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COMMITTEE OF MINISTERS
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Information made available 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.

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Réunion :	1230 réunion (9-11 juin 2015) (DH)
Référence du point :	Communication d'une ONG (Ukrainian Helsinki Human Rights Union (UHHRU)) (26/05/2015) dans l'affaire Vyerentsov contre Ukraine (Requête n° 20372/11) ***(anglais uniquement***)

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

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INDIVIDUAL COMMUNICATION

FROM

UKRAINIAN HELSINKI HUMAN RIGHTS UNION

ON THE EXECUTION OF THE JUDGMENTS OF THE ECtHR

IN THE CASE

VYERENTSOV V. UKRAINE, application no. 20372/11, judgment from 11/07/2013

I. Introduction

The Ukrainian Helsinki Human Rights Union (UHHRU) is an All-Ukrainian association of human rights organisations.

The Ukrainian Helsinki Human Rights Union (UHHRU) is a biggest association of human rights organisations of Ukraine. The goal of UHHRU is to protect human rights. With a view to achieving this goal, UHHRU is involved in such activities as representing the interests of citizens and businesses at the national level, at the European Court of Human Rights, United Nations Human Rights Committee and other international bodies. Besides, UHHRU is engaged in monitoring the observance of human rights and fundamental freedoms and informing about the facts of their violation. In addition, UHHRU conducts research in the field of observance of human rights, opposes the adoption of regulations that aggravate the situation with the enforcement of rights and freedoms, and draws up its own legislative proposals.

Following the Rule 9.2 of the Committee of Ministers for the supervision of the execution of judgments and of the terms of the friendly settlements, the Ukrainian Helsinki Human Rights Union hereby presents its individual communication. The communication aims to address the Committee of Ministers (CoM) on the status of execution of the judgment in the case of Vyerentsov v. Ukraine, application no. 20372/11, judgment from 11/07/2013.

II. Case Summary

The applicant, Oleksiy Oleksandrovych Vyerentsov, is a Ukrainian national who was born in 1973 and lives in Lviv (Ukraine).

On behalf of a human rights NGO, Mr Vyerentsov notified the Lviv City Mayor that he would hold a series of demonstrations over several months to raise awareness about corruption in the prosecution service. On 12 October 2010, he organised a peaceful demonstration during which he was called aside by police officers who eventually let him

go. On 13 October, following a complaint that had been previously lodged by the local council, the Lviv Administrative Court issued a decision prohibiting the holding of the pre-announced further demonstrations as from 19 October. The same day, Mr Vyerentsov was invited to the Galytskyy District Police Station, where he was accused in particular of breaching the procedure for organising and holding a demonstration. He was subsequently taken to the Galytskyy District Court, which found him guilty of the charges against him and sentenced him to three days of administrative detention. Once he had served his sentence, Mr Vyerentsov appealed against the court's decision before the Regional Court of Appeal, which rejected his request.

Relying on Article 11 (freedom of assembly and association), Mr Vyerentsov complained that the interference with his right to freedom of peaceful assembly was neither prescribed by law nor necessary in a democratic society. Under Article 7 (no punishment without law), he also claimed that he had been found guilty of breaching the procedure for holding demonstrations even though such a procedure was not clearly defined by law. Finally, he alleged a violation of Article 6 §§ 1 and 3 (right to a fair trial), claiming that the court decision in his case had been ill-founded and that he had had no possibility to prepare his defence, to examine witnesses or to obtain the assistance of a lawyer.

As regards violation of Article 11, the Court considered that the legal basis for the arrest of Mr Vyerentsov had been the Code on Administrative Offences establishing liability for breaches of the procedure for holding demonstration, which was deemed sufficiently accessible. However, the Court held that there had been no clear and foreseeable procedure for holding peaceful demonstrations in Ukraine since the end of the Soviet Union. Indeed, the general rules laid down in the Ukrainian Constitution as regards the possible restrictions on freedom of assembly still required further elaboration in the domestic law. In particular, in a decision of 19 April 2001 the Constitutional Court of Ukraine considered that the procedure regarding the notification of peaceful assembly to the Ukrainian authorities was a matter for legislative regulation. Moreover, the only existing document establishing such a procedure was the 1988 Decree, which had been adopted by a country that no longer exists – the USSR – and was not generally accepted by the Ukranian courts as still applicable. Even though the Court acknowledged that it could take some time for a country to establish its legislative framework during a transitional period like the one Ukraine was currently going through, it could not agree that a delay of more than 20 years was justifiable - especially when such a fundamental right as freedom of peaceful demonstration was at stake. The Court therefore concluded that the interference with Mr Vyerentsov's right to freedom of assembly had not been prescribed by law, in violation of Article 11.

