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THE LAW OF UKRAINE «ON AMENDMENTS TO THE ECONOMIC PROCEDURAL CODE OF UKRAINE, THE CIVIL PROCEDURE CODE OF UKRAINE, THE CODE OF ADMINISTRATIVE PROCEDURE OF UKRAINE ON IMPROVING THE PROCEDURE OF LITIGATION»: OVERVIEW

Summary. *This article is devoted to the analysis of the Law of Ukraine «On Amendments to the Economic Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine on Improving the Procedure of Litigation». During the work, the most important legal issues of this normative act were explored. We have analyzed the issues concerning administrative proceedings concerning such questions as the jurisdiction of the administrative courts in the article.*

Key words: *amendments, procedure of litigation, activity of judicial governments, purification of power, the Code of Administrative Procedure of Ukraine, jurisdiction.*

The purpose. This article highlights the key changes that have taken place in the area of the Code of Administrative Procedure of Ukraine. It explains the basics and describes the new requirements in this area. In the course of writing this article, we are going to analyze the following issues: provisions on disqualification of judges, provisions on securing the claim, changes regarding the involvement of third parties to appeal, changes in the provisions on closing the cassation proceedings.

Presentation of the main material. On February 8, 2020, the Law of Ukraine «On Amendments to the Economic Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine on Improving the Procedure of Litigation» came into force (hereinafter – the Law 460-IX). It is advisable to highlight the main changes that have been introduced to the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAP of Ukraine) under this Law. Therefore, per the provisions of the Act, the following should be noted: this Act simplifies the procedure for considering a judge's motions in the case of filing an application on the eve or on the day of the hearing (without stopping the proceedings and without referring the case to another court for consideration of the relevant application).

At the same time, the appeal of the rejection is allowed in the court of appeal or cassation. Thus, Article 40 reads as follows: « If the court concludes that the plea was not substantiated and the request for such withdrawal was submitted to the court during three working days (or earlier) before the next hearing, the decision on the withdrawal shall be exercised by the non-judge. To the court hearing the case, and it shall be determined as per the procedure lied down in Article 31 (1) of this Code. This judge cannot be challenged. If the application for dismissal of a judge is submitted no later than three working days before the next hearing, such application shall be sent to another judge, and the issue of refusal by the court hearing the case shall be addressed» [1].

There is a principal duty of a judge according to Art. 15 of the Code of Judicial Ethics, impartial consideration of cases. A judge has a right to self-refusal in cases provided for by procedural law if there is bias towards one of the parties and if a judge has personal knowledge of evidence or facts which may influence the outcome of the case.

A judge shall not abuse the right to self-refusal. A judge shall recuse himself if it is impossible for him to make an objective judgment in a case [2]. At the same time, the Bangalore Principles of Judicial Ethics contains a provision that the judge should seek to withdraw from the case when it is not possible for him or her to make an impartial decision in the case, or when a reasonable observer might have doubts about the judge's impartiality [3]. Therefore, the decisive issue is whether the judge's case is dismissed. It relies on a third party (a reasonable observer) who is self-aware, who «may believe» that the judge is unable to resolve the issue impartially. An analysis of the complaint of lawyers representing and defending people in courts of general jurisdiction reveals that the court that received the appeal cannot use the question of this, perhaps. In particular, this is because the claim can be claimed on other grounds. Therefore, the question of the need to change the provisions of Article 40 of the CAP is controversial today [4].

Securing the claim (Article 151, CAP of Ukraine). In accordance with the provisions of the Law, the types of securing the claim have been changed. Therefore, it now becomes impossible to enforce the claim by imposing a duty on the defendant to take certain actions. Also, it is now prohibited to pursue a claim by suspending acts of the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, the High Judicial Council, the High Qualifications Commission of Judges of Ukraine and bodies conducting disciplinary proceedings against prosecutors and imposing a ban or a duty on them to take some action. Article 151 is supplemented by part six following Law No. 460-IX of 15.01.2020. According to which it is forbidden to provide a lawsuit, which consists in the suspension or other interference in the conduct of a competition, auction, tender or other public competitive procedures conducted on behalf of the state, territorial community or with the participation of a state body designated by the entity as part of a commission that conducts an auction, tender or other public competitive procedure. Articles 167 and 169 have been amended. Part I of the Article 167 is now supplemented by the tenth paragraph: «The statement, complaint, petition or objection filed at the stage of execution of the judgment, including in the process of judicial control over the execution of court

