UDC 343.13
DOI https://doi.org/10.32782/2524-0374/2023-4/140

THE PROBLEM OF THE PARTICIPATION OF PERSONS WHO ARE SUBJECT TO CRIMINAL PROCEEDINGS WITHOUT NOTIFYING THEM ABOUT THE SUSPICION IN THE JUDICIAL PROCEEDINGS OF THE PROSECUTION'S REQUESTS FOR EXTENSION OF THE PRE-TRIAL INVESTIGATION

ПРОБЛЕМА УЧАСТІ ОСІБ, ЯКІ БЕРУТЬ УЧАСТЬ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ БЕЗ ПОВІДОМЛЕННЯ ЇМ ПРО ПІДОЗРУ, У РОЗГЛЯДІ КЛОПОТАНЬ ПРОКУРАТУРИ ПРО ПОДОВЖЕННЯ СТРОКУ ДОСУДОВОГО РОЗСЛІДУВАННЯ

Lukyanchikov E.D., Doctor of Legal Sciences,
Professor at the Department of Information, Economics and Administrative Law
National Technical University "Ihor Sikorsky Kyiv Polytechnic Institute"

Kolokolnikov V.A., PhD student of the 2nd year at the Department of Information, Economics and Administrative Law
National Technical University "Kyiv Polytechnic Institute named after Igor Sikorsky"

The article draws attention to the issue of the status of the actual suspect in criminal proceedings and explores the procedural ways of solving it.

Particular attention is paid to the methodology of the work of law enforcement agencies, which was developed as a result of a wrong perception by the prosecution of its own tasks and the purpose of the pre-trial investigation.

At the same time, this method of pretrial investigation is evident as a result of the long-term "accusatory bias" in the justice system during the Soviet legal system.

It is indicated the need to grant the suspect status in the shortest possible time to ensure the implementation of the protection side of all critical legal means that ensure the right to protection.

The actual suspect's lack of appropriate status unreasonably limits his procedural rights and provides opportunities for abuse by the prosecution, which is manifested in searches, interrogations, and seizure of property in "factual cases" related to the activities of certain business entities.

As a conclusion, it is stated that the law enforcement system and the legal framework need to be revised in certain moments, taking into account the decisions of the European Court of Human Rights.

The implementation of practices and approaches of the European Court of Human Rights is of exceptional importance for solving systemic problems of criminal justice in Ukraine, developing new areas of work of law enforcement agencies to avoid groundless interference with the rights and freedoms of persons not involved in a criminal offense.

Particular attention needs to be paid to raising the level of requirements of judicial authorities for information presented during pre-trial investigation by the prosecution in order to make decisions limiting the rights and freedoms of third parties based on evidence that actually confirms the involvement of persons in a criminal offense.

Key words: person whose rights or legal interests are restricted, report of suspicion, potential suspect.

У статті приділяється увага питанню статусу фактичного підозрюваного у кримінальному провадженні та досліджуються процесуальні шляхи його вирішення.

Особливу увагу приділено методиці роботи правоохоронних органів, яка склалася внаслідок неправильного сприйняття прокуратурою власних завдань і мети досудового розслідування.

Водночас цей спосіб досудового розслідування є очевидним як результат тривалого «обвинувального ухилу» у системі правосуддя за часів радянської правової системи.

Вказується на необхідність надання статусу підозрюваного в найкоротші терміни для забезпечення реалізації стороною захисту всіх найважливіших правових засобів, які забезпечують право на захист.

Відсутність у фактичного підозрюваного належного статусу безпідставно обмежує його процесуальні права та створює можливості для зловживань сторони обвинувачення, що проявляється в обшуках, допитах, арешті майна у «фактових справах», пов'язаних з діяльністю окремих суб'єктів господарювання.

Як підсумок зазначено, що правоохоронна система та законодавча база потребують перегляду в окремих моментах з урахуванням рішень Європейського суду з прав людини.