As regards violation of Article 7, the Court reiterated that, although the offence of a breach of the procedure for holding demonstrations had been provided for by the Code on Administrative Offences, the said procedure had neither been clearly defined in the domestic law nor by the domestic courts, the practice of which had revealed numerous inconsistencies in this sphere. Accordingly, Mr Vyerentsov's three-day administrative arrest had violated Article 7.

Finally, as regards violation of Article 6 §§ 1 and 3 first, the Court noted that only a few hours had elapsed between the drawing up of the administrative offence report by the police and the examination of the case by the first instance court. As a result, Mr Vyerentsov had not been able to assess the charge against him and to prepare his defence accordingly. Second, although Mr Vyerentsov had asked to be represented by a lawyer as provided for under the Code on Administrative Offences, the first instance court had refused his request owing to his legal background as a human rights defender, which the Court found unlawful and arbitrary. Third, the main basis for the findings of the first instance court had been police reports, without any witnesses being questioned, despite Mr Vyerentsov's request. Moreover, the Court of Appeal had failed to remedy those violations since, by the time it had examined the case, Mr Vyerentsov had already served his administrative detention. Finally, despite their relevance, Mr Vyerentsov's arguments had been totally ignored by the Ukranian courts, which had displayed a total lack of adequate reasoning in their decisions. The Court therefore held that there had been a violation of Article 6 §§ 1 and 3 (b), (c) and (d).

The Court reiterated that Article 46 imposed on contracting States a legal obligation to implement

appropriate measures to ensure the right of the applicant which the Court had found to have been violated. Such measures also had to be taken in respect of other people in a similar position, notably by solving the shortcoming found in the national system as quickly and as effectively as possible. In this case, the violations of Article 11 and 7 had stemmed from a legislative lacuna concerning freedom of assembly, which had persisted in Ukraine for more than two decades. Therefore, the Court stressed that specific reforms in the legislation and administrative practice of Ukraine should be urgently implemented in order to establish the requirements for the organisation and holding of peaceful demonstrations as well as the grounds for their restriction.

III. Description of the Situation on the Ground

The case of Vyerentsov v Ukraine (20372/11) raises an issue of citizens' right to peaceful assembly that remains unsettled on legislative level in Ukraine. There are three sources of law where the provisions regulating the right to peaceful assembly can be found, namely Articles 22, 39 and 92 of the Constitution of Ukraine[1] (hereafter "Constitution"), The Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 No. 9306 - XI on the Procedure for organising and holding meetings, rallies, street marches and demonstrations in the USSR[2] (hereafter "The 1988 Decree") and Decision of the Constitutional Court of Ukraine of 19 April 2001 No 4[3]. It is worth noting that the 1988 Decree is being considered by the Ukrainian courts as a valid legislative document on the basis of the Resolution of the Verkhovna Rada of Ukraine of 12 September 1991 on temporary application of certain legislative acts of the Soviet Union[4]. Furthermore, the Code on Administrative Offences (hereafter "CoAO"), in particular Articles 185, 185-1 and 185-2 establish a basis for liability for breach of the procedure for organising and holding meetings, rallies, street marches and demonstrations.[5] However, the initial irregularity and a legislative loophole lies in the conflicting provisions of the Constitution and the 1988 Decree.

Legislation

The Constitution requires advance notification to the authorities of an intention to hold a demonstration and stipulates that any restriction thereon can be imposed only by a court, while the 1988 Decree, drafted in accordance with the Constitution of the USSR of 1978, provides that persons wishing to hold a peaceful demonstration have to seek permission from the local administration which is also entitled to ban any such demonstration. From the preamble of the Decree it is clear that it had been intended for a very different purpose, namely for only certain categories of individuals to be provided by the administration with facilities to express their views in favour of a particular ideology, this in itself being incompatible with the very essence of the freedom of assembly guaranteed by the Ukrainian Constitution and the Convention. The Court considering merits of the application described the issue in the following terms :

> "...the Resolution of the Ukrainian Parliament on temporary application of certain legislative acts of the Soviet Union refers to temporary application of Soviet legislation and no law has yet been enacted by the Ukrainian Parliament regulating the procedure for holding peaceful demonstrations, although Articles 39 and 92 of the Constitution clearly require that such a procedure be established by law, that is, by an Act of the Ukrainian Parliament. Whilst the Court accepts that it may take some time for a country to establish its legislative framework during a transitional period, it cannot agree that a delay of more than twenty years is justifiable, especially when such a fundamental right as freedom of peaceful assembly is at stake"

Therefore, in essence it has been established by the Court that the only valid norm that ensures the right to peaceful assembly is contained in Articles 39 and 92 of the Consttution of Ukraine.

