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Observance of the Constitutional Rights and Freedoms of Man and Citizen During Surveillance

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Abstract
The relevance of the study, given the law enforcement practice of the courts of Ukraine and the case law of the European Court of Human Rights, based on the coverage of standard decisions, lies in identifying some errors in the pre-trial investigation. Further, the study disclosed the issues related to the observance of human and civil rights and freedoms during the surveillance. The purpose of the study is to identify the main reasons for recognising the evidence obtained during covert investigative action as inadmissible in the course of the trial. The methodological basis of the study is a comparative legal method based on the evaluation approach, a formal legal (dogmatic method, analysis and synthesis. The study highlights individual papers in the context of the issue under consideration, which allowed disclosing the content of each of the areas and tracing their relationship. Based on the review of judicial practice and decisions of the European Court of Human Rights, the main reasons for declaring evidence inadmissible are presented and substantiated. In addition, individual court decisions on non-compliance with constitutional human rights and freedoms during such a covert investigative (search action as surveillance are summarised and characterised. It was proved and argued that authorised bodies that have the right to authorise surveillance must comply with the norms of the European Convention on Human Rights. It is determined in which cases the court may recognise evidence obtained during surveillance as admissible. The ultima ratio principle, which guarantees the observance of constitutional human and civil rights and freedoms during pre-trial investigations, is highlighted separately. A personal opinion on each of the analysed decisions is formulated, considering national and international legislation. The practical value lies in the fact that the results of the study allow the prosecution to avoid mistakes during the collection of evidence in criminal proceedings

Keywords:
covert investigative (search actions; admissibility of evidence; criminal proceedings; covert surveillance; European Court of Human Rights

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Introduction

The issue of ensuring the constitutional rights and freedoms of a person and citizen during the surveillance is one of the urgent problems of pre-trial investigation because the evidence that is collected during this covert investigative (search) action (hereinafter – CI(S)A) is often recognised inadmissible by the court. In particular, this is stated in the generalisation of the case law of the Court of Cassation and in the decisions of the European Court of Human Rights (hereinafter – the ECHR). Confirmation of the above is that this procedural action has certain difficulties in implementation. Therewith, it should be noted that during the surveillance, certain actions or inaction of investigative or operational units may lead to violations of constitutional rights and freedoms of man and citizen, enshrined in the Constitution of Ukraine[1]. This is now crucial both at the Ukrainian and international levels regarding the observance of the above-mentioned right for persons who are under covert surveillance.

The issue of surveillance is not widely studied, however, there are researchers who considered the case law of the ECHR decisions on the observance of human and civil rights and freedoms by Ukrainian legislation in accordance with the European Convention on Human Rights (hereinafter – Convention)[2]. Among them, there are V.A. Zavhorodnii [1], A.R. Tumaniants and I.O. Krytska [2], A.V. Shylo [3].

V.A. Zavhorodnii considered "the influence of the ECHR practice on legal activity in Ukraine: theoretical, methodological, and applied aspects. In particular, he noted that the decision of the ECHR should be considered as an interpretive precedent, or rather a case-law precedent, namely as a law enforcement regulation, which specifies the rules of the Convention through rules of understanding the content[3] and which is precedent-setting for the Court States Parties to the Convention" [1, p. 12].

In comparison with V.A. Zavhorodnii, such researchers as A.R. Tumaniants and I.O. Krytska considered "issues of guarantee systems related to the conduct of CI(S)A, in the context of the Ukrainian judicial practice of the ECHR…The proposed systematisation can be used in further analysis of normative requirements that regulate CI(S)A" [2, p. 210, p. 214].

"The issue of ensuring the admissibility of evidence in the presence of special legal status of a subject whose actions are recorded through CI(S)A was covered by researcher A.V. Shylo. He formulated that in some cases in criminal proceedings the specificity of the legal status of the person in respect of whom the evidence is being collected is important" [3, p. 275].