Впровадження практики та підходів Європейського суду з прав людини має виняткове значення для вирішення системних проблем кримінального судочинства в Україні, розвитку нових напрямів роботи правоохоронних органів з метою уникнення безпідставного втручання в права та свободи осіб, не причетних до кримінального правопорушення.

Особливої уваги потребує підвищення рівня вимог органів юстиції до інформації, яка надається під час досудового розслідування стороною обвинувачення, для прийняття рішень, що обмежують права і свободи третіх осіб, на основі доказів, які фактично підтверджують причетність осіб до кримінального правопорушення.

Ключові слова: особа, права чи законні інтереси якої обмежені, повідомлення про підозру, потенційний підозрюваний.

Formulation of the problem. Currently, the current Criminal Procedure Code of Ukraine includes among the participants in criminal proceedings a person whose rights are limited during the pre-trial investigation. At the same time, this status can actually be granted to a participant against whom certain investigative actions are taken without notifying him of the suspicion of committing a criminal offense by the prosecution. At the same time, there are cases when a person, as a result of bad faith actions of law enforcement agencies, is in the actual status of a suspect and is not provided with the right to defend himself against accusations, which is contrary to the practice of the ECHR and the general provisions of criminal proceedings.

Analysis of recent research and publications. Analyzing the latest available research in the context of the topic of the article, it is worth noting the conclusions presented by I.V. Glovyuk, [6] who points out the obvious imperfection of the current criminal procedural legislation due to the lack of regulation of the mechanism for the protection of the rights of a person whose rights are limited during the pre-trial investigation (actual suspect), a similar opinion is held by P.V. Zhovtan and L.Yu. Kravtsova [4] in their own publications, which says about the obvious shortcomings of legislation and law enforcement in terms of protecting the rights of this participant in criminal proceedings.

Purpose of the article – investigate the legal issues of the state of persons whose rights are restricted during the pre-trial investigation, realisation of the rights granted to them during the pre-trial investigation, the problems and shortcomings of the mechanism for protecting the rights of these persons.

Presenting main material. According to the norms of the current Code of Criminal Procedure of Ukraine, at the stage of pretrial investigation, the procedural status of persons against whom criminal proceedings are being conducted or evidence of guilt is being collected without notifying them of suspicion is not defined in the Code of Criminal Procedure.

However, in accordance with part 6 of article 9 of the Criminal Code of Ukraine, in cases where the provisions of this code do not regulate or ambiguously regulate issues of criminal proceedings, the general principles defined in part 1 of article 7 of the Criminal Procedure Code of Ukraine apply. These include, in particular: the rule of law; legality; ensuring the right to protection; rivalry of the parties, etc.

Systematic analysis of judicial practice makes it possible to conclude that in the vast majority of cases, criminal cases are initiated based on the fact that law enforcement agencies have allegedly established the facts of the commission of certain natural persons or officials of business entities, which contain signs of a crime.

Based on this, information is entered into the Unified Register of Pretrial Investigations regarding clearly defined individuals and/or legal entities, they are summoned for questioning, they are searched, equipment and documents, money, etc. are seized.

At the same time, in the vast majority of cases, the notification of suspicion is not carried out for years, which does not give these persons the procedural status of suspects, with the acquisition of certain procedural opportunities.

Thus, one of the similar procedurally uncertain points is the participation of persons against whom criminal proceedings are being conducted, without notifying them of suspicion, in the judicial review of motions of the prosecution to extend the period of pre-trial investigation of criminal proceedings

Moreover, such petitions, as a rule, do not contain any specific circumstances that could affect the effectiveness of the pre-trial investigation, and the reasons indicated by the investigator for extending the period of the pre-trial investigation are of a formal nature.

Thus, as a rule, the need to extend the period of pre-trial investigation in petitions by the prosecution is not substantiated in any way.

This situation, unfortunately, is standard, as investigative judges adhere to a formal approach to considering this category of petitions, not least because of excessive workload and the absence of persons whose rights are violated by such an investigation in the court session.

