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Visual surveillance of a person: the legality issue

Nadzór wzrokowy osoby: kwestia legalności

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Abstract: The relevance of the study stems from the legal ambiguity surrounding specific aspects of visual surveillance utilised by law enforcement agencies, journalists, private detectives, and other individuals with a need for it. The purpose of the study is to identify indicators that can differentiate between legal and illegal covert visual surveillance of individuals in public spaces, to establish the circumstances under which such surveillance should be deemed a criminal offence, define the specific aspects of documenting this offence, and explore methods of proving the guilt of those responsible. Historical-legal, formal-legal, logical-normative, logical-semantic, sociological and statistical research methods are applied in the study. The criteria for the legality of covert visual surveillance of a person in publicly accessible places are: its conduct by authorised subjects (investigators or employees of operational units), implementation only within the framework of criminal proceedings (or proceedings in an intelligence gathering case), the existence of a decision of the investigating judge on permission to conduct visual surveillance of a specific person, strict compliance

with the requirements of the Criminal Procedure Law regarding the procedure for conducting visual surveillance and restrictions established by the decision of the investigating judge. It is found that representatives of civilian professions can conduct visual surveillance in publicly accessible places only in an open way. Covert visual surveillance of a person to collect information about them constitutes a criminal offence consisting in violation of privacy. To bring illegal observers to criminal responsibility, factual data indicating the purpose of visual surveillance (collecting confidential information about a person), motives, time, place, means of committing the crime, and other circumstances are collected during the pre-trial investigation. The practical value of the paper is the possibility of using the obtained data to prevent illegal actions of private detectives, journalists, and other entities who secretly collect information about a person through visual surveillance, and to ensure effective investigation of such activities.

Keywords: confidential information, covert recording, journalistic investigation, private detective, compliance with the rule of law

Abstrakt: Znaczenie badania wynika z niejasności prawnej dotyczącej konkretnych aspektów nadzoru wizualnego wykorzystywanego przez organy ścigania, dziennikarzy, prywatnych detektywów i inne osoby, które tego potrzebują. Celem badania jest identyfikacja wskaźników pozwalających na rozróżnienie legalnej i nielegalnej ukrytej inwigilacji wizualnej osób w przestrzeni publicznej, ustalenie okoliczności, w których taka inwigilacja powinna zostać uznana za przestępstwo, zdefiniowanie konkretnych aspektów dokumentowania tego przestępstwa oraz zbadanie metody udowodnienia winy osób odpowiedzialnych. W opracowaniu stosowane są metody badań historyczno-prawnych, formalno-prawnych, logiczno-normatywnych, logiczno-semantycznych, socjologicznych i statystycznych. Kryteriami legalności tajnego monitoringu wzrokowego osoby w miejscach publicznie dostępnych są: jego prowadzenie przez uprawnione podmioty (śledczych lub pracowników jednostek operacyjnych), realizacja wyłącznie w ramach postępowania karnego (lub postępowania w sprawie gromadzenia danych wywiadowczych), istnienie postanowienia sędziego śledczego o wyrażeniu zgody na prowadzenie obserwacji wizualnej konkretnej osoby, ściśle przestrzeganie wymogów Kodeksu postępowania karnego dotyczących trybu prowadzenia obserwacji wzrokowej oraz ograniczeń ustanowionych decyzją sędziego śledczego. Ustala się, że przedstawiciele zawodów cywilnych mogą prowadzić kontrolę wzrokową w miejscach publicznie dostępnych jedynie w sposób jawny. Ukryty monitoring wzrokowy osoby w celu zebrania informacji na jej temat stanowi przestępstwo polegające na naruszeniu prywatności. Aby pociągnąć nielegalnych obserwatorów do odpowiedzialności karnej, w trakcie dochodzenia przygotowawczego zbierane są dane faktyczne wskazujące cel nadzoru wzrokowego (zebranie poufnych informacji o osobie), motyw, czas, miejsce, sposób popełnienia przestępstwa i inne okoliczności. Praktyczną wartością artykułu jest możliwość wykorzystania uzyskanych danych do zapobiegania nielegalnym działaniom prywatnych detektywów, dziennikarzy i innych podmiotów, które w tajemnicy zbierają informacje o osobie poprzez monitoring wizyjny, i zapewnienia skutecznego prowadzenia dochodzeń w sprawie takich działań.

