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EXTRADITION IN THE CRIMINAL PROCEDURAL LEGISLATION OF UKRAINE: COMPLIANCE WITH THE EUROPEAN STANDARDS

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Abstract: *The importance of legal regulation of extradition in the system of legal aid in criminal proceedings is determined both by the national interests of states and the interests of international cooperation in combating transnational and international crimes. The objective of this paper was to get the answer to the main question of this research - Did the provisions of the law on extradition in Ukraine meet international standards? A set of general and special scientific, and philosophical methods of scientific research were used while preparing this article, to clarify the approaches to the extradition procedure of different countries and in practice. The results of the research suggested that the current criminal procedure legislation of Ukraine in the sphere of extradition generally meets European standards. Although, there are some gaps in the national legal regulation of extradition that may adversely affect the observance of the rights and freedoms of persons to whom it is applied.*

Keywords: *Extradition; Human Rights; Case-Law; European Court of Human Rights; Suspect; Imprisoned Person*

INTRODUCTION

Despite the benefits of globalization in respect of people's well-being, freedom of movement of employees, services, and goods, it also adds to the international community's responsibility of combating crime, particularly organized crime. Ukraine is

not immune to it. Some suspected persons or accused use the opportunity to avoid public prosecution for wrongdoing by fleeing abroad. The law enforcement agencies are forced to employ an international legal instrument for searching and returning wanted persons - an institute of extradition.

Extradition is the legal process by which one country returns a fugitive to another country where that person has been charged accused or convicted of a crime. It's often a lengthy and complicated, even bureaucratic procedure, whose specifics are determined through treaties signed by individual governments and ratified by a country's Parliament (Bereznyak 2020, 5-7). Part 1, article 9 of the Constitution of Ukraine states, that International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, is part of the national legislation of Ukraine (Constitution of Ukraine 1996). An extradition procedure consists of different by its nature, essence actions, which can be divided into organizational-logistic actions and pre-trial investigative actions. For example, an arrest, an interview of a suspected person at court, etc. Extradition is not a novelty nowadays in international cooperation in criminal matters. It is an ancient mechanism of international cooperation in criminal matters, dating back to at least the XIII century BC, when an Egyptian Pharaoh, Ramesses II, negotiated an extradition treaty with Hittite King, Hattusili III. The first extradition agreement in Europe was signed between English King Henry II and Scottish King, Williams in 1174 (Buciunas 2017).

The importance of legal regulation of the institute of extradition in the system of legal aid provided by states in criminal proceedings is determined both by the national interests of states to prevent crimes on their territory and the interests of international cooperation in combating transnational and international crimes that threaten all the community.

The objective of this paper is to get an answer to the main question of this research - are the provisions of the law on extradition in Ukraine meet international standards? To reach the mentioned objective, the following tasks have been set out:

- To identify international (namely UN) and regional (namely European Council) conventions and their additional protocols, other multilateral and bilateral agreements, directly and indirectly, related with the extradition procedures in Ukraine from a point of view the case-law of the European Court of Human Rights (ECtHR);
- To review identify legal provisions of laws on extradition of a suspected person/accused in Ukraine;
- To identify main issues which arise during a suspected person/accused extradition through comprehensive and detailed analysis of the case-law of the ECtHR;
- To introduce proposals on improvement of extradition procedure in existing laws of Ukraine.

LEGAL FRAMEWORK FOR AN EXTRADITION IN UKRAINE

Currently, extradition is a fairly common form of legal aid in criminal matters in Ukraine. Thus, according to the statistical data of the Office of the Prosecutor General of Ukraine for 2012-2019. During the above-mentioned period, Ukraine received 18,701 requests for international assistance, including 933 requests from foreign institutions for extradition, of which 757 were executed. Ukraine prepared only 6,535 requests for international assistance, only 1,335 of them were for extradition, of which 1,042 were executed (About the work of the prosecutor 2020). The main legal sources on which the extradition is based in Ukraine are: relevant provisions of multilateral special international treaties on combating certain types of crime, namely: The United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (article 6); UN Convention Against Transnational Organized Crime, 2000 (article 16) and the three protocols to it which entered into force on 25 December 2003, 28 January 2004, 03 July 2005; UN Convention for the suppression of Acts of Nuclear Terrorism, 2005 (articles 10-14), Council of Europe Convention on Extradition on 1957 (Convention on Extradition 1957) and four additional protocols to it dated 15 October 1975 (Additional Protocol 1975), 17 March 1978 (Second Additional Protocol 1978), 10 November 2010 (Third Additional Protocol 2010), 20 September 2012 (Fourth Additional Protocol 2012); Council of Europe Convention on the Transfer of Sentenced Persons on 1983 (Convention 1983); Council of Europe Convention on Cybercrime or the Budapest Convention, 2001 (articles 22-24); Council of Europe Convention on Prevention of Terrorism, 2005 (articles 18-19); Bilateral international agreements/treaties of Ukraine with other states (for example, treaty between the Republic of Lithuania and Ukraine on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, entered into force 20 November 1994); Criminal Procedural Code of Ukraine (CPC) (Chapter 44) (Criminal Procedural Code of Ukraine 2012) etc.

