АДМИНИСТРАТИВНОЕ ПРАВО И ПРОЦЕСС

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FEATURES OF FORMATION OF ADMINISTRATIVE COURT DECISIONS ON PROTECTION OF RIGHTS AND FREEDOMS OF FOREIGN CITIZENS

Sergiy BODNAR,
Researcher of the Constitutional, Administrative Law and Civil Law and Procedure Chair,
Kiev University of Law of Academy of Sciences of Ukraine

SUMMARY

The article deals with the best approaches to the administrative cases consideration and features of the formation and adoption of court decisions when considering claims concerning the protection of the rights and freedoms of foreigners. Administrative Court decisions regarding foreigners in article are discussed as the right of concrete legal acts that have the law capacity (law enforcement) and law interpretive nature in accordance to the law interpretive decisions of the European Court of Human Rights.

Key words: judgment, foreign citizens, stateless persons, refugees, administrative cases, trial, international law.

АНОТАЦІЯ

У статті розглядаються оптимальні підходи до розгляду адміністративних справ та особливості процесу формування та прийняття судових рішень під час розгляду позовних заяв щодо захисту прав і свобод іноземців. Рішення адміністративного суду з приводу іноземних громадян розглядаються як право конкретизаційних юридичних актів, які мають правоздатний (правозастосовний) і правотлумачний характер, відповідно до правотлумачень прийняття рішень Європейського суду з прав людини.

Ключові слова: судове рішення, іноземні громадяни, особи без громадянства, біженці, адміністративні справи, судовий процес, міжнародне право.

Introduction. Throughout the whole history of Ukrainian statehood, the new Constitution of Ukraine for the first time recognized the man, its honor, dignity, rights and freedoms. Art. 55 of the Constitution of Ukraine secures the right of individuals to protect their rights by court. The main object of constitutional regulation is the protection of the rights and freedoms of the individual as the highest social value. Proclamation of rate on the social state inevitably brings to the fore the problem of protecting the men's rights and freedoms in accordance with international standards, recognizing the international legal status both as citizens of Ukraine, as foreign citizens. However, the mechanism of foreigners' protection in accordance with international law in Ukraine is still imperfect [4, p. 156].

Nevertheless that foreigners are endowed by laws of Ukraine of the relevant rights, duties and freedoms, and they have a certain status, inflows of foreign nationals require enhanced administrative influence on their sometimes illegal encroachments, administrative offences in Ukraine, as well as the subjects of administrative-delicate proceedings, they can be witnesses, victims and be brought to administrative responsibility [1, p. 163]. Based on these realities, the problem of study of consistent and reasoned approach to solving the problems of the legal protection of rights and freedoms of foreigners and stateless persons in administrative proceedings, peculiarities of consideration of cases on administrative offenses is quite relevant. Therefore there is a need to systematize scientific approaches and use of the potential of administrative procedural regulation of lawsuits against foreign citizens (stateless) and the development of the common practise on this point.

Analysis of recent researches and publications relating to protection of human rights and freedoms of foreigners, compliance by them the Ukrainian legislation showed, that this topic was little highlited in the literature, there is almost no scientific research. A number of approaches can be identified of lack of understanding of the judicial nature of the foreigners' and refugees' status, and also the right of regulatory function of court decisions on the matter.

As for the consideration of this matter in the scientific literature, most domestic authors (A. Klimovich, P. Rabinowich, A. Soloviev, L. Timchenko, S. Fedyk) consider the court's decision on the rights and freedoms of foreigners as a legal act that has a dual nature: law enforcement and law interpretation. However, it is not disclosed foreigner's defense mechanism, but is only deal with the interpretation of the rules and written legal expressions of understanding the meaning of the Convention on Human Rights [5, p. 4].

