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JUDICIAL PRACTICE ON THE PARTICIPATION OF THE PROSECUTOR IN ADMINISTRATIVE PROCEEDINGS

The article examines the judicial practice on the participation of the prosecutor in administrative proceedings. The chosen topic of scientific research requires the use of various scientific methods and approaches to obtain qualitative results. Therefore, the following research methods were used to solve the set tasks: analysis; system method; analytical, etc. It is specified that the prosecutor's representation of the interests of the state in court: firstly, it can be implemented in exceptional cases, in particular in the event of a violation or threats of violation of the interests of the state, if the protection of these interests is not carried out by a body of state power, a body of local self-government or another subject of power, the competence of which includes the relevant powers; secondly, the prosecutor in the statement of claim independently determines what the violation of the interests of the state is and justifies the need to protect them, notes the body authorized by the state to perform the relevant functions in disputed legal relations; thirdly, the prosecutor must make sure that the relevant state body does not protect the interests of the state (i.e., he is aware of the violation of the interests of the state, has the appropriate powers to protect them, but does not apply to the court for protection contrary to these interests), for example, notify such a state body of the identified violations, and in case of failure of this body to take actions aimed at protecting the interests of the state, represent the interests of the state in court in accordance with Article 23 of Law No. 1697-VII, giving an appropriate justification for this. It is stated that Article 53 of the Code of Administrative Procedure of Ukraine establishes that in cases determined by law, the prosecutor applies to the court with a statement of claim, participates in the consideration of cases on his claims, enters on his own initiative into a case, the proceedings in which were initiated at the request of another person, before the start of consideration of the case on the merits, submits an appeal, cassation, application for review of a court decision due to newly discovered or exceptional circumstances. Prosecutor, who applies to the court in the interests of the state, in a statement of claim or other statement, complaint, substantiates the violation of the interests of the state, the need to protect them, the legal grounds for the prosecutor to apply to the court, and also indicates the body authorized by the state to perform the relevant functions in disputed legal relations. The prosecutor shall represent the interests of a citizen (citizen of Ukraine, foreigner or stateless person) in court in cases where such a person is unable to independently protect his/her violated or disputed rights or exercise procedural powers due to minority, incapacity or limited legal capacity, and legal representatives or bodies authorized by law to protect the rights, freedoms and interests of such a person do not or improperly protect him/her.

Key words: prosecutor, representation, administrative proceedings, participation of the prosecutor, interest.

Problem statement and its relevance.

According to Art. 55 of the Constitution of Ukraine Everyone is guaranteed the right to appeal in court against decisions, actions or inaction of state authorities, local self-government bodies, officials and officials [1].

According to part one of Article 124 of the Constitution of Ukraine, justice in Ukraine is administered exclusively by courts [1]. In the administration of justice, judges are independent and obey only the law (part one of Article 129 of the Constitution of Ukraine).

Only the laws of Ukraine determine the judicial system and judicial proceedings, as well as the procedure for the administration of justice is regulated by the relevant procedural legislation of Ukraine.

According to Art. 1311 of the Constitution of Ukraine, there is a prosecutor's office in our country, which carries out: 1) support of public prosecution in court; 2) organization and procedural management of pre-trial investigation, resolution of other issues in accordance with the law during criminal proceedings, supervision of covert and other investigative and investigative actions of law enforcement agencies; 3) representation of the interests of the state in court in exceptional cases and in the manner determined by law [1].

Article 53 of the Code of Administrative Procedure of Ukraine establishes that in cases determined by law, the prosecutor applies to the court with a statement of claim, participates in the consideration of cases on his claims, enters on his own initiative into a case, the proceedings in which are initiated at the request of another person, before the start of the consideration of the case on the merits, submits an appeal, cassation complaint, an application for review of the court decision on newly discovered or exceptional circumstances. A prosecutor who applies to the court in the interests of the state, in a statement of claim or other statement, complaint, substantiates the violation of the interests of the state, the need to protect them, the grounds for applying to the court of the prosecutor determined by law, and also indicates the body authorized by the state to perform the relevant functions in disputed legal relations [2].

