

Compensation for Damage, Caused to Citizens By Illegal Actions of Government Bodies Performing Operational Search Activities and Pre-Trial Investigation, and Restoration of Their Violated Rights

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ABSTRACT

With the definition of the European vector of Ukraine's development, with the need to improve the legal regulation of business and create appropriate conditions for business development, which is associated with the implementation of European Union law to domestic law, in which respect for human rights and freedoms is a priority, the problem of relevant compensation for damage caused to citizens by illegal actions of state bodies engaged in operational and investigative activities and pre-trial investigation, and restoration of their violated rights, becomes especially. It was stated that for a long time in Ukraine there have been numerous cases of illegal pressure on business caused by certain officials of these government agencies and resulting in material and moral damage to citizens and violation of their rights and legitimate interests. The current legislation of Ukraine provides the possibility of restoring violated rights, compensation for damages and bringing to justice officials of state bodies. The study helped to identify a set of civil signs of liability for damage, some problematic issues of criminal procedural guarantees of business security in modern conditions and develop proposals for their strengthening.

Keywords: *pressure on business; rights, freedoms and legitimate interests of citizens; illegal actions; bodies carrying out operational and investigative activities; pre-trial investigation bodies; reparation; restoration of violated rights.*

1. INTRODUCTION

The problem of pressure on business by certain government officials engaged in operational and investigative activities and pre-trial investigation has existed in Ukraine for a long time and is recognized both at the level of government and a number of domestic and international public organizations - the Union of Ukrainian Entrepreneurs, The European Business Association, the American Chamber of Commerce in Ukraine, etc. Unfortunately, even today there are numerous cases of illegal application of the law enforcement force to entrepreneurs - without reasonable grounds and in violation of procedural law, which hinders business development and violates the constitutional rights and freedoms of man and citizen [1, 2].

Achieving a reasonable balance of interests in the field of law enforcement interaction with business is one

of the tasks of reforming the law enforcement system, without which it is impossible to create a comfortable business climate in Ukraine and create favorable conditions not only for strategic investors and large international companies, as well as micro- and small businesses and individual entrepreneurs. This problem needs to be solved systematically, because comfortable business conditions are the basis of a prosperous market economy. One of the elements of the state ensuring such conditions for business is to guarantee compensation for damage that may be caused by illegal actions of government officials engaged in operational and investigative activities and pre-trial investigation, restoration of violated rights of citizens, and bringing the perpetrators to justice.

2. RESEARCH METHODOLOGY

A number of methods have been selected for the

study, taking into account its purpose, objectives, object and subject. Their basis is a dialectical method of scientific knowledge of real phenomena and processes.

Also special methods that are a means of scientific research in the arsenal of legal sciences were used, in particular: system-structural - allowed to reveal the concept and content of certain illegal actions of government officials engaged in operational and investigative activities and pre-trial investigation, violating rights, freedoms and legitimate interests of the person and cause appropriate harm; comparative-legal - used in the analysis of laws and regulations, materials of operational and investigative activities, criminal proceedings and judicial practice; formal-logical - contributed to the identification of contradictions between the conceptual apparatus of certain regulations, which regulate compensation for damage to the person and the restoration of violated rights; sociological and statistical - used for processing relevant data on research issues; interpretations and generalizations - to formulate the conclusions of the study.

These methods were used in the relationship and interdependence, which ensured the comprehensiveness, completeness and objectivity of the study.

3. RESULTS OF THE RESEARCH

A complete list of operational units of state bodies, using the right to conduct operational and investigative activities, is defined in part 1 of art. 5 of the Law of Ukraine "On operational and investigative activities". These are units of the National Police, the State Bureau of Investigation, the Security Service of Ukraine, the Foreign Intelligence Service of Ukraine, the State Border Guard Service of Ukraine, the Department of State Protection, Income and Fees, the State Penitentiary Service of Ukraine, the Ministry of Defense of Ukraine and the National Anti-Corruption Bureau of Ukraine [3]. In accordance with pp. 1, 2, 3 art. 38 of the Criminal procedure code of Ukraine, authorized units of the National Police, the State Bureau of Investigation, the Security Service of Ukraine, Income and Fees authorities and the National Anti-Corruption Bureau of Ukraine have the right to conduct a pre-trial investigation [4].