Słowa kluczowe: poufna informacja, tajne nagranie, śledztwo dziennikarskie, prywatny detektyw, przestrzeganie praworządności.

1. Introduction

Visual surveillance of a person in publicly accessible places is an effective method of obtaining and recording various (including confidential) information about such a person. Therefore, it is actively used not only by law enforcement officers, but also by representatives of other professions. Thus, numerous television programmes and publications on the Internet resources indicate that visual surveillance is practised by journalists (as part of conducting investigative journalism). Naturally, visual surveillance is a common practice for detective agencies, debt collection companies and security firms. Sometimes lawyers and their assistants use visual surveillance to obtain evidence (or information that allows them to obtain evidence) in favour of their clients. In some places, individuals themselves resort to visual observation to establish the social circle of their children, identify facts of marital infidelity, expose secrets of their relatives, organise ‘random’ acquaintance with a certain person, and so on.

The legality of these activities is often justified by a socially useful goal (or the absence of harm), and the right of everyone to freely collect, store, use and disseminate information orally, in writing or in any other way of their choice (Part 2 of Article 34 of the Constitution of Ukraine).

Nevertheless, Part 2 of Article 32 of the Constitution of Ukraine provides that it is not allowed to collect, store, use and distribute confidential information about a person without their consent, except in cases defined by law, and only in the interests of national security, economic welfare, and human rights. Such cases, in particular, are provided for by the law of Ukraine “On intelligence gathering activities” and the Criminal Procedure Code of Ukraine (CPC).

The qualification of actions performed by subjects of public and private law to conduct covert visual surveillance of individuals in publicly accessible areas, and the legal basis for collecting information through this method by professionals from different fields and ordinary individuals, pose certain concerns.

The aim of this paper is to determine criteria for the legality of covert visual surveillance of a person in publicly accessible places, the circumstances under which it should be considered an offence, methods for detecting and documenting such an offence, algorithms for actions to bring observers to legal responsibility and prove their guilt.

2. Literature review

Today, studies on the issue of conducting surveillance of a specific person, a certain circle or a wide range of people are conducted in various areas.

Thus, many papers have recently been devoted to the covert acquisition of information using various means of observation (in the broad sense). Firstly, this is surveillance using computer technologies that allow law enforcement and intelligence agencies to remotely penetrate remote electronic information systems, determine their location, take information from them and gain access to their cameras and microphones (Abdelhameed, 2019: 85-97). Research on these issues is conducted at various levels, covering the validity and expediency of restricting the rights of a suspect accused in criminal proceedings (Rojszczak, 2020: 1-29), tools for monitoring such restrictions (Galagan et al., 2021: 1-18), the justification of total monitoring of communication data in telecommunications networks from the standpoint of ensuring a balance between the need for interference in human rights and the interest of the state and society in ensuring law and order (Murray and Fussey, 2019: 31-60), the legality of using software that allows law enforcement agencies to monitor a considerable number of objects not only in their own country but also abroad (Warren, Mann and Molnar, 2020: 357-369; Pegasus Project, 2022: 85).

As for purely visual surveillance, there is currently no shortage of scientific attention paid to the legality of open use of video cameras for targeted surveillance of specific places. In particular, this refers to the establishment by employers of technical means of visual control of employees (Kravchenko, 2020: 114-125; Goral and Tyc, 2020: 255-261). Actively studied issues are the use of surveillance camera networks by the police in publicly accessible locations (Widen, 2008: 1688-1697), information from which is processed with artificial intelligence (Montasari, 2023: 81-114) and used to investigate crimes (Jung and Wheeler, 2023: 143-164), identify persons involved in criminal offences and determine their location (Bragias, Hine and Fleet, 2021: 1637-1654), detect signs of carrying cold and hand-held firearms (Boukabous and Azizi, 2023: 1630-1638; Yadav, Gupta and Sharma, 2023: 118698; Abdallah et al., 2023: 65-78) and others.