The organization and procedure of the prosecutor's office shall be determined by law. Thus, Art. 23 of the Law of Ukraine "On the Prosecutor's Office" of 14.10.2014 No. 1697-VII stipulates that the representation of the interests of a citizen or the state by a prosecutor in court consists in the implementation of procedural and other actions aimed at protecting the interests of a citizen or the state, in cases and in the manner established by law [3].

Analysis of research and publications on the problem. The participation of pros-

ecutors in administrative proceedings has been the subject of research by a number of legal scholars. In particular, the works of Y. Bernazyuk, V. Borovsky, I. Soboleva, B. Shabarovsky, A. Pavliuk, V. Gordeev, I. Nesterenko and others should be highlighted.

The purpose of the article is to study the judicial practice on the participation of the prosecutor in administrative proceedings.

Presentation of the main material. A prosecutor shall represent the interests of a citizen (citizen of Ukraine, a foreigner or a stateless person) in court in cases where such a person is unable to independently protect his/her violated or disputed rights or exercise procedural powers due to reaching the age of majority, incapacity or limited legal capacity, and legal representatives or bodies that are entitled by law to protect the rights, freedoms and interests of such a person do not exercise or improperly exercise it protection.

On the basis of the above, it should be pointed out that in law enforcement practice there is no question of understanding the category of "citizen's interest", which cannot be said about such a category as "state interest". It is advisable to note that judicial practice has formed an approach to defining this category. Thus, in the Resolution of the Administrative Court of the Supreme Court of Ukraine dated November 5, 2019 in case No. 804/4585/18 [4], the court emphasized that in the Decision of the Constitutional Court of Ukraine dated April 8, 1999 No. 3-rp/99 [5], the Constitutional Court of Ukraine, clarifying the concept of "interests of the state", expressed the consideration that the interests of the state differ from the interests of other participants in public relations. The former are always based on the need to implement national (political, economic, social and other) actions, programs aimed at protecting the sovereignty, territorial integrity, state border of Ukraine, guaranteeing its state, economic, informational, environmental security, protecting land as a national wealth, protecting the rights of all subjects of property and economic rights, etc. (paragraph 3 of the motivational part).

The interests of the state may coincide completely, partially, or not at all coincide with the interests of state bodies, state-owned enterprises and organizations. Taking into account the fact that "interests of the state" is an evaluative concept, the prosecutor or his deputy in each specific case independently determines, with reference to the legislation on the basis of which the claim is filed, in what exactly the violation of the material or other interests of the state has occurred or may occur, substantiates in the statement of claim the need to protect them and indicates the body authorized by the state to perform the relevant functions in disputed relations (paragraph 4 of the reasoning part of the decision of the Constitutional Court of Ukraine of April 8, 1999 No. 3-rp/99) [5].

As indicated by the panel of the Administrative Court of the Supreme Court in the above-mentioned case, the understanding of the concept of "interests of the state" expressed by the Constitutional Court of Ukraine has an independent meaning and can be used to interpret the same concept used in Article 23 of the Law of Ukraine "On the Prosecutor's Office" [3].

Therefore, the panel of the Administrative Court of the Supreme Court noted that the "interests of the state" cover a wide and at the same time not clearly defined range of legitimate interests that cannot be accurately classified, and therefore their presence should be the subject of an independent assessment by the court in each case of a prosecutor's filing a lawsuit. Excessive formalization of the "interests of the state", especially in the field of public legal relations, can lead to an unreasonable restriction of the prosecutor's powers to protect socially significant interests where it is really needed.

A similar legal position is set out, in particular, in the resolutions of the Supreme Court of April 25, 2018 in case No. 806/1000/17 [6], of September 19, 2019 in case No. 815/724/15 [7], of October 17, 2019 in case No. 569/4123/16-a [8].

Therefore, the prosecutor can represent the interests of the state in court in exceptional cases that are directly provided for by law. The extended interpretation of cases

(grounds) for the prosecutor to represent the interests of the state in court does not comply with the principle of adversarialism, which is one of the principles of justice (paragraph 4 of part two of Article 129 of the Constitution of Ukraine) [1].

