ukraine will in reality eliminate formal grounds for delaying the review of the first instance court decision on imposition of a preventive measure in the form of detention or extension of the term of detention, as well as the refusal of the court of appeal to cancel the decision due to the expiry of the term of consideration and/or the validity of the next decision on extension of the term of detention at the time of consideration.

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