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Date: 31/05/2024

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Meeting: 1501st meeting (June 2024) (DH)

Reply from the authorities (30/05/2024) following a communication from an NGO (Human Rights Platform) (23/05/2024) concerning the case of Sedletska v. Ukraine (Application No. 42634/18).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1501^e réunion (juin 2024) (DH)

Réponse des autorités (30/05/2024) suite à une communication d'une ONG (Human Rights Platform) (23/05/2024) relative à l'affaire Sedletska v. Ukraine (requête n° 42634/18) **[anglais uniquement]**

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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DGI

30 MAI 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Mr Pavlo Pushkar

**Head of Division
Department for the execution of
judgments of the European Court of
Human Rights
Directorate of Human Rights
Directorate General Human Rights
and Rule of Law**

Council of Europe
F-67075 Strasbourg Cedex

As regards the execution of the Court's judgment
in the "Sedletska v. Ukraine" case

Dear Mr Pushkar,

As to the execution of the Court's judgment in the case of "*Sedletska v. Ukraine*" (application no. 42634/18), the Government of Ukraine would like to address some issues in response to the communication under Rule 9 (2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (the "**communication**") from the NGO "Human Rights Platform" (the "**NGO**").

The Government of Ukraine would like to express their appreciation to the NGO for their comments given in order to ensure journalists' rights. The Government acknowledge and respect the interest and concern shown by the aforementioned organization regarding the journalist's right to the protection of their sources.

The Government would like to reiterate the position on the individual and general measures taken so the applicant would not be suffering from the negative consequences as a result of the violation, and to overcome and prevent future violations of Convention found in the *Sedletska* case. At the same time, the Government would like to emphasize that there were no similar judgments adopted by the Court since the adoption of the judgment in the case "*Sedletska v. Ukraine*", once more demonstrating that this is a violation of an isolated nature.

As it was provided by the Government in the Action Report of 28 February 2024 on measures taken for implementation of the Court's judgment in the case of "*Sedletska v. Ukraine*" (the



“**Action Report**”) during the pre-trial investigation in criminal proceedings concerned, information on mobile telephone communications data of journalist Sedletska N.Y. was not obtained by the authorities and was not included into the case file.

In the Action Report the Government also provided information on legislative provisions that guarantee to some extent professional journalistic activity, its principles and legitimate abridgement, on judicial practice as regards unified approach to the comprehensive assessment of the relevant requests of investigators/prosecutors for temporary access to items and documents in order to adopt lawful and reasonable court decisions without violating the right of journalists to protect their sources, as well as information on trainings for prosecutors and judges in the field of protection of journalistic sources of information.

Furthermore, it should be noted that broader measures to strengthen legislation on the protection of professional interests and rights of journalists are being examined in the *Gongadze* case.

As regards the NGO’s comments on the review by the Supreme Court of the applicant’s case under exceptional circumstance after the Court’s judgment in this case, the Government would like to emphasize that according to the Article 124 of the Constitution of Ukraine¹, justice in Ukraine is administered exclusively by courts. Moreover, according to the Article 126 of the Constitution of Ukraine, independence of judges is guaranteed by the Constitution and laws of Ukraine. It is forbidden to influence the judge in any way.

As regards the NGO’s comments on public access to the full text of the court decisions representing judicial practice in the field of protection of journalistic sources, the Government would like to note that decisions in the criminal cases may not be publically accessible due to the specifics of an individual case, according to the Article 2 of the Law of Ukraine “On Access to Court Decisions”² (Openness of court decisions).

The Government consider that the current domestic legislation provides adequate guarantees for the protection of journalistic sources of information and will prevent similar violations of the Convention in the future.

Taking into account the aforementioned, the Government believe that comprehensive measures, both general and individual, have been undertaken to prevent similar to those in the case of “*Sedletska v. Ukraine*” violations in the future.

The comments and recommendations provided by the NGO are duly considered and taken into account, as well as will be applied in the further work of the Government regarding the implementation and protection of human rights in Ukraine, in particular those guaranteed by the Convention.