At the same time, according to clause 25. Article 3 of the Criminal Procedure Code of Ukraine [2] participants in criminal proceedings – the parties to the criminal proceedings, the victim, his representative and legal representative, the civil plaintiff, his representative and legal representative, the civil defendant and his representative, the representative of the legal entity in respect of which the proceedings are being conducted, a third party, in relation to property for whom the issue of arrest is being resolved, another person whose rights or legal interests are limited during the pre-trial investigation, a person in respect of whom the issue of extradition to a foreign state (extradition) is being considered, the applicant, including the whistleblower, a witness and his lawyer, a witness, a mortgagor , translator, expert, specialist, representative of the staff of the probation body, secretary of the court session, court administrator.

The European Court of Human Rights defines "criminal prosecution" as "the official bringing to the attention of a person by a competent authority of the statement that this person has committed a criminal act", while "in some cases this may be done in the form of other measures, the implementation of which carries itself such a statement and, in fact, has the same effect on the position of the suspect" (decision in the case "Ekle v. Germany") [5].

At the same time, according to the practice of the ECHR, the following circumstances are recognized as an indictment: the arrest of a person (the decision in the case "Wemhoff v. Germany"), the official notification of the person's intention to prosecute (the decision in the case "Neumeister v. Austria"), the beginning of the pretrial investigations against a specific person or seizure of bank accounts of a specific person (the decision in the case "Ringeisen v. Austria") [5].

The Constitutional Court of Ukraine, in its decision No. 23-рп/2099 dated September 30, 2009, emphasized that the provision of the first part of Article 59 of the Constitution of Ukraine "everyone has the right to legal aid" should be understood as an opportunity guaranteed by the state to any person, regardless of the nature of his legal relationship with state bodies, local self-government bodies, associations of citizens, legal entities and natural persons to freely, without undue restrictions, receive help on legal issues in the scope and forms as they need it [3].

According to the content of Article 64 of the Constitution of Ukraine, [1] the constitutional right of everyone to legal aid cannot be limited in any case. According to the Basic Law of Ukraine, the provision "everyone has the right to legal aid" (part one of Article 59) is a norm of direct effect (part three of Article 8), and even if this right is not provided for by the relevant laws of Ukraine or other legal acts, a person cannot be limited in its implementation.

The guarantees provided for in Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, according to the practice of the European Court of Human Rights, are used by a person summoned as a witness in a criminal case, but actually suspected of committing a crime (in particular, he was asked questions during interrogation , which can be used against her as incrimination) (decision in the case "Serves v. France") [5]. According to the European Court of Human Rights, the concept of "criminal prosecution" is related to the execution of various procedural actions provided for by national legislation, from the beginning of a pre-trial investigation to the adoption of a court decision.

At the same time, it should be noted that the European Court of Human Rights defines the following circumstances, which are considered the moment of indictment:

• the initiation of a pre-trial investigation against a specific person or the seizure of his bank accounts (the decision in the case "Ringeisen v. Austria);

• arrest of a person (decision in the case "Wemhoff v. Germany);

• an official notification of the intention to prosecute her (the decision in the case "Neumeister v. Austria") [5].

That is, the indictment covers the entire complex of procedures from the beginning of the pre-trial investigation against the person to the final decision.

Thus, in view of Art. 9 of the Criminal Procedure Code of Ukraine [2] and the practice of the European Court of Human Rights, a person against whom a pre-trial investigation has been initiated due to the fact that this person committed a specific criminal offense must have the procedural rights of a suspect.

Therefore, the criminal procedural legislation proceeds from the fact that a person against whom a pre-trial investigation has been initiated, even without a notification of suspicion, has the right to protection, which can be implemented by observing the rights of the suspect, defined in Article 42 of the Criminal Procedure Code of Ukraine [2].

Everyone has the right to participate in a court hearing of any instance of a case concerning his rights and obligations,

in accordance with the procedure provided for by the Criminal Procedure Code of Ukraine (Part 3, Article 21 of the Criminal Procedure Code of Ukraine) [2].

