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SEVERAL ISSUES OF AUTONOMOUS INTERPRETATION OF THE "CRIMINAL CHARGE" CONCEPT BY THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS SIGNIFICANCE FOR NATIONAL LEGISLATION

ДЕЯКІ АСПЕКТИ АВТОНОМНОГО ТЛУМАЧЕННЯ ПОНЯТТЯ «КРИМІНАЛЬНОГО ОБВИНУВАЧЕННЯ» ЄВРОПЕЙСЬКИМ СУДОМ ІЗ ПРАВ ЛЮДИНИ ТА ЙОГО ЗНАЧЕННЯ ДЛЯ НАЦІОНАЛЬНОГО ЗАКОНОДАВСТВА

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The article is dedicated to the meaning and role of autonomous interpretation by the European Court of Human Rights of several categories stipulated in the European Convention on Human Rights. Special attention is granted to such concepts as: "criminal charge", "criminal offence" and "severity of penalty". Much attention is given to interpretation of the aforementioned concepts in the meaning of the Article 6 of the Convention on Human Rights which grants a right to a fair trial. An emphasize is made on the criteria that the European Court of Human Rights uses to verify if the charge shall be considered as a criminal one in the meaning of the European Convention on Human Rights. In the article a brief case-law overview is provided to highlight the most significant steps that led to the current interpretation of the concept of "criminal charge" by the European Court of Human Rights. The reference is made to a number of judgements concerning Ukraine thus revealing drawbacks of national procedural legislation. The European Court of Human Rights keeps constantly finding violations of right to a fair trial by Ukraine which is an important indicator of the fact that Ukrainian procedural legislation requires a number of significant modifications that will bring our provisions in compliance with the European laws and will establish higher standards of protection of humans rights in Ukraine, including the right to a fair trial.

Key words: ECHR, right to a fair trial, autonomous interpretation, criminal charge, criminal offence, severity of penalty.

Стаття присвячена значенню та ролі автономного тлумачення Європейським судом із прав людини деяких категорій, закріплених у Європейській конвенції про захист прав людини та основоположних свобод. Особлива увага приділяється таким поняттям, як: «кримінальне обвинувачення», «кримінальне правопорушення», «суворість покарання». У статті аналізується тлумачення вищезгаданих концепцій у значенні статті 6 Конвенції з прав людини, яка закріплює право на справедливий суд. Також увагу приділено критеріям, які Європейський суд із прав людини використовує для перевірки того, чи буде обвинувачення розглядатися як кримінальне у значенні Європейської конвенції з прав людини. У статті проаналізовано ряд рішень стосовно України, що дає змогу виявити недоліки українського законодавства, які призводять до систематичного порушення права на справедливий суд, та запропонувати актуальні шляхи вирішення цієї проблеми.

Ключові слова: ЄСПЛ, право на справедливий суд, автономне тлумачення, кримінальне обвинувачення, кримінальне правопорушення, суворість санкції.

Статья посвящена значению и роли автономного толкования Европейским судом по правам человека некоторых категорий, закрепленных в Европейской конвенции о защите прав человека и основных свобод. Особое внимание уделяется таким понятиям, как: «уголовное обвинение», «уголовное преступление», «суровость наказания». В статье анализируется толкование вышеупомянутых концепций в контексте статьи 6 Конвенции по правам человека, которая закрепляет право на справедливый суд. Также внимание уделено критериям, которые Европейский суд по правам человека использует для проверки того, будет ли обвинение рассматриваться как уголовное в контексте Европейской конвенции по правам человека. В статье проведен анализ ряда решений против Украины, что дает возможность раскрыть недостатки украинского законодательства, которые являются причиной систематического нарушения права на справедливый суд, а также предложить актуальные пути решения этой проблемы.

Ключевые слова: ЕСПЧ, право на справедливый суд, автономное толкование, уголовное обвинение, уголовное правонарушение, строгость санкции.

