THE CONCEPT OF APPEAL IN PRE-TRIAL CRIMINAL PROCEEDINGS

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Annotation. The aim of the work is to define the concept of appeal in pre-trial criminal proceedings.

The methodological basis of the study is a combination of general scientific and special methods of cognition. In particular, to define the concept of appeal in pre-trial criminal proceedings, the author uses the method of legal comparative's (comparison of approaches to understanding appeal in pre-trial criminal proceedings), hermeneutics (interpretation of the legal provisions regulating the mechanism of appeal in pre-trial criminal proceedings) and the systemic and structural method (consideration of appeal in pre-trial criminal proceedings as a complex legal phenomenon).

Results. The article is devoted to the study of certain issues that arise when interpreting the concept of appeal in pre-trial criminal proceedings, taking into account the norms of criminal procedural legislation and the practice of the European Court of Human Rights. It is emphasized that the institution of appeal is of leading importance precisely during the pre-trial investigation, since within this stage the use of procedural coercion measures prevails, limiting the constitutional rights and freedoms of a person. It has been established that the prosecutor's review of the legality and reasonableness of the decisions, actions and inactions of the inquirer, the investigator is a "quasi-appeal", because the prosecutor as the main subject of the prosecution cannot remain independent and impartial.

Conclusions. An appeal in pre-trial criminal proceedings is a procedure of judicial review of the legality and validity of decisions, actions and inactions of the prosecution and decisions of investigating judges initiated by interested participants in pre-trial criminal proceedings or other interested persons in order to ensure procedural rights, protection of material rights, freedoms and legitimate interests of a person in criminal proceedings, stipulated by the provisions of the criminal procedural legislation and/or the content of the principles of criminal justice.

Key words: actions or inaction; pre-trial proceedings; appeal; rights and freedoms; procedural decisions; investigation; the investigating judge.

1. Introduction.

The right to appeal against procedural decisions, actions or omissions is one of the key principles of criminal proceedings designed to help protect the rights, freedoms and legitimate interests of participants to criminal proceedings (Article 24 of the CPC of Ukraine). However, the current state of criminal procedural legislation and its application practice show that due to the lack of generally accepted approaches to understanding the concept of appeal in pre-trial criminal proceedings, other problematic issues related to the establishment of the subject matter, boundaries and subjects of appeal remain unresolved. This affects the risk of violation of fundamental human rights, which negatively affects the results of the criminal procedure in general.

Thus, development of a reasonable interpretation of the concept of appeal in pre-trial criminal proceedings is an important scientific task in the context of bringing the national criminal justice practice in line with the principles of a democratic state governed by the rule of law which consistently and effectively implements European human rights standards, in particular, with regard to the proper

implementation of the provisions of Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR).

2. Analysis of scientific publications.

The institute of appealing against actions (inaction) and decisions of state bodies and officials is actually one of the constitutional guarantees of human rights protection (Article 55 of the Constitution of Ukraine). Therefore, it is quite natural that the mechanism for exercising the right to appeal is of considerable scientific interest in various branches of legal knowledge, including the theory of criminal procedure. However, certain issues of legal regulation of the appeal procedure at different stages of criminal proceedings remain the subject of active scientific debate among many proceduralists, such as I.V. Hloviuk, M. Denysovskyi, D.I. Klepka, K.E. Lysenkova, V.T. Malyarenko, I.M. Odintsova, S.O. Pshenichko, V.O. Popelushko, A.R. Tumanyants, I.O. Tomchuk, A.R. Tumanyants, L.D. Udalova, S.L. Sharenko, O.H. Shylo, O.H. Yanovska and others. However, numerous scientific studies on the peculiarities of appealing against decisions, actions and omissions of state bodies and officials are not able to fully cover the conceptual issues of determining the content and focus of this institution, including at the stage of pre-trial investigation, causing ambiguous interpretation of the provisions of the criminal procedure law due to the lack of a generally accepted interpretation of the concept of appeal in pre-trial criminal proceedings.

3. The aim of the work.

The purpose of the article is to define the concept of appeal in pre-trial criminal proceedings. Achievement of this goal requires a doctrinal analysis of the content and purpose of the procedural institution of appeal with due regard for the provisions of national criminal procedure legislation and the case law of the European Court of Human Rights.

