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Substantiation of the risk of absconding when applying pre-trial restriction measures related to the limitation of a constitutional person's right

Обґрунтування ризику переховування при застосуванні запобіжних заходів, пов`язаних з обмеженням конституційних прав особи

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Abstract

The article examines the features of the prosecutor's substantiation of the risk of absconding from the pre-trial investigation bodies and / or the court when applying measures related to the restriction of the constitutional rights of a person. Statistical data show a trend towards an increase in the number of cases of refusals by investigating judges to approve petitions of prosecutors as subjects of proving on the use of means of criminal procedural evidence, in particular, security measures, which indicates, among other things, the low level of validity of the petitions filed. Thus, in 2018, investigating judges refused to satisfy 5,970 petitions out of a total of 37,193 petitions for the application of precautionary measures (16.5%); in 2019 - 5,733 out of 34,780 (about 16.4%); in 2020 - 5,693 out of 31,547 (18.1%); for 2021 - 5,277 out of 30,408 (17.3%); for January-March 2022 - 799 out of 4,526 (17.6%). This is due to the fact that the problems of the prosecutor's

Анотація

У статті досліджуються особливості обґрунтування прокурором наявності ризику переховування від органів досудового розслідування та/або суду при застосуванні запобіжних заходів, пов`язаних з обмеженням конституційних прав особи. Статистичні дані засвідчують тенденцію до зростання числа випадків відмов слідчих суддів у погодженні клопотань прокурорів як суб'єктів доказування про застосування засобів кримінального процесуального доказування, зокрема заходів забезпечення, що вказує, серед іншого, на низький рівень обґрунтованості поданих клопотань. Так, у 2018 р. слідчі судді відмовили у задоволенні 5 970 клопотань із загальної кількості 37 193 клопотань про застосування заходів забезпечення (16,5 %); у 2019 р. - 5 733 із 34 780 (близько 16,4 %); у 2020 р. - 5 693 із 31 547 (18,1 %); за 2021 р. - 5 277 із 30 408 (17,3 %); за січень-березень 2022 р. - 799 із 4 526 (17,6%). Вказане обумовлено тим, що

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exercise of his powers in proving in the pre-trial investigation, in particular in substantiating the presence of the risk of absconding, have not yet been subjected to a comprehensive theoretical study.
The study of the practice of the European Court of Human Rights allows us to reveal the essence of the risk of absconding as a basis for the application of measures related to the restriction of the constitutional rights of a person, as well as to find out what factors should be taken into account by the prosecutor when substantiating the risk of absconding.

Key words: prosecutor, proving, risk of absconding, constitutional rights.

проблеми реалізації прокурором своїх повноважень під час доказування у досудовому розслідуванні, зокрема при обґрунтуванні наявності ризику переховування, досі не були піддані комплексному теоретичному дослідженню.
Вивчення практики Європейського суду з прав людини дає змогу розкрити сутність ризику переховування як підстави для застосування запобіжних заходів, пов`язаних з обмеженням конституційних права особи, а також з'ясувати які фактори мають бути враховані прокурором при обґрунтуванні ризику переховування.

Ключові слова: прокурор, доказування, ризик переховування, конституційні права.

Introduction

The application of pre-trial restriction measures in criminal proceedings related to the limitation of the constitutional rights of a person will be allowed only on the basis and in the order provided by the current criminal procedural legislation of Ukraine, as well as with the implementation of constitutional guarantees of protection of the rights and freedoms of a person and a citizen.

In accordance with the current criminal procedural legislation of Ukraine, the burden of proving the need to apply pre-trial restriction measures to a suspect, accused before an investigating judge is placed by the court on the investigator, prosecutor as subjects conducting criminal proceedings.

