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SOME ISSUES OF COURTS CONSIDERATION OF CASES ON ADMINISTRATIVE OFFENSES

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SUMMARY

This article is intended to detect some issues that arise during consideration of cases on administrative violations. Thus, the case of bringing a person to administrative proceedings before a court within prosecution set out in the protocol on administrative offense, which allows the court to take timely and reasonable decision. Also, the author analyzes the existing rules of CAO and European legislation and controversial court practice of Ukraine using which the courts make decisions according to the rules of the Criminal Procedural Code of Ukraine (hereinafter referred to as "Code"). Completing the article the author concludes that the court must strictly adhere to requirements of the law without using any analogies.

Key words: administrative, consideration of cases on administrative offenses, administrative protocol, bringing a person to administrative responsibility.

АНОТАЦІЯ

Стаття присвячена розгляду окремих проблемних питань, які виникають під час розгляду судами справ про адміністративні правопорушення. Так, справи про притягнення особи до адміністративної відповідальності розглядаються судом у межах обвинувачення, викладеного в протоколі про адміністративне правопорушення, що дає суду змогу прийняти своєчасне та обгрунтоване рішення. Також автор аналізує чинні норми Кодексу України про адміністративні правопорушення, положення європейського законодавства, неоднозначну судову практику України, із застосуванням якої суди приймають рішення за аналогією з нормами Кримінального процесуального кодексу України, доходить висновку, що суд має чітко дотримуватися приписів закону без застосування будь-яких аналогій.

Ключові слова: адміністративні правопорушення, розгляд судами справ про адміністративні правопорушення, адміністративний протокол, притягнення особи до адміністративної відповідальності.

Problem setting and its relevance. In a state governed by the rule of law in its activities, citizens have the right to expect the functioning of an efficient and fair legal system. In July 2014, the Association Agreement between Ukraine and the European Union was signed, which defined the vectors for the further development of our state, the most important of which is the strengthening of democratic values, the establishment of the rule of law, the focus on the protection of human rights [1]. According to this Agreement, Ukraine has undertaken to adapt national legislation to the legislation of the European Union, based on the norms and principles enshrined in the Convention on Human Rights and Fundamental Freedoms 1950 (hereinafter referred to as the Convention, European Convention on Human Rights) [2].

In Recommendation Rec (2004) 5 of the Committee of Ministers of the Council of Europe concerning the verification of draft laws, existing laws and administrative practices in accordance with the standards which are set forth in the European Convention on Human Rights, the need for further efforts to ensure the full effectiveness of the Convention is mentioned [3]. One of the means of solving this problem is to check the existing national laws in accordance with the standards from the point of the case-law of the European Court of Human Rights. Based on the content of paragraph 8 of the Recommendation, such verification is extremely important for laws relating to areas experiencing a particular risk of human rights violations, for example, law enforcement, criminal proceedings, conditions of detention, etc.

In our opinion, this refers to the Code of Ukraine on Administrative Offenses (hereinafter referred to as the Code of Administrative Offenses, the Code), which, while still in Soviet times, contains obsolete regulatory provisions [4]. The specified procedural code determines, among other things, the procedure for carrying out judicial proceedings in cases involving bringing citizens to administrative responsibility. Regarding

this, the courts in the resolution of cases of administrative violations often fail to fully ensure the right of each citizen to a fair trial in the understanding of the Convention.

Analysis of research and publications. The scientific works of such scientists as V. Averyanov, A. Bandurka, A. Banchuk, S. Benkovsky, I. Golosnichenko, E. Demsky, V. Kolkpakov, A. Komzyuk, D. Lukyanets have been devoted to the activities of the court as a subject of administrative and delictual jurisdiction. V. Malyarenko, N. Pisarenko, G. Suprun, N. Khoroshak, A. Shergin, etc. However, despite the tendency of constant expansion of the limits of the jurisdiction of the court to review cases of administrative delicts, this problem does not lose its relevance.

That is why **the purpose of this article** is to investigate the procedure for judicial review of cases of administrative violations and identify problems faced by courts because of the imperfection of norms, it is determined.