Nevertheless, the issues of such a conventional method of police activity as physical (direct) covert surveillance of a person in modern conditions are understudied. This area is represented by individual studies of foreign researchers on legal regulation (Loftus, 2019: 2070-2091) and tactics (Dahl, 2022: 2020-2036) of this type of observation.

In Ukraine, the vast majority of studies devoted to visual surveillance, which is secretly conducted by law enforcement agencies to counteract crime, are classified as “secret” and subject to restricted access. This is due to the fact that these studies disclose the organisation and tactics of such surveillance, which, according to the current regulations, determines their classification as information constituting a state secret.

Until recently, the results of studies related exclusively to the history of the development of covert visual surveillance as a method of informational and cognitive activity of law enforcement agencies (Shendrik and Voytovych 2009: 57-60; Chisnikov, 2010: 322-323; Zhaldak, 2014: 327-334) or its legal regulation (Hribov, Yemets and Rusnak, 2020: 8-21; Prygunov et al., 2020: 47; Knyazev, Chernyavskiy and Hribov, 2021: 8-20) were openly published. In this regard, legal research is aimed at improving the legislative regulation of conducting covert visual surveillance by law enforcement agencies and determining criteria and methods for ensuring the admissibility of evidence obtained as a result of such surveillance.

Recently, the findings devoted to the professional conduct of covert visual surveillance by representatives of the criminal world for law enforcement officers, including the means of detecting and stopping such surveillance, have been published in open sources (Prygunov et al., 2020: 47; Prygunov, Tronko and Greenin, 2022: 326). An analysis of the content of these findings allows stating that they are a means of bringing closer a wide range of organisational, technical, tactical and psychological foundations of hidden visual surveillance in publicly accessible places. Through the disclosure and explanation of these foundations, the authors of the studies have formed a set of theoretical knowledge that in practice allows identifying hidden visual observation. Therewith, researchers do not submit a legal assessment of either the use of individual techniques and means of hidden visual observation, or the specified covert activity in general. Thus, currently, in Ukraine, any interested person has access to a professional method of organising and conducting covert visual surveillance, including using modern technologies.

3. Presentation of the main content

The conducted research allows discarding any doubts about the legality of visual surveillance of a person, secretly conducted in publicly accessible places by an investigator or employees of operational units within the framework of criminal proceedings on a grievous or extremely grievous crime (or proceedings in an intelligence gathering case on such a crime) based on a decision of the investigating judge. Meanwhile, it is also legitimate to use photographing, video recording, and special technical means for surveillance, as well as tracking those with whom the object of surveillance comes into contact before the possibility of their identification arises (if this is provided for by a court ruling).

All these actions are regulated by Article 269 of the CPC of Ukraine. An analysis of the application of the provisions of this regulation shows that in practice, sometimes there are certain violations of the procedure for conducting this

covert investigative (search) action and the corresponding intelligence-gathering event. Non-compliance may concern the requirements of the decision of the investigating judge regarding the time and range of objects of visual observation and the means used in this case. There are also cases of substitution of visual surveillance of a person (permitted by the investigating judge) by the conduct of other covert investigative (search) actions, in particular, audio and video monitoring of a person, which is interference in private communication.

Detection of such cases in judicial practice often leads to recognition of the received evidence as inadmissible, which forces the court to make a decision on the case based on other evidence. However, attempts by surveillance objects and their lawyers to hold observers accountable for interference in private life have not been successful. This practice can be considered quite acceptable due to the impossibility of completely avoiding procedural errors by operational units during the proceedings in an intelligence-gathering case and by investigators during a pre-trial investigation. Liability for such errors should arise only if they have serious consequences for the victim.

Procedural errors and minor violations of the CPC of Ukraine when conducting visual surveillance should be clearly distinguished from the purposeful deliberate use by law enforcement officers of their capabilities for groundless, illegal, contrary to one's interests surveillance, including in compliance with a clearly criminal order.

