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APPEAL OF RULINGS ON THE ISSUES REGARDING SECURING A CLAIM BY SUSPENDING ACTS OF SUBJECTS OF IMPERIOUS PLENARY POWERS

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The article substantiates that the right to appeal and cassation of the rulings, which are issued as a result of solving the issue of securing a claim by suspension of acts (an individual act or a normative legal act) of subjects of imperious plenary powers, is a component of a person's constitutional right to judicial protection.

The problems related to the appeal of the rulings issued as a result of the resolution of the issue of securing a claim by suspension of an individual act or a normative legal act are singled out. Among the main problems of this category are, in particular: the absence of indication in Chapter 10 of Section I of the Code of Administrative Proceedings of Ukraine of the possibility of appealing the court ruling on returning the application for securing a claim to the applicant without consideration; failure to take into account the requirements for legislative technique when setting out the provisions of the Code of Administrative Proceedings of Ukraine, which are related to the cassation of the court rulings of the appeal instance on issues of securing a claim.

As part of solving the above-mentioned problems, amendments to the Code of Administrative Proceedings of Ukraine are proposed.

It is substantiated that the introduction of appropriate amendments to the Code of Administrative Proceedings of Ukraine will allow improving the administrative procedural legislation in the part of appeals of rulings which are issued as a result of solving an issue of securing a claim by suspension of an individual act or a normative legal act and will increase the effectiveness of the judicial form of protection of rights, freedoms and interests of individuals.

Keywords: court ruling, administrative proceedings, appeal, cassation, suspension of acts.

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The right to appeal and cassation of a court decision, in particular, a ruling which is issued as a result of solving the issue of securing a claim by suspension of acts (an individual act or a normative legal act) of subjects of imperious plenary powers, is a component of the guaranteed by Art. 55 of the Constitution of Ukraine everyone's right to judicial protection. The given opinion is formulated taking into account the legal position of the Constitutional Court of Ukraine that «the realization of a person's right to judicial protection is the possibility of appealing the court decisions in courts of appeal and cassation. Revision of court decisions in accordance with appeal and cassation procedures guarantees restoration of the violated rights and legally protected interests of a person and a citizen» [14]. However, the study of the provisions of the Code of Administrative Proceedings of Ukraine (hereinafter referred to as CAP of Ukraine) gives rise to certain doubts as to whether all rulings which are issued as a result of solving the issue of securing a claim by suspension of acts of subjects of imperious plenary powers

can be subject to appeal and cassation. The arguments above determine the relevance of choosing the topic of this research.

The issue of securing a claim in administrative proceedings is partially discussed in the works of such scholars as N. P. Poberezhna [5], S. A. Martynkevych [3], T. O. Tur [16], I. V. Diorditsa [1], V.A. Siomina [15] and others. However, the issue related to the appeal and cassation of the rulings issued as a result of solving the issue of securing a claim by suspension of an individual act or a normative legal act, has not been subject to a comprehensive and exhaustive study.

The purpose of the article is to determine the problems associated with appeal and cassation of the rulings issued as a result of solving the issue of securing a claim by suspension of acts of subjects of imperious plenary powers.

The right of a person to appeal rulings which are issued as a result of solving the issue of securing a claim is enshrined in Part 8 of Article 154 of CAP of Ukraine. Thus, this regulatory provision says that «a ruling on securing a claim or refusing to secure a claim can be appealed» [2]. From the content of this legislative provision, it can be inferred that the following two types of rulings are subject to appeal, which are issued as a result of solving the issue of securing a claim by suspension of acts of subjects of imperious plenary powers: 1) a ruling to secure a claim by suspension of an individual act or a normative legal act; 2) a ruling on refusal to secure a claim by suspension of an individual act or a normative legal act.

Still unsolved is the issue of appealing the ruling to return the application for securing a claim by suspension of an individual act or a normative legal act to the applicant without consideration. Resolving this question through the prism of a literal interpretation of the provisions provided in Chapter 10 of Section I of the CAP of Ukraine, it can be stated that the ruling to return the application for securing a claim to the applicant without consideration is not subject to appeal to a higher court. This is due to the fact that in the chapter of the CAP of Ukraine devoted to the institution of securing a claim there is no normative provision that would provide the possibility of appeal and cassation of the above-mentioned ruling.