decisions, shall be accompanied by evidence of their referral to other parties to the case (proceedings).» In Article 169, paragraph 1, the following shall be added to the second paragraph: without moving under the requirements of the administrative procedural law in force at the date of filing the claim» [1].

The legislator has changed the provisions on the termination of proceedings in the case (Art. 236 CAP of Ukraine). The article excludes the grounds for suspension of the proceedings: «the receipt of the request for withdrawal pends the resolution of the question of withdrawal» (paragraph 8). In the article on closing the proceedings in the case (Article.239 CAP of Ukraine) a rule was added, which stipulates that in the case of closing the proceedings on grounds of irrelevance of the dispute, the plaintiff has the right within 10 days from the date of his receipt of the decision to apply to the court for the referral of the case within the established jurisdiction. Therefore, per the provisions of Article 239, if the proceedings are closed on the grounds set out in Article 238, the court shall inform the plaintiff in whose jurisdiction the case has been referred. The court of appeal or cassation shall inform the plaintiff that he has the right within ten days from the date of receipt of the relevant order to apply to the court with a statement of referral of the case in the established jurisdiction, except in cases of combining several claims that are subject to one consideration in the order of different proceedings. The application is filed to the court which has adopted the decision to close the proceedings. In the case of a court case, which is subject to consideration in the administrative procedure, after the closure of the proceedings by the Supreme Court or the court of appeal in civil or commercial proceedings, the proceedings in the case may not be closed on the grounds set out in paragraph 1 of part one of Article 238 of this Code.

The legislator has changed the first and the second paragraphs of Article 293, according to which participants in the case who did not participate in the case (if the court resolved their rights, freedoms, interests and (or) duties) have the right to appeal the decision to the court of the first instance. Participants of the case, people who did not participate in the case (if the court decided on their rights, freedoms, interests, and duties) have the right to appeal the judgment separately

from the court decision only in cases provided for Article 294 of this Code. The appeal against the judgment which is not provided for in Article 294 of this Code shall not be permitted separately from the court decision. However, in our opinion, the proposed changes are not correct because of the following: Art. 4 CAP defines the terms used in the Code. In particular, 13.1 Art. 4 CAP of Ukraine determined that the judgment is the decision of the court of the first instance in which the claims are resolved. According to the proposed changes, the subject of the legislative initiative proposed layout part 1 of Art. 293 CAP of Ukraine in the new version, namely by supplementing the current version with the word «judicial» [5]. Therefore, the provisions of Part 1 of Art. 293 CAP of Ukraine is in system connection with clause 13 of Part 1 of Art. 4 CAP of Ukraine and does not need to be changed. Now, in the article concerning the preparation of the case for appeal (Article 306 of the CAP of Ukraine), the legislator stated that the right of a court was granted in the case that the decision of the court of the first instance could affect the rights and obligations of the person who did not participate in the case, such person shall participate in the case as a third party who does not make independent claims about the subject of the dispute.

The provisions of Article 319 concerning the ground for annulment of the decision have been changed in part. The legislator supplemented Article 319 with part three of the following content: «In case the court of appeal instance closes the proceedings in the case based on paragraph 1 of part one of Article 238 of this Code, the court, upon the petitioner's application, issues a decision on the moving of the case to the court of the first instance, such case is referred to, except several cases being joined in one proceeding, which is subject to consideration in different judicial procedures. Such a claim must specify the jurisdiction of one court applicable to the dispute». In other words, a rule of law has now been laid down that, in the event of a court closing an appellate court in connection with the irrelevance of a dispute, such a court, at the request of the plaintiff, shall refer the case to the court of the first instance of the appropriate jurisdiction to continue the proceedings [6].