Statement of the main material. Today, in accordance with Part 1 of Art. 18 of the Law of Ukraine "On the Judiciary and the Status of Judges" of July 2, 2016, the courts of general jurisdiction specialize in the consideration of civil, criminal, economic, administrative cases, as well as cases of administrative law infringement [5]. The duty to resolve the issue of bringing a person to administrative responsibility in court is assigned to the Administrative Code for district, district in the city, city or district courts (hereinafter - local general courts). In Art. 221 of The Code of Ukraine on Administrative Offenses has a list of cases that are subject to the jurisdiction of local general courts. Also, art. 2211 of the Code authorizes local administrative and economic, appellate and higher specialized courts, as well as the Supreme Court of Ukraine to consider cases of contempt of court - an administrative offense under Art. 1853, if such disrespect is allowed in the exercise by these courts of proceedings in cases falling within their jurisdiction.

In accordance with Art. 92 of the Constitution of Ukraine, issues relating to the judiciary, the status of judges and the judiciary, can receive their own regulation only in the laws of Ukraine [6]. The procedure for the administration of proceedings in cases of administrative offenses is defined in the Code of Administrative Offenses. However, Part 2 of Art. 246 of the Code indicates the possibility of settling justice issues in this category of cases and in other laws. For example, the Law of Ukraine "On the Judiciary and the Status of Judges" defines the general principle of justice, but does not specify the specifics of the implementation of a particular type of court proceedings.

The overwhelming majority of the rules, according to which the courts consider cases of administrative violations, are contained in the Code of Administrative Offenses. In Chapters 22 and 23 of the Code, which are respectively referred to as "Consideration of cases of an administrative offense" and "Decision on an administrative offense case", the place and terms of such review are determined, its stages and actions that fill, as well as a list of circumstances that are subject to Compulsory clarification. In addition, in Chapter 18 of the Code of Administrative Offenses, the tasks and separate principles of the proceedings on cases of bringing a person to administrative liability are textually set forth, information on evidence in these cases is posted, as well as circumstances precluding the manufacture of them. Finally, Chapter 21 of the Code fixes the circle of participants in the proceedings in the case of an administrative offense, to which the person brought to administrative responsibility, the victim, legal representatives, representatives, counsel, witness, expert and interpreter.

In accordance with Art. 278 of the Code of Administrative Offenses, the court must prepare the case for consideration by deciding, at this procedural stage, the following issues: 1) whether its jurisdiction covers the consideration of this case; 2) whether the protocol and other materials of the case on administrative violation are properly drawn up; 3) whether the persons participating in the consideration of the case are notified of the time and place of its consideration; 4) required additional materials; 5) whether the petition of the person brought to administrative responsibility, the victim, their legal representatives and the lawyer is subject to satisfaction.

On the duty of the court over the verification of the affiliation of the materials of the case, the following should be noted. Evidence in the case of an administrative offense is any factual evidence on the basis of which, in a manner determined by law, the court determines the existence or absence of an administrative offense, the person's guilt in committing him and other circumstances that are important for the proper resolution of the case. These data are established by a protocol on an administrative offense, explanations of a person brought to administrative responsibility, victims, witnesses, expert opinions, material evidence, indications of technical devices, a protocol on seizure of things and documents, and other documents. Obligation to collect evidence rests with those authorized to draw up protocols on administrative violations (Article 255 of the Code of Administrative Offenses). The bodies of the National Police are given the widest powers to identify and document the facts of committing administrative offenses.

The protocol on administrative violation is the main evidence in the case and must necessarily comply with the requirements established by law. So, in the art. 256 of The Code of Ukraine on Administrative Offenses the list of data which should be specified in this procedural document is given: date and a place of its drawing up; Information on the subject of the protocol and on the person being brought to administrative responsibility; Place, time of committing and the essence of an administrative offense; A normative act providing for responsibility for this offense; Surnames, addresses of witnesses and victims, if any; Explanation of the person brought to adminis-

trative responsibility; Other information necessary to resolve the case. In the protocol of an administrative offense, all the essential circumstances of the case, reflecting all the elements of the offense, must be recorded. At the same time, all the circumstances set forth in the protocol must be properly checked and accounted for by a set of appropriate and admissible evidence.

