

METHODS OF PROTECTION AND DISCRETIONARY POWERS IN ADMINISTRATIVE JURISDICTION: PROBLEMS OF LAW ENFORCEMENT

Gorbalinskyi Volodymyr

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Annotation. The article is devoted to the problems of the court's discretionary powers in selected defenses that do not inform the law and are more effective. The article analyzes the peculiarities of the court going beyond the legal requirements and choosing other methods of protection than those requested by the requester. The purpose of the article is to explain the content and inter-judicial discretion in the context of the principle of the rule of law when deciding on the court's choice of other ways of protecting rights and interests that are not legally binding and that are more effective.

The article draws attention to the fact that the actual issue of judicial practice remains the problem of choosing methods of protection other than those requested by the person whose right has been violated. At the same time, it should be noted that the CAS of Ukraine and other legislation do not establish such limits. It is noted that when going beyond the limits of claims and choosing other methods of protection, the court must comply with the principles and international standards of judicial proceedings, the requirements of material and procedural law, the specifics of a specific case, put forward claims and their justification, administrative-legal status and powers of response, position the plaintiff, moral norms and other factors. At the same time, the administrative court must be guided by the principle of the rule of law, proceed from the goals and objectives of administrative proceedings, use judicial practice, reflect the analogy of the law or the analogy of the law. To conclude that the methods of protection of the subjective rights and interests of individuals in administrative proceedings are differentiated in the material-legal (consolidation in the law) and procedural component (judicial discretion). At the same time, applying judicial discretion and making discretionary decisions of the judge, guided by the rule of law, his reasoned choice between alternative types of ways to protect the violated subjective right or interest.

Keywords: court, administrative proceedings, methods of protection, discretionary powers, law enforcement.

1. Introduction.

The principle of the rule of law is recognized and applied in our country. The manifestation of which is that the courts must make court decisions guided by the requirements of justice, and the court decision itself must ensure the effective restoration of rights.

According to Art. 9 of the Administrative Judicial Code of Ukraine, the court considers administrative cases only on the basis of a claim submitted in accordance with the requirements of the Administrative Judicial Code of Ukraine, within the limits of the claim requirements. The court can go beyond the legal requirements if it is necessary for the effective protection of the rights, freedoms, interests of people and citizens, other subjects in the field of public-legal relations from violations by the subjects of power[1, p. 268]. At the same time, going beyond the legal requirements, the court may choose another, not prohibited, method of protection. We are talking about judicial discretion, the content of which is the opportunity given to the court at its own discretion to choose a method of protection

other than the one requested by the person, if the court believes that it is more effective in the disputed legal relationship.

2. Analysis of scientific publications.

The problems of going beyond legal requirements and choosing other, more effective methods of protection were studied by such scientists as Ya. Bernaziuk, O. Gubska, A. Korenev, V. Ilkov, T. Minka, M. Onishchuk and many other scientists. Regardless of the certain development of this issue, it should be noted that beyond the boundaries of research, the problems of determining the limits of judicial discretion when choosing other ways of protecting rights and interests that do not contradict the law and are more effective have not been illuminated by scientific opinion. Analysis of judicial practice and the state of the judiciary also increases the need for such research.

3. The aim of the work.

The purpose of the article is to clarify the content and limits of judicial discretion in the context of the principle of the rule of law when deciding the court's choice of other ways of protecting rights and interests that do not contradict the law and are more effective.

4. Review and discussion.

In the field of legal practice, there is a variety of doctrines that relate to the use of the concept of "discretion". Most jurists use this concept in the context of the activities of subjects with powerful powers. However, when considering administrative cases at the stage of choosing the means of protection, the administrative court can also exercise discretion, namely judicial discretion.

In general, the concepts of discretion and discretionary powers are insufficiently developed in judicial doctrine. Each researcher gives it his own list of characteristics, properties and content, but all definitions of this concept are quite similar to each other, moreover, most scientists, considering its content, identify it with the concepts of "discretionary powers" and "administrative discretion". Some authors see discretion (discretionary power, discretionary powers) as a special type of discretion. Others define discretion as a special form of managerial activity. In science, there are also opinions that the concepts of "discretionary powers", "discretion" and administrative discretion should be used as synonyms, but with certain caveats [2, p. 47].

