GENERAL CHARACTERISTICS OF DECISIONS WITHIN THE DISCIPLINARY PROCEEDINGS AGAINST A JUDGE AS A SUBJECT OF JUDICIAL APPEAL

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Annotation. *Improving the procedure for bringing judges to disciplinary responsibility is one of the important elements of judicial reform and strengthening the independence, professionalism and integrity of the judiciary. An integral element of such a procedure, on which its effectiveness largely depends, is judicial control over the decisions of the disciplinary body of judges. The article attempts to analyze the existing procedure for disciplinary proceedings against a judge from the perspective of the possibilities of judicial appeal against decisions made within this procedure.*

The aim of the work is to analyze the procedure for disciplinary proceedings against a judge, to identify the decisions which may be made within this procedure and to analyze them from the perspective of the possibilities of judicial appeal through the prism of the Supreme Court case law.

The methodological basis of the study consists of general scientific and special research methods.

Based on the results of the study, the author analyzed the statutory regulation of the procedure for disciplinary proceedings against a judge and the relevant case law of the Supreme Court. The results of the analysis showed that currently, decisions made within the framework of disciplinary proceedings against judges are not subject to judicial review, and only decisions of the High Council of Justice made upon review of the decision of the Disciplinary Chamber to bring judges to disciplinary responsibility can be appealed in court. The validity of such restrictions should be the subject of further research. In addition, certain provisions of the legislation on the possibility of appealing against decisions of the Disciplinary Chamber appear to be discriminatory, which has been recognized by the state.

Key words: *judicial appeal, disciplinary liability of judges, right of access to justice, guarantees of judicial independence, High Council of Justice, administrative proceedings.*

1. Introduction.

The Strategy for the Development of the Justice System and Constitutional Justice for 2021-2023, approved by the Decree of the President of Ukraine of 11.06.2021 No. 231/2021, identifies ineffective mechanisms for bringing judges to disciplinary responsibility as one of the problems that necessitate further measures in the field of judicial reform [1]. To solve this problem, it is envisaged, in particular, to improve the procedure for disciplinary proceedings and bringing judges to disciplinary responsibility, including the possibility of appealing against decisions of the disciplinary body. At the same time, excessive expansion of the possibilities to appeal decisions within the framework of disciplinary proceedings against a judge may lead to risks of interference with judicial independence and/or constitutional powers of the High Council of Justice (hereinafter – HCJ). For the purposes of further scientific research of this issue, first of all, it is necessary to establish the range of decisions that may be made within the framework of disciplinary proceedings against a judge and analyze the existing case law of appealing against them.

2. Analysis of scientific publications.

A wide range of scholars, including R.O. Kuibida, M.I. Khavroniuk, A.M. Boyko, A.V. Malyarenko, V.P. Kohan, A.V. Shevchenko, Y.I. Bilokur and others, have studied the issues of disciplinary liability of judges. At the same time, despite some scientific research on judicial appeal of decisions made within the framework of disciplinary proceedings against a judge, this issue requires further scientific study.

3. The aim of the work.

The purpose of the study is to analyze the procedure of disciplinary proceedings against a judge, to identify the decisions which may be made within this proceeding and to analyze them from the perspective of the possibilities of judicial appeal through the prism of the Supreme Court case law. The results obtained will be further used for a scientific rethinking of the existing procedure and grounds for judicial appeal of decisions made within the framework of disciplinary proceedings against judges with a view to establishing an optimal balance between the right of an individual to access to justice, the specifics of the constitutional and legal status of the HCJ, and the constitutional guarantees of judicial independence.

4. Review and discussion.

The institution of disciplinary liability of judges plays an important role in the process of establishing high standards of independence, professionalism and integrity of the judiciary. As A.M. Boyko notes: "Everyone in a democratic state has the right to respond to judicial arbitrariness and violation of standards of integrity and professional ethics by judges" [2, p. 11]. The mechanism of bringing a judge to disciplinary responsibility provided by the Constitution of Ukraine and the Laws of Ukraine "On the Judiciary and the Status of Judges" and "On the High Council of Justice" is designed to ensure the full realization of this right. The effectiveness of this mechanism determines not only the standards of professionalism and ethics required of persons administering justice but also the level of trust in the justice system as a whole.