The protocol is signed by the person who drafted it and by the person who is brought to administrative responsibility. The latter has the right to refuse to sign the protocol, then a record is made about it in it. Also, a person has the right to submit explanations and comments on the content of the protocol and to state the reasons for his refusal to sign it. According to the Instruction on the preparation of materials on administrative violations in the police, strikings or corrections of information that are recorded in the protocol of an administrative offense are not allowed, as well as additional entries after it has been signed by a person who is being brought to administrative form of vision [7].

A person signing a protocol on an administrative offense should not be perceived as a fact of recognizing his guilt in committing an offense, she is charged with authorized subjects. In this regard, it is appropriate to appeal to the decision of the European Court of Human Rights on 15.11.2007. In the case of Galstyan versus Armenia, in which the Court, taking into account the possibility provided by national legislation to refuse signing the protocol, noted the following: "Neither in the law nor in the materials of the administrative violation case does it make anyone think that the applicant, signing the protocol, had something other than confirm that he is acquainted with him and knows about his rights and charges against him..." 8].

Obviously, due to proper registration of the protocol on administrative violation and other materials of the case, the timeliness of its consideration depends, as well as the legality and validity of the decision rendered on it. Violation of the requirements for the preparation of a protocol on the fact of the offense leads to the impossibility of observing the provisions of art. 7 of the Administrative Code of Ukraine of the principle of legality when deciding whether to bring a person to administrative liability.

Judicial practice shows that subjects authorized to draw up protocols on administrative violations often tolerate violations of legislation when they are issued. So, for example, cases when in reports: there are no data about the person who is involved in administrative responsibility, the victim or witnesses are not uncommon; There is no reference to the norm (or part of it), which provides for liability; The circumstances and essence of the offense are not specified, which precludes the establishment of the presence of the administrative offense in the actions of the person.

Such facts of inadequate registration of protocols are rendered by courts, as a rule, when preparing cases on administrative offenses for consideration. And since the Code of Administrative Offenses has not envisaged how the court should act in these situations, the practice of solving them is different, which, of course, can not testify to the high level of implementation of the proceedings. Thus, some courts issue resolutions, which return the protocols on administrative violations to the body (official), which they made up for revision (see, eg. unified state register of judgments – Nos. 65058737, 65610103, 48198931, 65428577). At the same time, it is noted in the operative part of the mentioned court decisions that they are not subject to appeal. Once again, we emphasize that neither the Code of Administrative Offenses, nor other procedural law for the adoption of such regulations is provided. Nevertheless, individual judges even decide to re-direct the materials of the case for their proper registration, until the time for imposing an administrative penalty, set out in art. 38 of the Code of Administrative Offenses, after which they are forced to close the proceedings.

In order to solve this problem, some scholars propose to introduce in the Code of Administrative Offenses the institution of giving letters to the bodies (officials) authorized to form materials on the case of administrative law infringement [9, c.45]. In addition, it is necessary to pay attention to the resolution of the Plenum of the Supreme Court of Ukraine (hereinafter – the Plenum of the Supreme Arbitration Court of Ukraine) of 23.12.2005. “On the practice of applying by the courts of Ukraine legislation on cases of certain crimes against road safety and transport, as well as administrative violations Transport”, in paragraph 24 of which the practice of those judges who are reasoned by decisions to return protocols on administrative offenses, drawn up by an unauthorized person Or without the requirements of Art. 256 the Code of Administrative Offenses, the corresponding law enforcement bodies for proper registration [10].

The position of the Plenum of the Armed Forces is demonstrated, in our opinion, does not stand up to any criticism, because according to it the substantive flaws of the protocol, violation of the procedure for its adoption, non-observance of the human right to defense during documenting the fact of the offense, the absence of admissible and proper evidence in the case are recognized as grounds for referral Materials on the administrative offense for registration, and not to close the case. We are convinced that the approach of judges, which, in the presence of the above circumstances, makes a decision to close the case is correct and fair.

