Problems of application of item 1 of part 2 of article 445 of the Criminal Procedure Code of Ukraine by the Supreme Court of Ukraine

Проблеми застосування Верховним Судом України п. 2 ч. 1 ст. 445 КПК

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Key words:

standard of criminal procedural law; review of judgements; THE SUPREME COURT OF UKRAINE; application of the standard of law.

Ключові слова:

норма кримінального процесуального права, перегляд судових рішень, Верховний Суд України, застосування норм права.

Formulation of scientific problem. The art. 445 of the Criminal Procedural Code of Ukraine (hereinafter – CPC) was set forth in the new edition according to the Law of Ukraine on February 12, 2015 "On the right to a fair trial"[1]. The last one, among other things, provides the following grounds for judicial review by the Supreme Court of Ukraine as "different application of the court of cassation of the same standard stipulated by this Code, which led to adoption of the Court Decisions with different content" (of part 2 of article 445). The said Law entered into force on 28 March 2015. Its application is relatively short-lived, however, sufficient to describe the problem in the use of the CPC in the part of realization of this legal provision and make proposals for solving them if possible. Actuality of the researching topic is in the fact that the Supreme Court of Ukraine is only beginning to form the practice of item 1 of part 2 of article 445 of the CPC of Ukraine by ensuring the uniform application of the same "law prescribed by this Code" by the court of cassation (hereinafter – the procedural rules). But on these issues the Judgements (decree) of the Supreme Court of Ukraine concern not only individual decisions (determination) of the court of cassation, but the practice of all courts of the state. We can debate about what exactly the Supreme Court of Ukraine does by making their decree: interprets the procedural standards; "complements the CPC"; forms the judicial precedent or the jurisprudence and so on. But out of all sorts of doubt the activity of the Supreme Court of Ukraine is useful to ensuring the uniformity of jurisprudence, which is the basis of predictability, and therefore the principles of the supremacy of law.

Analysis of the latest research and publications. The questions of review of the judgments by the Supreme Court of Ukraine are in researches of the criminal process[2], [3] , [4].

However, researches of scientists, which are described above, contain the general questions about the proceedings in the Supreme Court of Ukraine, the grounds of revision of judicial decisions by the Supreme Court of Ukraine. But the question of review of judgement of item 2 of part 1 of article 445 of the CPC of Ukraine was not the subject of a separate study at a monograph or at a scientific article. But some aspects of the item have been studied. Purpose of the article is to formulate the main problems of using of the item 2 of part 2 of article 445 of the CPC of Ukraine by the Supreme Court of Ukraine and proposals to overcome them [5].

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[1] Про забезпечення права на справедливий суд : Закон України від 12 лютого 2015 р. // Відомості Верховної Ради. – 2015. – № 18, № 19-20. – Ст. 132.

[2] Дроздов О. Наукові підходи до формування окремих підстав для перегляду судових рішень Верховним Судом України у кримінальному провадженні / О. Дроздов // Вісник Нац. акад. правових наук України. – 2015. – № 1. – С. 113-129.

[3] Дроздов О.М. До проблеми провадження у Верховному Суді України у кримінальному процесі / О.М. Дроздов // Вісн. Харк. нац. ун-ту імені В. Н. Каразіна. Серія «Право». – 2013. – № 1063. – С. 187-191.

[4] Чупринська Є.М. Правова природа перегляду Верховним Судом України судових рішень у кримінальних справах : автореф. дис. на здобуття наук. ступеня канд. юрид. наук : спец. 12.00.09 «кримінальний процес та криміналістика; судова експертиза; оперативно-розшукова діяльність» / Є.М. Чупринська. – К., 2015. – 20 с.

[5] Лобойко Л.М. Щодо можливості «ретроактивного» застосування Верховним Судом України пунктів 2 і 3 частини першої статті 445 КПК України / Л.М. Лобойко, С.О. Касапоглу // Слово Нац. школи суддів. – 2016. – № 1. – С. 77-86.

Presenting main material. Consider the basic problem of using of the item 2 of part 2 of article 445 of the CPC of Ukraine by the Supreme Court of Ukraine how fully this can be done within a scientific article. *1.The first problem*. "The vagueness" of concept "of the same standard of law provided by this Code" and logical structure of it. The answer to this question is extremely important theoretical and more – practical value. Because of its correct solution depends, first, a decision on the application for review. And, secondly, the Supreme Court of Ukraine should answer the question of what is "standard of the CPC" he regards as being unequally applied inferior court. From this decision, among other things, depends on how the courts will apply the "standard of the CPC", on which the highest judicial authority of providing are giving the legal opinion. Because judgments of the Supreme Court of Ukraine is obligatory for all government entities that apply in their work the relevant standard of law, and all courts of general jurisdiction which are required to bring their judicial practice into line with the judgments of the Supreme Court of Ukraine (p. 1 art. 458 CPC).

