Contradicting Verdicts of Courts in Ukraine: on the Way to Ensuring the Unity of Judicial Practice

Galyna Mykhailiuk†

Abstract

The procedural powers of the Grand Chamber of Supreme Court and the Cassation Courts of Supreme Court, which should ensure the unity of court practice, have been analyzed in the article; the areas of concern and the ways of resolving thereof were identified. The author emphasized that ensuring the unity of judicial practice is a priority for the Courts of Cassation in the newly created Supreme Court. A number of Supreme Court decisions have been summed up and discussed in order to work out common approaches, determined with what legal opinions of the Supreme Court are controversial and need correction.

Key words: investigating judge, legal opinion, subject of appeal, motivated decision, complaint, criminal offence, pre-trail investigation.

† Dr. Habil., Ph.D., Associate Professor in Department of European and International Law, National University "Kyiv Mohyla Academy" and Lead Scientific Advisor, Industrial Property Department Scientific – Research Institute of Intellectual Property National Academy of Law Sciences of Ukraine. Deputy Head of Law Enforcement Committee in the Parliament of Ukraine, 3A Sadova str., Kyiv, Ukraine, 01008.

1. Introduction

The procedure ensuring the unity of court practice, namely proceeding in a case by chamber, the joint chamber of the cassation court or the Grand Chamber of the Supreme Court is of major importance among the numerous novels of the Procedural codes of Ukraine.

Most according to it, proceedings are conducted in the cases which are submitted to the cassation courts within the framework of the Supreme Court and which form the court Practice. At the same time, after the new Supreme Court has been established the court practice is being developed not from scratch, which means that judges may not bypass the legal positions expressed by the Supreme Court of Ukraine, since according to Article 360-7 of the Code of Civil Procedure of Ukraine (from 2004), the opinion of the Supreme Court of Ukraine on the application of the provisions of law should be taken into account by other courts of general jurisdiction when they use such provisions of law.

In this regard Procedural legislation of Ukraine prescribes that a court conducting cassation proceedings in a case by the panel of judges or the chamber (joint chamber) shall refer the case to the Grand Chamber of the Supreme Court, if such a panel or chamber (joint chamber) deems it necessary to vary from the opinion on the application of legal provisions in similar legal relations set forth in an earlier decision of the Supreme Court of Ukraine.

It is not an imperfection of procedural rules that the legislator has granted such a right only to the court of cassation, but rather a mechanism meant to ensure the unity of court practice with a review to turning the positions of court into its reliable "pillars" and sources contributing to predictability of adjudication of certain categories of cases.

This is the only one form of ensuring the unity of court practice and the exercise

of procedural powers by the Courts of Cassation within the Supreme Court and Grand Chamber of Supreme Court. Irrespective that the Grand Chamber of Supreme Court and Cassation Courts of Supreme Court are the component parts of the Supreme Court, Grand Chamber of the Supreme Court has no authority to review or otherwise interfere with the activities of cassation courts comprising the Supreme Court. Moreover, the provisions of the Procedure Codes of Ukraine also prescribe other mechanisms of binding procedural interaction of these judicial bodies within the Supreme Court with a view to ensuring the unity of court practice (Luspenyk, 2018).

The ECHtR, examining the problems of different application of procedural and material law in the court practice, stated:

> *29. While certain divergences in interpretation could be an inherent consequence of any judicial system which, like the Romanian one, is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, the Court notes that in the case at hand the conflicting interpretations stemmed from the same jurisdiction which, in addition, was the court of last resort in the matter. Moreover, no effective mechanism was available for the Supreme Court to resolve conflicts between decisions of the lower courts (see* ***Păduraru****, §§ 99 and 109, and Beian, § 37, cited above, and, mutatis mutandis, Schwarzkopf and Taussik v. the Czech Republic (dec.), no. 42162/02, 2 December 2008) (Tudor Tudor v. Romania).*

Ensuring the unity of judicial practice is a priority for the Courts of Cassation in the newly created Supreme Court. During the time before the start of its procedural activity (early January 2018), the Cassation Courts at the meetings of the judges constantly summed up and discussed virtually all legal positions of the previous Supreme Court of Ukraine (Tuieva, 2018) in order to work out common approaches, determined with what legal opinions of the Supreme Court of Ukraine are

controversial and need correction.

