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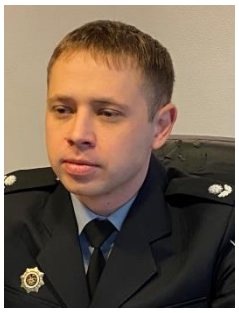

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PRACTICAL ASPECTS OF SEARCH APPEAL: REVIEW OF COURT PRACTICE

Андрій Мельниченко. ПРАКТИЧНІ АСПЕКТИ ОСКАРЖЕННЯ ОБШУКУ: ОГЛЯД СУДОВОЇ ПРАКТИКИ. Розглянуто основні проблемні практичні аспекти, висвітлені в судовій практиці, щодо процедури проведення обшуку та його організації. Досліджено ключові засади розмежування обшуку і огляду місця події крізь призму міжнародної і національної судової практики, а також кримінального процесуального законодавства України. Звернено увагу на аспекти, які слід враховувати практичним працівникам під час підготовки клопотання про проведення обшуку і здійснення самої слідчої (розшукової) дії. Наголошено на конституційному праві особи на оскарження рішень, дій чи бездіяльності службових осіб, що може спричинити визнання доказів, отриманих в результаті обшуку або огляду місця події недопустимими та невизнання їх судом під час розгляду кримінального провадження.

Обшук, відповідно до системи слідчих (розшукових) дій кримінального процесуального законодавства є найбільш ефективною в доказовому аспекті дією і спроможна створити певний доказовий фундамент. Однак при цьому важливим аспектом залишається дотримання права на недоторканність житла особи, на приватне і сімейне життя, свободу та особисту недоторканність тощо. Сучасний кримінальний процес характеризується інтенсивним впровадженням у кожен інститут правозахисних аспектів, які повинні дотримуватися уповноваженими службовими особами для попередження визнання доказів недопустимими та невизнання результатів обшуку належними доказами в межах конкретного кримінального провадження. У випадку порушення своїх прав і свобод під час обшуку, особа наділена конституційним правом на оскарження.

У зв'язку з цим законодавцеві необхідно звернути увагу на спрощення процедури проведення огляду місця події відразу після вчинення кримінального правопорушення, з врахуванням забезпечення прав людини та громадянина в рамках усіх вищезазначених процедур.

Ключові слова: *обшук, огляд місця події, судова практика, процедура оскарження, ЄСПЛ.*

Relevance of the study. Search is the most regulated investigative (search) action in criminal proceedings. This feature of the search is justified by the high degree of restriction of rights and freedoms of the man and the citizen, in respect of housing or other possession of which the decision of the investigating judge issued permission to conduct a search. Thus, the person's right to inviolability of the home, property, liberty and security, etc., and many other constitutional rights and freedoms of the individual are restricted. Search in the system of investigative (search) actions has a special place. Recent court practice has pointed to legislative inaccuracies and conflicts that lead to mass appeals against investigative judges' decisions or the actions of law enforcement officials during searches. Similarly, the question in the theory and practice of criminal procedure arises during the distinction between search and inspection as related investigative (search) actions, which creates the preconditions for appealing the search in court. After all, in court practice there are also examples of appeals against the search, which was conducted as an inspection of the scene. There is a fine line between a search and an inspection, which may have adverse consequences for those authorized to conduct a pre-trial investigation. The analysis of court practice contributes to the identification of shortcomings in the legislation governing a particular institution, as well as the formation of algorithms for the implementation of procedural measures according to the principle of the rule of law. Practitioners should seek such an analysis and work to prevent appeals from searches, which could lead to the destruction of the evidence base in a particular criminal proceeding.

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Recent publications review. The issues of preparation and conduct of the search, as well as its features in the context of current criminal procedural law were considered by R. Belkin, V. Konovalova, A. Ratinov, A. Filippov, S. Sheifer, V. Shepitko, etc.