Article 185 and related in CoAO cannot be rgarded as valid provision. Although the offence of a breach of the procedure for holding demonstrations was provided for by the CoAO, the basis of that offence is not established in the domestic law with sufficient precision. In the absence of clear and foreseeable legislation laying down the rules for the holding of peaceful demonstrations, the provision for punishment for breaching an inexistent procedure lacks any sense and is incompatible the Convention.

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[1] http://www.president.gov.ua/content/constitution.html
[2] http://search.ligazakon.ua/l_doc2.nsf/link1/PC889306.html
[3] http://www.legislationline.org/ru/documents/action/popup/id/14429
[4] http://zakon0.rada.gov.ua/laws/show/1545-12
[5] http://zakon4.rada.gov.ua/laws/show/80731-10

Domestic Courts Practice

In 2001 the Ministry of the Interior of Ukraine applied to the Constitutional Court of Ukraine for an official interpretation of the provisions of Article 39 of the Constitution of Ukraine regarding timely notification to executive authorities or bodies of local self-government of planned meetings, rallies, marches or demonstrations. The constitutional Court held as follows:

"...the provisions of the first part of Article 39 of the Constitution of Ukraine on the timely notification to the executive authorities or bodies of local self-government about planned meetings, rallies, marches or demonstrations relevant to this constitutional application shall be understood to mean that where the organisers of such peaceful gatherings are planning to hold such an event they must inform the above-mentioned authorities in advance, that is, within a reasonable time prior to the date of the planned event. These time-limits should not restrict the right of citizens under Article 39 of the Constitution of Ukraine, but should serve as a guarantee of this right and at the same time should provide the relevant executive authorities or bodies of local self-government with an opportunity to take measures to ensure that citizens may freely hold meetings, rallies, marches and demonstrations and to protect public order and the rights and freedoms of others. Specifying the exact deadlines for timely notification with regard to the particularities of [different] forms of peaceful assembly, the number of participants, the venue, at what time the event is to be held, and so on, is a matter for legislative regulation ..."

Reviewing of the practice of the Supreme Court in cases concerning administrative offences relating the rights to freedom of assembley (Articles 185-185-2 of the Code on Administrative Offences) of 1 March 2006

the Supreme Court noted inter alia as follows:

"... No legislation has been enacted in Ukraine establishing a mechanism for fulfilling the right to freedom of peaceful assembly. According to the Resolution of the Verkhovna Rada of Ukraine of 12 September 1991 no. 1545-XII on temporary application of certain legislative acts of the Soviet Union, the normative acts of the USSR remain in force, applying in order of legal rank, for example, the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 on the procedure for organising and holding meetings, rallies, street marches and demonstrations in the USSR ..."

In the information note of April 2012 by the Higher Administrative Court of Ukraine on a study and summary of the jurisprudence of administrative courts applying the relevant legislation and deciding cases concerning the exercise of the right to peaceful assembly (meetings, rallies, marches, demonstrations, etc.) in 2010 and 2011 the following reference is made:

"...The legislation of Ukraine does not currently have a special law regulating public relations in the sphere of peaceful assembly. One of the urgent problems to be settled by such a law is the time-limits for notifying the authorities of a planned peaceful gathering in order to ensure that it is held in safe conditions. Article 39 of the Constitution of Ukraine, while providing that the executive authorities or bodies of local self-government must be notified in a timely manner that a peaceful gathering is to be held, does not establish specific deadlines for such notification. The uncertainty of this matter results in the relevant constitutional norm being applied inconsistently and thus requires legal regulation ...

... The judicial practice contains instances of cases restricting the right to peaceful assembly being decided on the basis of the procedure for organising and holding meetings, rallies, street marches and demonstrations laid down by the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 No. 9306-XI on the procedure for organisation and holding of meetings, rallies, street marches and demonstrations in the USSR. This approach is incorrect.

Since the norms of this Decree establish the procedure for authorising (registering) peaceful assembly and empower the authorities and bodies of local self-governments to ban such events, whereas the norms of the Constitution of Ukraine provide for a procedure whereby the authorities are notified that a gathering is to be held and provides that only the courts have power to ban a peaceful gathering, the above-mentioned legal act should not be applied by courts when deciding such cases ..."

As for the rest of courts across country the following data has been gathered by the NGO "Institute Respublica", a member of the All-Ukrainian Initiative for Peaceful Protest : in 2014 administrative courts considered 113 cases concerning restriction of the right to peaceful assembly, 80% of which were satisfied partially or in full; in 2013 253 cases were considered 207 of which were satisfied partially or in full which makes 81, 82% of total number of cases concerning restriction of right to peaceful assembly.