The right to a cassation appeal (article 328 of the CAP). The system of filters for the cassation appeal, finding that such an appeal

may take place in exceptional cases. Following the new provisions of the normative act judgments in cassation may be appealed to the court of the first instance for interim measures, replacement measures to ensure the claim, the definitions referred to paragraphs 3, 4, 12, 13, 17, 20 the first part of article 294 of the Code. Appeal grounds on judicial decisions mentioned in part one of this article are incorrect applications of the substantive law or violation of procedural rules only in the following cases: 1) if the court of appeal in the contested decision applied a rule of law without regard to the opinion concerning the application of the law in similar legal relations outlined in the Supreme Court decision unless there is a Supreme Court decision on the assignment from such detention; 2) if the complainant is motivated by a justified need for deviation from the conclusions concerning the application of the law in similar legal relations outlined in the decision of the Supreme Court and applied by the court of appeal in the contested judicial decision; 3) if there is no Supreme Court opinion on the application of the law in similar legal relations; 4) if a judgment is challenged on the grounds envisaged in the second and third paragraphs of Article 353 of this Code. Appeal grounds of judicial decisions referred to the second and third parts of this article are incorrect applications of the substantive law or violations of procedural rules.

Form and content of the cassation complaint (Art. 330 CAP of Ukraine). During the filing of a cassation complaint, the complainant is obligated to state in it the grounds stipulated by Article 328 of the CAP of Ukraine. According to the new wording of Article 330 of the CAP in the case of filing a cassation appeal under paragraph 1 of part four of Article 328 of the CAP, the cassation appeal shall state the decision of the Supreme Court, which includes the rule of law in such legal relations, which were not taken into account in the appealed court decision. In the case of a cassation appeal, according to the paragraph 2 of part four of Article 328 of the CAP, the cassation appeal shall state the need to depart from the conclusion on the application of the rule of law in such legal relations, as set out in the ruling of the Supreme Court. In the case of filling a cassation appeal against a court decision referred to the paragraphs 2 and 3 of Article 328 of the CAP, the cassation appeal shall state the rationale for the misapplication of

substantive law or violation of procedural law, which led to the adoption of an illegal court decision (decisions).

The abandonment of the appeal, leaving the application without motion, the return of the appeal (article 332 of the CAP). Today, the legislator clarifies that the issue of leaving the application without motions must be decided by a panel of three judges and no later than 20 days. It should also be noted that in the previous version of the code this question was decided by a single judge, and the issue of opening cassation proceedings was decided within 20 days (not 10 like now).

The refusal to initiate cassation proceedings (article 333 CAP). The article is supplemented with new conditions for refusal to open the cassation proceedings, in particular: if the Supreme Court set out in its decision the conclusion concerning the application of the law in similar legal relations, which were considered in cassation against the judicial decision and the appellate court revised the judicial decision according to this conclusion (except if there is a Supreme Court decision on the assignment from such detention or if the Supreme Court deems it is necessary to deviate from the conclusion regarding the application of the law in similar legal relations). In other words, the court of cassation refuses to open the cassation proceedings if the Supreme Court has formed the legal conclusion in such matters. In case of appealing against the judgment (except the decision which ended the trial) the court may declare the appeal unfounded and refuse to open cassation proceedings if the correct application of the rule of law is evident and does not raise a reasonable doubt about its application or interpretation. Besides, the Court shall refuse to open cassation proceedings in a revision of the definition of the return statement to the plaintiff (petitioner) and court decisions in cases prescribed by articles 280, 281, 287, 288 of the present Code if the court of appeals' decision by the results of consideration of such appeals may have a value for common practice.

