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Capabilities Of The Defense Counsel While Pre-Trial Investigation Of Criminal Offenses In The Field Of Official Activities (Review article)

Abstract. The research paper considers provisions of the current criminal procedural legislation of Ukraine, current developments in criminal procedure science, issues of participation of the defense counsel in criminal proceedings on criminal offenses in the field of official activities, in particular while collection, assessment and provision of evidence. The idea concept has been clarified: the main place in ensuring fair justice, in particular in criminal proceedings on crimes in the field of official activities, belongs to a professional defense counsel, that is, a qualified advocate who possesses professional knowledge and practical work skills. On this basis, it has been summarized that only advocacy is founded on verification of professional knowledge, compliance with the Rules of Advocate's Ethics, disciplinary responsibility, etc.

Keywords: advocate, defense counsel, criminal proceedings, criminal offense, evidence, pre-trial investigation.

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Introduction. Multi-scale socioeconomic transformations of the last decade going on within the framework of the main direction for the establishment of democratic legal state in Ukraine, led to the need to not only firmly oppose any negative manifestations, but also to further strengthen constitutional rights, freedoms and interests of an individuals, including those, who, due to particular circumstances, turned out to be involved in the field of criminal procedural activities.

Legislative acts and by-laws, newly-created or significantly restructured, are increasingly filled with human rights and ethical content, which should permeate all law enforcement activities of bodies and persons who carry out criminal proceedings, protect and provide legal aid to those who are accused of committing criminal offenses in the field of official activities.

In 1950 the Council of Europe recognised the importance of the defence lawyer's role in the criminal justice process in The European Convention on Human Rights[1*]. This is an international treaty that protects of the human rights and fundamental freedoms of citizens of member states of the Council of Europe. Article 6 is the provision that protects the right to a fair trial; of particular interest to this thesis is Article 6(3)(c). This provision allows a defendant to either defend himself or be defended through legal assistance of his choosing. Should he not be able afford legal assistance, it is to be given to him free when it is in the interests of justice. It is clear from the drafting of this

[1] This was formally known as The Convention for the Protection of Human Rights and Fundamental Freedoms

provision that the defence lawyer had an integral part to play in the criminal justice process[2].

Current period of legal science development in Ukraine is associated with the need to solve a number of issues, among which a special place is occupied by study and creative analysis of scientific developments, ways of using scientific and technical achievements, identification of promising research areas, etc.[3].

Analysis of publications where this problem solution is initiated. In a broad sense, the majority of researchers dedicated research papers to the issue concerning capabilities of the defense counsel while application of measures supporting criminal proceedings during pre-trial investigation of criminal offenses, in particular: A. M. Biriukov, T. V. Varfolomeieva, T. B. Vilchyk, Yu. O. Hurdzhi, V. H. Drozda, Ya. P. Zeikan, O. V. Kaplina, O. M. Kliuiev, O. P. Kuchynska, O. V. Malakhova, V. V. Nazarova, T. V. Omelchenko, A. I. Paliukha, M. A. Pohoretskyi, V. M. Tertyshnyk, A. M. Tytova, N. Ye. Filipenko, V. I. Farynnyk, V. V. Shendryk, M. Ye. Shumylo, Yu. P. Yanovych, O. O. Yukhno and others[4].

However, a great number of scientists developed one or more aspects of the raised problematics, thus not resolving the issue in a comprehensive and integrated way. The issue of scientific and practical evaluation of certain rules of the current Criminal Procedural Code of Ukraine governing procedural capabilities of the defense counsel should be stressed and further developed.

Aim. The aim of the article is to study theoretical and practical issues associated with participation of the defense counsel in criminal proceedings regarding criminal offenses in the field of official activities, identification of problematic aspects and development on its basis of evidence-based proposals for improving criminal procedural legislation and its practical application.

Results and discussion. The current Criminal Procedural Code of Ukraine introduced conceptually new approaches to regulatory control of legal procedures related to application of measures ensuring criminal proceedings and its efficiency. This is manifested, in particular, in: exceptional nature of its application, legislative coverage of grounds and conditions for choosing, altering and terminating these measures, as well as sufficiently precise legal regulation of the procedure for consideration and resolution of corresponding issues. Reinforcement of mechanisms for protection of rights and freedoms of participants in criminal proceedings from illegal and groundless restrictions was preceded by a long and gradual empowerment of the court in making relevant decisions not only within court proceedings but also during pre-trial investigation. Throughout the civilized world, immunity of a person is recognized as one of the essential principles of society development. Constitutions of many countries, in compliance with the Convention for the

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2 Edward Michael Johnston The Defence Lawyer In The Modern Era. (LL.B Hons) (UWE, Bristol), LL.M (UWE, Bristol). 2019, Pp. 61.

3 Nechyporuk, M., Pavlikov, V., Ivanović, A., Filipenko, N. (2021) Forensic Science Posibilities Within The Framework Of Criminal Proceedings While Aviation Accidents (Review Article). Archives of Criminology and Forensic Sciences. 1(3). 56-66. DOI: https://doi.org/10.32353/acfs.3.2021.05.

4 Палюх А.І. Особливості участі прокурора в доказуванні обставин, які обґрунтовують обрання окремих запобіжних заходів у кримінальному провадженні. Науковий вісник Львівського державного університету внутрішніх справ. 2016. № 1. С. 324–332.; Фаринник В. І. Відсторонення від посади: кримінальний процесуальний аспект. Науковий вісник Національного університету ДПС України. Серія: Економіка, Право. 2014. № 2 (65). С. 162–171.;Mykola Nechyporuk, Oleksandr Kliuiev, Aleksandar Ivanović, Nataliia Filipenko (2021) Development Strategy of International Cooperation of Forensic Science Institutions of Ukraine with Foreign Experts in Prevention of Terrorist Attacks on Aerospace Industry and Critical Infrastructure. Integrated Computer Technologies in Mechanical Engineering – 2021. Synergetic Engineering Pp. 825-848. Presents the proceedings of the ICTM´21 Conference held in Kharkov, Ukraine, at November 28–29, 2021. ISBN: 978-3-030-94259-5 (eBook). URL: https://link.springer.com/chapter/10.1007/978-3-030-94259-5_64 та ін.

Олексій КУЧЕР

МОЖЛИВОСТІ ЗАХИСНИКА ПІД ЧАС ДОСУДОВОГО РОЗСЛІДУВАННЯ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ У СФЕРІ СЛУЖБОВОЇ ДІЯЛЬНОСТІ

У статті, з урахуванням положень чинного кримінального процесуального законодавства України, сучасних розробок науки кримінального процесу розглянуто проблеми участі адвоката-захисника у кримінальних провадженнях щодо кримінальних правопорушень у сфері службової діяльності, зокрема, при збиранні, оцінці та наданні доказів. Сформульовано ідею, що основне місце у забезпеченні справедливого правосуддя, зокрема, у кримінальних провадженнях про злочини у сфері службової діяльності, належить саме професійному захиснику, тобто кваліфікованому адвокату, який має професійні знання та навички практичної роботи. На підставі цього резюмовано, що лише адвокатська діяльність ґрунтується на перевірці професійних знань, дотриманні Правил адвокатської етики, дисциплінарної відповідальності. Визначено процесуальні особливості участі захисника при застосуванні заходів забезпечення кримінального провадження, у тому числі запобіжні заходи. У контексті вивчення цього питання, з урахуванням наукових точок зору та власного практичного досвіду, зазначається, що захисник повинен мати більше часу для ознайомлення з клопотанням про застосування запобіжного заходу, ніж це передбачено чинним законодавством. Зокрема, для передчасного та якісного вивчення такого клопотання та матеріалів, якими обґрунтовується застосування відповідного запобіжного заходу, раціональним є надання їх захиснику не пізніше 24 годин до початку розгляду клопотання в суді. Підтримано наукову ідею, представлену судовою практикою, щодо законності здійснення виклику особи по телефону, зокрема через мобільні додатки Viber та WhatsApp, за таких умов: 1) у матеріалах кримінального провадження попередньо належним чином зафіксовано належність особі певного номера телефону; 2) особі надана вся необхідна інформація, яка має бути зазначена у порядку денному про виклик; 3) підтвердження одержання відповідною особою такої інформації. Підкреслено, що обов'язковою

умовою усунення з посади слід відносити наявність зв'язку між професійною діяльністю підозрюваного, обвинуваченого та інкримінованим йому кримінальним правопорушенням.

Ключові слова: адвокат, захисник, кримінальне провадження, кримінальне правопорушення, докази, досудове розслідування.

Protection of Human Rights and Fundamental Freedoms, not only declare this important provision, but also clearly support its real implementation. Article 29 of Ukrainian Constitution declares this very principle[5] to be one of the essential as well.

In conformity with Section 2 of Art. 131 of the Criminal Procedural Code of Ukraine, the following shall be measures to ensure criminal proceedings: 1) summons by investigator, public prosecutor, court summons and compelled appearance; 2) imposition of pecuniary penalty; 3) temporary restriction on a special right; 4) suspension from position; 4^{-1}) temporary suspension of a judge from justice administration 5) provisional access to objects and documents; 6) provisional seizure of property; 7) attachment of property; 8) apprehension of a person; 9) preventive measures[6].

According to the general rule, measures to ensure criminal proceedings are applied based on the decision of the investigating judge or the court. However, the Criminal Procedural Code of Ukraine stipulates exceptional cases when individual measures are applied to a person by an investigator or prosecutor (summons based on Article 133 of the Criminal Procedural Code of Ukraine), competent official (apprehension based on Article 208 of the Criminal Procedural Code of Ukraine), anyone who is not an authorized official (legal apprehension under Article 207 of the Criminal Procedural Code of Ukraine).

Article 132 of the Criminal Procedural Code of Ukraine lays down general application rules for all measures of ensuring criminal proceedings, and it is these provisions of the law that ensure their unity as a legal institution. At the same time, individual types of securing measures defined in the Criminal Procedural Code of Ukraine have an essence and implementation mechanism that differ them from the general model of ensuring criminal proceedings[7]. Each of them has its own purpose which stems from their essence: creation of appropriate conditions for evidence collection by parties in criminal proceedings (provisional access to objects and documents), provision of a civil claim (attachment of property), ensuring proper behaviour of participants in criminal proceedings (summons by investigator, public prosecutor, court summons and compelled appearance; imposition of pecuniary penalty; suspension from position; temporary restriction on a special right, preventive measures), etc. This approach is logical and much more perfect than the one outlined in the Criminal Procedural Code dated 1960, where rules governing the application procedure of these measures were included in different sections of the legal regulation (excluding restraint measures), however, it still raises certain concerns.

Definition of a person's summons provided in a measure (Section 11 of the Criminal Procedural Code of Ukraine) actually equated it to measures of a coercive nature. Individual researchers also characterize it as a measure[8] where there are certain restrictions as to the rights and freedoms of a person. Upon receiving summons from the investigator, public prosecutor, investigating judge, court, a person is obliged to appear before an official at the specified time, day, month, year and place of arrival. An individual must adjust (postpone or cancel) their plans and appear when summoned. Article 138 of the Criminal Procedural Code of Ukraine stipulates valid reasons for non-compliance with court summons: 1) apprehension, custody, or service

[5] Дубівка І. В. Діяльність адвоката в стадії досудового розслідування: дис. … канд. юрид. наук: 12.00.09. Київ, 2017. С. 16.

