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IMPACT OF THE RESOLUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS ON FORMATION OF THE POSITION REGARDING THE APPLICATION OF THE SEPARATE PROVISIONS OF THE LEGISLATION ON ADMINISTRATIVE OFFENCES

In the article we have analyzed several resolutions of the European court of human rights, taken under the applications of the citizens of Ukraine as well as the position of the Supreme Court of Ukraine regarding the cases where the legitimacy of bringing the persons to the administrative responsibility is evaluated. On the basis of the analysis, a number of the conclusions is suggested. Taking into consideration the conclusions, not only the court practice should be formed, but also the norms of the Code of Ukraine on administrative offences should be improved.

Key words: proceeding in the cases on administrative offences, principles of proceedings in the cases on administrative offences, revision of the resolutions in the cases on administrative offences.

Pysarenko Nadija Borysivna,

candidate of legal sciences, associate professor, associate professor of the administrative law department of the Yaroslaw Mudryi National Law University

Lately the European Court of Human Rights (hereinafter – the Court) has approved a lot of resolutions in the cases against Ukraine which state the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter – the Convention). The content of some of them stipulated that these violations have been committed due to the fact that the Ukrainian courts applying some norms of administrative law (in particular, the regulations of the Code of Ukraine on administrative offence (hereinafter - CUAO)) do not consider the obligatory character of the convention provisions which determine the principles, which resolve the issues on legal responsibility of the physical persons.

We would like to emphasize that the majority of the resolutions of the Court in the proceedings against Ukraine have received the status of the final ones. It has given a possibility to the applicants of the proceeding to raise a question concerning the review by the Supreme Court if Ukraine of the resolutions of national courts taken with the violation by Ukraine of the international obligations.

The analysis of the Court resolutions as well as the provisions of the Supreme Court of Ukraine in the proceed-

ings where the legitimacy of bringing of the persons to the administrative responsibility is evaluated, gives the possibility to formulate a number of the conclusions. In our opinion the court practice should be formed as well as the norms of CUAO should be improved considering these conclusions.

1. Proceeding in the cases on administrative offences, in the result of which a resolution on application of the most strict penalty – administrative arrest can be taken and it is considered criminal according to its content that is such that demands the provision of all the guarantees of the article 6 of the Convention.

The resolutions in the proceedings "Gurepka against Ukraine" and "Kornev and Karpenko against Ukraine" can serve as the samples of the resolutions in which the Court demonstrates the specified positions. The last one determines that the applicant Karpenko due to committing the administrative offence specified in the part 1 of the article 185-3 CUAO has been punished by means of imposition of fine. However, the sanction of the specified article at the moment when the applicant had been brought to the responsibility, defined the possibility of application of the administrative arrest. Thus, the offence specified is not significant and the proceeding on consideration of the cases on bringing to the responsibility for its commitments should take place on the basis similar to those which are used for the consideration of the criminal case [1].

Moreover, the questions regarding the criteria, according to which the offences can be considered an insignificant one, was specified in the explanatory note to the Protocol No. 7 of the Convention. The explanatory note specified that the main criteria is whether the offence is castigated with imprisonment. Specifying this explanation, the Court in the resolution in the case "Gurepka against Ukraine" demonstrates a point of view which totally coincides with the one stated in the case "Kornev and Karpenko against Ukraine": the applicant Gurepka was brought to responsibility under the part 1 of the article 185-3 of CUAO which stipulated the possibility of application of the administrative arrest to 15 days; presence in the sanction of the main penalty in the form of imprisonments makes it impossible to consider the offence as an insignificant one [2].

2. Bringing of a person to administrative responsibility for the order violation which is not duly established by the national legislation is incompatible with the provisions of the Convention, in particular art. 7 of the international law act.

This conclusion was formulated in the Court resolution in the case "Verenzov against Ukraine". In the application to the Court, Verenzov complained about the fact that he was declared to be guilty in the violation of the order of manifestation realization despite such order is not duly determined in the legislation.

Having investigated the international acts, the Ukrainian legislation, having analyzed the court practice regarding realization of the right for peaceful meetings, the Court specified that the applicant was brought to responsibility for disobedience to legal orders of the police representatives and for violation of the order of the demonstrations holding.

The last one of the specified violations is stated in the article 185-1 of the CUAO. Nevertheless, its ground, in other words the order of the demonstration holding, is not duly specified in the legislation. Due to this reason, the Court has summed up that due to absence of the rules of holding a peaceful demonstration, the applicant's penalty for the violation of the non-existing order is a violation of the convention norms [3].

3. Fixing in CUAO of too short time period for the examination of the case regarding administrative offence leads to the violation of the person's right for time and possibility for preparation of his defense as well as the right for legal assistance at his own option.

The above specified laws are guaranteed by the paragraphs 1 and 3, article 6 of the Convection. Their violation is determined in the resolutions of the Court in the cases "Kornev and Karpenko against Ukraine" and "Verenzov against Ukraine".

