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**REPORT**

**on the results of a study of court decisions**

**on release from prisons due to illness**

**Introduction**

Release from prison due to a serious illness is a procedure designed to ensure the right of the prisoner to proper treatment and the opportunity to preserve his own life. However, in order to carry out the tasks assigned to this procedure, it is necessary to properly implement the provisions provided by the law.

For many years Kharkiv Human Rights Protection Group has been trying to protect the human rights in various areas of social life, in particular, the rights of people serving their sentences. Many KHPG lawyers helped or tried to help hundreds of people sentenced to imprisonment.

KHPG monitors visited almost all prisons, where they documented human rights violations, and the topic of inadequate medical assistance that subjects the prisoners to inhuman suffering, became the subjects of dozens of appeals to national and international organizations.

Within the framework of this study we publish the work of the Kharkiv Human Rights Protection Group on the analysis of the decisions of the courts of first instance, delivered under pt. 2 of Art. 84 of the Criminal Code (CC) of Ukraine between 1 January 2017 and 30 June 2022 all across Ukraine.

In 2020 the Kharkiv Human Rights Protection Group already carried out a similar study that only concerned the Kharkiv region and focused on a limited circle of issues. The results of the previous study showed the need for a more detailed and systemic study that would take the previous experience into account.

The study was based on the analysis by lawyers of the content of all decisions previously selected using the search tools of the Unified State Register of Court Decisions, followed by the filling of special forms to ensure the calculation of statistical data.

This study consolidates the results of the statistical analysis with the long-term work of the Kharkiv Human Rights Protection Group in the field of monitoring prisons and legal protection of the medical rights of persons deprived of their liberty.

**1. General statistical information obtained during the study**

During the studied period, our organization examined **1,471** court decisions throughout Ukraine. All those decisions were delivered under pt. 2 of Art. 84 of the CC of Ukraine and concerned the resolution on the merits of release due to illness.

The results of the analysis are as follows:

* in ***756*** decisions an individual was released from serving the sentence, which is ***51, 39%*** of the total number of decisions;
* in ***650*** decisions the court refused to release the individual, which constituted ***44,19%*** of the total number;
* in ***65*** decisions, the prisoner died while the case was being considered, and therefore the corresponding submission or application was left without consideration by the court, such cases constitute ***4,42%*** of the total number of decisions.

Having studied the subject composition of persons submitting the relevant application, petition or submission, we found that the administration of the prisons where they were serving their sentence applied to the court with the relevant application for release only in at least 52.96% of all investigated decisions.

The prisoners themselves turned to court in at least ***37,87%*** of all the studied cases, and their lawyers in at least ***9,11%*** more. So, the proceedings were initiated by the prisoners in at least ***46,97%*** of all the studied decisions in general.

It should be noted that since pt. 2 of Art. 84 of the CC of Ukraine does not contain restrictions on the subject of submitting an application for exemption from serving a sentence due to illness, unlike pt. 5 of Art. 154 of the Criminal Executive Code of Ukraine, where the subject of the submission is only the head of the body or institution of execution of punishments, in this study special attention was paid to the distribution by subject composition of the initiators of the proceedings (see Section 3).

Taking into account the fact that the release procedure under pt. 2 of Art. 84 of the CC of Ukraine is decided in court, the prisoner has the right to be defended by a professional lawyer. Thus, according to the analyzed information, a lawyer was present only in at least ***22,23%*** of all cases. At the same time, of those cases when a lawyer was present, he was the initiator of the proceedings for the release of the prisoner due to illness in ***40.98%*** of cases.

Such a low percentage of the participation of a lawyer leads us to believe that, either in most cases the prisoners simply did not seek the help of a lawyer or did not demand the appointment of a free defense attorney from the court (for more details, see Section 3).

Geographically, the undisputed leader in terms of the number of issued decisions is the Kharkiv region, its courts issued at least ***26.58%*** of all the studied decisions. In total, 7 regions can be identified, the courts of which issued a total of 72.26% of all the studied decisions:

|  |  |  |
| --- | --- | --- |
| Region | Number of studied decisions | Percentage of the total number of the studied decisions |
| Kharkiv region | 391 | 26,58% |
| Lviv region | 143 | 9,72% |
| Kherson region | 138 | 9,38% |
| Dnipro region | 120 | 8,16% |
| Zaporizhzhia region | 105 | 7,14% |
| Vinnitsya region | 83 | 5,64% |
| Kyiv region | 83 | 5,64% |
| ***Total in the mentioned regions*** | ***1063*** | ***72,26%*** |

In our opinion, such a significant number of decisions issued within the specified areas is directly related to the specifics of individual prisons and the presence of special medical commissions (see Section 2).

**2. Description of prisons with the greatest number of prisoners who had court proceedings for their release due to illness**

During the study of court decisions and the analysis of the obtained results, 15 colonies with the highest number of prisoners who had court proceedings for their release, were singled out.

In total, ***60,30%*** of all proceedings under pt. 2 of Art. 84 of the CC of Ukraine were initiated in the below-mentioned prisons. Among the prisoners who died during the ongoing proceedings for release due to illness before obtaining a court decision, ***83,08%*** of all prisoners served their sentences in those 15 colonies.

We believe that such a significant number of proceedings may indicate systemic problems with the provision of proper medical assistance to the prisoners serving their sentences in those colonies. That is why we compared the obtained statistical data with the results of monitoring visits carried out by experts of the Kharkiv Human Rights Protection Group to these institutions, with the aim of finding possible reasons for such a large number of proceedings.

***2.1. Pokrovska Correctional Colony No. 17***

The colony is located in the village of Pokrovske, Donetsk community, Izyum district, Kharkiv region. This colony is a medium-security treatment and penal institution for men sentenced to imprisonment for a certain period who have tuberculosis. The colony also has a pre-trial detention center unit, which holds suspects who have been diagnosed with tuberculosis or who need treatment.

In addition, prisoners are sent to the colony for treatment not only from the Kharkiv region, but also from all over Ukraine. The planned capacity of the institution is 711 people. The colony has been operating since 1961.