[6] Кримінальний процесуальний кодекс України: від 13.04.2012 № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

[7] Завтур В. А. Особливості доказування при розгляді та вирішенні слідчим суддею та судом клопотань про застосування заходів забезпечення кримінального провадження: дис. … канд. юрид. наук: 12.00.09. Одеса, 2017. С. 121

[8] Бондаренко О. Виклик особи за кримінальним процесуальним законодавством України. *Вісник прокуратури*. 2013. № 12. С. 67.

of punishment; 2) restriction of the freedom of movement under law or based on court's decision; 3) force-majeure circumstances (epidemics, military hostilities, floods or any other similar disasters); 4) absence of the summoned person in the place of residence during prolonged time due to official mission, travel, etc.; 5) serious disease or sojourn in a medical establishment in connection with treatment or pregnancy, on condition of impossibility to temporarily leave the establishment; 6) death of close relatives, family members, or any other close persons, or a serious threat to their life; 7) untimely receipt of the summons; 8) other circumstances objectively preventing appearance of a person on summons.

There are two types of consequences of non-appearance on summons:

of material nature – imposition of pecuniary penalty (Section 1, Article 139, Criminal Procedural Code of Ukraine);

of personal nature (restriction of personal freedom) – compelled appearance (Section 2 Article 139 of the Criminal Procedural Code of Ukraine).

Both imposition of pecuniary penalty (Chapter 12 of the Criminal Procedural Code of Ukraine) and enforcement of summons (Articles 140–143 of the Criminal Procedural Code of Ukraine) are possible only on the basis of decision issued by the investigating judge or court upon the availability of the following obligatory conditions:

1) a person who has been summoned according to the procedure set forth in the present Code (in particular, presence of confirmation of receipt of the court summons or of learning its content in other way);

2) failure to appear on summons without valid reason or did not inform on reasons for his non-appearance.

According to Section 1 Article 135 of the Criminal Procedural Code of Ukraine, while pre-trial investigation of criminal offenses in the field of official activities, the prosecution uses all available possibilities of summoning a person to participate in procedural actions (sending summons by mail, electronic mail or facsimile communication, by telephone or cable). Thus, a question arises concerning legality of actions of the pre-trial investigation body, the prosecutor in the case of sending a photocopy of the summons to a person's phone via various messengers (Viber, WhatsApp, Telegram) or via a personal message in a social network account. Analysis of court practice demonstrates an increased prevalence of the use of this type of summons. Thus, according to the decision of the investigative judge of Prydniprovskyi District Court of Cherkasy City of March 19, 2020, the investigator's motion of the Main Directorate of the National Police in Cherkasy Region is satisfied concerning imposition of pecuniary penalty on a witness in criminal proceedings. The judge concluded that summoning a person to the investigator by phone (including via Viber and WhatsApp mobile applications) is legal. On the contrary, the following should be reflected in case files: belonging of phone number to a person; a person was provided with all needed information that must be specified in the summons (Article 137 of the Criminal Procedural Code of Ukraine); a relevant person confirms the receipt of such information[9].

In the event of receiving summons, the latter must include information enshrined in Art. 137 of the Criminal Procedural Code of Ukraine:

1) name and position of investigator, public prosecutor, investigating judge, judge; name of the court which issues summons;

2) name and address of a court or other institution to which summons is made, number of telephone or other communication means;

3) name (appellation) of the person who is summoned and his address;

[9] Ухвала слідчого судді Придніпровського районного суду м. Черкаси від 19.03.2020 у справі № 711/1967/20. URL: https://reyestr.court.gov.ua/Review/88315659.

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CAPABILITIES OF THE DEFENSE COUNSEL WHILE PRE-TRIAL INVESTIGATION OF CRIMINAL OFFENSES IN THE FIELD OF OFFICIAL ACTIVITIES

The research paper considers provisions of the current criminal procedural legislation of Ukraine, current developments in criminal procedure science, issues of participation of the defense counsel in criminal proceedings on criminal offenses in the field of official activities, in particular while collection, evaluation and provision of evidence. The idea concept has been clarified: the main place in ensuring fair justice, in particular in criminal proceedings on crimes in the field of official activities, belongs to the professional defense counsel, that is, a qualified advocate who possesses professional knowledge and practical work skills. On this basis, it has been summarized that only advocacy is founded on verification of professional knowledge, compliance with the Rules of Advocate's Ethics, disciplinary responsibility, etc. Procedural peculiarities of the defense counsel's participation while application of measures to ensure criminal proceedings, including measures of restraint, have been specified. In the context of studying this issue, emphasizing scientific views and own practical experience, it is stressed that the defense counsel should have more time to familiarize himself with the motion on application of measure of restraint than is stipulated in the current legislation. In particular, for premature and qualitative study of such a motion and case files justifying application of the corresponding measure of restraint, it is rational to provide them to the defense counsel within 24 hourse before the beginning of consideration of the motion in court. The scientific idea presented by judicial practice as to legality of calling a person by phone, in particular, via Viber and WhatsApp apps, is supported under the following conditions: 1) case files of criminal proceedings include information on phone number ownership which is properly documented; 2) a person is provided with all needed information, which must be specified in the agenda on summoning; 3) confirmation of receipt of such information by a respective person. It is stressed

that there should be connection between professional activities of the suspect, accused person, and criminal offense he is charged with, and it has to be viewed as a mandatory condition for suspension from office.

Key words: advocate, defense counsel, criminal proceedings, criminal offense, evidence, pre-trial investigation.

4) name (number) of the criminal proceedings in the framework of which summons is issued;

5) current procedural status of the summoned person;

6) hour, date, month, year and place for appearance of the person summoned;

7) procedural action (actions) for participation in which the person is summoned;

8) consequences of failure to appear, with citing of the text of the relevant provisions of law, including the possibility of applying compelled appearance and conducting special pre-trial investigation or special judicial proceedings;

9) valid reasons specified by the present Code for which a person may not appear in response to the summons, and the requirement to notify in advance of the inability to appear;

10) signature of the investigator, public prosecutor, investigating judge, judge who issued court summons.

Oftentimes, there are cases when the prosecution does not specify the current procedural status of the summoned person. In particular, such type of summons is sent to persons in respect of whom a written suspicion notification is to be sent for committing official crime (however, the specified status does not indicate that a person was not afraid of appearing before law enforcement agencies).

In addition, as practice demonstrates, the investigator, inquirer or prosecutor sometimes does not indicate in summons the procedural action in which a person is summoned to participate. This usually happens with the purpose of confusing the defense counsel and depriving the possibility of qualitative preparation for one or another type of investigative or other procedural action. In our viewpoint, failure to specify any kind of mandatory data in the summons excludes the obligation of a person to appear (arrive at the place) upon summons. In particular, this obligation does not take place if summons is received or notified by other means later than three days after the day when a person is obliged to appear upon summons.

In compliance with Section of Art. 144 of the Criminal Procedural Code of Ukraine, pecuniary penalty may be imposed on participants in the criminal proceedings for failure to fulfil their procedural duties in the cases and amounts stipulated in the present Code. Participants in criminal proceedings are "the parties to criminal proceedings, victim, his representative and legal representative, civil plaintiff, his representative and legal representative, civil defendant and his representative, representative of the legal person in whose regard the proceedings are taken, third person, whose property is subject of arrest, another person whose rights or legitimate interests are restricted while pre-trial investigation, person considered to be surrendered (extradited) to a foreign country, applicant, witness and his counsel, witness of an investigative action, bailor, translator, expert, specialist, secretary of court session, representative of probation authority, and bailiff" (paragraph 25, Section 1, Article 3 of the Criminal Procedural Code of Ukraine)[10]. At the same time, in accordance with Section 1 of Article 139 of the Criminal Procedural Code of Ukraine, only the suspect, accused, witness, victim, civil plaintiff, representative of a legal person in whose respect proceedings are taken shall be subject to imposition of pecuniary penalty. In such a case, the defense counsel is obliged to pay attention to the current procedural status of a person, since the Criminal Procedural Code of Ukraine includes an exhaustive list of participants in criminal proceedings against whom pecuniary penalty may be imposed.

Suspension from office may be applied to a person who is suspected of or charged with committing a crime (Section 1 of Article 154 of the Criminal

[10] Кримінальний процесуальний кодекс України: від 13.04.2012 № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

Procedural Code of Ukraine). Analysis of the provisions of Chapter 14 of the Criminal Procedural Code of Ukraine provides grounds for arguing that a decision on temporary suspension of the judge from justice administration can also be drawn in connection with bringing him to criminal liability for committing any crime (regardless of severity).

An important point that the defense should take into consideration is the subject: an official or a body authorized to make a decision on application of this measure to ensure criminal proceedings.

Thus, according to a general rule, suspension from office shall be effected on the grounds of the decision passed by the investigating judge in the course of pre-trial investigation or by the court in the course of judicial proceedings (Section 2 Article 154 of the Criminal Procedural Code of Ukraine). At the same time, the matter of suspension from office of persons appointed by the President of Ukraine shall be decided by the President of Ukraine on the grounds of the public prosecutor's motion in accordance with the procedure set forth by law; suspension of a Director of the National Anti-Corruption Bureau of Ukraine from his office shall be carried by the investigative judge on the grounds of a reasoned motion of the Prosecutor General of Ukraine in accordance with the procedure set forth by law; a member of the National Agency for Prevention of Corruption: based on the motion of the Prosecutor General or his Deputy Head of the Specialized Anti-Corruption Prosecutor's Office (Section 3 Art. 154, Section 1 Art. 155 of the Criminal Procedural Code of Ukraine).

Temporary suspension of a judge from his office in connection with bringing him to criminal liability shall be carried out by the Supreme Council of Justice of Ukraine on the grounds of a reasoned motion of the Prosecutor General of Ukraine or his deputy prosecutor in accordance with the procedure set forth by law (Section 1 Article 155[1] of the Criminal Procedural Code of Ukraine). Taking into consideration provisions of Art. 480 of the Criminal Procedural Code of Ukraine (individuals subject to special procedure of criminal proceedings), the scientific position of V.I. Farynnyk[11], our research results concerning notification of suspicion under article Art. 481 of the Criminal Procedural Code of Ukraine, we believe that the question of whether the Prosecutor General or the prosecutor deputy has the status of procedural head in criminal proceedings remains open; in conformity with paragraph 21 Section 2 of Art. 36 of the Criminal Procedural Code of Ukraine, and therefore it t gives the right to exercise other powers envisaged in the present Code, in particular, to file a motion on suspension from office of certain categories of officials.

A copy of the prosecutor's or investigator's motion, upon agreement with prosecutor, as well as case files justifying the motion, must be handed over to a person who have acquired the procedural status of a suspect (during pre-trial investigation) or an accused (while court proceedings) before sending it to the body authorized to make a decision. This follows from requirements of paragraph 2 (2) Section 2 Article 155 of the Criminal Procedural Code of Ukraine, documents which prove that the suspect or the accused was provided with the copies of the motion and the materials which substantiate the motion shall be attached to the motion. Failure of the investigator or prosecutor to comply with this requirement will result in violation of general principles of criminal proceedings envisaged by the criminal procedural law, in particular, the right to defense, adversarial nature of parties, freedom to pres-

[11] Фаринник В. І. Відсторонення від посади: кримінальний процесуальний аспект. *Науковий Вісник Національного університету ДПС України*. Серія: Економіка, Право. 2014. № 2 (65). С. 166.

