

UDC 34.343.13

DOI <https://doi.org/10.32849/2663-5313/2022.12.08>**Oleksandr Babikov,***PhD in Law, Postdoctoral Student, Scientific Institute of Public Law, 2a, H. Kirpa street, Kyiv, Ukraine, postal code 03055, babikovoleksandr@ukr.net***ORCID:** orcid.org/0000-0003-4003-5198

Babikov, Oleksandr (2022). Admissibility of evidence obtained during covert investigative (search) actions outside the scope of pre-trial investigation in criminal proceedings. *Entrepreneurship, Economy and Law*, 12, 47–51, doi <https://doi.org/10.32849/2663-5313/2022.12.08>

ADMISSIBILITY OF EVIDENCE OBTAINED DURING COVERT INVESTIGATIVE (SEARCH) ACTIONS OUTSIDE THE SCOPE OF PRE-TRIAL INVESTIGATION IN CRIMINAL PROCEEDINGS

Abstract. Purpose. The purpose of the article is to study the correlation between the subject matter of proving and the purpose of covert investigative (search) actions, and their importance for verifying evidence for admissibility, and to formulate the legal position on the assessment of evidence obtained outside the scope of pre-trial investigation in criminal proceedings. **Results.** Ensuring the rule of law, legality, the right to liberty and security of person, secrecy of communication and non-interference with private life during covert investigative (search) actions in criminal proceedings should be considered not only as general principles of criminal proceedings, but also as rights and freedoms guaranteed by the Constitution of Ukraine and the European Convention on Human Rights. The right to respect for private and family life guaranteed by Article 8 of the European Convention stipulates that public authorities shall not interfere with the exercise of this right, except such interference is in accordance with the law and is necessary. The correct determination of the subject matter and the scope of proving in a particular criminal proceeding, and the comparison of the purpose of covert measures with the circumstances to be proved, is one of the main prerequisites for ensuring guarantees of rights and freedoms in the sphere of private and family life. The study of the subject matter of proving, determination of its scope, in addition to the circumstances of the act, entails the study of the content of actions of each person who have participated in the commission of a criminal offence. **Conclusions.** The author concludes that the implementation of the principles of the rule of law, legality, respect for human dignity, ensuring the right to liberty and personal integrity, secrecy of communication and non-interference with private life, requires that when verifying evidence for its admissibility, not only the scope of rights and powers of actors, who make decisions on permission to covert investigative (search) actions and conduct these actions in the context of holding a certain position, of involving in a group of investigators or prosecutors shall be considered are conducted, but also the performance of such actions within the scope of the pre-trial investigation in terms of legal facts and parties.

Key words: covert investigative (search) actions, criminal procedure, subject matter of proving, guarantees of rights and freedoms, privacy.

1. Introduction

The ongoing reform of the criminal procedure legislation, the introduction of such a new institution as covert investigative (search) actions (further – CI(S)A) and significant changes to the organisation and conduct of these actions in connection with the introduction of martial law require a rethinking of approaches to ensuring guarantees of human rights and freedoms, improving the practice of applying covert actions to obtain information, including in the field of judicial control, when considering applications for permission

to conduct them, and using the results of CI(S)A in other criminal proceedings. The legality and validity of conducting CI(S)A, as well as the observance of human rights and freedoms during their conduct, largely depends on the correct definition of the subject matter of proving, which in its essence limits the scope of interference by the prosecution with a person's private life by determining the circumstances to be proved. Evaluation of evidence obtained in the course of conducting CI(S)A outside the scope of the subject matter of proving in criminal proceedings results not only in

the inadmissibility of such evidence, but also in grounds for recognising the actions (activities) of operational units, investigators and prosecutors as committed in excess of authority and contrary to the established procedure.

The issues of proving in criminal proceedings, organisation and conduct of covert investigative (search) actions have been under focus in the works by: V.D. Arseniev, Yu.M. Hroshevyi, O.V. Kaplina, V.T. Nor, O.Ye. Omelchenko, M.A. Pohoretskyi, D.B. Serhieieva, V.I. Farynnyk, I.V. Tsiupryk, and many others. However, insufficient attention has been paid to the issues of correlation between the purpose of a particular covert action and the subject matter of proving in criminal proceedings, assessment of such evidence for its admissibility, as well as assessment of such actions performed by the prosecution as committed outside the scope of their authority.

The purpose of the article is to study the correlation between the subject matter of proving and the purpose of CI(S)A, and their importance for verifying evidence for admissibility, and to formulate the legal position on the assessment of evidence obtained outside the scope of pre-trial investigation in criminal proceedings.

2. The circumstances and subject matter of proving in criminal proceedings

The purpose of proving in criminal proceedings is to obtain knowledge as close as possible to objective reality (Omelchuk, Fedorenko, 2020).