In our opinion, the discretionary powers of the public administration should be defined as a set of their rights and obligations regulated by the norms of administrative law, acting at their own discretion. At the same time, discretionary powers should not be considered as absolute freedom of administrative discretion. Such limitation of discretion in the content of discretionary powers should occur in the limitation of state power through the guarantee of human rights. And this approach should be the basis of discretionary powers. It is quite obvious that all interpretations and concepts of the definition and interpretation of the concepts of "discretionary powers" cannot be reduced to a single term and approach, the multifaceted understanding of the meaning of the concept of "discretionary powers" is a peculiar scientific reflection of the instability and multifacetedness of social relations, and the legal regulation of the activity of public administration [2, p. 48].

Judicial discretion has its peculiarities. Judicial discretion should be understood as the authority of the court in choosing decision options, governed by the rules of the Administrative Judicial Code of Ukraine, guided by the rule of law and the circumstances of the case in order to render a legal and justified decision in the case. At the same time, judicial discretion puts the right of choice before the court, while the court must make a decision that should be based on the principles of administrative justice as much as possible and correspond to the individual features of a specific administrative case [1, p. 270].

An actual issue of judicial practice remains the problem of choosing methods of protection other than those requested by the person whose right has been violated. We are talking about going beyond the limits of legal claims and the court's intervention in the discretion of the subject of power, who made the decision. At the same time, it should be noted that the Code of Administrative Procedure of Ukraine and other legislation do not establish such limits. And that is why the administrative court, going beyond the legal requirements and choosing methods of protection, does it independently.

When going beyond the limits of claims and choosing other methods of protection, the court must take into account the principles and international standards of judicial proceedings, the requirements of material and procedural law, the circumstances of a specific case, the claims made and their justification, the administrative and legal status and powers of the defendant, the position of the plaintiff, moral norms and other factors. At the same time, the administrative court must be guided by the principle of the rule of law, proceed from the goals and objectives of administrative proceedings, take into account judicial practice, apply the analogy of law or the analogy of the law.

As he notes, in order to establish the limits of administrative discretion, it is most expedient, in addition to the application of national legislation, to take into account international standards for the limitation of discretionary powers. They are quite clearly and succinctly formulated, including in Recommendations of the Committee of Ministers of the Council of Europe No. R(80)2. Thus, the administrative body of power, making a specific decision, should strive to achieve the goal for which it is empowered; adhere to the principle of objectivity and impartiality, taking into account only those factors that are relevant to this particular case; to observe the principle of equality before the law, not to allow unfair discrimination; ensure proper balance (proportionality) between the purpose of the decision and its negative consequences for the rights, freedoms or interests of individuals; to make a decision within a reasonable period of time, taking into account the nature of the case; consistently and consistently apply general administrative prescriptions, taking into account the specific circumstances of each case [3; 4; 5].

The complexity of the legal relationship with the exercise of discretionary powers by the court determines the high requirements for the court decision, in which the court went beyond the limits of the claims, or guided by Part 4 of Art. 245 of the Code of Administrative Procedure of Ukraine of Ukraine obliged the defendant - the subject of authority to make a decision in favor of the plaintiff, if all the conditions specified by law for its adoption are met, and the adoption of such a decision does not imply the right of the subject of authority to act at his own discretion [6]. Judicial discretion is embodied in the form of a court decision. In order to be legal and justified, such a court decision must be characterized by a high degree of reasoning, contain a detailed and systematic analysis of the circumstances of the case, correct and motivated conclusions.

As O. Gubska notes, during consideration of the relevant category of cases, the court must provide answers to such questions. Namely:

1. whether the subject of authority had discretionary powers at the time of decision-making;
2. whether the subject of authority acted in accordance with Part 2 of Art. 2 of the Administrative Judicial Code of Ukraine, ensuring the quality of the decision made (within the limits provided to it by the regulatory act and in the manner determined by the law, reasonably, in good faith, judiciously, impartially, proportionally, in compliance with the principle of equality before the law);
3. whether the subject of authority acted in accordance with Part 2 of Article 2 of the Code of Administrative Procedure of Ukraine, ensuring compliance with procedural guarantees (taking into account the right of a person to participate in the decision-making process, in a timely manner, that is, within a reasonable period, etc.);
4. whether the subject of authority acted with a legitimate purpose. Did the body act transparently and in the most consistent way possible; whether he properly motivated the decision; whether it is arbitrary (arbitrary), irrational, not supported by evidence or erroneous in relation to legal facts; biased or clearly unfair [4].

