

Duties of judge concerning of protection of human rights: some problems of law enforcement and ways of their solution

Обов'язки судді щодо захисту прав людини: деякі проблеми правозастосування та шляхи їх вирішення

Oleg Tamarov

Key words:

monitoring of Court, investigating judge, measures to ensure criminal proceedings, European Court of Human Rights (ECHR).

Ключові слова:

моніторинг суду, слідчий суддя, заходи щодо забезпечення кримінальної процедури, Європейський суд із прав людини (ЄСПЛ).

An important step to reform the justice system in Ukraine is the adoption of new Procedural Criminal Code of Ukraine, whose main task – providing impartial, highly qualified, impartial pretrial investigation and justice in criminal proceedings. An important role in this process given the “new” entity – the investigating judge, the main “purpose” of which is the Court monitoring. In 2014 by the investigating judges had been reviewed 413.9 thousand of petitions and complaints during pre-trial investigation. They all related to violations of rights of participants of criminal process.

Monitoring of Court is justified as a necessary element of legitimacy. According to article 55 of the Constitution of Ukraine, everyone is guaranteed the judicial protection of his rights and freedoms, and the decisions and actions (inaction) of state authorities, officials may be appealed in court¹.

Timeliness of court control of pre-trial investigation makes it possible to ensure the legitimacy and in subsequent stages of the criminal process.

With regard to monitoring of Court in criminal proceedings had been contributed the significant attention of domestic and foreign scientists, including S.A. Alpert, L.Ye. Vladymyrova, Yu.M. Hroshevoho, K.F. Hutsenka, B.A. Kistyakovsky, M.A. Pohoretskoho, V.T. Malyarenka, V.I. Maryniva, V.V. Moldovan, O.R. Mikhaylenko, M.N. Myheyenka, M.M. Rozina, M.D. Sergius, O.V. Smyrnova, M.S. Strohovycha, A.R. Tumanyantsa S.M. Tryhubova, D.H. Talberha, L.Ya. Tauber, V.M. Savytskoho, I.Ya. Foynytskoho, H.P. Himychevovi, V.P. Shybiko, A.H. Shylo and others who contributed significantly to the solution.

However, the study of relevant issues not fully take into account the current stage of the formation of criminal procedural law. Besides requiring detailed consideration of problems of implementation of powers of the investigating judge on human rights in the application of the measures of the criminal proceedings, which is the purpose of the article.

Investigative judge – a new figure in the criminal proceedings of Ukraine, which serves as an arbitrator between the defense and prosecution under preliminary investigation². However, the investigating judge in criminal proceedings – the French invention. His prototype was launched in the era of Frankish kingdom of Charlemagne (VIII cent.) During the birth process of Criminal Investigation had been introduction of royal judges bypass (missi dominici), the responsibility of which included four times a year to bypass certain area, to receive and consider complaints questioning of crimes (ingvisitio) and chair the court hearings³.

¹ Should be noted that in practice this rule does not apply, this will be discussed further.

² Банах С.С. Особливості повноважень слідчого судді щодо захисту прав людини / С.С. Банах, С.С. Штогун // Вісник Національної академії прокуратури України. – 2013. – № 4. – С. 61–65. – [Electronic resource]. – Access mode : http://nbuv.gov.ua/j-pdf/Vnapu_2013_4_13.pdf.

³ Попелюшко В.О. Інститут слідчого судді в історії кримінального процесу Франції (до Кодексу кримінального розслідування 1808 р.) / В.О. Попелюшко // Часопис Національного університету «Острозька академія». Серія «Право». – 2010. – № 1. – С. 41–45. – [Electronic resource]. – Access mode : <http://lj.oa.edu.ua/articles/2010/n1/10pvokkr.pdf>.

Thus, the institution of investigative judges arose when combined powers of judge of some of its investigative powers detective character, he carried out as different, and in the same “criminal proceedings”.