2. Judgements of the Supreme Court v Supreme Court of Ukraine[1]

It should be noted that during the development of the codes of practice, commentaries of academics and practitioners on their drafts, and after their entry into force and the first practice of the new Supreme Court on application of novels of Procedural Codes, there are numerous debates in the legal literature (Kostin, 2018; Zozulya, 2017; Luspenyk, 2018) on whether a new Supreme Court will deviate from the legal positions of the Supreme Court of Ukraine (how it will be justified), or will ignore them.

For example, N. Zozulya in his article "Legal Positions of the Supreme Court as the Basis of Constancy and Unity of Jurisprudence" (2017) wrote: *"there is a reason to hope that the new Supreme Court will reconsider the most ambiguous and contradictory legal positions of the Supreme Court of Ukraine and will correct the mistakes made by the law enforcement, as well as develop and promote the development of a unified judicial practice in Ukraine through a qualitative review of court cases and the adoption of just and legitimate decisions".*

After initiating cases, using the procedural rules of authority, the Cassation Courts often referred to the Grand Chamber of the Supreme Court, since it considered it necessary to step back from the conclusion on the application of the rule of law in similar legal relations set forth in the previously adopted decision of the Supreme Court of Ukraine. Mostly, the motives from which the Cassation Courts applied to the Grand Chamber of the Supreme Court have found their reasoned confirmation in the motivated decisions of the Grand Chamber of the Supreme

(1) On September 30, 2016 Constitutional amendments regarding judiciary came into force. As a result new Supreme Court (200 judges) was created, while its predecessor the Supreme Court of Ukraine (48 judges) ceased to exist.

Court. By the way, it should be noted that in many cases the Grand Chamber of the Supreme Court, in agreement with the Cassation Courts motives, returned to the legal positions previously expressed in court decisions by the higher specialized courts, as well as in their resolutions of plenums.

In some legal issues the Supreme Court of Ukraine within less than one year, changed its legal opinion three times, coming back to the previous one. This in turn led to the cancellation of more than 50 court decisions of the High Specialised Courts, and as a result, the High Specialised Courts, being binding by the conclusion of the Supreme Court of Ukraine, cancelled more than 400 court decisions of lower courts, and accordingly the Courts of Appeal abolished court decisions of the first instance courts. At the same time, court decisions were cancelled regularly, where the courts followed the instructions of the High Specialised Courts, but afterwards the Supreme Court of Ukraine again changed its opinion.

During a short period of procedural legal relations between the Grand Chamber of the Supreme Court and the Courts of Cassation in the Supreme Court, deviations from the legal opinions of the Supreme Court took place in almost 20 cases, ensuring the unity of judicial practice in a number of categories of cases.

Another equally important form of ensuring the unity of judicial practice is the right of the Court of Cassation in the Supreme Court to refer the case to the Grand Chamber of the Supreme Court if it concludes that the case contains an exclusive legal problem and such a transfer is necessary to ensure the development of law and the formation of a single law enforcement practices.

Article 309 of the Criminal Procedure Code (hereinafter – CPC) provides an exhaustive list of rulings of investigative judges that can be appealed. Ruling of investigating judge upon results of consideration of the complaint against a decision, act or omission during pre-trial investigative action, may be related to:

1) quashing the decision of the investigator or prosecutor;

2) order to stop conducting act;

3) order to conduct a certain act;

4) refusal to satisfy the complaint.

Additionally, according to paragraph 3 Article 309 of the CPC a ruling of investigating judge based on results of consideration of complaint against a decision, act, or omission of the investigator or prosecutor may not be appealed against, except a ruling of refusal to satisfy the complaint filed against decision to close criminal proceedings.

Some investigative judges make mistakes due to the incorrect interpretation and application of procedural rules and incorrect understanding of the role of court in the mechanism of protection of rights and legitimate interests of the person established by the Constitution of Ukraine (Articles 1, 3, 55 and others), particularly in deciding on the launch of pre-trial investigation procedure. For example, the decision of the investigative judge of Bobrovick District Court of Chernihiv region from 7 February 2013 returned the complaint of a "Person A" on the illegal omissions and obligation of Bobrovick District Department of Internal Affairs of Ukraine in Chernihiv region to enter information on criminal offence to the Register on the basis that he is not a person entitled to file the stated complaint under subparagraph 1 paragraph 2 Article 304 of the CPC (Kostin, 2018).