For considering the issue of bringing a judge to disciplinary responsibility functioning the HCJ – a collegial, independent constitutional body of state power and judicial governance, which operates in Ukraine on a permanent basis to ensure the independence of the judiciary, its functioning on the basis of responsibility, accountability to society, formation of a virtuous and highly professional corps of judges, observance of the Constitution and laws of Ukraine, as well as professional ethics in the activities of judges and prosecutors (part 1 of Article 2 of the Law of Ukraine "On the High Council of Justice", hereinafter – Law No. 1798-VIII [5]). Part 10 of Article 131 of the Constitution of Ukraine stipulates that in accordance with the law, bodies and institutions are established in the justice system, in particular, to ensure consideration of cases of disciplinary liability of judges, and the constitutional power of the HCJ is to consider complaints against decisions of the relevant body to bring a judge to disciplinary liability (clause 3 part 1 of Article 131). At the same time, according to some scholars: "in matters of bringing judges and prosecutors to legal responsibility, the HCJ acts as a court, i.e., it is a court within the meaning of Article 124 of the Constitution of Ukraine and administers justice. ... At the same time, it can be said that this constitutional body acts as a court of first instance, appeal and revision, and should also provide judicial control during pre-trial investigation of judges" [3, p. 13].

The current regulatory framework, taking into account the amendments introduced in August 2021 to introduce the HCJ disciplinary inspectors' service [4], provides that the HCJ shall establish Disciplinary Chambers from among the HCJ members to consider cases of disciplinary liability of judges (part 2 of Article 26 of Law No. 1798-VIII). In addition, in order to exercise the HCJ's powers to conduct disciplinary proceedings against judges, there is a service of disciplinary inspectors, which is an independent structural unit operating on the principle of functional independence from the HCJ (part 5 of Article 27 of Law No. 1798-VIII).

According to part 3 of Article 42 of Law No. 1798-VIII, disciplinary proceedings against judges consist of two stages: 1) preliminary examination of the materials that have signs of a disciplinary offense committed

by a judge and decision-making on opening a disciplinary case or refusal to open it; 2) consideration of a disciplinary complaint and decision-making on bringing or refusing to bring a judge to disciplinary responsibility. Based on a systematic analysis of the provisions of the said law, the following decisions may be made in the disciplinary proceedings against judges:

1) on leaving the disciplinary complaint without consideration and returning it, which is made by: the disciplinary inspector if there are grounds specified in clauses 1-5 of part 1 of Article 44 (clause 2 of part 1 of Article 43); the Disciplinary Chamber on the basis of an appeal from the HCJ disciplinary inspector if there are grounds specified in clause 6 of part 1 of Article 44 (clause 3 of part 1 of Article 43);

2) on refusing to open a disciplinary case, which is adopted: by the Disciplinary Chamber if there are grounds specified in part 1 of Article 45 (part 2 of Article 45); by the HCJ if a member of the Disciplinary Chamber or a HCJ disciplinary inspector - rapporteur disagrees with the relevant decision of the Chamber to refuse to open the case (part 3 of Article 46);

3) on opening a disciplinary case, which is adopted by: the Disciplinary Chamber on the basis of the conclusion of the disciplinary inspector based on the results of consideration of the disciplinary complaint (clause 4 of part 1 of Article 43, part 1 of Article 46) or in case of detection, during the consideration of the disciplinary case, of signs of disciplinary misconduct in the actions of other judges or signs of another disciplinary misconduct in the actions of the judge against whom the case is being considered (part 10 of Article 49); the HCJ, in case of cancellation of the decision of the Disciplinary Chamber to refuse to open a disciplinary case based on the results of consideration of the request of a member of the Disciplinary Chamber or a disciplinary inspector - rapporteur who does not agree with the relevant decision of the Chamber (part 3 of Article 46);