Based on the review of the above-mentioned findings, this study combines three areas into a single whole, namely: case law of ECHR decisions and consideration of individual decisions of Ukrainian jurisprudence; system of guarantees of observance of the constitutional rights and freedoms of the person and the citizen during surveillance; issues of ensuring the admissibility of evidence during the pre-trial investigation. The content of each of the areas is disclosed and their relationship is traced.

The purpose of this study is to identify possible reasons for declaring such evidence inadmissible.

Materials and Methods

The study is based on examining materials of case law and decisions of the ECHR on the observance of constitutional rights and freedoms of man and citizen during surveillance to identify the main reasons for declaring such evidence inadmissible. The methodological basis of the study is the comparative legal method, which allowed comparing court decisions based on an evaluation approach, applied to determine the content of some concepts traced in ECHR decisions and absent in Ukrainian case law. A formal legal (dogmatic) method established the relationship between the decisions of the ECHR and the decisions of the Court of Cassation, provided an individual evaluation of each of the decisions, and identified the main reasons for declaring evidence obtained through surveillance inadmissible.

Notably, the analysis and synthesis of selected materials were conducted, including the regulatory framework of Ukraine: the Constitution of Ukraine[4], Criminal Procedure Code of Ukraine[5], Criminal Code of Ukraine[6], court decisions of Ukraine (rulings and resolutions). The above methods, in particular, analysis, allowed identifying issues related to the observance of human and civil rights and freedoms, based on the available information in court decisions of Ukraine and decisions of the ECHR. In turn, synthesis combined the materials under study and identified typical errors during the pre-trial investigation regarding covert surveillance.

Results and Discussion

The Constitution of Ukraine "declares that a person, their life and health, honour and dignity, inviolability and security are recognised as the highest social value, while the approval and ensuring of their rights and freedoms are the main duties of the state" (Art. 3)[7]. In addition, "the Constitution of Ukraine contains a large number of regulatory provisions that are important for governing

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[2]European Convention for the Protection of Human Rights. (1997, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004 -Text.
[3]*Ibidem*, 1997.
[4]Constitution of Ukraine, op. cit.
[5]Criminal Procedural Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.
[6]Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14 - Text.
[7]Constitution of Ukraine, op. cit.

criminal procedural activities. In general, the norms of the Constitution are the conceptual basis of criminal procedural legislation, they determine the strategy for its development and application" [4, p. 119].

The results of the analysis of the materials of individual court decisions of the ECHR and Ukrainian courts indicate that in all cases, without exception, both surveillance and other types of CI(S)A should be conducted legally, in compliance with the constitutional human rights and freedoms defined by the Constitution of Ukraine[1] and the Convention[2]. Moreover, according to the law of Ukraine "On the implementation of decisions and application of the practice of the European Court of Human Rights"[3], courts should apply the Convention and the practice of the court as a source of law when considering cases[4]. Therefore, all situations in which it is impossible to fully exercise the constitutional rights and freedoms of a person during surveillance are recognised as a violation of these rights [5, p. 255–256].

It can be noted that in case of violation of constitutional rights during the surveillance, the court may call into question the evidence obtained as a result of the above-mentioned procedural action and declare it inadmissible. One of the reasons for this is: "... when the procedural documents for their conduct were not disclosed under the Art. 290 of the Criminal Procedure Code (hereinafter – CPC) of Ukraine or were disclosed untimely" [6, p. 2]. On the other hand, "decisions and rulings not opened at the stage of pre-trial investigation, which became the basis for surveillance, may be declared admissible by the court... if the defence party, having read the materials of the pre-trial investigation, finds that they have a protocol on the results of surveillance, but no procedural documents that led to these actions, did not apply to the investigator, prosecutor, or court to open and involve specified documents to the materials of the proceedings" [6, p. 20].