Oleksii KUCHER

OPPORTUNITÉS D'AVOCAT LORS DE L'ENQUÊTE PRÉJUDICIAIRE DES INFRACTIONS PÉNALES DANS LE DOMAINE DE L'ACTIVITÉ DE BUREAU (Aperçu)

Dans l'article, compte tenu des dispositions de la législation de procédure pénale actuelle de l'Ukraine, des développements modernes de la science de la procédure pénale, des problèmes de la participation d'un avocat de la défense aux procédures pénales concernant des infractions pénales dans le domaine de l'activité officielle, en en particulier, lors de la collecte, de l'évaluation et de la fourniture de preuves sont pris en compte. L'idée est formulée que la place principale pour assurer une justice équitable, en particulier dans les procédures pénales concernant des crimes dans le domaine de l'activité officielle, appartient à l'avocat professionnel, c'est-à-dire à un avocat qualifié qui possède des connaissances professionnelles et des compétences pratiques. Sur cette base, il est résumé que seule la plaidoirie est basée sur la vérification des connaissances professionnelles, le respect des règles de déontologie de l'avocat et la responsabilité disciplinaire. Les caractéristiques procédurales de la participation de l'avocat de la défense à l'application des mesures visant à garantir les poursuites pénales, y compris les mesures préventives ont été déterminées. Dans le cadre de l'étude de cette question, en tenant compte des points de vue scientifiques et de sa propre expérience pratique, il est noté que le défenseur devrait disposer de plus de temps pour se familiariser avec la demande d'application d'une mesure préventive que ce qui est prévu par l'actuel législation. En particulier, pour l'étude précoce et de qualité d'une telle requête et des éléments justifiant l'application de la mesure préventive correspondante, il est rationnel de les fournir au défenseur au plus tard 24 heures avant le début de l'examen de la requête en cours. L'idée scientifique, présentée par la pratique judiciaire, concernant la légalité d'appeler une personne par téléphone, notamment via les applications mobiles, savoir: Viber et WhatsApp est soutenue, dans les conditions suivantes : 1) la propriété d'un certain numéro de téléphone à une personne a été correctement enregistré dans la procédure pénale ; 2) personne reçoit toutes les informations nécessaires qui

doivent être précisées dans l'ordre du jour de l'appel ; 3) confirmation de la réception de ces informations par la personne concernée. Il est fait remarquer que l'existence d'un lien entre l'activité professionnelle du suspect, de l'accusé et l'infraction pénale qui lui est reprochée doit être considérée comme une condition impérative pour la révocation.

Mots-clés : avocat, défenseur, procédure pénale, infraction pénale, preuve, enquête préliminaire.

ent their evidence to the court and prove the preponderance[12] of this evidence before the court, etc.

When studying the content of motion and materials attached to it, the defender should pay attention to its compliance with the requirements of Section 2 of Article 155 of the Criminal Procedural Code of Ukraine. The following must be stated in the motion: 1) short description of the circumstances of a criminal offence in connection with which the motion is made; 2) legal determination of the criminal offence with the indication of the corresponding Article (paragraph of the Article) of the Law of Ukraine on criminal liability; 3) statement of the circumstances which give grounds to suspect the person of having committed criminal offence, and reference to the circumstances; 4) office held by this person; 5) statement of the circumstances which give grounds to believe that holding the office by the suspect or the accused contributed to perpetration of criminal offence; 6) statement of the circumstances which give grounds to believe that the suspect or the accused, if holding the office, will destroy or forge objects and documents of essential importance for the pre-trial investigation, or exert illegal influence on witnesses and other participants in criminal proceedings, or otherwise illegally obstruct criminal proceedings; 7) list of witnesses whom the investigator or the public prosecutor considers necessary to examine during consideration of the motion. Non-compliance with the indicated requirements of the Criminal Procedural Code of Ukraine results in returning the motion to its initiator, and a relevant decision is made on it.

Let's consider circumstances that the investigating judge and the court are obliged to take into account when resolving the issue of suspension from office or temporary suspension of a judge from administrating justice.

Firstly, it is legal grounds for suspending a judge from office. The prosecution must prove that a person has the procedural status of a suspect, accused person (in crime commission).

Secondly, it is sufficiency of evidence indicating criminal offence by a judge.

Thirdly, proportionality in the application of such a measure of ensuring criminal proceedings as suspension from office with those negative consequences for a person (third parties) that may take place (non-fulfilment of contractual obligations, leaving an enterprise without the knowledge of the head, non-payment of wages, non-payment of taxes, termination of the court in connection with judge's temporary suspension from the administration of justice, etc.). At the same time, as researchers and practitioners rightly emphasize, the prosecutor must prove the existence of circumstances that give grounds to believe that the very prolongation of the suspect's stay in his position will allow him to destroy or forge belongings and documents that are significant for pre-trial investigation, to influence witnesses and other participants in criminal proceedings using unlawful means or unlawfully impede criminal proceedings in other ways[13]. Given the practical experience, it should be stressed that in most cases the motion of the investigator, prosecutor for suspension from office does not include distinct circumstances that testify to the specified facts. From our perspective, in such a case, the investigating judge, court should require relevant case files of criminal proceedings, which prove the existence of the indicated circumstances. Otherwise, this should be a reason for refusing to grant the motion.

As to the opportunities of unlawfully influencing witnesses, certain observations should be made. The very concept of *unlawful influence on*

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[12] Поцілуйко В. М. Особливості відсторонення особи від посади як заходу забезпечення провадження в кримінальних справах і справах про адміністративні правопорушення. *Науковий Вісник публічного та приватного права*. 2018. Вип. 3. Т. 2. С. 158.

[13] Фаринник В. І. Відсторонення від посади: кримінальний процесуальний аспект. *Науковий Вісник Національного університету ДПС України*. Серія: Економіка, Право. 2014. № 2 (65). С. 166.

a witness is a personal opinion, since particular opportunities to influence depend on the suspect's position, relationship between the witness and the suspect, the suspect's identity, and may take various forms (bribery, threats, persuasion). There is a practice in which investigating judges while solving this issue consider only the possibility of direct contact between the suspect and the witness[14], or if we discuss this aspect more broadly: the possibility of real systematic communication and being in certain well-established social relations[15].

As stressed by V. I. Farynnyk, initiation of application of the specified measure cannot take place at a time when the suspect himself is on sick leave or on vacation, since the very existence of the mentioned circumstances contradicts the purpose of measure[16] application. In our judgement, existence of relationship between professional activity of the suspect and the accused and crime he is charged with should also be included as a mandatory condition for the application of the measure of ensuring criminal proceedings: suspension from office. In particular, there is currently a practice when investigating judges refuse to grant motions for suspension from office in cases where a crime of which a person is suspected has no relation to the position[17] held by him.

Attachment of property in criminal proceedings on criminal offenses in the field of official activities is a fairly common measure of ensuring criminal proceedings. This is due to the fact that the majority of offenses included in Chapter XVII of the Special Part of the Criminal Procedural Code of Ukraine, in accordance with the note to Art. 45 of this Code, are classified as corrupt, in this connection, the legislator stipulated property seizure. In view of the above, in conformity with Section 1 of Art. 170 of the Criminal Procedural Code of Ukraine, attachment of property is also allowed if it is the evidence of crime commission, subject to asset forfeiture from the suspect, accused, convicted person, third parties, confiscation from a legal entity, to secure a civil action or recovery from the legal entity of the received improper advantage, probable forfeiture of property[18].

Relevance and significance of practical focus of the raised issue is conditioned by the fact that Art. 16 of the Criminal Procedural Code of Ukraine provides for the possibility of temporary seizure of property without court decision. At the same time, the Criminal Procedural Code of Ukraine does not provide a clear wording and regulation of permitted cases of property rights restriction. Legislative consolidation of relevant restrictions on the right to property in criminal proceedings should be expedient and fair both from the standpoint of ensuring guarantees of human rights and freedoms, as well as guarantees of comprehensive conduct by the investigator, the prosecutor of pre-trial investigation[19].

The emphasis should be made on the fact the Criminal Procedural Code of Ukraine does not define *reasonableness* criteria for suspicions since it is an evaluative concept, therefore one of the most challenging tasks of the

[14] Ухвала Апеляційного суду Одеської області від 02.06.2015 у справі № 522/10259/15-к. URL: http://www.reyestr.court.gov.ua/ Review/44947498.

[15] Завтур В. А. Розгляд та вирішення слідчим суддею клопотання про відсторонення від посади: питання предмета доказування. Наукове забезпечення досудового розслідування: проблеми теорії та практики: збірник тез доповідей V Всеукр. науково-практичної конференції (м. Київ, 8 липня 2016 р.). Київ: Національна академія внутрішніх справ, 2016. С. 79.

[16] Туркот М. С., Ярмиш Н. М. Козій В. В. та ін. Методичні рекомендації щодо участі прокурора у судовому кримінальному провадженні про злочини у сфері службової діяльності в суді першої інстанції. Київ, 2017. С. 166.

[17] Ухвала слідчого судді Придніпровського районного суду м. Черкаси від 21.03.2016 у справі № 711/2242/16-к. URL: http://www.reyestr.court.gov.ua/Review/56732322.

[18] Кримінальний процесуальний кодекс України: від 13.04.2012. № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

[19] Дрозд А. В. Забезпечення недоторканності права власності в кримінальному провадженні: дис. … канд. юрид. наук: 12.00.09. Харків, 2019. С. 80.

Oleksii KUCHER

MÖGLICHKEITEN DES VERTEIDIGERS BEI DER VORGERICHTLICHEN AUFFASSUNG VON STRAFTATEN IM BEREICH DER AMTSTÄTIGKEIT (Übersichtsartikel)

In dem Artikel, unter Berücksichtigung der Bestimmungen des geltenden Strafverfahrensrechts der Ukraine, moderner Entwicklungen in der Strafprozesswissenschaft, der Probleme der Teilnahme eines Verteidigers an Strafverfahren wegen Straftaten im Bereich der amtlichen Tätigkeit, in insbesondere bei der Erhebung, Auswertung und Bereitstellung von Beweismitteln berücksichtigt werden. Es wird die Idee formuliert, dass der Hauptplatz bei der Gewährleistung einer gerechten Justiz, insbesondere in Strafverfahren wegen Straftaten im Bereich der amtlichen Tätigkeit, einem professionellen Verteidiger gehört, dh einem qualifizierten Anwalt, der über Fachkenntnisse und praktische Arbeitsfähigkeiten verfügt. Darauf aufbauend wird zusammengefasst, dass nur die Interessenvertretung auf der Überprüfung von Fachkenntnissen, der Einhaltung der Berufsethikregeln und der disziplinarischen Verantwortung beruht. Verfahrensmerkmale der Mitwirkung des Verteidigers bei der Anwendung von Maßnahmen zur Sicherstellung des Strafverfahrens einschließlich vorbeugender Maßnahmen sind festgelegt. Im Zusammenhang mit der Untersuchung dieser Frage wird unter Berücksichtigung wissenschaftlicher Gesichtspunkte und eigener praktischer Erfahrungen darauf hingewiesen, dass der Verteidiger mehr Zeit haben sollte, sich mit dem Antrag auf Anwendung einer vorbeugenden Maßnahme vertraut zu machen, als dies derzeit vorgesehen ist Gesetzgebung. Insbesondere für die frühzeitige und qualitativ hochwertige Untersuchung eines solchen Antrags und der Materialien, die die Anwendung der entsprechenden vorbeugenden Maßnahme rechtfertigen, ist es vernünftig, sie dem Verteidiger spätestens 24 Stunden vor Beginn der Prüfung des Antrags zur Verfügung zu stellen vor Gericht. Die von der Rechtspraxis vertretene wissenschaftliche Vorstellung über die Rechtmäßigkeit des Anrufens einer Person per Telefon, insbesondere über die mobilen Anwendungen Viber

und WhatsApp, wird unter den folgenden Bedingungen unterstützt: 1) Der Besitz einer bestimmten Telefonnummer einer Person wurde ordnungsgemäß aufgezeichnet im Strafverfahren; 2) die Person erhält alle notwendigen Informationen, die in der Tagesordnung des Anrufs angegeben werden müssen; 3) Bestätigung des Erhalts dieser Informationen durch die betreffende Person. Es wird betont, dass das Bestehen eines Zusammenhangs zwischen der beruflichen Tätigkeit des Verdächtigen, des Angeklagten und der ihm zur Last gelegten Straftat als zwingende Voraussetzung für die Amtsenthebung anzusehen ist.