An exact example of the execution of such an order is contained in the decision of the Supreme Court of 2 July, 2021, in case No. 1-368/11, (criminal proceedings No. 11561565611561561) on charges of the former head of the operational service department of the MIA of Ukraine in a number of extremely grievous crimes. According to the information contained in the resolution, the latter organised illegal visual surveillance of a journalist of the online publication *Ukrayinska Pravda*, and later – his abduction and murder. The Supreme Court upheld the decisions of the courts of first and appellate instances to find the accused guilty and impose a final sentence of life imprisonment.

Counteraction to such clearly criminal acts of law enforcement officers is conducted by means of the prosecutor's supervision, and departmental, judicial and public control (Galagan et al., 2021: 1-18). Nevertheless, the violations of the Criminal Procedure Law that do not contain elements of a criminal offence or crime and do not entail a significant violation of human rights and freedoms should not be overlooked. For example, it concerns delays on the part of the prosecution in appealing to the investigating judge for permission to conduct surveillance on a person when it was initiated under Article 250 of the Criminal Procedure Code of Ukraine until the corresponding ruling is issued; untimely preparation and submission of protocols of visual surveillance to the prosecu-

tor, mistaken tracking of the wrong person due to incorrect identification, the use of video recordings and photography without proper authorisation, and the failure to disclose to the defence party, under Article 290 of the Criminal Procedure Code of Ukraine, the protocols of visual surveillance on a person and the documents that served as the basis for its conduct, etc.

Each such case should find its own assessment and appropriate response from representatives of the prosecutor's office and heads of pre-trial investigation bodies and operational units. After all, when conducting covert visual surveillance of a person, investigators and operational officers must adhere to the principle established by Article 19 of the Constitution of Ukraine: "State authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine."

Notably, a different principle applies to subjects of private law: "Everything that is not expressly prohibited by law is allowed" (Karnauch, 2020: 31-36). National legislation does not directly prohibit visual surveillance, including covert surveillance. This is absolutely justified. After all, visual observation is quite a natural activity for every person. It is one of the main means of learning about the surrounding world by a child. It is used by representatives of various branches of science in their research. Using visual observation, information is obtained that is necessary for understanding the processes and phenomena that take place in nature and society in the behaviour of individuals. This is often done to further manage these processes, phenomena, and behaviours of people.

Sometimes visual observation is covert so that those who are being watched do not know about it. In addition to the examples given above, parents often secretly observe how their child plays to understand the features of their imagination. Through a door eyepiece (or video camera), people often watch what is happening at the entrance. Through the window, many people secretly follow the events unfolding in the courtyard, on the street. Such activities cannot be considered illegal, they cannot be banned, because they are natural.

For the most part, hidden visual observation is used not out of ordinary curiosity, but for the purpose of planning further actions. It is reasonable to consider it precisely as a means of obtaining information about a person. A combined analysis of Part 2 of Article 32 and Part 2 of Article 34 of the Constitution of Ukraine gives grounds to assert that everyone has the right to collect any information, with the exception of confidential information about a person. Therefore, to achieve the purpose of the study (in terms of determining the possibilities of conducting surveillance by subjects of private law) it is necessary to conduct a comparative analysis of the information that can

be obtained by conducting hidden visual surveillance and the legal content of “confidential information about a person”. In other words, it is necessary to determine whether all (any) information that can be obtained through hidden visual surveillance is confidential information about a person, that is to apply the criteria for attributing certain information to confidential.

The analysis of intelligence-gathering, investigative, judicial, and detective practice shows that using hidden visual surveillance, it is possible to obtain and/or verify such information about a person as: type of activity, place of work and residence, places visited on permanent basis, daily routine, typical routes of movement, habits, time of stay in a particular place, meetings with specific persons, contacts (friendly, business, family and other ties), availability of real estate (garages, cottages, apartments, houses), availability of vehicles (cars, motorcycles, boats, yachts, etc.) and their storage locations, etc.