Fairness must be the vital principal of all relations that occur in the state between an individual and state bodies, especially when it goes about possible restriction of one's rights when facing legal liability. In such case the legislative base and its execution should be organized and carried out in the way that absolutely ensures effective enforcement of human rights during all stages in criminal proceedings. Right to a fair trial constitutes one of the fundamental human rights which is provided for by the International Covenant on Civil and Political Rights of 16 December, 1966 (ICCPR) and by the European Convention on Human Rights of 4 November, 1950 (Convention). The international acts named above don't just proclaim the right to a fair trial, but also create an obligation for the Parties to take necessary measures in compliance with their domestic constitutional procedures that are needed to enforce it [1, art. 2]. These documents also make the Parties obliged to secure to everyone within their jurisdiction the rights and freedoms defined in them, including the right to a fair trial [2, art. 1].

In Ukraine Convention was ratified by Law of Ukraine "On ratification of the European Convention on Human Rights of 1950, of the First Protocol and of Protocols No. 2, 4, 7 and 11 to the Convention" from 17 July, 1997 and the relevant amendments were made in the Constitution and in the Criminal Procedure Code of Ukraine in order to meet requirements of the Convention regarding the right to a fair trial [3]. After the Convention had become the part of national legislation, it also became essential to take into account case law of the European Court of Human Rights (ECHR) as the body, authorized to control execution of human rights by the Member-States.

In order to ensure conformity of national judicial practice with the European standards Ukrainian parliament adopted the law "On execution of decisions and application of practice of the European Court of Human Rights", which indicates that decisions of the Court are compulsory for execution in Ukraine [4, art. 17, 19].

The Article 17 of the Law states that:

"1. The courts apply the Convention and the Court's practice as a source of law during the national proceedings".

The Article 19 of the same Law indicates the following:

"1. The representative body carries out a legal examination of all bills, as well as sub-legislative acts, which should undergo state registration, for compliance with Convention, and prepare a special conclusion as a result.

2. Failure to implement the provisions of the first part of this article or presence of a conclusion which indicates non-

compliance of the national act to the requirements of the Convention is a ground for a refusal in the state registration of the corresponding national act.

3. The representative body shall ensure permanent examination of the current laws and regulations on compliance with the Convention and the case law of the Court, especially in the areas related to the activity of law enforcement agencies, criminal proceedings, deprivation of liberty.

4. According to the results of the examination the representative body submits to the Cabinet of Ministers of Ukraine proposals for amendments to existing laws and regulations in order to bring them in conformity with the requirements of the Convention and the relevant case-law of the Court".

Based on the acts mentioned above it seems that Ukraine made sufficient legislative work to meet requirements of the Convention and ensure application of case law of the ECHR thus giving effect to the rights recognized in it, including right to a fair trial. But indeed, if we analyze decisions of the ECHR regarding Ukraine, it is clearly seen, that the national legislator has been neglecting case law of the ECHR regarding the right to a fair trial and failing to implement corresponding changes into legislation, which has led to numerous applications against Ukraine being submitted to the ECHR. According to the recent Country Profile the ECHR delivered 91 judgments (concerning 290 applications) in 2018, 86 of which found at least one violation of the European Convention on Human Rights, including violations of the right to a fair trial [5, p. 1].

It is vital to dedicate attention to the issue of autonomous interpretation of "criminal charge" in context of the Article 6 of the Convention by the ECHR using the most significant decisions regarding Ukraine in order to identify drawbacks of the national legislation which trigger violation of the right to a fair trial in Ukraine.

The Convention contains a vast amount of concepts that are not clearly defined in the Convention itself, so the role of an official interpreter is given to the ECHR which often uses autonomous interpretation in its practice, which means that the Court is not bounded by the national interpretations of the corresponding concepts. Furthermore, some restrictions concerning protection of the right that are raised due to understanding of the scope of its application in the national order, are not applicable to the rights ensured by the Convention [6, p. 14]. The Court uses autonomous interpretation to define the concepts of "criminal charge", "criminal offence", "severe penalty" as well [7, para. 30]. The Convention contains two similar concepts that might cause confusion, these are the "criminal offence" and the "crime". Criminal offence is used in the articles of the Convention which grant human rights in the criminal law sphere. The concept of crime is stipulated in the articles that contain circumstances which enable restrictions of certain rights, including the purpose of prevention of crime. However, these concepts are not identical: the concept of crime is interpreted according to the national law and the concept of criminal offence has an autonomous meaning defined by the ECHR [8, p. 109]. The criteria used by the Court to identify a criminal charge in conventional sense were formed in the case of Engel and others v. the Netherlands and constitute the following:

