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LEGAL EXPERIENCE OF THE USA AND COUNTRIES OF THE EUROPEAN UNION REGARDING THE ADMINISTRATIVE AND LEGAL PROVISION OF FORCED DEPORTATION FOREIGNERS AND STATELESS PERSONS FROM UKRAINE

ПРАВОВИЙ ДОСВІД США ТА КРАЇН ЄВРОПЕЙСЬКОГО СОЮЗУ ЩОДО АДМІНІСТРАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ПРИМУСОВОЇ ДЕПОРТАЦІЇ ІНОЗЕМЦІВ ТА ОСІБ БЕЗ ГРОМАДЯНСТВА З УКРАЇНИ

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Relevance of the research topic. Each country, depending on the legal system introduced in it and the historical features of development, has its own authentic, clearly developed mechanism for acquiring citizenship, procedures for issuing identity documents, registration of citizens, control over compliance with the rules of entry (exit) to (from) its territory, rules of stay of foreigners, refugees and stateless persons. However, in the course of violations of these rules of the legislation of one or another state by a foreigner or a stateless person, the question of punishment arises, in the form of forced deportation or deportation of these persons from the territory of the country where the offense was committed.

Over the past decade, a significant impact on the study of various aspects of the migration process in Ukraine was carried out with the help of the borrowed experience of the countries of the USA and the European Union.

Deportation has been known since ancient times. Thus, in Roman law, deportation was applied to persons for lifelong exile to a foreign land, mostly to an island. Initially, deportation was applied to political criminals, and later to other categories of citizens. This measure was accompanied by confiscation of the property of such a person, deprivation of citizenship and civil rights. In Kyivan Rus', expulsion outside the community ("to send out from the parish") or the region ("to drive out of the land") was used. According to Russian Truth, exile was part of the punishment for serious crimes. In the Grand Duchy of Lithuania, a type of deportation was used – liberation, which by its nature was limited to the current judicial deportation outside the country. Since the time of the Hetmanship, many of its political figures were deported to the Moscow Empire. In Western Europe, mass deportation began to be practiced in Portugal, from where at the end of the 15th century. criminals were deported to South America. In the criminal law of France, deportation meant special types of exile to overseas colonies, which were used in the 18th – 19th centuries. both to recidivist criminals and to political criminals (for example, the Paris Communards). A mass campaign of deportation and genocide of French and Franco-Acadian settlers was carried out by the British with the official support of the authorities in the territory of modern Canada. Deportation and genocide affected the French-speaking inhabitants of the former French territories (Acadia Nova Scotia) in Atlantic Canada, which came under the jurisdiction of Great Britain. In total, from 1755 to 1763, on the orders of the British governor Charles Lawrence, more than 10,000 people were deported, more than half of whom died in the holds of the ships that transported them to the prisons of those British colonies in North America, which later created the United States, and to the Falkland Islands islands Initially, the campaign was called "The Great Disturbance".

The purpose of the scientific article. Analyzing the foreign experience of regulating the processes of migration, deportation, and deportation, it should be noted that this experience is contradictory, the continuity of state policy in the field of population migration is the same as in Ukraine. The experience of the USA and European countries in the field of migration policy is ambiguous. There are many unresolved problems in the countries of the European Union. However, European countries have experience in legal regulation of migration, protection of the rights and legitimate interests of persons carrying out professional activities outside their states, and ensuring national security. Their study and generalization will contribute to the improvement of migration relations in Ukraine, without repeating their mistakes.

Key words: administrative and legal provision of forced deportation, foreigners, legislation, state, law, minors, citizens, deportation, deportation, illegal entry into the country, stateless persons, judicial protection, asylum.

Актуальність теми дослідження. Кожна країна, залежно від запровадженої в ній правової системи і історичних особливостей розвитку, має свій автентичний, чітко відпрацьований механізм набуття громадянства, процедури видачі документів, що посвідчують особистість, обліку громадян, здійснення контролю за дотриманням правил в'їзду (виїзду) на (з) її території, правил перебування іноземців, біженців та осіб без громадянства. Проте, в ході порушень цих правил законодавства тієї чи іншої держави іноземцем чи особою без громадянства, постає питання покарання, у вигляді примусового видворення чи депортації даних осіб з території країни, де було вчинене правопорушення.