The aim of the paper is the isolation of a number of approaches to forming solutions of Administrative Court on the claims to the persons of foreign countries in the context of the international standards of human rights and freedoms. Our studies provide a theoretical basis, initial practical results that can improve not only the state of the current electoral legislation of Ukraine, but also will be an important step to strengthen the process for reviewing cases and adoption of grounded administrative decisions.

Methods of the research. The methodological basis of the study is the epistemology of social and legal phenomena and scientific principles and conceptual positions in the field of administrative law, administrative and conceptual law and legal acts regarding administrative law capacity of foreigners. To clarify the nature, content and the specific of administrative and legal proceedings during consideration of administrative cases and adopting of court decisions on the claims to the persons of foreign countries preference was given to scientific methods such as system-structural and scientific analysis.

Scientific novelty. In the article the scientific approach is proposed to solving the specific issues of administrative cases consideration and making grounded court decisions to ensure the rights and freedoms of foreigners – stateless persons, refugees and immigrants.

The practical significance. Our research make it possible to identify the main approaches to the examination of cases involving foreign nationals, to optimize the trial of this matter and to ensure the adoption of legal and grounded administrative judgments according to the standards of democratic countries.

The main material. In Ukraine features of administrative-legal status are determined by a number of special regulations, including the Law of Ukraine "On legal status of foreigners" from February 14, 1994; Resolution of Cabinet of Ministers "On temporary order of processing visas for foreign nationals staying in Ukraine" from February 26, 1993; Law of Ukraine "On Refugees" from December 24, 1993. After ratification by Ukraine in 1997 the European Convention on Human Rights and Fundamental Freedoms; in October 2006 – the European Social Charter, the problems of implementation of European standards for Ukraine gained practical importance. Analysis of domestic regulatory documents in accordance with international regulations shows that the rights and freedoms set out for citizens of Ukraine, are equally concerning foreign nationals. Foreigners have the same rights and freedoms and perform the same duties as citizens of Ukraine, unless otherwise is provided by the Constitution, laws, and international treaties. Foreigners are equal before the law regardless of origin, social or economic status, race and ethnicity, gender, language, religion, occupation and other circumstances.

However, administrative law capacity of foreigners is smaller than the law capacity of citizens of Ukraine. For them are set limits on the right to work, they can not be elected to state bodies, be appointed to key positions, they are not obliged to perform military service. The legislation of Ukraine considers that foreigners as subjects of administrative law are such persons who belongs to the category of foreign countries and are not citizens of Ukraine, stateless persons who are not citizens of any state, refugees [6, p. 124].

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It is stipulated by the Law of Ukraine "On legal status of foreigners and stateless persons" from February 4, 1994, Art. 1, that foreign nationals belonging to the citizenship of foreign countries and are not citizens of Ukraine, and that stateless persons – they are persons who does not belong to the citizenship of any state. The category of foreigners also covers persons who are nationals of a foreign country, refugees, internally displaced persons, dual nationals and stateless persons [6, p. 124].

The legal basis for the appeal to the court for these people is the part one of Article 55 of the Constitution of Ukraine, according to which everyone is guaranteed the right to challenge the decisions, actions or omissions of bodies of public authorities, local authorities, officials and employees.

The right of individuals to appeal to the Administrative Court is determined by part four of Article 6 of the Code of Administrative Procedure of Ukraine, in accordance to which foreigners and stateless persons in Ukraine enjoy the same right to judicial protection as citizens of Ukraine [3].

According to the law interpretation of practice of adoption decisions by the European Court of Human Rights, we conclude that the administrative court decisions as to the foreign nationals should be considered as the right of concrete legal acts that have the law capacity, law enforced and law interpretative character.

Law enforcement nature of the judgments is characterized by the fact that decisions are made only by the court; decisions have public-authoritive character and are the last instance of proceedings; solutions contain individual as to the foreign citizen formal mandatory rule for the determination of presence or absence of violations depending on their outcomes in fair certification in accordance with international standards; mandatory action on court decisions is always for personalized subjects – the applicant and the defendant; judgment in a particular case can not be applied to other foreigner in the collective offence; court decisions inherent the direct action, they have written legal form of expression; these decisions are the prerequisite for the proper implementation of the violated rights and freedoms provided by law of Ukraine.

