



OPEN DIALOG

28 July, 2016

## PROLONGED DETENTION IN UKRAINE IN VIOLATION OF REASONABLE TIME OF CRIMINAL PROCEEDINGS

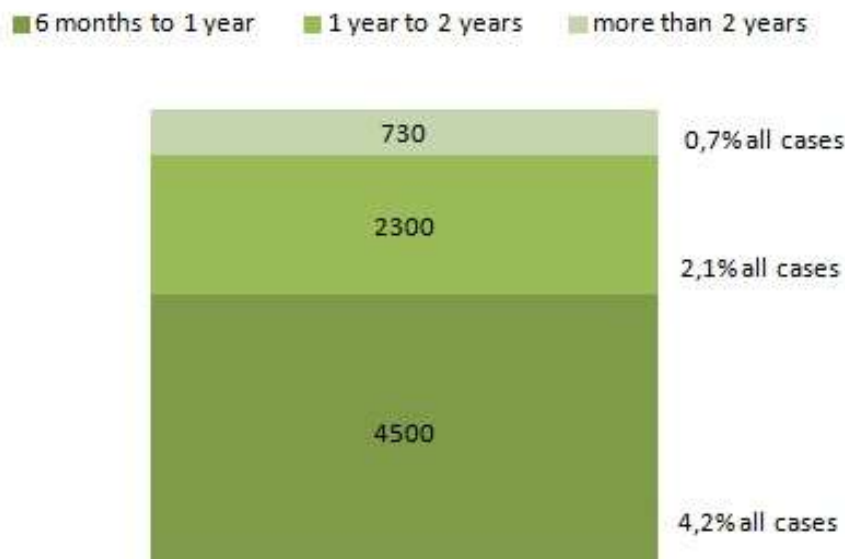
*The results and recommendations of a study conducted by the Open Dialog Foundation under the auspices of the Ukrainian Bar Association (the full report will be published in August 2016).*

Reasonable time – one of the general principles of criminal proceedings. Article 28 of the CCP provides criteria that affect the determination of reasonable time, namely: the complexity of criminal proceedings; behaviour of the people involved in the proceedings; the manner of execution of powers by the investigator, prosecutor and court.

Ukrainian legislation establishes specific deadlines for pre-trial investigation. However, no concrete deadlines have been stipulated for judicial examination.

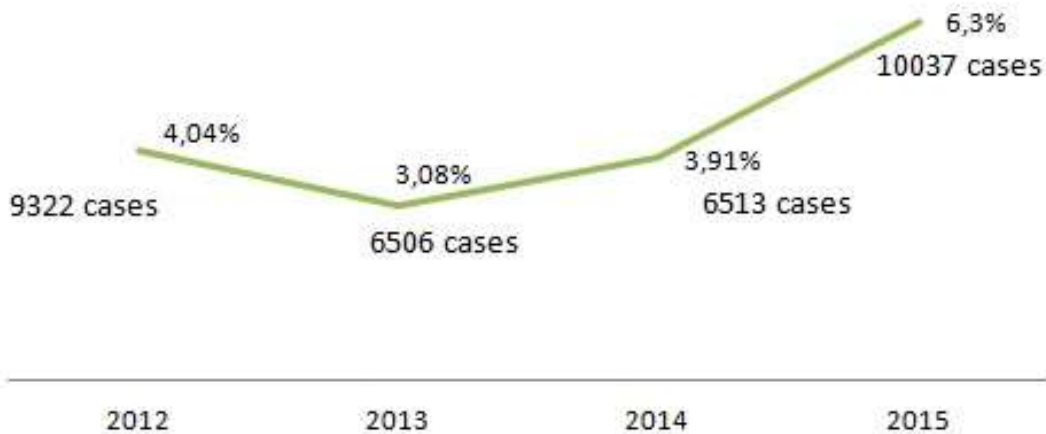
In Ukraine, 4.2% of criminal cases are considered by courts within a period of 6 months to 1 year, and more than 2% of cases are examined for 2 years.

*The number of criminal cases which have been examined by courts in violation of reasonable time in 2014<sup>1</sup>*



<sup>1</sup> Source: High Specialised Court of Ukraine for Civil and Criminal Cases.