Furthermore, according to the requirements of Art. 177 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the Criminal Procedure Code of Ukraine), the purpose of applying a pre-trial restriction measures is to ensure that the suspect, accused person fulfills the procedural duties assigned to him, and the basis is the existence of a well-founded suspicion that a person has committed a criminal offense, as well as the existence of risks that provide sufficient grounds for the court to believe that the suspect, the accused, can abscond from the court; illegally influence the victim, witness, other suspect, accused, expert, specialist in the same criminal proceedings; obstruct criminal proceedings in other ways; continue a criminal offense or commit another one (Law № 4651-VI, 2012).

In view of the above, the investigator, the prosecutor, in the petition for the application of pre-trial restriction measures, must set out two mandatory components: 1) the presence of well-founded suspicion; 2) the presence of risks defined by the criminal procedural legislation of Ukraine, in particular the risk of absconding from pre-trial investigation bodies and/or the court.

However, the legislator when regulating in Art. 178 of the Criminal Procedure Code of Ukraine, the circumstances that are taken into account when choosing a pre-trial restriction measure, did not determine the criteria for establishing the presence or absence of risks that give reasons for the investigating judge, the court to believe that the suspect, accused, convicted person can carry out the actions provided for in part 1 of Art. 177 of the CPC of Ukraine. In addition, at the legislative level, the content of the category "sufficient grounds" is not defined when establishing the presence or absence of risks, in particular absconding from pre-trial investigation bodies and/or the court, which negatively affects the unity of law enforcement practice, compliance with the constitutional rights and freedoms of a person and a citizen when applying pre-trial restriction measures and determines the relevance of the chosen research topic.

The Constitution of Ukraine in Part 2 of Article 29 establishes that no one can be arrested or detained except by reasoned court decision and only on the grounds and in the order established by law.

The Constitutional Court of Ukraine, as the only body of constitutional jurisdiction in Ukraine, which ensures the supremacy of the Constitution of Ukraine, resolves the issue of conformity of the Constitution of Ukraine with the laws of Ukraine and carries out the official interpretation of the Constitution of Ukraine, emphasizes in its

decisions that the right to freedom and personal integrity is not absolute and can be limited, but only on the grounds and in the order specified in the law (clause 3 of the Decision of the KSU dated October 11, 2011 No. 10-рп/2011). The limitation of the constitutional right to freedom and personal integrity must be carried out in compliance with the constitutional guarantees of protection of the rights and freedoms of a person and a citizen (Decision of the Constitutional Court of Ukraine № 10-рп/2011, 2011).

Restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they must pursue a legitimate goal, be conditioned by the social need to achieve this goal, be proportionate and justified, in the event of a restriction of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation that will provide the opportunity to optimally achieve a legitimate goal with minimal interference in the realization of this right or freedom and not to violate the essential content of this right (clause 2 of the Decision of the CCU dated June 1, 2016 No. 2-рп/2016) (Decision of the Constitutional Court of Ukraine № 2-рп/2016, 2016).

The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter - the Convention) in Clause 1 of Art. 6 stipulates the right of everyone to a fair hearing of his case by an independent and impartial court determined by law (Convención Europea de Derechos Humanos, 1950).

The importance and fundamentality of the right to freedom and personal integrity is recognized at the international level. In particular, in Art. 9 of the Universal Declaration of Human Rights of 1948 stipulates that no one can be subjected to unjustified arrest, detention or exile, the International Covenant on Civil and Political Rights of 1966 in clause 1 of Art. 9 stipulates that no one should be deprived of liberty other than on the grounds and in accordance with the procedure established by law.

The right to freedom and personal integrity, as a fundamental human right, requires the existence of an effective mechanism of protection against arbitrary restriction, in particular through the implementation of judicial control over such restriction or deprivation of freedom and personal integrity, which must be carried out in accordance with the procedure established by law.