4. Review and discussion.

Each stage of criminal proceedings has its own distinctive features in the regulatory framework for the mechanism of appealing against actions (inaction) and decisions of state bodies and officials conducting criminal proceedings. However, when considering the institution of appeal as a criminal procedural form of exercising the constitutional right to judicial protection, it is necessary to note its leading importance at the pre-trial investigation stage, where the use of procedural coercive measures restricting human rights and freedoms prevails. Moreover, the effect of the adversarial principle at the pre-trial stage of criminal proceedings is limited due to the occasional participation of court representatives in criminal proceedings. In this context, the possibility for interested parties to criminal proceedings to file a complaint emphasizes the special role of this procedure as one of the effective guarantees of protection of human rights and legitimate interests, which is reflected in a number of international legal acts, such as the Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2(3)), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13), etc.

The provisions set out in these international documents are also reflected in the national criminal procedure law, which regulates the procedure for initiating by interested parties to criminal proceedings of review of procedural decisions, actions, inaction of the investigator, detective and prosecutor (Article 303 of the CPC of Ukraine), as well as a certain list of rulings of the investigating judge (Article 309 of the CPC of Ukraine) during the pre-trial investigation. Undoubtedly, these norms allowed to establish a certain level of compliance of the criminal procedure of Ukraine with international standards in the field of protection of conventional rights, but the issues of understanding the legal nature of the institution of appeal in pre-trial criminal proceedings remain unresolved, which does not contribute to the rapid and effective restoration of violated rights in pre-trial criminal proceedings.

Despite the widespread study of issues related to appeal in criminal proceedings, the theory and practice of criminal procedure do not have a well-established understanding of the meaningful definition of the concept of criminal procedural appeal. For the most part, appeals are considered regardless of the stage of criminal proceedings, revealing the content through the prism of the essence of the principles of ensuring the right to appeal against procedural decisions, actions or omissions (Article 24 of the CPC of Ukraine) and the adversarial nature of the parties (Article 22 of the CPC of Ukraine), which serve as a solid foundation for the relevant criminal procedural institution [1, p. 145; 2, p. 143]. Other scholars try to define the concept of appeal either by identifying it with a fundamental human right, which is reflected in the procedural legislation of Ukraine as the right to defense in court, or through a criminal procedural guarantee and the same name means of ensuring the rights, freedoms and legitimate interests of each subject of criminal procedural activity [3, p. 602]. According to this approach, an appeal is understood as an activity based on the criminal procedural law for filing (sending), receiving, registering, considering and resolving a complaint about a violation of the rights, freedoms and legitimate interests of persons by a criminal procedural action, decision (inaction) of officials conducting the process [4, p. 217].

I.M. Odintsova, emphasizing the dual nature of the appeal institute, notes that, on the one hand, appeal involves filing a complaint against procedural decisions and actions (inaction) of the investigator, prosecutor, investigating judge, and on the other hand, appeal should be the activity of the court to accept, consider and resolve complaints of interested parties. In this aspect, the appeal simultaneously acts as an officially established procedure for the formation of materials, and as a control system that provides for the achievement of a specific result and the procedure for the implementation of legal relations that are in flux [5, p. 309-310].

Agreeing with the above opinions of scholars on determining the content of appeal in criminal proceedings, in particular, at the pre-trial investigation stage, it should be emphasized that not only the interested parties to criminal proceedings, but also other interested persons have the right to appeal in pre-trial criminal proceedings. This follows both from the content of Article 303 of the CPC of Ukraine and from the results of the pre-trial investigation practice, during which not only the rights, freedoms and legitimate interests of participants in criminal proceedings, but also other persons may be restricted.

Thus, as a result of summarizing the analyzed theoretical concepts of the concept of "appeal in pre-trial criminal proceedings", the latter can be defined as a procedure provided for by criminal procedural rules and initiated by the interested participants to the pre-trial investigation or other interested persons for judicial review of the legality of decisions, actions and inactions of the prosecution and decisions of investigating judges to ensure the rights, freedoms and legitimate interests of a person in pre-trial criminal proceedings.

At the same time, this approach to the content of the definition of appeal in pre-trial criminal proceedings does not take into account the fact that the appeal procedure may be based not only on the provisions of the criminal procedure law, but also directly follow from the content of the principles of criminal justice.