Sometimes during the consideration of the case the courts independently supplement the plot of the offense, fixed in the protocol on the administrative violation, in case of its incomplete presentation. In this connection, the question arises whether the court has such an opportunity in accordance with the law and will it not result from a violation of the procedural rights of the person being brought to administrative responsibility or other participants in the proceedings? Responding to the question posed, we consider it necessary to analyze the European Court of Human Rights' judgment of May 30, 2013 in the Malofeev versus Russia case (hereinafter referred to as the Decision) [11]. Recall that Art. 17 of the Law of Ukraine “On the implementation of decisions and application of the practice of the European Court of Human Rights” obliges the Ukrainian courts to apply the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights as a source of law when considering cases within their jurisdiction [12].

According to the facts of this case in July 2005. Regarding the applicant, the militia officers drafted a protocol on the administrative violation provided for in Art. 19.3 of the Code of Administrative Offenses of the Russian Federation (hereinafter referred to as the Code of Administrative Offenses of the Russian Federation), which resulted in the organization of an illegal demonstration, although the law defined disobedience to the lawful order or demand of a police officer as an outward manifestation of the said offense [13]. This protocol, together with other materials of the case, was sent for consideration to a court that recognized Mrs. Malofeeva as guilty of not complying with the lawful requirements of a police officer and applied administrative penalty to her in the form of 7 days of arrest. The applicant appealed against this decision to a higher court.

During the review of the case, the appellate court found it necessary to supplement the description of the circumstances under which the offense was committed, indicating that the applicant had conducted an illegal demonstration and was holding a banner with an extremely negative assessment of the professional performance of individual officials. In addition, the higher court noted that the applicant had failed to comply with legal requirements to end the violation of public order and threatened to prosecute police officers. Having examined

the circumstances of the case, the appellate court came to the conclusion that the qualifications of Mrs. Malofeeva's actions under art. 19.3 of the Code of Administrative Offenses of the Russian Federation, carried out by police officers when drawing up a protocol on an administrative offense, as committed is covered by the content of art. 20.2 of this Code. Consequently, the court overturned the decision of the previous instance, noting that the latter had not been provided with sufficient evidence to confirm the applicant's fault in the commission of the offense charged with her.

Nevertheless, Ms. Malofeeva applied to the European Court of Human Rights, convinced that the domestic courts violated the requirements of paragraphs 1 and 3 of Art. 6 of the Convention. In this regard, the European Court of Human Rights recalled that Art. 6 guarantees everyone the right to a fair trial, and the task of the court is to make sure that the trial was fair in general, including proving the method of obtaining and research [14]. At the same time, one should pay attention to the fact that the right to protection was ensured to the person, which covers the possibility to challenge the reliability of the evidence.

In accordance with the sub. “A” of Article 6 § 3 of the Convention, anyone accused of a criminal offense has the right to be informed promptly and in detail in a language that is understandable to him of the nature and basis of the charges against him. It should be clarified that the European Court of Human Rights, in spite of the classification of the offense in the national legislation, considers the cases of administrative offenses, upon review of which the person may be punished by imprisonment or a large fine, criminal, and therefore needing, the guarantees of fair trial set forth in Art. 6 of the Convention. The findings of the domestic courts in this case contained conflicting data on the nature of the actions that led to the initiation of an administrative offense case against the applicant. In view of this, she claimed that she had not been duly notified of the nature of the charge.

From the contents of articles 245, 280 of the Code of Administrative Offenses, it follows that in the consideration of a case the court must find out all its circumstances and establish the fact of an administrative offense (or its absence) specified in the protocol and the fault of the person brought to administrative responsibility in its commission. The guilt of the person the court must confirm the evidence available in the case and, having eliminated all possible doubts, take a legitimate and informed decision.

Conclusions. Analyzing these and other norms of the Code of Administrative Offenses, which determine the procedure for the conduct of administrative and tort production, it can be concluded that the case of bringing a person to administrative liability is considered by the court within the limits of the charge set forth in the protocol on administrative violation. The norms of the Code of Administrative Offenses are mandatory, that is, the court must strictly comply with the requirements of the law without applying any analogies.

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