In particular, the Resolution of the Supreme Court dated March 12, 2021 [9] in case No. 850/6/19 (administrative proceedings No. A/9901/15/21) states that in case of failure by the parties to comply with the terms of this settlement agreement, each of the parties reserves the right to apply to the court with a claim to induce the other party to fulfill the settlement agreement. By the same ruling, the First Administrative Court of Appeal closed the proceedings in case No. 850/6/19 on the claim of the Mariupol City Council against the Limited Liability Company on the forced alienation of real estate for public needs.

Disagreeing with this decision of the court of first instance, on March 2, 2021, the Head of the Mariupol Local Prosecutor's Office No. 1 appealed to the Administrative Court of Cassation within the Supreme Court (as a court of appeal) with an appeal, in which he asks to cancel the decision of the First Administrative Court of Appeal dated 27.01.2021 and adopt a new decision, which refuses to approve the reconciliation of the parties and send the case for further consideration.

Having checked the appeal of the Head of the Mariupol Local Prosecutor's Office No. 1 against the decision of the First Administrative Court of Appeal dated January 27, 2021 in case No. 850/6/19, the Court considers that it cannot be accepted for appeal proceedings and should be left without movement, since it does not meet the requirements of the Administrative Procedure Code of Ukraine on the following grounds.

In accordance with part two of Article 296 of the Code of Administrative Procedure of Ukraine, the appeal shall indicate, in particular, the claims of the person filing the appeal to the court of appeal and the justification of the claims of the person who filed the appeal, indicating the incorrectness or incompleteness of the examination of evidence and the establishment of circumstances in the case and (or) the application of the rules of law.

Thus, the appellant points out that the Mariupol Local Prosecutor's Office No. 1 was not a participant in the consideration of this case in the court of first instance, however, the prosecutor's appeal to the Supreme Court is due to the presence of violations of the interests of the state represented by the territorial community of the city of Mariupol when the court of first instance approved the reconciliation of the parties in this case.

According to part one of Article 55 of the Code of Administrative Procedure of Ukraine, a party, a third party in an administrative case, as well as a person who is granted the right by law to apply to the court in the interests of another person, may participate in the judicial process in person (self-representation) and (or) through a representative.

Article 19 of the Constitution of Ukraine establishes that state authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine.

In accordance with paragraph 3 of part one of Article 131-1 of the Constitution of Ukraine, there is a prosecutor's office in Ukraine, which, in particular, represents the interests of the state in court in exceptional cases and in the manner determined by law.

A similar provision is set out in paragraph 2 of part one of Article 2 of the Law of Ukraine "On the Prosecutor's Office" No. 1697-VII of October 14, 2014 (hereinafter in the version in force at the time of filing an appeal), according to which the prosecutor's office is entrusted with the function of representing the interests of a citizen or the state in court in cases determined by this Law and Chapter 12 of Section III of the Civil Procedure Code of Ukraine [3].

According to parts one and three of Article 23 of the Law of Ukraine "On the Prosecutor's Office" (hereinafter referred to as Law No. 1697-VII), the representation of the interests of a citizen or the state by a prosecutor in court consists in the implementation of procedural and other actions aimed at protecting the interests of a citizen or the state, in cases and in the manner established by law [3].

The prosecutor shall represent the legitimate interests of the state in court in case

of violation or threat of violation of the interests of the state, if the protection of these interests is not carried out or improperly carried out by a state authority, local self-government body or other subject of authority, whose competence includes the relevant powers, as well as in the absence of such a body.

The presence of such circumstances shall be justified by the prosecutor in the manner provided for in Part Four of this Article, except for the case specified in Paragraph Four of this Part.

In accordance with the provisions of Part Four of Article 23 of Law No. 1697-VII, the existence of grounds for representation must be substantiated by the prosecutor in court. The prosecutor represents the interests of a citizen or the state in court only after the court confirms the grounds for representation [3].

The prosecutor is obliged to notify the citizen and his legal representative or the relevant subject of authority in advance, before applying to the court. If the court confirms the existence of grounds for representation, the prosecutor shall exercise the procedural powers of the relevant party to the proceedings. The existence of grounds for representation can be challenged by a citizen or his legal representative or a subject of authority.

