CRIMINAL PROCEDURAL MEANS OF EXAMINING EVIDENCE IN INVESTIGATING JUDGE`S PROCEEDINGS

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Annotation. The article is dedicated to clarifying the criminal procedural means of proof used in the proceedings of the investigating judge in Ukrainian criminal procedure.

It is emphasized that the investigating judge is authorized to resolve a number of significant criminal procedural issues within the framework of exercising the function of judicial control during the pre-trial investigation. All decisions made by this entity are procedural and must therefore be based on the results of the examination and evaluation of the evidence presented to them.

The author argues that the current criminal procedural legislation does not establish a separate procedure for the proceedings of the investigating judge and contains a number of gaps and contradictions regarding the mandatory nature and procedure for the examination of evidence by this entity. Instead, the provisions of the Criminal Procedure Code of Ukraine regarding the rules for trial in the court of first instance are applied to investigating judge`s proceedings by analogy. To ensure legal certainty principle it is proposed to amend the Criminal Procedure Code of Ukraine to clarify the procedural status and powers of the investigating judge. The amendment should explicitly establish that judicial reviews conducted by the investigating judge follow the general rules outlined in Articles 318–380 of the Code, while considering any specific features defined by the Code.

Based on the analysis of 100 rulings by investigating judges of first instance courts issued between 2020 and 2024, the author demonstrates that in the vast majority of cases (92 %) investigating judges, while exercising their powers, examine written evidence (procedural documents) that substantiated the motions, applications, and complaints submitted to them, as well as the objections against them. At the same time, the interrogation of witnesses and the examination of physical evidence by Ukrainian investigating judges are practically not conducted.

Based on the review of judicial practice, the author concludes that the procedural opportunities for examining evidence in the proceedings of the investigating judge are not fully utilized.

Key words: criminal proceedings, proceedings of the investigating judge, proof, submission of evidence, examination of evidence, application of preventive measures, appeal of decisions.

1. Introduction.

A specific form of judicial proceedings under the current Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine) is the proceedings of the investigating judge, who within the framework of exercising the function of judicial control during the pre-trial investigation is authorized to resolve a number of significant issues for criminal proceedings. This entity reviews challenges during the pre-trial investigation; makes decisions on the application of almost all measures to secure the criminal proceedings (including preventive measures) upon motions from participants in the criminal proceedings; authorizes searches, inspections and investigative experiments in

a person's home or other premises, as well as most covert investigative (search) actions; appoints judicial expertise upon the defense's motion; grants permission for special pre-trial investigations; sets and extends deadlines for the pre-trial investigation after informing the person of the suspicion; reviews complaints about certain forms of decisions, actions, and inactions of pre-trial investigation bodies or prosecutors; appoints inpatient forensic psychiatric examinations; and approves a person's consent to extradition in a simplified procedure, among other functions.

According to Part 1 of Article 110 of the CPC of Ukraine, all decisions of the investigating judge are procedural and, therefore, according to the provisions of Article 94 of the CPC of Ukraine must be based on the results of evaluating the evidence presented to this entity. Proper evaluation of such evidence requires familiarization with the relevant sources (carriers) of evidential information, obtaining and analyzing such information, which means conducting an examination of the evidence.

2. Analysis of scientific publications.

Certain features of proof in the proceedings of the investigating judge have been examined by A. Bondiuk, O. Bronevytska, I. Hloviuk, D. Hovorun, M. Karpenko, D. Kryklyvets, V. Mykhailenko, V. Nor, V. Rohalska, N. Rohatynska, Yu. Sukhomlyn, O. Torbas, S. Sharenko, O. Yanovska, V. Zavtur and other Ukrainian scholars. However, due to the low quality of their legal regulation, the issues of mandatory and procedural order of evidence examination by this entity remain contentious in scholarly sources and problematic in practice, which underscores the timeliness and relevance of the proposed article.

3. The aim of the work is to highlight and evaluate the effectiveness of criminal procedural means for examining evidence in the proceedings of the investigating judge within Ukrainian criminal justice.

4. Review and discussion.

Despite the fact that the proceedings of the investigating judge are a component of the pre-trial investigation stage, their procedural nature and form are derivative of judicial proceedings. The current legislation does not provide for a separate procedure for judicial hearings in the proceedings of this entity. Some provisions of the CPC of Ukraine regulate the powers of the investigating judge, the procedure for submitting motions and complaints to them, certain preparatory actions before the hearing, requirements for the mandatory participation of specific persons, the subject of proof during the review, the content and form of the investigating judge's decisions, and several other matters.

