

SOME LEGAL ASPECTS OF PROSECUTOR'S PARTICIPATION IN CASES OF ADMINISTRATIVE OFFENCES DURING APPLICATION OF COERCIVE MEASURES RELATED TO RESTRICTION OF PERSONAL FREEDOM OF CITIZENS

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Annotation. *The article deals with the legal characteristics of the prosecutor's participation in cases of administrative offences during the application of coercive measures related to the restriction of the personal freedom of citizens.*

The legislation on administrative offences is analysed with relevant conclusions about those categories of cases, the consideration of which is impossible without the participation of a prosecutor.

The attention is focused on the fact that the departmental acts of the Office of the Prosecutor General of Ukraine provide for mandatory provision for the participation of prosecutors in cases of administrative offences if coercive measures related to the restriction of personal freedom of citizens are applied.

Parallels are drawn between the direct participation of a prosecutor in the consideration of cases of administrative offences and the prosecutor's supervision of the relevant bodies that carry out the consideration of cases and apply coercive measures for administrative offences.

The authors of the article also draw attention to the fact that the prosecutor's supervision of compliance with the laws in administrative offence cases can be divided into two categories:

- *Direct participation in the consideration of a case on the administrative offence;*
- *Supervision over the relevant bodies that review cases and apply coercive measures for administrative offences.*

The authors differentiate coercive measures related to the restriction of personal freedom of citizens, which are used in cases of administrative offences. In particular:

- *The type of administrative sanction provided for in Art. 24 of the Code of Ukraine on Administrative Offences (hereinafter – CUAO) [1, Art. 24] (for example, administrative arrest, arrest with military detention, forced (administrative) deportation outside Ukraine);*
- *The measure to ensure proceedings in cases of administrative offences, provided for in Art. 260 CUAO [1, Art. 260] (for example, administrative detention).*

The article also draws attention to the conclusions of the European Court of Human Rights regarding the observance of the principle of impartiality in the absence of a prosecutor during proceedings in cases of administrative offences, etc.

Keywords: *prosecutor, prosecutor's supervision, administrative offence proceedings, European Court of Human Rights.*

1. Introduction.

One of the prosecutor's functions assigned to him by the Law of Ukraine "On the Prosecutor's Office" is to supervise the observance of laws in the execution of court decisions in criminal cases, as well as in the application of other coercive measures related to the restriction of personal freedom of citizens [7, Art. 2].

The conclusion of O. Tamozhnia is worthy of attention, that the powers of a prosecutor during the performance of the above-mentioned function are significantly narrowed by the exercise of powers to supervise compliance with laws when applying coercive measures related to the restriction of personal freedom of citizens, which, according to the Transitional Provisions of the Basic Law, the prosecutor's office continues to carry out before the law on the creation of a dual system of regular penitentiary inspections comes into force.

At the same time, the rules of the CUAO on the mandatory participation of a prosecutor in cases of administrative offences related to corruption continue to apply, so the prosecutor under the above-mentioned legislative restrictions on supervision cannot properly exercise procedural rights to make a legal decision in this category of cases, in particular due to lack of authority to appeal court decisions in such cases [4, Art. 120].

2. Analysis of scientific publications.

The following scientists have at different times dealt with the coverage of certain problems of the prosecutor's participation in cases of administrative offences, namely V.B. Averianov, O.M. Bandurko, D.M. Bakhrahk, Yu.P. Bytiak, D.F. Bortniak, T.F. Veselska, S.A. Kulynych, V.V. Shemchuk etc. However, the practical aspects of the implementation of the above function by the prosecutor's office indicate the existence of problems that need to be solved.

3. The aim of the work.

The article aims to analyse the legal characteristics of the prosecutor's participation in cases of administrative offences during the application of coercive measures related to the restriction of the personal freedom of citizens.

4. Review and discussion.

The Article 7 of CUAO [1, Art. 7] provides for the prosecutor to supervise the observance of laws when applying actions for administrative offences by exercising powers to supervise the observance of laws when applying coercive measures related to the restriction of personal freedom of citizens.

