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Grounds and conditions for securing a claim in administrative proceedings

Olena S. Yara*

PhD in Law, Professor

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Olha V. Kravchuk

Postgraduate student

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

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The article examines the grounds and conditions for interim relief in administrative proceedings. By analysing the legislative provisions and law enforcement (judicial) practice in conjunction with the achievements of legal science, the author identifies the grounds and conditions for interim relief in administrative proceedings, and focuses on the problematic issues which arise when courts verify the existence of grounds for interim relief and compliance with the conditions for interim relief. In particular, the author draws attention to the fact that interim relief on the grounds of obvious signs of unlawfulness of a decision, action or inaction of a public authority is in fact inapplicable due to the reservation on the inadmissibility of resolving the dispute on the merits during interim relief. It is concluded, however, that an

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*Corresponding author

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administrative claim may be secured if there is at least one of the grounds specified in part one of Article 150 of the Code of Administrative Procedure of Ukraine and subject to the conditions of proportionality, adequacy of measures to secure an administrative claim, direct relation to the subject matter of the dispute and taking into account the legal behavior of the defendant in the dispute. The author emphasizes that the court's discretion in applying interim measures to secure an administrative claim is unconditional, but not unlimited, and is controlled by the requirement to properly justify the relevant procedural action

Keywords: administrative court, administrative claim, administrative proceedings, interim relief, principles of administrative proceedings, protection of rights and freedoms of a person, grounds for interim relief, conditions for interim relief

Introduction

The right to a trial is a key human right, a fundamental element of law in a democratic and rule-of-law state.

The content of the right to a trial is most fully explained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall determine the dispute concerning his rights and obligations in a civil matter or the validity of any criminal charge against him.

The European Court of Human Rights has repeatedly emphasized that the right to a trial would be illusory if the legal system of a Contracting State allowed a final binding judgment not to be enforced to the detriment of one of the parties (e.g., the ECHR judgment in *Hornsby v. Greece*).

Contrary to popular belief, such requirements for the enforcement of a final judgment relate not only to enforcement proceedings, but also to the correct and timely application of interim measures.

Interim relief in administrative proceedings, as defined by the Supreme Court [1], is one of the guarantees of protection of the rights, freedoms and legitimate interests of legal entities and individuals-plaintiffs in administrative proceedings, a mechanism designed to ensure the real and strict enforcement of a court decision made in an administrative case.

The institute of interim relief in administrative proceedings is an object of scientific interest for many lawyers both within the framework of comprehensive studies and independent scientific research. In particular, the issues of interim relief were considered by Ukrainian researchers O. Dzhurynskiy, I. Diorditsa, S. Martsynkevych, H. Medvidchuk, V. Semina, and O. Shurnyn.

However, the current state of scientific research into the issues of interim relief in administrative proceedings cannot be called sufficient. The specifics of this procedural institute, due, inter alia, to the broad discretion of the court in its application, require further thorough scientific research to enhance the efficiency and effectiveness of interim relief

in fulfilling the tasks of administrative proceedings.

The purpose of the article is to identify the peculiarities and problems of legal regulation of the grounds and conditions for securing a claim in administrative proceedings, as well as to formulate conclusions and proposals that will contribute to the unity of the relevant law enforcement practice.

Results and Discussion

Article 150 of the Code of Administrative Procedure of Ukraine (entitled “Grounds for securing an administrative claim”) authorizes the court to take the measures to secure a claim specified in this article at the request of a party or on its own initiative.

According to part two of Art. 150 of the Code of Administrative Procedure of Ukraine, interim relief is allowed both before filing a claim and at any stage of the proceedings if:

1. failure to take such measures may significantly complicate or make it impossible to enforce the court decision or to effectively protect or restore the violated or disputed rights or interests of the plaintiff, for the protection of which he/she has applied or intends to apply to the court; or

2. there are obvious signs of unlawfulness of the decision, action or inaction of the authority, and violation of the rights, freedoms or interests of the person who applied to the court by such a decision, action or inaction.

Thus, the existence of at least one of these grounds is sufficient to take interim measures.

The phrase “the court ... shall have the right” used in the said legal provision indicates the discretion of the court in deciding

on the interim relief even if there are grounds for such relief as set forth in Article 150 of the Code of Administrative Procedure of Ukraine.