In 1995, a tuberculosis department began to function in the institution, which eventually grew into a specialized tuberculosis hospital. Since the 2000s, modern laboratory equipment has been purchased with funds from international donors and the Government of France, which makes it possible to diagnose tuberculosis effectively and in a short period of time and provide the most effective method of treatment, taking into account chronic diseases.

In the study period in Pokrovska correctional colony No. 17, at least ***296*** decisions were documented, delivered under pt. 2 of Art. 84 of the CC of Ukraine, which is ***20,12%*** of all the decisions analyzed throughout Ukraine. According to the available data, during this period at least ***two individuals died*** in the colony before they were released under pt. 2 of Art. 84 of the CC of Ukraine.

In the report on the monitoring visit for 2021, the monitors noted that the colony lacked 10 doctors and the underfunding was 86.67% of the requested amount.

***2.2. Lviv correctional institution No. 19***

The institution is located in Lviv and is known as “Brygidky”. It has a pre-trial detention center, a maximum security level sector for the prisoners for life, as well as the inter-regional multidisciplinary hospital. The planned capacity of the institution is 1072 people. The building in which the institution is located was built in 1614 as the monastery of St. Brigid. In 1786, the monastery was converted into a prison.

During the study period, at least ***122*** decisions were recorded in the Lviv Correctional Institution No. 19, which is ***8.29%*** of all cases analyzed in Ukraine.

According to the analyzed data, during this period at least ***eight people*** died in this colony before being released under pt. 2 of Art. 84 of the CC of Ukraine.

A monitoring visit in 2021 revealed problems with the diagnosis of oncological diseases, a shortage of drugs for chemotherapy, and a lack of means for radiation therapy.

***2.3. Temnivka correctional colony No. 100***

The colony is located in the village of Temnivka of the Bezlyudivska community of the Kharkiv district of the Kharkiv region. This institution is known as "Sotka".

The colony is a medium-security institution (for holding men sentenced to imprisonment for a certain period of time who have previously served prison sentences). The colony also has a maximum security sector for life prisoners and an inter-regional multidisciplinary hospital.

During the analyzed period, at least ***65*** decisions, which is ***4.42%*** of all analyzed in Ukraine, were recorded concerning prisoners serving their sentences in Temnivka correctional colony No. 100.

In the report for 2020, the monitors found that the hospital lacks medicines for conducting special research, there is no specialized equipment for conducting brain research, in particular for conducting electroencephalograms, and the surgical department does not have the ability to perform surgeries.

***2.4. Bucha correctional colony No. 85***

The colony is located in the village of Gostomel, Bucha district, Kyiv region. The majority of prisoners were convicted of crimes in the field of illegal trafficking of narcotic drugs, psychotropic substances, their analogues, precursors or falsified medicinal products. An inter-regional hospital is located in the colony.

In 1943, the Bucha children's labor and educational colony for homeless children was founded. In 1960, the Bucha children's correctional colony was reorganized into the strict regime Men's Correctional Labor Colony No. 85. This colony is not functioning today.

During the studied period, at least ***56*** decisions were recorded in the Bucha Correctional Colony No. 85, which is 3.81% of all decisions analyzed in Ukraine.

According to the analyzed data, in this period at least ***nine people*** died in the colony before being released under pt.2 of Art. 84 of the CC of Ukraine. Therefore, among the persons, concerning whom the release proceedings were initiated, ***16.07%*** died before receiving court decisions (for more details, see Section 6).

During the monitoring visit in 2018, the monitors discovered the following problems: lack of testing of prisoners for HIV, determination of CD4 cells and viral load, lack of specialists in the hospital, terrible conditions of detention, etc.

***2.5. Stryzhavka Correctional Colony No. 81***

The institution is located in the village of Stryzhavka, Vinnytsia district, Vinnytsia region. The facility is a medium-security prison for men who are serving their second sentence. An inter-regional multidisciplinary hospital is located in the colony.

During the studied period at least ***49*** decisions were recorded in Stryzhavka correctional colony No. 81, constituting ***3,33%*** of the total decisions analyzed in Ukraine.

According to the analyzed data, in this period at least ***nine people*** concerning whom the proceedings for release due to illness were initiated, died in the colony. Thus, among the prisoners concerning whom the proceedings under pt. 2 of Art. 84 of the CC of Ukraine were ongoing, ***18,37 %*** died before receiving court decisions (for more details see Section 6).

The report on the monitoring visit states that the hospital needs repairs, as the conditions of detention there are unsatisfactory.

***2.6. Holoprystanska correctional colony No. 7***

The institution is located in the village of Stara Zbruivka of the Hola Prystan district of the Kherson region. This is a medium security facility for men. A special feature of the institution is that it houses an inter-regional specialized tuberculosis hospital. The planned capacity of the institution is 502 people.

The report for 2020 states that the institution lacks 5 phthisis doctors, prisoners complain of significant side effects from drugs. According to the monitoring report, 5 prisoners died in the institution in 2020. The medical advisory commission recognized eight prisoners as subject to release due to their health. Of these, four were released by the court, one of whom died while waiting for the actual release, three were refused by the court and one died before the court's decision.

The laboratory at the colony has modern medical equipment. The main task of the laboratory is to establish the type of tuberculosis, its resistance and methods of treatment. Clinical tests of blood, urine, feces and cerebrospinal fluid are also performed. In the laboratory, the entire set of tests for tuberculosis samples is carried out, including its cultivation to determine the type.

During the analyzed period at least ***39*** decisions were taken concerning the prisoners in Holoprystanska correctional colony No. 7, which is ***2,65%*** of all the decisions analyzed in Ukraine.

***2.7. Daryivka correctional colony No. 10***

The institution is located in the village of Daryivka, Kherson district, Kherson region. This is a medium-security institution (for men who have been sentenced to imprisonment for a certain period for the first time). The planned capacity of the institution is 1,067 people. A special feature of the institution is that it houses a regional multidisciplinary hospital.

During a monitoring visit in 2020, it was found that prisoners complained about the lack of medicine and the need to buy expensive medicine from relatives. Also, the prisoner, who according to the doctor is in a satisfactory condition, was partially paralyzed, because of which he could not move and had weak speech. The monitors offered the prisoner free legal aid for release from prison due to his health condition, to which the doctor on duty asked not to offer such a thing and noted that a petition to the court for release from prison due to his health condition can only be submitted by a medical advisory commission.