The research paper's objective: to study the legislative and practical aspects of the search from the standpoint of court practice, as well as to draw attention to the distinction between search and inspection as related investigative (search) actions. The task of the scientific article is to form a belief in the need for investigators, prosecutors to study the practice of national courts and the European Court of Human Rights (ECtHR) for proper application and attention to respect for constitutional and procedural rights and freedoms of the man and the citizen.

Discussion. The main components of the search are its purpose, objectives and procedural order of implementation. Current human rights trends determine the need to take into account the observance of the individual's rights and freedoms in the procedural order of any procedural measure by preventing their arbitrary violation. S.S. Kulyk states that «the main purpose of the search is to identify and obtain documents and items that are relevant to criminal proceedings». However, it is important to add to this goal other, not covered by the wording properties of the search, in particular legality, ie legal detection and obtaining, as well as the lack of alternatives, which is the lack of opportunity to obtain necessary items and documents in other ways [1, p. 233–234; 2, p. 214]. The purpose of the search is specified by A. Ratinov, who notes that the following procedural tasks are solved by conducting a search:

– search and seizure of material and written evidence;

– identification of the suspect, accused and materials that facilitate his/her search;

– detection of property that provides compensation and possible confiscation, as well as the seizure of items withdrawn from circulation, etc. [3, p. 17].

The author notes that the first task of the search is performed by identifying and removing forms of documents (blank, filled, semi-filled, reworked, changed, stamped, stamped); income and expenditure documents, destroyed documents; diaries, notebooks, address books, correspondence, invoices and other financial information, etc. In addition, it is important to find equipment for counterfeiting or making fakes. These can be specially equipped printers, scanners, computers, substances intended for text etching, stamps, seals, etc. [4, p. 141]. S. Kulyk adds to this list materials that may have been used for packing goods and money (paper, rope, nails, packaging board, etc.), pawnshop and commission shops receipts, computer system and computer media, CDs, diskettes, computer magnetic tapes, contracts and agreements, their projects (fragments), etc. [5, p. 268]. This is a rather narrow list of items of search, which theoretically need to be found in a particular criminal case to confirm certain elements of the criminal offense of material, electronic evidence and documents. These items are mainly found during the investigation of criminal offenses in economic activity or official criminal offenses, etc. However, for all categories of criminal offenses, there is a typical list of items that must be found and seized during a search, because they are the basis for proving the guilt of a suspect accused of committing a specific socially dangerous act.

The above search tasks have been formed by A. Ratinov in the second half of the twentieth century, however, despite this, they are relevant in the modern criminal procedure. In Part 1 of Art. 234 of the Criminal Procedural Code of Ukraine (hereinafter – CPC of Ukraine) states that «the search is conducted to identify and record information about the circumstances of a criminal offense, finding a weapon of a criminal offense or property obtained as a result of its commitment, and locating wanted persons» [6]. It follows that the first task of the search, formulated by A.R. Ratinov is fully executed, because the instrument of a criminal offense or property obtained as a result of a criminal offense is considered to be a material evidence, i.e. the factual data that are then used to prove the guilt / innocence of the suspect, accused. In addition, the evidence is information about the circumstances of the criminal offense, the detection and fixation of which is carried out during the search.

In our opinion, during the search it is important not only for the official to perform his/her tasks, but also for the way to ensure and respect the constitutional human rights and freedoms, because every person according to the Constitution and CPC of Ukraine has the right to appeal as a result of which all the evidence obtained during the search will be declared inadmissible. This is the reason why authorized officials need to pay special attention to the observance of human rights during the search and its organization in accordance with the procedural order established by the CPC of Ukraine and necessarily taking into account court practice. It is appropriate to pay attention not only to the search in the light of national law, but

also in the light of the provisions of the European Convention on Human Rights (hereinafter – the Convention). Thus, according to Article 8 of the Convention, «everyone has the right to respect for his/her private and family life, his/her home and his correspondence» [7]. However, the provisions of Article 8 of the Convention do not recognize the right to the inviolability of the home as absolute, as indicated in Article 8 § 2 of the Convention: «Public authorities may not interfere in the exercise of this right, except in cases… to prevent riots or crimes …» [7]. The rule defines a specific list of cases according to which the right to inviolability may be restricted, but does not provide for arbitrary restriction or violation. Protection of the right by the Convention does not mean similar protection by national law. Today, Ukraine is moving towards the European space and strives for the right to be called a state governed by the rule of law, not only legally, but also in fact, given the existing human rights and law enforcement practices and so on.