The article 250 of CUAO [1, Art. 250] gives the concept of prosecutor's supervision over the implementation of laws during proceedings in cases of administrative offences in details. In particular, a prosecutor, a deputy prosecutor, supervising the observance and correct application of laws in proceedings in administrative offence cases, has the right to: initiate proceedings in the case of an administrative offence; get acquainted with the case materials; check the legality of the actions of bodies (officials) in the course of the case; participate in the consideration of the case; make a request; give conclusions on issues that arise during the consideration of the case; check the correctness of the application by relevant bodies (officials) of actions for administrative offences; make a submission, appeal the resolution and decision on the complaint in the case of an administrative offence, as well as perform other actions provided for by law.

Considering the above, the prosecutor's supervision of compliance with the laws in administrative offence cases can be divided into two categories:

- Direct participation in the consideration of a case on the administrative offence;

- Supervision over the relevant bodies that review cases and apply coercive measures for administrative offences.

We fully agree with the opinion of O. Tamozhnia that the specificity of administrative jurisdictional proceedings of the prosecutor in cases of administrative offences is that they are carried out in three forms:

1. A prosecutor as a subject authorized to draw up protocols on administrative offences provided for in Articles 185-4, 185-8, etc.;
2. A prosecutor as a participant in the trial of administrative offences, including as a mandatory participant in the trial of administrative offences related to corruption;
3. A prosecutor as a subject that supervises the observance of laws when applying actions for administrative offences by exercising powers to supervise the observance of laws when applying coercive measures related to the restriction of personal freedom of citizens [4, Art. 121].

I. Sobolieva's statement is noteworthy that a prosecutor can exercise his right to appeal in cases of administrative offences in cases defined by law exclusively at the stage of execution of a court decision.

In other cases, based on the content of part 2 of Art. 294 of CUAO, the appeal shall be returned to the prosecutor as filed by a person who is not entitled to appeal. Under such circumstances, the prosecutor, participating in the court of first instance and disagreeing with the court's decision, does not have the right to appeal it, and therefore, his participation in the local court is absurd [9, Art. 121].

Coercive measures related to the restriction of personal freedom of citizens, applied in cases of administrative offences, can also be conditionally divided into two categories:

- The type of administrative sanction provided for in Art. 24 of CUAO [1, Art. 24] (for example, administrative arrest, arrest with military detention, forced (administrative) deportation outside Ukraine);
- The measure to ensure proceedings in cases of administrative offences, provided for in Art. 260 CUAO [1, Art. 260] (for example, administrative detention).

In part 2 of Article 250 of CUAO [1, Art. 250] it is declared about the mandatory participation of prosecutor in the proceedings on cases of administrative offences, provided for in the articles 1724–1729, 1729-2 of CUAO (cases regarding anti-corruption offences).

Having analysed the rest of the CUAO norms, we can conclude that when considering other cases of administrative offences, the participation of a prosecutor is not mandatory, and his role in the judicial process is indirect. This is explained, first of all, by the low public danger of administrative offences (Art.9 of CUAO: administrative liability for offences provided for by the CUAO, if these violations by their nature do not entail criminal liability in accordance with the law [1, Art. 9]) and, as a result, the lack of interest of the prosecutor's office to participate in the consideration of such cases.

However, despite the low public danger of administrative offences, a number of the CUAO norms, as already mentioned above, provide the taking of coercive measures related to the restriction of the personal freedom of citizens as a sanction (administrative arrest, arrest with military detention, forced deportation outside Ukraine, public, correctional works, etc.).

In our opinion, it would be expedient to oblige the court considering cases, the sanction of which involves taking the above-mentioned measures, to involve a prosecutor.

Similar conclusions were reached by the European Court of Human Rights (hereinafter – ECHR) [8].

In particular, the latter's conclusions about the absence of the prosecution during the proceedings on an administrative offence deserve attention, set forth in the cases 'Bantysh et al. v. Ukraine', 'Mykhaylova v. Ukraine', 'Karelin v. Russia', etc.