This information, admittedly, can be obtained in another way. In particular, by investigating the object’s pages in social networks, exploring open databases, secretly encrypted (undercover) questioning of them or their environment, as well as by establishing confidential cooperation with persons who are part of the object’s social circle. Each of these methods has its own advantages and disadvantages in comparison with visual observation. Yet if there is an urgent need to collect information about a particular person, all these methods are usually used in a comprehensive manner. Meanwhile, visual observation allows one to: continuously follow the person over a certain period of time, wait and see a certain planned event, making sure that it has occurred.

Based on the above, all information about an individual obtained through covert surveillance is confidential. Part 2 of Article 11 of the law of Ukraine “On information” clarifies the constitutional prohibition of collecting confidential information about a person by determining its content: “Confidential information about an individual includes, in particular, data on one’s nationality, education, marital status, religious beliefs, health status, address, date and place of birth” (the construction of the above regulation provides that this list is not exhaustive). In addition, Part 2 of Article 21 of this law provides: “Confidential is information about an individual, information access to which is restricted by an individual or legal entity, except for subjects of power, and information recognised as such on the basis of law.” Thus, part one of the above sentence establishes that any information about an individual is confidential.

Nevertheless, Part 1 of Article 11 of the law of Ukraine “On information” stipulates that personal data refers to information or a collection of information pertaining to an individual who is either identified or can be specifically identified. Therefore, in the case of covert visual surveillance of an unidentified person (observers do not know their passport data), the information collected

during surveillance is not confidential and is generally not information about the person. Therefore, such surveillance is legitimate, but only until the moment when the observers (or the organisers of the surveillance) become aware of information that will allow them to specifically identify the person (the state license plate of the car belonging to them, the place of registration of residence, the place of work and position, etc.).

Additionally, according to the second sentence of Part 2 of Article 21 of the Ukrainian law “On information”, confidential information can be shared upon the request or with the consent of the respective individual, following the procedure specified by them and subject to the conditions set by them, unless otherwise prescribed by law. In connection with the above, it can be stated that, if a person appoints and holds a meeting in a publicly accessible place (or visits a store, makes purchases there, moves by public transport, walks with friends in the park, etc.), they should be aware that this fact will be seen by other persons present in this place. Thus, such behaviour can be regarded as a conscious admission of the possibility of spreading information about the actions and behaviour of a person in a publicly accessible place. Such an assumption cannot be identified with desire, but it can be considered a prediction of the conditions for the dissemination of information.

One way or another, finding a person in a publicly accessible place makes it possible for other people who are there to observe them. Observers can openly look at the person from a distance of visual contact, or follow them unnoticed (without attracting attention). In both cases, observers cannot be accused of collecting confidential information about a person solely based on such behaviour. They can always provide their own justification for their whereabouts and actions, attributing them to coincidental circumstances or deriving aesthetic enjoyment from observing various objects in the vicinity, such as cars, architectural structures, plants, animals, and so on, rather than focusing on observing specific individuals. Moreover, observers are not required to explain anything to anyone, since there is a natural right of every person to look around while in a public place. Only if it is proved that the observers set themselves the goal of collecting information about an individual, their activities can be recognised as illegal.

One of the proofs of the illegal collection of information about a person through covert visual surveillance may be the use of photo and video recording tools for this person. If the observation is hidden, the visual information recorded during it will also be hidden. Based on the regulations of the legislation and numerous decisions of the Supreme Court, it can be noted that the covert recording of a specific person (their actions, behaviour, contacts, movements, places of visit, etc.) using technical means is possible only by subjects author-

ised to perform intelligence gathering activities and pre-trial investigation and exclusively based on the decision of the investigating judge and in accordance with the procedure provided for by law.

In other cases, these actions constitute the objective side of a criminal offence under Article 182 of the Criminal Code of Ukraine “Violation of privacy”. Part 1 of this Article establishes a penalty of up to three years of restriction of freedom for illegal collection, storage, use, and dissemination of confidential information about a person. If such actions are committed repeatedly, or if they have caused considerable damage to the rights, freedoms, and interests of a person protected by law, the penalty may reach five years in prison (Part 2 of Article 182).