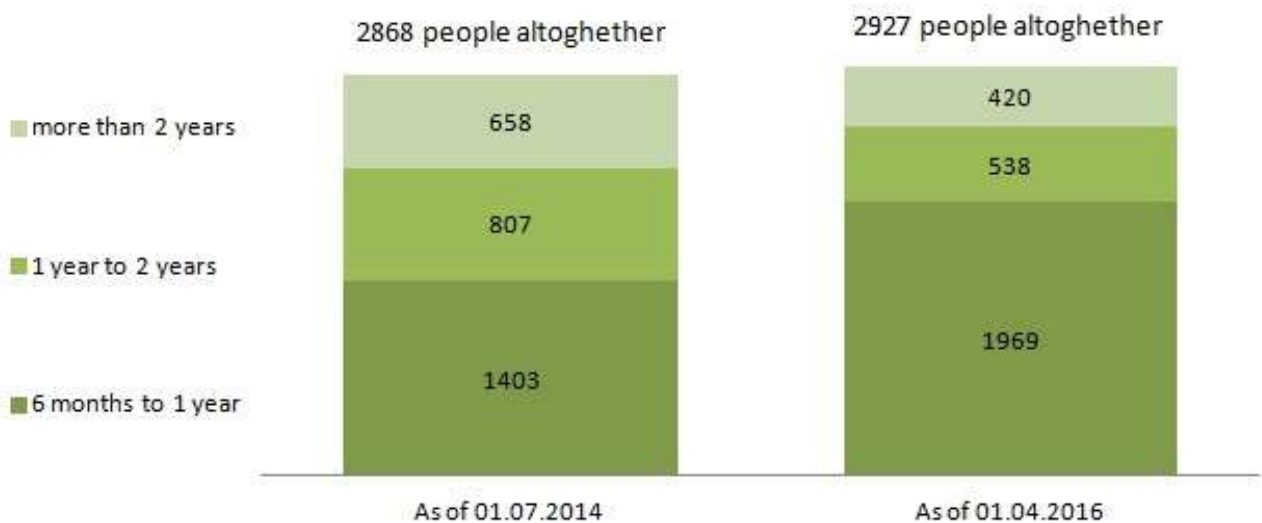
The number of criminal cases which have not been considered by common law courts within the period of more than 6 months<sup>2</sup>



The question of reasonable time of criminal proceedings is especially important for persons to whom detention has been applied as a preventive measure.

As of 1 April, 2016, 538 people were held in custody in detention facilities for 1 to 2 years, and 420 people – for more than 2 years.

The number of persons held in custody in detention facilities for more than 6 months<sup>3</sup>



**THE CASES SUBJECTED TO EXAMINATION**

The authors of the study have examined 18 cases, in which people are being held or were held in custody for 4 to 7 years, and in some cases – for 8 to 10 years. In these proceedings, gross violations by the investigative bodies and cases of exertion of torture in order to obtain confession, have been recorded.

<sup>2</sup> Source: Judicial statistics on the website of the State Judicial Administration of Ukraine.

<sup>3</sup> Data for 2014 - High Specialised Court of Ukraine for Civil and Criminal Cases. Data for 2016: Reply of the State Penitentiary Service of Ukraine of 21 June, 2016 and a reply of the State Judicial Administration of Ukraine of 21 June, 2016 to the request of the CA 'Open Dialog Foundation'.

For example, the cases of Pavel Broslavsky (more than 10 years in custody), Aleksandr Kantsedaylo (7 years in custody), Yuriy Symonenko (almost 7 years in custody), Vadim Polishchuk (more than 5 years in custody), Aleksandr Orlov (4.5 years in custody), Andrey Schadilo (almost 4 years in custody), Aleksandr Rafalsky (3 years in custody) and others have been analysed. Among the examined cases, it was only in 3 cases that these persons were acquitted by the court.

A detailed description of the cases will be presented in a report to be published in August 2016.

## REASONS FOR DELAYS IN CRIMINAL PROCEEDINGS

The analysis of many cases confirms that the excessive length of the criminal proceedings is often a sign of falsification of the case file or other gross violations on the part of the investigating authorities. Prolonged detention is used in order to exert psychological pressure on the accused.

### 1. Prosecutors' unofficial duty to bring about guilty verdict by all means

The CPP guarantees procedural independence of prosecutors. However, from the formal and administrative point of view, prosecutors are dependent on their heads, and, therefore, they cannot make decisions without their heads' approval.

According to the established practice, heads of local and regional prosecutor's offices impose certain restrictions on prosecutors, demanding from them to act in the following way: a) send as many materials as possible to the court even in the absence of objective evidence of guilt; b) during the trial, press charges even if there are no reasons to do so; c) strongly seek handing down guilty verdicts by the court; d) appeal against acquittals. Prosecutors are unofficially obliged to carry out these actions, as otherwise, due to a strict hierarchy, they may be punished for their 'poor quality work'.