The closure of the appeal proceedings (Article 339 of the CAP). It should be noted that grounds for termination of the cassation proceedings were also amended, in particular: the first part of article 339 of clauses 4 and 5: «4) after the opening of the appeal, if the Supreme Court in its decision has already set out the conclusion on the application of the law in similar legal relations that are considered

in the appeal or retreated from its conclusion regarding the application of the rule of law, which became the basis for the cassation proceedings, and the appellate court revised the judicial decision according to this conclusion (except for cases when the Supreme Court considers it is necessary to depart from this conclusion). If the decision to open cassation proceedings is motivated by other reasons that are not grounds for the closure of proceedings, the appeal proceedings shall be closed only concerning the part of the grounds under this paragraph; 5) after the opening of the cassation proceedings based on paragraph 1 of the fourth paragraph of article 328 of this Code, the court found that the conclusion regarding the application of the law set out in the decision of the Supreme Court and which was referred to the appellant in the appeal concerns the legal relations that are not similar».

Currently, the provisions of the Supreme Court closes the proceedings if the Supreme Court has already concluded concerning the application of the law in similar legal relations that have been considered in the appeal or retreated from its conclusion regarding the application of the rule of law, which became the basis for the cassation proceedings, and the appellate court revised the judicial decision in accordance to this conclusion. In another case, the Supreme Court closes the case if, after the opening of the cassation proceedings based on paragraph 1 of part 4 of article 328 of the CAP, the court found that the conclusion regarding the application of the law is set out in the decision of the Supreme Court and which was referred to the appellant in the appeal concerns the legal relations that are not similar.

It should also be noted that the legislator amends article 354 of the CAP grounds for the annulment fully or in part with the closure of the proceedings. According to which, in the event of the closure of proceedings by the court of cassation in the jurisdiction of the dispute, a court at the request of the plaintiff shall send the case to the first instance court of the relevant jurisdiction for further consideration [7].

Conclusion. In this article, we summarize the main changes of The Law of Ukraine «On Amendments to the Economic Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine on Improving the Procedure of Litigation». We have analyzed the issues in the field of administrative

proceedings in the article, the jurisdiction of the administrative courts, provisions for securing the claim, changes regarding the involvement of third parties to appeal, changes in the provisions on closing the cassation proceedings.

References

1. Code of Administrative Procedure of Ukraine; 2747-IV; URL: https: // zakon.rada.gov.ua/laws/show/2747–15.
2. CODE OF JUDICIAL ETHICS; APPROVED by the XIth Congress of Judges of Ukraine February 22, 2013; URL: https://newjustice.org.ua/wp-content/uploads/2018/06/Code_of_Judical_NEW_eng1.pdf.
3. Bangalore Principles of Judicial Conduct; United Nations Office on Drugs and Crime; URL: https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf.
4. Key amendments to the CAP of Ukraine to increase the Law № 460-IX «On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine to improve the visit of judicial rights»; Legal newspaper online; URL: https: //drive.google.com / file / d / 1bk2JTAFBwbys_YVy8xTrh8CMsuOGppmR / view.
5. Comments and suggestions to the draft Law «On Amendments to the Commercial Procedure Code Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure judiciary of Ukraine to improve the review of court decisions in appeal and cassation order "(Reg. No. 2314 of 25.10.2019); URL: https://unba.org.ua/assets/uploads/027d2854ac4c758d42fa_file.pdf.
6. Key amendments to the Code of Administrative Procedure of Ukraine regarding the law of Ukraine № 460 – IX. Administrative Court of Appeal. Law and Business. URL: www.zib.com.ua.
7. «KEY CHANGES TO THE ADMINISTRATIVE JUDICIAL CODE OF UKRAINE»; Ukrainian law; 2020. URL: https://ukrainepravo.com/news/ukraine/sud-poyasnyv-klyuchovi-zminy-do-kodeksu-administratyvnogo-sudochynstva-ukrayiny/.

References

1. Code of Administrative Procedure of Ukraine; 2747-IV; URL: https: // zakon.rada.gov.ua/laws/show/2747–15.
2. CODE OF JUDICIAL ETHICS; APPROVED by the KhIth Congress of Judges of Ukraine February 22, 2013; URL: https://newjustice.org.ua/wp-content/uploads/2018/06/Code_of_Judical_NEW_eng1.pdf.