The practice of the ECHR indicates the existence of separate cases of non-disclosure of certain evidence in criminal proceedings to ensure the protection of public interests[5]. This is stated, in particular, in the decisions of the ECHR in the cases: "Jakuba v. Ukraine" of 02/12/2019[6], "Doorson v. The Netherlands" of 03/26/1996[7], "Leas v. Estonia" of 03/06/ 2012"[8]. Therewith, this may contradict the actions of authorised bodies regarding legitimate interference in the private life of individuals and lead to restrictions on constitutional rights and freedoms of man and citizen [7, p. 704]. Thus, upon examining the criminal proceeding No. 42016051110000054, included in the Unified Register of Pre-trial Investigations (hereinafter – URPI) since 03/20/2016 on charges of committing a criminal offence under p. 3 of Art. 368 of the Criminal Code[9] (hereinafter – the CC) of Ukraine, it can be noted the court found the following: "the protocol on the visual surveillance of persons was obtained as a result of a violation of human rights and freedoms guaranteed by the Constitution[10]. Therefore, guided by Art. 87,89,372,395 of the CPC of Ukraine[11], the court ruled to declare evidence inadmissible, in particular, the protocol on the results of the CI(S)A in criminal proceedings dated 07/06/2016 based on the prosecutor's decisions No. 05-278t, No. 05-279t dated 03/21/2016 on visual surveillance"[12].

It is advisable to agree with the court's decision, which is fully justified, because the prosecutor in court did not prove that visual surveillance took place exclusively under such conditions, namely: in the interests of national and public safety, to prevent the commission of a serious or particularly serious crime, to save life and protect health, and to protect the rights and freedoms of others.

The opposite example is the cassation appeal in case No. 751/7557/15-k (proceedings No. 13-37ks18[13]), in which the defence party requested to cancel the court decisions on the convict under Part 3 of Art. 307 of the CC of Ukraine[14] and appoint a new trial. The grounds for annulment of court decisions included: decisions of the investigating judge on permission to conduct CI(S)A, the materials of which are the basis of the sentence and material evidence were not disclosed to the defence under the Art. 290 of the CPC of Ukraine[15]. "The panel of judges of the Second Judicial Chamber of the Cassation Criminal Court, composed of the Supreme Court,

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[2]European Convention for the Protection of Human Rights. (1997, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004 -Text.
[3]Law of Ukraine No. 3477-IV "On the Implementation of Decisions and Application of the Case Law of the European Court of Human Rights". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3477-15-Text.
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[12]Decision in the case No. 225/5822/16-k Dzerzhinsky City Court of Donetsk region. (2019, May). Retrieved from https://zakononline.com.ua/court-decisions/show/81620702.
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[14]Criminal Code of Ukraine, op. cit.
[15]Criminal Procedural Code, op. cit.

drew attention to the fact that it was also important to understand the legal nature of the investigating judge's decision to authorise CI(S)A, which was not a separate piece of evidence along with the protocols concerning the results of CI(S)A. In the case under consideration, all materials that were at the disposal of the prosecutor at that time, including declassified protocols on the results of surveillance, were opened to the defence pursuant to Art. 290 of the CPC of Ukraine[1]. For the first time, the defence expressed its arguments on the inadmissibility of protocols of investigative actions as evidence, in addition to the appeal against the verdict, noting the non-disclosure to the defence, pursuant to Art. 290 of the CPC of Ukraine[2], during the pre-trial investigation of the relevant decisions of the investigating judge, who granted permission to conduct CI(S)A. During the evaluation of the fairness of the trial, the Grand Chamber of the Supreme Court considered that the appellate court stated in its decision that the CI(S)A materials themselves indicated the preparation of the accused for the crime, but the crime itself was proved by other evidence"[3].

In this situation, it is advisable to pay attention to the fact that the defence party was not deprived of the right to submit petitions for conducting procedural actions, including those aimed at collecting and verifying evidence. In addition, it should be remembered that the decision of the investigating judge to conduct surveillance of a person does not contain materials of the guilt of the accused person, it is solely permissive. In fact, the defence was familiarised with the protocols for conducting visual surveillance, which at that time were declassified and at the disposal of the prosecutor[4]. Thus, the constitutional rights and freedoms of man and citizen were observed in the judicial process. Therefore, this judicial practice is consistent with the position of study, because the right to a fair trial was ensured.

