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NIEKTÓRE ASPEKTY PRAWA DO SPRAWIEDLIWEGO PROCESU W PRAKTYCE EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA

Taras Huk

laureat Naukowego Instytutu Prawa Publicznego (Kijów, Ukraina)

ORCID ID: 0009-0000-3147-424X

guktaras@ukr.net

Adnotacja. W artykule dokonano przeglądu kluczowych aspektów prawa do rzetelnego procesu sądowego w kontekście praktyki Europejskiego Trybunału Praw Człowieka (ETPC), ze szczególnym uwzględnieniem stosowania tajnych metod śledczych. W badaniu wykorzystano szczegółową analizę orzecznictwa ETPC, aby ocenić, w jaki sposób tajne operacje wpływają na rzetelność postępowań karnych. W badaniach wykorzystano ogólnonaukowe i specjalne metody poznania, m.in. metodę formalno-prawną, która posłużyła do badania normatywnych aktów prawnych Ukrainy i konwencji międzynarodowych; metoda kazuistyczna do rozpatrywania konkretnych spraw, w których ETPC orzekał w sprawie prawa do rzetelnego procesu przy stosowaniu tajnych śledztw, wraz z analizą wniosków sądu; metoda porównawcza; oraz metoda formalno-logiczna ułatwiająca definiowanie terminów i kryteriów. Opracowano kryteria definicji prowokacji pośredniej, które w dalszych badaniach należy dostosować do obowiązującego ustawodawstwa i/lub opracować propozycje wprowadzenia odpowiednich zmian legislacyjnych.

Słowa kluczowe: poufne czynności dochodzeniowe, monitorowanie przestępczości, dopuszczalność dowodów, prawa człowieka.

SOME ASPECTS OF THE RIGHT TO A FAIR TRIAL IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Taras Guk

laureate of the Scientific Research Institute of Public Law (Kyiv, Ukraine)

ORCID ID: 0009-0000-3147-424X

guktaras@ukr.net

Abstract. This article examines key aspects of the right to a fair trial in the context of the European Court of Human Rights' (ECHR) practice, particularly focusing on the use of covert investigation methods. The study employs a detailed analysis of ECHR case law to evaluate how covert operations affect the fairness of criminal proceedings. The study employed general scientific and special methods of cognition, such as the formal-legal method, which was used to study the regulatory acts of Ukraine and international conventions; the case method to examine specific cases in which the ECHR made decisions regarding the right to a fair trial when covert investigation methods were used, with an analysis of the court's conclusions; the comparative method; and the formal-logical method, which facilitated the definition of terms and criteria. Criteria for determining indirect provocation have been developed, which should be adapted to current legislation in further research and/or proposals should be developed for making appropriate legislative changes.

Key words: confidential investigative actions, crime monitoring, admissibility of evidence, human rights.

ДЕЯКІ АСПЕКТИ ПРАВА НА СПРАВЕДЛИВИЙ СУД У ПРАКТИЦІ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

Taras Guk

здобувач Науково-дослідного інституту публічного права (Київ, Україна)

ORCID ID: 0009-0000-3147-424X

gukmaras@ukr.net

Анотація. У статті розглядаються ключові аспекти права на справедливий суд у контексті практики Європейського суду з прав людини (ЄСПЛ), особливо зосереджуючись на застосуванні негласних методів слідства. Дослідження використовує детальний аналіз судової практики ЄСПЛ, щоб оцінити, як таємні операції впливають на справедливість кримінального провадження. У дослідженні використовувалися загальнонаукові та спеціальні методи пізнання, такі як формально-юридичний метод, за допомогою якого вивчалися нормативно-правові акти України та міжнародні конвенції; кейс-метод для розгляду конкретних справ, у яких ЄСПЛ виносив рішення щодо права на справедливий суд при застосуванні негласних методів слідства, з аналізом висновків суду; порівняльний метод; і формально-логічний метод, що полегшує визначення термінів і критеріїв. Розроблено критерії визначення непрямой провокації, які в подальших дослідженнях необхідно адаптувати до чинного законодавства та/або розробити пропозиції щодо внесення відповідних законодавчих змін.

Ключові слова: конфіденційні слідчі дії, моніторинг злочинності, допустимість доказів, права людини.

Introduction. The issue of the right to a fair trial is one of the most discussed topics in global scientific literature due to its fundamental role in ensuring the protection of human rights and fundamental freedoms. The European Court of Human Rights plays a key role in shaping the standards and principles of fair trial, which have universal significance for all member states of the Council of Europe. In particular, significant scientific interest is drawn to the issue of the use of covert investigation methods, such as operational-search measures, which have the potential to violate the right to a fair trial.