Yours sincerely,

Marharyta SOKORENKO
Agent before
the European Court of Human Rights

¹ <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>

² <https://zakon.rada.gov.ua/laws/show/3262-15#Text>

DGI Directorate General of Human Rights and Rule of Law

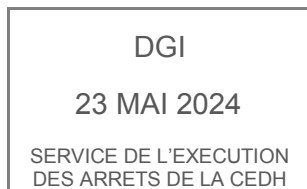
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22 May 2024



COMMUNICATION

**In accordance with Rule 9.2. of the Rules of the Committee of Ministers of the Council of Europe
regarding the supervision of the execution of judgment**

SEDLITSKA v. UKRAINE¹

by the NGO “Human Rights Platform”

I. INTRODUCTION

1. This submission is made by the NGO Human Rights Platform in accordance with Rule 9.2. of the Rules of the Committee of Ministers of the Council of Europe regarding the general measures required for the implementation of the [Sedletska v. Ukraine](#) judgment, which concerns the protection of journalistic sources.

2. The Human Rights Platform (hereinafter – HRP) is a non-governmental organization, based in Kyiv (Ukraine), whose activity focused, *inter alia*, on the protection of the right to freedom of expression, the professional rights of journalists and media, including the defence of their rights and freedoms in national and international courts, carrying out of monitoring, analytical work, preparation of relevant reports as well as participation in working groups on preparation of drafts of legislative acts etc. NGO “Human Rights Platform” unites a network of media lawyers from different regions of Ukraine who have more than 20 years of professional experience in the field of protection of the right to freedom of expression, professional rights of journalists and media. Together with Media Legal Defence Initiative (currently – Media Defence), HRP intervened as a third-party in the Court’s proceedings and submitted written observations concerning the case *Sedletska v. Ukraine*.

II. SUMMARY OF THE CASE

3. The case *Sedletska v. Ukraine* concerns an interference with the journalist’s right to the protection of her sources due to judicially authorised access to her mobile telephone communications data, grossly disproportionate and not justified by an overriding requirement in the public interest (violation of Article 10). The European Court of Human Rights applied an interim measure under the Rule 39 of the Rules of

¹ <http://hudoc.exec.coe.int/eng?i=004-58305>

the Court in this case. On April 1, 2021, the Court found violation of the Article 10 of the Convention. The judgment of the Court became final on July 1, 2021.

4. The case *Sedletska v. Ukraine* was qualified by the Committee of Ministers as “leading” case and today it is under standard supervision.

5. The European Court found that: “...Rather than enunciating specific reasons for considering the PGO’s [*Prosecutor General’s Office*] request without summoning the applicant, the District Court made a formulaic reference to the “threat of the information sought being altered or destroyed”...As a consequence of the District Court’s decision to apply Article 163 § 2, the applicant was also not notified by it that the PGO had obtained an authorisation to access her communications data and, once she learned about that authorisation from other sources, the District Court refused to provide her with a copy of its respective order...It appears that had it not been for a pure chance that the applicant became aware of that order, she might not have been able to make use of any procedural safeguards existing in the domestic law for protecting her rights. The Court is deeply concerned with this possibility, which would be tantamount to arbitrariness” (§ 60).

III. COMMENTS REGARDING ACTION REPORT

6. On 28 February 2024, the Government of Ukraine submitted an Action Report in the case *Sedletska v. Ukraine*, arguing that there have been changes in Ukrainian legislation and case-law regarding the consideration of requests for temporary access to items and documents. According to the Government, these changes now guarantee the protection of journalistic sources. In this regard, a request was made to close the supervision of the judgment’s execution in this case.

7. HRP, seeking to facilitate the appropriate execution of the judgment of the European Court of Human Rights (hereinafter – the Court or ECHR), cannot agree with the foregoing conclusion. The closure of the supervision in this case would be premature, as amendments to Ukrainian legislation have not addressed the problems connected with the violations of the right of journalists to the secrecy of their sources, as well as the relevant case-law has not undergone significant changes. Related arguments in favour of this statement are set out below.

IV. INDIVIDUAL MEASURES

8. The seizure (removal) of protected information about telephone communications and geolocation of journalist N. Sedletska for more than a year and a half from the possession of state bodies, in particular, the Prosecutor General’s Office of Ukraine, is extremely important for the implementation of individual measures.

9. The Government argues that in the present case the domestic courts’ decisions on temporary access to N. Sedletska’s items and documents had not been enforced and that the protected information about the journalist’s telephone communications and geolocation had not allegedly been obtained.

