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Meeting: 1390th meeting (1-3 December 2020) (DH)

Communication from an NGO (07/10/2020) in the case of GONGADZE v. Ukraine (Application No. 34056/02) and reply from the authorities (26/10/2020).

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 : 1390^e réunion (1-3 décembre 2020) (DH)

Communication d'une ONG (07/10/2020) relative à l'affaire GONGADZE c. Ukraine (requête n° 34056/02) et réponse des autorités (26/10/2020) **[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.

07 OCT. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH



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Committee of Ministers of the Council of Europe

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Ladies and Gentlemen!

Institute of Mass Information (IMI) is a Ukrainian non-governmental organization registered in 1996. IMI was founded by a group of Ukrainian and foreign journalists led by Alla Lazareva, who became the organization's first executive director. Through the years, IMI was also headed by Serhiy Taran, Victoria Siumar, and since 2013 Oksana Romaniuk is the IMI's executive director. IMI conducts assessment of the state of freedom of speech in Ukraine, including monitoring of cases of interference with the work of journalists. According to the monthly results, these cases are recorded by IMI in the "Barometer of Freedom of Speech" (<https://imi.org.ua/en/monitorings/barometr-svobody-slova>).

Given the specifics of our activities, the NGO "Institute of Mass Information" would like to convey to you its views on the existing problems in Ukraine with impunity for cases of interference with journalistic activities.

The situation with impunity for hindering professional activities of journalists in Ukraine remains difficult. For example, during the first nine months of this year, we only managed to find 5 sentences in the relevant cases (1 of them is acquittal) in the Unified State Register of Court Decisions (<http://www.reyestr.court.gov.ua>). At the same time, according to the letter of the Office of the Prosecutor General of Ukraine dated 22.01.2020 № 27 / 3-426-vyh20, during 2019, 259 sets of proceedings were registered in the Unified Register of Pre-trial Investigations under Articles 171-1, 345-1, 347-1, 348-1, 349-1 of the Criminal Code of Ukraine, of which only 14 cases were sent to court.

According to the results of the IMI's monitoring conducted during the filling of the Barometer in 2019, 243 cases of violation of journalists' rights were recorded, and 235 cases were recorded in 2018 (<https://imi.org.ua/en/monitorings/freedom-of-speech-in-ukraine-deteriorated-imi-i31288>, two years prior to 2019 were chosen for comparison, as criminal proceedings are considered in court with a certain time lag after the incident itself, which is often more than a year). We cannot claim that criminal proceedings should be instituted for all the violations we have recorded, as journalists often do not turn to law enforcement bodies (although usually because they consider it as inefficient waste of time). But the difference in indicators, which is more than ten times, between our statistics and the

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preliminary results of the work of law enforcement agencies on the one hand, and as little as 14 real court cases on the other does not speak in favour of law enforcement agencies.

There are several reasons for this situation. On the one hand, it is a weak basic training of pre-trial investigation bodies on crimes against journalists, in particular (mis)understanding of the evidence, features of the object of the crime, etc., which leads to the inability of law enforcement agencies to prove the *mens rea* of the crime: intent, motive to hinder the professional activity of the journalist as a way to satisfy the interests of society in relation to information. Therefore, in many cases, pre-trial investigation bodies classify such events as a manifestation of interpersonal conflict between two individuals or hooliganism aimed against public order. Given that in the absence of significant property damage or harm to health as a result of such a conflict, criminal liability is not provided - due to improper qualification, investigators close these cases for lack of evidence of crime or do not carry out appropriate investigative actions.

In addition, allegations of crimes against journalism (as well as other allegations of crimes) in many cases are in fact registered as applications of citizens, i.e., they do not automatically become grounds for initiating criminal proceedings contrary to the requirements of Article 214 of the Criminal Procedure Code of Ukraine. At the same time, the standard term for consideration of a citizen's application in Ukraine is up to 1 month.

On the other hand, the wording of the relevant articles of the Criminal Code of Ukraine (171, 345-1, 347-1, 348-1, 349-1) provides for liability for hindering legitimate professional activities of a journalist. Therefore, it is necessary to prove the formal existence of the victim's status as a journalist. According to the note to Article 345-1 of the Criminal Code of Ukraine: "The status of a journalist or his/her affiliation with the media is confirmed by an editorial or official certificate or other document issued by the media, its editorial office or a professional or creative union of journalists." That is, Ukrainian law protects not so much journalistic activity as, rather, a person with a journalist's ID. At the same time, according to Ukrainian law, having the status of a journalist creates additional advantages over ordinary citizens, in particular, gives the right to possess traumatic weapons, to visit, unimpeded, government agencies, to be present at polling stations during voting etc. Access to additional rights and benefits creates a situation where a journalist's certificate is obtained by persons who are not engaged in journalistic activities.

However, persons who are constantly and professionally engaged in informing public about important events and phenomena may not have a journalist's ID. In particular, the activity of Internet-media is not considered by Ukrainian legislation as the work of the media (there is no special regulation, registration, their editorial offices are not considered as a subject of legal relations, similar to the offices of print media or television and radio organizations), and accordingly certificates issued by such media are not considered as duly certifying status of journalists. And this is despite the growth in number of Internet-media, as well as of their impact on the audience. As a result, employees of online-media have fewer opportunities for criminal protection than journalists of print media, television or radio. In particular, in order to obtain such protection, these employees must be members of professional / creative journalistic associations. It is also difficult for investigators to distinguish journalists who distribute content over the Internet from other users who also distribute their content on the Web (bloggers, etc.). It is currently difficult to talk about the criminal law protection of the latter, given the link in criminal law to the status of a journalist.