Taking into account the provisions of Art. 8 of the Criminal Procedure Code of Ukraine on conducting criminal proceedings based on the principles of the rule of law, taking into account the practice of the European Court of Human Rights, we consider it necessary to analyze the decisions of the specified court in the context of the outlined issues. Thus, according to the practice of the European Court of Human Rights (hereinafter referred to as the ECHR) in the application of paragraph 3 of Article 5 of the Convention, in particular in the case "***Yeloiev v. Ukraine***", after a certain period of time, the existence of only reasonable suspicion ceases to be a reason for deprivation of liberty, and judicial authorities must cite other reasons for continuing to keep the person in custody; moreover, such grounds must be clearly stated by the national courts. In addition, the ECHR in the case under review emphasizes that the national courts never considered the possibility of choosing alternative pre-trial restriction measures instead of detention, and the authorities, referring mainly to the seriousness of the charges against the applicant, continued to detain the applicant on the grounds that cannot be considered "appropriate and sufficient". These conclusions are sufficient for the court to recognize a violation of paragraph 3 of Article 5 of the Convention in this case ("***Yeloev v. Ukraine***" case of November 6, 2008 (application No. 17283/02, paragraph 60) (Case of Yeloiev v. Ukraine, 2008).

In addition, the decision of the KSU emphasized that the validity of the application of pre-trial restriction measures related to the restriction of a person's right to freedom and personal integrity, in particular house arrest and detention, should be subjected to judicial control after certain intervals of time, periodically objective and impartial by the court to verify the presence or absence of risks for which the specified pre-trial restriction measures are applied, including at the end of the pre-trial investigation, when some risks may already disappear (paragraph 3 of the motivational part of the Decision of the KSU dated November 23, 2017 No. 1-r/2017) (Decision of the Constitutional Court of Ukraine № 1-p/2017, 2017).

This shows that the application of a pre-trial restriction measure to a person, which limits the right to freedom and personal integrity, without proper substantiation, is a violation of Article 3. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The **purpose** of this article is to study the specifics of the prosecutor's substantiation of the risk of absconding when applying pre-trial restriction measures related to the restriction of a person's right to freedom and personal integrity.

Materials and methods

To achieve the set goals and ensure the scientific objectivity of the results of the study, a set of modern general scientific and special methods was chosen, in particular:

dialectical - to study the structure and content of the prosecutor's petition for the application of measures related to the restriction of a person's right to freedom and personal integrity;

system-structural - to determine the criteria for assessing the risk of absconding to decide on the application of precautionary measures;

formal-logical - to analyze the current legislation and existing theoretical provisions regarding the essence of the risk of absconding and the features of the prosecutor's substantiation for the presence of such a risk in criminal proceedings;

comparative law - for comparing constitutional, criminal law and criminal procedural norms and a number of legal norms of foreign states;

statistical - to study law enforcement practice in criminal proceedings and in the analysis of reporting, which made it possible to generalize the results obtained.

At the same time, all scientific research methods were used in interrelation and interdependence, which contributed to ensuring the principle of comprehensiveness, completeness, objectivity of the study and made it possible to lay the foundation for further possible directions for the development of theoretical knowledge about the substantiation by the prosecutor of the presence of the risk of absconding when applying precautionary measures, which restrict human rights to freedom. and personal integrity.

The empirical basis of the study is the studied and generalized criminal proceedings for 2018-2021 (320 proceedings of the prosecutor's offices of Lviv, Zhytomyr, Odesa, Kyiv regions and the city of Kyiv); statistical and analytical data of 2018-2021 of General Prosecutor's Office on the application of precautionary measures; materials of studying the decisions of the Constitutional Court of Ukraine, decisions of the Supreme Court, decisions of the European Court of Human Rights.

Results

Statistical data show an upward trend in the number of cases of investigating judges refusing to approve prosecutors' petitions for precautionary measures, indicating, among other things, the low level of validity of the submitted petitions. Thus, in 2018, investigating judges refused to satisfy 5,970 petitions out of a total of 37,193 petitions for the application of precautionary measures (16.5%); in 2019 - 5,733 out of 34,780 (about 16.4%); in 2020 - 5,693 out of 31,547 (18.1%); for January-September 2021 - 4,030 out of 23,148 (17.4%) (Information from the Office of the Prosecutor General of Ukraine, 2021).