Schlüsselwörter: Anwalt, Verteidiger, Strafverfahren, Straftat, Beweismittel, Ermittlungsverfahren.

defense counsel in criminal proceedings, including on criminal offenses within the field of official activities, is to convince the investigating judge, the court in unjustified suspicions. Concerning attachment of property, an important criterion in this case is proportionality of the value of property to be attached with the size of damage caused by criminal offense or stated in civil action as well as the amount of illegal benefit received by a legal person. What is more, the investigative judge as well as the court must consider the fact that in compliance with Section 1 of Art. 170 of the Criminal Procedural Code of Ukraine, the task of property attachment is preventing the possibility of its concealment, damage, spoiling, destruction, transformation, alienation. This is exactly what contributes to efficiency of criminal proceedings[20].

Given the latest amendments to the Criminal Procedural Code of Ukraine: "... it is not allowed to attach property/bank funds classified as insolvent, a bank, on which a decision was made to revoke the banking license and liquidate the bank on the grounds defined in Article 77 of the Law of Ukraine *On Banks and Banking* (excluding liquidation of bank by the decision of its owners), property/funds of The Individuals Deposit Guarantee Fund, as well as prohibition to commit actions by other persons while disposal by The Individuals Deposit Guarantee Fund of bank property classified as insolvent and of property of bank liquidated in accordance with the Law of Ukraine No. 4452-VI *On System of Guaranteeing Household Deposits* dated February 23, 2012."

One of the essential issues during pre-trial investigation of criminal offenses in the field of official activities is application of restraint measures as a type of criminal procedural measures of a coercive nature, related to temporary restriction by the investigating judge, court, of a person's (suspect, accused) right to freedom and person immunity. An important role in choosing a measure of restraint for the suspect, the accused, belongs to the defender[21].

The current Criminal Procedural Code of Ukraine of 2012 takes into account experience of Western European democracies tested in practice through the prism of decisions of the European Court of Human Rights (ECHR) on application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as domestic experience, concerning restraint measures[22].

The modern model of standardizing restraint measures was developed with regard to the guidelines of the Council of Europe and the practice of ECHR. In particular, the current Criminal Procedural Code of Ukraine stipulates the possibility of using valid alternatives to apprehension, regulates the moment of a person's apprehension, etc. However, among numerous appeals of Ukrainians submitted to ECHR, a substantial number are complaints about violations of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms that must be strictly observed during restraint measures application. Thus, according to ECHR reports, 109 decisions were adopted against Ukraine in 2019, 54 of which related to violations of the right to freedom and person immunity[23].

In conformity with Section 4 of Art. 176 of the Criminal Procedural Code of Ukraine, restraint measures are enforced: by the investigating judge at the

[20] Мороцька Н. Арешт майна в кримінальному провадженні: 5 основних тез. URL: https://legalhub.online/kryminalne-pravo/aresht-majna-v-kryminalnomu-provadzhenni-5-osnovnyh-tez/.

[21] Скрябін О. М. Участь адвоката при вирішенні питання про обрання підозрюваному, обвинуваченому запобіжного заходу у вигляді тримання під вартою. *Держава та регіони*. Серія: Право. 2014. № 2 (44). С. 144.

[22] Лобойко Л. М. Реформування кримінально-процесуального законодавства в Україні (2006–2011 роки): монографія. Київ, 2012. Ч. 1. Загальні положення і досудове провадження. С. 134.

[23] Фоміна Т. Г. Теоретичні та процесуальні основи застосування запобіжних заходів у кримінальному судочинстві України: дис. … д-ра юрид. наук: 12.00.09. Харків, 2020. С. 25.

request of the investigator and agreed with the prosecutor during pre-trial investigation; and by the court at the request of the prosecutor while court proceedings. Thus, all restraint measures can currently be enforced only by the judicial authority. The main task of the advocate at this stage will be to persuade the court in expediency of applying the most lenient restraint measure[24].

According to Section 1 of Art. 193 of the Criminal Procedural Code of Ukraine, motion to enforce a measure of restraint is considered with participation of public prosecutor, suspect, accused, his defense counsel, except cases stipulated for in Part Six of this Article. In this context, let's support the view of O. M. Skriabin that there is no need to involve an investigator to review a motion on a measure of restraint, even if the investigating judge received a motion from an investigator agreed with the prosecutor[25]. Let's add to the above that in line with the concept of the current Criminal Procedural Code of Ukraine, the prosecutor is the procedural head whose participation must be permanent throughout the criminal proceedings. In view of this, it is quite logical that the prosecutor (the procedural head) should familiarize himself in detail with procedural documents which he approves and further supports in court.

In scientific literature, general conditions for application of restraint measures by the investigating judge are the availability of: initiated and unfinished pre-trial investigation; presence of person to whom restraint measures are to be applied and who has the procedural status of a suspect; availability of criminal procedural status as well as criminal procedural competence in the subject filing a motion to the investigating judge[26]. What is more, the doctrine of criminal procedure notes special conditions which are linked to the possibility of enforcing one or another measure[27], for example, the official position of the suspect, accused. Relevance of their selection is determined predominantly by specificity of implementing a particular measure of restraint, since the availability or lack of specific circumstances will make its implementation impossible or derail the intended purpose.

Therefore, in general, in order to choose a measure of restraint in the form of personal warranty, it is required to have persons who are ready to act as warrantors, the choice of bail is associated with the availability of respective funds from a suspect or persons who are ready to pay them, house arrest can be imposed only in case of availability of housing, as well as well-founded suspicion of crime for which commission law stipulates punishment in the form of imprisonment. The law sets forth a number of special conditions of material and procedural legal nature for choosing a measure of restraint in the form of apprehension.

Thus, a measure of restraint as apprehension, in compliance with Art. 183 of the Criminal Procedural Code of Ukraine, is applied only if the prosecutor proves that none of most lenient restraint measures will not be able to prevent risks stipulated in Art. 177 of the Criminal Procedural Code of Ukraine, excluding cases provided for in Section 5 of Art. 176 of the Criminal Procedural Code of Ukraine. The main peculiarity of imposing such a measure of restraint is that it is chosen against the will of the suspect (accused). At this point, such a principle of criminal proceedings as adversariality of parties fully reveals itself when during trial the prosecutor tries to prove the investigating

24 Скрябін О. М. Участь адвоката при вирішенні питання про обрання підозрюваному, обвинуваченому запобіжного заходу у вигляді тримання під вартою. *Держава та регіони.* Серія: Право. 2014. № 2 (44). С. 145.

25 Скрябін О. М. Захисник в кримінальному процесі: нормативно-правове дослідження: дис. ... д-ра юрид. наук: 12.00.09. Запоріжжя, 2017. С. 142.

26 Гловюк І. В. Окремі аспекти доказування при застосуванні заходів забезпечення кримінального провадження слідчим суддею. *Право України.* 2014. № 10. С. 99.

27 Мироненко О. Вплив спеціальних умов застосування та обставин, які при цьому враховуються, на обрання запобіжного заходу. *Публічне право.* 2014. № 2 (14). С. 92.

Oleksii KUCHER

SZANSE OBROŃCY W TRAKCIE POŚWIADCZENIA PRZESTĘPSTW KARNYCH W ZAKRESIE DZIAŁALNOŚCI URZĘDOWEJ

W artykule, uwzględniając przepisy obowiązującego prawa karnego procesowego Ukrainy, współczesny rozwój nauki o postępowaniu karnym, problematykę udziału obrońcy w postępowaniu karnym dotyczącym przestępstw w zakresie działalności urzędowej, w w szczególności podczas gromadzenia, oceny i dostarczania dowodów. Formułuje się pogląd, że główne miejsce w zapewnieniu sprawiedliwego wymiaru sprawiedliwości, w szczególności w postępowaniu karnym o przestępstwa z zakresu działalności urzędowej, należy do zawodowego obrońcy, czyli wykwalifikowanego prawnika, który posiada wiedzę zawodową i praktyczną umiejętność pracy. Na tej podstawie podsumowuje się, że wyłącznie rzecznictwo opiera się na weryfikacji wiedzy zawodowej, przestrzeganiu Zasad Etyki Adwokackiej oraz odpowiedzialności dyscyplinarnej. Autor określa cechy procesowe udziału obrońcy w stosowaniu środków zabezpieczających postępowanie karne, w tym środków zapobiegawczych. W kontekście badania tego zagadnienia, uwzględniając naukowe punkty widzenia oraz własne doświadczenia praktyczne autora, zauważa się, że obrońca powinien mieć więcej czasu na zapoznanie się z wnioskiem o zastosowanie środka zapobiegawczego niż przewidują to obowiązujące przepisy. W szczególności dla wczesnego i wysokiej jakości rozpatrzenia takiej petycji oraz materiałów uzasadniających zastosowanie odpowiedniego środka zapobiegawczego racjonalne jest przekazanie ich obrońcy nie później niż 24 godziny przed rozpoczęciem rozpatrywania petycji w sądzie. Pomysł naukowy, przedstawiony przez praktykę sądową, dotyczący legalności dzwonienia do osoby przez telefon, w szczególności za pośrednictwem aplikacji mobilnych Viber i WhatsApp, znajduje poparcie pod następującymi warunkami: 1) posiadanie określonego numeru telefonu przez osobę została prawidłowo zarejestrowana w postępowaniu karnym; 2) udzieleniu tej osobie wszystkich niezbędnych informacji, które muszą być określone w porządku obrad naboru; 3) potwierdzenie otrzymania informacji przez właściwą osobę. Podkreśla się, że istnienie związku między działalnością zawodową podejrzanego, oskarżonego a zarzucanym mu przestępstwem należy uznać za bezwzględną przesłankę usunięcia ze stanowiska.