In the Russian Empire had been applied similar concept – “the coroner”, which first appeared on judicial reform in 1864 (Articles 262–277 of the Charter of criminal proceedings). Quite often in literature the term “judicial investigation” by SCS in 1864 and the modern “investigating judge” identified that is not quite true. According to their functional responsibilities “coroner” is more consistent with the modern “investigator”, although he was the nominal unit of the district court or the Chamber and all its decisions were subject to judicial review and complaints of his actions considered by the same courts⁴.

Thus, in this model of justice coroner, under double prosecutorial and judicial control, implementing only pre-function (at that time – preliminary) investigations. The criminal procedure legislation in Europe and the CIS differently determines a subject who is authorized to carry out control functions in pre-trial proceedings.

In particular, the investigating judge were required by law in countries such as Latvia and Italy. By Procedural Criminal Code of Lithuania also is stipulated the status of pre-trial inquest judge. In French criminal proceedings also were stipulated the pre-trial inquest judge. Pre-trial investigation in France is the responsibility of the judicial office, as well as investigating authorities investigating authorities are divided into general jurisdiction and specialized investigative bodies.

A special place in French criminal proceedings is the pre-trial inquest judge which responsible for detention, which, in fact, is investigators functions not, but as in the criminal process Ukraine – solves many issues within this stage of the criminal process. The permission of the judge is required in: detention (applies to both adults and persons over sixteen years); in search and seizure procedure and hearings of anonymous witness⁵.

Procedural Criminal Code of Republic of Moldova provides the judge with criminal prosecution, which according to article 24, ch. 1, article 6 Procedural

Criminal Code of Republic of Moldova is defined as the judge has the functions of prosecution and judicial control over the proceedings, carried out during prosecution⁶.

Investigation and Litigation indicate that proper judicial review, objective and independent pre-trial investigation impossible without investigating judge as objective and independent researcher of circumstances of committed a criminal offense. That is why, for proper judicial review of human rights in the application of the measures of the criminal proceedings during the preliminary investigation the investigating judges the rules of criminal procedural law international jurisprudence, which accordingly, not only confirms the efficiency of an independent and impartial court, but in general will increase the authority of the judiciary.

The main duty of the investigating judge is the implementation of human rights in relation to the provisions of the Convention on Human Rights and Fundamental Freedoms, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court determined by law⁷.

However, experience shows that these rules do not always are apply. As an example, in April 21, 2015 in city Kharkiv without good reason, under the article. 208 of Procedural Criminal Code of Ukraine in February 18, 2014 had been arrested person on suspicion of a crime. Notification of suspicion had been given in April 21, 2015 (with incorrectly stated the year of birth of the person and therefore, presentation on suspicions was in the manner not prescribed by new Procedural Criminal Code of Ukraine).

Despite the obvious illegality of the detention procedure (i. e. violation of Procedural Criminal Code of Ukraine concerning of the period of detention, order of preparation and presentation of reports of suspicion), only a month later, after the two “breaks”, there was consideration of a request for release of a person who unlawfully had been in custody in the manner of article 206 of Procedural Criminal Code.

⁴ Сиза Н.П. Повноваження слідчого судді щодо здійснення контролю у кримінальному процесі України / Н.П. Сиза // Часопис національного університету «Острозька академія». Серія «Право». – 2012. – № 2(6). – С. 1–21.

⁵ Горшеньова М.С. Конституційне право зарубіжних країн : [навчальний посібник] / М.С. Горшеньова. – 2-е вид., допов. і перероб. – К. : Юрінком Інтер, 2004. – С. 19.

⁶ Горелкіна К.Г. Особливості процесуального статусу слідчого судді: порівняльний аналіз / К.Г. Горелкіна // Юридичний часопис Національної академії внутрішніх справ / Нац. акад. внутр. справ. – К. : Вид-во НАВС України. – 2013. – № 2. – С. 17.

⁷ Конвенція про захист прав людини і основоположних свобод [Electronic resource]. – Access mode: http://zakon4.rada.gov.ua/laws/show/995_004.

In April 15, 2015, by Resolution of investigating judge, in breach of national and international legislation, mentioned petition is denied on the grounds that the person was detained in the manner of article 208 of Procedural Criminal Code in day of announcement of her suspicion.