However, analyzing the provisions of the CAP of Ukraine devoted to reviewing court decisions we can state the following:

– the ruling of the court of first instance to return the application for securing the claim by suspension of acts of subjects of imperious plenary powers to the applicant without consideration is subject to appeal. Our opinion is based on the provisions of Clause 3 Part 1 of Art. 294 of the CAP of Ukraine, which claim that «separately from the court decision, rulings of the court of first instance regarding the return of the application to the plaintiff (applicant) can be appealed in accordance with the appeal procedure» [2]. Given that the above-mentioned legal provision is of a general nature, it is obvious that its effect also extends to such a court decision as a ruling to return the application for securing the claim by suspension of acts of subjects of imperious plenary powers to the applicant without consideration. The objectivity of our position is additionally proved by case law, from the study of which it follows that administrative appeal courts consider appeals against rulings to return the application for securing the claim to the applicant without consideration. For example, within the scope of administrative case № 380/2134/20, the Eighth Administrative Court of Appeal considered an appeal against the ruling of the Lviv District Administrative Court as of 03.04.2020, which the application to secure the claim by suspending the Lviv City Council's ruling of 09.19.2019 № 5429 «On Borrowing to the City Budget of Lviv» was returned to the applicant without consideration. As a result of the review of the appeal, the Eighth Administrative Court of

Appeals made a resolution as of 15.09.2020 [8], by which it cancelled the ruling of the Lviv District Administrative Court as of 03.04.2020 and sent the case to the court of first instance for further consideration;

– the ruling of the court of first instance to return the application for securing the claim by suspension of acts of subjects of imperious plenary powers to the applicant without consideration is subject to cassation. Our position is based on the provisions of Part 2 of Art. 328 of the CAP of Ukraine, the content of which provides for the possibility of a cassation against the ruling of the court of first instance to return the application to the plaintiff (applicant), provided that it was reviewed in accordance with the appeal procedure. In support of this opinion, we will give an example from case law. Thus, within the framework of administrative case № 809/1092/18, cassation proceedings were opened based on the cassation of Public Joint Stock Company "Delta Bank" against the ruling of the Ivano-Frankivsk District Administrative Court as of 06.26.2018 to return the application for securing a claim to the applicant without consideration and resolution of the Eighth Administrative Court of Appeal as of 20.05.2019, which upheld the ruling of the court of first instance. Based on the results of the review of the cassation, the Cassation administrative court as a part of the Supreme Court adopted a decision as of 30.09.2019 [9], which rejected the cassation and left the court rulings of the courts of previous instances unchanged;

– the possibility of a cassation against the ruling of the appeal court to return the application for securing a claim by suspension of acts of subjects of imperious plenary powers to the applicant without consideration is debatable. The difficulty of this issue lies in the fact that Part 3 of Art. 328 of the CAP Ukraine provides an exhaustive list of rulings of the appeal court that are subject to the cassation procedure, and among this list there is no such a court decision as a ruling to return the application for securing a claim to the applicant without consideration. It is from these considerations that the court of cassation instance issues rulings on refusal to open cassation proceedings on cassation against the rulings of the courts of appeal to return applications for securing a claim, in particular by suspension of acts of subjects of imperious plenary powers to the applicant without consideration (an example is the ruling of the Cassation administrative court as a part of the Supreme Court as of 30.12.2020 in case № 932/7911/20 [10]).

However, it is worth emphasizing that the above position is not supported by all judges of the cassation instance. In particular, the Justice of the Cassation administrative court as a part of the Supreme Court Y. Bernaziuk expressed a dissenting opinion regarding this issue and noted that «revising the rulings of the appeal court issued on procedural issues, the Supreme Court provides the second (appeal) review of court decisions, the right to initiate which is a constitutional guarantee. Therefore, when deciding the issue of opening or refusing to open proceedings regarding the review of rulings of the appeal court, made on procedural issues, the Supreme Court cannot be guided by Article 328 of the CAP of Ukraine, which regulates the issue of the third (cassational) review of a court decision» [4]. In our opinion, the conclusion of Y. Bernaziuk is fully justified and formulated through the prism of everyone's constitutional right to the second (appeal) review of a court decision. In view of the above, we conclude that the predominant approach of the judges of the Cassation administrative court as a part of the Supreme Court regarding the impossibility of a cassation appeal against the ruling of the court of appeals to return the application for securing a claim to the applicant without consideration is quite controversial.

Thus, on the basis of the above-mentioned research, we come to the conclusion that the absence in Chapter 10 of Section I of the CAP of Ukraine of the indication of the

possibility of appealing the ruling to return the application for securing a claim to the applicant without consideration is a legislative gap that obviously contradicts the principle of legal certainty. Therefore, in order to set out the provisions included in the system of the institution of securing a claim in compliance with the requirements of the legislative technique, we propose to supplement Part 7 of Art. 154 of the CAP of Ukraine with a sentence as follows: «The ruling to return the application for securing a claim to the applicant without consideration can be appealed».