4) on consolidation of several disciplinary cases into one disciplinary case, which is adopted by the Disciplinary Chamber if all cases are in its proceedings (part 11 of Article 49) or by the HCJ if the cases are in the proceedings of different Disciplinary Chambers (part 12 of Article 49). In this case, by its decision, the HCJ transfers them to one Disciplinary Chamber for consideration;

5) on bringing a judge to disciplinary liability, which is adopted by the Disciplinary Chamber (part 2 of Article 50);

6) on refusal to bring a judge to disciplinary responsibility and termination of disciplinary proceedings, which is adopted by the Disciplinary Chamber (part 2, 6 of Article 50).

Law No. 1798-VIII defines the specifics of appealing decisions made in disciplinary proceedings against a judge. First of all, the provisions of part 4 of Article 44, part 2 of Article 46, part 2 of Article 45 stipulate that decisions to return a disciplinary complaint, open or refuse to open a disciplinary case, are not subject to appeal. In this case, an appeal should be understood not only as a court appeal but also as an appeal to the HCJ, since Chapter 5 of Section II of the said law defines the mechanism for appealing only decisions to bring a judge to disciplinary responsibility. As noted by the Grand Chamber of the Supreme Court in its decision of November 15, 2018 in case No. 9901/751/18, within the meaning of Articles 51, 52 of Law No. 1798-VIII, the decision of its disciplinary body, adopted upon consideration of a complaint against the actions of a judge on the merits, is subject to appeal to the HCJ [6].

In the context of judicial appeal, it should be noted that the Supreme Court has established a stable practice regarding the impossibility of appealing decisions to return a disciplinary complaint, open or refuse to open a disciplinary case in administrative proceedings.

Thus, in refusing to judicially appeal against decisions to return a disciplinary complaint or refuse to open a disciplinary case, which is usually carried out by persons who have filed a disciplinary complaint, the Supreme Court proceeds from the fact that such decisions do not create any legal rights/obligations for the complainant, despite the fact that they are made in connection with his or her appeal. The court justifies its position by the fact that the complainant is not a direct participant in the legal relations that arose in connection with the decision to bring the judge to disciplinary responsibility. Only the HCJ has the right to evaluate the actions of a judge in the performance of his or her official duties, and its decisions to bring or refuse to bring a judge to

disciplinary liability create legal consequences for such a judge, not the complainant. Therefore, the right to appeal the actions/decisions of the HCJ and its bodies conducting disciplinary proceedings is vested only in the subjects of these proceedings in the manner prescribed by law (para. 38 of the Resolution of the Grand Chamber of the Supreme Court of 16.03.2023 in case No. 9901/41/21 [7], para. 44, 45 of the Resolution of the Grand Chamber of the Supreme Court of 02.03.2023 in case No. 640/15229/21 [8]).

In other words, according to the legal positions of the Grand Chamber of the Supreme Court, the complainant is not a subject of disciplinary proceedings, and therefore has no right to appeal against the actions and decisions of the HCJ based on the results of such proceedings (Resolution of the Grand Chamber of the Supreme Court of 31.05.2018 in case No. 9901/500/18 [9]). In addition, the Court notes that the decision to return a disciplinary complaint or refuse to open a disciplinary case cannot be an independent subject of judicial review and in its justifications uses an expansive interpretation of the concept of "dispute not subject to administrative proceedings", noting that this concept applies to both disputes that are not subject to administrative proceedings and disputes that are not subject to judicial review at all (para. 43 of the Resolution of the Grand Chamber of the Supreme Court of 16.03.2023 in case No. 9901/41/21 [7]).