In practice, judicial review in the proceedings of the investigating judge is conducted in accordance with the general rules for proceedings in the court of first instance. For example, Part 1 of Article 306 of the CPC of Ukraine stipulates that complaints against decisions, actions, or inactions of the investigator, interrogator, or prosecutor are reviewed by the investigating judge according to the rules of judicial review provided in Articles 318-380 of the CPC of Ukraine, taking into account the provisions of Chapter 26 of the Code. D. Kryklyvets notes that during the review of such complaints in the proceedings of the investigating judge, a judicial investigation is conducted, within which it is possible to interrogate witnesses and victims, including minors, conduct identification procedures, interrogate experts in court, examine physical evidence, documents, audio and video recordings, utilize consultations and explanations from specialists, and conduct on-site inspections [1, p. 199]. As for other forms of the investigating judge's proceedings (such as the application of measures to secure criminal proceedings and preventive measures, authorization of searches and covert (investigative) actions, etc.), the CPC of Ukraine does not contain such provisions. Thus, in a number of cases, the provisions of Chapter 28 of the Criminal Procedure Code of Ukraine are applied by analogy to the proceedings of the investigating judge.

Moreover, the current CPC of Ukraine does not contain a clear and consistent position regarding the timing and procedure for submitting evidence that supports the arguments of motions [2, p. 105],

as well as the nature and procedure for their examination by the investigating judge. In particular, a number of provisions in the Criminal Procedure Code of Ukraine empower the investigating judge, upon the motion of the parties or on their own initiative, to hear any witness or examine any materials relevant to resolving the substantive issue before them (Part 4 of Article 151, Part 5 of Article 156, Part 4 of Article 172, Part 4 of Article 193, Part 5 of Article 244, and Part 3 of Article 297-3 of the CPC of Ukraine). Part 1 of Article 194 of the CPC of Ukraine obliges the investigating judge to examine the evidence submitted by the parties when considering motions for preventive measures. At the same time, Articles 142, 146, 156, 163, 172, 234, 248, and 295-1 of the CPC of Ukraine do not contain a direct indication of the investigating judge's right to examine evidence. Additionally, the provisions of Articles 141, 145, 234, and 295-1 of the CPC of Ukraine require the investigator (inquirer) and prosecutor to attach originals or copies of documents and other materials that substantiate the arguments of the motions to the respective requests. In several other cases (such as the review of complaints about decisions, actions, or inactions of pre-trial investigation bodies, and the consideration of challenges, etc.), current legislation does not contain any provisions regarding the instances and procedures for examining evidence in the proceedings of the investigating judge [3, p. 184].

We believe that the described conflicts and gaps in legislation regarding the mandatory nature and procedure for examining evidence in the proceedings of the investigating judge can currently be addressed by applying the provisions of Articles 23 and 94, as well as Chapter 28 (by analogy) of the CPC of Ukraine. Considering the listed normative requirements, we are convinced that, in making their own decisions, the investigating judge is nonetheless required to examine evidence regardless of the absence of a specific provision in the Law mandating such examination. The general procedure for such actions should align with the requirements for similar procedures in the context of judicial hearing in the court of first instance. At the same time, to ensure the principle of legal certainty, we advise to amend the Criminal Procedure Code of Ukraine with a provision that would further regulate the procedural status of the investigating judge, clearly define the scope of their powers, and explicitly establish the rule that judicial review of issues within their powers is conducted according to the general rules of Articles 318-380 of the CPC of Ukraine, taking into account the specific features defined by the Code.

An analysis of 100 rulings by investigating judges of first instance courts issued between 2020 and 2024 showed that in the vast majority of cases (92 %), investigating judges, while exercising their powers, examined the evidence that substantiated the submitted motions, applications, and complaints, as well as objections against them. Cases where rulings do not reference the evidence examined by the investigating judge (8 %) are typically related to the failure of the party submitting the motion, application, or complaint to provide the relevant materials (see, for example, [4; 5]).

Reviewing the provisions of the current criminal procedural legislation allows us to conclude that the examination of evidence in the proceedings of the investigating judge can be carried out according to three main scenarios:

1) examination of materials that were submitted by the parties to the proceedings as attachments to motions, applications, complaints, and objections. According to the current criminal procedural legislation, only written documents can be the attachments to motions (both originals and copies are permitted to be submitted to the investigating judge). Such evidence was examined by investigating judges in all cases we reviewed where an examination was conducted (92 % of the total number of rulings). At the same time, physical evidence (including physical evidence-documents) and witness testimony cannot be examined under this scenario and must be submitted during the hearing;

2) examination of evidence submitted by the parties during the hearing procedure (or evidence requested by the investigating judge upon their motions). We did not find such situations while reviewing the rulings of investigating judges. However, the lawyers we interviewed reported that in their practice, there have been instances where evidence was submitted by the parties during the hearing related to the application of preventive measures. It is likely that investigating judges do not differentiate between evidence submitted as attachments to motions and evidence presented during the hearing itself in their rulings;

3) examination of evidence that has been requested by the investigating judge on their own initiative. Such situations were found in only 2 of the cases we reviewed (2 %). In both instances, the investigating judges required the investigators to provide materials from the criminal proceedings for examination: during the review of the issue of lifting the seizure of a land plot [6]; and during the consideration of a motion for temporary access to things and documents [7].