Appeals against the results of a search after its conduct are primarily due to the inability of law enforcement officials to maintain a fair legally determined balance between respect for human rights and their reasonable restriction within the current legislation. As a rule, the scope of restriction of a certain constitutional right or freedom of a person is prescribed in the procedural order of a procedural measure (investigative), but we can state that in current criminal procedural law there are some legal inaccuracies in the regulation of the search violations of a person's rights during a search. Legal practitioners should keep in mind that searching and inspecting a person's home or other property is one of the most effective in forming the evidence base, and therefore taking into account all possible violations to prevent them, including violating a person's right to inviolability, freedom and personal integrity, property, personal and family life, etc., must be carried out carefully and thoroughly so that in the future all information obtained as a result of a search or inspection becomes the fundamental basis of the evidence.

The need to respect human rights and freedoms in conducting searches and compliance with criminal procedures is due to the high rate of searches, according to official statistics. Thus, according to official data, in 2017 the courts of Ukraine received 188,884 petitions for a search of a home or other person's property, but in 2019 in Kyiv alone 19,300 decisions were recorded based on the results of searches. These data are provided by us in this study rather than to compare statistics, but to form an understanding of the extent of law enforcement appeals to the use of investigative (search) action in the form of search, which necessitates its legislative improvement, etc. [8-9].

When searching for material for this study, we found that Part 1 of Art. 233 of the CPC of Ukraine states the following: «No one has the right to enter the home or other property of a person for any purpose, except with the voluntary consent of the person who owns them, or on the decision of the investigating judge…» [6]. It is clear that the search is carried out on the basis of the decision of the investigating judge, because its implementation is subject to judicial control, but the inspection of the scene (housing or other property) is not subject to such judicial control under current law, therefore, there are a number of questions about the legality of penetration into the home of a person of the investigative task force to record the traces of a criminal offense without the proper written permission of the owner. Sometimes the need to seize this document is ignored by the investigator, which is the basis for appeal if necessary, the owner of the legality of such intrusion. We adhere to the position that there are no signs of arbitrary restriction or violation of the right to inviolability of the home in the intrusion of the investigator into the dwelling or other property of a person within the investigative task force for the preparation of relevant procedural documents, after all, in this case we are talking about the termination of a criminal offense or the need to accumulate primary information for the organization of further pre-trial investigation. Thus part 3 of Art. 233 of the CPC of Ukraine defines a clear list of cases according to which the investigator, coroner, prosecutor has the right to enter the home or other property of a person before the decision of the investigating judge. Thus, such cases include the following:

– saving lives and property;

– direct prosecution of persons suspected of committing a criminal offense [6].

At the same time, the legislator provides another safeguard against violations of constitutional human rights and freedoms, because after penetrating into a person's home or other property in certain cases, the prosecutor, investigator, inquiry officer in consultation with the prosecutor must immediately after such actions apply to the investigating judge about the search. There is a paradox in this situation: the legislator has identified several cases for an

authorized official to enter the home or other property of a person, after which he/she must immediately apply to the investigating judge for a search, other cases require a decision to penetrate, but this ignores the regulation of the procedural order for inspecting housing or other property in the event of a criminal offense there. Only Part 2 of Art. 237 of the CPC of Ukraine stipulates that the inspection of housing or other property of a person is carried out in accordance with the rules of this Code, provided for the search of housing or other property [6]. Based on the content of this provision, the following example can be given: if the place of commitment of a criminal offense is the home of the victim, then without his/her consent to inspect the scene, it is impossible to do otherwise. Thus, the inspection of housing is conceptually parallel to the search of housing, although compared to the search the inspection has a slightly different meaning and legal nature [10].