First, how writes Alexander Drozdov, there is the rising problem of determining the ratio of such categories as "standard of law" and "standard of legislation "[6] . The subjects of criminal proceedings (mainly – prosecutors) try to specify what kind of the standard of CPC violated by the court of cassation in the petition for review of judgments which addressed to the Supreme Court of Ukraine. In this case, as a rule, it's indicated in what is meaningfully different application of "appropriate" standards of the CPC. The standard itself, which is its logical construction, is not formulated by the applicants. However, recently, in almost all applications for review, prosecutors note the articles of the CPC, in which, in their opinion, there are structural elements (hypothesis, disposition, sanction) of the procedural standard, which was differently applied by the court of cassation. Moreover, each structural element of the "procedural standard" is indicated as contained in several articles of the CPC.

Thus, for example, in the application for review of the court decision of the cassation instance, which refused to open the cassation proceedings on the complaint of the prosecutor about the cancellation of the decision of the court of appellate instance about the refusal to open the appeal proceedings in connection with the fact that the current criminal procedural law does not provide for appeal in the appellate order of the court decision to close the consideration of the application of the prosecutor on the restoration of the lost materials of criminal proceedings due to the lack of materials. The prosecutor in a statement on review of the decision of the court of cassation raises the demand to abolish this unlawful, in his opinion, decision, because in another case, the court of cassation "correctly" applied the norm, allowing the appeals to review the decision of the court of first instance on a similar basis materials. The prosecutor, without formulating the appropriate "norm of the CPC", supposes that its hypothesis is contained in "Art. 2, item 1, 17 p. 1 of Art. 7, part 6 of Art. 9, part 2 of Art. 24 CPC of Ukraine, disposition – in Part 1 of Art. 392, part 4 of Art. 399, part 1 of Art. 531 CPC of Ukraine, sanction – in p. 1 of Art. 438 of this Code».

Thus, the prosecutor is convinced that the hypothesis of the "relevant standard of the CPC" is contained in four, and the disposition is in three articles of the CPC. But these articles of the CPC also consist of separate rules of law.

Without the purpose of the theoretical study of the concept and structure of the standards of law, it should be noted that in the theory of law all standards, including procedural, are classified into traditional (triple elements) and non-typical types. The latter are divided into: norm-tasks (Article 2 of the CPC), norms-principles (Articles 7-28 of the CPC), and norms-definitions (Article 3, part 1 Article 84, etc.), operational norms (paragraph 1 of Section X of the CPC "Final Provisions"). Unusual standards are independent in the system of standards of law and can't be parts of others – traditional – norms.

The prosecutor or other persons (professional subjects: defense counsel, lawyer-representative) who appeals to the Supreme Court of Ukraine should state in their statements each of the elements (hypothesis, disposition, sanction) of the CPC standards, which, in their opinion, unequally applied by the court of cassation. Because, for example, the legal requirement set out in paragraph 1 of Article 438 of the CPC is not a sanction. It is a norm-definition, in which the grounds for canceling or changing court decisions are formulated when a case in the court of cassation is considering. Sanctions provide negative consequences for the culprit. The grounds for the abolition of court decisions in this context are not sanctions, since they do not create any negative consequences for the perpetrator of crime. As the sanction can be considered not the basis of its sanction, but the decision of the higher court to cancel the decision of the lower court.

[6] Ухвала Слов'янського міськрайонного суду Донецької області від 10 листопада 2015 р. у кримінальному провадженні № 243/4972/15-к.

The norm, which is probably unequally applied by the court of cassation in the case under consideration, could be formulated as follows: "If the court of appeal has made a decision to refuse to comply with the decision of the court of first instance of the regarding refusal to restore the lost materials of criminal proceedings in connection with the fact that the latter is not subject to appeal, and a complaint to this court has been received by the court of appeals (hypothesis), the latter revises the decision of the court of appeal on the subject of its lawfulness and concludes whether the appeal is subject to such a decision of the court of first instance (disposition) ", and in case of establishment the fact of the illegality of the decision of the court of appellate instance – cancel it (sanction)". This standard can be dispersed by the CPC, since the standard of procedural law almost never coincides with the text of the law in textual terms.