The examination of judicial precedents regarding the application of this criminal law provision revealed that the prosecution, among other methods, establishes the culpability of individuals involved in the unlawful practice of covert visual surveillance by presenting photographic and video evidence obtained from the individuals under surveillance. The very presence of such materials in possession of the accused can be considered evidence not only of illegal storage, but also of collecting confidential information about a person through covert visual surveillance.

Thus, according to the verdict of the Kovel City District Court of the Volyn region of 3 February, 2022, in Case No. 159/4835/19 (criminal proceedings No. 42017030000000371), Vovk, guided by the motive of hostile relations with Melnyk, violating the right of citizens to privacy, contrary to the Constitution of Ukraine, the law of Ukraine “On information”, received and stored at his place of residence, video materials for 06.05.2017, which reflect the observation of the house with the adjacent territory where Melnyk and his family members live. The court of first instance found Vovk guilty of committing a criminal offence under Part 1 of Article 182 of the CC of Ukraine, namely intentional illegal collection and storage of confidential information about a person.

In addition, evidence of illegal collection of information about a person through visual surveillance can be handwritten records of observers about the movement of an object, their meeting, place of visit, the testimony of witnesses, victims, customers, organisers and perpetrators of a criminal offence. Such evidence is contained in the criminal proceedings registered in URPI as No. 42013170110000064, which were considered by the Primorsky District Court of Odesa on 11 December, 2018 (Case No. 522/1290/14-K). The materials of the case indicate that the Senior Operational Officer of Special Assignments of the Operational Service Department of the MDMIA of Ukraine in Odesa Oblast, Husak, for selfish motives, received a private assignment from a little-known person named Lysytsia to conduct unlawful visual surveillance on Zhuk. As

payment for completing this assignment, the Husak received 400 US dollars from Lysytsia. While running errands, the latter recorded Zhuk's contacts, his car, the places he visited, and took covert photos and videos of the object of surveillance.

Furthermore, together with another employee of the Operational Service Department of the MDMIA of Ukraine in Odesa Oblast, Husak G.G., based on a private assignment from an unidentified individual, conducted unlawful visual surveillance on Sokol for several days from 07:00 to 17:00. During this time, they documented the contacts and places visited by Sokol. Evidence of this, among other things, was the photographs and video recordings of the Sokol, and handwritten notes on his movements around the city. The case includes evidence of other instances of unlawful covert surveillance, which were accompanied by covert questioning and the use of an employee identification card from the company "Odesaobenergo" with a photograph of Husak (under a different person's name). According to orders and instructions marked "confidential", Husak was supposed to use the identification card exclusively for official duties.

Thus, the use of any additional (except for covert visual surveillance) methods and means of collecting information about a person, such as a covert survey of citizens using cover documents, is additional evidence of the commission of a criminal offence under Article 182 of the CC of Ukraine. This applies, in particular, to the sound recording of conversations of the object of observation. Thus, by the verdict of the Lutsk City District Court of the Volyn region in case No. 161/19355/19 (criminal proceedings No. 2201803000000157), the representative of the detective agency "Private detective Lutsk" Solovey was found guilty of committing criminal offences under Part 1 and Part 2 of Article 182 of the CC of Ukraine. The latter, out of self-serving motives (8,400 Hryvnias), received and fulfilled an order for visual surveillance and audio recording of Chyzhik's conversations. While conducting the aforementioned assignment, Solovey positioned himself near the entrance and inside the café "Videnska kava" located at 24 Kryvyi Val Street, Lutsk. He visually observed the meeting between Chyzhik Ch.Ch. and another person, and recorded their conversation using a black device resembling a USB flash drive, which had foreign language inscriptions such as "USB Disk Recorder", "REC", "STOP", and "MIC". According to the conclusion of the expert from the Volyn RDEFC of the MIA of Ukraine, document number 60 dated 15 October 2019, the device is an electronic storage device with a digital voice recorder function. By using this device, Solovey engaged in the unlawful collection and storage of confidential information about an individual. Thus, in this case, the violation of privacy turned out to be not only in covert visual surveillance of a person but also in interference in private

communication, which greatly simplified the task of proving the guilt of the accused to the prosecution.