The subject matter of proving is usually understood as the range of circumstances enshrined in law that are subject to establishment or refutation in each criminal proceeding.

Circumstances to be proved in criminal proceedings are defined in Article 91 of the Criminal Procedure Code of Ukraine (2001) and include:

- 1) the event of the criminal offence (when, where, how a criminal offence has been committed and under what circumstances of the criminal offence);
- 2) the degree of guilt of the accused in committing a criminal offence, form of guilt, motive and purpose of the criminal offence;
- 3) the type and amount of damage caused by the criminal offence, as well as the amount of procedural costs;
- 4) circumstances which aggravate, mitigate the committed criminal offense, characterise the personality of the accused, toughen or mitigate punishment, preclude criminal liability or shall be grounds for terminating the criminal proceedings
- 5) circumstances that shall be grounds for relief from criminal liability or punishment;
- 6) circumstances that confirm that cash, valuables and other property subject to spe-

cial confiscation have been gained as a result of commission of a criminal offence and/or are proceeds from such property or that they were designed (used) to induce a person to commit a criminal offence, finance and/or provide logistical support to a criminal offence or reward its commission, or are a target of a criminal offence related inter alia to their illicit trafficking or are selected, made, adapted or used as means or instruments of criminal offence;

7) circumstances that are grounds for application of criminal law measures to legal entities.

The subject matter of proving is correlated with the totality of circumstances to be proved. Previously, there was an opinion among proceduralists that the subject matter of proving was limited to establishing only information indicating the fact of a criminal offence and the person(s) who committed it (Volobuiev, 2011). However, the list of circumstances to be proved set out in Article 91 of the CPC of Ukraine indicates that the subject matter of proving in criminal proceedings is not limited to information, that characterise a socially dangerous act and the person who committed it, there are a number of others, in particular: the amount of procedural costs; circumstances that characterise the person, exclude criminal liability of the act or are grounds for terminating the proceedings, etc.

Sometimes the subject matter of proving is correlated with the scope of proving.

According to M.M. Mykheenko, the scope of proving is a totality of evidence (evidence and its sources) that will ensure reliable, consistent establishment of all circumstances that are the subject matter of proving, correct resolution of the case and taking measures to prevent crimes (Mykheenko, 1984). Therefore, there is an opinion: "...if the subject matter of proving can be viewed as the horizontal limits of investigation of circumstances, then the scope of proving determines the depth of investigation of these circumstances", and "The scope of proving is determined by the totality of evidence necessary to recognise the circumstances that are the subject matter of proving as sufficiently established" (Karneeva, 1962).

These perspectives reveal that "the subject matter of proving", "the scope of proving", "circumstances to be proved" are usually considered in terms of sufficiency for: serving a person with a notice of suspicion, making certain other procedural decisions, and rendering a court decision. That is, as a necessary, sufficient minimum for making a certain procedural decision.

This is primarily due to the tasks of criminal proceedings set out in Article 2 of the CPC of Ukraine as follows: protection of a person, society and the state from criminal offences,

protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensuring prompt, full and impartial investigation and trial, so that everyone who has committed a criminal offence is brought to justice to the fullest extent of his or her responsibility, no one who is innocent is accused or convicted, no one is subjected to unreasonable procedural coercion and due process is applied to everyone involved in criminal proceedings.

The formulation of the tasks of criminal proceedings in this way indicates that the rights of an individual, society and the state to protection from criminal encroachments, the rights and legitimate interests of participants in criminal proceedings, and the application of due process to each participant in criminal proceedings are decisive. However, the rights and freedoms of a person who is not a victim of criminal proceedings, suspect, accused, defendant or other participant, but who is subject to covert investigative (search) actions during the pre-trial investigation that significantly restrict his or her rights and freedoms, are not allowed for.

The protection of the rights of such people is beyond the scope of criminal proceedings, which to some extent contradicts the provisions of Article 3 of the Constitution of Ukraine, which guarantees: "A person, his/her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is accountable to the individual for its activities. The promotion and protection of human rights and freedoms is the primary duty of the state," as well as Article 8 of the European Convention, which recognises "necessary" as one of the conditions for public authorities to interfere with private and family life.

Therefore, based on the provisions of Article 3 of the Constitution of Ukraine, Part 2 of Article 8 of the European Convention, the general principles of organising and conducting CI(S)A, defined in Chapter 21 of the CPC of Ukraine, the subject matter of proving in criminal proceedings, its scope should be determined not only in terms of their sufficiency to prove the guilt of a person, but also be limited to the circumstances of the criminal offence under investigation, the person in respect of whom it is being investigated.