10. However, according to the judgment of the European Court, the Prosecutor General’s Office had applied to the mobile operator for obtaining this information in order to enforce the decisions of the domestic courts during the validity period of the latter (see paragraph 18 of the judgment). In view of this, there is every reasonable ground to believe that the mobile operator complied with these requirements of the investigator. After all, neither at the time of the described events nor now, **no evidence** that would testify to the contrary, except for unsubstantiated and contradictory statements (see

also par. 21 of the ECHR judgment), **has been provided**. The Government's assertion in this respect remains unsubstantiated by any independent body, enterprise, institution, or organisation. The response of the mobile operator, mentioned by the then Prosecutor General of Ukraine Y. Lutsenko at a press conference, was not provided as well (see paragraph 21 of the ECHR judgment in this case).

11. This opinion is also in line with the Dissenting Opinion of one of the judges of the Grand Chamber of the Supreme Court, expressed in case on the review of decisions of domestic courts in the case of N. Sedletska (case No. 757/42049/18-к, more details on this decision in the Section "General measures"). The judge, *inter alia*, noted that "in this case the ECHR concluded that there were no convincing grounds to believe whether the information on incoming and outgoing connections from the applicant's phone remained untouched during the term of validity of the district court's ruling. Therefore, protected information about the journalist may still be at the disposal of law enforcement agencies, which cannot be verified in any other way than by resuming the proceedings in this case"².

12. Thus, we believe that the Government has not provided evidence that would convincingly confirm that the law enforcement agencies do not have information about the telephone communications and geolocation of journalist N. Sedletska, *inter alia*, evidence that this information was not received or, if received, was completely erased from any places of its storage.

13. Therefore, in our opinion, the supervision over the execution of the judgment in this part should be continued.

V. GENERAL MEASURES

Relevant practice

a) Permanence of the case-law regarding consideration of requests for temporary access to items and documents

14. The Government claims that as of today, the courts have developed a unified approach to the comprehensive assessment of the relevant requests of investigators and prosecutors for temporary access to items and documents. In Government's opinion, it enables courts to make lawful and reasonable court decisions without violating the right of journalists to protect their sources.

15. However, it is possible to agree with this statement only partially. Indeed, in Ukraine, there is an established case-law regarding consideration of the requests for temporary access to items and documents, one of the typical features of which is that the court proceeding is held **without summoning the persons who have such information, and even more so – without summoning the persons about whom the information is collected**.

16. Consideration of such cases without summoning the **persons who hold** the information (even if it is a third party that legally collects the relevant information, such as telecommunications operators, banks, etc.) is usually justified by a **formal** reference to the existence of a real threat of alteration or destruction of items and/or documents (part 2 of Article 163 of the Criminal Procedural Code of Ukraine, hereinafter – CPC of Ukraine). However, **neither the grounds for such conclusions nor the relevant evidence to support them are usually provided in the court decision**.

17. This situation is typical, as evidenced by both the experience of lawyers cooperating with the HRP in cases on temporary access to items and documents of journalists and the media, as well as by

² Dissenting Opinion of the judge of the Grand Chamber of the Supreme Court in the case No. 757/42049/18-к (proceeding No. 13-141 збо 21) of 17.09.2021, par. 14, <https://reyestr.court.gov.ua/Review/102051081>

numerous court rulings in other cases of this category, which show that Ukrainian courts do not usually provide sufficient and adequate grounds not to summon the owners of the requested information to court. The court decisions³, although they do not concern the disclosure of the secrecy of journalistic sources, confirm the general tendency, typical approach and, accordingly, the consistency of the consideration of the cases on temporary access to items and documents.

18. The mentioned case-law has been developing for years, facilitated by a number of reasons, including: the absence of other practices and traditions, time savings in case of consideration of requests without the participation of the parties, the absence of the need to record the trial by technical means (part 4 of Article 107 of the CPC of Ukraine), limited grounds for appealing against a judge's ruling on temporary access to items and documents⁴, and other problems, *inter alia*, of a legislative nature, as described below.

19. The foregoing case-law did not change even after the delivery of the *Sedletska v. Ukraine* judgment. The examples of decisions given above directly indicate this. Therefore, it would be premature to conclude that decisions in this category of cases are reasonable and take into account democratic standards of the protection of journalistic sources.

b) Case-law of the Supreme Court

20. The implementation of the *Sedletska* judgment imposes an obligation on Ukraine to take measures of general nature. In this regard, the Supreme Court had the right and the opportunity to review the case and to **formulate legal positions binding on all courts** to fulfil these duties. This could change the case-law described above, bringing it closer to European standards in the field of freedom of expression. However, unfortunately, this did not happen.