The court in its law enforcement activity follows the principles of administrative justice, among which is the leading principle is the rule of law, according to which a person, his rights and freedoms are recognized as the highest values and determine the content and direction of the state. This principle, according to part two of Article 8 of the Code of Administrative Procedure of Ukraine is applied taking into account the judicial practice of the European Court of Human Rights.

In examining cases it was found that the plaintiffs in the investigated category of cases are: foreign citizens, stateless persons residing on the territory of Ukraine on legal grounds, foreign citizens or stateless persons who have no legitimate reason to stay in Ukraine.

Defendants in cases of this category mainly serve specially authorized central executive body of migration – The State Migration Service of Ukraine and its territorial bodies (hereinafter – the migration authorities).

In accordance to the Statutes of the State Migration Service of Ukraine, which was approved by the Decree of the President of Ukraine from April 6, 2011 № 405/2011, this service is central executive body and is directed by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine. Among the main tasks are to propose for forming public policy in the areas of migration (immigration and emigration), including combating illegal migration, citizenship, registration of individuals, refugees and other categories of migrants determined by the law; implementation of state policy in the areas of migration (immigration and emigration), including combating illegal migration, citizenship, registration of individuals, refugees and other categories of migrants determined by the law.

In administrative proceedings may be appealed the decisions of the State Migration Service of Ukraine and its territorial divisions as to the dismissal of complaint to refuse acception of application for gaining refugee status, to the dismissal of complaint to refuse making documents for resolving the issue of granting refugee status, to refuse granting, losing or deprivation of refugee status.

In this context, it is necessary to note that in the decision of the Constitutional Court of Ukraine from December 25, 1997 № 9 in the case as to an official interpretation of Articles 55, 64 and 124 of the Constitution of Ukraine stated, that the first part of Article 55 of the Constitution of Ukraine provides the general rule that means the right of everyone to go to court if his rights or freedoms are infringed or are being infringed, are established or are being established obstacles to their implementation or there are other infringements of rights and freedoms. The noted rule obliges courts to accept applications for

consideration even in the absence in the law of a special provision for judicial protection.

Typical examples of such disputes is an administrative case of Administrative Court: № 2270/1815/12 for the claim of Azerbaijani citizens Mamedov Aynur Nofal kyzy, Mamedov Elshan Nofal oglu to the State Committee of Ukraine on Nationalities and Religions, the State Migration Service of Ukraine on recognition as wrongful and cancellation of the decision from October 31, 2011 № 628-11 and the obligation to grant refugee status. The plaintiffs refer to the Law of Ukraine "On Refugees" from June 21, 2001 № 2557-111 and note that the controversial decisions not to grant refugee status are illegal and to be liable to cancellation. Also, the plaintiffs said that they can not return to Azerbaijan as there is a danger to their lives and pointed to the lack of basic social rights, which guarantee a peaceful life in society. This administrative appeal was granted in part. The decisions of the State Committee of Ukraine on Nationalities and Religions № 628-11 and № 662-11 from October 31, 2011 were cancelled. The State Migration Service of Ukraine was obliged to re-consider the decision of giving to citizens of Azerbaijan Mamedov Aynur Nofal kyzy and Mamedov Elshan Nofal oglu refugee status in accordance with the current legislation of Ukraine. The rest of the claims were denied. The decision was motivated by the fact that the defendant, when considering the claims of the plaintiffs did not reflect the circumstances and reasons of arrival of these persons to the state of Ukraine, had not taken into account and not provided proper assessment of the facts of the case, indicating the arrival in 2001 of plaintiffs to Ukraine, as underages who had come to the parents who had refugee status. Taking such persons to the appropriate account migration service actually recognized the need for family reunification, which entered the territory of Ukraine in terms of the concept of the Law of Ukraine "On Refugees", as in effect at the time of arrival in Ukraine.