Therefore, taking into account the above, the pre-trial investigation body considers the actions of natural persons or officials of economic entities as potential suspects from the moment of entering information into the EDPR and subsequently during investigative (search) actions.

Under the stated circumstances, the statements of the pre-trial investigation authorities about the participation of natural persons or officials of economic entities in the commission of a criminal offense clearly and unambiguously testify to the interference with the rights and legitimate interests of the latter during the pre-trial investigation, and therefore concerns their rights and obligations , as they are another person whose rights or legal interests are limited during the pre-trial investigation.

Also, the ECHR in its numerous decisions defines the concept of "criminal prosecution" in a much broader context – the prosecution covers the entire complex of procedures – from the beginning of the pre-trial investigation against a specific person (excerpt from the ECHR) to the final decision. Thus, the ECHR determines that the moment of emergence of the right to legal aid does not depend on the formal status of a person suspected of committing a crime.

At the same time, even the Constitutional Court stated at one time that the provisions of Part 1 of Article 59 of the Constitution should be understood as a state-guaranteed opportunity for any person to freely receive help on legal issues in the amount and forms he needs. Even if this right is not provided for by the laws of Ukraine or other legal acts, a person cannot be limited in its implementation.

At the same time, only individual investigating judges have the procedural courage to go beyond formality and make decisions, ensuring the rights of persons who have been subjected to procedural pressure by investigators and prosecutors for years under the aegis of a pre-trial investigation.

Conclusions and suggestions. Thus, having analyzed the current situation of the status of a person whose rights or interests are limited during the pre-trial investigation, we can conclude that today the issues of procedural status and the possibility of interaction of the actual suspect with the prosecution and the court for his own defense are complicated due to formal perception (presumption of absence) person of this status.

At the same time, such actions directly contradict the practice of the European Court of Human Rights, which in numerous decisions indicates specific actions and facts that may indicate that a person has the appropriate procedural status.

Taking into account the stated differences in the understanding of the application of the provisions of the Criminal Procedure Code of Ukraine and the decisions of the ECHR, we consider it necessary to correct this situation in modern law enforcement practice during court proceedings and pre-trial investigation, to create methodological recommendations and manuals on this issue.

ЛІТЕРАТУРА

1. Конституція України від 28 червня 1996 р. *Відомості Верховної Ради України*. 1996. №. 30. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (дата звернення: 10.09.2022).

2. Кримінальний процесуальний кодекс України: Закон України від 13 квітня 2012 р. № 4651-VI. *Відомості Верховної Ради України*. 2013. №. 9–10, 11–12, 13. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (дата звернення: 10.09.2022).

3. Рішення Конституційного Суду України від 30 вересня 2009 р. № 23-рп/2099. *Відомості Верховної Ради України*. 2009. URL: https://zakon.rada.gov.ua/laws/show/v023p710-09#Text (дата звернення: 11.09.2022).

4. Жовтан П. В., Кравцова Л. Ю. Здійснення особистих прав іншої особи, права чи законні інтереси якої обмежені під час досудового розслідування. 2020. ПІВДЕННОУКРАЇНСЬКИЙ ЮРИДИЧНИЙ ВІСНИК. С. 256–260 URL: http://www.sulj.oduvs.od.ua/archive/2020/4/45.pdf (дата звернення: 11.09.2022).

5. Посібник до статті 6 Європейської конвенції з прав людини. Рада Європи/Європейський суд з прав людини. 2020. URL: https://www.echr.coe.int/Documents/Guide_Art_6_criminal_UKR.pdf (дата звернення: 11.09.2022).

6. Гловюк І.В. Право іншої особи, права чи законні інтереси якої обмежені під час досудового розслідування, на закриття кримінального провадження: проблеми нормативного регулювання та реалізації. *Вісник* Південного регіонального центру Національної академії правових наук України. 2019. № 18. С. 158–165. URL: https://barristers.org.ua/wp-content/uploads/2019/03/2019-Glovyuk-vyp.-18.pdf (дата звернення: 11.09.2022).