Taking into account the results of the study of criminal proceedings and judicial practice, we can note that the petition for the application of measures filed by investigators and prosecutors in most cases does not contain a meaningful load, only formally lists the risks provided for in Art. 177 of the Criminal Procedure Code of Ukraine, there is no reference to proper, sufficient and admissible evidence in the case. At the same time, the current criminal procedural legislation of Ukraine does not define the criteria for establishing the presence or absence of the risk of absconding from the pre-trial investigation bodies and / or the court. Thus, in each criminal proceeding, it is necessary to examine the circumstances that the ECHR emphasizes in its decisions, and also take into account that the risk is of a specific nature, the presence of which must be proven in a particular criminal proceeding by appropriate, admissible and sufficient evidence.

The absence of substantiation by the prosecutor of the risk of absconding when applying pre-trial restriction measures leads to a violation of the constitutional human rights to freedom and personal integrity and to the European Court of Human Rights ascertaining a violation by the state of Ukraine of paragraph 1 "c" of Art. 5 Convention for the Protection of Human Rights and Fundamental Freedoms.

Discussion

In the doctrine of criminal procedural law, the concept of "risk" is defined as a well-founded probability of resistance of the suspect, the accused to the criminal proceedings in the forms provided for in Part 1 of Art. 177 of the Criminal Procedure Code of Ukraine (Fomina, 2018).

Thus, the application of a pre-trial restriction measure mitigates the identified risks and makes it impossible to have negative consequences in the form of the influence of the suspect, the accused on the course and results of the criminal proceedings.

According to the decision of the ECHR in the case "***Klishyn v. Ukraine***" (application No. 30671/04) dated 23.02.2012, the existence of each risk must not be abstract, but specific in nature and must be proven by appropriate evidence (Case of Klishyn v. Ukraine, 2012).

The prosecutor's substantiation of the existence of risks as a basis for the application of pre-trial measures related to the restriction of the constitutional rights of a person is complicated by the absence of criteria at the legislative level for establishing their existence, as well as the probable nature of conclusions about the existence of such risks.

After all, the provision of the probable presence of risks that the suspect, accused, convicted person may in the future take actions aimed at obstructing criminal proceedings, in particular, absconding from pre-trial investigation bodies and the court is subject to criminal procedural proving. In such a case, the subjects of proving must establish the presence of factual data that indicate not an event that has already taken place, but only the possibility of its occurrence, that is, substantiate assumptions about a certain event in the future.

On this issue, O.H. Shylo notes that "proving the existence of the stated reasons in combination with the circumstances specified in Art. 178 of the Criminal Procedure Code of Ukraine, makes it possible to reasonably predict the possible negative behavior of the suspect, the accused, to make sure of the necessity of applying a pre-trial restriction measure to him and the impossibility of ensuring the implementation of criminal proceedings by other measures" (Shylo, 2014).

V.V. Mykhailenko emphasizes that assumptions about the presence of risks of obstruction of criminal proceedings on the part of the suspect or the accused must be substantiated by factual data. This can be evidence that confirms both real, already committed (statement of the victim or a witness about threats, protocols of interrogation of these persons), and potential actions (sale of property, closing / opening of bank accounts, purchase of foreign tours or tickets, availability of materials of covert investigative activities about intentions to leave the country) (Mykhailenko, 2019).

However, the results of the analysis of law enforcement practice allow us to conclude that in most petitions for the application of a pre-trial restriction measure related to the restriction of a person's constitutional rights, only a list of risks is outlined without substantiating the possibility of their occurrence, which is a violation of the current criminal procedural legislation of Ukraine (Hablo, 2020).

The lack of proper substantiation of the existence of risks as a basis for the application of precautionary measures is also noted by the ECHR in its decisions regarding Ukraine. Thus, in the case ***"Moskalenko v. Ukraine"*** (application no. 37466/04) dated 20.08.2010, it was stated that in their decisions to keep the applicant in custody or extend the detention, the state authorities did not indicate any specific reasons on the basis of which they came to such a conclusion. Moreover, as the proceedings progressed and the collection of evidence was completed, the risk that the applicant would threaten certain witnesses also became less and less. The Court also notes that the authorities did not consider any other alternatives to ensure the applicant's appearance in court (paragraphs 37, 38) (Case of Moskalenko v. Ukraine, 2010).