It should be noted that an inspection of a person's home or other property with his or her voluntary consent does not guarantee the observance of the constitutional rights and freedoms of the person whose home or other property is subject to inspection. Theoretically, this is a risk of violating the right to liberty and security of person, as an official may apply pressure to a potential suspect or accused to sign a document, i.e. voluntary consent to the entry of law enforcement officers. The results of this inspection are factual data, which are then attached to the materials of criminal proceedings. Judicial practice of the Supreme Court in decisions of 26.02.2019 in case № 266/4000/14-k and off 12.02.2019 in the case № 159/451/16-k forms a legal position on the recognition of the legality of the inspection subject to obtaining the voluntary consent of the owner of housing or other property. Thus, the decisions state that «determining the admissibility of evidence obtained during a search of a person's home or other property, if the existence and / or voluntary consent of the owner is questioned, the court must proceed from the totality of all the circumstances that accompanied this investigative action, not limited to the presence of evidence of such» [11–12]. That is, the presence of voluntary written consent in the modern interpretation of the court practice is not a guarantee of respect for human rights and freedoms and the absence of any violations by authorized officials. Thus, the existence of this consent is not an obstacle to appeal to the person in whose home or property was inspected, because the court decides on the legality, based on all the facts. The ECtHR also draws attention to this in its judgment of 7 November 2013 in «Belousov v. Ukraine», emphasizing that any interference under Article 8 § 1 of the Convention must be justified under Article 2 § 1, i.e. it must be carried out «in accordance with the law» and is «necessary in a democratic society» to achieve one or more legitimate lawful purposes for which a procedural measure is applied [13].

The judicial practice of the Criminal Court of Cassation within the Supreme Court recognizes the sufficient presence of voluntary consent to enter and inspect a person's home. In the practice of appealing the recognition as evidence of the results of a search or inspection, there are court decisions in which the position of the appellant is not accepted. For example, in the Supreme Court ruling in case № 630/515/17 of 10 September 2019, the Court did not accept the defense counsel's position on inadmissibility as evidence of the scene inspection report [14]. In proving this fact, the defense counsel relied on the fact of conducting investigative actions before entering information about the criminal offense into the Unified Register of Pre-trial Investigations and in the absence of a decision of the investigating judge, etc. It is necessary to agree with the justice position, because the decision justifies the legality of obtaining evidence during the inspection by law. In particular, from the content of the provisions of Part 1 of Art. 233 of the CPC of Ukraine, it follows that the legislator, in addition to the possibility of penetration into the home or other property of a person with the decision of the investigating judge, provides the opportunity to enter the home or other property of the person with the voluntary consent of the owner. However, the Court proceeded from the analysis of criminal procedural norms: Part 2 of Art. 233, part 2 of Art. 234, part 2 of Art. 237 of the CPC of Ukraine and concluded that the inspection of housing or other property of a person may be conducted with the voluntary consent of the person who owns it, provided there are procedural guarantees of expressing genuine will to give voluntary consent. As noted above, the Court must be firmly convinced that the consent was given voluntarily [14-15].

Judicial practice states that the investigative task force disguises the scene of a search in order to further save time on other investigative actions or activities, but such actions radically violate the set of human rights that must be respected. during the search and are absolutely not recognized by the court as lawful and justified to obtain certain evidence. In this regard, the Supreme Court, in its judgment in case № 755/6685/17 of 13 February 2020, expressed its