During the analyzed period at least ***39*** decisions were taken concerning the prisoners in Daryivka correctional colony No.10, which is ***2,65%*** of all the decisions analyzed in Ukraine.

***2.8. Kherson correctional colony No. 61***

The colony is located in the city of Kherson. This institution is a maximum security correctional facility and is intended for the treatment of prisoners suffering from tuberculosis.

Since 2019, the colony has not been functioning, and the special tuberculosis hospital is currently subordinated to the Kherson pre-trial detention center.

In 2020, during a monitoring visit, the monitors discovered improper conditions of detention, namely, the ward cells where prisoners who are undergoing treatment are held, have mold and moisture on the walls.

During the analyzed period at least ***38*** decisions were taken concerning the prisoners in Kherson correctional colony No. 61, which is ***2,58%*** of all the decisions analyzed in Ukraine.

According to the studied information, at least ***10 people*** died in the colony during this period, concerning whom the proceedings for the release due to illness were initiated. Thus, among the prisoners concerning whom proceedings under pt.2 of Art. 84 of the CC of Ukraine were ongoing, ***26,32 %*** died before receiving a court decision (for more details see Section 6).

***2.9. Sofiivska correctional colony No. 55***

The colony is located in the city of Vilniansk, Zaporizhzhia district, Zaporizhzhia region. This is a medium-security prison. An inter-regional hospital for prisoners suffering from tuberculosis operates in the colony. The institution also has a maximum security sector for those sentenced to life imprisonment. The planned capacity of the institution is about 800 people.

In the report on the monitoring visit in 2020, it was found that the department for prisoners suffering from tuberculosis is in a neglected state, namely: the windows are old and wooden, covered with rags. The blocks for prisoners were dark and stale and had an unpleasant smell. There are drinking water tanks in the dining rooms, but there are no kitchen utensils needed for cooking and eating. On the ceiling in some places there are traces of flooding due to atmospheric precipitation.

During the analyzed period at least ***37*** decisions were taken concerning the prisoners in Sofiivska correctional colony No. 55, which is ***2,52%*** of all the decisions analyzed in Ukraine.

***2.10. Shepetivska correctional colony No. 98***

The colony is located in the village of Klymentovychi, Sudylkiv community, Shepetiv district, Khmelnytskyi region. This is a medium-security prison for men who have been sentenced to imprisonment for the first time. The planned capacity is 1,043 prisoners. This is the largest colony in Ukraine in terms of area, which is 72 hectares. An inter-regional hospital operates in the colony.

In 2021, during the monitoring visit, improper living conditions were found, namely traces of past flooding and mold could be seen on the ceiling and walls. The linen was old and dirty. The sanitary facilities are neglected and in need of repair. The prisoners complained about the treatment and noted that they buy medicine with their own funds, and the treatment is carried out only symptomatically.

During the analyzed period at least ***35*** decisions were taken concerning the prisoners in Shepetivska correctional colony No. 98, which is ***2,38%*** of all the decisions analyzed in Ukraine.

According to the studied information, in this period at least ***three prisoners*** died in this colony, concerning whom the proceedings for release due to illness were initiated and ongoing.

***2.11. Dnipro penitentiary institution No.4***

The institution is located in the city of Dnipro. This institution consists of a pre-trial detention center, a block for prisoners deprived of liberty for a certain period, a maximum security sector for life prisoners and transit sectors for prisoners. Inter-regional multidisciplinary hospital No. 4 also operates in the institution.

The low-quality work and lack of treatment of prisoners in this hospital is highlighted in the article “[A cancerous tumor of the already ill prison medicine](https://khpg.org/1608809743)”.

During the analyzed period at least ***28*** decisions were taken concerning the prisoners in Dnipro correctional colony No.4, which is ***1,90%*** of all the decisions analyzed in Ukraine.

***2.12. Zbarazh correctional colony No. 63***

The colony is located in the village of Dobrovody, Zbarazh community, Ternopil district, Ternopil region. The institution is of a minimum security level with general conditions of detention of women sentenced to imprisonment for a certain period, who previously served a sentence in the form of imprisonment. In the institution there is a social rehabilitation ward and an inter-regional specialized tuberculosis hospital for women who have been sentenced to imprisonment for a certain period and are suffering from tuberculosis. The planned capacity is 860 people.

In the report on the monitoring visit in 2017, it was found that due to the lack of funds, the medical unit carries out its activities without accreditation. For the same reason, the institution is in debt for the repair of the X-ray machine, which was installed in 2007 without concluding a contract for its maintenance.

During the analyzed period at least ***25*** decisions were taken concerning the prisoners in Zbarazh correctional colony No. 63, which is ***1,70%*** of all the decisions analyzed in Ukraine.

***2.13. Dnipro correctional colony No. 89***

The colony is located in the city of Dnipro. This is a medium-security facility for men who have previously served time. The colony has a maximum security sector and a specialized tuberculosis hospital. The planned capacity of the institution is 993 people.

During the analyzed period at least ***22*** decisions were taken concerning the prisoners in Dnipro correctional colony No. 89, which is ***1,5%*** of all the decisions analyzed in Ukraine.

According to the analyzed data, at least ***12 prisoners*** died in this period in the colony before being released under pt. 2 of Art. 84 of the CC of Ukraine. Thus, among the persons concerning whom the proceedings for release due to illness were initiated, ***54,55 %*** , ***every other one***, died before receiving court decisions (for more details see Section 6).

Given the low number of all decisions from this colony and the high mortality rate during the court proceedings, we can assume that the procedure for release due to illness in this colony faces critical delays and obstacles, resulting in significant mortality among prisoners at this stage.

The report for 2021 states that the conditions of detention in the inpatient department of the hospital are unsatisfactory. The walls in the sanitary rooms are in terrible condition. They have peeling paint and fungus. Out of four toilets, one is in use because the others are broken.