Entrepreneurs have the most complaints about cases of illegal pressure on business to the last five state bodies. The greatest likelihood [5, 6] of temporary restriction of rights, freedoms and legitimate interests of citizens is at the stage of operational and investigative activities and further pre-trial investigation. Usually, such temporary restrictions are related to the procedure defined by law for certain operational and investigative measures, investigative and covert investigative actions related to interference in the professional sphere, private and family life of citizens, and the use of other means of coercion that a person may experience during these activities. It is extremely important for such measures and actions to be

carried out by authorized entities in accordance with the requirements of current legislation and international regulations, which guarantee the observance of human and civil rights and fundamental freedoms.

However, in practice there are cases of illegal conducting operational and investigative measures, violation of the provisions of current legislation and regulations, fiscal pressure on business, entering in the Unified Register of pre-trial investigations information about alleged criminal offenses, where officials of the business entity involved, etc. For example, in the latter case, despite the obvious fact of the absence of a criminal offense, the activities of business entities are paralyzed, property is seized, the terms of the contracts and reputation are deliberately disrupted. It is made veiled during the pre-trial investigation, using procedural means of state coercion. The possibility of such a significant violation of the citizens-entrepreneurs rights made by the relevant state bodies and caused by illegal actions of their officials, on the one hand, indicates the imperfection of criminal procedural guarantees of business security. And on the other it indicates the difficulty of bringing perpetrators to criminal, administrative, disciplinary or civil legal liability and the presence of certain shortcomings of legal regulation in compensation for damage and restoration of violated rights of citizens.

The state recognizes that the rights and freedoms of a person violated by illegal actions of bodies carrying out operational and investigative activities or pre-trial investigation, in accordance with Art. 55 of the Constitution of Ukraine, must be protected by a court. Citizens also have the right for personal protection of their rights and freedoms from violations and unlawful encroachments by any non-prohibited means. The Art. 56 of the Constitution of Ukraine guarantees that everyone has the right to compensation at the expense of the state or local governments for material and moral damage caused by illegal decisions, actions or inaction of state authorities, local governments, their officials exercising their powers [7].

In Part 8 of Art. 9 of the Law of Ukraine "On operational and investigative activities" is stipulated that in cases of violation of human rights and freedoms of legal entities in the process of operational and investigative activities, as well as in the case of non-confirmation of involvement in the offense of a person which is a subject to operational and investigative measures, the subjects of the specified activity mentioned in this norm are obliged to restore the violated rights immediately and to compensate the caused material and moral damages in full.

Damage caused by illegal decisions, actions or inaction of the body carrying out operational and investigative activities or pre-trial investigation, in accordance with Art. 130 of the CPC of Ukraine, is reimbursed by the state at the expense of the State Budget

of Ukraine in the cases and in the manner prescribed by law. The state, having compensated the damage caused by the operative, investigator, prosecutor (as the procedural head of the pre-trial investigation), applies the right of recourse to these persons in case of establishing in their actions a criminal offense under a court conviction that has entered into force, or disciplinary misconduct regardless of the expiration of the term of application and the effect of disciplinary action.

In accordance with Part 1 of Art. 3 of Civil procedure code of Ukraine, every person has the right in the manner prescribed by law, to go to court to protect their violated, unrecognized or disputed rights, freedoms or interests [8]. In Art. 1176 of the Civil Code of Ukraine it is regulated the provision on compensation by the state in full, regardless of the fault of the relevant officials, for the damage caused to an individual as a result of his illegal conviction, illegal prosecution, illegal use as a precautionary measure or detention on remand or illegal detention [9].

Restoration of violated rights and compensation for damage caused by illegal actions of state bodies engaged in operational and investigative activities and pre-trial investigation is carried out according to the rules established by the Law of Ukraine "On the procedure for compensation for damage caused to citizens by illegal actions of bodies pre-trial investigation, prosecutor's office and court" [10]. The Ministry of Justice of Ukraine, the Prosecutor General's Office of Ukraine and the Ministry of Finance of Ukraine developed a joint order of March 4, 1996, № 6/5/3/41 and approving the Regulations on the application of the Law of Ukraine "About the order of compensation of the damage caused to the citizen by illegal actions of bodies of inquiry, preliminary investigation, prosecutor's office and court", which determines and details the procedure for applying the provisions of this Law [11].