In most cases, prosecutors are not allowed even to file a motion to change the preventive measure to a milder one. In addition, data for the last three years show that prosecutors refused to bring charges only in less than 1% of cases.

### Reasons for delay of examination of criminal cases<sup>4</sup>



<sup>4</sup> Source: A reply by the State Judicial Administration of Ukraine of 21 June, 2016 to the inquiry sent by the CA Open Dialog Foundationi..

## 2. Accusatory bias in the work of judges

In 2013 and 2015, the proportion of acquittals in Ukraine amounted to 0.24% and 0.32%, respectively.

### The proportion of convictions and acquittals<sup>5</sup>



Although detention is an exceptional measure of restraint, Ukrainian courts will continue its use en masse. Frequently, the request of a prosecutor regarding the detention of a person or extension of detention is considered by the courts only formally, without proper assessment of the facts regarding the need to apply such a preventive measure.

## 3. Organisational shortcomings in the work of judges

A) Long or frequent breaks between court hearings. The main reasons are as follows:

- Failure of participants in the trial to appear in court. In 2014, this was the most common reason for a delay in court proceedings. As practice shows, frequently, it is the prosecution witnesses who do not appear at the hearing; at the pre-trial stage, they may be forced, by a means of intimidation, to sign certain statements. Decisions of the Court regarding compulsory appearance are largely unexecuted.
- Flaws in the operation of relevant public services regarding the compulsory appearance of suspects or the accused in the court. This is due to the lack of or failure of vehicles and non-agreement of transport schedules.

B) Prolonged expertises or non-arrival of experts to the court hearing.

C) The problems of the quality of work performed by judges, namely: inadequate preparation for the examination of cases, overloading of judges, non-appearance of the jury members, a lack of the jury and others.

### **‘THE SAVCHENKO LAW’**

According to this law, in case of conviction of a person to imprisonment, 1 day of detention should be counted as 2 days of imprisonment.

<sup>5</sup> Data Source: For 2013 - High Specialised Court of Ukraine for Civil and Criminal Cases. For 2015 - State Judicial Administration of Ukraine.

As of 24 June, 2016, under the 'Savchenko law', 6543 persons (5807 convicts and 736 prisoners) were released, while the terms of imprisonments of 46 481 persons were reduced.<sup>6</sup>

The law does not relieve the fate of those who have been accused of committing less serious crimes and have not been held in custody. According to the representative of the Supreme Court of Ukraine, Yaroslav Romanyuk, the 'Savchenko law' puts prisoners in unequal conditions, because those who cooperated with the investigative bodies and were not held in custody, may serve longer terms than those who were held in custody and were convicted of serious crimes.

One of the problems with the implementation of the law is that it doesn't follow clearly from the text which court must consider the request for the re-calculation of the prison term: whether it's the court that issued the judgment or the court at the place of imprisonment.

## RECOMMENDATIONS

Considering the reasons, presented in this study, for violations of the right to reasonable time of criminal proceedings and excessively long detention, **the Ukrainian Bar Association** and the **Open Dialog Foundation** hereby appeal to the Supreme Court of Ukraine, the General Prosecutor's Office of Ukraine, the Verkhovna Rada of Ukraine and the the Ukrainian Parliament Commissioner for Human Rights to evaluate and consider our proposals.

We hereby request that **the Supreme Court of Ukraine**, on the basis of current legislation and generalisation of judicial practice by Ukrainian courts and the ECHR, adopt an updated decision by the Plenum, which will explain to local general courts, the issue of preventive measure in the form of detention and extension of detention and, in particular, make the following recommendations:

- 1) To refrain from accusatory bias and strictly observe the principle of competition when considering applications by a prosecutor regarding detention or extension of detention. In particular, if the prosecutor states that, if at large, the suspect or the accused may interfere with the criminal proceedings (hiding from the investigation, destroying evidence, exerting influence on witnesses, etc.), the court must assess not only the likelihood and sufficiency of grounds for such allegations, but availability of direct, concrete evidence which reasonably confirms these risks. The court must also consider the relevance and validity of these risks at a particular time, i.e. consider the situation as it develops. On this basis, a court's decision regarding detention must contain a detailed assessment of the validity of arguments of the prosecution and defence.
- 2) When applying a preventive measure in the form of detention or its extension, a court must take due account the person's age, the health condition, the presence of minor children or relatives sustained by the person, the length of detention and the existence of cases of ill-treatment of the person in a detention facility.
- 3) According to the presumption of innocence, potential future conviction of a person cannot be the exclusive argument, used by the court as a reason for the issuance of a preventive measure in the form of detention or its extension.