Accordingly, despite the lack of legal grounds, there are hundreds of private detective agencies in Ukraine that openly advertise their services on the Internet. Among other things, they offer visual surveillance and counter-surveillance (surveillance of observers). In many countries of the world, private detective practice is common and legal. Its legal regulation is characterised by a clear rationing of the list of permitted methods and means. This practice is the subject of studies aimed at determining the effectiveness and improvement of this type of activity (Atkinson, 2023: 95-111; Button et al., 2023: 150-169).

In Ukraine, as in other countries of the world, there is an objective necessity to provide private individuals with detective services. Therefore, several draft laws on private detective activities were submitted to the Verkhovna Rada of Ukraine, based on the results of research by Ukrainian legal researchers (Anatolii et al., 2020: 421-435). Yet, currently, there are no legal grounds for private detective activity in Ukraine, and the subjects who conduct it are at risk of being exposed and brought to criminal responsibility. Thus, on 20 March 2023, by the verdict of the Holosiivskiy District Court of Kyiv (Case No. 752/16495/22; criminal proceedings No. 22022101110000493), Puhach was brought to criminal responsibility under Part 2 of Article 359, Part 1 of Article 361-2, Part 2 of Article 361-2 of the CC of Ukraine. The latter established a detective agency called “Kyevscoe Detektyvnoe Ahenstvo” in Kyiv. This agency specialises in providing unlawful services to an unspecified group of individuals, including unauthorised access and extraction of information from state and law enforcement databases, engaging in illegal operational and investigative activities (covert surveillance, installation of specialised technical surveillance equipment in premises, conducting audio monitoring, gaining unauthorised access to citizens’ messengers, etc.). Notably, that the agency’s website is still active on the Internet.

Dozens of similar entities in Ukraine openly note on their websites that due to the lack of regulation of detective activities, the agency is registered as a mass media outlet that conducts (journalistic) investigations within the legal framework (as an example, the agencies “Konrad” and “Pryvatnyi detektyv Mykolaiv”). The analysis shows that using mass media as a cover-up does not give detective agencies any advantages and additional opportunities compared to ordinary citizens in terms of conducting visual surveillance. Actually, the legislator does not give the representatives of the mass media themselves the authority to conduct covert visual surveillance. On the contrary, the analysis of the rights and obligations of journalists in accordance with the legislation (Article 25 of the law of Ukraine “On information”) shows that they can col-

lect information in an open way and do not have the right to use covert video recordings.

An analysis of the legislation of developed democratic countries and their judicial practice indicates a similar approach to the use of covert surveillance and hidden video recording in the work of a journalist. In this regard, it is rightly acknowledged by the academic community that this approach hinders journalistic investigations and thus undermines the proper functioning of a democratic system. It prevents the public from accessing information about unquestionably socially significant facts, such as political corruption or abuse of power (Alegria, 2019: 87-116).

The examination of information contained in the Unified State Register of court decisions of Ukraine did not reveal sentences (rulings or resolutions) that would contain information about the illegal conduct of covert visual surveillance by journalists. Nevertheless, it is not difficult to find materials of various journalistic investigations on the Internet resources that contain photos and videos of hidden surveillance of individuals. As already noted, such materials themselves are evidence of the commission of a criminal offence under Article 182 of the CC of Ukraine. If technical means of secretly obtaining information were used, this is the basis for bringing the perpetrators to criminal responsibility under Article 359 of the CC of Ukraine.

A different situation arises when observation of a person is conducted covertly (without the use of recording devices), and photography and video recording are done openly after the cessation of observation. As an example, a journalist conducted covert surveillance of a political figure to expose his connections with representatives of the criminal world, and after the politician met with a criminal authority, the media representative moved on to openly record the event. In this case, the fact of covert surveillance may go unnoticed and not recorded (that is why it was hidden). At the same time, the open activity of a journalist will be conducted in accordance with their rights provided for by law. Thus, to bring a journalist to legal responsibility for conducting covert visual surveillance, it will be necessary to prove this by refuting the versions about a random combination of circumstances, about the correspondent receiving information about the time and place of the meeting from confidential sources, etc.