We would specify that in the first case the Court investigated the issue of responsibility to convention provisions of the procedures of bringing the applicant Karpenko to responsibility under the part 1 article 185-3 of CUAO and in the other one – the applicant Verenzov under the article 185 and part 1 article 185-1 of the CUAO.

The article 277 of CUAO determines that the cases regarding administrative offences stipulated by article 185 and part 1 article 185-3 are considered by the court within one day and article 185-1 – within three days.

In both specified resolutions the Court reminded that the subparagraph b part 3 article 6 of the Convection guarantees for the accused one "adequate time and possibilities necessary for the preparation of his defense". The accused one should have a possibility to organize his defense in a due way, to present without any obstacles to the court, which investigates the case, all necessary defense arguments and in such way influence on the proceeding result. In addition, the means which are accessible to all, who is accused of offence commitment, should include the possibility to get acquainted with the results of the investigation which took place during the whole proceeding in order to prepare his defense. The issue of the time period adequacy and the means given to the accused one should be evaluated taking into account the circumstances of each certain case.

In the case of Karpenko and in the case of Verenzov, the Court specified that despite the absence of a certain stating a certain time period between drawing up of the acts on administrative offences and examination of the cases regarding the applicants, it's obvious that it did not exceed several hours. Even if to presume that these cases were not complicated, the Court expresses it doubt that the circumstances under which they have been considered, had been such that gave the applicants a possibility to get duly acquainted with the accusation and proves against them, to evaluate them and elaborate an effective legal strategy of their defense. The further appellation claim which took place in the case of Verenzov, in opinion of the Court, could not change the situation taking into account the fact that at the moment when the appellation court investigated the applicant's claim, he has

already completed the time of the administrative arrest. Thus, in the specified cases the Court has come to a conclusion that the applicant had not had adequate time and means for the preparation of their defense.

Regarding the right for the legal assistance on his own choice, the Court has also defined that it was violated in both considered cases. Whereas in the resolutions for both cases, it it described a different demonstration of such violation. So in the case of Verenzov, the national court refused the applicant to satisfy his claim regarding the presentation of his interests by the attorney at his own choice under the reason that the claimant was a human rights activist.

Expressing critics to such argumentation, the Court indicated that not each human right activist is an attorney and if even when such person is an attorney, it does not mean that he was not vulnerable or did not needed the assistance in his procedural status of a suspect one. If a person considers that he need legal assistance and the national legislations guarantees his right for the defender notwithstanding his own legal knowledge. Refusal of the national bodies to satisfy such petition on legal representation is illegal and self-willed.

In the other case the claimant Karpenko affirmed that still she didn't apply for the provision of the legal representation of her interest, she should not be blamed for that because as it was said earlier, she didn't have any time to evaluate the situation and understand the necessity and importance of such petition for the examination of her case. Thus, the Court has come to a conclusion that the inactivity of the claimant does not release the country from the responsibility for the violation of her procedural rights.

4. Review by the appellation court of the resolution regarding administrative arrest after full completion of the penalty is a violation of the appellation right specified in the article 2 of the Act No. 7 to the Convention.

Such resolution was taken by the Court after having examined the case "Shvidka against Ukraine". The claimant in this case was brought to the responsibility under the court resolution dd 30 August 2011 under the article 173 of CUAO with the imposition of the penalty in the form of the administrative arrest of 10 days. The defender of Shvidka presented an appeal on her behalf in the day of the resolution approval which was considered by the appellation court in 21 September 2011. At that time Shvidka has already completed her full penalty and for this reason in her claim to the Court, she specified that at the moment of the appeal consideration, it was not important to her whether the appellation court cancels the resolution of the court of first instance or leaves it without any changes.

Having certified in this case the violation of the appellation right, the Court specified that under the CUAO, the appellation claim does not terminate the execution of the court resolution on imposing the administrative arrest. Thus, the review by the appellation court of the resolution on imposing the arrest shall be executed afterwards when the person brought to responsibility, has completed her penalty. Due to this reason the Court mentioned that such review cannot effectively correct the deficiencies

of the resolution of the court of lower instance as it (reviw) "serves to no aim anymore".

The Court has also mentioned the fact that if the appellation court has cancelled the resolution of the court of first instance, than the claimant would be able to demand on this basis the payment of material and moral damages. Nevertheless, in the Court's opinion, such retrospective and exclusively compensation method of legal defense cannot be considered as a replacement of law for revision as the Contention is aimed to guarantee not the illusion rights but the rights, which are effective in practice [4].

5. The powers of the Supreme Court of Ukraine specified in the article 297-10 CUAO completely guarantee the adequate possibilities to reach the juridical state, which has a person before violation of the Convention, in respect to which the question of brining to administrative responsibility was solved.

According to this article if the Supreme Court of Ukraine has come to a conclusion about complete or partial revision of the resolution in the case on administrative offence due to the definition of the violation by Ukraine of the international obligations, it has the right a) to cancel the resolution and terminate the proceeding, b) cancel the resolution and send the case to a new examination to the court, which has delivered the judgment subject to appellation.