Similarly, the court’s discretion is presumed when deciding on the sufficiency of the grounds for interim relief: in each disputed case, the court independently assesses the concepts of “significant complication” and “effective defence”.

Depriving the court of such discretion in interim relief, as suggested by some scholars, will not solve the problem of excessive judicial discretion and will dilute the very essence of interim relief. Instead, a proper justification of a certain procedural action, indicating the motives that prompted the court to take it, will facilitate the ability of persons involved in the case to control the legality of such court powers [2].

It should be noted that the existence of obvious signs of unlawfulness of a decision, action or inaction of a public authority and violation of the rights, freedoms or interests of a person who has applied to the court by such a decision, action or inaction is a ground that is rarely used by courts – the Unified State Register of Court Decisions contains only a few relevant court decisions.

At the same time, the existence of obvious signs of unlawfulness of a regulatory legal act is the only alternative ground for securing a claim by suspending the effect of such a regulatory legal act in accordance with part five of Article 151 of the Code of Administrative Procedure of Ukraine.

It is quite obvious that the “unpopularity” of interim relief on these grounds is due to the court’s fear of prematurely resolving the dispute on the merits.

In fact, the inadmissibility of such a ground was emphasized by the Supreme Court in its decision of November 20, 2019 in case No. 640/2298/19 [1], noting that the presence of signs of unlawfulness of the challenged legal act can be identified by the court only on the basis of clarifying the factual circumstances of the case, as well as assessing the relevance, admissibility and reliability of each evidence separately, as well as the sufficiency and interconnection of the evidence available in the case file in their entirety. The application of interim measures in this case resolves the case on the merits of the subject matter of the dispute [1].

Moreover, until recently, unreasonable interim measures taken by a court were an unconditional ground for bringing a judge to disciplinary liability. According to A. Muzychenko [3], such a ground for bringing a judge to disciplinary liability could completely neutralize the purpose of the interim relief institute.

Most often, the courts resort to checking another of the above grounds for interim relief – the risk of significant complication or impossibility of enforcement of the court decision or effective protection or restoration of the plaintiff's violated or disputed rights or interests, for the protection of which he or she has applied or intends to apply to the court.

It is noteworthy that in the procedural codes of Ukraine, the legislator invariably uses the same construction to determine the grounds for interim relief, the essence of which is the assumption that failure to take measures to secure a claim may complicate or make it impossible to enforce a court decision [4].

In this respect, the Ukrainian model of the institution of interim relief is in many respects similar to the German model of “delayed effect” or “delayed action” of interim relief [5].

At the same time, supporters of the preventive function of the institution of interim relief propose to introduce another ground for interim relief – the existence of a real threat of significant damage to the applicant.

However, in our opinion, such a proposal is contrary to the objectives of administrative proceedings, which protect the rights, freedoms and interests of individuals and the rights and interests of legal entities violated by public authorities.

Let us now turn to the conditions for securing an administrative claim. Some researchers call them “procedural grounds” for interim relief [6]. In our opinion, based at least on the grammatical and purposeful interpretation, it is more accurate to use the term “conditions for interim relief” to characterize the circumstances that make it possible to apply interim relief.

Proponents of this approach distinguish two groups of conditions for securing a claim:

1. conditions for filing an application for interim relief: proper subject matter, compliance with the procedural requirements for filing an application for interim relief, etc.
2. conditions for satisfying the relevant application [7].

In the context of this study, we will focus on the second group of these conditions. Thus, from the content of part two of Article 151 of the Code of Administrative Procedure of Ukraine it is clear that a condition for securing a claim is the proportionality of the

measures to secure the claim with the claims stated by the plaintiff.

The European Court of Human Rights, in the context of applying Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also proceeds from the fact that an interim decision may be equivalent to provisional or interim measures and procedures (e.g., the judgment in *Merkica and Others v. Malta*, paragraph 35) [8]. The legislator refrained from elaborating on the concept of proportionality of interim measures.

However, the Grand Chamber of the Supreme Court in its decision of February 12, 2020 in case No. 381/4019/18 [9] defined proportionality as the ratio of the negative consequences of the application of interim measures to the negative consequences that may occur in the event of failure to take such measures, taking into account the compliance of the right or legitimate interest for the protection of which the applicant applied to the court and the value of the property to be seized or the consequences of prohibiting the defendant from taking certain actions.