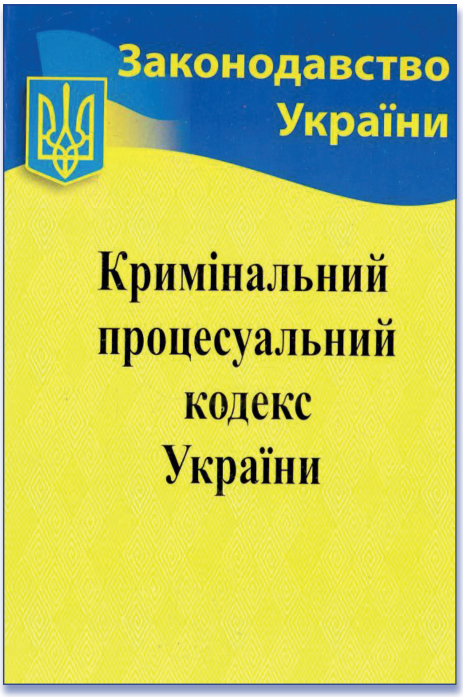
Słowa kluczowe: adwokat, obrońca, postępowanie karne, przestępstwo, dowody, postępowanie przygotowawcze.

judge that none of most lenient restraint measures will not be able to prevent risks; and the defense counsel, on the contrary, pays attention of participants in criminal procedure to the fact that there are no exceptional grounds for enforcing these measures, and indicates that it is possible and expedient to apply a lenient type of measure of restraint to the suspect or accused (personal surety, personal commitment, bail, house arrest), which can ensure proper conduct of the suspect. From the standpoint of adversariality, such a process is ideal since participants in criminal proceedings are highly active and interested in the outcome. This helps the investigating judge to carefully examine and assess all pieces of evidence collected by parties and to correctly apply the measure of restraint[28].

According to Sections 2, 3 of Art. 193 of the Criminal Procedural Code of Ukraine, investigating judge, court before whom the suspect, accused appeared or was brought for participation in the consideration of the motion to enforce a measure of restraint, is required to advice the suspect, accused of his rights, including as to the right to be represented by the defense counsel. Later, investigating judge, court is required to take all necessary measures to provide a defense counsel to the suspect, accused if the latter filed a plea on engaging a defense counsel, if participation of defense counsel is mandatory, or if investigating judge, court finds that circumstances of the proceeding require participation of a defense counsel.

In conformity with Article 33 of the Constitution of Ukraine, adoption of the measure of restraint in the form of apprehension substantially restricts the rights of the suspect (the accused), in this connection the latter requires special legal aid from the defense counsel.

We believe that during application of the measure of restraint in the form of apprehension, participation of a defense counsel should be mandatory. On the one hand, the content of Section 1 of Article 193 of the Criminal Procedural Code of Ukraine stipulates but does not admit participation of a defense counsel in consideration of the motion on the measure of restraint; and on the other hand, in cases defined in Section 2 of Art. 52 of the Criminal Procedural Code of Ukraine, the legislator did not define a binding nature of participation of the defense counsel in criminal proceedings when considering such a motion.



Therefore, we suggest amending Section 2 of Art. 52 of the Criminal Procedural Code of Ukraine with paragraph 10 which content will be set out as follows: "in respect of persons to whom it is envisaged to enforce a measure of restraint in the form of apprehension: from the moment of providing the suspect (accused) with a motion and case files justifying the need to enforce a measure of restraint in the form of apprehension."

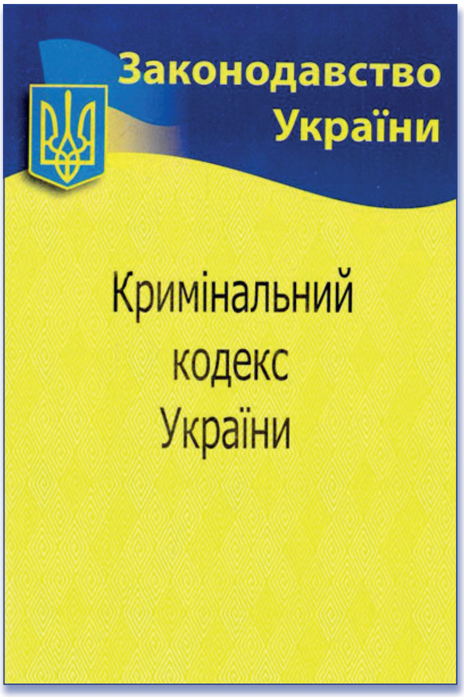
There is no clear regulation of the defender's actions when choosing a measure of restraint for a suspect in Ukrainian legislation; however, first and foremost, the essence and types of existing restraint measures as well as circumstances taken into account when choosing a measure of restraint should be clarified to the suspect. After all, in view of the list of circumstances enshrined in Article 178 of the Criminal Procedural Code of Ukraine, the suspect can tell the defender information that positively describes him or points to difficult family circumstances, disease, firmness of social relations the suspect (accused) has in the place of his permanent residence, whether the suspect, accused has the place of permanent employment or study, existence of bank deposit account, etc.,

[28] Скрябін О. М. Участь адвоката при вирішенні питання про обрання підозрюваному, обвинуваченому запобіжного заходу у вигляді тримання під вартою. *Держава та регіони*. Серія: Право. 2014. № 2 (44). С. 145.

thereby motivating the motion for application of a more lenient measure of restraint. Also, we need to discuss the issue of the need to summon witnesses for interrogation during trial and determine the list of case files that should be examined when considering the motion for application of a measure of restraint during trial in accordance with Section 4 of Article 193 of the Criminal Procedural Code of Ukraine. Later, it is required to take all necessary measures to search for and claim evidence that is important in solving the issue of choosing a measure of restraint. When considering the motion in court, the defense counsel must clarify the consideration procedure to the defendant and provide guidelines for preparing a corresponding speech[29] at court hearing.

The defense counsel must also bear in mind that justification in the motion on application of a measure of restraint of the existence of one or more risks or grounds that determine the possibility of imposing one or another restraint measure stipulated in the Criminal Procedural Code of Ukraine implies the obligation of the prosecutor to prove the impossibility of applying other, more lenient types of securing measures (paragraph 9 of the Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases No. 511-550/0/4-13: *On certain issues of the procedure for application of measures in the course of pre-trial investigation and court proceedings in accordance with the Criminal Procedural Code of Ukraine* dated 04.04.2013)[30].

The two-pronged reason for applying restraint measures is the existence of a reasoned suspicion that a person has committed a criminal offense as well as risks providing sufficient grounds to the investigating judge, court, to believe that the suspect (accused), the convicted, can carry out actions enshrined in Section 1 of Article 177 of the Criminal Procedural Code of Ukraine. If we are talking about enforcement of a certain type of measure of restraint, another component of grounds is availability of information that it is impossible[31] to solve tasks of criminal proceedings using other restraint measures. The law refers to the risks that may become grounds for choosing a measure of restraint for the suspect (accused), including the capability of the suspect to: 1) hide from pre-trial investigation agency and/or the court; 2) destroy, conceal or spoil any of objects or documents that have essential importance for establishing circumstances of criminal offence; 3) exert unlawful influence on the victim, witness, another suspect, accused, expert or specialist in the same proceedings; 4) obstruct criminal proceedings in other way; 5) commit similar or the same criminal offence, or continue the criminal offence of which he is suspected, charged (Section 1 of Article 177 of the Criminal Procedural Code of Ukraine)[32].



In this respect, emphasis is made on specification in para. 4, Section 1, Article 177 of the Criminal Procedural Code of Ukraine of the risks of obstructing criminal proceedings in other way, which basically points to non-exhaustive list of them.

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29 Скрябин А. Н. Этапу действий защитника при решении вопроса об избрании меру пресечения подозреваемому, обвиняемому в уголовном производстве Украину. *Оралдуң Ғулум Жаршусу* Серия: Политология, Право, История. 2014. № 19 (98). С. 65–66.

30 Про деякі питання порядку застосування запобіжних заходів під час досудового розслідування та судового провадження відповідно до Кримінального процесуального кодексу України: лист Вищого спеціалізованого суду з розгляду цивільних і кримінальних справ від 04.04.2013 № 511-550/0/4-13. URL: http://zakon2.rada.gov.ua/laws/show/v0511740-13.

31 Грошевий Ю., Шило О. Проблемні питання застосування КПК України при обранні запобіжних заходів у кримінальному провадженні. *Юридичний часопис Національної академії внутрішніх справ*. 2013. № 11. С. 223.

32 Кримінальний процесуальний кодекс України: від 13.04.2012 № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

ECHR also assumes as a risk a circumstance that may be grounds for application of a measure of restraint (in this case, it refers to apprehension): danger to public order and danger to a person in respect of whom investigation is conducted. It is, in particular, refers to the *Aleksandr Makarov v. Russia* case where the Court noted that specific crimes, due to their particular severity and corresponding public reaction to them, may be the reason for such disturbance of public order, which can justify pre-trial apprehension at least for a certain time. At the same time, the Court notes that such reasoning can be considered in exceptional circumstances and in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. Given that such a risk is not defined in the Criminal Procedural Code of Ukraine, it cannot substantiate grounds for apprehension within the Code. Grounds specified in para. 4, Section 1, Art. 177 of the Criminal Procedural Code of Ukraine, in our opinion, cannot entail such a risk either, since the very concept of risk, according to the current legislation, is associated with negative attempts to obstruct criminal proceedings on the part of the suspect or the accused.

There have been particular attempts to interpret provisions of paragraph 4, Section 1, Art. 177 of the Criminal Procedural Code of Ukraine in the criminal procedural doctrine. For example, O. V. Firman believes that evidence of that a person obstructs criminal proceedings in other ways is information indicating of threats or bribery of authorities administrating justice as well as encroachment on their lives[33]. Indeed, such actions are not included within the scope of risks defined by Art. 177 of the Criminal Procedural Code of Ukraine; thus in the event of their emergence, there must be a corresponding response to prevent such attempts. Although for this purpose, it would be more expedient to amend paragraph 3, Section 1 of Art. 177 of the Criminal Procedural Code of Ukraine, stating it as follows: "It is illegal to influence the pre-trial investigation body, investigating judge, court, witness...." Therefore, it would be more logical to group the main risks that are grounds for imposing a measure of restraint by their nature and focus: that is quite clearly reflected in provisions of Art. 177 of the Criminal Procedural Code of Ukraine of Ukraine.

Taking this into account, the viewpoint of A. I. Paliukh should be supported, who points out that provision of paragraph 4, Section 1, Art. 177 of the Criminal Procedural Code of Ukraine, worded with violation of the logical formation of the structure of the legal rule, and failure to determine its content filling, enables to unreasonably expand boundaries of interpretation and provide opportunities for abuse in investigative and judicial practice. In view of the above, the researcher concludes that it must be excluded[34].

From the analysis of ECHR practice, it follows that application of measures to ensure criminal proceedings must be carried out on the grounds of *reasonable suspicion* standard of proof. In Ukraine, not all investigating judges consider the need to comply with this standard. Thus, as stated in paragraph 1, Section 3 of Article 132 of the Criminal Procedural Code of Ukraine, the application of measures to ensure criminal proceedings is not allowed if the investigator, the prosecutor, does not prove that "there is a reasonable suspicion of the commission of criminal offence of such severity which may be grounds for application of measures to ensure criminal proceedings."