The objects of evidence examination in the proceedings of the investigating judge may differ somewhat from the evidence examined during the substantive judicial review of criminal cases. For example, when the investigating judge addresses issues related to the existence of reasonable suspicion (such as the application of preventive measures or challenges to the notification of suspicion), the judicial review involves examining "traditional evidence" that, according to the prosecution's view, is intended to demonstrate the person's involvement in committing a particular criminal offense.

The scope and consequences of the investigating judge's examination, verification, and evaluation of such evidence are subject to debate. In particular, the investigating judges of the High Anti-Corruption Court, in their rulings following the review of motions for the application and extension of preventive measures, consistently state that "At this stage of the criminal proceedings, the investigating judge must only assess whether the obtained information and examined evidence are sufficient to permit the possibility that the person for whom the preventive measure is being considered could have committed the criminal offense they are accused of. The issue of evaluating evidence in terms of its sufficiency and admissibility for determining a person's guilt or innocence in committing a particular crime falls within the competence of the court during the substantive review of the criminal proceedings." [8]. The motivational sections of certain rulings by the investigating judges of the High Anti-Corruption Court include a block titled "Regarding the Reasonableness of the Suspicion," where the evidence collected by the prosecution and the arguments of the parties to the proceedings are analyzed (see, for example, [9]).

Article 198 of the CPC of Ukraine specifies that conclusions expressed in an investigating judge's ruling following the review of a motion for applying a preventive measure regarding any circumstances related to the essence of the suspicion or accusation do not have prejudicial value. However, Judge V. Mykhailenko of the High Anti-Corruption Court emphasizes that the investigating judge should indeed play a preventive role in allowing the introduction of evidence that is of questionable admissibility. Granting permits for procedural actions based on inadmissible evidence could lead to the subsequent invalidation of the results of such actions under the "fruit of the poisonous tree" doctrine [10, p. 229].

At the same time, in the proceedings of the investigating judge, evidence related to other circumstances that are of significant importance for resolving the issue at hand may also be examined. For example, during the review of a motion for permission to allow a suspect, who is under a preventive measure in the form of a personal obligation (including the duty not to leave the boundaries of the Kyiv region without the consent of the investigator, prosecutor, or court), to travel, the investigating judge examined the original document – an invitation to an expert meeting addressed to the suspect (the motion was granted) [11]. In another case, during the review of a motion to change the preventive measure, the investigating judge examined documents provided by the defense, including an email from the suspect's mother requesting him to visit her and her medical documentation (the motion was denied) [12]. These documents are not related to the criminal offense and cannot be considered as proper evidence in resolving the substantive criminal dispute. However, they can directly or indirectly confirm the existence of circumstances that are relevant to the specific issue the investigating judge is addressing, and in this particular context, they are considered adequate evidence.

Therefore, the object of evidence examination in the proceedings of the investigating judge should be defined as the information (factual data) contained in the sources provided by the parties or requested by the investigating judge, which confirm or refute the facts upon which the judge makes a decision within their authority. The set of facts that need to be established in order for the investigating judge to make a particular decision is defined by the subject of proof within each form of review. It is worth noting that for some decisions of the investigating judge, specific (local) subjects

of proof are defined separately by current legislation (e.g., Articles 194, 234, and other norms of the CPC of Ukraine); in other cases, such as Article 303 of the CPC of Ukraine, the subject of proof in the proceedings of the investigating judge is not defined by legislation at all.

The general principles of evidence examination in the proceedings of the investigating judge are largely analogous to those in a trial in the court of first instance. Specifically, such examination is conducted solely in procedural form and, as noted by Yu. Sukhomlyn, is carried out based on the adversarial principle in criminal proceedings [13, p. 235]. As in the trial stage, the participants in proceedings of the investigating judge advocate their own legal positions, take part in the examination of evidence, and influence the formation of the judge's internal conviction regarding the need to make a particular procedural decision. In some cases, only the prosecution participates in proceedings before the investigating judge, as the initiator of the hearing (for example, when the judge considers motions for permission to conduct searches, covert investigative actions, etc.). Under these conditions, the adversarial principle is implemented by giving the prosecution the burden of overcoming the presumption of unnecessity of restricting the rights and freedoms of participants in the criminal proceedings. Additionally, as previously noted, in some cases the investigating judge may, at their discretion, hear witnesses or examine certain materials.