It is clear that the formulation in the application for review of the court decision by the Supreme Court of Ukraine "the CPC standards" can be not accurate or mistaken. But the essence of the legal prescription, called the legislator in Art. 445 CCP "Code of Criminal Procedure» must be determined by the court, taking into account the position of the applicant (a professional participant in the proceedings). The Supreme Court of Ukraine is obliged to express its opinion in the ruling on this provision.

It is obvious there should at least be a logical connection between the formulation of the "unequally applied" standard of procedural law by the applicant and the formulation of this standard by the Supreme Court of Ukraine in its decision. Otherwise, the legality of the decision of the Supreme Court of Ukraine can always be questioned because of the impossibility of judges and other participants in criminal proceedings that will apply this decision to determine if "the one and the same" standard referred in the statement of review and the standard referred by the Supreme Court of Ukraine in the legal opinion of it. If the standard of law is not formulated in the decision of the Supreme Court of Ukraine, then all subjects to whom the relevant court decision is addressed will consider the position of the prosecutor (lawyer) to be correct in relation to the content and structure of the standard, casting doubt on the decision set forth in the resolution.

In connection with the above, the question arises as to whether the use is correct in item 2 of Part 1 of Art. 445 CPC of the term "standard of law, provided by this Code". Such a term, as illustrated above, encourages practitioners (lawyers, prosecutors, judges) to look for a norm in the CPC that is likely to be unequally applied by the court of cassation. But such searches can lead (and lead) to different results. And this is normal. It is difficult to hope that the subjects of the "search" of the structural elements of the procedural norm will reach the same conclusions, in such a large array of normative material, which is contained in the criminal procedural law. Moreover, the concept of the structure of the rule of law is rather "watered down". Some of its structural elements may include provisions that are not criminal procedural. For example, a hypothesis describing the conditions for applying a procedural standard, in addition to the principles of criminal proceedings and the specific conditions with which a standard begins to apply, can also be considered a provision of the rules of criminal law, because the latter "invisibly" are present in the hypothesis of each standard of criminal procedural law"[7]. And sanctions of procedural standards (and this is generally accepted) are contained not only in the criminal procedural law, but also in other branches of it. Sanctions of norms of criminal procedural law, their (sanctions) are divided into criminal law; administrative-legal; civil law; disciplinary; criminal proceedings according to the branch of law in which they are contained. It seems that the applicants to the Supreme Court of Ukraine and the court itself should not be engaged in the search for structural elements of the criminal procedural standard in other branches of law. Moreover, the sanction, if contained, for example, in the law on criminal liability, is a standard of criminal law.

If the practice follows the positions expressed in the science of the criminal process regarding the structuring of the standard of criminal procedural law, they will have to spend a considerable amount of activity, the results of which are not irrelevant to the practice of reviewing court decisions by the Supreme Court of Ukraine. For example, it is not necessary to ensure the uniform application of the procedural standard for the exact determination of a sanction in the standard regarding the possibility of a cassation appeal of a particular court decision. Except for cases where the legal provision, which in the theory of law is defined as a sanction, has an independent significance and it has become the subject of unequal application by the court of cassation. In fact, the subject of review by the Supreme Court of Ukraine is often those procedural rules, which determine the procedure for conducting procedural actions. The latter is submitted to the disposition of the legal standard in the form of a specific legal prescription. In order to simplify the realization of item 2 of Part 1 of Art. 445 CPC in it the word "standard" it is advisable to replace the words "legal order".

[7] Гейц С.О. Норми кримінально-процесуального права : дис. … канд. юрид. наук : 12.00.09 / Світлана Олександрівна Гейц. – Дніпропетровськ, 2007. – 189 с.

The impossibility of accurately wording the court decisions of a particular "standard of this Code" leads to the fact that sometimes the court of cassation does not formulate it at all and / or does not indicate in what article the CPC it contains, but interprets its provisions. In its decision of September 24, 2015, No. 5-93x15[8], the Supreme Court of Ukraine clarified that it was competent to consider exclusively those decisions based on the facts established by the courts of the lower level and in respect of which conclusions of the court of cassation were drawn (interpretation) regarding the correctness (incorrectness) of the application of the standard of law. Therefore, the absence of a formal reference to the relevant criminal procedural standard in its actual use indicates that there is a conclusion of the court of cassation regarding its application. Therefore, such a decision may be reviewed by the Supreme Court of Ukraine on the ground provided for in item 2 of part 1of Article. 445 CPC. However, the court of cassation in its decision interprets a specific legal order, but not all structural elements its logical construction – a hypothesis, disposition and sanction.