***2.14. Vilniansk correctional colony No. 20***

The colony is located in the city of Vilniansk, Zaporizhzhia district, Zaporizhzhia region. This is a medium-security institution for men who have been imprisoned for the first time. The planned capacity of the institution is 900 people. A special feature of the institution is the presence of a psychiatric hospital.

Monitors visited the colony in 2020 and found that the cells lacked toilets. So in order to use the toilet, a prisoner has to ask the guard. The problem is further complicated by the fact that there is no junior medical staff in the institution and its function is performed by the prisoners themselves.

During the analyzed period at least ***21*** decisions were taken concerning the prisoners in Vilniansk correctional colony No. 20, which is ***1,43%*** of all the decisions analyzed in Ukraine.

***2.15. Sofiivska correctional colony No. 45***

The institution is located in the village of Makorty, Davledivska community, Kryvyi Rih district, Dnipropetrovsk region. This is a medium-security institution for men sentenced to imprisonment for a certain period. A special feature of the institution is the accommodation of persons with disabilities of the I and II groups who need constant medical supervision and rehabilitation. The planned capacity of the institution is 1202 prisoners.

The 2020 report states that the medical unit is located in a two-story building. The entrance to the medical unit is not equipped with a ramp. In front of the entrance there is a high porch with six steps. The side exit is equipped with a ramp, which is completely unsuitable for use by persons with disabilities. Doctors' offices and manipulation rooms are located on the first floor. The hospital's wards are located on the second floor. There is no elevator or special lifts. Monitors note that, despite the large number of sick prisoners in the institution, during the last three years no person was recognized as subject to release due to health conditions.

During the analyzed period at least ***15*** decisions were taken concerning the prisoners in Sofiivska correctional colony No. 45, which is ***1,02%*** of all the decisions analyzed in Ukraine.

**3. The influence of circumstances related to the role and positions of individual subjects of the proceedings on the final decision of the court**

Within the framework of the conducted research, one of the tasks was to identify possible connections that, from a statistical point of view, would help to understand the mechanisms of court decision-making. During the analysis of the received data, we came to the conclusion that such relationships exist regarding the subject composition of the proceedings.

***3.1. The subject of initiation of proceedings on release due to illness***

First of all, we analyzed how the status of the original subject of initiation of proceedings influences the final decision of the court. In this context, the proceedings were initiated by the administration of the prison, the prisoner or the defense attorney.

In the case where the case is initiated by the administration of the penal institution, a significant number of submissions were granted (at least ***75,10%*** of the submissions were granted and at least ***19,90%*** cases were dismissed).

Among the applications filed by the prisoners, the situation is almost the opposite – only ***25,85%*** of all the researched applications are granted, and ***70,74%*** are dismissed.

Approximately the same ratio is observed in cases initiated by a lawyer in the interests of a convicted individual – in ***20,15%*** the petitions were granted, and in ***75,37%*** dismissed.

We believe that such a diametrically opposed distribution of submission results may indicate the presence of a certain regularity concerning the subject of initiation of release proceedings.

***3.2. The influence of the prosecutor's position on the outcome of the trial***

An interesting regularity, which was consistently traced throughout the study, is the specific coincidence of the position of the prosecutor, which is recorded in the text of the decision, with the final decision of the court.

To determine the degree of correlation, we conducted a correlation analysis, as a result of which we obtained the following pairs of data.

|  |  |  |
| --- | --- | --- |
| Correlation between the prosecutor's position and the court's decision | Percentage of all decisions of a certain category | |
| Prosecutor supported and the court granted | 83,47% | % of all the granted applications |
| Prosecutor objected, but the court granted | 5,03% |
| Prosecutor objected and the court refused | 88,62% | % of all the dismissed applications |
| Prosecutor supported, but the court refused | 5,69% |

In general, according to our calculations, the percentage of coincidence of the court decision with the position of the prosecutor is at least ***82.05%*** of all cases, while the cases where the deviation of positions is clearly recorded are at least ***5.10%***.

Despite the percentage where it is impossible to determine a clear position of the prosecutor based on the text, in cases with a clear fixation, a tendency for the court to repeat the position held by the prosecutor is clearly visible, which raises the question of the extent of the prosecutor's influence on the course of the proceedings.

It is also indicative of the fact that in ***39.38%*** of all decisions where a court refused to grant the request, the court found that the prisoner's illness falls under the List of diseases that are the basis for submitting to the court the materials on the release of prisoners from further serving their sentence (Appendix 13 to the Procedure for the provision of medical care to those sentenced to imprisonment; hereinafter List of diseases), but the prosecutor was against granting the request, and the court refused the request.

At the same time, in ***44.14%*** of the cases described above, when refusing, the court referred to non-medical indicators (for example, the fact that the prisoner did not take the path of correction, has a lot of fines, etc.).

***3.3. Cases of non-submission of applications for dismissal due to illness by the prison administration***

As already mentioned above, although part 2 of Art. 84 of the CC of Ukraine does not establish the entity that has the right to submit an application for release from prison, Part 5 of Art. 154 of the CC of Ukraine still unambiguously assigns to the head of the penitentiary institution the duty to prepare and submit relevant materials to the court.

From a certain point of view, this approach can be justified by the vulnerable and limited condition of the prisoner in combination with the responsibility of the state represented by the prison administration for the care of such a prisoner.

However, within the framework of the conducted research, we found that in ***34.97%*** of the cases when the prisoner's illness falls under the List of Diseases, the application or petition was not submitted by the administration of the execution of punishments.

Moreover, from this array of cases, in ***44.86%*** of proceedings, the court released the prisoners due to illness.

Therefore, under such circumstances, in almost a third of cases, when there are even formal grounds for an appeal to the court, such an appeal from the administration either does not take place, or is accompanied by certain delays, which leads to the necessity of an appeal by the prisoner himself or his lawyer.

Having analyzed only the array of decisions, we believe that this practice does not comply with the provisions of Part 5 of Art. 154 of the Criminal Executive Code of Ukraine in view of the concept of positive obligations of the state concerning persons under its control.

**4. Analysis of the courts' use of references to separate legal acts and the circumstances of the case**

Within the conducted research, a separate direction was the analysis of the courts' use of references to individual legal acts and the circumstances of the case through the prism of their reflection in the final decision on the merits.