The lack of regulatory definition for the content of *reasonable suspicion* standard of proof in the Criminal Procedural Code of Ukraine raises difficulties

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[33] Фірман О. В. Поняття та підстави для застосування запобіжних заходів. *Науковий вісник Херсонського державного університету*. Серія «Юридичні науки». 2015. Вип. 2. Т. 3. С. 125.

[34] Палюх А.І. Особливості участі прокурора в доказуванні обставин, які обґрунтовують обрання окремих запобіжних заходів у кримінальному провадженні. *Науковий вісник Львівського державного університету внутрішніх справ*. 2016. № 1. С. 332.

within law enforcement activities and places a burden of interpretation of a relevant standard on the courts[35].

Critical review of Art. 178 of the Criminal Procedural Code of Ukraine allows to express certain comments concerning optimality of legislatively defined list of circumstances that are taken into account when applying a measure of restraint. Logical discrepancy with other rules of the Criminal Procedural Code of Ukraine is traced throughout provision of paragraph 1, Section 1 of Article 178 on assessment of "importance of available evidence concerning the commission of criminal offence by the suspect, accused." The existence of evidence on criminal offence commission by the suspect is covered by the concept of reasonable suspicion, which is the basis for application of a measure of restraint, and therefore we are talking about establishing similar circumstances. T.V. Lukashkina also disagrees with regulatory wording of such a circumstance, justifying this by the fact that evidence is necessary to establish all circumstances constituting the subject of proof, as well as by the lack of instructions on the need to evaluate aggregate of collected evidence for "weight" in Art. 94 of the Criminal Procedural Code of Ukraine[36].

In paragraph 2, Section 1 of Art. 178 of the Criminal Procedural Code of Ukraine, the legislator also includes "severity of punishment which can be imposed on the person concerned if the suspect, accused is found guilty of the commission of the criminal offence he is suspected, charged of..." to considered circumstances. It should be noted that the legislation of some foreign countries also contains references to the possibility of justifying a measure of restraint through probability of future punishment. However, imposition of punishment is a rather complex law-enforcement process, carried out by the court when resolving criminal proceedings on the merits, given a wide range of circumstances determined by substantive law and which coincide with local subject of proof in judicial control proceedings on only partial application of a measure of restraint. In fact, the investigating judge can draw a conclusion about severity of possible punishment exclusively based on the sanction of the article of the Law of Ukraine on Criminal Liability, which stipulates punishment for the act in commission of which a person is suspected. *Therefore, we deem it expedient to set out paragraph 2, Section 1 of Art. 178 of the Criminal Procedural Code of Ukraine in the following wording: "severity of criminal offense of which a person is suspected or charged."*

The meaning of the concept of *reputation of the suspect, accused* is also subject to ambiguous interpretation in the doctrine and judicial acts (paragraph 6, Section 1, Article 178 of the Criminal Procedural Code of Ukraine). In Explanatory dictionary of the Ukrainian language reputation is defined as a general opinion formed about someone or something[37]. The Letter of The High Specialized Court of Ukraine for Civil and Criminal Cases *On certain issues of the procedure for the application of restraint measures during pre-trial investigation and court proceedings in accordance with the Criminal Procedural Code of Ukraine* states that taking into account relevant circumstances, the investigating judge/the court is obliged to analyze case files of parties in criminal proceedings, to objectively evaluate provided residence, employment and study references of the suspected/ accused; data testifying registration of the suspect, accused person, at a narcological and

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35 Погорецький М., Міцкан О. Стандарт доказування «Обгрунтована підозра»: непізнаний феномен українського кримінального процесу. *Закон і бізнес*. 2019. № 10. URL: https://zib.com.ua/ua/print/136819-yak_minimum_5_kriteriiv_obruntovanosti_pidozri_mae_vrahovuva.html.

36 Лукашкіна Т. В. Умови та підстави застосування запобіжних заходів за чинним КПК України. Правове життя сучасної України: матеріали Міжнародної науково-практичної конференції, присвяченої ювілею академіка С. В. Ківалова (м. Одеса, 16–17 травня 2014 р.). У 2-х т. Т. 1. 2014. С. 685.

37 Короткий тлумачний словник української мови / під ред. Д. Г. Гринчишина. 2-ге вид., переробл. і допов. Київ: Радянська школа, 1988. С. 247.

psychoneurological dispensary, etc. Theoretical and Practical Commentary of the Criminal Procedural Code of Ukraine notes that factors shaping the suspect's reputation are events from his biography, for example, participation in liquidation of the consequences of Chernobyl disaster, participation in hostilities in the performance of international duty or as part of the UN peacekeeping force, existence of injuries while performance of official or public duty, state awards, honorary titles, etc. However, the concept of reputation does not cover the listed above information, since in both cases we are talking about description of objective personographic data.

The use of such category as *reputation* within criminal procedural discourse is not a successful step on the way to ensuring validity of the investigative judge's decision on restraint measures application. A person's reputation may be described differently depending on the sphere of life (personal, business), and therefore it remains unclear which of them will be of paramount importance for solving legal issues while criminal proceedings.

In order to optimize the range of factual circumstances that must be taken into account when applying a measure of restraint, we suggest excluding from the Criminal Procedural Code of Ukraine provisions of paragraph 6, Section 1 of Article 178 of the Criminal Procedural Code of Ukraine; instead, paragraph 3, Section 1, Article 178 should be worded as follows: "Information characterizing the identity of the suspect, the accused, his age and state of health."

It is vital to support the viewpoint of scientists and practitioners that the wording "no later than three hours before the consideration of the motion begins" specified in Section 2 of Art. 184 of the Criminal Procedural Code of Ukraine, restricts the right of the defense counsel, the suspect or accused person to present their objections in full and to prepare properly for trial regarding consideration in court of the investigator's or prosecutor's motion justifying the need to apply a measure of restraint in respect of the suspect or accused person. The specified period should be at least 24 hours, in this regard, the Criminal Procedural Code of Ukraine has to be appropriately amended[38].

The existence of special conditions for applying individual restraint measures results in expansion of the scope of the local subject of proof when considering corresponding motions and in its sophistication using additional elements.

As stated in Section 1 of Art. 180 of the Criminal Procedural Code of Ukraine: "personal warranty consists in the giving by persons whom investigating judge, court regard as worthy of confidence, of a written obligation that they warrant the observance by the suspect, accused with duties imposed on him in accordance with Article 194 of this Code, and undertake, if necessity should arise, to bring him to the agency of pre-trial investigation or to court at first request." Even superficial analysis of these provisions leads to the conclusion that the court possesses wide discretionary powers in determining whether a person can be a warrantor. In this respect, it is appropriate to turn to the doctrinal interpretations of such a concept as *person worthy of confidence*. Thus, in viewpoint of S. M. Smokov, those who are worthy of confidence are those who have strong moral values, such as conscientious attitude to work, public duty, decent behaviour, adherence to principles, as well as a high status in society; however, he also notes that the basis of warranty is the suspect's trust in the warrantor, the desire of the

[38] Скрябин А. Н. Этапу действий защитника при решении вопроса об избрании меру пресечения подозреваемому, обвиняемому в уголовном производстве Украину. *Оралдуң Ғұлум Жаршусу* Серия: Политология, Право, История. 2014. № 19 (98). С. 66.

suspect, the accused to preserve his honour and not to break the word given to the warrantor[39].

H. M. Hapotchenko emphasizes that in order to fulfil requirements of Section 1 of Art. 180 of the Criminal Procedural Code of Ukraine, case files of criminal proceedings must reflect the following information about the warrantor: age and condition (absence of mental, alcoholic and drug-related illnesses); the warrantor has a permanent job and residence; no criminal record; characteristics from the place of work and residence; property status of the warrantor; other data important for identification of the warrantor[40]. In the legal literature, there are other views on requirements for the identity of a potential warrantor[41]. From our perspective, when choosing personal warranty as a measure of restraint, determination of whether a person is worthy of confidence in the context of ensuring efficiency of criminal proceedings should depend on the following circumstances: the warrantor has established social ties with the suspect, accused person; authority in the eyes of the suspect, accused person, as well as levers of influence on him, in order to restrain the suspect from carrying out actions aimed at obstructing criminal proceedings. *Therefore, we consider it expedient to set out Section 1 of Art. 180 of the Criminal Procedural Code of Ukraine in the following version: "personal warranty should be provided by persons who have established social ties with the suspect, accused person, and are able to have educational impact on him and whom the investigating judge, the court, views as worthy of confidence…."*

Section 2 of Art. 180 of the Criminal Procedural Code of Ukraine states that number of warrantors shall be determined by the investigating judge, court which chooses the measure of restraint concerned. Presence of a single warrantor may be recognized as sufficient only if he is a person worthy of special confidence. Interpretation of *worthy of confidence* concept somewhat varies in doctrinal sources and explanations of higher judicial authorities. Thus, authors of Scientific and Practical Commentary of the Criminal Procedural Code of Ukraine believe that *person worthy of confidence* has to be understood as the fact that he enjoys authority in society, previously acted as a warrantor, etc.[42]. On the other hand, the Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases *On certain issues of the procedure for the application of restraint measures during pre-trial investigation and court proceedings in accordance with the Criminal Procedural Code of Ukraine* dated 04.04.2013 provides specific examples of categories of persons who are potentially worthy of confidence: People's Deputy of Ukraine, Deputy of the Local Council , a person marked by state awards, etc.[43].

According to the current criminal procedural legislation of Ukraine, bail can be applied both as an independent measure of restraint and as an alternative to apprehension (Section 3, Article 183 of the Criminal Procedural

[39] Смоков С. Кримінально-процесуальні гарантії при застосуванні запобіжного заходу у вигляді особистої поруки. *Право України*. 2013. № 11. С. 44–245.

[40] Гапотченко Г. М. Актуальні питання застосування особистої поруки за новим Кримінальним процесуальним кодексом України. Актуальні проблеми застосування нового кримінального процесуального законодавства України та тенденції розвитку криміналістики на сучасному етапі: матеріали Всеукраїнської науково-практичної конференції (м. Харків, 5 жовтня 2012 р.). Харків: ХНУВС, 2012. С. 201–202.

[41] Рибалко В. О. Оцінні поняття, використовувані при регламентації запобіжного заходу у вигляді особистої поруки. *Науковий вісник Львівського державного університету внутрішніх справ*. Серія юридична. 2015. № 4. С. 241.

[42] Кримінальний процесуальний кодекс України: науково-практичний коментар: у 2 т. / О. М. Бандурка, Є. М. Блажівський, Є. П. Бурдоль та ін.; за ред. В. Я. Тація. Харків, 2012. Т. 1. С. 461.

[43] Про деякі питання порядку застосування запобіжних заходів під час досудового розслідування та судового провадження відповідно до Кримінального процесуального кодексу України: лист Вищого спеціалізованого суду з розгляду цивільних і кримінальних справ від 04.04.2013 № 511-550/0/4-13. URL: http://zakon2.rada.gov.ua/laws/show/v0511740-13.