За останнє десятиліття суттєвий вплив на дослідження різних аспектів міграційного процесу в Україні було здійснено за допомогою запозиченого досвіду країн США та Європейського союзу.

Депортація відома з найдавніших часів. Так, у римському праві депортацію застосовували щодо осіб для довічного заслання на чужину, здебільшого на острів. Спочатку депортація застосовувалася до політичних злочинців, а згодом і до інших категорій громадян. Цей захід супроводжувався конфіскацією майна такої особи, позбавленням громадянства та громадянських прав. У Київській Русі застосовувалося вигнання за межі громади («вислати з волості») або краю («вибити вон із землі»). За Руською Правдою вигнання було складовою покарання за тяжкі злочини. У Великому князівстві Литовському застосовувався різновид депортації – визволення, яке за своїм характером обмежувалося до теперішнього судового вислання за межі країни. З часів Гетьманщини багатьох її політичних діячів було депортовано до Московського царства. У Західній Європі масова депортація почала практикуватися в Португалії, звідки наприкінці XV ст. до Південної Америки виселяли кримінальних злочинців. У кримінальному праві Франції під депортацією розумілися особливі види вислання в заморські колонії, що застосовувалися в XVIII – XIX ст.ст. як до кримінальних злочинців-рецидивістів, так і до політичних злочинців (наприклад, паризьких комунарів). Масову кампанію депортації та геноциду французьких й франко-акадських поселенців було проведен британцями за офіційної підтримки влади на території сучасної Канади. Депортація та геноцид зачепили франкомовних жителів колишніх французьких територій (Акадія Нова Шотландія) в Атлантичній Канаді, що перейшли під юрисдикцію Великобританії. Усього з 1755 по 1763 рр. за наказом британського губернатора Чарльза Лоренса було депортовано понад 10000 осіб, більше половини з яких загинуло в трюмах кораблів, що перевозили їх до в'язниць тих британських колоній у Північній Америці, які згодом створили США, і на Фолклендські острови. Спочатку кампанію було названо «Великий переполох».

Мета наукової статті. Аналізуючи зарубіжний досвід регулювання процесів міграції та депортації, слід зазначити, що цей досвід є суперечливим, спадкоємність державної політики у сфері міграції населення така ж, як і в Україні. Досвід США та європейських країн у сфері міграційної політики неоднозначний. У країнах Євросоюзу є багато невирішених проблем. Проте європейські країни мають досвід правового регулювання міграції, захисту прав і законних інтересів осіб, які здійснюють професійну діяльність за межами своєї держави,

забезпечення національної безпеки. Їх вивчення та узагальнення сприятиме покращенню міграційних відносин в Україні, не повторюючи їхніх помилок.

Ключові слова: адміністративно-правове забезпечення примусового видворення, іноземці, законодавство, держава, право, неповнолітні, громадяни, видворення, депортація, незаконне в'їзд в країну, особи без громадянства, судовий захист, притулок.

From the analysis of international experience, in our opinion, the process of forced deportation (deportation) of foreigners and stateless persons from the United States of America is interesting for comparison.

In this country, the implementation of forced deportation (deportation) of foreigners and stateless persons is carried out by the Immigration and Customs Enforcement (ICE), which is the executive body responsible for the implementation of the decisions of the Immigration Services and the Immigration Court – that is, it is the service that deals with forced deportation from the USA.

The main task of the ISE is to prevent illegal entry into the country, to identify and forcibly expel those who live and work in the US illegally [3, p. 513].

US immigration law is quite complex, and one of the most confusing institutions is deportation. The Immigration Service changed the term "Deportation" to the term "Removal". Practically, except for minor technical details, both terms mean the same – forced expulsion, referral back. One of the common reasons the Immigration Service asks the Immigration Court to expel someone from the United States is that the person stays in the United States longer than the time allowed.

Foreigners and stateless persons who have served a sentence punishable by imprisonment for a term of one year or more are considered to have committed a serious crime ("felony"). Such persons are subject to deportation (deportation) after serving the sentence. All pre-existing deportation protections, such as deportation exemptions, political asylum, or suspension of deportations, are considered ineffective under the new "Anti-Illegal Immigration Act of April 1, 1997, and do not apply to immigration decisions.

