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VOLODYMYR MYKHAILOVYCH BEVZENKO¹

Prerequisites for the Protection of Rights, Freedoms and Interests of the Participants of Administrative and Legal Relations in the Ukrainian Administrative Procedure: Content, Characteristics and Significance

National legislation provides for a practical mechanism of the protection of rights, freedoms, and interests of participants of administrative and legal relations. The appeal to a court for protection of a person's and citizen's constitutional rights and freedoms is guaranteed directly on the basis of the Constitution of Ukraine (in its Article 8).

Everyone is guaranteed the right to appeal against decisions, actions or inactions of state authorities, local self-government bodies, governmental officials and officers to the court. Everyone has the right to apply for the protection of their rights to the Commissioner of the Verkhovna Rada of Ukraine for Human Rights. Everyone has also the right to protect their rights and freedoms from violations and unlawful infringements by any means not prohibited by law (Article 55 of the Constitution of Ukraine).

The task of administrative legal proceedings is to protect the rights, freedoms and interests of individuals, the rights and interests of legal entities in the field of public and legal relations against violations by state authorities, bodies of local self-government, their officials and officers, other subjects exercising their power administrative functions based on the legislation, including for the implementation of delegated powers through fair, impartial and timely consideration of administrative cases (Part 1, Article 2 of the Code of Administrative Court Procedure of Ukraine).

Everyone has the right to apply to the administrative court under the procedure established by the Code of Administrative Procedure of Ukraine, if they consider that their rights, freedoms or interests have been violated due to a decision, action or inaction of the subject of authority (Part 1, Article 6 of the Code of Administrative Court Procedure of Ukraine).

It is very common that individuals as well as legal entities are not able to take full advantage of these constitutional guarantees of the protection of

¹ Volodymyr Mykhailovych Bevzenko – Doctor of Juridical Sciences, Professor, Professor of Administrative Law Department, Legal Department, Kyiv National Taras Shevchenko University, Ukraine.

their subjective rights, freedoms, and interests, both due to subjective and objective reasons. After all, the initiation of proceedings in an administrative case and satisfaction of the plaintiff's claims in many respects also depend on the fact that the plaintiff has taken into account the circumstances of the case, the conditions which preceded their appeal for protection to the administrative court, or not.

The prerequisites for the protection of subjective rights, freedoms, and interests are exactly one of the factors of success for both an appeal to the administrative court and a decision on the merits in favour of the plaintiff.

The practical experience of functioning of public administration subjects as well as an assessment of their administrative activity (public administration) by administrative courts has convincingly shown that the requirements of the Code of Administrative Court Procedure of Ukraine (namely Part 1 of Article 2, Part 2 of Article 4, Part 1 of Article 6, and Article 17) describe the prerequisites for the protection of subjective rights, freedoms, and interests only in general and do not always provide (guarantee) the both unconditional and substantiated initiation of proceedings in administrative cases and the perspective of judicial protection initiated by the plaintiff.

In fact, many other circumstances have been left beyond the scope of the Code of Administrative Court Procedure of Ukraine as revealed by practical experience of administrative legal proceedings that affect both the success of the administrative claim consideration and the adoption of a favourable decision on the merits by the administrative court.

Firstly, such circumstance marks a difference between the legislative names of the instruments of public administration activity which can be appealed against in administrative proceedings and the names of the instruments that public administration subjects use in practice. Hence, the norms of the Code of Administrative Justice of Ukraine, in particular Part 2 of Article 2, stipulate that any decisions, actions or inactions of subjects of authority may be appealed against in administrative courts, except for the cases when the Constitution or laws of Ukraine establish a different procedure for judicial proceedings concerning such decisions, actions or inactions².

Alternatively, such instruments of public administration activities as the resolution, decision, order, and protocol, etc. are provided in the material law establishing the competence of public administration subjects. Public administration subjects may also adopt other acts – an administrative offense act, inspection act, examination act, acceptance-handover act, state act on the right of ownership, or a state act for the right of permanent use.