1) national criterion;
2) nature of the offence;
3) severity of the penalty that could be applied for the offence [9, para. 82–83].

The first criterion is not decisive and it does not affect ECHR's recognition of a criminal offense within the meaning of the Convention. If domestic law classifies an offense as a criminal one, this criterion will be vital. Otherwise, the Court does not take into account the national classification and moves to the second and third criteria. To identify nature of the offence, meaning second criterion, the Court takes into consideration the following characteristics: whether the provision is applied to a certain group or it has a generally binding nature, whether the purpose of the provision is punishment and how such proceedings are classified in other member states of the Council of Europe [10, para. 47; 11, para. 53]. For the third criterion it is needed to indicate what is the most severe sanction for the offence and if it can be recognized as a criminal punishment depending on its nature and degree of severity [12, para. 72]. The second and third criteria are alternative and will not necessarily be applied at the same time. However, if either criterion is by itself not sufficient to amount to the criminal aspect, they can be analyzed together [13, p. 21]. In order to recognize applicability of Article 6, the offense in question must be considered as a criminal one by its nature in the meaning of the Convention, or trigger a possibility to undergo sanction which according to the degree of its severity can be regarded as a punishment that belongs to the criminal sphere.

There are several famous decisions of ECHR concerning Ukraine when administrative or disciplinary cases were recognized to be criminal cases in nature thus attracting all rights guaranteed by the Article 6 of the Convention for an individual charged with a criminal offence.

The first significant case for Ukraine that revealed legal consequences of different interpretation of the "criminal charge" was the case of Gurepka v. Ukraine [14, para. 50–62]. The national court imposed 7 days' administrative detention on the applicant for contempt of court, as manifested by his repeated failure to appear. Such punishment for contempt of court (for up to 15 days) was foreseen by the Code on Administrative Offences. The applicant complained under Article 13 of the Convention about the lack of an effective remedy against the decision ordering his administrative arrest and detention. The Court reiterated that Article 13 of the Convention does not, as such, guarantee a right of appeal or a right to a second level of jurisdiction, but it stated that impugned proceedings should be characterized as "criminal" for Convention purposes and so the applicant's complaint can be examined under Article 2 of Protocol No. 7, which indicates that:

"1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal..."

The Government agreed that classification of proceedings as "criminal" for the purposes of Article 6 of the Convention would be equally pertinent to a complaint under Article 2 of Protocol No. 7. Nevertheless, the Government claimed that the proceedings in the instant case were not "criminal". The Government maintained that the proceedings were administrative and that the domestic law made a clear distinction between a criminal offence and an administrative offence. They also observed that a person found guilty of an administrative offence was not considered to have been "convicted". The Government also maintained that in the instant case the seven-day detention for an administrative offence, taking into account the fact that the maximum punishment could have been 15 days' detention, could not be considered to have been a criminal penalty. Relying on its settled case-law, the Court stated that by virtue of the severity of the sanction, the present case was criminal in nature and the purported administrative offence was in fact of a criminal character attracting the full guarantees of Article 6 of the Convention and, consequently, those of Article 2 of Protocol No. 7.

So the Court applied second and third criteria and concluded that this case is criminal by its nature thus giving an individual a procedural status of an individual convicted of a criminal offence with further application of all guarantees related to such procedural status, including the right of appeal in criminal matters.