We would like to underline that Verenzov and Shvydka in their claims to the Court specified that their bringing to administrative responsibility formed the violation of the rights which are protected by the Convention. So, Verenzov complained about the intervention in his right of peaceful meetings (article 11 of the Convention) and Shvydka – about violation of the rights of free expression of opinion (article 10 of the Convention). In other words, both claimants affirmed that their actions were not illegal and for this reason, the enforcement measures cannot be applied to them. The Court in its resolutions supported the positions of Verenzov and Shvydka stating the violation of the specified articles of the Convention.

The Supreme Court of Ukraine, having investigated the relevant claims of Verenzov and Shvydka, cancelled the resolutions of national court on bringing of these persons to responsibility, and terminated the proceeding in these cases due to the lack of content of administrative offences [5, 6].

Karpenko in the claim to the Court indicated the violation of the part 3 of the article 6 of the Convention, e.g. the nonprovision of the time and possibilities required for preparation of her defense. So, the claimant has not complained about bringing her to responsibility due to the absence in her actions of the offense content, she mentioned that she had not has fair judicial examination due to violation of the procedural guarantees stipulated by the Convention. For this reason the Supreme Court of Ukraine has partly satisfied the Karpenko claim on review of the resolution of her bringing to responsibility, cancelled the resolution of the court of first instance and the case was directed to new review [7].

The proceeding in the case regarding Karpenko was terminated by the resolution of the judge of Chervonozavodskiy district court in Kharkiv city. By the mo-

ment of its new review, the term of administrative penalty has finished. In this resolution Karpenko was proclaimed guilty in committing an offence stipulated by the part 1 of the article 185 – 3 of CUAO [8]. We consider that the desirable for the claimant reason for the proceeding termination which would completely rehabilitate her, would have been the determination by the court at new consideration of the case, of the absence in her action of the offence content due to not proving the guilt in committing the offense.

The decision of the appellation court regarding bringing of Karpenko to responsibility is not included into the Unified register of court decisions. We suppose that the claimant has not used her right to appeal the court resolution according to which she was declared guilty. Whereas under the article 294 of the CUAO she could have appealed the resolution of the court of first instance declared in the result of new consideration of the case and ask the appellation court to terminate the proceeding under the rehabilitation reason.

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Писаренко Н. Б. Вплив рішень Європейського суду з прав людини на формування позицій з приводу застосування окремих положень законодавства про адміністративні правопорушення.

У статті проаналізовано деякі рішення Європейського суду з прав людини, постановлені за заявами громадян України, а також позиції Верховного Суду України у справах, де оцінюється законність притягнення осіб до адміністративної відповідальності. На підставі аналізу запропоновано низку таких висновків: 1) провадження в справі про адміністративне правопорушення, у результаті якого може бути прийнято рішення про застосування найжорсткішого стягнення – адміністративного арешту, вважається по суті кримінальним, а тому таким, що вимагає забезпечення всіх гарантій статті 6 Конвенції про захист прав людини і осно-

воположних свобод; 2) притягнення особи до адміністративної відповідальності за порушення порядку, який з належною чіткістю не визначений національним законодавством, є несумісним з положеннями Конвенції; 3) надто короткі строки для розгляду справи про адміністративне правопорушення, передбачені Кодексом України про адміністративні правопорушення, призводять до порушення права особи мати час та можливості для підготовки свого захисту, а також права на юридичну допомогу за власним вибором; 4) перегляд апеляційним судом постанови по накладення адміністративного арешту після відбуття стягнення у повному обсязі є порушенням права на оскарження, задекларованого у Протоколі № 7 до Конвенції; 5) визначені у Кодексу України про адміністративні правопорушення повноваження Верховного Суду України повною мірою забезпечують адекватні можливості для досягнення юридичного стану, що мала до порушення Конвенції особа, відносно якої вирішувалось питання про притягнення до адміністративної відповідальності.

Відзначено, що з огляду на дані висновки доцільно формувати не тільки судову практику у відповідних справах, а й удосконалювати норми Кодексу України про адміністративні правопорушення.

Ключові слова: провадження в справах про адміністративні правопорушення, принципи провадження в справах про адміністративні правопорушення, перегляд рішень у справах про адміністративні правопорушення.

Писаренко Н. Б. Влияние решений Европейского суда по правам человека на формирование позиций относительно применения отдельных положений законодательства об административных правонарушениях.

В статье проанализированы некоторые решения Европейского суда по правам человека, вынесенные по заявлениям граждан Украины, а также позиции Верховного Суда Украины по делам о законности привлечения физических лиц к административной ответственности. На основе проведенного анализа сформулировано ряд выводов, на которые следует ориентироваться не только при судебном рассмотрении данных дел, а и при усовершенствовании норм Кодекса Украины об административных правонарушениях.

Ключевые слова: производство по делам об административных правонарушениях, принципы производства по делам об административных правонарушениях, пересмотр решений по делам об административных правонарушениях.

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