In the following example of the recognition of evidence as inadmissible, it is worth noting the decision of the Cassation Criminal Court of 04/04/2019 in case No. 727/4888/16-k [8], which states that: "…The permission to conduct visual surveillance of one of the convicts was granted by the decision of the investigating judge of the Appellate court in the framework of other criminal proceedings. Furthermore, the data on combining the materials of criminal proceedings and the decision of the investigating judge, ruled under Art. 257 of the CPC of Ukraine[5], were absent, which remained without the attention of the appellate court" [8, p. 16].

In the context of the above, there are some problems in the application of the CPC of Ukraine[6]. In cases which refer to proving. As already noted, in practice, protocols for conducting surveillance can be disputed by the defence. Thus, in this example, there was no court ruling on combining the materials of criminal proceedings into one proceeding, which is a violation, in particular, non-compliance with the constitutional rights and freedoms of man and citizen. Moreover, the court had to consider this and declare the evidence inadmissible during the trial, because when conducting visual surveillance, it is necessary to remember that the right to privacy may be violated.

In the international case law of the ECHR, It is advisable to examine the following decision in the case "Hambardzumyan V. Armenia "of 12/05/2019[7]. Referring to Art. 22 of the Constitution of the Republic of Armenia (Art. 22)[8] and Art. 105 of the CPC of the Republic of Armenia (Art. 105)[9], the plaintiff stated that the evidence that was obtained during the pre-trial investigation was unjust since illegal covert surveillance measures were applied. However, the decision of this case states that the impugned materials were not the only information on which the conviction was based, and therefore the evidence obtained as a result of secret surveillance fully meets the requirements of Art. 6 p. 1 of the Convention (Art. 6)[10] and the national legislation of the Republic of Armenia[11].

"As to whether the interference in this case was "necessary in a democratic society" to achieve a legitimate aim, the ECHR reiterates that the power to secretly monitor citizens is allowed under Art. 8 of the Convention (Art. 8)[12] only to the extent that they are really necessary for the protection of democratic institutions." Notably, an important condition for conducting visual surveillance is, primarily, the evaluation of the situation and the course of the circumstances of the case. The duration of measures authorised by authorised bodies must be based on legal grounds and within the framework of

[1]Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14-Text.
[2]Criminal Procedural Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.
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[10]European Convention for the Protection of Human Rights. (1997, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004-Text.
[11]Judgment of the European Court of Human Rights in the "Case of Khambardzumian v. Virmenia", op. cit.
[12]European Convention for the Protection of Human Rights. (1997, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004-Text.

national legislation[1]. Compliance with the requirements of the Convention[2], primarily, aims to prevent abuse by bodies that have procedural rights.

Thus, to summarise, the court recognised the evidence obtained during the investigation as permissible and noted that the restrictions during covert surveillance occurred without violations, which complies with the norms of the Convention[3] in terms of ensuring the right to a fair trial and the right to respect for private and family life, constitutional rights and freedoms of man and citizen.

It is advisable to present the following example of the ECHR's decision on the observance of constitutional human and civil rights and freedoms when conducting surveillance in the case "Liblik and others v. Estonia" of 05/28/2019[4]. Having considered the decision of the above-mentioned case, it can be noted that referring to Art. 6 of the Convention[5] and Art. 8 of the Convention[6], the plaintiffs complained that criminal proceedings had been instituted against them for too long and about the retrospective motivation of the permits for covert surveillance of them, which led to non-compliance with the right to respect for private life. The Supreme Court of the Republic of Estonia (the SC) clarified the interpretation of the ultima ratio principle[7], which is literally translated from Latin as the last argument. Pursuant to Art. 111 of the CPC of the Republic of Estonia[8], the above principle is used to ensure the proportionality of the interference with private life"[9]. Failure to comply with this principle when granting permission to conduct covert surveillance may lead to non-compliance with the constitutional rights and freedoms of a man and citizen, as a result of which, evidence may be recognised by the court as inadmissible[10].