The analysis of sentences (rulings and orders) in the Unified State Register of Court Decisions allows stating that no person who collected confidential information about a person through covert visual surveillance in publicly accessible places has been sentenced to a real penalty. The courts either released the accused (of violating the inviolability of private life) from criminal liability on the basis of articles 45-49 of the CC of Ukraine or applied exemption from

-serving a sentence with the appointment of a probationary period, in accordance with Part 1 of Article 75 of the CC of Ukraine.

Naturally, this does not apply to those cases when the collection of information about a person by conducting covert visual surveillance of a person was conducted for the purpose of further committing more grievous criminal offences. In such cases, the courts, for the most part, impose the real measure of punishment, but it applies only to those crimes for which they were prepared with the help of visual surveillance.

Thus, the decision of the Supreme Court of 26 March 2019 (case No. 431/3002/16-k; criminal proceedings No. 12014130480000193) stated the fact of purposeful organisation of visual surveillance of a person – a future victim of contract murder. In particular, this decision states that the convicted person, being an active member of an organised group, conducted visual surveillance of the object of criminal encroachment to determine the timing of their movement, possible places of stay, environment, features of communication in certain circles, etc. In the future, this allowed the convict to commit premeditated murder of the Starobilsk mayor by using firearms. The guilty person was convicted under Part 2 of Article 115, part 1 of Article 263 of the CC of Ukraine and the final penalty for the totality of crimes was imposed in the form of life imprisonment with confiscation of property. He was not charged with committing criminal offences, provided for by Article 182 of the CC of Ukraine at all.

The same approach applies to members of organised criminal groups who specialise in thefts and robberies and conduct visual surveillance of their victims and their surroundings (as an example of the Supreme Court's ruling in cases 686/14363/18 of 17 November 2022; 134/1776/18 of 1 July 2021; 656/28/17 of 2 November 2018, etc.). In these and similar cases, the prosecution tries to bring offenders to justice only for committing grievous and extremely grievous crimes, considering covert visual surveillance only as preparation for them. In general, this approach is considered justified, given the established judicial practice and substantial savings in procedural time.

4. Conclusions

Covert visual surveillance of a person in publicly accessible places, performed by unauthorised subjects, is an illegal activity and should entail criminal liability for violation of privacy, according to the provisions of Article 182 of the CC of Ukraine. Only the investigator and/or employees of the operational unit acting based on the decision of the investigating judge with permission to conduct visual surveillance of a specific person can be authorised subjects to

conduct such surveillance. Ordinary people, employees of detective agencies, journalists and representatives of other professions (except those mentioned above) can only conduct visual surveillance in publicly accessible places in an open way.

To bring a person to criminal responsibility for illegal covert surveillance, the prosecution needs to prove that it was conducted precisely for the purpose of secretly collecting confidential information about the person. Evidence of this can be: the testimony of accomplices of a criminal offence, victims, witnesses; seized information carriers with photographs and videos (with recording of victims), handwritten records of movements, meetings, and places of visit of surveillance objects, etc.

Engaging in covert visual surveillance of an individual with the intent to commit a crime or criminal offence against them does not constitute a separate criminal offence under Article 182 of the CC of Ukraine. Instead, it is considered as preparation for the aforementioned crime or criminal offence.

Prospects for further research are the issues of the legality of using evidence obtained by the parties involved through the use of open surveillance with the use of technical means for capturing visual data in criminal, civil, and administrative proceedings in Ukraine. A promising subject for studies is also the criteria for the legality of certain organisational measures and tactics used by law enforcement agencies for the purpose of conducting covert surveillance of a person in publicly accessible places.

Abbreviations

MDMIA	- Main Directorate of the Ministry of Internal Affairs
URPI	- Unified Register of Pre-trial Investigations
Criminal Code	- Criminal Code
CPC	- Code of Criminal Procedure
MIA	- Ministry of Internal Affairs
RDEFC	- Research and Development Expert Forensic Center

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