It is reasonable to give an example in support of the above. Within the limits of its competence, the Cabinet of Ministers of Ukraine issues orders

² The Code of Administrative Court Procedure of Ukraine of 6 July 2005, „Journal of the Verkhovna Rada of Ukraine” 2005, No. 35–36, No 37, p. 446.

that are mandatory for enforcement (Article 117 of the Constitution of Ukraine). The Councils manage local community land by their decisions (Part 1 of Article 59 of the Act on local self-government, Articles 8–10, 12 of the Land Code of Ukraine)³.

It is sometimes difficult, both for parties and administrative courts, to determine exactly which decisions, actions or inactions in the meaning of the Code of Administrative Court Procedure of Ukraine can be appealed against in an administrative court among the numerous instruments of public administration provided by various legal acts. As a result, the parties and administrative courts alike incorrectly determine the matter of appeals – a decision, an action or inaction, which has not violated rights, freedoms and interests.

In particular, the Supreme Administrative Court of Ukraine and the Supreme Court of Ukraine deny the validity of appeals against inspection acts since the conclusions set forth in them do not generate or change the rights and obligations of the plaintiff and therefore the requirements to recognise these conclusions as unlawful cannot be considered in administrative proceedings⁴.

The Supreme Court of Ukraine has explained that the general concept of the inspection act is given in paragraph 3 of the Procedure for the execution of results of documentation inspections on compliance with tax, currency and other legislation approved by the order of the State Tax Administration of Ukraine on 22 December 2010 № 984, in accordance with which the act is an official document confirming the fact of carrying out a documentary inspection of financial and economic activities of a taxpayer and is the storage of evidence information on detected violations of requirements of tax, currencies and other legislation⁵.

In this case, an inspection act describing legal violations revealed in general, which in turn meets the established rules for the drawing up of an inspection act, is not a legal document establishing the liability of a business entity and, accordingly, is not an act of individual action in the meaning of Part 1 of Article 17 of the Code of Administrative Court Procedure of Ukraine⁶.

³ The Constitution of Ukraine of 28 June 1996, „Journal of the Verkhovna Rada of Ukraine” 1996, No. 30, Article 141; Act on local government in Ukraine of 21 May 1997 No 280/97–BP, „Journal of the Verkhovna Rada of Ukraine” 1997, No. 24, Article 170.

⁴ Resolution of the Supreme Administrative Court of Ukraine of 12 March 2013 in the administrative case K/9991/78912/12, <http://reyestr.court.gov.ua/Review/30328930> (3 June 2018); Resolution of the Supreme Court of Ukraine of 10 September 2013, <http://reyestr.court.gov.ua/Review/33770792> (3 June 2018).

⁵ *Ibidem*; Procedure for drawing up the results of documentary inspections on compliance with tax, currency and other legislation approved by the Order of the State Tax Administration of Ukraine of 22 December 2010, No. 984, „Official Journal of Ukraine” 2011, No. 5, Article 72.

⁶ *Ibidem*.

Secondly, the lack of unambiguous criteria in law and science for determining the fact of violations of subjective rights, freedoms and interests which leads to errors in establishing and proving the fact of such violations is a circumstance that affects the success of the administrative claim consideration and adoption of a favourable decision on the merits by the administrative court.

In this regard, it is reasonable to give the following example: the District Administrative Court, whose conclusion in the case was later found to be justified by Lviv Administrative Court of Appeal, agreed with the plaintiff's arguments that the conclusions of the Act № 040–24/029 of 28 November 2011 were directly related to himself because they stated not only certain facts of violations that Volyn Lis Service Ltd. had committed in the opinion of the defendants but also indicated that such violations had been committed precisely due to the plaintiff's fault⁷.

The court has stated that the act № 040–24/029 of 28 November 2011 is an act of the subject of authority with given information that relates directly to the rights, interests and responsibilities of the plaintiff; in such circumstances, this act is recognised as an act of an individual action⁸.

It seems clear that the fact of a violation of rights, freedoms or interests is evaluative and determined at the discretion of the parties and the administrative court.

At the same time, both an individual and a legal entity have a constitutional right to appeal to the court (Articles 8 and 55 of the Constitution of Ukraine) which cannot be limited and is associated with a person's self-incrimination concerning the existence of violations of their rights, freedoms or interests and the desire to appeal to the court⁹.