3. Bangalore Principles of Judicial Conduct; United Nations Office on Drugs and Crime; URL: https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf.
4. Key amendments to the CAP of Ukraine to increase the Law #460-IX «On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine to improve the visit of judicial rights»; Legal newspaper online; URL: https: //drive.google.com / file / d / 1bk2JTAFBwbys_YVy8xTrh8CMsuOGppmR /view.
5. Comments and suggestions to the draft Law «On Amendments to the Commercial Procedure Code Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure judiciary of Ukraine to improve the review of court decisions in appeal and cassation order "(Reg. No. 2314 of 25.10.2019); URL: https://unba.org.ua/assets/uploads/027d2854ac4c758d42fa_file.pdf.
6. Key amendments to the Code of Administrative Procedure of Ukraine regarding the law of Ukraine #460 – IX. Administrative Court of Appeal. Law and Business. URL: www.zib.com.ua.
7. «KEY CHANGES TO THE ADMINISTRATIVE JUDICIAL CODE OF UKRAINE»; Ukrainian law; 2020. URL: https://ukrainepravo.com/news/ukraine/sud-poyasnyv-klyuchovi-zminy-do-kodeksu-administratyvnogo-sudochynstva-ukrayiny/.

И. В. Костенко

Основные положения Закона Украины «О внесении изменений в Хозяйственный процессуальный кодекс Украины, Гражданский процессуальный кодекс Украины, Кодекс административного судопроизводства Украины относительно совершенствования порядка рассмотрения судебных дел»

Аннотация. *Статья посвящена анализу Закона Украины «О внесении изменений в Хозяйственный процессуальный кодекс Украины, Гражданский процессуальный кодекс Украины, Кодекс административного судопроизводства Украины о совершенствовании судебного процесса». В ходе работы были рассмотрены ключевые изменения и новые требования этого нормативного акта, касающиеся положения об отводе судей, положения об обеспечении иска, изменения в положениях о закрытии кассационного производства.*

Ключевые слова: *порядок судебных процессов, деятельность суда, юрисдикция, судопроизводство, очистка власти, Кодекс административного судопроизводства Украины.*

І. В. Костенко

Провідні засади Закону України «Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України щодо вдосконалення порядку розгляду судових справ»

Анотація. *Стаття присвячена аналізу ключових змін до Кодексу адміністративного судочинства України на підставі Закону України № 460 – IX. Головною метою Закону є комплексне врегулювання питань організації діяльності Верховного Суду, збалансування навантаження та сприяння швидкому розгляду справ. Законодавець вносить зміни у питання щодо відводу судді, забезпечення позову, щодо підстав для касаційного оскарження рішення суду першої інстанції та постанови суду апеляційної інстанції. Проте чи дійсно впроваджені зміни є такими, що здатні забезпечити досягнення поставленої законодавцем мети? Саме цьому питанню присвячена наша стаття. Наразі Україна перебуває в дуже стрімкому потоці змін, реформ і мінливості влади. Така позиція всередині держави абсолютно повністю відбивається на її законодавчій сфері. Неспинний розвиток, рух уперед є дійсно важливими чинниками при створенні «нової держави», проте останнім часом ми не один раз стикалися з тим, що «зміни до реформ, реформи до змін» й постійне необдумане «адаптування до Європейських країн» призводило лише до втрати сил, часу, коштів без одержання бажаного результату.*

Проблема полягає не в тому, що імплементація українського законодавства до бажаного європейського рівня – це погано, ні. Проблема полягає у впровадженні цих самих змін, тобто, говорячи іншими словами, «все дуже гарно лише на папері». Так, Законом вносяться зміни щодо відводу судді, забезпечення позову, щодо підстав для касаційного оскарження рішення суду першої інстанції та постанови суду апеляційної інстанції. Якщо заява про відвід судді надійшла до суду пізніше ніж за три робочі дні до наступного засідання, така заява не підлягає передачі на розгляд іншому судді, а питання про відвід судді вирішується судом, що