Article 309 of the CPC defines an exhaustive list of decisions of the investigating judge, which may be appealed in an appeal procedure. However, the mentioned decision of the investigating judge is not included in this list. In addition, paragraph 3 Article 309 of the CPC provides that complaints against other decisions of the investigating judge are not subject to appeal, and objections to them may be filed during the preparatory proceedings before the court. *Consequently, the Court of Appeal, having established that the decision of the investigating judge is not subject to appeal and refusing to open the appeal proceeding on the complaint of*: "Person B" acted in

accordance with the requirements of the criminal procedural law.

Such a position is consistent with the conclusions set forth in the Supreme Court of Ukraine from November 16, 2017 (Proceedings No. 5-357, p. 17) regarding the procedure set forth in paragraph 3 of Article 309 CPC on prohibition of appeals.

Recently a number of cassation appeals on procedural decisions of investigating judges were submitted to the Supreme Court. In fact, the Supreme Court practice is based on the same arguments and provisions of the CPC. For instance, on 22 January 2019, having verified the arguments of the cassation appeal and the copies of court decisions attached to it, the Supreme Court reached the following conclusion. Article 309 of the CPC of Ukraine defines an exhaustive list of decisions of an investigating judge that may be appealed in an appeal procedure. According to paragraph 2 Article 309 of the CPC, during the pre-trial investigation, an appeal may be appealed against the decision of the investigating judge regarding the return of the complaint against the decision, action or omission of the investigator, the prosecutor or the refusal to open the proceedings thereon.

Thus, the review of an investigating judge's decision to refuse to comply with a complaint regarding the inaction of an investigator, which a "Person C" appealed to the court of appeal, is not foreseen by the criminal procedural law.

According to paragraph 4 Article 399 of the CPC of Ukraine, the judge-rapporteur refuses to open proceedings if the appeal is filed against a judicial decision that is not subject to appeal in an appeal.

However, paragraph 6 Article 399 of the CPC of Ukraine stipulates that the decision on the return of the appeal or the refusal to open the proceedings may be appealed in cassation proceeding, taking into account that the subject of review of the court of cassation is the decision of the Court of Appeal to refuse to open the appeal proceedings.

Under the subparagraph 2 paragraph 2 Article 428 of the CPC of Ukraine, the

court of cassation decides to refuse to open a cassation proceeding, if from the cassation complaint submitted to it's judgments and other documents, it is seen that there are no grounds for the satisfaction of the complaint.

From the content of the court of appeal ruling, "Person C" filed an appeal against the decision of the investigating judge of the Desniansky district court in Chernihiv on 19 November 2018, which refused to satisfy his complaint about the inaction of the investigator in particularly important cases of the investigation department of the Security Service of Ukraine in Chernihiv region.

According to the requirements of paragraph 3 Article 307, Article 309 of the CPC of Ukraine, the abovementioned decision of the investigating judge on the inaction of the investigator's appeal is not subject to appeals, and objections to it may be filed during the preparatory proceedings in court.

Thus, the judge of the Court of Appeal, having established that the cassation appeal was filed by a decision of the investigating judge, which is not subject to appeal in an appeals procedure, and the investigating judge within his/her competence made such a decision, adopted a reasoned decision refusing to open the proceedings under the appeal.

The Supreme Court based on the paragraph 2 Article 428 CPC of Ukraine decided to deny the opening of cassation proceedings under the cassation appeal of "Person C" on the decision of the investigating judge of the Desniansky district court of Chernihiv from 19 November 2018 and the decision of the Chernihiv Court of Appeal of 28 November 2018. The Supreme Court decision cannot be appealed.

3. Appeals against the decision of the investigating judge

The Supreme Court made a couple of attempts to put an end to the question of the procedural possibility of appealing against the decision of the investigating judge on appeal at the pre-trial investigation stage (in order to satisfy petition of

the investigator and appoint an unscheduled check).

On 23 May 2018, the Grand Chamber of the Supreme Court considered cassation complaints against the decisions of the Donetsk Regional Court of Appeal for refusing to open an appeal proceedings in respect of complaints from investigators regarding the issuance of permits for unscheduled inspections on legality and purposeful use of land and compliance with legislative requirements in criminal proceedings and normative legal acts on occupational safety, industrial safety, labour legislation. These proceedings were submitted for consideration by the Grand Chamber as containing an exclusive legal issue (Supreme Court Decision No. 243/6674/17-k; No. 237/1459/17).