According to this, when a preliminary investigation found sufficient grounds for bringing him to justice, and therefore in pretrial investigation were legal grounds for his detention, under paragraph. 1 ch. 1, of article 208 of Procedural Criminal Code. Unfortunately, there are numerous violations of human rights. Incidentally illegality of such approvals confirmed by sentences of judges.

In deciding the question of observance of rights of persons the investigating judge must be guided by the law as Ukraine and the practice of the ECHR. Thus the Ukrainian legislation allows precedents, the use of which in Ukraine is still quite problematic aspect.

It is connected with the fact that the general state of things nobody monitors. The only exceptions are some courts. For example, in 2014 local courts of Kirovohrad region applied the Convention on the Protection of Human Rights and Fundamental Freedoms and the practice of European Court only in 18% of criminal cases.

From another hand, is clearly described the requirement of part 5 of article 9 of Procedural Criminal Code, which obliges the investigating judge to take procedural and other decisions on the basis of the European Court. Part 1 of article 17 of the Law "On execution of decisions and application of the European Court of Human Rights", which stipulates that courts should apply the Convention and the case law of European court of human rights as a source during the hearings of cases⁸.

In this regard, especially acutely appears issue an official translation of European Court Decision and relevant court materials in order to training the judges. In our opinion, the procedure for notification of the decision of the European court of human rights, determined by the above law is insufficient and needs amendments and specifications. Since the process of translation and publication of data in making legal publications (article 6 of the Law "On execution of decisions and application of the European Court of Human Rights") takes a considerable period of time (sometimes up to six months), we consider it appropriate to provide in this article is also an opportunity to post aforementioned decisions on the official Internet resources.

In our opinion, this will speed up the process of familiarization investigative judges with the provisions of practice of European Court of Human Rights. Also is very useful adoption the Law "On Amending the Law of Ukraine "On execution of decisions and application of the European Court of Human Rights" (to enforce judicial decisions)" (№ 2237 of 2013, 7 February), which envisages that within 10 days from receiving the decision, the representative body prepares for official publication on website and permanent storage on the official website of the Ministry of Justice of Ukraine, as well as and publication in the newspaper "Governmental Courier" summary of Decision of the European Court in Ukrainian language.

The main and most important function of investigating judge – the implementation of human rights. However, the investigating judge does not have to interfere with the investigation of the criminal proceedings and establish the guilt of the suspect. According to part 1 of article 206 of Procedural Criminal Code of Ukraine the investigating judge within the territorial jurisdiction of which the person in custody is entitled to adopt the Decision which oblige any public authority or officer to ensure observance of the rights of the person.

If the investigating judge receives from any source information that create a reasonable suspicion that within the territorial jurisdiction of the court is the person deprived of liberty without a court decision, which came into force, or released from custody on bail in the prescribed manner he is obliged to adopt the Decision, which should oblige any public authority or officer, which is held in custody the person, immediately bring this person to the investigating judge in order to ascertain the reason of his detention.

In case the finding of unjust detention of a person – the investigating judge shall immediately release her. In fact, the investigating judge independently initiate checking the legality of the deprivation of liberty of a person within the jurisdiction of the respective court regardless of the sources from which the judge found out this fact. Thus, judicial control becomes active (and not only passive) forms of resolving

⁸ Про виконання рішень та застосування практики Європейського суду з прав людини : Закон України // Відомості Верховної Ради України. – 2006. – № 30. – Ст. 260. – [Electronic resource]. – Access mode : <http://zakon1.rada.gov.ua/laws/show/3477-15>.

individual complaints or petitions certain subjects. However the practical application of this regulation not enough widespread⁹.

Important place in the specified control is for consideration of petitions on preventive measures. The article of Procedural Criminal Code regulates list of circumstances which the investigating judge is set to decide on a preventive measure.

We consider it appropriate to supplement part 4 of article 194 of Procedural Criminal Code of Ukraine with such amendments: "the validity of detention if such detention without of Resolution of investigative judge". Securing such a provision in the legislation will be another way of judicial control under detention, as prescribed by article.208 of Procedural Criminal Code.