розглядає справу. Слід зазначити, що подання заяви про відвід судді не зупиняє провадження у справі. Закон виключає деякі види заходів забезпечення позову, а саме встановленням обов’язку вчинити певні дії, передачею речі, що є предметом спору, на зберігання іншій особі, яка не має інтересу в результаті вирішення спору, а також заборонено вжиття заходів забезпечення позову, які полягають в (або мають наслідком) припиненні, відкладенні, зупиненні чи іншому втручанні у проведення конкурсу, аукціону, торгів, тендера чи інших публічних конкурсних процедур, що проводяться від імені держави (державного органу), територіальної громади (органу місцевого самоврядування) або за участю призначеного державним органом суб’єкта у складі комісії, що проводить конкурс, аукціон, торги, тендер чи іншу публічну конкурсну процедуру.

Неабияку увагу слід приділити підставам касаційного оскарження судових рішень. Так, до набрання Законом чинності підставою касаційного оскарження було неправильне застосування судом норм матеріального права чи порушення норм процесуального права. Внаслідок чергових змін у законодавстві, підставами касаційного оскарження стають неправильне застосування судом норм матеріального права та порушення норм процесуального права лише в певних випадках: якщо суд апеляційної інстанції в оскаржуваному судовому рішенні застосував норму права без урахування висновку щодо застосування норми права у подібних правовідносинах, викладеного у постанові Верховного Суду, крім випадку наявності постанови Верховного Суду про відступлення від такого висновку; якщо скаржник вмотивовано обґрунтував необхідність відступлення від висновку щодо застосування норми права у подібних правовідносинах, викладеного у постанові Верховного Суду та застосованого судом апеляційної інстанції в оскаржуваному судовому рішенні; якщо відсутній висновок Верховного Суду щодо питання застосування норми права у подібних правовідносинах; або ж якщо судове рішення оскаржується з підстав, передбачених ч. 2 і 3 ст. 353 КАС України.

Ініціатори законопроєкту зазначали, що начебто Верховний Суд внаслідок недосконалого механізму підстав касаційного оскарження може дійти взаємозаперечних правових висновків без застосування передбаченої процесуальним законом процедури відступлення, що не забезпечує єдності судової практики. Проте чи дійсно йдеться про недосконалість «механізму»? На нашу думку, це положення жодним чином не вдосконалює «механізм», а лише створює нові питання та невизначеності.

Законодавець, апелюючи високими фразами, такими як «верховенство права», звужує права громадян, зводить до мінімуму можливість захисту своїх прав та інтересів у суді. Помислімо, чи дійсно йдеться про «верховенство права», коли законною стає така позиція, що у разі оскарження Верховний Суд може визнати касаційну скаргу необґрунтованою та відмовити у відкритті касаційного провадження, якщо правильне застосування норми права є очевидним і не викликає розумних сумнівів щодо її застосування чи тлумачення. «Правильне застосування норми права є очевидним» – саме таку відповідь може отримати громадянин від Верховного Суду й відмову у відкритті касаційного провадження. Або ж таке: Верховний Суд відмовлятиме у відкритті касаційного провадження, посилаючись на те, що він уже викладав у своїй постанові висновок щодо питання застосування норми права у подібних правовідносинах. Крім того, законодавець збільшує строки для розв'язання питання про залишення касаційної скарги без руху, постановлення ухвали про відмову у відкритті касаційного провадження, розв'язання питання про відкриття касаційного провадження. Чи дійсно ми можемо спостерігати елементи «верховенства права», на які посилається законодавець? Це – звуження прав громадян і зняття із себе відповідальності щодо розгляду справ, це жодним чином не відповідає «високим стандартам», до яких так прагне наша держава. Так, ознайомившись з окресленими законодавчими змінами, доцільно зазначити, що Закон жодним чином не поліпшує доступ до правосуддя громадян України, а лише звужує права на захист свобод та інтересів.

Ключові слова: *порядок судових процесів, діяльність суду, юрисдикція, судочинство, очищення влади, Кодекс адміністративного судочинства України.*