When conducting the relevant analysis, we singled out four key categories that in their own way influenced the court's decision: references to the List of Diseases, references to non-medical indicators, references to Resolution of the Plenum of the Supreme Court of Ukraine No. 8 of 28 September 1973, and references to the legal positions of the European Court of Human Rights (ECtHR).

The first three of the above categories will be analyzed in this chapter, and Section 5 is devoted to the use of ECtHR practice by the courts.

***4.1. Application by courts of reference to the List of diseases that are the basis for submitting the materials on the release***

The most frequent legal document referred to by the courts when issuing a decision is the List of Diseases - according to our calculations, the court referred to the List of Diseases in at least ***81.37%*** of all analyzed decisions. It is interesting that ***83.85%*** of all refusals also have a reference to the List of Diseases.

Speaking about the legal nature of this document, it should be noted that it is an appendix to the Procedure for the provision of medical care to individuals sentenced to imprisonment, which was approved by the joint order of the Ministry of Justice of Ukraine and the Ministry of Health of Ukraine No. 1348/5/572 dated 15 August 2014 (hereinafter the Procedure).

According to its target direction, as can be concluded from the text of the Procedure, this document is intended for use by employees of penal institutions and medical personnel of health care institutions during the decision-making process and preparation for sending an application for the release from prison.

Neither the Procedure, nor the List of Diseases, which is its appendix, contain any reference to the binding nature of the decision of the court on the merits. But at the same time, there is a situation in which, in a significant number of cases, courts refuse release on the grounds that the prisoner's illness "does not fall under the List of Diseases".

The following correlations can be cited to confirm this:

|  |  |  |
| --- | --- | --- |
| A combination of finding a disease in the List of Diseases and a court decision | Percentage of decisions in relation to the group (all granted, all refused) | |
| A disease is in the List of Diseases and the decision is "granted" | 90,87% | % of all the granted applications |
| A disease is not in the list of Diseases and the decision is "granted" | 1,98% |
| A disease is in the List of Diseases and the decision is "refused" | 47,38% | % of all the refused applications |
| A disease is not in the List of Diseases and the decision is "refused" | 44,15% |

Two conclusions can be drawn from this table:

* if the request is granted, the presence of a disease in the List of diseases is of decisive importance - there is a small percentage of those cases where the court made a decision to release the prisoner when the disease was not included in the list;
* in case of refusal, the number of cases where the prisoner's illness "falls" or "does not fall" under the List of diseases is almost the same. Therefore, considering the number of refusals to those prisoners whose diseases are in the List of Diseases, it can be assumed that in this situation the court relies on other arguments than the formal list of diseases.

That is, instead of making an assessment of the facts based on the condition of the prisoner and the individual circumstances of the case, many of which are part of the already established practice of the ECtHR regarding release due to illness, the courts continue to use an exhaustive list of illnesses, which does not yet have a direct obligation for the courts, as a "guide" concerning the release or refusal to grant a request.

Moreover, in our opinion, the application of the List of Diseases has the characteristics of being inconsistent with the principle of impartiality of application, since, on the one hand, the presence of a disease in the List of Diseases is an almost indisputable condition for satisfaction, when, on the other hand, the presence of such a disease in an exhaustive list does not yet mean release from punishment.

It should also be noted that in para. 61 of ***“Yermolenko v. Ukraine”*** ECtHR case *(application No. 49218/10)* The court has already drawn attention to the fact that, taking into account the absolute prohibition of torture, inhuman and degrading treatment, *it is not possible to assess the compatibility of the applicant's state of health with detention based solely on an exhaustive list of diseases*, without any consideration by national judicial authorities.

Taking into account the above, we would like to draw your attention to the fact that the currently existing method of law enforcement, which is mostly used by first-instance courts, in our opinion, does not correspond to the legal positions of the ECtHR and needs fundamental changes.

***4.2. Application by the courts of the Resolution of the Plenum of the Supreme Court of Ukraine No. 8 of 28 September 1973 and reference by the courts to non-medical arguments***

We consider it appropriate to display these two categories together because, according to our observation, they are closely related.

To our surprise, national courts in these decisions quite often directly refer to Resolution of the Plenum of the Supreme Court of Ukraine No. 8 of 28 September 1973 (hereinafter the Resolution No. 8), which is nowadays *almost 49 years old*.

In particular, among all the analyzed decisions, reference to Resolution No. 8 was present in at least ***30.66%*** of decisions. Moreover, in almost half (***47.85%***) of all refusals there is also a reference to this document of the Supreme Court of Ukraine of 1973. These statistics clearly give us the opportunity to state that even after almost 49 years, national courts still continue to use this document in their decisions, instead of the practice of the ECtHR, which should be applied by courts by virtue of Art. 17 of the Law of Ukraine "On the Implementation of Decisions and Application of Practice of the European Court of Human Rights" and part 5 of Art. 8 of the Criminal Procedural Code of Ukraine. That is why the question of researching references to Resolution No. 8 has become relevant.

In most cases, the rulings contain references to clauses 2, 3 and 5 of Resolution No. 8. After analyzing the content of these clauses, it is possible to single out certain theses that are used by the courts and that attract special attention:

* "*The fact that a convicted prisoner has a serious illness does not entail mandatory release from serving the sentence*". This norm in Resolution No. 8 was based on Art. 109 of the Correctional Labor Code of Ukraine, which expired in 2004, and Art. 408 of the Criminal Procedure Code of Ukraine in the version that has also long since expired. In our opinion, the application of provisions that were based on norms that have long since expired is illegal.
* "Deciding on the issue of release of persons who fell ill with a serious illness, except for persons with a chronic mental illness, *the court must not only proceed from the conclusion of the medical commission, but also take into account the gravity of the crime committed, the behavior of the prisoner while serving his sentence, his attitude to work, the degree of his correction, whether he evaded the prescribed treatment, as well as other circumstances*". In fact, this thesis contains a direct instruction to the courts on the need to study non-medical indicators along with medical ones.