The procedure for examining evidence in the proceedings of an investigating judge corresponds to the procedure for performing similar actions in the first-instance court proceedings. The examination of physical evidence and documents (including audio and video recordings) is conducted according to the general rules set out in Articles 357-359 of the Criminal Procedure Code of Ukraine: the investigating judge personally examines the physical evidence, reads documents and expert opinions, and audio and video recordings are played using appropriate technical equipment.

Additionally, the investigating judge may, either upon request from the parties or on their own initiative, hear witnesses. According to I. Glovyuk, such "hearing" should be conducted in the procedural form of interrogation [14, p. 103]. Taking into account the content of Article 65 of the CPC of Ukraine, we note that a witness in this context must be considered a person who knows or may know facts that are relevant to the issue within the jurisdiction of the investigating judge and who has been summoned to provide testimony. Questioning witnesses in the proceedings of an investigating judge should be conducted in accordance with the general requirements of Article 352 of the CPC of Ukraine. At the same time, listening to the arguments of the person who submitted the motion (application, complaint) by the investigating judge, in our opinion, is not considered a questioning of that person but rather corresponds to judicial procedures of opening statements and arguments of the parties.

It is also noteworthy that the investigating judge cannot appoint forensic examinations while considering complaints [1, p. 162] or issues related to the application of preventive measures, etc.

Analysis of court practice has shown that in all cases where evidence was examined (92%), investigating judges reviewed the contents of written procedural documents attached by the parties to the petitions, statements, complaints, and objections. The party submitting the petition, statement, or complaint, as a general rule, must attach copies or originals of supporting documents, ensure the delivery of any materials to the courtroom, and the presence of witnesses, among other responsibilities.

It should be noted that the prosecution typically has an advantage over the defense in terms of preparation time for addressing issues related to the application of preventive measures. For its part, the defense typically has limited preparation time for addressing such matters before the investigating judge, as the copy of the relevant petition and the supporting materials must be provided to the suspect or accused no later than three hours before the hearing begins (part 2 of Article 184 of the CPC of Ukraine). The prosecution party often provides these materials to the defense at the last moment or even after the legally specified deadline, for tactical reasons. Moreover, V. Zavtur rightly notes that current legislation does not regulate the procedure for the defense to obtain such materials or the consequences for prosecution if they fail to comply with such requirements [2, p. 118]. As a result, in practice, there may be cases where the defense does not have sufficient time to review such materials. In such situations, the defense may file a motion with the investigating judge requesting additional time to review the materials, and such motions are usually granted.

In only 1 % of the studied cases did the investigating judge interrogate a witness at the request of the person who filed a motion to recuse the investigator. For example, the grandmother of the suspect, who was present during the investigator's communication with her grandson was interrogated and she confirmed that the interaction did not occur "in a proper tone" [15]. Among the factors complicating the exercise of such authority by investigating judges, S. Sharenko cites the length of the standard procedure for summoning a person, which in some cases exceeds the maximum period for conducting judicial control proceedings [16, p. 16]. In addition, two of the lawyers we interviewed reported that they had filed requests with investigating judges for the summons and questioning of witnesses (whose appearance was ensured by the defense) during the consideration of issues related to the application of preventive measures. However, these requests were not granted, and the reasoning for such decisions was not provided in the relevant rulings.

Regarding the examination of physical evidence in proceedings of investigating judges, we did not record any such cases.

5. Conclusions.

Thus, the proceedings of the investigating judge represent a specific form of judicial control at the pre-trial investigation stage in Ukrainian criminal justice. According to Part 1 of Article 110 of the CPC of Ukraine, all decisions made by the investigating judge are procedural. Therefore, in accordance with Article 94 of the CPC of Ukraine, they must necessarily be based on the results of the examination and evaluation of the evidence presented to this entity.

The current criminal procedural legislation does not establish a separate procedure for the proceedings of the investigating judge and contains a number of gaps and contradictions regarding the mandatory nature and procedure for the examination of evidence by this entity. However, since such proceedings are derivative of judicial proceedings, the provisions of Articles 318-380 of the Criminal Procedure Code of Ukraine, concerning the rules for trial in the court of first instance, apply to them by analogy. The analysis of 100 rulings by investigative judges of first instance courts issued between 2020 and 2024 showed that in the vast majority of cases (92 %), investigative judges, while exercising their powers, examined written evidence (procedural documents) that substantiated the motions, applications, and complaints submitted, as well as objections against them. In one case (1 %), the investigative judge questioned a witness at the request of a person who had filed a motion to recuse the investigator. No instances were found where investigative judges examined physical evidence. In only two out of the hundred criminal cases reviewed did investigative judges take the initiative to examine evidence by requesting materials from the investigators. The results of the analysis of judicial practice revealed that the procedural opportunities for examining evidence in proceedings before an investigative judge are not being fully utilized. One of the reasons for this is the imperfection of the current criminal procedural legislation.

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