position as follows: «… it is impossible to recognize admissible evidence obtained in substantial violation of the requirements of criminal procedure law, and therefore the court of first instance correctly concluded that the investigator, contrary to the law, having removed the white powdery substance – amphetamine, he drew it up by the protocol of the scene inspection…» [16]. The court further notes that the investigator did so in order to give the performed action a lawful appearance We also refer to the decision of the Supreme Court №640 / 2449/16-k of 22.05.2019, which similarly reveals the illegality of drawing up the inspection report during the search. Thus, «… in the commission ... of the crime» were exposed (persons),… in the apartment belonging to the latter, an inspection was conducted, during which a mask, a pistol, gas canisters and money… were found, which were confiscated. The specified investigative action is procedurally formalized by the relevant protocol as an inspection of the scene. According to the report, «the purpose of this investigative action was to identify weapons and means of committing the crime, as the inspection revealed drawers on the table and chest of drawers. In fact, it was a search» [17]. Based on the studied decisions, it is necessary to state the facts of masking by prosecutors and investigators of the search to facilitate the obtaining of evidence and speed up the disclosure of criminal offenses, but the rights and freedoms are observed, as well as mandatory participation of judicial control mechanisms. According to the court position in both documents taken as an example, the evidence obtained will be declared inadmissible and will not be taken into account by the court during the decision. Based on the conclusions of the Supreme Court decisions, it can be argued that conducting a search and avoiding its disguise will improve the evidence base and the quality of evidence and the conduct of criminal proceedings in general. The intensification of human rights tendencies in all areas of law and legislation is very much reflected in the conduct of criminal proceedings and proving the guilt or innocence of the suspect or accused.

Examination appeals are also often challenged due to the uncertainty of the homeowner or other entity. Yes, it is quite interesting to decide: who is the actual owner of the home in which the inspection is to be conducted: the owner or the tenant? The person is not the owner of the dwelling, but only its user, but during the inspection the right to inviolability of the dwelling of the person living in it, i.e. the tenant, will be limited. There is also the Supreme Court practice on this issue. Thus, in the decision of the Supreme Court № 346/7477/13-k of 31.10.2019, the Court notes: «… conducting investigative actions with the permission of the apartment owner in the part of the apartment rented by the person violates the right to inviolability of the tenant's home» [18]. Accordingly, this should be taken into account when preparing a request for a search, because in fact the search is conducted by the tenant, in the room where he/she lives legally, ie in this area is his/her right to inviolability of home, to privacy and family life, to freedom and personal integrity, etc. The determination of an improper subject of possession in a court decision may be grounds for appealing the results of the search and declaring the evidence formed on their basis inadmissible.

Conclusions. According to the system of investigative (search) actions of criminal procedural law, a search is the most effective in the evidentiary aspect of action and is able to create a certain evidence base. However, respect for the right to inviolability of the person's home, private and family life, liberty and security of person, etc. remains an important aspect. The modern criminal procedure is characterized by the intensive introduction of human rights aspects in every institution, which must be observed by authorized officials to prevent the admission of evidence as inadmissible and non-recognition of search results as relevant evidence in specific criminal proceedings. It should be emphasized that in case of violation of their rights and freedoms during the search, the person has the constitutional right to appeal.

This scientific article examines the main rulings of the Supreme Court, which relate to the most common violations of the search procedure by authorized officials. Today, there are a significant number of court decisions on non-compliance with the search procedure not only of national courts, but also of international courts, such as the European Court of Human Rights. That is why it is advisable for legal practitioners to pay attention to the distinction between search and inspection, registration of procedural documents, the procedure for conducting search and inspection, as well as to carefully and attentively approach to the preparation of requests for search. Similarly, the legislator should pay attention to the simplification of the procedure for inspecting the scene immediately after the commitment of a criminal offense, taking into account the protection of rights of the man and the citizen in all the above procedures.

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ABSTRACT

The article deals with main problematic practical aspects highlighted in court practice regarding the search procedure and its organization. The key principles of delimitation of search and inspection of the scene through the prism of international and national judicial practice, as well as criminal procedural legislation of Ukraine have been studied. The attention has been paid to the aspects that should be taken into account by practitioners when preparing a request for a search and the implementation of the investigative (search) action. The emphasis has been placed on the individual's constitutional right to appeal against decisions, actions or omissions of officials, which may lead to the recognition of evidence obtained as a result of a search or inspection of the scene inadmissible and non-recognition by the court during criminal proceedings.

Keywords*: search, inspection of the scene, court practice, appeal procedure, ECtHR.*