Perhaps 49 years ago this was the correct approach to solving the issue of release due to illness, but today there are other legal positions, in particular, the legal position in the ECtHR decision "***Melnyk v. Ukraine***", where para. 94 states three criteria , which must be considered concerning the compatibility of the applicant's state of health and the conditions of his detention: *1) medical condition of the prisoner; 2) adequacy of medical care and assistance provided in prison conditions; 3) expediency of imprisonment in view of the prisoner's state of health.* These criteria in no way take into account non-medical indicators, such as, for example, the attitude to work of the prisoner, who may be unable to work due to his health.

* "The submission must contain the following information about the the prisoner: which court, when, under which law sentenced him; measure of punishment; the served sentence; *data on his behavior during the entire time of serving the sentence; information about past convictions; the degree of compensation for damages caused by the crime to individuals, legal entities and the state;* the disease from which he suffers - as well as the formulated request for the release due to the fact that the prisoner fell ill with a serious illness". In this thesis, as in the previous one, the question of researching the non-medical circumstances of the case is actually raised, which, in our opinion, does not correspond to the current practice of the ECtHR.

Through the prism of Resolution No. 8 and in other cases, courts also often refer to and examine the non-medical circumstances of the case and the identity of the prisoner. In particular, among all the analyzed decisions, in ***41.47%*** of all cases there is a reference to the study or consideration by the court of any non-medical circumstances related to the personality of the prisoner, his characteristics, behavior, attitude to work, etc. Moreover, among all refusals, references to non-medical indicators are present in ***41.08%*** of documents.

As already stated above, in our well-founded belief, having at our disposal the legal position of the ECtHR, formulated in the decision against Ukraine, where the criteria for assessing the circumstances of the case and solving the issue are specified, it is unlawful to use the 1973 document and refer to non-medical indicators.

**5. Analysis of application of the ECtHR practice by courts**

The European Court of Human Rights constantly issues new decisions concerning the problems of prison medicine in Ukraine. The table below shows the number of decisions against Ukraine in which the right not to be subjected to torture and cruel, inhuman or degrading treatment (in the field of prison medicine) was recognized violated and the number of victims in these decisions.

|  |  |  |
| --- | --- | --- |
| Year | The number of decisions v. Ukraine | The number of victims |
| 2014 | 1 | 1 |
| 2015 | 6 | 6 |
| 2016 | 4 | 4 |
| 2017 | 2 | 2 |
| 2018 | 4 | 4 |
| 2019 | 14 | 21 |
| 2020 | 6 | 6 |
| 2021 | 17 | 17 |
| first six months of 2022 | 2 | 4 |

Therefore, when analyzing judicial practice, it was separately taken into account whether courts apply the practice of the European Court of Human Rights (ECtHR) when considering the issue of release from punishment due to illness.

First of all, it is worth reminding about the status of the legal position of the ECtHR, that the courts apply the Convention and the practice of the Court as a source of law when considering cases in accordance with Art. 17 of the Law of Ukraine "On the Implementation of Decisions and Application of Practice of the European Court of Human Rights".

If we talk about the total number of cases that reference the decisions of the ECtHR, then their percentage is small - only ***5.57%***. In addition, even in the practice of the ECtHR, which is referred to in the decisions of the Ukrainian courts in cases of this category, which will be discussed a little later, a significant part of it is not specifically related to exemption from punishment for serious illness.

***5.1. Reference by the courts to the legal positions of the ECtHR concerning the issue of release from prison due to illness***

First of all, it should be mentioned that the references to the case "***Yermolenko v. Ukraine***" (*application No.* 49218/10) are almost absent in the decisions, however, this case against Ukraine must be applied by virtue of Art. 17 of the Law of Ukraine "On the Execution of Decisions and Application of the Practice of the ECtHR" and part 5 of Art. 9 of the CPC of Ukraine.

Going directly to the legal positions applied by the courts, we should start with the decision "***Oshurko v. Ukraine***" (*application* No*.* 33108/05), which was encountered 24 times during the study. At the same time, 14 proceedings had the same judge.

Usually, the provision is quoted that *authorities must comply with their positive duty to protect the physical integrity of persons deprived of their liberty, as part of their duty to supervise such persons and to prevent encroachments on their physical integrity, and that national authorities must respond properly for serious health problems of persons deprived of their liberty, otherwise, the prisoners are subjected to inhuman and degrading treatment prohibited by Article 3 of the Convention*.

The next most mentioned decision is "***Melnyk v. Ukraine***" (*application No. 72286/01*). In total, it was used by courts 20 times. It is often indicated that the violation of Article 3 of the Convention cannot occur only due to the deterioration of the health of the person concerned. Such a violation may be due to improper provision of medical care.

Less often, the courts used para. 94 of the Decision, which states three components that must be considered concerning the compatibility of the applicant's state of health and the conditions of his detention: 1) the prisoner's medical condition; 2) adequacy of medical care and assistance provided in prison conditions; 3) expediency of imprisonment in view of the prisoner's state of health. In our opinion, the use of the latter provisions regarding the components, in the context of the given case, is more appropriate when considering applications under pt. 2 of Art. 84 of the CC of Ukraine.

It is also worth noting that in these provisions there is absolutely no reference to the need to formally include the prisoner's illness in any list of such diseases - the court uses its own criteria to assess the need for the prisoner's release.

The third place is taken by the decision "***Riviere v. France***" (*application no. 33834/03*), the position was used 15 times. Courts use para. 62, which states that *Article 3 of the Convention does not specify the obligation to release a detainee on the grounds of health, it obliges the state to protect the physical integrity of persons deprived of their liberty, in particular, by providing them with the necessary medical assistance*.

The second last in terms of the number of mentions is taken by the decision of the ECtHR in the case "***Konovalchuk v. Ukraine***" (*application No. 31928/15*). The courts refer to the general provisions that *the ECtHR confirmed both systematic violations of the right of prisoners to medical assistance, lack of adequate treatment, and improper conditions of transportation, which was later recognized as a violation by Ukraine*. However, in one of the decisions, a question arises regarding the appropriateness of the reference, since the person was not sentenced specifically to deprivation of liberty.

The last place is occupied by two decisions - "***Kudla v. Poland***" (*application no. 30210/96*) and "***Keenan v. United Kingdom***" (*application no. 27229/95*), since each of them occurs 8 times.