Law interpretive nature of judgments is considered as: law interpretive proceedings contained in the external form of legal enforcement act; interpretation contained in the judgment is formally binding on all subjects; solutions containing rules of understanding of the content of legal rules and becomes concrete through their interpretation in the court. For example, the County Administrative Court in considering the case materials of District Department of Vynnytsia City Office of Administration of Ministry of Internal Affairs of Ukraine in Vynnytsia region to a citizen of Somalia Mohamed Ali as for the administrative arrest and temporary detention in the place of foreigners' and stateless persons' temporary detention was adopted decision in which was given the interpretation of the rules included in the case consideration by the part two of Article 4 of the Code of Administrative Procedure of Ukraine, which states that the jurisdiction of administrative courts extends to all public-legal disputes, other than disputes for which the law provides a different procedure for judicial resolution [3].

In the court judgement is observed that the provisions of part one Art. 107 of the Code of Administrative Procedure of Ukraine give a clear definition: a judge after receiving the claim finds if: the claim was given by a person who has administrative procedural capacity; representative has the appropriate authority (if the claim was filed by the representative); the claim meets the requirements laid down in Article 106 of the Code; claim should be seen in administrative proceedings order; administrative appeal was filed by the deadline set by law (if an application was filed to renew this period, were there the grounds for its satisfaction); there are no other reasons for the returning of claim, its leaving without consideration or refusal to initiate proceedings in the administrative case set by the Code of Administrative Procedure of Ukraine. According to paragraph 2, part 1, Art. 109 of the Code of Administrative Procedure of Ukraine, judge refuses to initiate proceedings in the administrative case only if in the dispute between the same parties on the same subject with the same reasons are those which came into force, a court decision or court order refusing to initiate proceedings in administrative case, to close the proceedings in this case due to the refusal of the plaintiff's administrative appeal or conciliation.

The decision of the court in accordance with the law has the written legal form of expression: to refuse to initiate proceedings in the administrative case for claim of Lenin District Department of Vynnytsia City Office of Administration of Ministry of Internal Affairs of Ukraine in Vynnytsia region to a citizen of Somalia Youssef Mohamed Ali on administrative arrest and detention in the place of temporary detention of foreigners and stateless citizens who illegally stay in Ukraine; a copy of the decision with the claim and attachments give back to the person who filed the claim. Thus, the court is denied the opportunity to decide on the opening of the proceedings.

Re-appeal to the administrative court with the same claim is not allowed. The decision of the court of first instance will enter into force in the manner specified by the Art. 254 of the Code of Administrative Procedure of Ukraine. According to Art. 186 of the Code of Administrative Procedure of Ukraine, appeal to the court of first instance shall be filed within five days after the approval of decision.

The disputes regarding status of refugees become of particular importance in the judicial administrative practice. The studied category of administrative cases is small compared to the other categories of cases.

In considering this category of cases are taking into account the requirements of part one of Article 5 of the Code of Administrative Procedure of Ukraine (hereinafter – CAP), as to the exercise of administrative justice in accordance with the Constitution of Ukraine, the noted Code and international treaties ratified by the Verkhovna Rada of Ukraine.

In administrative proceedings may appeal the decision of the State Migration Service of Ukraine and its territorial divisions of refusal to accept application for refugee status, on refusal to documents designed to address the issue of granting refugee status or refusal dokumentsd in the design, to address the issue of granting refugee status, a refusal, loss of refugee status.

In administrative proceedings may be appealed the decisions of the State Migration Service of Ukraine and its territorial divisions as to the dismissal of complaint to refuse acception of application for gaining refugee status, to the dismissal of complaint to refuse making documents for resolving the issue of granting refugee status, to refuse granting, losing or deprivation of refugee status.