Code of Ukraine). However, in any case, when resolving the issue of its application and determining its amount, the investigating judge or the court must consider the list of factual circumstances specified in Section 4 of Article 182 of the Criminal Procedural Code of Ukraine, including property and family status of the suspect. When developing grounds for imposing bail, the legislator stresses the need for their separate clarification, which is not accidental, in view of bail special purpose: prevention of possible illegal behaviour of a person or prevention of its occurrence through the threat of imposing a financial sanction. However, within the scope of solving the issue of bail choice, these factual circumstances should be specified in greater detail. The lack of the latter in provisions of Section 4 of Art. 182 of the Criminal Procedural Code of Ukraine in practice results in incomplete clarification and formal consideration of a person's property or family status when enforcing bail[44].

The Civil Code of Ukraine does not clearly define the *property status* concept. This, in particular, is outlined in the Order of the Ministry of Justice of Ukraine No. 525/5 *On approval of methodological guidelines concerning subjects who have the right to receive information from the Register of Property Rights* dated March 23, 2009. Still, the legal regulation states that after analyzing the legal nature of this concept, it can be concluded that the *property status* concept should be understood as a set of property rights and obligations[45] owned by a person. Considering the fact that determination of a person's property status is directly due to appraisal of property value, one should refer to provisions of the Law of Ukraine *On Appraisal of Property, Property Rights and Professional Appraisal Activities in Ukraine*, which states that properties that can be appraised are tangible objects, buildings and structures (including their major components), machines, equipment, vehicles, etc.; shares, securities; intangible assets, including objects of intellectual property rights; integral property complexes of all forms of ownership, and property rights are defined as any rights related to property, other than ownership, including rights that are constituent parts of ownership rights (rights to use, dispose and own), as well as others specific rights (rights to carry out activities, use natural resources, etc.) and the right of claim. However, in individual cases, the prosecution did not provide the court with evidence that would testify the existence of a person's movable or immovable property when applying a motion on bail imposition, which made it impossible to establish relevant circumstances and, as a result, the appeal court decreased[46] the amount of bail. Superficial analysis of circumstances characterizing property status of the suspect, accused person, is due to paragraph 1 of Article 182 of the Criminal Procedural Code of Ukraine stipulating that Bail consists in paying in of funds, in the legal tender of Ukraine, and excludes the possibility of paying it in the form of other property, which is a substantial drawback.

Section 5 of Art. 182 of the Criminal Procedural Code of Ukraine states that in exceptional cases, where the investigating judge or the court finds that the bail in the amount specified will not suffice to ensure fulfilment of the obligations imposed on a person suspected of or charged with the commission of a grave or especially grave offense, the bail may be established in the amount exceeding 80 or 300 times the minimum wage accordingly. Currently, there are no official and doctrinal interpretations of this rule, which

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[44] Завтур В. Обгрунтування ухвал слідчого судді про застосування запобіжного заходу у вигляді застави: аналіз проблем та шляхи вдосконалення. Вісник прокуратури: загальнодержавне фахове юридичне видання. 2015. № 12. С. 88–89.

[45] Про затвердження Методичних рекомендацій стосовно суб›єктів, які мають право на отримання інформації з Реєстру прав власності на нерухоме майно: Наказ Міністерства юстиції від 23.09.2009 №525/5. URL: http://zakon5.rada.gov.ua/laws/show/v525_323-09.

[46] Про оцінку майна, майнових прав та професійну оціночну діяльність в Україні: Закон України від 12.07.2001 №2658-III. URL: http://zakon4.rada.gov.ua/laws/show/2658-14.

leads to significant differences in the process of its practical application. Individual authors point out that such cases are determined taking into account circumstances of criminal offense, property and family status of the suspect, accused person, other data on his identity and the possibility of risks associated with obstruction of carrying out criminal proceedings in any way, caused material damage due criminal offense[47]. However, it is quite difficult to accept such position, since provided circumstances do not seem to meet the exclusivity criteria.

Investigating judges and courts oftentimes (especially while high-profile criminal proceedings) resorted to application of this provision of the Criminal Procedural Code of Ukraine when imposing bail that had not been appropriately justified. Later, this became the basis for overturn of such rulings by the courts of appeal.

Quite often, investigating judges assigned the amount of bail that was offered in the investigator's mention agreed with the prosecutor; however, it should be kept in mind that only the investigating judge or court can be the subject of the decision to apply restraint measures. Stemming from the above, it is expedient to speak about the fact that the prosecutor's suggestion to impose a measure of restraint of a certain size is only advisory in nature. In addition, general practice of higher judicial authorities stresses the need to seek the views of the defense concerning determination of the specific amount of bail[48]. However, it is a common practice when investigating judges impose bail exceeding limits specified in Section 5 of Article 182 of the Criminal Procedural Code of Ukraine, without resorting to justification of exceptional cases. Given the above, in one of the criminal proceedings the appeal court reduced the amount of bail from 400 minimum wages to 3,000 hryvnias, indicating that the investigating judge not only did not substantiate exceptional circumstances of criminal proceedings, but also did not take into account the fact that the suspect has a permanent job and low salary[49].

We also should admit misinterpretation of paragraph 3, Section 5 of Art. 182 of the Criminal Procedural Code of Ukraine in the rulings of investigating judges, which is that the provision according to which bail can be assigned in excess of the limit or 80-300 times the minimum wage for able-bodied persons is not taken into account. This means that, if a person is suspected of committing a serious crime, the investigating judge may, in exceptional cases, determine the amount of bail exceeding 80 times the minimum wage for able-bodied persons; however, will still be limited to 300 times the minimum wage. In separate rulings, the relevant provision was ignored. In addition, there was no justification for exceptionality of circumstances, which convinced the investigating judge of the need to exceed limits specified in Section 5 of Art. 182 of the Criminal Procedural Code of Ukraine[50]. We are convinced that this legal provision should be reflected in Art. 182 of the current Criminal Procedural Code of Ukraine.

As to proportionality of the amount (size) of bail with the amount of damage caused as a result of criminal offense, some insight should be provided. ECHR while reviewing the case *Neumeister v. Austria* recognized violation of Art. 5 of the Convention regarding assignment of the amount of bail exclusively on the basis of amount of damage caused by crime of

[47] Кримінальний процесуальний кодекс України: науково-практичний коментар: у 2 т. / О. М. Бандурка, Є. М. Блажівський, Є. П. Бурдоль та ін.; за ред. В. Я. Тація. Харків, 2012. Т. 1. С. 467.

[48] Узагальнення судової практики щодо розгляду слідчим суддею клопотань про застосування заходів забезпечення кримінального провадження. URL: http://zakon0.rada.gov.ua/laws/show/n0001740-14.

[49] Завтур В. Обгрунтування ухвал слідчого судді про застосування запобіжного заходу у вигляді застави: аналіз проблем та шляхи вдосконалення. *Вісник прокуратури: загальнодержавне фахове юридичне видання*. 2015. № 12. С. 91.

[50] Кримінально-процесуальний кодекс України: від 28.12.1960 № 1001-05. URL: http://zakon2.rada.gov.ua/laws/show/1001-05.

which the applicant[51] was suspected. At the same time, it does not mean that such connection is completely unacceptable, since when it comes to determining the amount of bail, which is effective for ensuring viability of criminal proceedings, relevant decision of the investigating judge requires an integrated justification, and such a criterion as prospective compensation for damage appears to be highly relevant. However, it should be emphasized that bail paid in by a bail bondsman may be reverted by court to the execution of sentence in respect of penalty involving property only in case if it was not reverted to state income and upon legislator consent (Section 11 of Article 182 the Criminal Procedural Code of Ukraine); and if the suspect, accused person, does violate obligations imposed on him by the investigating judge or the court, and the bail will be reverted in accordance with paragraphs 8 and 9 of Article 182 of the Criminal Procedural Code of Ukraine, problems may arise while compensation to the victim, especially if the suspect or the accused has no other property.

Continuing research, let's stress such challenging issue as apprehension of a person which, in conformity with Section 2 of Article 176 of the Criminal Procedural Code of Ukraine, is a "provisional measure of restraint is apprehension of a person which is enforced on grounds and according to the procedure laid down in the present Code restricting his right to freedom and security."[52] A person's freedom should be restricted only when it is impossible to ensure the fulfilment of set objectives. In view of this, the defense of a person detained on suspicion of criminal offense commission in the field of official activities is one of the most difficult problems encountered in criminal proceedings in general and in activities of a defense counsel, in particular. This issue is always highly relevant, as at the moment of apprehension (under most extreme conditions) both the investigator and the defense counsel are acting, which oftentimes results in irreparable mistakes.

Relying on the analysis of the practice of applying provisions enshrined in Art. 208 of the Criminal Procedural Code of Ukraine, as well as announced high-profile arrests of highest-ranked officials, O. Iu. Tatarov notes that the Criminal Procedural Code of Ukraine is often used, firstly, as a means of intimidating, and, secondly, as a means of creating an illusion of crime[53] counteraction.

One of the most commonly used types of apprehension in criminal proceedings regarding crimes in the field of official activities is apprehension by a competent official (Article 208 of the Criminal Procedural Code of Ukraine).

Peculiarities of apprehension of a separate category of persons are determined by Chapter 37 of the Criminal Procedural Code of Ukraine, which is important during criminal proceedings for crimes in the field of official activities.

The Criminal Procedural Code of Ukraine does not disclose the *competent official* concept, which results in relevant problems while application of the specified legal rule. In our opinion, it is a person who is granted with appropriate authority according to the Criminal Procedural Code of Ukraine and other laws of Ukraine (*On the National Police*, *On the National Anti-Corruption Bureau of Ukraine*, *On National Guard of*

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51 Постановление Европейского Суда по правам человека по делу «Ноймайстер против Австрии» от 27.06.1968. URL: http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/nejmajster-protiv-avstrii-neumeister-v-avstria-postanovlenie-evropejskogo-suda/.

52 Рішення Конституційного Суду України у справі … (справа про гарантії депутатської недоторканності) від 26.06.2003 № 12-рп/2003. URL: https://zakon.rada.gov.ua/laws/card/v012p710-03.

53 Татаров О. Ю. Кайданки на камеру: тенденція до проведення затримань без ухвали слідчого судді становить загрозу правам особи. *Закон і бізнес*. 2016. № 18 (1264). URL: http://zib.com.ua/ua/print/123397-tendenciya_do_provedennya_zatriman_bez_uhvali_slidchogo_sudd.html.

Ukraine, *On Security Service of Ukraine*, *On State Bureau of Investigation*, etc.). Therefore, competent officials are employees of the National Police, NABU, security agencies, authorities that supervise compliance with the tax legislation, the State Border Guard Service of Ukraine authorities and other law enforcement agencies, who within the limits of their powers have the right to apprehend a person.

The issue of legitimacy of apprehending a person on the grounds stipulated in paragraphs 1, 2, Section 1 of Article 208 of the Criminal Procedural Code of Ukraine, before the beginning of pre-trial investigation (that is, before the entry of information about criminal offense commission into the Unified Registry of Pre-Trial Investigations) remains unresolved[54]. It is believed that in the event of a person's apprehension, information on criminal offense commission must be entered into the Unified Registry of Pre-Trial Investigations (URPI) right after its completion, and only then minutes on apprehension should be drawn up.