One of the important points regarding the forced expulsion of foreigners from the territory of the United States is the "Suspension of Deportation" – postponement of deportation granted to persons subject to deportation procedures before April 1, 1997, and to persons subject to a law entitled: "NACARA". In order to be subject to the postponement of deportation, foreigners must provide evidence:

1) permanent stay in the USA for at least 7 years;

2) that the foreigner is characterized positively;

3) that forced deportation from the United States will cause significant harm to a foreigner, his parents, spouse or children who are currently citizens or permanent residents of the United States.

In 1996 the US Congress changed the law so that the majority of foreigners in the process of deportation could not apply for a postponement of deportation (deportation). Just in this law, the terminology has changed, that is, the word "Deportation" has changed to the word "Removal". But that's not all, the main thing is that the provision of "Suspension of Deportation" – postponement of expulsion has been replaced by the provision of "Cancellation of Removal" – refusal of expulsion.

A person against whom the procedure of forced deportation (deportation) has been initiated usually has the right to apply to the immigration court with an appeal against the preventive measure, as well as to request various forms of judicial protection.

Foreigners bear the burden of proving that they have the right to receive assistance under the law and that they deserve it.

One form of legal protection is voluntary deportation, which can be imposed by an immigration court, as well as by the United States Department of Homeland Security (DHS), the Immigration and Naturalization Service of the United States. Voluntary deportation avoids a formally defined procedure of expulsion from a country in disgrace, allowing instead a deported foreigner to voluntarily leave U.S. territory and return to his home country or any other country where he would be safe [1].

In general, a person who has been voluntarily expelled from the United States can apply for an entry visa abroad at any time. However, obtaining a tourist or study visa will be very difficult if the Judge finds that the foreign national has violated immigration rules. On the other hand, some individuals do not have the right to voluntary deportation, for example, because they are convicted of a serious crime, or cannot demonstrate their positive behavior and respect for the law. If the Immigration Judge issues a decision on forced deportation (deportation) from the USA, then the foreign citizen will not be able to return to this country for 10 years without the special permission of the Prosecutor General.

Most of such people subject to deportation (deportation) receive a summons to appear, the so-called "Nitice to Appear", at the deportation process, in the office where they were interviewed for political asylum, or by mail. People who are in prison for further deportation are delivered directly by federal or state authorities of the Immigration Service. Only a small number are arrested by the Immigration Service and sent to forced deportation proceedings [2].

Another form of legal protection is the annulment of the decision on deportation (deportation), which is available to persons who have a residence permit and have the status of residents who do not have the right to immigration. If a foreigner is allowed to cancel, then after that he can get "Greencard" and stay in the country, receiving further US citizenship.

The third form of judicial protection is asylum granted to persons who can prove the impossibility of returning to their country due to persecution in the Motherland in the past, fear or justified fear of future persecution based on racial, religious, national motives, belonging to a certain social group or political beliefs. However, these individuals are only eligible for asylum under certain circumstances, even if the asylum application was not submitted during the first year of their stay in the United States, the person was convicted of a serious crime, or was noted for harming national security.

Similar forms of judicial protection are the suspension of deportation and the submission of requests under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

Change of status – is a form of protection that allows you to change the status of a person from a non-immigrant to the status of a permanent resident, that is, it allows you to obtain an immigrant visa. Deportees must apply for a change of status in immigration court. At the same time, some conditions must be met, including a residence permit and the immediate availability of an immigrant visa at the time of application [2].

In June 2011, the Immigration and Customs Enforcement Service (ICE) issued two significant directives on issues related to the implementation of a court order on forced deportation (deportation).

The aforementioned directive of the Immigration and Customs Enforcement Service, "ICE", recommends against deporting those illegal immigrants who have sufficient strong and close ties to the United States, such as family ties, education, military service, etc., as well as witnesses crimes that gave (or give) testimony in court. All this provided that we are not talking about immigrants with a criminal past or other "aggravating" circumstances.

Given that power resources ("ICE") are limited, first of all, "ICE" should try to deport immigrants who have committed criminal offenses; those who have recently illegally entered

the United States and those who are hiding from the law or from immigration authorities. But this does not mean that those who are clean before the law and do not hide will not be automatically expelled (deported).

Thus, the above-mentioned opportunities give the right to apply for the so-called permission to stay in America. This does not give the immigrant legal status if he does not have such status. But given the opportunity to stay and not be deported, the immigrant gets the opportunity to be legalized in the future [4].