21. In 2021, after the European Court's judgment in this case became final, N. Sedletska within the time limits established by law and in full compliance with the procedures provided for by law, applied to the Supreme Court to review the decisions of national courts in her case under exceptional circumstances (on the ground of paragraph 2 of part 3 of Article 459 of the CPC of Ukraine). However, the Grand Chamber of the Supreme Court refused to open proceedings and to review the previous court decisions, arguing that the latter had expired in 2018⁵.

By refusing to review these decisions, the Supreme Court has not actually taken the necessary steps to change the above-mentioned established case-law towards improvement of journalistic sources' protection. As can be seen from this decision, it considered that compensation for non-pecuniary damage caused to the applicant is a sufficient compensatory measure to execute the judgment of the European Court.

³ Please, see, for instance, <https://reyestr.court.gov.ua/Review/118160881>; <https://reyestr.court.gov.ua/Review/118165369>; <https://reyestr.court.gov.ua/Review/118173099>; <https://reyestr.court.gov.ua/Review/118167858>; <https://reyestr.court.gov.ua/Review/118167857>; <https://reyestr.court.gov.ua/Review/118167859>; <https://reyestr.court.gov.ua/Review/118154435>; <https://reyestr.court.gov.ua/Review/118154437>; <https://reyestr.court.gov.ua/Review/118160875>; <https://reyestr.court.gov.ua/Review/118160863>; <https://reyestr.court.gov.ua/Review/118121649>

⁴ According to the Article 309 of the CPC of Ukraine, only the investigating judge's rulings on temporary access to items and documents that authorize the seizure of items and documents certifying the use of the right to conduct business, or others, in the absence of which an individual entrepreneur or legal entity is deprived of the opportunity to carry out its activities, may be appealed during the pre-trial investigation (par. 10 of part 1, Article 309 of the CPC of Ukraine).

⁵ Please, see the links to see the decision of the Grand Chamber of the Supreme Court of September 17, 2021: <https://reyestr.court.gov.ua/Review/100000493> and the judge's dissenting opinion, which differs from the position of other judges: <https://reyestr.court.gov.ua/Review/102051081>

22. As a result, the Supreme Court **did not formulate** legal positions **binding** on other Ukrainian courts that could change the above-mentioned established case-law (see paras. 8-11).

c) Case-law of the courts of appeal

23. The court of appeal may make decisions that are binding on the particular case under its review. Therefore, it objectively cannot form a unified judicial practice in the country. At the same time, the decisions of the courts of appeal of different regions of Ukraine on the same issue may differ significantly, and the elimination of these discrepancies is the prerogative of the Supreme Court.

24. In view of this, the decision of the Kyiv Court of Appeal of November 12, 2019, in case No. 757/55375/19-к, cited in the Action Report of February 28, 2024, is not binding on other courts, except for the court that delivered the overturned decision. The existence of this decision alone cannot indicate that the judicial practice regarding requests for temporary access to items and documents in Ukraine has undergone significant changes and that these changes guarantee journalists their right not to disclose sources of information.

25. Moreover, it is worth emphasizing that the appellate review of decisions on granting temporary access to journalists' items and documents, in particular to information about their telephone communications and geolocation, made by the first-instance courts, **is not guaranteed by Ukrainian legislation**. The latter does not provide for the possibility to appeal relevant decisions made by the first-instance courts, what is directly stated in their decisions.

26. The decision in case No. 757/55375/19-к, mentioned by the Government, as well as the decisions adopted by the Kyiv Court of Appeal in cases of N. Sedletska and K. Berdysky, are rather an exception. The opening of appeal proceedings in these cases was more a consequence of a wide public resonance caused by the decisions of the first-instance courts, rather than the result of the existence of reliable legal guarantees of the right of journalists to protect their sources.

27. Under such circumstances, Ukrainian courts of appeal are objectively unable to form and ensure the existence of a unified judicial practice for the protection of journalistic sources during the consideration of requests for temporary access to items and documents by lower courts.

d) Case-law of the first-instance courts, in particular, provided for in the Action Report

28. The Government described five court decisions of the first-instance courts, which, in its opinion, indicate that Ukrainian case-law has changed and that it takes into account European standards in the field of protection of journalistic sources.