In Art. 1 this Law stipulates that the damage caused to the citizen is subject to compensation in case of:

1) illegal conviction, illegal notification of suspicion of committing a criminal offense, illegal capture and detention, illegal conduct during criminal proceedings of search, seizure, illegal arrest of property, illegal dismissal from work and other procedural actions that restrict the rights of citizens;

2) illegal carrying out of operative-search actions provided by the laws of Ukraine "About operative-search activity", "About organizational and legal bases of fight against organized crime" and other acts of the legislation.

In these cases, the damage is reimbursed in full, regardless of the fault of officials of the bodies conducting operational and investigative activities or pre-trial investigation.

According to Art. 2 of this Law, the right to

compensation for damage arises in the following cases:

1) issuance of a court acquittal;

2) establishing in the conviction of a court or other court decision (except for a court decision on the appointment of a new trial) the fact of illegal notification of suspicion of committing a criminal offense, illegal arrest and detention, illegal search, seizure, illegal seizure during criminal proceedings on property, illegal dismissal from work and other procedural actions restricting or violating the rights and freedoms of citizens, illegal conduct of operational and investigative measures;

3) closure of criminal proceedings in the absence of an event of a criminal offense, absence in the act of a criminal offense or failure to establish sufficient evidence to prove the guilt of a person in court and exhaustion of opportunities to obtain them.

The right to compensation for damage caused by illegal investigative measures arises when a conviction or other court decision establishes this fact, or in case if within six months after such measures no criminal proceedings have been instituted as a result of these measures.

The results of the analysis of materials of operative-investigative activity, criminal proceedings, judicial practice and the legislative norms allow to conclude that illegal infliction of harm and significant violation of rights, freedoms and legitimate interests of citizens mainly takes place during pre-trial investigation of criminal offenses and operative-search activity.

The damage caused by illegal actions of state bodies carrying out operative-search activity and pre-trial investigation should be compensated to citizens at the expense of the State budget of Ukraine taking into account:

earnings and other incomes which the person lost as a result of illegal actions;

property, money, deposits, securities and interest thereon, shares in the statutory fund of the company and not received profit, valuables confiscated or turned to the state revenue by the court or seized;

fines imposed for the execution of a court sentence, court costs and legal aid costs, as well as moral damage.

Property lost by a person as a result of illegal actions is returned in kind, and in case of impossibility of such return - its value is reimbursed at market prices. Compensation for non-pecuniary damage is provided when illegal actions of state bodies carrying out operative-search activities or pre-trial investigation have led to the disruption of a person's normal life ties, which requires additional efforts for the proper organization of his life. Such damage is recognized as suffering as a result of physical or mental impact, after which a person

lost the opportunity to realize their habits and desires, their relationship with others was deteriorated or other negative moral consequences occurred. In the event of a citizen's death, the right to compensation in the cases provided for by this Law shall pass to his heirs.

The restoration of the rights of citizens violated by the illegal actions of state bodies engaged in operational and investigative activities and pre-trial investigation is the following. Dismissed due to illegal conviction or criminal prosecution persons must be reinstated in their former job, and if this is not possible, the public employment service must offer them another acceptable job. The period of detention and serving a sentence, as well as the time during which the citizen did not work in connection with the illegal dismissal, is included in the total length of service and is taken into account when awarding pensions on preferential terms and years of service. A citizen who has lost the right to use a dwelling as a result of an illegal conviction has the right to return the dwelling he occupied earlier within a month from the date of application, and if it has not been preserved in kind, to get an equivalent tidy dwelling, taking into account family composition and current living space norms. If a citizen has been deprived of military or other ranks, as well as state awards, due to an illegal conviction, his rank must be restored and the awards are returned to him.

In the event of a right to compensation for damage, the state bodies that carried out operational and investigative activities or pre-trial investigation or the court are obliged to explain to the person the procedure for restoring his violated rights and compensation for the damage. Within a month from the date of the citizen's application, these bodies must issue a relevant resolution. If a citizen disagrees with the decision on compensation, he may, in accordance with the provisions of civil procedural law, appeal to the court, and if the decision is made by the court, such a decision is appealed to a higher court on appeal. The issue of compensation for non-pecuniary damage at the request of a citizen is decided by the court in accordance with the current law, and its amount is determined taking into account the circumstances of the case within the limits established by civil law.

In accordance with Part 4 of Art. 1176 of the Civil Code of Ukraine there is no right to compensation for damage to a person who by self-incrimination prevented the clarification of the truth in criminal proceedings and thus contributed to illegal conviction, illegal prosecution, illegal application of precautionary measures or illegal detention.