Having read the above-mentioned case of the ECHR, it is worth noting that the correct interpretation of the ultima ratio principle is an important approach to understanding the circumstances of criminal proceedings. This concept is not tracked in the decisions of Ukrainian case law, but this does not mean that this principle should not be applied, since its non-compliance does not guarantee the observance of the constitutional rights and freedoms of man and citizen, and therefore the evidence gathered during the pre-trial investigation may be declared inadmissible by the court.

However, the practice of the ECHR has a somewhat negative decision to declare evidence obtained as a result of CI(S)A inadmissible. The above refers to the case "Evdokimov v. Ukraine" dated 04/22/2021[11]. "The plaintiff complained to the ECHR, pursuant to Art. 6 of the Convention[12], about the failure of the defence to disclose the text of the court order authorising covert investigative actions to supervise them, the ECHR concluded that at the time of the adoption of that decision, the national authorities had not invoked the public interest to prevent the defence from disclosing the text of the relevant order. There was also no evidence that the courts that examined the applicant's case had access to the text of the ruling. In addition, the plaintiff was not informed about the reasons for the restriction of their rights, therefore, the court found a violation of p. 1 of Art. 6 of the Convention[13]"[14].

When justifying the opinion on this decision of the ECHR, it is worth noting that this may become a negative precedent for the prosecution in considering further cases both at the national and international levels. Therefore, failure to comply with the requirements, in particular, Art. 6 of the Convention[15] in terms of non-disclosure to the defence of the court ruling on permission to conduct covert surveillance violates the rights of equality of the parties and the adversarial nature of the trial, which in turn leads to the lack of proper guarantees for protecting the interests of the accused. Considering the above, the decision itself does not contain any evidence of the person's guilt, however, this legal act is permissive, due to which the court determines the admissibility of evidence[16].

Another positive example of the ECHR decision is the case "Ekimdzhiev and others v. Bulgaria" of 01/11/2022[17]. "It should be noted that in accordance

[1]The ECHR Found a Violation of the Hambardzumyan v. Armenia Convention on the Illegal Use of CI(S)A Data. (2020). Retrieved from https://unba.org.ua/publications/print/5131-espl-viznav-porushennya-konvencii-u-spravi-hambardzumyan-proti-virmenii-shodo-nezakonnogo-vikoristannya-danih-nsrd.html.
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[6]*Ibidem*, 1997.
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[13]*Ibidem*, 1997.
[14]Judgment of the European Court of Human Rights in the "Case of Evdokimov v. Ukraine", op. cit.
[15]European Convention for the Protection of Human Rights, op. cit.
[16]Judgment of the European Court of Human Rights in the "Case of Evdokimov v. Ukraine", op. cit.
[17]Judgment of the European Court of Human Rights in the "Case of Ekimdzhiiev v. Bulgaria". (2022, January). Retrieved from https://www.echr.com.ua/translation/sprava-ekimdzhiyev-ta-inshi-proti-bolgarii.

with the main relevant legislation, namely: the Law of Bulgaria "On special means of surveillance" of 1997[1] and Art. 172–176 of the CPC of Bulgaria[2], covert surveillance is legal in Bulgaria and can be used to ensure national security or in case of suspicion of a "serious intentional offence" committed with abuse. However, in view of Art. 8, 13 of the Convention[3], the plaintiffs argued that the above laws did not provide sufficient safeguards against arbitrary or unlawful covert surveillance of abuse. They also complained of the lack of an effective remedy in respect of those violations. The ECHR found that the relevant legislation governing covert surveillance does not meet the requirements of the Convention[4] regarding the quality of law and cannot ensure surveillance only of what is necessary"[5].