Thus, the ECHR considered the issue of compliance with the principle of impartiality in the absence of a prosecutor during the entire administrative offence proceedings or a separate part thereof in relation to the applicants.

According to the ECHR, the court hearing the administrative offence case, in the absence of a prosecutor, had no choice but to take on the function of bringing and supporting the charge during the trial. In this case, the presumption of innocence will be violated, since the burden of proof is transferred from the prosecution to the defence. The presence of the prosecution is, as a rule, necessary to eliminate reasonable doubts that may arise about the impartiality of the court.

The mentioned conclusions of the ECHR also correspond with the order of the Office of the Prosecutor General of Ukraine No. 400 of December 29, 2021 "On the organization of activities of prosecutors to combat human rights violations in law enforcement and penitentiary spheres", in accordance with Clause 8 prosecutor's offices are obliged to ensure the participation of prosecutors in cases of administrative offences in cases of coercive measures application related to the restriction of personal freedom of citizens, timely and effective response to court decisions in cases and in the order established by law [3, Clause 8].

As for the prosecutor's supervision of the activities of the bodies that handle cases and apply measures of influence for committed administrative offences, in this case, the role of the prosecutor's office is determined by carrying out planned and surprise inspections based on appeals, other reports or on one's own initiative, taking actions provided for by law in cases establishment of facts of violations of the rights of detained persons; receiving notifications about coercive measures by authorities related to the restriction of personal freedom of citizens.

The above-mentioned Order [3, Clause 5] assigns the prosecutor's office the task of ensuring compliance with the law when applying coercive measures related to the restriction of personal freedom of citizens for the commission of administrative offences, as well as ensuring compliance with the law during delivery, administrative detention and holding persons, drawing up protocols on administrative offences against them, applying other measures related to the restriction of personal freedom of citizens in the administrative order, and imposing administrative penalties in the form of administrative arrest, including military detention, as well as correctional, public or socially useful works, forced return and deportation outside Ukraine of foreigners and stateless persons.

These norms correspond, for example, to the provisions of Article 263 of the CUAO [1, Art. 263], which requires the prosecutor's notification of the administrative detention of a person for a period of up to three days in cases of violation of the latest rules on the circulation of narcotic drugs and psychotropic substances (in necessary cases for identifying the person, conducting a medical examination, clarifying the circumstances of the acquisition of seized narcotic drugs and psychotropic substances and their research).

In addition, the provisions of the Instruction on the forced return and forced deportation of foreigners and stateless persons from Ukraine, approved by the order of the Ministry of Internal Affairs of Ukraine, the Administration of the State Border Guard Service of Ukraine and the Security Service of Ukraine of April 23, 2012 No. 353/271/150 [2, Chapter 2, Clause 1] provides for mandatory, within 24 hours, notification of a prosecutor about the grounds for making a decision regarding the forced return of foreigners/stateless persons outside of Ukraine.

A similar notification of the prosecutor's office is also required after the decision to place foreigners in a Temporary Holding Facility, etc. It is interesting that the same provision on the notification of a prosecutor was contained in Art. 26 of Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons" [6, Art. 26].

At the same time, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding the Protection of the State Border of Ukraine" of February 24, 2023 [5, Clause 14] excludes the above-mentioned provision of the Law.

5. Conclusion: the conducted research analyses some of the legal aspects of the prosecutor's participation in cases of administrative offences during the application of coercive measures related to the restriction of the personal freedom of citizens. Attention is drawn to those categories of cases on administrative offences, the consideration of which is impossible without the participation of a

prosecutor. It is mentioned about some differences between the direct participation of a prosecutor in the consideration of cases of administrative offences and the prosecutor's supervision of the relevant bodies that carry out the consideration of cases and apply coercive measures for administrative offences. It is also mentioned that it would be expedient to oblige the court considering cases, the sanction of which involves taking the above-mentioned measures, to involve a prosecutor, etc.

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