The decision "***Kudla v. Poland***" is applied together with others in the context of general provisions for similar cases, namely that *the lack of adequate medical care during detention and the possibility of such detention in view of the applicant's state of health indicates a violation of the articles of the Convention for the Protection of Human Rights and Fundamental Freedoms, since such a person is actually subjected to torture or inhuman or degrading treatment, treatment or punishment*.

The legal position from the ***Keenan v. United Kingdom*** decision was used together with the ***Melnyk v. Ukraine*** decision, and as already noted above when describing the relevant decision, *violation of Article 3 of the Convention cannot occur only in connection with the deterioration of the health of the person concerned. Such a violation may be due to improper provision of medical care*.

As for other decisions of the ECtHR that were applied by national courts, there is no need to carefully study them, since they are used together with others and contain provisions similar in their content.

***5.2. Reference by the courts to the legal positions of the ECtHR, which were not used in the context of release due to illness***

Now let's turn to those decisions where, in our opinion, the ECtHR decisions mentioned by the courts were not used in the context of release on the basis of Part 2 of Art. 84 of the Criminal Code of Ukraine.

One of such examples was already given above when analyzing the decision "***Konovalchuk v. Ukraine***". Another example can be three decisions: "***Petukhov v. Ukraine (No. 2)***" (*application No. 41216/13*); "***Tkachov v. Ukraine***" (*application No. 39458/02*) and "***Scoppola v. Italy***" (*application no. 10249/03*). These decisions are applied collectively (in several resolutions), so it is appropriate to mention them together.

Those Resolutions where there are references to positions from these decisions, resolved the issue of release of a life prisoner from punishment, where other provisions of the CC of Ukraine were applied in addition to Art. 84. These decisions were applied by the court within the framework of issues related to life imprisonment, so it is quite possible to consider the above cases as having nothing to do with release due to serious illness.

In one of the other decisions, three ECtHR decisions were also applied, namely: "***Korobov v. Ukraine***" (*application No. 39598/03*); "***Ireland v. United Kingdom***"; "***Paul and Audrey Edwards v United Kingdom***" (*application No. 46477/99*)*.*

The first two specified cases were used precisely from the point of view of procedural aspects, namely, that *the court has the right to substantiate its conclusions only with evidence arising from the coexistence of sufficiently convincing, clear and mutually consistent conclusions or similar irrefutable presumptions of fact, that is, such that leave no room for doubt, as the presence of the latter is inconsistent with the standard of proof "beyond a reasonable doubt"*.

As for the case "***Paul and Audrey Edwards v. United Kingdom***", the content of the case concerned the violation of Art. 2 of the Convention, unlike the first two, which referred to Art. 3. From it, the position regarding the procedural aspect was also used, in particular, that *competent authorities should always make serious efforts to ascertain the circumstances of the case and should not be guided by rash or unfounded conclusions for investigation or as a basis for decision-making*. Thus, it could be stated that the cases mentioned above were not used accurately in the context of the release due to illness.

Concluding the review, we would like to turn to the decision of the Shevchenkivsky District Court of the city of Chernivtsi, where the following four cases were used: "***Selmuni v. France***" (*application No. 25803/94*); "***Matyar v. Turkey***" (*application No. 23423/94*); "***Labita v. Italy***" (*application No. 26772/95*) and "***Ireland vs Great Britain***". All the specified decisions, one of which was present in the above decision, refer to Art. 3 of the Convention. However, the national court used only general provisions regarding the right protected in the specified article.

***5.3. The influence of the legal positions of the ECtHR on the outcome of the court decision***

An important question that was raised within the scope of this study is how to identify the impact of the use of ECtHR decisions by the national courts on the outcome of consideration of specific cases.

Therefore, in ***69.51%*** of all decisions where there is a reference to the legal position of the ECtHR, the court released the prisoners due to illness.

Moreover, if we take into account only the legal positions that directly relate to release due to illness, then in ***76%*** of all decisions with a reference to the legal position of the ECtHR "on the merits" of the case, the prisoners were released from serving their sentence.

Such statistics allow us to conclude that reference by the courts to the legal positions of the ECtHR is a good trend in view of the results of the rendered decisions, which contributes to increasing the level of protection of prisoners against violations of Art. 3 of the Convention. However, it would be an exaggeration to say that such mention of individual legal positions in most cases had a significant impact on the result, rather it should be agreed that the influence is subsidiary.

In summary, we can say that national courts are not very willing to apply the practice of the ECtHR when considering applications for the release of prisoners due to illness. In the vast majority of cases, the same points of decisions are applied, that is, it is possible to ascertain the "pattern" of their use. In the studied category of cases, the courts sometimes apply positions that relate to the general provisions of certain articles of the Convention (mainly Article 3). The overall impact on the outcome of the review, as noted, is subsidiary in nature. However, in any case, the application of the practice in general is a positive phenomenon, and increasing the quantitative level of its use can be a good trend to granting more applications.

**6. Analysis of proceedings in cases where the prisoners died before receiving the court's decision**

During the research of judicial practice, special attention was paid to those decisions where prisoners, in respect of whom the question of their release due to a serious illness was raised, died before the day of the final consideration on the merits.

According to the researched data, a total of 65 decisions were recorded, where it was stated that submissions (applications, petitions) remain unconsidered by the court due to the death of the prisoner. This number of cases is ***4.42%*** of all investigated cases.

Within the framework of this report, in our opinion, it will be relevant to focus on two important indicators, namely the duration of the proceedings from the date of submission of the application, as well as the subject of the submission of the application for release.

Regarding the duration of the case consideration, we conducted a cluster analysis of all cases, the results of which are shown in the table:

|  |  |  |
| --- | --- | --- |
| Time of consideration | Number of cases | Percentage of all the cases when the prisoners died |
| under 15 days | 22 | 33,85% |
| 16-30 days | 16 | 24,62% |
| 31-60 days | 11 | 16,92% |
| 61-90 days | 1 | 1,54% |
| more than 90 days | 3 | 4,62% |
| ***Total\**** | ***53*** | ***81,54%*** |

*\*It should be noted that the number of decisions in the above-mentioned table does not correspond to the data on their total number, which is due to the closure of access to the registers, as a result of which it is impossible to establish the date of receipt of the case. In particular, data from the Kherson and Kharkiv regions were not included.*

Therefore, in the majority of cases, the consideration from the moment the application was submitted to the moment when the person died was no more than 30 days.