Special attention is paid to examining the admissibility criteria of evidence obtained during such measures, as well as the impact of covert methods on the protection of human rights in the context of criminal proceedings. The research aims to identify the main problems and challenges arising from the use of covert methods and to determine the approaches of the ECHR to their resolution.

The relevance of this topic is driven by the need to ensure a balance between the effectiveness of criminal investigation and the protection of the rights of suspects and accused persons. Studying the practice of the ECHR allows for a better understanding of how international standards for the right to a fair trial can be implemented in national legislation and enforcement practices.

The aim of the article is to analyze certain aspects of the right to a fair trial in the practice of the European Court of Human Rights in connection with the use of covert investigative methods.

The objectives of the article are to analyze the aspects of the right to a fair trial in the practice of the European Court of Human Rights in connection with the use of covert investigative methods, to define the categories of “provocation” and “indirect provocation,” and to develop criteria for identifying indirect provocation.

The material for the research includes the practice of the European Court of Human Rights and relevant doctrinal sources.

Due to Ukraine’s aspiration to join the EU, it must develop democratic judicial procedures, update legislative and procedural norms to ensure a proper balance between the effectiveness of investigations and the observance of human rights. National legislation and practice often lag behind international standards, creating risks for violating the rights of the accused, particularly due to the inadmissibility of evidence or provocation to commit a crime by law enforcement officers.

Cases related to the use of covert investigative methods are examined by the European Court of Human Rights for their compliance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to a fair trial. The Court has established a number of criteria to help determine whether the use of such methods was permissible and whether it violated the principle of equality of arms and the right to defense.

Studying these aspects helps to understand how national courts should take into account the practice of the ECHR when assessing evidence obtained through covert methods.

Such a legal category as the provocation of a crime is not yet sufficiently developed in national law. In the legal field, where the legislator categorically lags behind the development of events, and judicial practice cannot outpace the lawmaker, doctrine (Kononenko, Tymchenko, Tarakhonych, 2022: 125) becomes of great importance. That is, the scientific analysis of the issues and proposals for their resolution. On the other hand, the analyzed category has been studied in detail by the European Court of Human Rights and is reflected in its legal positions, as set out in the decisions on the relevant category of cases. (Kononenko, 2011: 171).

The ECHR analyzes the grounds for conducting a covert measure and the behavior of the authorities carrying it out. It is important to determine whether there is an objective suspicion regarding the person’s involvement in criminal activities or their predisposition to commit a criminal offense. The mere fact that a person has a criminal record does not indicate that they are continuing criminal activities (Case of Constantin and Stoian v. Romania) or have an intention to commit illegal actions. The presence of objective suspicion can also be indicated by the point at which law enforcement authorities initiated the undercover operation: before the criminal activity began or when the crime was already being committed. (Case of Sequeira v. Portugal).

When considering the procedure followed by national courts, the European Court of Human Rights takes into account the potential for a positive outcome regarding the examination of an entrapment claim. In the case of “Ramanaukas v. Lithuania,” the Court emphasized that Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms will only be upheld if the applicant could effectively complain about police entrapment in court. Thus, ensuring a fair trial requires more than adhering to general guarantees such as equality of arms or the right to defense (Case of Ramanaukas v. Lithuania). The European Court of Human Rights has also formulated criteria for determining the effectiveness of procedures for examining a person’s complaint who is accused of committing a crime as a result of law enforcement entrapment. This procedure must be adversarial, thorough, comprehensive, and conclusive. (Case of Bannikova v. Russia).

As noted, the ECtHR considers the provocation of a crime through the lens of a violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms as a violation of the right to a fair trial. Such a violation occurs from the moment the fact of crime provocation is proven in court. Therefore, it is fundamentally inadmissible to use such evidence in criminal proceedings (Buromenskyi, Hutnyk, 2020: 20). According to D. Holovin, the provocation to commit crimes should be regarded as an intentional influence on a person to induce them to commit a crime. (Holovin, 2021: 93–95).

The European Court of Human Rights, in various cases such as “Teixeira de Castro v. Portugal”, “Vanyan v. Russia” and others, has established clear frameworks for assessing the admissibility of crime provocation.

The main principles highlighted by the ECHR include: the inadmissibility of using evidence obtained through police provocation; the limitation of the use of covert investigation methods to protect the right to a fair trial; the passive nature of covert investigations; the objective basis for initiating an investigation; the supervision of the prosecution or the court over the conduct of covert methods; and the thorough investigation of the defendant's claims of crime provocation.