In particular, when checking information of validity of detention, the investigating judge must in each case determine legally or illegally the arrest took place, or there is a violation of the rights of the detained person, including the right of defense. In addition to the immediate release of illegally detained persons, the remedy of judicial control will help further the determination of persons which guilty in violating of law and illegal detention. In turn, this practice should make the prosecution fully comply with the law when detaining persons without the Resolution of investigating judge.

However, the practice of Procedural Criminal Code shows that the provisions of article 206 of Procedural Criminal Code today is not very effective and are increasingly declarative and therefore, in our opinion, require a new revision of the legislature and implementation.

For example, during 2013 in Ternopil region the investigating judges had not reviewed any complaint in the manner of article 206 of Procedural Criminal Code, which indicates "absence of confidence" to the new criminal procedure or insufficient legal awareness of society. In case the investigating judge receives from any source information that create a reasonable suspicion that within the territorial jurisdiction of the court is the person deprived of liberty without a court decision, which came into force or had been released from detention on bail by Procedural Criminal Code established order, and judge should Decide and should oblige any public authority or officer, to release this person immediately and it to be escorted to the investigating judge to ascertain the reasons of deprivation of liberty (ch. 2 Art. 206 of Procedural Criminal Code)¹⁰.

This information can provide relatives, friends, attorneys, any other person who has learned the person you deprived of freedom. Obtaining information on reasonable suspicion violations of the right to freedom requires the judge to conduct such verification and approval of the immediate delivery of a person in court. Such information can be confirmed by explanation of persons document on detention, if able to obtain other materials.

The Procedural Criminal Code does not provide a mechanism to provide information about the violation. In particular, the question remains open for admission investigating judge of the applicants. At the same time, each person concerned are not deprived of opportunities and send written information about the violation of the right to freedom of swing-mail or directly to the court. If delivery of such person to appeal an investigator or prosecutor with a request for a preventive measure, the investigating judge shall as soon as possible to ensure consideration of the petition (ch. 4 article. 206 of Procedural Criminal Code).

Despite the fact that the provisions of article 206 of Procedural Criminal Code is clearly determined, in practice, investigating judges rarely use them, effectively leaving the "unserviceable". These rules include proactive enforcement activity active investigative judges, aimed at protecting the rights of persons deprived of freedom arbitrarily or one that has experienced violence during arrest or detention. However, there are cases when the investigating judge after receiving information about the illegal detention should react in the manner prescribed by article 206 of Procedural Criminal Code in a term of 10–14 days after receiving such information, as we have already noted earlier¹¹. Another problem is the inability to use this mechanism in cases where a person illegally detained for a time and later released – that is, when the time of the complaint the person is already free.

⁹ Банах С.С. Особливості повноважень слідчого судді щодо захисту прав людини / С.С. Банах, С.С. Штогун // Вісник Національної академії прокуратури України. – 2013. – № 4. – С. 61–65. – [Electronic resource]. – Access mode : http://nbuv.gov.ua/j-pdf/Vnapu_2013_4_13.pdf.

¹⁰ Кримінальний процесуальний кодекс України : Закон України від 13 квітня 2012 р. № 4651-VI [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/4651-17/page>.

¹¹ Банчук О.А. 35 неформальних практик у кримінальному судочинстві України / О.А. Банчук, І.О. Дмитрієва, Л.М. Лобойко, З.М. Саїдова. – К. : Арт-Дизайн, 2014. – 48 с.

In such cases the mechanism of judicial control (check) the legality of detention is absent and there is a gap of legislation. In our view, in all levels should be checking the validity (legality) detention and subsequent appropriate responses. Also quite problematic is the question of judicial control over the implementation of human rights during detention in the order stipulated by article. 208 of Procedural Criminal Code. Authorized officials often abuse the law concerning "detention" and interpret it slightly wrong. For example, in the decision Malinovsky District Court of city Odessa in the case had been stressed on violation of article 208 of Procedural Criminal Code, although the definition of committing the offense is not legally regulated, but objectively provides short period of time that has passed immediately after the crime.