29. Lawyers of the HRP tried to get acquainted with the full texts of these decisions with the help of the Unified State Register of Court Decisions. However, four of them are not publicly accessible, neither by the case number nor *via* hyperlinks provided by the Government (see Annexes 1-4). The restriction of public access to the above-mentioned decisions and the restriction of access to a significant part of the decisions in the Unified State Register of Court Decisions, as indicated on its main page (see Annexes 1-4), complicate the search for decisions in similar cases and do not allow journalists and the public to scrutinise the actions of the judiciary. It also makes it very difficult, if not impossible, to search for court decisions alternative to those that are listed by the Government.

30. However, even the analysis of decisions' summaries, provided for by the Government in the 2024 Action Report, shows that **there have been no real changes** towards improving and ensuring the protection of journalistic sources during the consideration by the courts of requests for temporary access to items and documents.

31. As follows from the Action Report, in cases No. 127/31227/21, 757/2546/23-к and 296/8215/19, while considering the request for temporary access to items and documents of media and journalistic union, the judges did not summon their representatives to the court hearing. Moreover, while deciding, they had neither taken into account the journalists' right to keep their sources secret, nor had they checked whether there were alternative measures that the investigator could have used during the investigation of the case and whether he/she had used them. The decisions in these cases also do not refer to the judgments of the European Court of Human Rights in cases on the protection of journalistic sources and do not apply the principles given in them to the circumstances of the cases.

32. In view of above, the decisions in these cases rather testify to the fact that the judicial practice in this category of cases has remained unchanged.

33. As regards the cases in which the investigating judge refused to satisfy the request for temporary access to items and documents of a journalist and the media, these refusals are also not related to the practical application of the principles set forth by the European Court in the cases on the protection of journalistic sources or of the provisions of Ukrainian legislation referred to by the Government.

34. In cases No. 227/1774/20 and No. 697/1476/23, the reason for refusing to grant temporary access to items and documents was the groundlessness of the relevant requests of the investigators, who either put forward only the argument that the said access was necessary in the interests of criminal proceedings or did not explain the need for such measures and did not provide evidence of their lack of alternatives.

35. Thus, there is reason to believe that the judicial practice of the first-instance courts in cases of temporary access to items and documents has not improved and has not reached a state that would guarantee the right to protection of journalistic sources of information.

36. The described situation is further complicated by the fact that journalists, as it was in the case of N. Sedletska, may not even know that investigators or prosecutors demand in court access to information that may reveal their sources, and that the courts grant such decisions. This is due to the fact that requests for access to information may be made to the third parties (for example, telecommunications operators), as well as by the fact that information published in the Unified State Register of Court Decisions is impersonalised. In addition, as it was previously mentioned, the latter does not provide public access to all decisions.

d) Capacity-building and awareness raising

31. Conducting trainings and seminars for investigators, prosecutors and judges, as well as preparing relevant guidelines and explanatory materials is indeed an important direction of activity aimed at implementation of the judgment of the European Court in the case of *Sedletska v. Ukraine*. HRP welcomes and supports such activities of the Government.

32. At the same time, not all the measures listed in the Action Report may relate to the execution of the decision in the case of *Sedletska v. Ukraine*. This is indicated by the date of the trainings and their topics. For example, a number of trainings were conducted before the *Sedletska* judgment was delivered, and therefore they cannot be considered as aimed at the implementation of general measures in this case.

33. Furthermore, the majority of trainings for prosecutors was related, in particular, to the specifics of conducting covert investigative (search) actions, to the issues of supporting the prosecutor's office and building interaction with the media, as well as to the topic of electronic evidence in criminal proceedings. These topics are also very important and may affect issues related to the protection of journalistic sources, but they do not relate to temporary access to items and documents.

34. Trainings for judges on the right to information and on restricted information were also related to another topic – the topic of access to public information. They did not concern the protection of journalistic sources when deciding on granting permission for temporary access to items and documents that may reveal the secrecy of journalistic sources. Unfortunately, the Government did not provide information on the content of the training programmes, which also makes it impossible to verify that they covered the protection of journalistic sources. These remarks also apply to guidelines, manuals and other literature, as well as to participation in conferences and round tables. Only the first two manuals and measures listed by the Government are likely to relate to the issues raised in the case of N. Sedletska, although without information about their content this cannot be said with full certainty either.