The possibility of appealing the rulings of the court of first instance on securing a claim by suspension of acts of subjects of imperious plenary powers or refusing to apply the corresponding measure to secure a claim is not doubted by both scholars and practitioners. This is explained as follows: 1) the right to appeal both the ruling to secure a claim and the ruling to refuse to secure a claim follows from the literal interpretation of Clause 2 Part 1 Art. 294 of the CAP of Ukraine, which establishes that «separately from the court decision can be appealed under the appeal procedure the rulings of the court of first instance regarding securing a claim, replacing a measure of securing a claim, cancelling a measure of securing a claim, refusing to secure a claim, refusing to replace a measure of securing a claim or cancelling a measure of securing a claim» [2]; 2) in the decision of the Constitutional Court of Ukraine as of 28.04.2019 № 12-пп/2010 [13], the conclusion is drawn that separately from the court decision, rulings of the court of first instance both on securing the claim and on the refusal to secure the claim can be appealed in accordance with the appeal procedure. The court of constitutional jurisdiction emphasized that this interpretation of the provisions of the procedural law is harmoniously consistent with such a principle of judicial procedure as the equality of all participants in the legal process before the law and the court.

However, it is worth noting that the prospects of cassation of the above rulings are different. As for the right to cassation against the ruling of the court of first instance to secure a claim by suspension of acts of subjects of imperious plenary powers, it is guaranteed by Part 2 of Art. 328 of the CAP of Ukraine, and therefore is quite widely implemented within the scope of administrative proceedings (an example is case № 640/19556/21, in which the Cassation administrative court as a part of the Supreme Court considered and partially satisfied the cassation of the National Commission for State Regulation of Energy and Public Utilities, against the ruling of the District Administrative Court of Kyiv City as of 15.07.2021 on securing the claim and the resolution of the Sixth Administrative Court of Appeal as of 06.10.2021, which left the ruling of the court of first instance unchanged [11]).

Instead, there are virtually no chances of a cassation against the ruling of the court of first instance on the refusal to secure a claim by suspension of an individual act or a normative legal. Case law demonstrates that filing a cassation against the above-mentioned ruling has a single consequence – issuing a ruling on refusal to open cassation proceedings (an example is the ruling of the Cassation administrative court as a part of the Supreme Court as of 09.10.2020 in case № 540/1629/20 [12]). This opinion of the court of cassation is substantiated by the following: 1) the CAP of Ukraine does not contain a normative provision that would grant the right to cassation against the ruling of the court of first instance on refusal to secure a claim; 2) in the resolution of the Grand Chamber of the Supreme Court as of 15.09.2020 in case № 753/22860/17 [6], an unequivocal conclusion was formulated that the cassation of the ruling of the court of first instance on the refusal to secure a claim and the resolution of the court of appeal, according to which such a ruling was left without changes is impossible. Also, the Grand Chamber of the Supreme Court clarified that such limitation of the possibility of a

cassation does not violate the right to implement the procedural guarantee of securing a claim, since a person can re-initiate the issue of securing a claim if there are sufficient grounds for this.

The study of the issue concerning the possibility of a cassation appeal against the ruling of the court of appeal on securing a claim by suspension of acts of subjects of imperious plenary powers or on refusing to apply the corresponding security measure, gives the opportunity to express the following considerations:

– the ruling of the appeal court to secure a claim by suspension of an individual act or normative legal act is subject to a cassation. This conclusion is formulated on the basis of a literal interpretation of Part 3 of Art. 328 of the CAP of Ukraine, the provisions of which establish the right to cassation against the court ruling of the appeal instance regarding securing the claim;

– the ruling of the appeal court to refuse to secure a claim by suspension of an individual act or a normative legal act is subject to cassation. It is important to pay attention to the fact that it is quite difficult to reach the above conclusion operating only with provisions of the CAP of Ukraine. The fact is that there is no clear regulatory provision in the CAP of Ukraine that the ruling of the court of appeal on the refusal to secure a claim can be appealed to the court of cassation. Therefore, proving our position, we consider it necessary to pay attention to the resolution of the Grand Chamber of the Supreme Court as of 18.05.2021 in case № 914/1570/20, which states that «in the cassation procedure, among others, rulings of the court of appeal regarding securing a claim can be reviewed (that is, both rulings by which an application for securing a claim is satisfied, and rulings by which such securing is refused)» [7]. It is appropriate to emphasize the fact that in the given court decision, the Grand Chamber of the Supreme Court departed from its own legal opinion, set forth in the resolution as of 15.09.2020 in case № 753/22860/17 [6], which stated the impossibility of cassation of the ruling, according to which the appeal court refused to satisfy the application for securing the claim. Thus, within the scope of case № 914/1570/20, the Grand Chamber of the Supreme Court actually admitted its mistake and stated that the limitation of the possibility of cassation of the ruling of the court of appeal on the refusal to secure a claim is unjustified and narrows the content of the constitutional right of everyone to judicial protection.