When reviewing the first basis enshrined in paragraph 1, Section 1 of Art. 208 of the Criminal Procedural Code of Ukraine, we would like to note that definition of "a person was caught" means that at the time of crime commission he was apprehended and did not have time to hide. "Upon committing a criminal offence or making an attempt to commit it" means that any investigator or other competent official, or any citizen who is not a law enforcement body, witnessed the commission of crime by a person and apprehended him. In this case, two factors are essential.

Firstly, a person committing crime must be apprehended at the moment when he was directly performing the "objective side of crime", that is, at the crime scene.

Secondly, apprehension is applied by a person who was an eye-witness. The expression "immediately after the commission of crime" indicates that there was a short period of time between the moment of crime commission and direct apprehension, during which a person did not have time to hide and did not drop out of sight of a person who chased him[55].

The second basis is the fact that eye-witnesses, in particular victims, point to the fact that this particular person has just committed a crime. An eye-witness is a person who was present at crime scene at the time of and clearly saw a person committing it. However, an eye-witness is a potential witness who has not become such yet, since as a witness he has not been invited and interrogated, and these procedural actions can also be carried out only after entering information into URPI. In this case, we are talking about apprehension until information is entered into URPI, which, according to the Criminal Procedural Code of Ukraine, is also impossible.

As noted, the requirement for *immediacy* in the world practice of apprehensions is not new at all. It can be interpreted by analogy with the *in the presence requirement* rule in the American model of apprehension without court permission. Therefore, in compliance with established judicial practice of the USA, the grounds for apprehension without court permission are cases when criminal offense is committed in the presence of a person carrying out apprehension. This standing is confirmed by the accuracy of opinion about illegitimacy of certain apprehensions in our country. Thus, sometimes the prosecution inappropriately applies provisions of Art. 208 of the Criminal Procedural Code of Ukraine and, in fact, carries out unjustified apprehension. Therefore, the issue of apprehending a person sometime

[54] Фаринник В., Мірковець Д. Затримання особи в новому Кримінальному процесуальному кодексі України: окремі питання відповідності міжнародним стандартам і практиці Європейського суду з прав людини. *Підприємництво, господарство і право*. 2017. № 6. С. 194.

[55] Солдатенко О. А. Теоретичні та практичні питання затримання особи за чинним КПК України. Реформування органів внутрішніх справ: проблеми та перспективи (вітчизняний і зарубіжний досвід): матеріали міжнародної науково-практичної конференції. Дніпропетровськ: Дніпроп. держ. ун-т внутр. справ, 2014. С. 96–97.

after crime commission without court permission should be addressed. As is known, during development of the Criminal Procedural Code of Ukraine, the world experience of ensuring human rights and freedoms related to arrests in clearly defined cases was considered: immediately after criminal offense commission and in the availability of circumstances indicating that a person has just committed a crime. It is obvious that there is a need to appropriately amend Art. 208 of the Criminal Procedural Code of Ukraine in order to ensure unambiguous understanding of the terms *immediacy* and *just*. Since the specified temporal and spatial parameters of *immediacy* determine a very short period of time, in our opinion, apprehension in accordance with Article 208 of the Criminal Procedural Code of Ukraine should be permitted only if few hours have passed from the moment of crime commission to the moment of actual apprehension. At the same time, the concept of *has just committed a crime* should be applied when the temporal and spatial features of a person's presence in relation to the event and scene of crime give grounds to suspect him of it[56].

As stated in provisions of Section 1 of Art. 48 of the Criminal Procedural of Ukraine, investigator, public prosecutor, court are required to provide the apprehended person or the person who is kept in custody assistance in establishing liaison with a defense counsel or with persons able to commit a defense counsel, and to make possible using communications means to commit a defense counsel[57].

Apprehension of a person is increasingly important in terms of providing him with timely legal aid. During this period the suspect's position in a case is being formed, and is gradually reflected in minutes of interrogation. If he testifies as a suspect and makes multiple mistakes, then later it is hard to convince the investigation of the inaccuracy of these testimonies. What is more, the very presence of a lawyer while criminal proceedings at this stage assists the prosecution in adherence to requirements of the law governing apprehension.

However, there are cases when the defense was not allowed to access a person who was actually apprehended at the crime scene or caught "red handed" and transferred to the pre-trial investigation body, and who needed immediate legal aid.

Participation of the defense counsel at the stage of apprehension is highly important, since it is at this stage that the suspect especially needs qualified legal aid, as oftentimes after the actual apprehension, the prosecution interrogates a person, identifies him, and at the request of the apprehended, investigators clarify that legal aid is provided by the defense counsel from the moment of the announcement of minutes on apprehension. Imposition on the defense counsel of the obligation to use all means and methods of defense specified in the law implies his continuous (from the moment of entering into criminal proceedings), and not episodic activities aimed at achieving objectives of defense.

Ukrainian legislation stipulates a special procedure for a person's *access* to the defense counsel. Importantly, this procedure is based on the basic principle

[56] Фаринник В., Мірковець Д. Затримання особи в новому Кримінальному процесуальному кодексі України: окремі питання відповідності міжнародним стандартам і практиці Європейського суду з прав людини. *Підприємництво, господарство і право*. 2017. № 6. С. 94.

[57] Кримінальний процесуальний кодекс України: від 13.04.2012 № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

of efficient legal aid while apprehension: early access. In conformity with this procedure, immediately after the actual apprehension of a person, a competent official of the body authorized to conduct apprehension, informs the relevant Center of Free Legal Aid (FLA) about it (Section 4 of Article 213 of the Criminal Procedural Code of Ukraine). An authorized person of this institution appoints an advocate and the advocate must meet with the apprehended person within two hours (in some cases: up to six hours). The apprehended person has the right to dispense with free legal aid, but he can do so in the presence of a FLA advocate in the course of the first confidential meeting. A competent official responsible for apprehension of a person is obliged to record the time of the advocate's arrival and the time of completion of provision of free secondary legal aid.

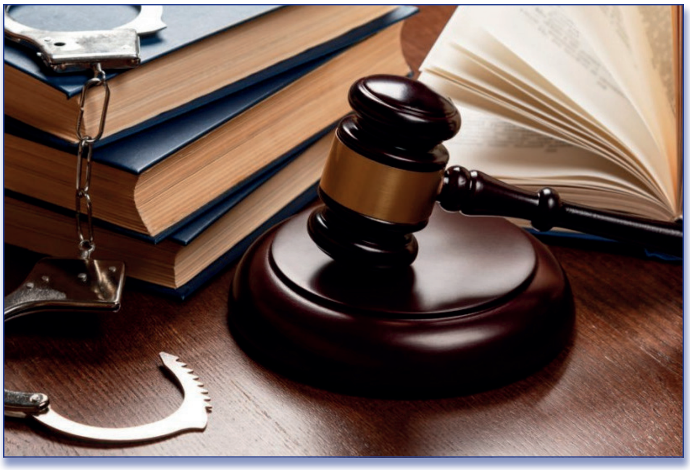
During apprehension of a person on suspicion of criminal offense commission in the field of official activities, the advocate must identify all data about a person and circumstances of apprehension: actual time and place; whether other persons were apprehended; whether grounds for apprehension and procedural rights are clarified; whether video (photo) shooting was used; what was seized while apprehension; whether body search was conducted; whether any documents were drawn up; whether clarifications were provided and which ones; whether any procedural actions were taken with regard to a person, etc. If the apprehension minutes are compiled in the presence of the defense counsel, then, in case of procedural violations on the part of the prosecution or shortcomings in the minutes, it is vital to record them either in the procedural document itself or on a separate sheet and ensure its execution as an attachment to the minutes[58].

In practice, it is essential to comply with requirements of Article 213 of the Criminal Procedural Code of Ukraine. Thus, in conformity with the content of Section 1 of Article 213 of the Criminal Procedural Code of Ukraine: "a competent official who detains a person shall be under the obligation to give the detainee an opportunity to immediately inform of his detention and his whereabouts his close relatives, family or other persons of his own choosing. If the competent official who has carried out apprehension has grounds for a reasonable suspicion that notification of apprehension may jeopardize pre-trial investigation, he may make such informing himself without, however, breeching the requirement concerning its immediacy."[59]

Let's note that information on the method of notifying relatives and data of notified members must be specified in the apprehension minutes. It should be emphasized that the Criminal Procedural Code of Ukraine consists of requirements for immediate suspension of the apprehended person in case if:

1) a person has not been served the notice of suspicion after 24 hours elapsed after the moment of his apprehension (Sections 2, 3 Article 278 of the Criminal Procedural Code of Ukraine);

2) an individual apprehended without investigating judge's, court's ruling shall be released or brought to court for consideration of a motion to impose on him a measure of restraint no later than



[58] Радкевич В. М. Дії захисника при затриманні особи за підозрою у вчиненні кримінального правопорушення. URL: https://unba.org.ua/assets/ uploads/legislations/education-materials/diji-zahisnika-pri-zatrimanni-osobi-za-pidozroju-u-vchinenni-kriminalnogo-pravoporushennja.pdf.

[59] Кримінальний процесуальний кодекс України: від 13.04.2012 № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

sixty hours after apprehension (Section 2 Article 211 the Criminal Procedural Code of Ukraine);

3) period of apprehension of a person without a ruling of investigating judge, court may not exceed seventy-two hours after the time of apprehension as determined (Section 1 Article 211 the Criminal Procedural Code of Ukraine).

Conclusions. Summarizing above, it should be emphasized that:

Firstly, in order to minimize possible abuses and violations on the part of the prosecution when servicing suspicion notification to a person, it is suggested to amend the Criminal Procedural Code of Ukraine with provision that will enshrine the necessity of carrying out the specified procedural action exclusively in the presence of a defense counsel. In the availability of conditions stipulated in Section 2 of Art. 46 of the Criminal Procedural Code of Ukraine, the investigator and the prosecutor are obliged to use continuous video recording of such procedural action.

Secondly, special procedure for criminal proceedings with regard to a specific category of individuals. (Chapter 37 of the Criminal Procedural Code of Ukraine) does not contradict the principle of equality of persons before the law and the court. Introduction of certain features in such criminal proceedings is aimed at ensuring proper functioning of the main state and self-governing institutions. An important role of the defense counsel in the specified category of proceedings is emphasized, which consists in the fact that during pre-trial investigation of criminal offenses in the field of official activities, the prosecution is obliged to comply with requirements of Article 481 of the Criminal Procedural Code of Ukraine concerning subject composition of persons authorized to report suspicion to a separate category of persons (Prosecutor General, Acting Prosecutor General, Deputy Prosecutor General, Head of Regional Prosecutor's Office, etc.). At the same time, the prosecutor, who is authorized by law to compile, sign and deliver a written suspicion notification as well as to clarify to the suspect his rights, must necessarily be a member of the group of prosecutors: procedural heads of criminal proceedings.

Thirdly, the defender counsel of the suspect, accused person, along with the prosecution, is the subject of evidence collection. At the same time, as practice of applying the Criminal Procedural Code of Ukraine demonstrates, the right to collect evidence by conducting investigative (search) and other procedural actions is granted exclusively to competent (authorized) persons who carry out pre-trial investigation and are responsible for its course and outcome.

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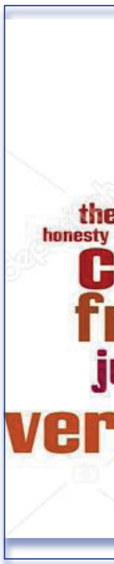

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