Another famous judgment that is vital for correct application of the Article 6 by the domestic courts was made in the case of Nadtochiy v. Ukraine [15, para. 15–29]. The applicant committed an administrative offence by infringement of customs regulations which he was not able to undergo because of serving a sentence in the place of detention. The domes-

tic court considered the case in the applicant's absence and changed qualification of the applicant's actions. The court ordered the confiscation of the vehicle which was later replaced with payment. In its decision, the court noted that the applicant had not expressed a wish to be present at the court's hearing. However, the applicant hadn't received any summons or notification about the proceedings, while they were pending. The applicant complained of an infringement of his right to a fair trial and, in particular, to the equality of arms. He further complained that the authorities unlawfully reclassified his actions as different offence. The Government maintained that in the instant case the applicant had failed to fulfil his obligation provided for by the Customs Code, which was not punitive in nature and was not a part of criminal law. They argued that the Criminal Code and the Code on Administrative Offences defined crimes and offences and the liability for their commission, which confirmed their punitive, criminal law nature. As to the Customs Code, under which the applicant became liable, the Government contended that the Code's purpose was to regulate the implementation of customs policies and activities. The Customs Code contained the regulatory norms, which determined the rights and obligations of individuals. Therefore, in the Government's opinion, the Customs Code was not punitive either in its content or in its functions, in contrast to the Criminal Code and the Code on Administrative Offences. The Government further maintained that the applicant had voluntarily taken an obligation by signing a customs declaration. In the Government's opinion the declaration signed by the applicant had a contractual nature as it determined the relevant obligation and the liability in case of non-execution of the obligation. They considered that this case concerned neither the violation of a universal principle of law, nor the punishment for its violation. This case raised the issue of the violation of a contractual obligation, and thus the application of a penalty stipulated in the contract. The aim of this penalty was not the punishment of the person who had breached the terms for the import of the goods and other items, but compensation for the amount of the non-paid customs duties for the goods imported into the territory of Ukraine. Thus, the Government maintained that the non-performance of the obligation voluntarily undertaken by the applicant could not be qualified as a criminal offence within the meaning of the Convention. Thus, Article 6 § 1 of the Convention in its criminal part was not applicable in this case. In order to determine whether Article 6 is applicable under its "criminal" head, the Court regarded to the three alternative criteria laid down in its case-law. The Court noted that the Government admitted the punitive, criminal law nature of the Code on Administrative Offences, but denied that the Customs Code has a similar nature. In the Court's view, the primary purpose of the Customs Code is to regulate economic issues, but, as it appeared from its provisions referred to in the Relevant domestic law, it also covers customs-related offences. As a result, the Court didn't see any substantial difference between the Code on Administrative Offences, which punitive, criminal law nature the Government admitted, and the Customs Code, which refers to particular types of customs-related offences, which can also be described as administrative offences. The Court therefore did not share the Government's view that the pertinent provisions of the Customs Code deal with contractual obligations. The Court noted that the relevant provisions of the Customs Code are directed towards all citizens who cross the border and regulate their conduct by means of sanctions (a fine and confiscation), which are punitive as well as deterring. Thus the customs offences in question had elements pertaining to a "criminal charge" within the meaning of Article 6 of the Convention. Therefore the Court concluded that the present case was criminal in nature and the purported customs-related administrative offences were in fact of a criminal character attracting the full guarantees of Article 6 of the Convention. The applicant maintained that the customs authorities and then the court had considered the case in his absence and without any confirmation that he had been notified about the hearing. He further complained that the unfairness of the proceedings had led to an arbitrary decision in his case. The Court noted that the applicant was serving a prison sentence at the time of the impugned administrative proceedings and was not present at those proceedings, even though the domestic authorities were aware of his particular situation and the place of his detention. The Court further noted the applicant's arguments that he could not be held liable for an infringement of customs regulations on the ground that, being imprisoned, he could not possibly honor his obligation. The domestic authorities failed to consider these circumstances of their own motion and did not give the applicant an opportunity to raise the issue. The Court considered that the impugned proceedings lacked important procedural guarantees and that these procedural deficiencies, in the circumstances of the case, were serious enough to compromise the fairness of the proceedings.