The specific features of the forced deportation (deportation) of foreigners and stateless persons are enshrined in the legislation of the European Union, whose countries have taken a rather strict immigration position, and actively make changes and additions to their own legislation to combat illegal migration, which is growing every year.

Thus, in 2011, 75% of asylum applications were rejected in 27 member states of the European Union. A new report by the Statistical Office of the European Union proved that –302,000 petitions were submitted to the participating countries in the previous year.

It is estimated that 90% are new applicants, 10% are reapplying for refugee status or asylum. The report notes that the first 237,400 decisions, for example, were made regarding asylum applications. Accordingly – 177,900 refusals (75% of decisions), 29,000 applicants (12%) were granted refugee status, 21,400 (9%) additional protection and 9,100 (4%), residence permit for humanitarian reasons. The main citizenship countries of these applicants were Afghanistan (28,000 or 9% of the total number of applicants), Pakistan (15,700 or 5%), Iraq (15,200 or 5%) and Serbia (13,900 or 5%).

The largest number of applicants was registered in France (56,300 candidates), followed by Germany (53,300), Italy (34,100), Belgium (31,900), Sweden (29,700), the United Kingdom (26,400), the Netherlands (14,600), Austria (14,400), Greece (9,300) and Poland (6,900).

Compared to the population in each member state, the highest applicant figures were recorded in Malta (4,500 people per million inhabitants), Luxembourg (4,200), Sweden (3,200), Belgium (2,900) and Cyprus (2, 200).

According to Art. 8 of this Directive, EU member states shall take all necessary measures to enforce the return decision, unless no deadline has been given for voluntary departure or if the mandatory return has not been met within the time limit for voluntary departure.

If an EU member state has given a deadline for voluntary departure, the decision on return may be enforced only after the expiration of this period, except in cases where during this period there is a risk of escape or evasion of voluntary departure. Forced deportation is applied by means of a separate decision or act adopted by an administrative or judicial body.

When Member States, as a last resort, use coercive measures to carry out the forced deportation of a third-country national resisting deportation, these measures must be proportionate and not include the use of force beyond reasonable limits. These measures are carried out in accordance with national legislation, in compliance with basic rights and in respect of the dignity and physical integrity of the relevant citizen of a third country.

If the expulsion is postponed by the European Council, the relevant third-country national (foreign citizen or stateless person) may be charged with duties such as regularly appearing in authorities, making an adequate financial guarantee, providing documents or staying in a certain place.

It should be noted that some countries of the European Union additionally regulate the list of entities to which expulsion (deportation) does not apply.

Thus, French legislation provides for a list of persons for whom deportation does not apply. Expulsion cannot apply:

– to a foreign citizen or a stateless person who has not reached the age of 18, except for cases when the persons dependent on them are minors, are themselves subject to expulsion from the country and no other persons permanently residing in France can take it for their maintenance;

– to a foreign citizen (citizen) whose wife (husband) is a citizen (citizen) of France, and at least 1 year has passed since the date of marriage, provided that the marriage is not fictitious;

– to a foreign citizen or a stateless person, if this person is the father (mother) of a child of French nationality, provided that he (she) actually performs parental duties;

– to a foreign citizen or a stateless person who has proven the fact of his permanent residence in France from the moment he reaches the age of 10, as well as to a foreigner who was suspected of committing a criminal misdemeanor or a violation that carries a penalty of imprisonment for a term of at least 6 months, but was acquitted by the court;

– to a foreign citizen or a stateless person who receives a pension in connection with an accident at work with a degree of disability of 20 percent or more.

At the same time, the legislation stipulates that foreign citizens and stateless persons of the listed categories, with the exception of minors who have not reached the age of 18, may be expelled from the country when it is necessary to protect state or public security. The legislator's indication of this category allows France to avoid additional lawsuits before the European Court of Human Rights.

As for the return and deportation of unaccompanied minors, according to Art. 10 of the above Directive, before making a decision to return to an unaccompanied minor, he is provided with assistance from competent institutions other than those responsible for the enforcement of the return, with due consideration of the child's higher interests.

Before the expulsion of an unaccompanied minor from the territory of an EU member state, the authorities of that member state are satisfied that he will be transferred to a member of his family, an appointed guardian or adequate host structures in the country of return.

