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PROLONGED PRE-TRIAL DETENTION IN UKRAINE: WAYS FORWARD

Policy brief

In Ukraine, 4.2% criminal proceedings are examined by the courts within a period of 6 months to 1 year, and more than 2% of proceedings are examined for 2 years.

Ukrainian legislation determines the maximum duration of pre-trial investigation (12 months counting from the date of notification of the person of suspicion that the person has committed a crime). As regards judicial proceedings, the Code of Criminal Procedure (*the CCP*) stresses the need for its completion 'within reasonable time limits', but fails to specify particular terms.

According to the CCP, pre-trial investigation within reasonable time limits should be ensured by the prosecutor and the investigating judge. In turn, reasonable terms of a court trial must be guaranteed by the court. Article 28 of the CCP lists the criteria that affect the determination of reasonableness of time limits: the complexity of criminal proceedings; behaviour of persons involved in the proceedings; the manner in which the powers are executed by the investigator, prosecutor and court.

The European Court of Human Rights has repeatedly pointed to frequent violations of reasonable terms of criminal proceedings by Ukraine. In this situation, those who are held in custody, suffer most. As of 1 April, 2016, 1969 people were held in detention facilities from 6 months to 1 year, 538 people were held in custody in detention facilities for 1 to 2 years, and 420 people – for more than 2 years.

Prolonged detention is frequently a sign of gross violations on the part of the investigative bodies and it is used by the investigating authorities in order to exert pressure or coerce detainees to make confession statements. This report presents 17 cases where people have been held in custody for several years (in some cases - 8 and 10 years). In these cases, in particular, incidents of torture by law enforcement officers were recorded.

As confirmed by the analysed cases, the stay in a detention facility led to a significant deterioration of health condition of the accused, and even to their disability. In some cases, people die in detention facilities, failing to survive long enough to see a verdict. Human rights organisations point out that conditions in Ukrainian detention facilities are much worse than those in penal colonies.

The Ombudsman's Office pointed to the systemic problem of ill-treatment of prisoners. In addition, the Ombudsman emphasised that the Ukrainian legislation establishes the standard of the living space for detainees (2.5 square metres for a person). This area does not meet European standards and is smaller than the living space for inmates, provided for by Ukrainian legislation (4 square metres for a person).

One of the key factors delaying examination of criminal cases is prosecutors' unofficial duty to seek a guilty verdict by all means.

The CPP guarantees procedural independence of prosecutors. However, in reality, from the formal and administrative points of view, prosecutors are dependent on their supervisors, and, therefore, they cannot make decisions without their supervisors' approval. According to the established practice, heads of local and regional prosecutor's offices impose certain restrictions on prosecutors, demanding from

them that they act in the following way: a) send the greatest possible number of materials to the court even in the absence of objective proof of guilt; b) during the trial, maintain charges even if there are no reasons to do so; c) appeal against acquittals. The data for the last three years show that prosecutors refused to maintain charges only in less than 1% of cases.

However, at the same time, it is difficult to persuade prosecutors to carry out investigation into the allegations of torture, corruption and abuse of office by law enforcement officers.

Another problem is accusatory bias in the work of judges and cases of violation of the principle of an adversarial process. In 2013 and 2015, the proportion of acquittals in Ukraine amounted to 0.24% and 0.32%, respectively. Based on their own practice, attorneys report that the courts mirror the Soviet tradition by continuing to maintain accusatory bias and, sometimes, taking on the functions of the prosecution.

Ukrainian courts continue to use detention as a preventive measure en masse. The judicial decision on detention is valid for 60 days. After this period, the person must be released from custody or the detention must be extended in court. Prosecutors' requests to take persons into custody or extend their detention are often considered only formally, without proper assessment of the arguments. In particular, in many cases, courts do not verify whether the prosecutor presented direct specific evidence to the fact that, if at large, the person would hinder the criminal proceedings.

Also, the reasons for violation of reasonable time limits include long breaks due to the absence of the persons involved in the trial (public prosecutors, defenders, witnesses, victims, defendants). As practice shows, it is the witnesses of the prosecution who frequently do not appear at the court hearing; at the pre-trial stage, they could have been intimidated and forced to sign certain testimonies. Decisions of the Court regarding compulsory appearance are largely unexecuted. As regards absenteeism of legal counsels, it is mainly caused by their participation in another trial, illness, business trip and vacation. Of course, sometimes, counsels also abuse their rights in order to protract the examination of the case. One of the possible reasons is seeking postponement of court sessions, hoping for the exhaustion of witnesses and victims, which could hinder the evidence process, carried out by the prosecutor.