According to the opinion of investigating judge setting legislator specified rules aimed not set any time limits in the authorized person for the relevant period of detention because the offense each and every case is different and unique events and their circumstances. However, in any case, it is only about an hour after the commission of a criminal offense, but not on days and more weeks after the crime. In this case, between the offense and the detention took almost two days. In studying materials of the criminal proceedings by the investigating judge has not been determined that the investigator has obstacles to access to the investigating judge with a request in the manner of article 188 of Procedural Criminal Code on permission of detention and obtain relevant decisions investigating judge¹².

The Prosecutor of Malinowski District of city Odessa had instructed to conduct a investigation of mentioned fact to determine those, who responsible and in order bring them to justice. However, the suspect was not released. In another similar case, the investigating judge of Balaklava District Court of city Sevastopol had released unlawfully detained person. After checking the information on the illegal detention investigating judge concluded that the arrest took place illegally, in violation of his rights under the law, including his right to defense¹³.

It is believed if the court finds that the fact of illegal detention had really a place, it is advisable first of all to release the illegally detained person. A further issue of accountability of perpetrators of violations of law to decide after that.

Thus, it is considered appropriate to amend article 206 of Procedural Criminal Code, including supplement tenth part of this article, which will improve the mechanism of realization of the right to check the validity of his detention by a court, which stipulates: "Investigative judge shall immediately verify the validity (legality) detention at any stage of the criminal proceedings if such verification demands to the detained person or his defense".

In case an investigating judge determined the groundlessness of detention he shall issue a Resolution on the immediate release of the detained person, and in the case where a person has already released – resolution on recognition unlawful detention, a copy of which is to be sent to the body that carries out pre-trial investigation of criminal offenses under article. Article 371 of Criminal Code (Knowingly illegal detention, house arrest or detention) in order to conduct the proceedings under article 214 of Procedural Criminal Code.

This right is provided by article 5 of European Convention on Human Rights, which stipulates that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings in which speedily by a court lawfulness of his detention and decide on the release if the detention is unlawful. The mechanism of realization of this right will strengthen respect for human rights in Ukraine by law enforcement agencies and ensure prosecution of persons guilty for knowingly unlawful detention or arrest to justice.

In deciding the investigating judge, justifying their position, must make a reference to the relevant article of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular the European Court of certain circumstances¹⁴.

Thus, the investigating judge must necessarily use the practice of ECHR case law and norms of the Convention for the Protection of Human Rights and Fundamental Freedoms considering, as these rules override rules of domestic law.

¹² Постанова Малиновського районного суду міста Одеси в справі № 521/2542/13-к [Electronic resource]. – Access mode : <http://www.reyestr.court.gov.ua/Review/29534263>.

¹³ Постанова Балаклавського районного суду міста Севастополя № 762/3700/13 [Electronic resource]. – Access mode : <http://www.reyestr.court.gov.ua/Review/34413290>.

¹⁴ Юрчишин В.Д. Практика європейського суду з прав людини як джерело кримінального процесуального права України: окремі аспекти / В.Д. Юрчишин, В.В. Король // Юридичний часопис Національної академії внутрішніх справ. – 2013. – № 2. – С. 73–78. – [Electronic resource]. – Access mode : http://nbuv.gov.ua/j-pdf/aymvs_2013_2_15.pdf.

Thus, in order to improve the activities of the courts in protection of human rights, the courts, during the hearings, must comply with the requirements of article 9 of Procedural Criminal Code, according to which in the Procedural criminal legislation of Ukraine should used the practice of ECHR and international law.

They should take into account the rules of ch. 4 article 9 of Procedural Criminal Code, according to which should be used the provisions of the relevant international Treaty of Ukraine when the rules of the Procedural Criminal Code contradict international agreement, ratified by the Verkhovna Rada of Ukraine.

Courts should used the decision of ECHR, which is adopted concerning of Ukraine, and also apply along with the rules of national law Ukraine norm Convention and the ECHR on other countries to prevent violations of human rights and fundamental freedoms.