It is important to note that for a person who has filed a disciplinary complaint, the refusal to open a disciplinary case deprives him or her of the right to address such facts again. In particular, according to clause 1 of part 1 of Article 45 of Law No. 1798-VIII, the opening of a disciplinary case must be denied if the facts of the judge's misconduct reported in the complaint have already been subject to verification and consideration and the disciplinary case was denied or a decision was made in the disciplinary case. That is, for the complainant, the decision to refuse to open a disciplinary case is final and restricts his or her right to file a similar disciplinary complaint in the future. At the same time, according to the law, there is no judicial or administrative control over the validity of such a decision, which could potentially give rise to a wide field for abuse by the disciplinary body.

The Grand Chamber of the Supreme Court takes a slightly different approach to appealing decisions to open a disciplinary case. In particular, in para. 37, 38 of the decision of 05.12.2019 in case No. 9901/495/19, the court emphasized that the provisions of part 2 of Article 46 of Law No. 1798-VIII (which establishes the impossibility of appealing against the decision to open a disciplinary case) are special in relation to Articles 22, 266 of the Code of Administrative Proceedings of Ukraine, and therefore prevail over the provisions of the procedural law. Agreeing with the conclusion of the cassation court, the Grand Chamber of the Supreme Court noted that in the context of the special provision of Law No. 1798-VIII, the HCJ's decision to open a disciplinary case is not subject to appeal and cannot be an independent subject of an administrative claim [10]. In another ruling, the Grand Chamber of the Supreme Court noted that: "the decision to open or refuse to open a disciplinary case is a discretionary power of the HCJ Disciplinary Chambers" [11].

That is, it can be assumed that, unlike the practice of appealing against decisions to return a disciplinary complaint or refuse to open a disciplinary case, in cases of appealing against a decision to open a disciplinary case, the Supreme Court recognizes that the judge against whom such a case is opened is a subject of disciplinary proceedings, such a decision gives rise to rights and obligations for him or her, but due to the existence of a special rule regulating the specifics of disciplinary proceedings against a judge, a judicial appeal against such a decision is impossible.

Decisions of the Disciplinary Chamber made upon consideration of the case on the merits, i.e., decisions to bring or refuse to bring a judge to disciplinary liability may be subject to appeal, but the law defines a special procedure for such appeal, which primarily consists in the fact that an appeal against the decision of the Disciplinary Chamber may be filed exclusively with the HCJ (part 4 of Article 35, part 3 of Article 51 of Law No. 1798-VIII). The essence of consideration of complaints against decisions of the Disciplinary Chambers is to check by the HCJ plenary composition of the decision in a disciplinary case both on the merits, for their correctness and validity, and for compliance with the rights and guarantees of the participants in the disciplinary proceedings [2, p. 159].

Currently, there is also a practice whereby the decision of the Disciplinary Chamber cannot be appealed directly to the court. In particular, when interpreting the provisions of Article 35 of Law No. 1798-VIII,

which regulates the procedure for appealing decisions of the HCJ and its bodies, the Administrative Court of Cassation of the Supreme Court noted that: "the word "may" used in parts 1 and 4 of Article 35 of the Law, should be interpreted in the same way in each of these provisions and means the possibility of appeal (a person has the choice to file or not to file a complaint), and not the possibility of choosing the body to which the complaint is filed. Under this interpretation, the decision of the High Council of Justice can be appealed only to the court, and the decision of the Disciplinary Chamber of the High Council of Justice can be appealed only to the High Council of Justice" [12]. In another case, the court emphasized that the legislation establishes a different procedure for reviewing decisions of the HCJ Disciplinary Chambers, which excludes the possibility of administrative judicial control over them in the manner requested by the plaintiff [13].