35. In addition, no information in regard to completing the relevant trainings by investigators of the Prosecutor's Office, the State Bureau of Investigation (SBI) and the Security Service of Ukraine (SBU), who also apply to the courts with requests for temporary access to items and documents, as well as regarding other investigative and search actions, as a result of which there is potential of violating the secrecy of journalistic sources of information, was provided. The fact that SBU officers need appropriate training is evidenced by the situation related to the establishment of illegal surveillance and interception of information about the content of telephone communications of journalists of the anti-corruption investigation project "Bihus.Info"⁶.

36. Thus, the measures taken in this part are not sufficient to consider that the judgment in this case has been executed.

37. Trainings, seminars and other educational activities for a wider range of Ukrainian judges, prosecutors and investigators from various law enforcement agencies should be continued. It is also necessary to continue to work on the development of the necessary guidelines that would help resolve issues related to the establishment of a fair balance between the interests of pre-trial investigation and the protection of the right of journalists not to disclose their sources of information.

Legislative framework

38. In our opinion, a more effective and timely way to improve judicial practice in this category of cases would be to amend the Criminal Procedure Code of Ukraine. Relevant amendments would quickly and purposefully change the case-law towards taking into account the rights of journalists to protect their sources of information when considering the relevant requests of investigators. In the absence of other effective methods of improving judicial practice (as mentioned above, see paragraphs 13-20), this method is one of the priorities.

39. The Government agreed that the violation of the Convention in the present case was caused by deficiencies in the existing system of guarantees for the protection of journalistic sources and legislative mechanisms to prevent their disclosure. It **acknowledged that it is necessary to amend the legislation of Ukraine**, noting this in its Reply to a Communication from an NGO "Human Rights Platform" (of November 18, 2021) of December 23, 2021, and in its Action Report of February 28, 2024.

40. However, **no amendments** to Ukrainian legislation that could improve judicial practice in this category of cases **have been made so far**.

⁶ Please, follow the link to find out more: <https://www.bbc.com/ukrainian/articles/cw4q057p8y7o>

41. Amendments referred to by the Government in the Action Report of February 28, 2024, have in no way impacted and cannot have an effect on situations similar to those in the case of *Sedletska v. Ukraine*.
42. In particular, the adoption of the Law of Ukraine “On Media” and the introduction of amendments to several other laws of Ukraine in this regard were actually aimed at transferring provisions regarding the guarantees of journalistic activity already existing in the legislation of Ukraine from the old laws that were losing their force to other legal acts that would continue to be enacted. As a result, there have been no improvements in the field of protecting journalistic activities. Furthermore, the existence of these guarantees in the national legislation did not protect N. Sedletska from the violation of her right not to disclose sources of information.
43. The approval by the Decree of the President of Ukraine of December 28, 2021 of the Decision of the National Security and Defence Council of Ukraine of October 15, 2021 “On the Information Security Strategy” also did not (and could not) change anything in the issue of protection of journalistic sources, since this is a strategic planning document that provides for the obligations of state bodies to take certain measures in the future. And it is worth highlighting that introduction of amendments to Ukrainian legislation in order to improve the guarantees for carrying out journalistic activities in Ukraine is among these measures.
44. However, no additional guarantees that would prevent situations similar to those that took place in this case have been introduced in national legislation.
45. In view of this, the most expedient and effective way to execute the Court’s judgment in this case and to improve the judicial practice of considering requests for temporary access to items and documents, would be to amend the Criminal Procedure Code of Ukraine, providing journalists and the media with the opportunity to receive, appeal and possibly appeal in cassation, court decisions on temporary access to items and documents, which may violate their right not to disclose sources of information.
46. However, by referring to the decision of the Constitutional Court of Ukraine (hereinafter – CCU) of March 17, 2020, No. 5-r/2020⁷ and, in particular, to the fact that the introduction of such changes will lead to an unreasonable delay in the consideration of cases, the Government seems to disagree with this solution.
47. However, in the above-mentioned decision, the CCU considered the issue of prohibiting to appeal the ruling of the investigating judge on permission to detain with the aim of summons, and therefore it concerned the grounds and circumstances that differ significantly from the case of N. Sedletska.
48. In this decision, the CCU indeed concluded that the right to appeal guarantees the right to review the case considered by the first-instance court on the merits, in the court of appeal. However, it immediately noted that the said constitutional provision **does not deprive the legislator of the power to provide for the possibility of appealing against any decision** made by the court during the consideration of the case, **but without deciding on the merits**, or to establish restrictions or prohibitions on appealing certain procedural court decisions that do not resolve the case on the merits. The CCU also highlighted the fact that the established restrictions or prohibitions on appealing certain procedural court decisions, which do not resolve the case on the merits, **cannot be arbitrary**, but shall be applied for a legitimate purpose, be proportionate and reasonable, and **should not violate**