Considering the national legislation that must meet the requirements of the Convention[6]. Violation or non-compliance with the constitutional rights and freedoms of a man and citizen when conducting surveillance and failure to fully comply with the norms of the Convention[7] should not be allowed. As evidenced by the above practice of ECHR decisions.

In addition, the following should be stated: "the decisions of the ECHR are designed not only to resolve cases pending before the court on the merits but also to specify and interpret the norms" [9, p. 23].

In general, based on the above, it can be noted that "most fundamental rights are formulated in general terms that are consistent with basic ethical and social values and do not consider specific situations and circumstances. The advantage of these broad formulations is that these rights provide space for interpretation and can be easily applied to different situations and in different contexts. This aspect undoubtedly helped most fundamental rights to stand the test of time and remain fundamental" [10, p. 4].

Conclusions

Based on the review of case law and decisions of the ECHR, the main reasons for recognising evidence as inadmissible in the context of the observance of constitutional human rights and freedoms during surveillance are:

– violation of the rights and freedoms of a citizen, since there was no decision of the investigating judge and the prosecutor in the court session did not prove the circumstances confirming the impossibility of fulfilling the requirements of the Criminal Procedure Code of Ukraine;

– permissive procedural documents for conducting the surveillance were not disclosed under the Art. 290 of the CPC of Ukraine or were disclosed untimely;

– permission to conduct surveillance was granted in the framework of other criminal proceedings. Therewith, there is no combination of materials of criminal proceedings and the decision of the investigating judge;

– ECHR emphasises the exclusivity of the use of covert surveillance, additionally focusing on the duty of investigative bodies, prosecutor's offices, and judges not only to indicate the impossibility of establishing certain information in another way but also to confirm this with proper justification;

– non-compliance of national legislation on surveillance with the requirements of the Convention, in particular, the lack of guarantees to prevent illegal covert surveillance.

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Дотримання конституційних прав і свобод людини та громадянина під час спостереження за особою

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Анотація

Результати аналізу правозастосовної практики судів України та прецедентної практики Європейського суду з прав людини засвідчують актуальність наукового дослідження щодо окремих помилок у процесі досудового розслідування на підставі висвітлення типових рішень. Розкрито проблемні питання стосовно дотримання прав і свобод людини та громадянина під час проведення спостереження за особою. Метою статті є виявлення основних причин визнання доказів, отриманих у межах цієї негласної слідчої (розшукової) дії, недопустимими в процесі судового розгляду. Методологічну основу дослідження становлять формально-юридичний (догматичний), порівняльно-правовий методи, застосовані на основі оцінного підходу, а також методи аналізу й синтезу. На підставі аналізу наукових праць з досліджуваної тематики, судової практики та рішень Європейського суду з прав людини наведено й обґрунтовано основні причини визнання доказів недопустимими. Узагальнено та схарактеризовано окремі судові рішення щодо недотримання конституційних прав і свобод людини під час проведення такої негласної слідчої (розшукової) дії, як спостереження за особою. Доведено, що уповноважені органи, наділені правом санкціонування проведення спостереження за особою, мають дотримуватися норм Європейської Конвенції про захист прав людини. Встановлено умови, за яких суд може визнати допустимими докази, отримані під час проведення візуального спостереження за особою. Виокремлено принцип «ultima ratio», який гарантує забезпечення дотримання конституційних прав і свобод людини та громадянина під час досудового розслідування. Висловлено авторську позицію щодо кожного з проаналізованих рішень з огляду на національне й міжнародне законодавство. Практична значущість дослідження полягає в тому, що отримані результати нададуть можливість стороні обвинувачення уникати помилок у процесі збирання доказів у кримінальному провадженні

Ключові слова:

негласні слідчі (розшукові) дії; допустимість доказів; кримінальне провадження; таємне спостереження; Європейський суд з прав людини