Solely for the purpose of establishing the existence of grounds for representing the interests of the state in court in the event that the protection of the legitimate interests of the state is not carried out or improperly carried out by the subject of power, whose competence includes the relevant powers, the prosecutor has the right to receive information that legally belongs to this subject, to demand and receive materials and their copies from him.

Parts three to five of Article 53 of the Code of Administrative Procedure of Ukraine stipulate that in cases determined by law, a prosecutor shall apply to the court with a statement of claim, participate in the consideration of cases on his claims, enter on his own initiative into a case in which proceedings have been initiated at the request of another person, before the start of consideration of the case on the merits, submit an

appeal, cassation complaint, an application for review of a court decision on newly discovered or exceptional circumstances [2].

A prosecutor who applies to the court in the interests of the state, in a statement of claim or other statement, complaint, substantiates what the violation of the interests of the state is, the need to protect them, the grounds for applying to the court of the prosecutor determined by law, and also indicates the body authorized by the state to perform the relevant functions in disputed legal relations. Failure to comply with these requirements results in the application of the provisions specified in Article 169 of this Code [2].

In case of initiation of proceedings on a statement of claim filed by a prosecutor in the interests of the state represented by a body authorized to perform the functions of the state in disputed legal relations, this body acquires the status of a plaintiff. In the absence of such a body or lack of authority to apply to the court, the prosecutor shall indicate this in the statement of claim, and in this case the prosecutor acquires the status of a plaintiff.

From the systematic analysis of the above-mentioned norms of legislation, it can be seen that the prosecutor represents the legitimate interests of the state in court only in the absence of an appropriate body that protects these interests or improperly carries them out, and when applying to the court, the prosecutor is obliged to justify what exactly is the violation of the interests of the state, the need to protect them and indicate the absence of the relevant body, who protects the interests of the state or about the improper exercise of relevant powers with the provision of proper and admissible evidence [9].

From the text of the appeal, it can be seen that the prosecutor's appeal to the court with this complaint is due to the need to protect the interests of the state, in particular, the territorial community of Mariupol, since the Mariupol City Council did not comply with the procedure provided for by law for the lease of a land plot to the Limited Liability Company, as well as when granting permission for the development of a land management project on Metalurhiv Avenue

between houses 77 and 75a in the Central District of Mariupol [9].

The court draws attention to the fact that the exceptional cases in which the prosecutor can represent the interests of the state in court are the violation or threat of violation of the interests of the state. The key to the application of the constitutional norm (Article 131-1 of the Constitution of Ukraine) is the concept of "interest of the state" [9].

In the Decision of the Constitutional Court of Ukraine in the case on the constitutional petitions of the Supreme Arbitration Court of Ukraine and the Prosecutor General's Office of Ukraine on the official interpretation of the provisions of Article 2 of the Arbitration Procedure Code of Ukraine (the case on the representation of the interests of the state by the Prosecutor's Office of Ukraine in the arbitration court) dated 08.04.1999 No. 3-rp/99, the Constitutional Court of Ukraine, clarifying the concept of "interests of the state", expressed the opinion that the interests of the state differ from the interests of other participants social relations. The former are always based on the need to implement national (political, economic, social and other) actions, programs aimed at protecting the sovereignty, territorial integrity, state border of Ukraine, guaranteeing its state, economic, informational, environmental security, protecting land as a national wealth, protecting the rights of all subjects of property and economic rights, etc. (paragraph 3 of the motivational part).

The interests of the state may coincide completely, partially or not at all with the interests of state bodies, state enterprises and organizations or with the interests of business companies with a share of state ownership in the authorized capital. However, the state can see its interests not only in their activities, but also in the activities of private enterprises and societies [9].

Taking into account the fact that "interests of the state" is an evaluative concept, the prosecutor or his deputy in each specific case independently determines, with reference to the legislation on the basis of which the lawsuit is filed, in what exactly the violation of material or other interests of the state has occurred or may occur, substantiates in the statement of claim the need to

protect them and indicates the body authorized by the state to perform the relevant functions in disputed relations (paragraph 4 of the reasoning part of the Decision of the Constitutional Court). Court of Ukraine) [9].