If we talk about the "fastest" trial, then this is the decision of the Vinnytsia District Court, where the prisoner died the day after the application was submitted by the administration of the prison. There are rare cases when the number was between 3 and 7 days.

Due to the lack of more specific data in such decisions regarding the state of health of the prisoners, since the courts are limited only to ascertaining the fact of the death of the convicted person, it is extremely difficult to draw conclusions about how timely such statements were given to the court, but it is quite reasonable to assume that most likely the state of the prisoner made it necessary to initiate this issue earlier.

Turning to the cases that have been considered for the longest time, three decisions should be singled out among them, which are contained in the table in the "more than 90 days" line.

According to the decision of the Shevchenkivsky District Court of the city of Lviv, the application was submitted by a lawyer on 7 May 2020. The Resolution itself was adopted on 10 August 2021, that is, ***460 days*** have passed.

In another case, also of the Shevchenkivsky District Court of Lviv, the proceedings were closed after ***273 days***. At the same time, the fact that a few days before, the defense attorney independently submitted an application to close the proceedings due to the death of the client is quite interesting.

The third case was considered by the Irpin City Court of the Kyiv Region. ***95 days*** passed from the moment of submission of the petition to the moment of leaving it without consideration. It should be emphasized that in all the above-mentioned decisions, *the issue was initiated either by the prisoner himself or by his lawyer*.

Regarding the number of days for consideration, it is also worth noting the average period of time depending on the subject of submitting the application.

Meaning that, almost three times more time passed from the moment of submission of the application to the closing of the proceedings by the court due to the death of the prisoner when this issue was initiated by the prisoner or his lawyer, which makes it possible to draw a cautious conclusion that if the reasonable terms of consideration of the application were observed, the death of the prisoner could have been avoided.

Also, this ratio, combined with the above information about the speed of consideration of individual cases, leads to the assumption that when the prison administration files an application concerning a prisoner who is on the verge of life and death, the consideration of the case is faster, in order to reduce the probability of death of the prisoner under the jurisdiction of the penitentiary institution.

According to the results of the data collected as part of the research, when the prisoner died, in ***60%*** of cases the issue was initiated by the administration itself. In addition, for understanding, it is worth citing the general statistics of the entire study, according to which the administration appealed to the court in ***52.96%*** of all cases. Thus, it is impossible to claim a significant difference in terms of percentage.

In addition, we provide data on institutions from which applications for release were received, and accordingly, the prisoners died before the case was considered.

The Dnipro Correctional Colony No. 89 is in the first place in terms of the number of such cases. Kherson Correctional Colony No. 61 is the second. The third place is taken by two institutions - Stryzhavka Correctional Colony No. 81 and Bucha Correctional Colony No. 85, where nine such cases were recorded each.

Summarizing the above, it is worth pointing out the following. The total number of cases where the prisoner died before receiving the court's decision amounted to 4.42%, but even this number is very large, since the prisoner’s death may indicate the state’s violation of its obligations.

As for the reasons for such terrible consequences in individual proceedings, it could be assumed, on one hand, that the reason is the overly lengthy consideration of those applications that were initiated by the prisoners or their lawyers, and, on the other hand, on the contrary, the representatives of the administration themselves applied too late, as evidenced by the presence of cases, where death occurred the next day or within a few days after the application was submitted.

Dnipro Correctional Colony No. 89 is the state penitentiary institution, from which applications for release due to serious illness were most often received, and the prisoners died before the final decision of the court.

**Conclusions and recommendations**

Having analyzed all of the above, we reached the following conclusions and recommendations.

A significant number of all issued decisions concern the prisons, during the monitoring of which the experts of the Kharkiv Human Rights Protection Group noted violations of human rights, in particular, related to improper conditions (including sanitary and hygienic) of detention and inadequate quality of treatment. In various institutions, the specific circumstances varied, but the fact that the monitors discovered violations in each of the prisons was a regularity. That is why, in our opinion, improving the conditions of detention and the level of medical care provided can have a positive impact on the improvement of the situation with maintaining of the health of prisoners.

Prison administrations, in our opinion, should be more careful about monitoring the state of health of prisoners, which is manifested not only in the need to independently apply to the court with a petition for release, when relevant grounds are revealed, but also not to delay the very fact of sending the petition. We believe that any latent obstacles that may arise within this process must be removed.

In our opinion, national courts should move away from the practice of applying "template" decisions and referring to an exhaustive list of diseases, which, moreover, is not binding on them. The replacement of completely outdated practices enshrined in Resolution No. 8, which was adopted in 1973, with the application of the legal positions of the ECtHR, which today are sufficiently diverse and detailed, will also have a positive effect. Such an approach will benefit not only individual proceedings, but also the entire process of Ukraine's implementation of ECtHR decisions.

The KHPG supports active communication with the Committee of Ministers of the Council of Europe, including concerning the case group "Nevmerzhytskyi v. Ukraine", where the issues of prison medicine are raised. We believe that the Government Commissioner for ECtHR cases should exercise his powers more effectively in order to stimulate the work of the Supreme Court in bringing judicial practice in line with the requirements of the Convention, including through the procedure for the execution of ECtHR decisions, which is enshrined in law. In particular, the legal positions of the Court in such categories of cases should be clearly stated in the analytical reviews provided for in Art. 14 of the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the ECtHR", in particular, the legal position in the case "Yermolenko v. Ukraine" (application No. 49218/10).

The question of the death rate of prisoners who were unable to use the stipulated right to release should be an indicator of the functioning of the entire procedure. We are confident that speeding up the processing of cases, combined with an earlier application of the administration to court, can save, or at least prolong, someone's life. In any case, mortality is an indicator that allows to assess the state of human rights compliance as a whole, and therefore the systematic implementation of a set of measures aimed at reducing its level can have a positive effect on all related areas of human rights protection.