In the practice of the European Court of Human Rights, the right to apply to a court is also concerned only with the will of a person. Pursuant to Part 5 of Article 6 of the Code of Administrative Court Procedure of

⁷ Resolution of Volyn Regional Administrative Court of 22 June 2012 in the administrative case No. 2a/0370/1471/12, <http://reyestr.court.gov.ua/Review/25415698> (3 June 2018); The decision of Lviv Administrative Court of Appeal of 13 November 2012 in the administrative case No. 126391/12/9104, <http://reyestr.court.gov.ua/Review/27610290> (3 June 2018).

⁸ Resolution of Volyn Regional Administrative Court of 22 June 2012 in the administrative case No. 2a/0370/1471/12, <http://reyestr.court.gov.ua/Review/25415698> (3 June 2018).

⁹ Decision of the Constitutional Court of Ukraine in the case of the constitutional petition of 54 MPs regarding the compliance of the Constitution of Ukraine (constitutionality) with certain provisions of the Act on the judiciary and status of judges, the Criminal Procedure Code of Ukraine, the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Court Procedure of Ukraine of 13 December 2011, No. 17–rp / 2011, „Journal of the Constitutional Court of Ukraine” 2012, No. 1, Article 37.

Ukraine, a person may refuse to exercise the right to appeal to the court, but not the very right as such¹⁰.

Thus, objectively, judicial protection of public rights, freedoms and interests must be preceded by an assessment of the actual circumstances of the case, namely, taking into account the judicial practice and examination of the conformity of these circumstances with the requirements of national legislation.

It is essential to evaluate not only the availability but also the sufficiency of the prerequisites for the protection of rights, freedoms and interests of participants in the administrative procedure in public law relations. Such prerequisites are of administrative and legal nature; they are substantiated by the theory of administrative law and examined within the limits of procedural discretion of the administrative court.

In particular, B.M. Yurkov has pointed out in his work to the following prerequisites for an appeal to the court¹¹:

- The legal capacity of a person appealing to the court;
- There is no court decision which has come into force in a dispute between the same parties on the same matter and on the same grounds or a court order to accept a the plaintiff's refusal of a claim or approval of a settlement agreement;
- The case falls under the jurisdiction of the court.

These prerequisites for the protection of rights, freedoms and interests of the participants of administrative and legal relations in administrative legal proceedings should be evaluated as a whole; the absence of at least one of the prerequisites makes it impossible to protect these rights, freedoms and interests in the administrative procedure.

Revealing the sufficiency of the prerequisites for the protection of the participants' rights, freedoms and interests in administrative-legal relations in the administrative procedure based on the results of such assessment will ensure not only the effectiveness of the appeal to the administrative court (launching proceedings in an administrative case) but also a positive decision in the administrative case in favour of the plaintiff.

The protection of rights, freedoms and interests of the participants in administrative and legal relations can be prospective, if such preconditions are jointly present:

- The fact of a violation of subjective rights, freedoms and interests;
- The subject is in administrative and legal relations;
- The right to appeal to the administrative court;
- The plaintiff has the right of making an administrative legal claim;
- There are criteria of administrative jurisdiction;

¹⁰ Ibidem.

¹¹ B.N. Yurkov, *Judicial Maintenance of Legality in the Activity of Administrative Bodies*, Kharkiv: Vyschia shkola 1987, p. 58, 74 and 75.

- Observance of the term for an appeal to the administrative court;
- There are grounds and limits of administrative court interference in the administrative discretion;
- Conformity of the judicial protection with the procedural discretion of the administrative court;
- There is judicial practice of resolving administrative and legal disputes.

Having analysed the prerequisites for the protection of rights, freedoms and interests in administrative proceedings, the plaintiff who has not filed an administrative case yet, may determine the prospect of appealing to the court for protection, the completeness of satisfaction of their claims, and therefore the justification and effectiveness of bringing their claims to the administrative court.

Having examined the prerequisites, the administrative court may take a justified decision regarding its subsequent procedural actions related to the administrative case filed;

- Initiation of proceedings in an administrative case;
- Prospects of consideration and decision on an administrative case on the merits;
- Termination of proceedings in an administrative case.

It is reasonable to give the following example¹². Having examined a statement of Person 1 made to the Foreign Intelligence of Ukraine about the obligation to take action, a judge of the Supreme Administrative Court of Ukraine found out that in their application the applicant reported on the facts of committing criminal acts against the person by officers of the Foreign Intelligence of Ukraine and others offering to conduct operational and investigative actions, which is actually a statement about a crime.