THE CASE-LAW OF ECtHR AND EXTRADITION

The authors of this paper following the objective of this research analyze the extradition institute in the laws of Ukraine through the prism of judgments and decisions of the ECtHR. The relevant case-law of the ECtHR against Ukraine has recently been formed. In particular, in their judgments and decisions in the following cases: *Novik v. Ukraine* (2008); *Soldatenko v. Ukraine* (2008); *Svitlorusov v. Ukraine* (2009); *Baisakov and Others v. Ukraine* (2010); *Dubovik v. Ukraine* (2010); *Kreidich v. Ukraine* (2010) and others. The ECtHR has repeatedly stated that Ukraine has violated the articles of the European Convention on Human Rights (ECHR) when deciding on extradition by national courts. Therefore, these and other ECtHR judgments and decisions must also be taken into account in extradition law enforcement practice.

Most often, the ECtHR in its judgments and decisions states violations of the requirements of article 6 and 5 of the ECHR during the extradition, guaranteeing the right to a fair trial and the right to liberty and security of a person. The right to a fair trial in criminal proceedings is regulated in both international and national regulations, but the most complete and detailed content is defined in article 6 of the ECHR. This article guarantees the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in determining the civil rights and obligations of a person or in considering any criminal charges against a person. The same norm regulates the substantive elements of the mentioned right, in particular - the rights of persons against whom criminal prosecution is carried out (Handbook on article 6 2014).

Currently, the scope of the right to a fair trial extends to the entire criminal process, but in the past, the provisions of article 6 of the ECHR were not applied to extradition cases (*Farmakapoulos v. Greece; Peñafiel Salgado v. Spain*).

Thus, previously neither the extradition judge nor the habeas corpus court had the right to consider the presence or absence of human rights abuses in the requesting country. However, the UN Model Treaty on Extradition, approved by the UN General Assembly in 1990, expanded 'fundamental human rights' during extradition to include the 'right to a fair trial', and the UN Subcommittee on Human Rights recommended that no person be transferred to the state where there is a real risk of imprisonment for an indefinite period without a trial, or a court hearing with gross violations of international standards of judicial proceedings (Resolution on the transfer of persons 2005; Abilov 2014, 325).

Similar changes have taken place in the practice of the ECtHR. For example, in *Soering v. the United Kingdom*, the ECtHR for the first time did not rule out the possibility of considering the fairness of a trial in exceptional cases, namely when a refugee has already been exposed or being exposed to risks of lack of a fair trial. With this decision, the ECtHR laid the groundwork for a possible denial of extradition to the State, which requires the extradition of a person if the person concerned is at risk of 'blatant denial of justice' in the country requesting extradition. The phrase 'blatant denial of justice' is considered synonymous with litigation, which is contrary to the provisions of article 6 or the principles enshrined in it (*Sejdovic v. Italy* (2006); *Stoichkov v. Bulgaria* (2005); *Drozd and Janousek v. France and Spain* (1992)). For the ECtHR to establish whether extradition or deportation constitutes a blatant denial of justice, the applicant must provide evidence capable of proving that there are serious grounds for believing that, in the event of extradition from a state party, he or she would be at real risk. If the applicant proves this, then the government must dispel any doubts on the matter (*Ahorugeze v. Sweden* (2012) §116; *Othman (Abu Qatada) v. the United Kingdom* (2012)), §§272-280; *El Haski v. Belgium* (2012), §86; *Saadi v. Italy* (2008), §129).

To examine the risk of blatant denial of justice, the Court examines the alleged consequences of the applicant's deportation to the country of destination in the light of the general situation and the special circumstances of the applicant's case (*Al-Saadoon and Mufdhi v. the United Kingdom*, §125; *Saadi v. Italy,* §130).

According to V. Rohalska (2020, 120-125), Ukraine also provided in its national legislation, namely in part 2 of article 589 of the Criminal Procedural Code (CPC) of Ukraine, the possibility of refusing to extradite to a foreign state where a person's health, life or liberty is in danger on the grounds of race, religion, nationality, citizenship, belonging to a particular social group or political beliefs, but the regulation in the legislation alone is not enough, these rules must be implemented in practice and act in specific circumstances, however, unfortunately, the above decisions of the ECtHR against Ukraine indicate that this is not always the case.

A RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS AND EXTRADITION

The analysis of criminal proceedings records and also questionnaire of practical workers within the research work 'Theoretical bases of realization of the right to a fair trial in criminal proceedings' allowed us to conclude that during detention, including the detention of persons in Ukraine wanted by foreign states in connection with the commission of a criminal offense, among all the rights guaranteed by article 6 of the ECHR, perhaps the greatest obstacles exist in the implementation of the rights provided for in part 'a' and 'e', part 3, article 6 of the ECHR, namely: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to have the free assistance of an interpreter if he cannot understand or speak the language used in court (ECHR 1948).

Although the right to information and interpreter are not explicitly regulated, only defined as substantive elements of part 2 of article 5 and part 3 of article 6 of the ECHR, their content is disclosed in detail in the case-law of the ECtHR and the standards of the European Committee for the Prevention of Torture (paragraph 37, paragraph 44) (Belousov 2013, 122). However, it should be noted that the main documents that currently regulate the above rights are the Directives of the European Parliament and the Council of the European Union 'On the Right to Information in Criminal Proceedings' (Directive 2012/13/EU 2012) and 'On the Right to Interpretation and Translation in Criminal proceedings' (Directive 2010/64/ EU 2010). Analysis of the above sources led to the conclusion that; the right to be informed in criminal proceedings includes the following substantive elements:

1. the right to be informed of the grounds for detention,
2. the right to be informed of the nature and causes of the accusation against a person;

3. the right of a person against whom criminal prosecution is carried out to be informed of his/her rights;
4. the right of a person to access the evidence on which the accusation against him/her is based.

The main provisions of the right to translation are:

1. the right of persons subject to criminal prosecution to free interpretation and translation in criminal proceedings;
2. the main purpose of the right to translation - ensuring the right to a fair trial;
3. the limits of the exercise of this right are applied at all stages of criminal proceedings;
4. the decision to involve an interpreter and which documents must be translated is made by the competent authorities, but the suspect's defense counselor may request the translation of additional documents, and the final responsibility for this decision rests with the court;
5. interpretation and translation must meet certain standards sufficient for the suspect to understand the nature of charges. Interpretation must ensure the 'effective participation' of a suspect in the process. Only those documents that a suspect 'must understand to have a fair trial' need a translation;
6. the state has an obligation to ensure sufficient qualification of the translators and interpreters involved to provide correct translation and interpretation;
7. to verify the correctness of the interpretation, the state must ensure the technical recording of procedural actions with the participation of the translator;
8. all costs associated with the exercise of the right to translation are borne by the state.

Despite the fact that according to the national legislation, the representatives of the prosecution are also obliged to comply with certain requirements when informing a person detained in Ukraine wanted by a foreign state in connection with the commission of a criminal offense, namely: be proactive; provide such information immediately; to inform a person about the grounds for detention in a language he/she understands (article 29 of the Constitution of Ukraine, parts 4, 5 of article 208 of the CPC, part 3 of article 212 of the CPC, part 7 of article 582 of the CPC), systematic analysis of current legislation, study of the criminal proceedings records and the survey of practitioners allowed us to conclude that there are certain obstacles in the implementation of the above requirements in the practice of the prosecution, namely: despite the fact that almost all interviewed practitioners (93%) said that they do not violate the requirement of immediate information about the grounds for detention, the authors of the study 'Human Rights Behind Closed Doors'. The report on the results of the research 'Procedural Safeguards of Detainees' calls into question the following

conclusions and states that it is extremely difficult to verify in practice whether a person has indeed been informed of the real reasons from the first minutes of detention.

The first official document stating the person's initial charges is a detention report, a copy of which must be immediately served to the detainee and sent to the prosecutor (part 5 of article 208, part 2 of article 582 of the CPC of Ukraine). However, the problem is that the CPC does not clearly state when exactly a report on a person's detention should be drawn up (Belousov 2015). In addition, according to some scholars, since Chapter 44 of the CPC of Ukraine does not contain any instructions of the legislator on the procedure for drawing up such a report, its name, and details, this gap should be filled by amending the CPC of Ukraine with a new article to determine a name of such a report 'Protocol of notification and clarification of the rights of a person in respect of whom the issue of extradition to a foreign state is being considered'. Scholars believe that such a protocol, in addition to the mandatory details provided for in article 104 of the CPC of Ukraine, should enter information about: the sequence of actions (notification of the list of rights defined in article 581 of the CPC of Ukraine); participation of all persons present during the detention (Basysta 2016), etc.