In our opinion, the existence of the above-mentioned position of the Grand Chamber of the Supreme Court is positive and certainly plays an important role for law enforcement, but the main priority for any legal state is the formation of clear (understandable) legislative provisions, the content of which will not allow ambiguous interpretation and complicate the mechanism of their use. Therefore, in order to ensure the effective application of the provisions of the CAP of Ukraine in terms of the implementation of the procedural guarantee of securing a claim, we offer to add the phrase «on refusal to secure a claim» to Part 3 of Art. 328 of the CAP of Ukraine after the phrase «regarding securing a claim».

In course of the research, the problems related to the appeal of the rulings issued as a result of the resolution of the issue of securing a claim by suspension of an individual act or a normative legal act have been singled out. Among the main problems of this category are, in particular, the absence of the indication in Chapter 10 of Section I of the CAP of Ukraine of the possibility of appealing the court ruling to return the application for securing a claim to the applicant without consideration; failure to take into account the requirements for the legislative technique when setting out the provisions of the CAP

of Ukraine, which are related to the cassation of the court rulings of the appeal instance on issues of securing a claim.

As part of solving the above-mentioned problems, proposals for amendments to the CAP of Ukraine are formulated. It is substantiated that the introduction of appropriate changes to the CAP of Ukraine will allow improving the administrative procedural legislation in the part of appeals of rulings which are decided as a result of solving the issue of securing a claim by suspension of an individual act or a normative legal act and will increase the effectiveness of the judicial form of protection of rights, freedoms and interests of individuals.

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ОСКАРЖЕННЯ УХВАЛ З ПИТАНЬ ЩОДО ЗАБЕЗПЕЧЕННЯ ПОЗОВУ ШЛЯХОМ ЗУПИНЕННЯ ДІЇ АКТИВ СУБ'ЄКТИВ ВЛАДНИХ ПОВНОВАЖЕНЬ

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Обґрунтовано, що право на апеляційне та касаційне оскарження ухвал, які постановляються за результатом вирішення питання про забезпечення позову шляхом зупинення дії актів (індивідуального акта або нормативно-правового акта) суб'єктів владних повноважень, є складовим конституційного права особи на судовий захист.

Доведено, що ухвала суду про повернення заяви про забезпечення позову шляхом зупинення дії актів суб'єктів владних повноважень заявнику без розгляду підлягає апеляційному та касаційному оскарженню. Наголошено, що відсутність у главі 10 розділу I Кодексу адміністративного судочинства України вказівки на можливість оскарження ухвали про повернення заяви про забезпечення позову заявнику без розгляду є законодавчою прогалиною, яка очевидно суперечить принципу правої визначеності. Для викладення положень, що входять у систему інституту забезпечення позову із дотриманням вимог до законодавчої техніки, запропоновано доповнити ч. 7 ст. 154 Кодексу адміністративного судочинства України другим реченням такого змісту: «Ухвалу про повернення заяви про забезпечення позову заявнику без розгляду може бути оскаржено».

З'ясовано, що приписи Кодексу адміністративного судочинства України, які стосуються касаційного оскарження ухвал суду апеляційної інстанції з питань забезпечення позову, допускають неоднозначне трактування та можуть ускладнювати механізм їх використання. Для забезпечення дієвого застосування положень Кодексу адміністративного судочинства України в частині реалізації процесуальної гарантії забезпечення позову запропоновано ч. 3 ст. 328 Кодексу адміністративного судочинства України після словосполучення «щодо забезпечення позову» доповнити словосполученням «відмови у забезпеченні позову».

Аргументовано, що внесення запропонованих змін до Кодексу адміністративного судочинства України допоможе вдосконалити адміністративне процесуальне законодавство в частині оскарження ухвал, що постановляються за наслідком вирішення питання про забезпечення позову шляхом зупинення дії індивідуального акта або нормативно-правового акта та підвищить ефективність судової форми захисту прав, свобод та інтересів осіб.

Ключові слова: ухвала суду, адміністративне судочинство, апеляційне оскарження, касаційне оскарження, зупинення дії актів.

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