These principles are aimed at ensuring a balance between the necessity of effective law enforcement and the protection of the rights of individuals suspected of committing crimes. They emphasize the importance of adhering to the principles of fairness and legality in the activities of law enforcement agencies, especially in the context of using covert investigative methods. The ECHR asserts that even in cases where there is a public interest, the use of evidence obtained through police provocation cannot be justified. The requirement for proper administration of justice applies to all types of crimes, regardless of their severity. At the same time, the use of special investigative methods (e.g., undercover operations) is not, in itself, a violation of the right to a fair trial, but their application must be supported by evidence that the person intends to commit a crime (Dudorov, 2020: 40). In this context, it is worth mentioning the position of K. P. Zadoya, who states that in the case of crime provocation, a person is not held criminally liable not because of the absence of substantive legal grounds, but due to deficiencies in constructing the information-evaluative model of the factual circumstances of the case (Judicial practice, 2014: 64–65).

The ECHR also defined the criteria for indirect provocation, which refers to a situation where a person does not directly interact with undercover police officers. However, this person is involved in committing an offense by an accomplice who was directly provoked to commit the crime by the police. The ECHR provided the following criteria for assessing indirect provocation: 1) whether it was foreseeable for the police that the person directly incited to commit the crime would interact with other individuals to participate in the crime; 2) whether the activities of these individuals were also influenced by the police's behavior; 3) whether these individuals were regarded as accomplices to the crime by national courts. (Babanly, Tarasenko, 2020).

Thus, the European Court of Human Rights has determined that a person may be considered a participant in entrapment even if they did not directly contact undercover police officers but were involved by another person who was directly incited by the police (case of *Lalas v. Lithuania*, No. 13109/04, §§ 41 et seq., 01 March 2011).

However, determining whether indirect entrapment occurred for one participant does not automatically mean entrapment for others. Completely different criteria apply to assessing indirect entrapment compared to direct entrapment.

It is important to consider that these criteria should be analyzed together, as was done in this case. Specifically, according to the first criterion, the Court found that the police could foresee the interaction of the person induced to commit the crime with other individuals.

Regarding the second criterion, the Court determined that although the entire operation was essentially orchestrated by the police, the actions of the third person (the applicant) were not provoked by the police but were based on other motivations. For instance, she believed that drug smuggling was safe, and her actions were based on this belief.

Regarding the third criterion, the court confirmed that the third person was an accomplice in the crime. Additionally, the court also analyzed whether the involvement of "infiltrated" law enforcement officers met procedural requirements, which also confirmed the absence of a violation of Article 6 of the Convention.

Thus, an important circumstance was that the motivation for committing the crime arose in the participant independently of the actions of law enforcement. The internal incentive to commit the crime was autonomous, and the crime was a manifestation of personal will.

In conclusion, the ECHR confirmed and applied its methodology for assessing provocation: it first evaluates whether the actions of national authorities were provocative. If the national authorities acted passively and did not provoke the crime, this is generally considered sufficient to deem the actions of the national authorities as not violating Article 6 of the Convention.

If the conclusions regarding the above-mentioned circumstance are unconvincing or if it is confirmed that the crime was provoked, the Court evaluates whether the decisions of the national courts comply with the requirements of the Convention. This includes recognizing any evidence obtained as a result of provocation as inadmissible for use in criminal proceedings.

According to R. Babanly and O. Tarasenko, the criteria for so-called indirect provocation are evaluative. It can be recognized as complying with the requirements of the Convention even if other accomplices were wrongfully provoked into committing the crime. The key, in the researchers' view, is the criterion that answers the question of whether there was freedom of will to commit the crime, and if such freedom was present, then indirect provocation complies with the requirements of the Convention (Babanly, Tarasenko, 2020). Considering that many norms of the 1950 Convention are evaluative in nature, the importance of judicial decisions for understanding its content and the protocols to it is significantly increased. Additionally, since many constitutional norms on human rights coincide with the fundamental rights enshrined in the norms of the 1950 Convention, analyzing the impact of ECtHR practice is essential. (Kononenko, 2012: 178).

The European Court of Human Rights has outlined several criteria for assessing indirect provocation. Firstly, it is necessary to determine whether it was foreseeable for the police that the person directly induced to commit a crime would interact with others to participate in the crime. Secondly, it is important to assess whether the actions of these

other individuals were also influenced by the behavior of the police officers. Thirdly, whether these individuals were considered accomplices by national courts.

Indirect provocation encompasses situations where an individual's motivation to commit a crime arises independently of the provocative actions of law enforcement agencies, but the actions of these agencies create conditions for the individual's participation in criminal activity. It is also important that the motivation for the crime should be autonomous, and the crime should be an expression of the individual's free will.