The analysis of part 3 of Article 23 of Law No. 1697-VII gives grounds to assert that the prosecutor can represent the interests of the state in court only in two cases:

- if the protection of these interests is not carried out or improperly carried out by a state authority, local self-government body or other subject of authority, whose competence includes the relevant powers;
- in the absence of such an organ [3].

The Court draws attention to the fact that the interests of the state should be protected primarily by the relevant subjects of power, and not by the prosecutor. In order for the interests of the state not to remain unprotected, the prosecutor performs a subsidiary role, replaces in court proceedings the relevant subject of power, which, contrary to the requirements of the law, does not protect or does so improperly. In each such case, the prosecutor must provide (and the court verify) the reasons that prevent the protection of the interests of the state by the proper subject, and which are the grounds for the prosecutor to apply to the court.

A prosecutor cannot be considered an alternative subject of appeal to the court and replace a proper subject of authority who can and wants to protect the interests of the state.

A similar position was expressed by the Administrative Court of Cassation within the Supreme Court in its rulings of 25.04.2018 in case No. 806/1000/17 and of 18.09.2018 in case No. 826/7910/17.

At the same time, as already noted by the court, the analysis of the norm of Article 23 of Law No. 1697-VII shows 2 cases when the prosecutor protects the interests of the state, in this case the prosecutor refers to the failure to properly defend himself.

"Failure to defend" is manifested in the conscious passive behavior of the authorized subject of power – he is aware of the violation of the interests of the state, has the appropriate powers to protect them, but contrary to these interests he does not apply to the court for protection [9].

The "impropriety" of the defense can be assessed in view of the established procedure for protecting the interests of the state, which, among other things, includes pre-trial clarification of the circumstances of violation of the interests of the state, the choice of the method of their protection and the effective exercise of the procedural rights of the plaintiff [9].

At the same time, the relevant subjects of power, and not the prosecutor, are obliged to protect the interests of the state. In order for the interests of the state not to remain unprotected, the prosecutor performs a subsidiary role, replaces in court proceedings the relevant subject of power, which, contrary to the requirements of the law, does not protect or does so improperly. In each such case, the prosecutor must provide (and the court verify) the reasons that prevent the protection of the interests of the state by the proper subject, and which are the grounds for the prosecutor to apply to the court.

Moreover, the mere reference in the appeal to the fact that the authorized body does not exercise or improperly exercises the relevant powers is not enough to accept the application for consideration.

In this case, the prosecutor must provide proper and admissible evidence in accordance with the requirements of the procedural law (for example, entering information into the Unified Register of Pre-Trial Investigations about the committed criminal offense on the basis of Article 367 of the Criminal Code of Ukraine (official negligence); court verdict against officials; evidence of imposing disciplinary sanctions on civil servants who hold a civil service position in a public authority and carry out the established for this position for non-performance or improper performance of official duties, etc.).

The above is consistent with the established legal conclusions of the Supreme Court, in particular in the resolution of the joint chamber of the Economic Court of Cassation within the Supreme Court dated 07.12.2018 in case No. 924/1256/17, as well as in the resolutions of the Economic Court of Cassation within the Supreme Court dated 23.10.2018 in case No. 926/03/18, dated 23.09.2018 in case No. 924/1237/17.

Appealing against the decision of the First Administrative Court of Appeal dated 27.01.2021, the Head of the Mariupol Local Prosecutor's Office No. 1 noted that he was acting in the interests of the state represented by the territorial community of the city of Mariupol, however, contrary to Article 53 of the Code of Administrative Procedure of Ukraine and Articles 23, 24 of the Law of Ukraine "On the Prosecutor's Office", he did not provide appropriate proper and admissible evidence of the failure or improper implementation of the defense by the Mariupol City Council of the Donetsk region of its powers, as well as warning the relevant public authority of the intention to appeal to the court in case No. 850/6/19 [9].

Therefore, the complainant must provide appropriate proper and admissible evidence of the existence of grounds on which he acquires administrative procedural capacity to appeal to the court in the interests of the state.