IV. Description of the Measures Taken by the Authorities

Since lodging of the application there has been a number of attempts to resolve these legislative irregularities and create a proper legal framework that would ensure the right to peaceful assembly for the citizens of Ukraine.

In 2013 there were two draft laws 2508a and 2508a-1 proposed for consideration by the Verkhovna Rada of Ukraine. Although both draft laws were similar in content according to the public opinion provisions of 2508a were better balanced out and better thought through. The most important provisions of the draft law were those that contained the following guarantees: presumption of holding a peaceful assembly regardless of the grounds and timely notification of the authorities with the only ground for intervention by the authorities being when assembly stops being peaceful; protection of the right to peaceful assembly as state's positive obligation which is in line with international standards (the obligation lies in state's duty to facilitate protection of assembly, resolution of organizational matters, for instance change of traffic directions, cleaning of the territory, supply of emergency services); protection from arbitrary decision by state authorities; protection from arbitrary judicial prohibitions.

The year 2014 was a very tumultuous year in the context of public protests and demonstrations. On 16 January 2014 the Verkhovna Rada adopted a set of 10 laws severely restricting right to peaceful assembly and inconsistent with the Constitution of Ukraine as well as the international standards. The laws were deemed as undemocratic and "draconian" in their nature and met with severe public reactions. 9 of 10 laws were repealed on 28 January 2014.

The 2013 draft laws were also withdrawn from consideration in November 2014. Since then no action has been taken by the Government.

V. Proposed Recommendations in Order to Fully and Effectively Implement the Judgment

The ECtHR recalled Article 46 imposed a legal obligation on Contracting Parties to take necessary measures to ensure the rights of the applicant, which the Court found were violated. Such measures must also be used in respect of other persons in a similar situation, in particular by correcting deficiencies identified in the national system efficiently and efficiently.

In case of Vyerentsov vs. Ukraine (20372/11) violations of articles 7 and 11 were caused by an existing for more than two decades legislative loophole in respect of the right to freedom of assembly in Ukraine. The Court stressed that specific reforms in legislation and administrative practice of Ukraine should be undertaken in order to determine the requirements for organising and conducting peaceful demonstrations, as well as reasons for their limitations.

Therefore, in order to fulfill its obligations under the Convention, the Government is recommended to take following steps:

1) Create a legislative framework ensuring the right to freedom of assembly in line with international standards, Court's decisions as well as taking into consideration comments and recommendations of international organisations such as the Venice Commission as per Parliamentary Assembly Resolution 1755[6] and OSCE;

2) together with civil society, trade unions and other stakeholders, or having ensured their full support, prepare and submit to the Verkhovna Rada of Ukraine the draft law on freedom of assembly, which *inter alia*, should include:
- exhaustive list of locations of where assembly is permitted in order to prevent illegal bans or territorial limits of peaceful assembly;
- clearly defined powers of public authorities to increase peaceful gatherings of citizens;
- unburdened possibility of spontaneous / urgent assemblies to avoid the need to hand in advance notifications of authorities;
-clear limitations of the right to freedom of peaceful assembly to avoid abuse of powers in this area;
-setting out of the participants' rights of peaceful assembly and their responsibilities;

[6] http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1755.htm

-procedures for appealling decisions of violations;
-responsibility for illegal actions by instigators of mass disturbances during peaceful assembly and personal responsibility of the organizers of such disturbances;
-personal responsibility for banning participation in peaceful assembly.

3) Reform and amend the laws that directly relate to enjoying the right to freedom of peaceful assembly, such as: on the settlement of collective labor disputes, on freedom of conscience and religious organisations, on local government, as well as the code on administrative offences and other;

4) Recommendations 2 and 3 sould be executed simultaneously in order to ensure a comprehensive and holistic approach to necessary reforms, conformity of laws as well as clarity and transparency of rights, obligations and sanctions;

5) prepare and submit without delay to the Committee of Ministers (CM) an Action Plan on the reforms taken and/or envisaged, together with an indicative timetable for their adoption[7];

6) make a request in the drafting and adopting of the legal framework for public assemblies as well as request for implementation assistance by the Council of Europe using one of its suitable programmes.

VI. Questions for the Government

Taking into account all the information provided above, we would like to seek a reply from the Government to the questions below:

1 – When is the Government of Ukraine is intending to submit the Action Plan on the reforms taken/envisaged?

2 – When will the new legal framwork for public assemblies be put in place?

Arkadiy Bushchenko
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[7] https://wcd.coe.int/ViewDoc.jsp?id=2103807&Site=CM