In the case of ***Temchenko v. Ukraine*** (application no. 30579/10) dated 10/16/2015, it was stated that the applicant's initial detention was based on the seriousness of the charges against him, as well as on other grounds, such as the likelihood of him evading investigation and trial and obstructing investigation. While the applicant's detention may have been initially justified on these grounds, after a certain period of time had elapsed, the courts were under an obligation to provide clearer grounds for extending the detention (see ***Gavula v. Ukraine***, application No. 52652/07, paragraphs 89-90). However, they repeatedly referred to the same grounds and did not provide any specific information. In particular, they did not explain how the applicant could influence witnesses and interfere with the investigation; the authorities did not explain how the applicant could influence witnesses and interfere with the investigation (paragraph 116) (Case of Temchenko v. Ukraine, 2015).

In the case of ***Tkachov v. Ukraine*** (application no. 39458/02) dated 13.12.2007, the Court noted that the prosecutor limited himself to repeating the formal grounds for detention, which were set

out without any attempt to demonstrate how they applied in the applicant's case. Furthermore, neither the possibility of absconding nor the possibility of obstruction of the investigation were mentioned in the prosecutor's orders, according to which the applicant's detention during the pre-trial investigation was extended to six months. Moreover, the Regional Court's ruling - the only judicial decision on the applicant's detention to which the parties referred in their submissions - contained no basis for extending the applicant's detention pending the pre-trial investigation. Thus, even if such risks were contained in the first detention order, the Court cannot assess whether they continued to justify the applicant's deprivation of liberty during the entire period in question (paragraphs 49-51) (Case of Tkachov v. Ukraine, 2007).

The study of the materials of criminal proceedings indicates that quite often in law enforcement practice, the risk of absconding from the bodies of pre-trial investigation and the court or illegal influence on the victim, the witness is justified by the severity of the crime committed. However, in the cited ***Moskalenko v. Ukraine*** case, the ECHR points out that the judiciary repeatedly referred to the possibility that the applicant could face severe punishment, given the gravity of the crimes he was charged with. In this context, the Court reiterates that the severity of the penalty that may be imposed is an appropriate element in assessing the risk of absconding or committing another offence. The Court accepts that, given the seriousness of the applicant's charges, the authorities could justifiably consider that such a risk existed. However, the Court has repeatedly found that the gravity of the charge in itself cannot justify long periods of detention (paragraph 36) (Pohoretskyi, Salenko, 2020; Sukhachova, 2020).

Moreover, in the ***case of Todorov v. Ukraine*** (application no. 16717/05) of 12.01.2012, it is noted that the Court cannot accept as an argument that the overall complexity of the case and the seriousness of the charges against the applicant could be considered “sufficient” the reasons for his detention (para. 63) (Case of Todorov v. Ukraine, 2012).

The danger of absconding of the accused cannot be judged solely on the basis of the severity of the punishment for the crime. The existence of a absconding risk must be assessed with reference to a number of other relevant factors which may either confirm the existence of a risk of absconding or make it so insignificant that it cannot justify detention, as reflected in ***Strohan v. Ukraine case*** (application No. 30198/11) dated October 06, 2016 (p. 97) (Case of Strohan v. Ukraine, 2016).

In the cases ***Becciev v. Moldova*** (application no. 9190/03) dated 04.10.2005, Eloev v. Ukraine (application no. 35231/02 of November 27, 2008, the European Court of Human Rights noted that the gravity of the crime in which a person is reasonably suspected is of significant importance, but cannot be the only basis for detention.