Besides, the absence of a defendant is a common reason for the postponement of court hearings. Relevant public services, responsible for transporting suspects or defendants from a detention facility to court, do not operate properly. One of the reasons for the failure to transport suspects or defendants from detention facilities is the shortage or failure of vehicles, a lack of fuel and unmatched transport schedules.

Other organisational flaws are the following: the problems of the quality of work performed by judges, namely inadequate preparation for the examination of cases, overload of judges, non-appearance of the jury members, a lack of the jury; frequent changes in the composition of the court, replacement of judges in connection with the termination of office, judges' vacation, sick leave and so on; the lack of free court rooms for meetings

On 24 December, 2015, the Law of Ukraine 'On amendments to the Criminal Code of Ukraine (regarding improvement of the procedure for counting by the court of the term of pre-trial detention in the term of sentence)' of 26 November, 2015, No. 838-VIII (the 'Savchenko Law'), was enacted. One of the authors of the law was Nadia Savchenko, MP of Ukraine and one of the Ukrainian political prisoners in Russia who was successfully released due to the pressure from the international community.

Under this law, in case of sentencing a person to imprisonment, one day of detention counts as two days of imprisonment. The court is obliged to release the person, if, after appropriate conversion, the period of detention equals or exceeds the term of their sentence. According to the State Penitentiary

Service, as of 24 June, 2016, 6,543 persons (5,807 convicts and 736 inmates) have been released under the 'Savchenko Law', while the prison term of 46,481 persons was reduced.

At the same time, the law does not relieve the fate of those who were accused of committing less serious crimes and were not held in custody. However, given the negative situation regarding the right to a fair trial in Ukraine, the 'Savchenko law' allowed to release a considerable number of persons whose charges were of dubious nature. This law will play a certain role in combating the effects of the problem of violation of reasonable terms of criminal proceedings.

The Ukrainian Bar Association and the Open Dialog Foundation developed recommendations for the state authorities regarding the right to reasonable terms of criminal proceedings. The wording of the recommendations allows for subsequent development, on their basis, of a draft law on amendments and additions to the Code of Criminal Procedure.

RECOMMENDATIONS

The Ukrainian Bar Association and the Open Dialog Foundation hereby appeal to the Supreme Court of Ukraine, the General Prosecutor's Office of Ukraine and the Verkhovna Rada of Ukraine with a request that our proposals be evaluated and taken into consideration.

We hereby request that the Supreme Court of Ukraine, on the basis of current legislation and generalisation of judicial practice of Ukrainian courts and the ECHR, adopt an updated decision of the Plenum, which will explain to local general courts, the issue of the application of a preventive measure in the form of detention and extension of detention and, in particular, make the following recommendations:

- 1) To refrain from accusatory bias and strictly observe the principle of an adversarial process when considering the prosecutors' motions regarding detention or extension of detention. In particular, the court must assess not only credibility and sufficiency of arguments, presented in the motion, but also the availability of direct, concrete evidence which reasonably confirms the risks, indicated by the prosecutor in the motion. The court must also consider the relevance and validity of the risks at a particular time, i.e. analyse the situation as it develops; to provide a detailed assessment of the validity of the arguments, presented by the prosecution and defence.
- 2) To take due account of the person's age, the health condition, the presence of minor children or relatives sustained by the person, as well as the duration of detention, as well as the existence of incidents of ill-treatment of the person in a detention facility.
- 3) To observe the principle of presumption of innocence, as a potential future guilty verdict against the person cannot be the sole argument for the court to apply the preventive measure in the form of detention or its extension.

In addition, we hereby urge the Supreme Court of Ukraine that it enshrine in the appropriate resolution of the Plenum, recommendations for local courts regarding the granting to persons, of the right to reasonable terms of criminal proceedings:

- 4) To comply strictly with the provisions of the CCP regarding the primary judicial proceedings, based on which, suspects or defendants are held in custody.
- 5) To expand the practice of the use (by courts) of sanctions, provided by law, against the persons involved in criminal proceedings who unjustifiably fail to appear at court hearings (in particular,

apply compulsory appearance, monetary penalties, address the issue of disciplinary responsibility, etc.).

- 6) In case of failure to execute the law on compulsory appearance, the court must immediately raise the issue of bringing the officials who are guilty of inaction, to disciplinary responsibility, and address the prosecutor's office with a request that such inaction be investigated into.
- 7) To adhere to the principle of an adversarial process in the question of the obligation of the parties to the criminal proceedings to ensure the attendance of their witnesses at the court session. In the case of systematic absenteeism of witnesses of any party to the proceedings, the court must decide whether to continue the trial without these witnesses.
- 8) If suspects or defendants who are held in custody, are not transported to court without a valid reason, the court must address the issue of bringing appropriate officials to disciplinary responsibility.
- 9) When reviewing decisions of local courts, appellate courts should give attention to incidents of violations by judges of reasonable time limits during the examination of the case, and address the High Council of Justice with a request that such incidents be verified and appropriate measures be taken.