This aspect is related to the fact that, on the one hand, unlike operational and investigative activities, the conduct of CI(S)A is not limited to the person being checked for involvement in a crime, but may concern an indefinite number of persons, including witnesses, victims and other participants, and, on the other hand,

the absence of prohibitions and clear boundaries of the subject matter of the pre-trial investigation allows the prosecution to conduct these measures to establish circumstances that are not the target of investigation in the criminal proceedings under which they are conducted.

For example, during the pre-trial investigation of a criminal proceeding on the sale of drugs, the investigator found that an employee of a penitentiary institution agreed to transfer a drug to a convicted person for a financial reward. However, after the investigator received information about the fact of acceptance of the offer of unlawful benefit, no criminal offence under Article 368 of the Criminal Code of Ukraine was registered. Instead, despite the fact that the target of the pre-trial investigation was only an act related to drug trafficking, the investigator commenced CI(S)A on the fact of accepting an offer of unlawful benefit, namely, noting, instructing and handing over money and other items to the person in order to verify the information about the receipt of drugs by the person in respect of whom CI(S)A are conducted for transfer to the convict and the unlawful benefit for committing these actions.

3. Investigation of the subject matter of proving in court proceedings

The court of cassation during the review of court decisions in this part concluded that at the time of the above actions, which are components of CI(S)A, that is control over the commission of the offence, the criminal proceedings under Article 368 of the Criminal Code had not been registered, respectively, CI(S)A were conducted contrary to the provisions of Article 214 of the CPC, before the registration of criminal proceedings and was carried out without proper procedural grounds (Resolution of the Supreme Court No. 346/553/15-k, 2022).

Relying on the analysis of this court decision, we can conclude that despite the fact that these CI(S)A were conducted with formal compliance with the requirements set out in Chapter 21 of the CPC of Ukraine: in criminal proceedings on a grave crime; in case when information about the criminal offence and the person that committed it cannot be obtained in any other way, based on a decision made by an authorised person, its results are recognised as inadmissible evidence, since the prosecution went beyond the scope of the pre-trial investigation in criminal proceedings when obtaining permission and conducting CI(S)A.

Furthermore, the study of the subject matter of proving, determination of its scope, in addition to the circumstances of the act, entails the study of the content of actions of each person who have participated in the commission of a criminal offence. However, the procedure

for obtaining and recording evidence in relation to special actors for whom some particularities are defined in the legislation (attorneys, judges, law enforcement officers, MPs) has differences. For example, the CPC of Ukraine, Article 247, part 2, provides that consideration of applications for permission to conduct covert investigative (search) actions against judges, court and law enforcement officers and/or in the premises of judicial and law enforcement bodies, which is referred to the powers of the investigating judge in accordance with the provisions of this chapter, may be performed by an investigating judge of the relevant court of appeal outside the territorial jurisdiction of the pre-trial investigation body conducting the pre-trial investigation.

In other words, if the subject matter of the pre-trial investigation is the actions of judges, court officials and law enforcement officers, or such actions take place on the premises of judicial and law enforcement bodies, the investigating judge authorised to consider the application for permission to conduct CI(S)A may be an investigating judge of another court that is most geographically close to the court. In such a case, when assessing the grounds for granting permission to conduct CI(S)A in relation to a special actor (premises), establishing the correspondence between the subject matter of the pre-trial investigation and the activities subject to control during covert actions is also crucial for assessing admissibility of evidence obtained.

For example, when assessing the results of CI(S)A for admissibility, the panel of judges

of the Third Judicial Chamber of the CCU of the Supreme Court (Resolution of the Supreme Court, 2021) underlines that during criminal proceedings on charges of Person 1 under Part 1 of Article 366, Part 3 of Article 368 of the Criminal Code of Ukraine, the prosecution unreasonably identified the suspect (accused) as a special actor – a law enforcement officer. Therefore, having incorrectly determined that the crime under investigation was committed by a law enforcement officer, the prosecution appealed to an investigating judge of the Court of Appeal outside the territorial jurisdiction. As a result, the court stated that since the accused was not a law enforcement officer, the investigating judge of the Court of Appeal outside the territorial jurisdiction did not have the procedural rights to grant permission to interfere with the private life of a person, and evidence obtained during these actions was inadmissible.

4. Conclusions

The implementation of the principles of the rule of law, legality, respect for human dignity, ensuring the right to liberty and personal integrity, secrecy of communication and non-interference with private life, requires that when verifying evidence for its admissibility, not only the scope of rights and powers of actors, who make decisions on permission to CI(S)A and conduct these actions in the context of holding a certain position, of involving in a group of investigators or prosecutors shall be considered are conducted, but also the performance of such actions within the scope of the pre-trial investigation in terms of legal facts and parties.