In addition, noteworthy is paragraph 21 of the ECHR decision in the case of ***Pozvezko v. Ukraine*** (application No. 74297/11) dated February 12, 2015, where the Court also found that paragraph 3 of Article 5 of the Convention requires the authorities to provide convincing substantiation for any period of detention, no matter how short it is. Arguments for and against release (from custody), including the risk that the accused may obstruct the proper proceedings, should not be assessed in the abstract (in abstracto), but supported by factual data. The risk that the accused may go into absconding cannot be judged solely on the severity of the possible punishment. It must be assessed in the light of a number of other relevant factors which may either confirm the existence of a risk of absconding or prove that such a possibility is so low as to not justify pre-trial detention (Case of Pozvezko v. Ukraine, 2015).

In addition, in the case "***Osypenko v. Ukraine***" (application No. 4634/04) dated February 9, 2011, it was stated that "over time, additional substantiation is required for the long-term detention of the applicant, but the courts did not provide any additional arguments. In addition, at no stage did the national courts consider any other pre-trial restriction measures as an alternative to detention. The stated considerations are sufficient for the Court to come to the conclusion that there has been a violation of paragraph 3 of Article 5 of the Convention" (paragraphs 77, 79) (Case of Osypenko v. Ukraine, 2011).

In the decision of the ECHR in the case " ***Becciev v. Moldova***" (application No. 9190/03) dated October 4, 2005, it is indicated that the risk of flight must be assessed by the court in the context of factors related to the character of the person, his morality, place of residence, occupation, property status, family ties and all types of connection with the country in which such a person is subject to criminal prosecution. The seriousness of the punishment is a relevant factor

in assessing the risk that the suspect may escape (Case of Becciev v. Moldova, 2005).

The stated decisions of the ECHR on the outlined issues indicate the impossibility of assessing any risks in the abstract and the need to confirm the existence of such risks with actual data. Thus, the severity of the punishment is not a substantiation for the risk of absconding from pre-trial investigation bodies and/or the court and the basis for the application of a pre-trial measure related to the restriction of a person's right to freedom and personal integrity. This legal conclusion is confirmed in the decision of the Constitutional Court of Ukraine dated 08.07.2003 (the case on taking into account the gravity of the crime during the application of a pre-trial restriction measure), which emphasizes that the gravity of the committed crime is taken into account along with other circumstances (Decision of the Constitutional Court of Ukraine, 2003).

Given that the practice of the ECtHR is a source of law in Ukraine, we consider it necessary to dwell in detail on the conclusions set forth in the decisions of the ECHR regarding the substantiation of the risk of absconding from pre-trial investigation bodies and/or the court.

In the decision of the ECHR in the case " ***Boicenco v. Moldova***" (application No. 41088/05) dated 11.07.2006, it was concluded that the mere reference of the courts to the relevant provision of the law without indicating the grounds on which they consider justified the statement that the applicant allegedly can obstruct the proceedings of the case, abscond from justice or commit new crimes are not sufficient for making a decision to keep the applicant in custody (paragraph 143) (Case of Boicenco v. Moldova, 2006). A similar legal position is laid out in the case "***Becciev v. Moldova***".

The decision of the ECHR in the case "***Avraimov v. Ukraine***" (application No. 71818/17) dated March 25, 2021 emphasized that the existence of a reasonable suspicion that a prisoner has committed a crime is a condition sine qua non for the legality of his or her long-term detention. But when the national judicial authorities consider for the first time "immediately" after detention the question of the need to apply to the detainee a pre-trial restriction measure in the form of detention, this suspicion will no longer be sufficient, and the state authorities must also provide other relevant and sufficient grounds for justifying the detention. These other grounds may include the risk of absconding, the risk of pressure on witnesses or falsification of evidence, the risk of conspiracy, the risk of re-offending or causing a breach of public order and the associated need to protect the detainee. These risks must be properly substantiated, and the considerations of state authorities on these issues cannot be abstract, general or stereotyped (paragraph 57) (Case of Avraimov v. Ukraine, 2021). In the case "***Klishyn v. Ukraine***" (application No. 30671/04) dated February 23, 2012, the Court draws attention to the fact that the grounds for detention must be substantiated by facts (Case of Klishyn v. Ukraine, 2012).