There may also be a problem in proving that the suspect was aware of the journalist's status of a victim. After all, journalists do not always wear badges or vests with the inscription "press" when

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performing work (in particular, for security reasons so as not to attract attention), and the journalist does not always have time to warn about his/her status before his work is interfered with or to prove later the fact of such warning.

In addition, there are certain problems with the wording in the text of above-mentioned articles of the Criminal Code of Ukraine. The most typical is the criminalization of "illegal denial of a journalist's access to information" (Part 1 of Article 171 of the Criminal Code, the wording of this Article of the Criminal Code was updated in 2016, and Articles 345-1, 347-1, 348-1 and 349-1 were added to the Criminal Code). In our opinion, such criminalization is an excessive measure, because in the vast majority of cases the level of public danger from this illegal refusal is insufficient for the emergence of criminal liability. Therefore, in many cases, in practice the police do not initiate criminal prosecution of the official responsible for the refusal.

However, in such situations, journalists find themselves in a worse position than ordinary information seekers, as the issue of prosecuting for denying access to information must first be considered by the National Police, as there are indications of a criminal act. And, after receiving the police's negative opinion, the period for bringing to administrative responsibility for illegal denial of access to information (i.e. in the general procedure for responding to violations in the field of access) usually already expires. According to Part 2 of Article 38 of the Code of Ukraine on Administrative Offenses, the term of imposition of an administrative penalty should not exceed three months from the date of the violation.

Please take into account the above facts and considerations when assessing the fulfillment by the state of Ukraine of its obligations and responsibilities before the Council of Europe.

Executive director of

NGO «Institute of Mass Information»



Oksana Romaniuk

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Mr Pavlo Pushkar

**Head of Division
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*As to the communication submitted by
the Institute of Mass Information*

Dear Mr Pushkar,

On behalf of the Government of Ukraine please let me assure the Committee of Ministers in our commitment to solving the problems identified by the European Court of Human Rights in *Gongadze v. Ukraine* case (No. 34056/02).

In this regard, the Government would like to express appreciation to the Institute of Mass Information (the “IMI”) for their monitoring of the issues on protection of professional rights of journalists in Ukraine.

As regards the recent amendments to the domestic law the Government would like to refer to their communication of 20 October 2020¹ and underline that the Draft Law “On Amendments to the Code of Ukraine on Administrative Offences and the Criminal Code of Ukraine regarding Ensuring Freedom of Speech, Right to Information and Legislative Guarantees of Professional Activity”, registered in the Parliament of Ukraine as per No. 4224² aims at enhancing the protection of the

¹ [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22DH-DD\(2020\)921E%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2020)921E%22]})

² http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70189

professional activities of journalists and other media actors, in particular, by strengthening administrative and criminal liability for committing offences against them.

The promoters of the Bill propose to exclude the term “journalist” from the Law of Ukraine “On State Support of Mass Media and Social Protection of Journalists” and to define it in a modified form in the Law of Ukraine “On Information” as follows:

"A journalist is a creative employee in the field of media, who professionally collects, receives, creates, distributes and prepares information for mass media".

The status of a journalist will be confirmed by a document issued by an institution in the field of media, professional or creative union of journalists. This document shall contain name and type of media, photo, surname, name and patronymic of the journalist, number, date of issue, validity period, as well as the signature of the person who issued it.

Furthermore, the Code on Administrative Offences of Ukraine should be supplemented by the definition of professional activity in the field of media:

"Professional activity in the field of media shall be understood as the activity of a person related to the collection, obtaining, creation, dissemination, storage or other use of information with the purpose of its dissemination to an undefined number of persons through mass media, TV and radio organisations, news agencies, the Internet.

The activity of a person in the field of media shall not be considered the professional activity of a person which was carried out without complying with the standards of journalism provided by the Resolution of the Parliamentary Assembly of the Council of Europe No.1003 on Ethical Principles of Journalism”.

The amendments proposed also include a supplement to the note to Article 345-1 of the Criminal Code of Ukraine, namely “*Cinematographers, directors and other media actors are equated with journalists if they are part of creative groups*”. As of today, the Draft Law is examining by the Parliamentary Committee on Law Enforcement Issues.

As to improving the effectiveness of investigations into crimes against journalists it is to be noted that on 16 March 2020 the Public Prosecutor’s Office established a working group on the analysis of the state of supervision over the observance of laws in criminal proceedings on criminal offences committed against journalists (the Order No.150³). The purposes of the working group are processing and summarising information on counteracting criminal offenses committed against journalists, the state of their pre-trial investigation; examination of the status of pre-trial investigation in criminal proceedings on criminal offences against journalists; initiation of taking measures to improve the efficiency of pre-trial investigation of criminal offences committed against journalists.

In addition, an interagency working group on the analysis of the state of pre-trial investigation, procedural management and judicial examination of proceedings on criminal offences committed against journalists was established (Order No. 330 of 22 July 2020)⁴.

The Government of Ukraine would like to reiterate that they are open to any comments and meaningful recommendations provided by the non-governmental organisations, which will be able to

³ https://old.gp.gov.ua/ua/file_downloader.html?_m=fslib&_t=fsfile&_c=download&file_id=208675

⁴ https://old.gp.gov.ua/ua/file_downloader.html?_m=fslib&_t=fsfile&_c=download&file_id=209384

facilitate the execution of the European Court's judgments. They will inform the Committee of Ministers with detailed information regarding the improvement of the mechanisms to ensure the journalists' safety.

Yours sincerely,

Ivan LISHCHYNA
Deputy Minister – Agent
before the European Court of Human Rights