An example is the Resolution of the Grand Chamber of the Supreme Court of 23 May 2018 in case No. 237/1459/17 (proceedings No. 13-19кс18), in which the Supreme Court, based on the provisions of Art. 9 of the CPC of Ukraine, which reveals the principle of legality of criminal proceedings, provisions of para. 17, part 1, Art. 7 of the CPC of Ukraine, Art. 24 of the CPC of Ukraine, which regulate the principle of ensuring the right to appeal against procedural decisions, actions or omissions, concluded that the decisions of investigating judges, which are not directly provided for in Art. 309 of the CPC of Ukraine, may be subject to appeal [6]. Thus, in the absence of criminal procedural rules, the Supreme Court derived the right to appeal against the relevant decision of the investigating judge directly on the basis of the principles of criminal procedure.

Also, in our opinion, the concept of appeal in pre-trial criminal proceedings should contain a more specific purpose (purpose) of such a procedure than ensuring the rights, freedoms and legitimate interests of a person.

Taking into account the case law of the European Court of Human Rights (hereinafter – the ECHR), it is worth noting that the main focus of the institution of appeal in pre-trial investigation is mainly to ensure the principle of legality by creating an effective mechanism for the protection and restoration of violated conventional rights and fundamental freedoms. After all, the introduction of this institution indicates the legislator's recognition of the need to strengthen control over the legality, validity and fairness of procedural decisions, actions (inaction) of the investigator, detective or prosecutor in the form of their appeal in accordance with the procedure established by the criminal procedure legislation [7, p. 775]. For example, in the ECtHR judgement "Klass and Others v. Germany", considering the application of Article 13 of the ECHR on the right to an effective remedy, the court emphasised that national legal protection systems should provide individuals with the opportunity to appeal against actions that violate their rights in order to restore them [8]. In the case of Silver and Others v. the United Kingdom, the court concluded that any interference with the rights guaranteed by the Convention must be subject to an effective appeal that can lead to the restoration of the violated rights [9]. A similar position was expressed in the case of Kudla v. Poland", where the court found a violation of Article 13 in conjunction with Article 6 of the ECHR due to the lack of an effective remedy to challenge the excessive length of the trial at the pre-trial investigation stage. The Court noted the importance of ensuring access to effective legal remedies that can compensate for violated rights [10]. In its judgment in the case of M.S.S. v. Belgium and Greece, the ECtHR, in addressing the issue of a legal remedy for appealing against improper conditions of detention during the pre-trial investigation, reiterated that an effective appeal should lead to the restoration of violated rights and be practical [11]. Thus, an effective remedy in the form of appealing against decisions, actions (inaction) during the pre-trial investigation involves ensuring the legality and restoration of violated human rights.

The considered decisions of the ECHR show that the need for urgent judicial protection of violated rights necessitates the need to provide participants in criminal proceedings with the opportunity to appeal against decisions, actions or inaction of pre-trial investigation bodies or the prosecutor already during the pre-trial investigation [12, p. 507]. Therefore, when defining the concept of appeal in pre-trial criminal proceedings, it is necessary to take into account not only the provisions of criminal procedural law, subjects, subject matter and procedure for judicial review of the legality of the decision, action (inaction) of the subjects of investigation and the decision of the investigating judge, but also the specific purpose (purpose) of the appeal to ensure (protect) certain rights of the interested parties.

The content of the regulatory regulation of the right to appeal during the pre-trial investigation is ensured by: 1) a mechanism for appealing against procedural decisions, actions (inaction) of the subjects of criminal prosecution; 2) the procedure for appealing against the decisions of the investigating judge. Given the subject matter of the appeal provided for in Art. 303, Art. 309 of the CPC of Ukraine, O. Shylo rightly noted that the right to judicial protection includes narrower rights in terms of their content - the right to apply for judicial protection (procedural aspect) and the right to protect the rights of a person, restore the violated state, etc. (material aspect) [13, p. 23]. That is, we are talking about actions and omissions that relate either directly to the investigation process (for example, an unjustified decision to suspend the pre-trial investigation) or to violations of the fundamental rights and legitimate interests of participants in criminal proceedings (for example, the right to personal integrity). The first type of appeal is aimed at ensuring the effectiveness of pre-trial proceedings and the right to a reasonable time limit for criminal proceedings. The second type is aimed at guaranteeing fundamental human rights [14, p. 456].