Detention can be justified only in the presence of a specific public interest, which, despite the presumption of innocence, prevails over the principle of respect for individual freedom (the decision of the ECHR in the case "***Kharchenko v. Ukraine***" (application No. 40107/02) dated February 10, 2011, (p. 85)) (Case of Kharchenko v. Ukraine, 2011). Limiting consideration of a petition for election, continuation of a pre-trial restriction measure in the form of detention only by a list of legislative (standard) grounds for its application without establishing their existence and validity to a specific person is a violation of paragraph 4 of Article 5 of the Convention (the decision of the ECHR in the case "***Belevetskyi v. Russia***" (application No. 72967/01) dated March 1, 2007, (paragraphs 111-112)) (Case of Belevetskyi v. Russia, 2007).

Taking into account the conclusions reached in the decision of the ECHR in the case "***Olexander Makarov v. Russia***" (No. 15217/07) dated 12.03.2009, national authorities are obliged to analyze the personal circumstances of the person in more detail and to cite specific grounds in favor of keeping him in custody, supported by the established evidence in the court session (Case of Olexander Makarov v. Russia, 2009).

In the decision of the ECHR in the case "***Vierentsov v. Ukraine***" (No. 20372/11) dated July 11, 2013, the Court stated that, in accordance with its established practice, which reflects the principle related to the proper administration of justice, the grounds must be adequately stated in the court's decision, on which they are based. The degree of application of this obligation to give reasons may vary depending on the nature of the decision and should be determined taking into account the circumstances of the case (paragraph 33) (Case of Vierentsov v. Ukraine, 2013).

As stated in the separate opinion of ECHR by the judge Z. Kalaidzhieva in the decision on the case "***Shalimov v. Ukraine***" (application No. 20808/02) dated June 4, 2010, any concept of "automatic legality" of deprivation of liberty is incompatible with the principles of the Convention and there is no doubt that paragraph 4 of Article 5 of the Convention is a procedural guarantee and a means of legal protection against such detention (Case of Shalimov v. Ukraine, 2010).

Thus, in each criminal proceeding, the investigating judge, the court must examine in detail the evidence provided by the prosecutor to confirm the risks identified in the petition, conduct their analysis and make an assessment. This is consistent with the position of the ECHR, which in its decision on the case "***Kobets v. Ukraine***" (application No. 16437/04) dated February 14, 2008 noted that "the Court reiterates that, in accordance with its precedent practice, when evaluating evidence, it is guided by the criterion of proving "beyond a reasonable doubt" (also the decision in the case "***Avsar v. Turkey***", paragraph 282). Such proving must be derived from a set of signs or irrefutable presumptions, sufficiently weighty, clear and mutually agreed upon" (Pohoretskyi, Salenko, 2020; Case of Kobets v. Ukraine, 2008).

The results of the analysis of the ECHR's practice on the outlined issues make it possible to determine which factors should be taken into account when substantiating a petition for the presence of a risk of absconding from pre-trial investigation authorities and/or the court.

1. ***The severity of the punishment***. When establishing the risk of absconding from the pre-trial investigation authorities and / or the court, one of the factors that the investigating judge takes into account is the severity of the punishment. However, the severity of the punishment itself does not indicate the existence of the risk under study.
2. ***The identity of the suspect, the accused***. The results of the analysis of data on the identity of the suspect, the accused are significant and allow us to make a predictive conclusion about the possible negative behavior of a person in criminal proceedings and determine the level of danger of such a person escaping.

The ECHR in the case of ***Becciev v. Moldova*** (para. 58) noted that the risk of absconding must be assessed in the light of factors related to the character of the individual, his morality, place of residence, occupation, property status, family ties and all kinds. connection with the country in which such a person is subject to criminal prosecution. In addition, the ECHR noted that, with regard to the risk of the applicant being a fugitive, the Czech courts noted in particular that the applicant had already evaded criminal proceedings in Germany, that he had numerous business connections abroad and that he was threatened relatively harsh punishment. In the Court's opinion, such reasoning is sufficient and "relevant" and the arguments put forward by the applicant prevail" (para. 76)).