In the practical implementation of compensation for damage to citizens and restoration of their violated rights there are often raised issues of imperfection of substantive and procedural law and the lack of adequate funding for these costs from the State Budget of Ukraine.

It encourages interested parties to apply to the European Court of Human Rights man. The legal position of this court on the issue of compensation for damage caused by illegal actions of officials of state bodies engaged in operational and investigative activities and pre-trial investigation is outlined quite clearly. Thus, in the case of *Volokh v. Ukraine*, the European Court of Human Rights found the respondent State (Ukraine) liable for violating Articles 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms and ordered to reimburse Volokh O. and Volokh M. 1,000 euro moral damages for unlawful violation of their right to secrecy of correspondence, telegraph and other correspondence [12]. In the case of *Mykhailyuk and Petrov v. Ukraine*, the same court found that the applicants' correspondence had been unlawfully violated and ordered Ukraine to reimburse them for non-pecuniary damage in the amount of EUR 1,200 each [13].

4. DISCUSSION OF RESULTS

Recently, in Ukraine, the courts are considering an increasing number of cases of compensation for damage caused to citizens by illegal actions of state bodies engaged in operational and investigative activities and pre-trial investigation. At the same time, the statistics of judicial practice show a dynamic increase not only in the number of claims for compensation for such damage, but also satisfied appeals and amounts to be reimbursed from the State Budget of Ukraine [14].

Compensation for damage caused to citizens by illegal actions of state bodies engaged in operational and investigative activities and pre-trial investigation is carried out in civil law procedure at the expense of the State Budget of Ukraine. The core of the issue of compensation for such damage is the established and duly proven fact of illegality of the conviction, notification of suspicion of committing a criminal offense, detention and detention, search, seizure of property, removal from work (position), other procedural actions restricting the rights of a citizen, or conducting operational and investigative measures. That is, a person has a legally guaranteed right to compensation if it was unlawfully caused during an operational search activity or pre-trial investigation.

Illegality of actions of state bodies carrying out operative-search activity and pre-trial investigation must be duly confirmed. The citizen has the right to compensation for material (lost earnings, other income, property, money, valuables, etc.) and moral damage and restoration of violated socio-economic (labor, housing, social and other) rights. As a general rule, the subjects of operational and investigative activities and pre-trial investigation must establish the amount of damage and decide on its compensation. If this is not done or the amount of damage does not suit the person, he has the right to apply to the court to appeal such a decision.

It was found that the results of the study showed the lack of effectiveness of criminal procedural guarantees in the field of business protection, some shortcomings of the standardized procedure for compensation for damage caused to citizens by illegal actions of government agencies conducting investigative activities and pre-trial investigation, and restoration of their violated rights.

5. CONCLUSIONS

During the pre-trial investigation, an individual is the most vulnerable and, accordingly, the risk of harm and violation of the rights and legitimate interests of government officials engaged in operational and investigative activities and pre-trial investigation is the most likely. Civil liability for damage caused to a citizen occurs in the presence of a set of such features as:

- 1) special subjective composition of responsible officials;
- 2) an exhaustive list of their illegal actions causing a special tort;
- 3) illegality of actions of these officials, which must be confirmed accordingly;
- 4) compensation for the damage caused by them, regardless of guilt;
- 5) compensation for such damage at the expense of the State Budget of Ukraine;
- 6) compensation for damage in full;
- 7) the right of the state to a reverse (recourse) claim against the guilty person under certain conditions;
- 8) the existence of certain cases when the victim does not receive the right to compensation for the damage caused to him.

Business security and strict observance of property rights are among the most important indicators of investment attractiveness in the country. However, despite recent measures, the pressure on business from government agencies conducting operational and investigative activities and pre-trial investigation in Ukraine is not diminishing. The most significant negative impact on business development is the lack of really established guarantees of its protection in the criminal procedure legislation, which is actively used for illegal purposes by certain officials of the mentioned state bodies. Strengthening such guarantees requires improving the procedure for entering information into the Unified Register of Pre-trial Investigations about:

- committing a criminal offense and appealing it in case of obvious illegality;
- establishment of clearly defined terms of seizure of the business entity's property in criminal proceedings;
- establishing responsibility for officials for procedural abuses during the pre-trial investigation;

increasing the legal capacity of legal entities - business entities in criminal proceedings.

The implementation of the proposed changes should provide a real opportunity to minimize risks for business and increase the efficiency of criminal justice in general.

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