The function of protection of substantive rights is carried out by appealing against procedural decisions of investigating judges in pre-trial criminal proceedings. By appealing against the decisions of investigating judges, material rights are protected, such as the right to liberty, the right to inviolability of the home or other possessions of a person, the right to property, etc [15, p. 20]. The material basis for the exercise of the right to appeal is the relevant factual data confirming the existence of a violation (possible violation) of the relevant subjective right that a person has regardless of the existence of criminal procedural relations. Conversely, when appealing against the procedural activity/inactivity of the prosecution, procedural rights are ensured, in particular, the right to an effective investigation, the right to a reasonable time limit for criminal proceedings, etc

[15, p. 19]. Violations of procedural rights can lead to a significant limitation, and in some cases, to the complete impossibility of protecting the substantive rights of participants in criminal proceedings. In this regard, procedural rights, although related exclusively to the possibility of applying measures of criminal procedural coercion, act as an independent object of judicial protection [13, p. 130]. Summing up, it is worth noting that the appeal procedure in pre-trial criminal proceedings serves as an effective and efficient means of protecting and restoring the rights of participants in criminal proceedings (other persons), both procedural and substantive, violation of which serves as grounds for appealing a specific decision, action, inaction of the prosecution or the decision of the investigating judge.

In addition, the ECHR judgments are unanimous in stating that when using an effective remedy, the legality and validity of decisions must be verified by a court. The rationale for this position is that in criminal proceedings, legal relations between a person and the state are usually accompanied by intense coercive influence of the latter, which is seen as a manifestation of a tendency for the prosecution to exceed its powers, negatively affecting the procedural position of the person. For example, the ECHR judgment "McKay v. the United Kingdom" contains instructions that the judiciary must provide the necessary guarantees of independence from the executive branch. Only the court can provide an independent and impartial assessment of the actions of the prosecution [16]. At the same time, the ECHR case law is structured in such a way that the understanding of a "court" is determined not by its name, but by the functional content of the administration of justice. Such a body that has the characteristics of a "court" must meet the criteria of independence (in particular, in relation to the executive branch) and impartiality [17, p. 44]. Therefore, in the context of consideration of complaints against decisions, actions or omissions of the subjects of investigation in pre-trial criminal proceedings, T. O. Loskutov's position is fair that failure (non-compliance) of criminal justice authorities to fulfil their obligations aimed at ensuring the exercise of the rights of participants in the criminal process allows the latter to apply to the court (investigating judge) to file a complaint against actions or omissions of pre-trial investigation authorities [18, p. 153]. At the same time, it should be borne in mind that some procedures established by the CPC of Ukraine, for example, appealing against non-compliance with reasonable terms of pre-trial proceedings, do not comply with the principle of equality of parties. This is due to the fact that the defense party is at a disadvantage when the prosecution is authorized to file a complaint about the failure to comply with reasonable time limits by the investigator or prosecutor to a higher-level prosecutor. In this case, there is a risk that the prosecution will actually make decisions "for itself" [19, p. 91-92].

In our opinion, when describing the possibility of the prosecutor's review of the legality and validity of decisions, actions and inactions of the investigator, it is advisable to use the term "quasi-appeal", since the prosecutor, given his/her accusatory functional orientation in criminal proceedings, cannot remain independent, impartial and unbiased.

The prosecutor, as the main subject of the prosecution, performs the accusatory function in criminal proceedings, provides procedural guidance to the pre-trial investigation, is subordinate to a superior prosecutor, and therefore cannot be independent, impartial and unbiased in deciding on the verification of the legality and validity of decisions, actions and inactions of the investigator, investigator or lower prosecutor in order to ensure procedural rights, protection of substantive rights, freedoms and legitimate interests of a person in criminal proceedings.

A prosecutor who checks the legality and validity of decisions, actions and inactions of an inquirer, investigator or lower prosecutor in order to ensure procedural rights, protection of substantive rights, freedoms and legitimate interests of a person is a "quasi-judicial body" that does not contribute to the fairness of criminal proceedings.

5. Conclusions.

An appeal in pre-trial criminal proceedings is a procedure of judicial review of the legality and validity of decisions, actions and inactions of the prosecution and decisions of investigating judges initiated by interested participants in pre-trial criminal proceedings or other interested persons in order to ensure procedural rights, protection of material rights, freedoms and legitimate interests of a person

in criminal proceedings, stipulated by the provisions of the criminal procedural legislation and/or the content of the principles of criminal justice.

A prosecutor's review of the legality and validity of decisions, actions and inactions of an investigator, investigator's officer or a lower prosecutor to ensure procedural rights, protection of material rights, freedoms and legitimate interests of a person is a "quasi-appeal", since such a prosecutor is a "quasi-judicial body" in view of its accusatory functional orientation in pre-trial criminal proceedings, official subordination, and, as a result, failure to meet the requirements of independence, impartiality and impartiality.

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