In addition, we hereby urge **the Supreme Court of Ukraine** that it enshrine in the appropriate resolution of the Plenum, recommendations for local courts regarding the granting of the right to reasonable time of criminal proceedings. We suggest that it give the following recommendations:

- 4) To comply strictly with the provisions of the CCP regarding the primary trial proceedings, on whose basis, suspects or defendants are held in custody.

---

<sup>6</sup> According to the State Penitentiary Service.

- 5) To expand the practice, used by courts, of imposing sanctions, provided by law, against those persons involved in criminal proceedings who unreasonably failed to appear at court hearings (the law on compulsory appearance, monetary penalties, violations of the issue of disciplinary responsibility for it, etc.).
- 6) In case of non-execution of the law on summons, the court must immediately raise the issue of bringing to disciplinary responsibility of officials guilty of inaction and address the prosecutor's office with a request that such inaction be investigated.
- 7) According to the principle of adversarial, every party to criminal proceedings is individually obliged to ensure the attendance of their witnesses. Therefore, in the case of systematic absenteeism without a valid reason, the courts must decide whether to continue the trial without these witnesses.
- 8) If the relevant public services, without valid reasons, do not bring for trial, the suspects or defendants who are held in custody, the court must raise the issue of bringing relevant officials to disciplinary responsibility.

We also urge **the appellate courts**:

- 9) To pay attention to violations by judges of reasonable time during the examination of cases in courts of first instance, and appeal to the High Council of Justice for verification of such violations.

We suggest that the **General Prosecutor of Ukraine** make a public statement and distribute among heads of local and regional prosecutor's offices, an instruction on the following:

- 10) Public prosecutors should not be subjected to punishment, pressure, punishments or criticism by the leadership for refusing to send a case to the court (due to lack of proof of guilt); for failure to press charges during the trial; for refusing to appeal the acquittal. On the contrary, these actions should be applied in proceedings where there is no objective evidence of guilt.
- 11) Take efficient steps to change the principles of the evaluation of the work performer by prosecutor's offices. The Soviet-era approach to evaluation, which is based mainly on statistical indicators, should be abandoned.
- 12) The Prosecutor's Office is obliged to initiate a change in a measure of restraint not connected with detention in cases of violation of the right to reasonable time in criminal proceedings, in cases of subjecting the detainee to torture, and due to the state of health and age of the detained person.

We hereby appeal to the **Verkhovna Rada of Ukraine** with proposals to introduce legislative amendments concerning the following issues:

- 13) Clearly stipulate in the CCP, the right of a prosecutor to deny the referral of the case to court or withdraw charges during the trial (in the absence of proof of guilt), as well as prohibit prosecutors from bringing disciplinary charges for the issuance of such decisions.
- 14) Due to the common practice by which prosecutors open criminal cases against judges for issuance by them of 'inconvenient' decisions (including acquittals), change the order of the opening of a criminal case against a professional judge under Art. 375 of the Criminal Code ( 'Handing down by a judge (judges) of knowingly unfair sentence, judgment, order or decree'). We propose to enable the opening of a criminal case under Art. 375 of the Criminal Code only with the consent of the High Council of Justice following the receipt of an appropriate request by the prosecutor.
- 15) To amend the 'Savchenko Law', clearly indicating which court should consider the duration of detention in the sentence.

16) Provide, in legislation, a specific amount of monetary compensation for persons acquitted by court, for which a preventive measure of detention was applied (with determination of the amount of compensation for each day of detention).

We also appeal to **the Ukrainian Parliament Commissioner for Human Rights** for:

17) Immediate reaction, within their powers, to a violation of the right to reasonable time of criminal proceedings and the excessive length of detention, and inform the General Prosecutor of Ukraine about such incidents.

**For more information, please address:**

- Sergiy Kischenko, Member of the Ukrainian Bar Association, attorney in 'Solodko and Partners' Jsc. – [svk@solodko.kiev.ua](mailto:svk@solodko.kiev.ua)
- Igor Savchenko, Analyst of Open Dialog Foundation – [igor.savchenko@odfoundation.eu](mailto:igor.savchenko@odfoundation.eu)
- Katerina Savchenko, Analyst of Open Dialog Foundation – [katerina.savchenko@odfoundation.eu](mailto:katerina.savchenko@odfoundation.eu)
- Jędrzej Czerep, representative of Open Dialog Foundation, Project Coordinator – [jedrzej.czerep@odfoundation.eu](mailto:jedrzej.czerep@odfoundation.eu)
- Christine Brandauer, representative of Open Dialog Foundation, Project Assistant – [christine.brandauer@odfoundation.eu](mailto:christine.brandauer@odfoundation.eu)