Summary

Characterized the responsibilities of Court in protection of Human Rights during the application of measures to ensure the criminal proceedings. Determined the problems of criminal procedural regulations in the application of measures to ensure the criminal proceedings and had justified the necessity of amendments in Procedural Criminal Code of Ukraine.

Анотація

Охарактеризовано обов'язки суду в захисті прав людини під час застосування заходів щодо забезпечення кримінального провадження. Визначено проблеми процедурних правил у застосуванні заходів щодо забезпечення кримінального провадження. Доведено необхідність внесення поправок до Кримінального процесуального кодексу України.

Literature:

1. Банах С.С. Особливості повноважень слідчого судді щодо захисту прав людини / С.С. Банах, С.С. Штогун // Вісник Національної академії прокуратури України. – 2013. – № 4. – С. 61–65. – [Electronic resource]. – Access mode : http://nbuv.gov.ua/j-pdf/Vnapu_2013_4_13.pdf.
2. Попелюшко В.О. Інститут слідчого судді в історії кримінального процесу Франції (до Кодексу кримінального розслідування 1808 р.) / В.О. Попелюшко // Часопис Національного університету «Острозька академія». Серія «Право». – 2010. – № 1. – С. 41–45. – [Electronic resource]. – Access mode : <http://lj.oa.edu.ua/articles/2010/n1/10pvokkr.pdf>.
3. Сиза Н.П. Повноваження слідчого судді щодо здійснення контролю у кримінальному процесі України / Н.П. Сиза // Часопис національного університету «Острозька академія». Серія «Право». – 2012. – № 2(6). – С. 1–21.
4. Горшеньова М.С. Конституційне право зарубіжних країн : [навчальний посібник] / М.С. Горшеньова. – 2-е вид., допов. і перероб. – К. : Юрінком Інтер, 2004. – 543 с.
5. Конвенція про захист прав людини і основоположних свобод [Electronic resource]. – Access mode : http://zakon4.rada.gov.ua/laws/show/995_004.
6. Про виконання рішень та застосування практики Європейського суду з прав людини : Закон України // Відомості Верховної Ради України. – 2006. – № 30. – Ст. 260. – [Electronic resource]. – Access mode : <http://zakon1.rada.gov.ua/laws/show/3477-15>.
7. Конституція України від 28 червня 1996 р. // Відомості Верховної Ради України. – 1996. – № 30. – Ст. 141.
8. Про прокуратуру : Закон України // Відомості Верховної Ради. – 2015. – № 2–3. – Ст. 12.
9. Кримінальний процесуальний кодекс України : Закон України від 13 квітня 2012 р. № 4651-VI [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/4651-17/page>.
10. Банчук О.А. 35 неформальних практик у кримінальному судочинстві України / О.А. Банчук, І.О. Дмитрієва, Л.М. Лобойко, З.М. Саїдова. – К. : Арт-Дизайн, 2014. – 48 с.
11. Постанова Малиновського районного суду міста Одеси в справі № 521/2542/13-к [Electronic resource]. – Access mode : <http://www.reyestr.court.gov.ua/Review/29534263>.
12. Постанова Балаклавського районного суду міста Севастополя № 762/3700/13 [Electronic resource]. – Access mode : <http://www.reyestr.court.gov.ua/Review/34413290>.

13. Юрчишин В.Д. Практика європейського суду з прав людини як джерело кримінального процесуального права України: окремі аспекти / В.Д. Юрчишин, В.В. Король // Юридичний часопис Національної академії внутрішніх справ. – 2013. – № 2. – С. 73–78. – [Electronic resource]. – Access mode : http://nbuv.gov.ua/j-pdf/aymvs_2013_2_15.pdf.
14. Горелкіна К.Г. Особливості процесуального статусу слідчого судді: порівняльний аналіз / К.Г. Горелкіна // Юридичний часопис Національної академії внутрішніх справ / Нац. акад. внутр. справ. – К. : Вид-во НАВС України. – 2013. – № 2. – С. 17.

Oleg Tamarov,

*J.D. the Doctor of Jurisprudence,
the Honorable Lawyer of Ukraine*