In this context, it is necessary to note that in the decision of the Constitutional Court of Ukraine from December 25, 1997 № 9 in the case of an official interpretation of Articles 55, 64 and 124 of the Constitution of Ukraine, is stated that the first part of Article 55 of the Constitution of Ukraine provides the general rule that is particularly important in terms of ATO and means that everyone has right to go to court if his rights or freedoms are infringed or are being infringed, established or are being established obstacles to their implementation or there are other infringements of rights and freedoms. The noted rule obliges courts to accept applications for consideration even

in the absence of a special provision in the law for judicial protection.

We also should note that the procedure for obtaining refugee status, as defined by the Law of Ukraine "On refugees and persons in need of additional or temporary protection" is unnecessarily complex and multi-layered. At least four phases of appling the refugee status (application, the decision to make documents for deciding whether to grant refugee status, adopting the complaint for consideration, appeal the decision to the court) are accompanied by the issuing of relevant certificates which certifies the legitimacy of temporary residence in the territory of Ukraine and are valid for realization the rights and duties provided by law of Ukraine.

Assessing the completeness and comprehensive study of evidence in cases for that category, the courts should pay attention to whether the defendants committed all actions contemplated by the legislation on refugees, to determine information about the applicant and the circumstances which became grounds to the statement of claim for refugee status.

According to paragraph 9 of Resolution of the Plenum of the Supreme Administrative Court of Ukraine from June 25, 2009, № 1 "On judicial practice of considering disputes regarding the status of refugees and persons in need of additional or temporary protection, forced return and forced expulsion of a foreigner or stateless person from Ukraine and disputes relating to the detention of foreigners and stateless persons in Ukraine as amended", the burden of proof in administrative proceedings is defined by Article 71 of CAP of Ukraine and is distributed as follows: the plaintiff must prove the circumstances that justify the claim, that is the cause of claim; the defendant must prove the circumstances that justify denial of the claim.

The legal positions of the court seem to be more valuable in terms of the science and practice as in one that decision may be some legal positions relative to the defendant – a foreigner, and the situation can be studied in terms of violation of several articles: residence without documents or with invalid documents, failure to register or order of residence and place of residence, evasion of departure at the end of the stay, administrative or criminal offences. In any case, the administrative court decisions at the claim for foreigners is not the result of lawmaking, and in his understanding are considered "law conctere precedents" [3] which contain legal positions that are not legal norms, but have mandatory nature for the court itself and lawmaking value of the state in accordance with international standards.

Conclusions. At any approaches of administrative decisions regarding foreigners, stateless persons, refugees and others, of their legal status, according to most scholars should prevail the fundamental principle of equality of rights and freedoms in accordance with international standards, equality of everyone before the law and the courts and the prohibition of any discrimination. When considering lawsuits against foreign nationals it is important to apply the principle of inalienability and inviolability, meaning that none of the human rights recorded in legislation of Ukraine and international norms can not be canceled or ignored in the trial, and foreigner's denial of his rights and freedoms is invalid. Application of uncertainty principle implies further expansion of rights and freedoms as needed. Hence there is the need in the most detailed regulation in the laws of relations superfiction of judicial practice regarding the rights and freedoms of foreigners in the plane of obligations and responsibilities. Therefore is needed appropriate legal expertise, scientific substantiation of jurisfiction of administrative proceedings concerning the protection of legal status of foreign nationals, their advocacy.

As a result the laws on the legal status of foreign citizens adopted previously, eventually lose their relevance when making the visa-free regime with the EU. The adoption of new laws without scientific justification could create a serious danger to the state to ensure the stability and protection of human rights of citizens, the activities of administrative agencies and courtsis is complicated. Often a special law is contrary to administrative, there are "underwater reefs" for lawyers, leading to errors in decision making and application of the law concerning foreign nationals, their specific parts – refugees.

It is especially important that all measures were aimed at the formation in the national legal science and practice of administrative judiciary modern European values and approaching the newly created administrative court system to the standards prevailing in democratic countries.

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