There is no norm in the CPC of Ukraine regarding the immediate interrogation of a detained person. As a result, a person can find out the real grounds for detention a few hours after the actual arrest (Belousov 2015). In our opinion, the violation of the requirement to immediately notify a person of the grounds for his/her detention is facilitated by the lack of a common understanding of who is the authorized official for detention, and therefore the duties imposed on such a person, including informing about the grounds for detention, are often not fulfilled. The provisions on the grounds for detention of persons whose extradition is requested are also inconsistent. The grounds for detention of a person whose extradition is requested are foreseen in article 208 of the CPC of Ukraine, taking into account the peculiarities of Chapter IX of the CPC (part 7 of article 585 of the CPC of Ukraine). The analysis of the articles of Chapter IX shows the absence of such peculiarities related to the detention of a person whose extradition is requested, except for those provided for in article 582 of the CPC of Ukraine. The procedural law also does not contain grounds for re-detention and re-application of temporary arrest, although the implementation of re-extradition arrest is established by part 13 of article 584 of the CPC of Ukraine. Among the list of grounds for detention of a person (articles 207, 208, 582 of the CPC of Ukraine) there is no such ground as declaring a person internationally wanted with the aim of extradition. This violates the principle of legal certainty of procedural law, and the lack of a definition of the grounds for detention of a person who is internationally wanted for extradition allows such a person to further appeal his/her detention as unlawful to the investigating judge.

The results of the survey show that practitioners are fully aware of their obligation to immediately inform the detainee of the grounds for his/her detention in a language

he/she understands, but almost all of them state that they are currently unable to properly ensure this requirement. due to the lack of round-the-clock linguistic assistance and inefficiency during the detention of the existing mechanism for attracting translators through the Centers for Free Legal Secondary Assistance (Resolution of Cabinet of Ministers of Ukraine 2016).

The lack of regulation in the legislation of clearly defined grounds for the involvement of a translator also negatively affects the process of ensuring the right to translation. To resolve such conflict situations, we consider it is appropriate to amend the CPC of Ukraine, which provides that the decision to involve an interpreter at the expense of the state during the proceedings should rely on the judge, and during pretrial proceedings and international cooperation - the investigator or prosecutor. However, as the final responsibility for ensuring a fair trial rests with the judge, we consider it necessary to allow the defense to appeal to the investigating judge against the investigator's or prosecutor's refusal to engage an interpreter.

According to A. Hora (2017) when deciding on an interpreter, the above-mentioned participants should make sure that the absence of an interpreter does not prevent the person from taking a full part in resolving the issue that is crucial to him, and in cases where the defense tries to prove that the suspect or accused does not have a proper command of the language in which the trial is conducted, the above-mentioned participants should determine the expediency of hiring an interpreter based on a detailed analysis of the suspect's (accused's) previous language experience (ECtHR judgments: *Kuskani v. the United Kingdom; Lagerblom v. Sweden*).

According to Nychka (2015, 186) lack of legislation in the definition of who can be a translator, specific requirements for such persons, and a list of documents confirming their authority, as well as difficulties in finding translators who would be specialists and meet the requirements for their qualifications. A survey of practitioners and a study of investigative and judicial practice led to the conclusion that frequently the documents confirming the authority of the translator are a document on the education and qualifications of the translator (diploma of relevant education). At the same time, the peculiarities of professional legal language, which requires specific knowledge and skills, including understanding the legal aspects of processes and phenomena, encourages a critical evaluation of this approach, as a diploma in language does not guarantee qualified legal translation.

To find translators who would be specialists and meet the requirements for their qualification, in 2013 a Reference Register of Translators/Interpreters (The Register of Translators) was created in Ukraine (Order of the Ministry of Internal Affairs of Ukraine 2013), but in practice, neither pre-trial investigation bodies nor courts use this register. Due to certain shortcomings of maintaining such a Register, as well as the inconvenience of its use, the access to the information is closed and it can be obtained only by requesting a specific person. Also, the Register does not always contain

information about the translator/interpreter who speaks and understands the language fitting a person for whom it is necessary to involve such a translator/interpretation. Thus, today the Register of Translators does not fully meet the requirements to guarantee the mandatory involvement of an interpreter who meets all the necessary procedural professional criteria, which also does not contribute to the effective exercise of the right to a fair trial within a reasonable time (Decision of the Council of Judges of Ukraine 2016).