According to the above Directive, return decisions are accompanied by a ban on entry to EU countries in cases where no deadline was given for voluntary departure, or mandatory return was not met. In other cases, expulsion decisions may be accompanied by an entry ban.

The term of entry ban is established taking into account all relevant circumstances of a specific case and should not, in principle, exceed five years. However, it can exceed five years if a third-country national poses a serious threat to public order, public safety or national security.

EU member states are considering the possibility of lifting or suspending the entry ban, when a third-country national is the object of a similar ban, can demonstrate that he has left the territory of a member state in full compliance with the return decision.

Persons who are victims of human trafficking who have been granted a residence permit in accordance with Directive 2004/81/EC of the Council of April 29, 2004 on residence permits issued to third-country nationals who are victims of human trafficking or have become an object assistance of illegal immigration, and who cooperate with the competent authorities, are not subject to an entry ban, provided that the relevant citizen of a third country does not pose a threat to public order, public safety or national security.

In some cases, Member States may refrain from imposing an entry ban, cancel or terminate such a ban for humanitarian reasons or for other reasons.

When an EU member state considers the issue of issuing a residence permit or other permit granting the right of stay to a citizen of a third country who is the object of an entry ban established by another member state, this state shall first consult with the member state, which established the entry ban, and takes into account the interests of the foreign citizen.

Also, in EU countries, the detention of a foreign citizen or a stateless person is applied for the purpose of deportation (deportation), but only when, in a specific case, it is impossible to effectively apply other sufficient, but less coercive measures, in order to prepare the return and/or carry out deportation.

Any detention should be as short as possible and will last only as long as the expulsion mechanism is in place and should be carried out at all necessary speed. Detention orders are issued by administrative or judicial authorities in writing, indicating the factual and legal grounds. If the detention is not legal, then this citizen of a third country is immediately released.

In each case, the detention is subject to reasonable re-examination intervals at the request of the relevant third-country national or automatically. In case of extended detention periods, repeated checks are subject to control by the judicial body.

When it becomes apparent that there is no longer a reasonable prospect of forced deportation for legal or other reasons or that conditions are no longer met, the detention ceases to be justified and the person concerned is immediately released.

Detention continues as long as conditions are met and successful deportation must be guaranteed. The EU member state sets a certain period of detention, which cannot exceed six months. According to national law, a period of time can only be extended for a certain period of time not exceeding twelve additional months, when, contrary to all reasonable efforts, there is a possibility that the expulsion operation will take longer due to lack of cooperation on the part of the relevant third-country national, or delays in obtaining the necessary documents from a third country.

Detention is carried out in specialized detention centers. When a Member State cannot place third-country nationals in a specialized detention center and is forced to place them in a penitentiary, these detained citizens are kept separately from ordinary prisoners. Detained citizens of third countries are allowed to come into contact with their legal representatives, family members and competent consular institutions in a timely manner at their request.

Special attention is paid to the situation of vulnerable persons. Emergency medical care and necessary treatment of diseases are provided. Competent national, international and non-governmental organizations and authorities have the opportunity to visit detention centers, check how much they are used to detain citizens of third countries. Detained citizens of third countries are systematically informed of information that explains the rules in force at the place of detention, their rights and obligations.

Unaccompanied minors and families with minors are detained only as a last resort and for a fairly short period of time. Families detained pending deportation are located in separate places, which guarantees adequate respect for their private lives.

Detained minors should be able to engage in leisure activities, including games and entertainment, appropriate to their age, and, depending on the length of their stay, have access to education. When detaining minors while awaiting deportation, primary importance should be given to the higher interests of the child.

In emergencies where a large number of third-country nationals are subject to compulsory return, this is a heavy and unforeseen burden on the detention centers of the Member State or on its administrative and judicial personnel, the Member State concerned, while this emergency remains, may decide to establish longer terms for judicial review and urgent measures are taken regarding the conditions of detention [5].

So, after analyzing the experience of the above-mentioned developed countries of the world, we can conclude that the modern process of forced expulsion of foreigners and stateless persons from the territory of Ukraine, despite the new Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons adopted on September 22, 2011", is not yet sufficiently formed and developed. That is why today it is necessary to modernize and create new rules in Ukraine in this sphere of public life, taking into account international practice. At the same time, it should be noted that these transformations should take place systematically and consistently, without violating the constitutional rights of persons of foreign origin.

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