The court has found that Article 17, Clause 2, Part 3 of the Code of Administrative Court Procedure of Ukraine provides that the jurisdiction of administrative courts does not apply to public legal cases, which must be resolved by way of the criminal procedure.

Guided by Article 17 of the Code of Administrative Court Procedure of Ukraine, the court has declined to initiate administrative proceedings in the case on the application of Person 1 to the Foreign Intelligence of Ukraine on the obligation to take action.

The absence of a prerequisite (prerequisites) for the protection of subjective rights, freedoms and interests in administrative proceedings may lead to negative consequences which, finally, will prevent from such protection or complicate it:

- A subjective right remains unprotected (not recognised or not recovered);

¹² Decision of the Supreme Administrative Court of Ukraine of 23 December 2015 in the administrative case No. 800/488/15, <http://reyestr.court.gov.ua/Review/54598810>.

- Leaving a claim without consideration (Article 100 of the Code of Administrative Court Procedure of Ukraine);
- Refusal to initiate proceedings in an administrative case (Article 109 of the Code of Administrative Court Procedure of Ukraine);
- Termination of proceedings in an administrative case (Article 157 of the Code of Administrative Court Procedure of Ukraine);
- Refusal to satisfy the administrative claim in full or in part (Part 1 of Article 162 of the Code of Administrative Court Procedure of Ukraine).

Thus, on 8 April 2013 a judge of Pridniprovsk District Court in Cherkassy considered an administrative claim of Person 1 towards the Hagarina-45 Association of co-owners of blocks of apartments regarding the recognition of actions as unlawful and the obligation to take certain actions. It is established that the defendant is not a subject of authority and there is a dispute between the parties about the right, which in turn excludes its consideration under the procedure of administrative legal proceedings, since according to Article 15 of the Civil Procedural Code of Ukraine such disputes must be resolved under the civil procedure¹³.

Having examined the case file, the court believes that this case cannot be considered in administrative legal proceedings and the initiation of proceedings in the case should be refused pursuant to Clause 1 Part 1, Article 109 of the Code of Administrative Court Procedure of Ukraine.

Taking into account all the above, the court has declined to start proceedings triggered by an administrative claim of Person 1 against the Hagarina-45 Association of co-owners of blocks of apartments on recognition of actions as unlawful and the obligation to take certain actions.

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Yurkov B.N., *Judicial Maintenance of Legality in the Activity of Administrative Bodies*, Kharkiv: Vyschia shkola 1987.

¹³ Decision of Pridneprovsky District Court of Cherkassy in case 711/3065/13–a, proceedings No. 2–a / 711/109/13, data from the website: <http://reyestr.court.gov.ua/Review/30767074>.

Abstract

The author of the article studies the practical mechanism for the protection of rights, freedoms, and interests of the participants of administrative and legal relations. The appeal to a court for the protection of a person's – and citizen's – constitutional rights and freedoms on the basis of the Constitution of Ukraine is guaranteed directly (in its Article 8). The author discusses the subjective and objective obstacles to the full use by citizens and other legal entities in Ukraine of the constitutional guarantees for the protection of their rights, freedoms and interests.

Keywords: Code of Administrative Court Procedure of Ukraine, right to appeal, Supreme Administrative Court of Ukraine

Warunki ochrony praw, wolności oraz interesów uczestników stosunków administracyjnych i prawnych w ukraińskim postępowaniu administracyjnym

Streszczenie

Autor artykułu analizuje praktyczny mechanizm ochrony praw, swobód i interesów uczestników stosunków administracyjnych i prawnych. Ukraińska konstytucja bezpośrednio gwarantuje możliwość odwołania się do sądu w celu zapewnienia ochrony konstytucyjnych praw i wolności osoby i obywatela (w art. 8). W artykule omówiono przedmiotowe i podmiotowe bariery pełnego wykorzystania przez obywateli i inne podmioty prawne na Ukrainie konstytucyjnych gwarancji dotyczących ochrony ich praw, wolności oraz interesów.

Słowa kluczowe: ukraiński kodeks postępowania administracyjnego, prawo do apelacji, Najwyższy Sąd Administracyjny Ukrainy