So as in the previous case, the Court applied second and third criteria, making a conclusion that the administrative offence (violation of customs regulations) can be recognized a criminal offense in conventional sense, thus indicating violation of the principle of equality of arms (including personal participation in the proceedings) in the criminal proceedings – one of the elements of the broader concept of a fair trial – guaranteed by the Article 6 of the Convention [16, para. 28].

Another significant judgment that proved once again ECHR's position concerning applicability of the Article 6 in administrative proceedings was within the case of Kornev and Karpenko v. Ukraine [17, para. 58–71]. The applicant claimed that there was violation of her right to have adequate time and facilities for the preparation of her defense after she was accused in commitment of the administrative offence. The Government challenged the applicability of Article 6 in its criminal limb to the administrative offence proceedings against the applicant. They maintained that the proceedings were administrative and not criminal under the domestic law. They further contended that the applicant had been ultimately punished with a fine, which brought the offence committed by the applicant into the category of minor offences. The applicant disagreed. She noted that the maximum penalty envisaged was 15 days' imprisonment and therefore the severity of this penalty brought it with the criminal limb of Article 6. Furthermore, she had originally been sentenced to that maximum penalty and it was only because of her hospitalization that her administrative detention had not been enforced. The Court has found that given the severity of the sanction envisaged the offence foreseen by Article 185-3 was not a minor offence and the administrative proceedings had to be considered criminal in nature, attracting the full guarantees of Article 6 of the Convention. The Court concluded that Article 6 is applicable to the impugned proceedings against the applicant. The applicant maintained that the period between the alleged offence and the trial was too short to enable her to prepare her defense properly. She noted that under the relevant law her administrative case had to be examined within one day and there was no exception to this rule. Furthermore, the Code on Administrative Offences did not contain a provision explicitly entitling her to seek adjournment of the proceedings in her case in order to prepare her defense. The Court reiterated that Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defense" and therefore implies that the substantive defense activity on behalf of the accused may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organize his defense in an appropriate way and without restriction as to the opportunity to put all relevant defense arguments before the trial court and thus to influence the outcome of the proceedings. The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular

case. The Court doubted that the circumstances in which the applicant's trial was conducted were such as to enable her to familiarize herself properly with and to assess adequately the charge and evidence against her and to develop a viable legal strategy for her defense. The Court concluded that the applicant was not afforded adequate time and facilities for the preparation of her defense. There has accordingly been a violation of Article 6 § 3 of the Convention taken together with Article 6 § 1 of the Convention.

So the Court again recognized one more time, that the Article 6 is applicable for certain categories of the administrative offences and that the accused individuals can fully enforce their rights granted by the Article 6 of the Convention.

Autonomous notion of the concept of "criminal offence" in the case-law of the ECHR ensures unified level of minimal procedural guaranties of human rights in the criminal law sphere for all member-states of the Council of Europe regardless national approach to determining the scope of criminal offences [8, p. 117]. Based on the analysis of the ECHR's practice regarding Ukraine it can be clearly concluded that certain provisions of the current Ukrainian legislation regarding the right to a fair trial do not fully meet the European standards of protection of the human rights. Namely the current version of the Code on Administrative Offences contains certain drawbacks that require modifications based on the ECHR's case law, which is an essential part of the provisions of the Convention concerning their interpretation and application. Based on the Court's application of the Article 6 of the Convention, if the possible sanction is severe enough and thus the offence is recognized criminal in the purposes of the Convention, it means that the case is defined as a criminal case regardless domestic classification. So it means that the proceedings should be conducted in compliance with all aspects of the right to a fair trial in the criminal proceedings. In order to fulfill its international obligations and avoid systematic violations of the right to a fair trial it is necessary to implement corresponding changes into national procedural legislation. It could be done by providing additional procedural rights to the individual who is at risk of undergoing severe sanctions that are regarded by the Court as criminal punishments by their nature (administrative detention, confiscation, sufficient fines). It will allow Ukraine to avoid sufficient budget expenditures for payments of satisfactions according to the Court's decisions and will approach Ukrainian legislation to the European standards.

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