The position on the impossibility of a separate appeal against the decision of the Disciplinary Chamber based on the results of consideration of the issue of bringing a judge to disciplinary responsibility is also supported by the Grand Chamber of the Supreme Court. In particular, in its decision of 15.03.2018 in case No. 11-66sap18 [14], providing a legal assessment of the institution of disciplinary proceedings against a judge, the Court noted that the HCJ disciplinary chambers in such proceedings act as a quasi-court of first instance, since they consider the complaint and make decisions based on the balance of evidence submitted. The HCJ, as part of the consideration of an appeal against the decision of the Disciplinary Chamber, provides appellate review, and the Grand Chamber of the Supreme Court, which considers appeals against the HCJ's decisions, in turn, provides cassation review. Based on the provisions of part 3 of Article 51 of Law No. 1798-VIII, the court concluded that the decision of the Disciplinary Chamber cannot be an independent subject of judicial review. Thus, according to the position of the Supreme Court, it is not possible to immediately appeal the decision of the quasi-court of first instance (i.e., the Disciplinary Chamber) in cassation (i.e., to the Grand Chamber of the Supreme Court).

Another peculiarity of appealing against decisions of the Disciplinary Chamber on disciplinary liability is that only the judge against whom such a decision was made has the unconditional right to appeal. In other words, in the context of the above legal interpretation of the institution of disciplinary proceedings provided by the Grand Chamber of the Supreme Court, only the judge against whom it is carried out is guaranteed the right to appeal (by filing a complaint against the decision of the Disciplinary Chamber to the HCJ) and cassation (by filing a complaint against the decision of the HCJ to the Grand Chamber of the Supreme Court). Instead, the complainant may appeal the decision of the Disciplinary Chamber to the HCJ only if this Chamber has granted him/her permission to appeal. The grounds for granting/refusing to grant such permission are not defined in the law, only clause 12.39 of the Rules of Procedure of the High Council of Justice, approved by the decision of 24.01.2017 No. 52/0/15-17, states that such permission may be granted, in particular, if the decision is not made unanimously and/or if the decision does not coincide with the position of the rapporteur [15]. In its opinion of 17.10.2016 on the draft law "On the High Council of Justice" (which was later adopted), the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine noted that such a provision seems illogical: if a person has the right to appeal a decision made against him/her, it would be inappropriate to grant "permission" to file a complaint by the very body (instance) whose decision is to be appealed [16].

Additionally, it should be noted that in para. 2.1.3.1.1. of the Measures for Implementation of the State Anti-Corruption Program for 2023-2025, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 220 dated 04.03.2023 [17], it is planned to develop a draft law in January-July 2024 to provide for the right to appeal to the HCJ against the decisions of the Disciplinary Chamber without obtaining permission from the Disciplinary Chamber for such an appeal.

In addition, a complainant may appeal the HCJ's decision based on the results of consideration of an appeal against the decision of the Disciplinary Chamber to the Grand Chamber of the Supreme Court only if the decision of the Council was made on his or her complaint (part 2 of Article 52 of Law No. 1798-VIII). In other words, even if the HCJ reviewed the decision of the Disciplinary Chamber to bring a judge to disciplinary liability and issued a decision, the complainant may appeal to the court only if the "appeal proceedings" in the HCJ were carried out on his/her initiative. Thus, the current regulatory framework does not guarantee the complainant the right to appeal and cassation review of the Disciplinary Chamber's decision.

5. Conclusions

Based on the analysis of the legislation and relevant case law, it can be concluded that decisions made in the framework of disciplinary proceedings against judges are not currently subject to separate administrative judicial control. Only decisions of the HCJ adopted upon review of the decision of the Disciplinary Chamber to bring a judge to disciplinary responsibility may be subject to judicial appeal. The current regulatory framework seems to be somewhat discriminatory with respect to the rights of a person who has filed a disciplinary complaint against a judge, and the state has now declared its goal to eliminate such discrimination. At the same time, such an element of the institution of disciplinary liability of judges as judicial appeal of decisions made in disciplinary proceedings requires further research in order to establish an optimal balance between the right of an individual to access to justice, the peculiarities of the constitutional and legal status of the HCJ, and the constitutional guarantees of judicial independence.

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