3. ***The behavior of the suspect, the accused and other factors***. This factor corresponds to the above factors and is taken into account by the investigating judge, the court when establishing the risk of absconding. So, the investigating judge, the court takes into account the circumstances of the commission of the crime, the behavior after the commission of the crime. The conscientious performance by the suspect or the accused of his procedural duties, the failure to use the real possibility of absconding or flight, the staying at the scene of the crime, the transfer of the instrument of the crime, etc., may indicate a decrease in the risk of absconding. Thus, the ECHR noted that during the four weeks when the applicant was at large, she performed all the duties related to judicial control and did not try to leave from justice. By the way, it would be difficult for her to do this, because she has minor children and a trading establishment, which is the only source of her income. Therefore, the Court concluded that the decisions of the indictment chambers did not indicate reasons on which to explain why they did not take into account the applicant's arguments and proceeded only from the risk that she would leave the investigating authorities.

Thus, taking into account the results of the analysis of the law enforcement practice of national courts and the practice of the ECHR, we come to the conclusion that when determining the risk of absconding, there is no single approach to justifying it, in each specific case it is necessary to take into account the presence or absence of facts that are relevant in accordance with the current criminal procedure. the legislation of Ukraine, as well as to study in detail all the factors determined by the practice of the ECHR, in particular: the severity of the intended punishment, the personality and behavior of the suspect, the accused, etc. The prosecutor’s

request for the application of measures related to the restriction of the constitutional rights of a person must include a substantiation of the existing risks with reference to appropriate and admissible evidence, which would enable the court to conclude that there are real risks of a person's dishonest behavior in criminal proceedings.

Conclusions

In criminal proceedings, there is no single formula by which it would be possible to justify the risk of absconding from the authorities of the pre-trial investigation and/or the court. Each criminal proceeding, in which it is necessary to apply pre-trial restriction measures, requires a detailed study of the circumstances emphasized by the ECHR in its decisions, as well as to take into account that the risk is not abstract, but concrete in nature, and to prove it with proper, admissible and sufficient evidence.

A request for the application of a pre-trial restriction measure related to the restriction of a person's constitutional rights to freedom and personal integrity must be substantiated by factual data that make it possible to conclude that there is a real risk of hiding. The prosecutor's abstract assumptions about the likely negative behavior of the suspect, accused, convicted person in the future, as well as references only to the gravity of the offense committed and possible punishment, which collectively lead to prognostic conclusions, cannot be considered by the court as confirmation of the presence of the risk of absconding.

Taking into account the results of the analysis of the practice of the ECHR, the risk of absconding must be determined taking into account a number of factors that can confirm or deny the presence of danger, for example, the character of the accused, his moral qualities, his financial situation, social ties, his international contacts. Proper substantiation of the investigated risk can be the facts that the person previously hid from law enforcement agencies or the court, has work relationships in foreign countries, urgently alienates real estate in which he was registered or lived, opened accounts in foreign banks, acquired cash in foreign currency, etc. However, the specified information must be confirmed by the evidence contained in the materials of the criminal proceedings. Also, when substantiating the existence of the specified risk, it is necessary to take into account whether the suspect or the accused had the opportunity to hide from the pre-trial investigation authorities and the court earlier during the criminal proceedings. If the person did not take advantage of this opportunity, the risk of escape at the time of considering the application of a pre-trial restriction measure is significantly reduced. At the same time, the decisive factors when justifying the risk of absconding cannot be the behavior of accomplices of the person in custody, as well as the person's lack of a permanent place of residence. The application of a pre-trial restriction measure limiting the right to freedom and personal integrity, without proper substantiation of the risks provided for in Part 1 of Art. 177 of the Criminal Procedure Code of Ukraine, is a violation by the state of clause 3 of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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