Scholars emphasize that the basis for the application of interim relief is a construction based on an assumption that is always subjective and can only be proven in the exact sciences [6].

It is worth noting that the U.S. Federal Court uses a specific “formula” for calculating the grounds for injunctive relief. The said Leibs Dorf-Pozner formula is $P \times H(p) > (100\% - P) \times H(d)$, where P is the credibility of the claim and the likelihood of its satisfaction, H is irreparable harm, p is the plaintiff, and d is the defendant.

If the product of the left-hand side of the formula prevails, the claim should be enforced,

and vice versa – the predominance of the product of the right-hand side of the formula leads to a refusal to enforce the claim [10].

However, the application of this approach, in our opinion, does not exempt the institution of interim relief from the subjective, evaluative factor. In this case, “proportionality” is achieved by applying the same evaluative concepts of “credibility of the claim” and “irreparable harm” (especially in administrative cases concerning non-property legal relations).

Thus, we have to state that it is impossible to deviate from the excessive use of evaluative concepts in securing a claim and to develop a single, unified measure of the proportionality of interim measures.

In such circumstances, our earlier conclusion that the administrative court should provide the most substantial reasons for the relevant court decisions when applying interim measures is confirmed.

Pursuant to part two of Article 151 of the Code of Administrative Procedure of Ukraine, the court must also take into account the correlation between the rights (interests) sought to be protected by the applicant and the consequences of interim measures for the interested parties.

The Supreme Court in its ruling of June 19, 2018 in case No. 826/9263/17 [11] characterized this ratio as the adequacy of the interim measures applied by the court.

Another, in our opinion, unconditional, aspect of the condition of adequacy of interim relief arises from paragraph 5 of part three of Article 151 of the Code of Administrative Procedure of Ukraine, which presumes that interim relief measures are related to the subject matter of appeal in an administrative case [12].

Conclusions

Summarizing the above, we note that the procedural institution of interim relief in administrative proceedings is characterized by a fairly broad discretion of the court. Granting the court such discretion is fully justified and aimed at guaranteeing the actual enforcement of a future court decision by taking measures to secure a claim. At the same time, the court's discretion in this case is limited to the right to take measures to secure an administrative claim only if one of the grounds specified in part one of Article 150 of the Code of Administrative Procedure

of Ukraine is present and in connection with the conditions established by the Code of Administrative Procedure of Ukraine. This study highlights that such conditions are proportionality, adequacy of measures to secure an administrative claim, direct relation to the subject matter of the dispute, and legal behavior of the defendant in the dispute.

In our opinion, compliance by the courts with the grounds and conditions for interim relief identified in this study will facilitate the reasonable, prompt and effective application of interim relief by administrative courts.

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Підстави та умови забезпечення позову в адміністративному судочинстві

Олена Сергіївна Яра

Кандидат юридичних наук, професор
Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Ольга Володимирівна Кравчук

Аспірант
Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

У статті досліджуються підстави та умови забезпечення позову в адміністративному судочинстві. Шляхом аналізу законодавчих положень, правозастосовчої (судової) практики у сув'язі з надбаннями правової науки виокремлено підстави та умови забезпечення позову в адміністративному судочинстві, зацентовано увагу на проблемних питаннях, які виникають при перевірці судами наявності підстав забезпечення позову та дотримання умов забезпечення позову. Зокрема, звертається увага на те, що забезпечення адміністративного позову з мотивів наявності очевидних ознак протиправності рішення, дії чи бездіяльності суб'єкта владних повноважень є фактично незастосовною через застереження щодо недопустимості вирішення спору по суті під час забезпечення позову. Зроблено висновок проте, адміністративний позов може бути забезпечено за наявності принаймні однієї з підстав, зазначених у частині першій статті 150 Кодексу адміністративного судочинства України та за дотримання умов співмірності, адекватності заходів забезпечення адміністративного позову, безпосередньої пов'язаності з предметом спору та з урахуванням правової поведінки відповідача у спорі. Акцентовано увагу на тому, що свобода розсуду (дискреції) суду при застосуванні заходів забезпечення адміністративного позову є безумовною, але не безмежною та контрольована вимогою щодо належного обґрунтування відповідної процесуальної дії

Ключові слова: адміністративний суд, адміністративний позов, адміністративне судочинство, забезпечення позову, принципи адміністративного судочинства, захист прав і свобод особи, підстави забезпечення позову, умови забезпечення позову