Inability to provide the documents provided for in part 4 of article 583 of the CPC of Ukraine within the period prescribed by the CPC of Ukraine, in particular, due to the lack of translation/interpretation into Ukrainian of some documents attached to the international request.

An analysis of criminal records and interviews with practitioners has also shown that judges refuse temporary detention resulting in the release of detainees in recent years. Such decisions are usually substantiated by the prosecutor's failure to provide the documents foreseen in part 4 of article 583 of the CPC of Ukraine, or their improper, in the opinion of the courts, registration; the lack of translation into Ukrainian of some documents attached to the request (procedural decisions on bringing as a defendant and detention, identity documents), failure to provide data that would indicate a deliberate evasion of a person from appearing before the judiciary, etc. At the same time, the courts do not take into account that the current legislation sets minimum requirements for the number of documents and information provided to the court with a request for temporary arrest, as procedural decisions are made in a foreign country and their translation into Ukrainian at the time of detention cannot be made in time. Providing other data of criminal proceedings by foreign pre-trial investigation body in addition to the specified paragraph 2 part 4 of article 583 of the CPC of Ukraine at this stage is not provided. Documents that contain information about the commission of a crime by a wanted person on the territory of a foreign state are documents that in any way indicate the fact of committing criminal acts on the territory of another state. At the same time, the current legislation does not specify the types of such documents, as well as their affiliation to a particular government agency or organization. A supporting document, in this case, maybe a letter from Interpol about the presence of a person on the international wanted list for arrest, a foreign court decision to detain a person or a reference to the existence of such a decision, and so on (Rohalska 2019, 151-153).

The authors of this paper also consider too strict the requirement set by the legislator to the parameters of the period of 60 hours for the prosecutor to attach to the request for temporary arrest originals or duly certified copies of the documents from the foreign state. The prosecutor does not have them immediately and it is impossible to obtain them within 60 hours, as well as the lack of information on whether a foreign body will request the extradition of such a person leads to the complexity of the

procedure of careful preparation of materials for the detention of an internationally wanted detainee (Rohalska 2019, 156).

According to the respondents, the Court's remarks on the submitting of the relevant documents are also unfounded. It should be noted that the application for temporary arrest under article 583 of the CPC of Ukraine must be considered as soon as possible, but no later than 72 hours from the date of detention. It is virtually almost impossible to obtain properly executed documents from a foreign state during this time. In addition, the norms of the above-mentioned international agreements provide that the requests for the application of temporary arrest can be made by fax, telegraph, mail, and Interpol channels.

Part 4 of article 548 of the CPC of Ukraine provides for the receipt of requests by electronic, facsimile, or other means of communication. When releasing persons from custody due to the refusal of the courts to apply temporary arrest, it should be taken into account that such persons continue to be internationally wanted and are subject to valid decisions of foreign courts on detention, in connection with which following articles 208, 582 of the CPC of Ukraine, their detention is a direct duty of the law enforcement agencies of Ukraine. Failure by the law enforcement agencies to fulfill their obligations under international instruments to detain persons wanted by foreign law enforcement agencies for arrest and extradition on the territory of Ukraine, and their further extradition to requesting states if there are grounds for that, may lead to negative consequences and deterioration of state's image in general.

CONCLUSION

Thus, the results of the research suggest that, in addition to certain problems with the implementation of current criminal procedure legislation of Ukraine, which regulates the use of extradition and generally meets European standards. Although, there are some gaps in the national legal regulation of extradition that may adversely affect the observance of the rights and freedoms of persons to whom it is applied. To ensure European standards during the extradition, the author of this paper considers it appropriate:

1. to amend the CPC of Ukraine with a list of norms about the content of the right to translation; grounds for hiring an interpreter; qualification requirements to be met by the translator; a list of documents confirming the qualification of the translator; persons who make the final decision on the need to involve the interpreter/translator; the procedure for engaging an interpreter through the centers for free secondary legal aid, including during the detention of a person; grounds for detention;
2. to develop an effective mechanism for the round-the-clock provision of urgent linguistic assistance for persons who are being prosecuted and who do not speak

the language of criminal proceedings. We see the way out to create at the expense of the state registers of interpreters and translators, which would function by analogy with the Unified Register of Lawyers of Ukraine;

3. continue to implement in all units of pre-trial investigation and pre-trial detention facilities the Custody Records System through which it is possible to record all actions that occur with a detainee from the moment of his actual detention until the issue of choosing a measure of restraint, in particular, the rights of the detainee; and
4. increase the period during which the prosecutor is obliged to add to the application for temporary arrest documents (originals or duly certified copies thereof) from a foreign state body. 

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