We hereby request that the General Prosecutor of Ukraine initiate changes in the bodies of the prosecutor's office, taking into account, in particular, the following:

- 10) Public prosecutors shouldn't be subjected to punishment, pressure, sanctions or criticism by the leadership for a justified refusal to send a case to court; for refusal to maintain charges during the trial; for refusal to appeal the acquittal if there is no objective evidence of guilt.
- 11) Principles of the evaluation of the work performed by prosecutor's offices, need to be changed drastically. Also, the Soviet-era approach to evaluation, which is based mainly on the pursuit of statistical indicators, should be abandoned.
- 12) Prosecutors in criminal proceedings are obliged to initiate a change of a preventive measure to such which isn't connected with detention, in case when there are appropriate grounds to do so, and, in particular, in cases of violation of the right to reasonable terms of criminal proceedings; in cases when a detainee has been subjected to torture in a detention facility, as well as in case of poor health condition and elderly age of the detained person.

We hereby appeal to the Verkhovna Rada of Ukraine with proposals that amendments be introduced in the Code of Criminal Procedure of Ukraine, concerning the following issues:

- 13) Increase the guarantees of procedural independence of the prosecutor in the criminal proceedings by introducing a ban on the exertion of pressure on him from the leadership, and a ban on disciplinary responsibility for making informed decisions to refuse to refer the case to court or withdraw charges during the trial due to the lack of proof of guilt.
- 14) Due to the common practice of opening criminal cases by prosecutors against judges for handing down 'inconvenient' decisions (including acquittals), change the order of the initiation of a criminal case against a professional judge under Art. 375 of the CC ('Handing down of knowingly unfair sentence, judgment, order or decree by a judge (judges)'). We suggest that the initiation of a criminal case under Art. 375 of the CC be only possible upon the consent of the High Council of Justice, following the receipt of an appropriate request by the prosecutor.
- 15) To supplement the list of persons to whom the court may apply compulsory appearance, including victims.

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- 16) To grant the right to a person, acquitted by court, to whom the preventive measure of detention had been applied, for monetary compensation, stating the specific amount of such compensation for each day of detention and the order of its receipt.

The obtained results can be further developed in future projects. For example, a separate project can be devoted to the advocacy and implementation of the proposed recommendations. In particular, based on the results of this study, as well as taking into account international experience, several rounds of discussion between the stakeholders (representatives of the General Prosecutor's Office, Interior Ministry, the State Penitentiary Service, the State Judicial Administration, Ministry of Justice, as well as MPs, lawyers, academics in law, attorneys, human rights activists, representatives of NGOs, etc.) could be carried out (in accordance with the chosen methodology). Apart from the issue of implementation of the recommendations, one of the topics of discussion may be evaluating the effectiveness of the 'Savchenko Law' and options for its improvement. The result could be the creation of laws to amend the Ukrainian legislation in order to ensure the right to reasonable terms of criminal proceedings.

Taking into consideration the very slow implementation of the reform of the prosecution bodies and the judiciary, and given the reluctance of the General Prosecutor's Office in its fight against violations committed by their employees, such projects must also include international advocacy. In particular, if representatives of the European Parliament, the European Union Advisory Mission, PACE, OSCE address the Ukrainian authorities, raising the issue of the implementation of the suggested amendments, the effectiveness of the reform will increase.

In addition, the results of this study can be used in other projects regarding the reform of the judiciary and the prosecution bodies.

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This policy brief is based on findings of the report on the issue of prolonged pre-trial detention in Ukraine due to the violation of reasonable terms of criminal proceeding, completed in August 2016 under the auspices of the Ukrainian Bar Association as part of the research project funded by the Netherlands Organisation for Scientific Research and completed in August 2016.

The source base of the study were materials of criminal cases; statistical data from the replies by the State Penitentiary Service and the State Judicial Administration to the inquiries sent by the Open Dialog Foundation; Ukrainian Ombudsman's replies to inquiries sent by the Open Dialog Foundation; information from human rights organisations and the media; information from the legal practice of members of the Ukrainian Bar Association and the practice of the Open Dialog Foundation; and provisions of Ukrainian law and decisions of the ECHR.

The report has been prepared, taking into account the comments of attorneys, analysts, civil society organisations, and representatives of the Ministry of Justice and General Prosecutor's Office who took part in a debate on the preliminary study results, held on 28 July, 2016.