⁷ <https://zakon.rada.gov.ua/laws/show/v005p710-20#Text>

the essence of the constitutional right of a person to judicial protection (see par. 2.2 of the decision).

49. Thus, the establishment of an additional legal ground that would guarantee journalists and the media the right to receive and appeal to higher courts against decisions of first-instance courts that interfere with their rights, in particular, the right to protection of sources of information, does not contradict the conclusions set out in the above-mentioned decision of the CCU.
50. In order to ensure the right of journalists to protect their sources, the right to appeal against the relevant decisions on temporary access to items and documents is absolutely necessary. HRP would like to recall that the applicant in the present case had to apply to the European Court of Human Rights and ask for the application of Rule 39 of the Rules of Court, since the domestic legal framework did not contain guarantees against the arbitrary violation of journalist's rights (at the time of the application there were no guarantees that the court of appeal would open appeal proceedings, while obtaining information about her telephone communications and geolocation would have had extremely negative consequences).
51. In view of this, the national legislation of Ukraine should contain appropriate guarantees for the protection of journalists' rights, so that they do not find themselves in the situation to apply to the European Court with a request for the application of interim measures.
52. Thus, in our opinion, it is possible and expedient to comprehensively solve the described problems by introducing appropriate amendments to the legislation of Ukraine.

VI. CONCLUSIONS AND RECOMMENDATIONS

Having in mind the observations above, the Human Rights Platform kindly asks the Committee of Ministers to request the Ukrainian authorities to adopt the following general measures:

- 1) To provide evidence convincingly confirming that the law enforcement agencies do not possess information about the telephone communications and geolocation of journalist N. Sedletska, *inter alia*, evidence that this information was not received by the Prosecutor General's Office of Ukraine or, if received, that it was completely erased from any places of its storage by this law enforcement agency (from case materials, databases or elsewhere).
- 2) To continue conducting trainings, seminars and other educational activities for a wide range of investigators of the Prosecutor's Office, police, the State Bureau of Investigation, the Security Service of Ukraine, as well as prosecutors and judges, etc., concerning the European standards for the protection of journalistic sources and in order for them to gain skills in their practical application; and to provide information on training programs and their content, indicating the number of hours devoted to the issues of the protection of journalistic sources, as well as information about the number of people who have undergone appropriate training.
- 3) To continue to prepare guidelines and explanatory materials that would help investigators, prosecutors and judges to understand democratic standards for the protection of journalistic sources of information and to apply them in practice.
- 4) To amend Criminal Procedure Code of Ukraine in order to:

- (a) foresee an obligation of the courts to summon the journalist and/or media representative (such journalist's employer) to the court hearing, when items and documents to which an investigator or prosecutor is seeking access are in their possession.
- (b) provide journalists with the right to receive a copy of the court's decision on temporary access to items and documents that may reveal their sources of information and with an effective remedy to challenge them in the courts of appeal and cassation (which would help to develop unified case-law).
- 5) To amend national legislation in order to foresee an obligation of persons that possess information which may assist to reveal journalists' sources (*inter alia*, mobile operators, internet providers etc.) and to which access has been ordered by the court, to inform journalists and/or media (such as the journalists' employer) regarding the request to execute the court's decision in their regard;
- 6) To provide statistical information on annual number of requests on temporary access to items and documents that may concern disclosure of the secrecy of journalistic sources, submitted to the courts during last three years (indicating the number of satisfied and rejected motions). In the absence of such statistical information, collect such data and provide it together with the information on the Action Plan's execution;
- 7) To ensure collaboration between authorities and civil society for the development of the above-mentioned measures.

Annexes:

- Annex 1 – Screenshot 1;
Annex 2 – Screenshot 2;
Annex 3 – Screenshot 3;
Annex 4 - Screenshot 4.

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NGO "Human Rights Platform"