Thus, indirect provocation reflects more complex forms of involvement in crime, where the key is to evaluate the individual's internal freedom of will and their independence from the provocative actions of law enforcement agencies.

Regarding direct provocation, in the decision of the European Court of Human Rights (ECHR) in the case "Ramanauskas v. Lithuania" of February 20, 2018, it was determined that such provocation occurs when law enforcement officers or persons engaged by them do not limit themselves to passive investigation, but instead influence a person with the aim of detecting a criminal offense, prompting them to commit a crime that would not have been committed otherwise. (Case of Ramanauskas v. Lithuania).

In the case of "Bannikova v. Russia" dated November 4, 2010, it is noted that several substantive and procedural criteria have been established to distinguish between provocation and permissible actions of pre-trial investigation bodies. The substantive criterion involves the presence or absence of signs characteristic of provocation by the pre-trial investigation bodies. The procedural criterion includes the court's ability to verify information about alleged provocation while adhering to procedural principles (Case of Bannikova v. Russia).

The ECtHR indicates that according to the substantive criterion, any information obtained as a result of covert police operations must meet the criteria of absence of provocation. This excludes, in particular, any actions that could be interpreted as influencing a person to commit a crime, such as taking initiative in contacts, repeated proposals, persistent reminders, and so on.

Therefore, the Court seeks to determine whether such circumstances existed: the passivity of the investigation; the presence or absence of government intervention in the commission of the crime; incitement of a person to unlawful actions, including initiative in contacts, increasing the price (in the case of commissioned unlawful actions), repeated proposals; the seriousness of the reasons for monitoring the commission of the crime; the presence of sufficient grounds for officials to believe that a person is attempting to commit unlawful actions, and so forth (Chernysh, Pastukh, 2021: 301).

Therefore, the practice of the European Court of Human Rights allows for a clear definition of the concept of "provocation" in the context of pre-trial investigations. Provocation occurs when law enforcement agencies or individuals acting on their behalf do not limit themselves to passive investigation but actively influence a person to commit a crime that would not have otherwise been committed. To distinguish between provocation and permissible actions of investigative authorities, substantive and procedural criteria are applied. The investigation should be conducted in a passive manner, without initiating contacts or making repeated proposals that could prompt a person to commit a crime. The court should have the ability to verify the presence of provocation, taking into account the circumstances of investigative passivity, governmental interference, incitement to illegal actions, and the sufficiency of grounds for monitoring the commission of a crime.

Conclusions. Provocation occurs when law enforcement agencies or individuals engaged by them do not limit themselves to passive investigation but actively influence a person to commit a crime that otherwise would not have been committed. Content and procedural criteria are used to distinguish between provocation and permissible actions of pre-trial investigation authorities.

Indirect provocation can be defined as involving a person in committing a criminal offense through provocative actions of the police directed at another participant, who in turn interacts with the involved person. Indirect provocation covers cases where a person's motivation to commit a crime arises independently of the provocative actions of law enforcement agencies, but these actions create conditions for the person's involvement in criminal activity. It is also important that motivation for the crime be autonomous, and the crime itself be an expression of the person's own will.

Criteria for indirect provocation can be established based on the practice of the European Court of Human Rights and other legal sources. We propose the following criteria for assessing indirect provocation, which involve analyzing the relevant circumstances.

1. Predictability of interaction: whether it was foreseeable for the police that the person they directly incite to commit a crime would contact others to participate in the offense.

2. Controlled behavior: whether the actions of other individuals were also influenced by police behavior, i.e., whether these persons were drawn into criminal activity through actions of accomplices provoked by the police.

3. Recognition of accomplices: whether these other individuals were considered by national courts as accomplices in the crime, i.e., whether they were regarded as part of a conspiracy organized or incited by the police.

4. Independence of motives: whether the person involved in the crime had independent motives for committing the offense, unrelated to provocative actions by law enforcement officers. It is important to decide whether motivation for the crime arose directly from police actions or was an expression of personal will.

5. Procedural guarantees: whether law enforcement agencies adhered to procedural requirements during the operation, confirming the absence of violations of the right to a fair trial.

6. Degree of police activity: whether police actions were passive and limited to monitoring the actions of suspects and others, or whether they actively encouraged criminal activity by provoked accomplices.

7. Availability of alternative means: whether law enforcement had the opportunity to use other, less provocative methods to uncover the crime, and whether the use of such a method was justified.

These criteria should be analyzed collectively to determine whether indirect provocation occurred and whether the actions of law enforcement agencies adhered to principles of justice and requirements of the European Convention on Human Rights. In further research, they should be adapted to current legislation and/or proposals should be developed for legislative changes accordingly.

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