Choosing a specific method of protection imposes on the court the obligation to use its own discretion in compliance with the basic principles of judicial procedure. The court can oblige the body (official) to re-examine the application (appeal) only if there are grounds to believe that the consideration of the raised issue with which the person applied did not take place due to the fact that: – the application (appeal) was not considered by an authorized sub object of authority (without authority or with excess of authority); - the review did not take place in accordance with the procedure established by law, that is, when there are reasons to believe that the review as such did not take place, or took place with significant violations that affected the decision made by the authority [7].

When making a decision on choosing other ways to protect the violated rights and interests of persons, which do not contradict the law and are more effective, the administrative court is limited by certain limits. We are talking about the limits of discretion (judicial discretion), about certain objective and subjective criteria. Subjective criteria include those related to the personality of the judge, his legal awareness and legal culture, the judge's understanding of the consequences of the decision, the ability to be guided by the principle of the rule of law and other judicial principles when making a discretionary decision, the idea of justice, objectivity, that are reflected in the legal consciousness of the judge who makes a discretionary decision, trends in judicial practice, etc.

As we can see, the subjective limits of judicial discretion indicate that the final result of the court's exercise of its discretionary powers (that is, a discretionary decision) largely depends on the judge's legal awareness, as it determines the judge's perception of the presence of discretionary powers, the methods and limits of their implementation [8].

The judge, going beyond the claims and choosing a different method of defense than the one requested by the plaintiff, determines the content of his discretionary powers at his own discretion.

Therefore, we see that when applying other methods of protection than those requested by the plaintiff, a subjective criterion is of great importance, which directly depends on the personality of the judge, his independence and impartiality, worldview, ability to make decisions guided by the principle of the rule of law. That is why one of the indicators in the field of application of the rule of law during administrative proceedings is an increased level of legal awareness and legal culture of a judge. Therefore, the judge's discretionary powers in choosing the methods of defense are the basis for implementing the principle of the rule of law in the implementation of administrative proceedings.

The purpose of administrative proceedings is to protect the violated rights, freedoms and interests of a person in the field of public-legal relations. Therefore, the principle of the rule of law should be manifested not only in the process of applying legal norms, but also in ensuring effective legal procedures. This principle should be embodied in the work of the entire judicial corps, which should be aimed at the exact observance of the norms of procedural law, as well as in the existing possibility of choosing an option of a court decision that should correspond to the ideas of justice and fundamental human rights. Therefore, the rule of law in the judge's choice of the method of judicial protection in the case of a discretionary court decision involves a departure from the mechanical application of the rules of law and, taking into account all the circumstances of the case, to resolve a public legal dispute based on the principles of law.

The objective criteria (limits) of judicial discretion (that is, those that have an objective external appearance) include, in particular, legal norms, generalizations of judicial practice, decisions of higher courts, claims of the parties. The limitation of lower courts by the position of higher courts contributes to the fact that individual discretionary decisions of lower courts are subsequently unified and form a stable line of judicial practice from certain categories of cases, which is a limiting factor in the further exercise of discretionary powers by courts (especially in the case of reflecting certain provisions of judicial practice in generalizations made by higher courts). Thus, judicial discretion is capable of self-limitation, as even a single discretionary decision has the potential to shape judicial practice [8].

The exercise of discretionary powers by courts forms judicial practice in certain categories of cases. In this way, judicial discretion performs a signaling function for the legislator, which contributes to the updating of the regulatory framework. Established judicial practice indicates to the legislator the need for normative consolidation of certain practical provisions, the need to change or abolish outdated legal norms [8].

5. Conclusions.

So, judicial discretion, or judicial discretion, is used as a limited authority of the court to choose the most expedient and fair way of solving an administrative case. This enables the court to choose the optimal, expedient and fair version of the decision for a specific situation.

Ways of protecting the subjective rights and interests of individuals in administrative proceedings are differentiated into a material-legal (fixed in law) and a procedural component (judicial discretion). At the same time, applying judicial discretion and making a discretionary decision, the judge, guided by the rule of law, makes a reasoned choice between alternative types of ways to protect the violated subjective right or interest.

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Volodymyr Gorbalskiy,

Candidate of Philology Science, Professor,

*Associate professor of the department of general legal disciplines
of the Dnipropetrovsk State University of Internal Affairs*

E-mail: k_zpd@dduvs.in.ua

ORCID ID: 0000-0002-6203-6151