References:

- Karneeva, L.M.** (1962). *Pryvlechenye v kachestve obvyniaemoho* [Involvement as a defendant]. Moskva: Hosiurozdat (in Russian).
- Kryminalnyi protsesualnyi kodeks Ukrainy: vid 5 kvitnia 2001 roku № 2341-III [Criminal Procedure Code of Ukraine dated April 5, 2001 No. 2341-III]. (2001). *rada.gov.ua*. Retrieved from: <https://zakon.rada.gov.ua/laws/main/4651-17#Text> (in Ukrainian).
- Mykheenko, M.M.** (1984). *Dokazyvanye v sovetskom uholovnom sudoproizvodstve* [Evidence in Soviet criminal proceedings]. Kyev: Vyshcha shkola (in Russian).
- Omelchuk, L.V., Fedorenko, Y.V.** (2020) *Vyznachennia predmeta ta mezh dokazuvannia pid chas sudovoho rozghliadu u kryminalnomu provadzhenni* [Determination of the subject matter and limits of evidence during the trial in criminal proceedings]. *Yurydychnyi naukovyi elektronnyi zhurnal – Legal scientific electronic journal*, 3, 436-438 (in Ukrainian).
- Postanova VS №346/553/15-k vid 05.10.2022 [Resolution of the Supreme Court No. 346/553/15-k dated October 5, 2022]. (2022). Retrieved from <http://iplex.com.ua/doc.php?regnum=106637637&red=10000364b-6f833882f8e7e70e6add2a3007e51&d=5> (in Ukrainian).
- Postanova VS vid 25.10.2021 u spravi № 159/1383/17 (provadzhennia № 51-2227km20) [Resolution of the Supreme Court of October 25, 2021 in case No. 159/1383/17]. (2021). Retrieved from <https://reyestr.court.gov.ua/Review/100579483> (in Ukrainian).
- Volobuiev, A.F.** (2011). *Kryminalistyka* [Forensics]. Kyiv : KNT (in Ukrainian).

Олександр Бабіков,

кандидат юридичних наук, докторант, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2а, Київ, Україна, індекс 03055, babikovoleksandr@ukr.net

ORCID: orcid.org/0000-0003-4003-5198

ДОПУСТИМІСТЬ ДОКАЗІВ, ОДЕРЖАНИХ ПІД ЧАС ПРОВЕДЕННЯ НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ ПОЗА МЕЖАМИ ПРЕДМЕТА ДОКАЗУВАННЯ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

Анотація. Мета. Метою роботи є дослідження співвідношення предмета доказування та мети проведення негласних слідчих (розшукових) дій, їх значення для перевірки доказів на предмет допустимості, формулювання правової позиції щодо оцінки доказів, одержаних поза предметом досудового розслідування у кримінальному провадженні. **Результати.** Забезпечення верховенства права, законності, права на свободу та особисту недоторканість особи, таємниці спілкування та невтручання у приватне життя під час проведення негласних слідчих (розшукових) дій у кримінальному провадженні слід розглядати не лише як загальні засади кримінального судочинства, а й як права і свободи, гарантовані Конституцією України, Європейською Конвенцією з прав людини. Гарантоване ст. 8 Європейської Конвенції право на повагу до приватного і сімейного життя передбачає, що органи державної влади не можуть втручатись у здійснення цього права, за винятком випадків, коли втручання здійснюється згідно із законом і є необхідним. Правильність визначення предмета та меж доказування у конкретному кримінальному провадженні, співставлення мети проведення негласних заходів з обставинами, що підлягають доказуванню, є однією з головних передумов забезпечення гарантій прав і свобод у сфері приватного та сімейного життя людини. Дослідження предмета доказування, визначення його меж, крім обставин вчинення діяння, зумовлює дослідження змісту дій кожної особи, яка брала участь у вчиненні кримінального правопорушення. **Висновки.** Зроблено висновок, що реалізація принципів верховенства права, законності, поваги до людської гідності, забезпечення права на свободу й особисту недоторканість, таємниці спілкування та невтручання у приватне життя передбачає обов'язок під час перевірки доказів на предмет їх допустимості враховувати не лише обсяг прав та повноважень суб'єктів, якими ухвалюються рішення про дозвіл на проведення негласних слідчих (розшукових) дій та проводяться зазначені заходи в контексті перебування на певній посаді, включення до складу групи слідчих чи прокурорів, а й щодо вчинення таких дій у межах предмета досудового розслідування за фактичним та суб'єктивним складом.

Ключові слова: негласні слідчі (розшукові) дії, кримінальний процес, предмет доказування, гарантії прав і свобод, таємниця приватного життя.

The article was submitted 18.07.2022

The article was revised 08.08.2022

The article was accepted 29.08.2022