The second problem of the correct definition of the content and structure of "the standard of law provided by this Code" is the procedural standard of law can be set forth not only in the codified legislative act – the CPC, but also in other sources of law. Part 2 of Art. 1 CPC established that "the criminal procedural law of Ukraine consists of the relevant provisions of the Constitution of Ukraine, international treaties, the consent of which is binding on the Verkhovna Rada of Ukraine, this Code and other legislative acts of Ukraine". "This Code", that is the CPC, is just one of the elements of the criminal procedural law system. It is debatable whether the norms laid down in the sources other than the CPC, other than the CPC, may be subject to consideration and formulation by the Supreme Court of Ukraine of legal conclusions regarding their (norms) of unequal application by the court of cassation. The legislator has established the priority of the CPC in comparison with other laws and regulations: "laws and other normative legal acts of Ukraine, provisions of which concern criminal proceedings, must comply with this Code. The law cannot be applied, which is contrary to this Code in the course of conducting criminal proceedings "(part 9 of art. 3 of the CPC). That is why the legislator in other laws should establish a rule according to which the order of proceedings that governs the "other law" is such that does not contradict the order defined by the CPC. For example, in Article 3 of the Law of Ukraine of February 18, 1992 "On Operational and Investigative Activity"[9] (hereinafter – the Law "On ODI") regulates that the legal basis of this activity, along with other legislative acts, is the CPC. Taking into account the above, the rules of the Law "On ODI" may be regarded as "standard of the CPC" in the sense of item 2 of Part 1 of Art. 445 CPC. If the applicant poses a question to the Supreme Court of Ukraine about the unequal use by the court of the cassation instance of the standard of "another law", which is contrary to the CPC standard, then the latter cannot be regarded as applied, and the former is not "the standard of this Code".

The research carried out within this article gives grounds for the following conclusions: the logical structure of the procedural standards is rather complex, dispersed in the CPC and other laws, because of it in item 2 of Part 1 of Art. 445 of the CPC, the words "of the same standard of law as provided for in this Code" should be replaced by the words "of the legal prescription provided for by this Code"; if the rule of law, set forth in another law, does not contradict the CPC, then it can be regarded as a "norm of law provided for by this Code" in the sense of paragraph 2 of Part 1 of Art. 445 CPC; The Supreme Court of Ukraine, when considering the application for review of a court decision, which sets out the grounds, is stipulated in paragraph 2 of Part 1 of Art. 445 of the CPC is obliged to make judgments on two questions: (1) whether the court of cassation has applied the procedural norm and in which of the decisions, and (2) if different, whether it led to the adoption of different court decisions. The legal conclusion of the court on the first question will be important to ensure the unity of future court practice of applying the CPC norm, and the conclusion on the second question – to determine the fate of "contested" decision of the court of cassation.

Prospects for further exploration. Within the framework of one article to consider all problems of the using by the Supreme Court of Ukraine item 2 of Part 1 of Article. 445 of CPC is impossible. In this article, we examine only some, though basic, problems. Perspective directions of research of problematic issues of application of Item 2 of Part 1 of Art. 445 CPCs are the following: definition of criteria for the uniformity of the application of the item; differentiate the degree of influence of others, except those indicated in the statement on review, norms of criminal procedural law on the decision of the court of cassation.

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[8] Постанова Верховного Суду України від 24 вересня 2015 р. № 5-93кс1524. [Електронний ресурс]. – Режим доступу: http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/921A850AF8A7F754C2257EF8003D341B

[9] Про оперативно-розшукову діяльність : Закон України від 18 лютого 1992 р. [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/2135.

Summary

The article investigates major problems of application of item 1 of part 2 of article 445 of the CPC of Ukraine by The Supreme Court of Ukraine. Were considered the issue of overcoming the "fuzziness" of definition and logical structure "of the same standards of law stipulated by this Code"; the attribution to the number of such standards, which laid down not in the CPC, but in other legal acts; the complexity of determination of the level (force) of impact of the content of Court Decisions by the different using of standard of CPC.

Анотація

Стаття присвячена дослідженню основних проблем застосування Верховним Судом України положень п. 2 ч. 1 ст. 445 КПК. Розглянуті питання подолання «розмитості» поняття і логічної структури «однієї і тієї самої норми права, передбаченої цим Кодексом»; віднесення до числа таких норм, тих, що викладені не у КПК, а в інших законодавчих актах; складності визначення судом ступеню (сили) впливу неоднаково застосованої норми КПК на зміст судових рішень.

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