In particular, in the Resolution of the Administrative Procedure Court of the Supreme Court dated November 5, 2019 in case No. 804/4585/, the court panel indicated that the systematic interpretation of these provisions allows us to conclude that Article 53 of the Administrative Procedure Code of Ukraine requires that evidence be indicated in an administrative claim, complaint or other procedural document in support of the grounds of the claims with an indication of what exactly the violation of the interests of the state is, and the circumstances that necessitated their protection by the prosecutor. At the same time, the court's disagreement with the justification of the prosecutor given in the administrative claim pursuant to part four of Article 53 of the Code of Administrative Procedure of Ukraine regarding the grounds for representation determined by him, as well as the prosecutor's failure to provide evidence of the absence of authorities that have the authority to protect the legitimate interests of the state in disputed legal relations, is not a ground for leaving the claim without consideration, as the courts erroneously considered in this case. A similar legal position is contained, in particular, in the resolution of the Grand Chamber of the Supreme Court dated June 26, 2019 in case No. 587/430/16-ц [4].

Conclusions. The prosecutor shall represent the legitimate interests of the state in court in case of violation or threat of violation of the interests of the state, if the protection of these interests is not carried out or improperly carried out by a state authority, local self-government body or other subject of authority, whose competence includes the relevant powers, as well as in the absence of such a body.

The prosecutor is obliged to notify the citizen and his legal representative or the relevant subject of authority in advance, before applying to the court. If the court confirms the existence of grounds for representation, the prosecutor shall exercise the procedural powers of the relevant party to the proceedings. The existence of grounds for representation can be challenged by a citizen or his legal representative or a subject of authority.

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Вельков А. Судова практика щодо участі прокурора в адміністративному судочинстві

У статті досліджено судову практику щодо участі прокурора в адміністративному судочинстві. Обрана тема наукового дослідження потребує застосування різноманітних наукових методів і підходів для отримання якісних результатів. Тому для вирішення поставлених завдань використано такі методи дослідження: аналіз; системний метод; аналітичний тощо. Вказано, що представництво прокурором інтересів держави у суді: по-перше, може бути реалізовано у виключних випадках, зокрема у разі порушення або загрози порушення інтересів держави, якщо захист цих інтересів не здійснює орган державної влади, орган місцевого самоврядування чи інший суб`єкт владних повноважень, до компетенції якого віднесені відповідні повноваження; по-друге, прокурор у позовній заяві самостійно визначає, в чому полягає порушення інтересів держави та обґрунтовує необхідність їх захисту, зазначає орган, уповноважений державною здійснити відповідні функції у спірних правовідносинах; по-третє, прокурор повинен пересвідчитися, що відповідний державний орган не здійснює захисту інтересів держави (тобто, він усвідомлює порушення інтересів держави, має відповідні повноваження для їх захисту, але всупереч цим інтересам за захистом до суду не звертається), приміром, повідомити такий державний орган про виявлені порушення, а у разі невчинення цим органом дій спрямованих на захист інтересів держави, представляти інтереси держави в суді відповідно до статті 23 Закону №1697-VII, навівши відповідне обґрунтування цього. Констатовано, статтею 53 КАС України встановлено, що у визначених законом випадках прокурор звертається до суду з позовною заявою, бере участь у розгляді справ за його позовами, вступає за своєю ініціативою у справу, провадження у якій відкрито за позовом іншої особи, до початку розгляду справи по суті, подає апеляційну, касаційну скаргу, заяву про перегляд судового рішення за нововиявленими або виключними обставинами. Прокурор, який звертається до суду в інтересах держави, в позовній чи іншій заяві, скарзі обґрунтовує, в чому полягає порушення інтересів держави, необхідність їх захисту, визначені законом підстави для звернення до суду прокурора, а також зазначає орган, уповноважений державою здійснювати відповідні функції у спірних правовідносинах. Прокурор здійснює представництво в суді інтересів громадянина (громадянина України, іноземця або особи без громадянства) у випадках, якщо така особа не спроможна самостійно захистити свої порушені чи оспорювані права або реалізувати процесуальні повноваження через недосягнення повноліття, недієздатність або обмежену дієздатність, а законні представники або органи, яким законом надано право захищати права, свободи та інтереси такої особи, не здійснюють або неналежним чином здійснюють її захист.

Ключові слова: прокурор, представництво, адміністративне судочинство, участь прокурора, інтерес.