The Grand Chamber of the Supreme Court passed a decision on the mandatory review of the decisions of investigating judges on the appointment of unscheduled inspections.

The Grand Chamber of the Supreme Court recognized the unlawful practice of the Courts of Appeal, according to which they refuse to open such proceedings, basing it on the absence of the mentioned decisions of the investigating judges in the list of decisions subject to appeal in the course of pre-trial investigation (Article 309 of the CPC).

The decisions of court of appeal were revoked and a new appellate hearing was set up. The Grand Chamber of the Supreme Court concluded that the decisions of investigating judges on the appointment of unscheduled inspections should be reconsidered by way of appeal on the basis of point 17 paragraph 1 of Article 7 and paragraph 1 of Article 24 of the CPC, which guarantee the right to appeal against such a court decision. In support of its decision, the Grand Chamber of the Supreme Court also referred to the provisions of paragraph 6 Article 9 of the CPC, which states that, in cases where the provisions of the CPC do not regulate or ambiguously regulate criminal proceedings, the general principles of criminal

proceedings, as defined in paragraph 1 of Article 7 of the CPC (Decision No. 243/6674/17-k, No. 237/1459/17).

The ruling dated from 6 March 2018 in case No. 243/6674/17-k is not a final decision and the question of which chamber of the Supreme Court to transfer the case, is being considered.

At the same time, the situation regarding judicial decisions not to satisfy the complaints on investigator's / prosecutor's / investigation body's refusal to initiate criminal proceedings (Article 236-2 of the CPC, 1960) or decision to close the case (Article 236-6 of the CPC, 1960), which entered into force prior to the adoption of the current CPC, is not as unequivocal and requires a differential approach (Kostin, 2018). In any case, such complaint should be subject to judicial review. Meanwhile, court decisions to keep in force the investigator's / prosecutor's / investigation body's refusal to initiate criminal proceedings shall be of no critical value to the investigative judge, as the current CPC in comparison with the CPC of 1960 significantly extends the choice of verification means of crime statements / reports and the scope of their use. Instead, the investigative judge may take into account the judgment to leave in force the reasonable decision of the stated officials to close the criminal proceedings on the results of preliminary investigation, which was adopted after the launch of a criminal case (Kostin, 2018).

It is advisable that investigative judges pay attention to the fact that investigators and prosecutors may create preconditions of other nature to impede the right of applicants to appeal in court the inaction of the stated officials. The vast majority of applicants are not present and, consecutively, are not aware of the time of adoption of investigator's / prosecutor's decision to refuse registration of a crime statement / report, and as they do not generally receive the corresponding notification (or receive it with a significant delay) (Kostin, 2018). As a result, in great majority of cases they cannot fulfil the requirements of paragraph 1 Article 304 of the CPC

regarding the filing of a complaint within ten days and exercise their right to appeal the inaction of the prosecutor (investigator), i.e. non-registration of a crime statement / report.

4. Concluding Remarks

Nowadays, one of the key issues in the work of the Supreme Court is to identify how to ensure unity and consistency of the court practice. For instance, on 13 February 2019 the judge of the Cassation Administrative Court of the Supreme Court, Volodymyr Kravchuk, appealed to lawyers to report on cases of controversial practices of the Cassation Administrative Court of the Supreme Court. As the judge Kravchuk pointed out, the Cassation Administrative Court has a working group on ensuring the unity of judicial practice.

In the above mentioned context, it should be noted that the analysis of the aforementioned provisions makes it possible to conclude that transfer of the case to the Grand Chamber of the Supreme Court is not mandatory and is carried out at the discretion of the court, which considers the case in cassation, in the absence of grounds: firstly, there is an exclusive legal problem, and secondly, the transfer is necessary to ensure the development of law and the formation of a single established practice in application of law.

Despite the rather short period of the Supreme Court activity, the Grand Chamber has considered a large number of cassation complaints relating to matters of judicial jurisdiction. It is worth mentioning that the mechanism for resolving conflicts of jurisdiction is effective and contributes to the unity of judicial practice.

Academics and practitioners often point out that such a reason for referral for consideration by the Grand Chamber of the Supreme Court is a novelty of procedural law and the criteria are only being worked out.

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