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DUTIES AND RIGHTS OF PARTIES TO CRIMINAL PROCEEDINGS WITH REGARD TO APPLICATION OF MEASURES TO ENSURE CRIMINAL PROCEEDINGS

Abstract. ***Purpose.*** The purpose of the article is to determine the correlation between the rights and duties of the parties to criminal proceedings with regard to proving the need (or lack thereof) for application of measures to ensure criminal proceedings. ***Results.*** The article studies the correlation of rights and duties of the parties to criminal proceedings with regard to proving the need for application of measures to ensure criminal proceedings. It is noted that the investigator and the prosecutor are responsible for proving to the investigating judge and the court the existence of grounds for applying measures to ensure criminal proceedings, and therefore they shall justify the need to apply a particular measure. In this case, it is the duty of the prosecution to prove the necessity of applying measures to ensure criminal proceedings. ***Conclusions.*** With regard to the defence, in this context, arguments are made for granting the right to prove the absence of the need to apply measures to ensure criminal proceedings, since the burden of proof is not provided by measures of legal liability, but rather by the interests of the defence. That is, if the prosecution is interested in applying measures to ensure criminal proceedings, it is the prosecution that should initiate and collect the necessary arguments to make a decision on their application. If the defence is interested in applying (or not applying) measures to ensure criminal proceedings, it is the defence that should select the necessary arguments, and in our opinion, both parties should have equal opportunities to both collect the necessary arguments (proof of their position) and prove them. However, on the part of the defence, this only concerns proving the absence of the need for application of measures to ensure criminal proceedings (and is positioned as an interest, not a duty). On the part of the prosecution, the use of the term «interest» is questionable, since the actors cannot be interested, but they shall take all possible measures to prove the suspect's guilt, so it is necessary to use the term «duty to prove the need to apply measures to ensure criminal proceedings

Key words: criminal proceedings, provisional measures, parties to criminal proceedings, proving, application, duties and rights.

1. Introduction

The CPC allows both the defence and the prosecution to initiate the application of measures to ensure criminal proceedings, which is one of its most progressive provisions. However, in addition to initiating the application, the actor shall prove the necessity of applying the measures in question. When this proof (justification of the necessity) is carried out by the prosecution, it looks logical, since all actions of the actors are focused precisely on proving certain facts, for which they have all the necessary tools at their disposal (the possibility of giving assignments, instructions, a well-established mechanism for such actions, etc.) However, in addition to the investigator with the consent of the prosecutor (in accordance with paragraph 5 of the letter of the High Spe-

cialised Court of Ukraine No. 223-558/0/4-13 of 5 April 2013 «On some issues of the exercise of judicial control by the investigating judge of the court of first instance over the observance of rights, freedoms and interests of persons during the application of measures to ensure criminal proceedings» in the absence of the prosecutor's consent (approval), the investigator is not entitled to apply to the court with a motion for the application of measures to ensure criminal proceedings) (Letter of the Higher Specialised Court of Ukraine On some issues of the exercise of judicial control by the investigating judge of the court of first instance over the observance of the rights, freedoms and interests of individuals during the application of measures to ensure criminal proceedings, 2013) and the prosecutor, the following actors have right to submit a motion to the investigating judge to apply: a summons – the suspect, his/her defence counsel, the victim, his/her representative (Article 134 of the CPC); a forced appearance before court – a party to the criminal proceedings, the victim (Article 140(2) of the CPC); temporary access to things and documents – parties to the criminal proceedings (Article 160 of the CPC); seizure of property – a civil plaintiff (Article 171 of the CPC). The practice of initiating the application of measures to ensure criminal proceedings by the defence and other participants (as opposed to the prosecution) is not widespread today, since although, according to part two of Article 22 of the CPC, the parties to criminal proceedings have equal rights to collect and submit to the court items, documents, other evidence, motions, complaints, as well as to exercise other procedural rights provided for by the CPC (Farynnyk, 2012, p. 4), but there are a number of legal conflicts and «silences» in the CPC provisions that do not allow other parties to the criminal proceedings to act on an «equal footing» both in the process of collecting evidence in general and in justifying (proving) the need to apply (or not to apply) measures to ensure criminal proceedings. Although the Law of Ukraine «On the Bar and Practice of Law» allows an advocate to collect information about facts that can be used as evidence, adversariality as a general principle of criminal proceedings during pre-trial investigation is not fully implemented, due to a number of objective and subjective factors (Nykonenko, 2014, p. 10). The imperfection of certain provisions of the CPC, which make it impossible to fully exercise the rights of the defence counsel, including the right to collect evidence (Tatarov and Cherniavskyi, 2015, pp. 77–84), leads to impossibility of justifying motions for the application of measures to ensure criminal proceedings properly.

A number of scholars have considered the issues related to the participation of the parties to criminal proceedings in proving the need for application of measures to ensure criminal proceedings. L. M. Loboiko and O. A. Banchuk argue that unlike the duty to prove, which consists in proving the guilt of a person in committing a criminal offence before the court, the burden of proof relates to other circumstances. Placing the burden of proof on the defence to prove these circumstances does not contradict the presumption of innocence (Loboiko and Banchuk, 2014, p. 177). V. V. Vapniarchuk insists on the need to distinguish and recognise legal duty and burden of proof as independent legal phenomena. However, he believes that the difference between them is that the burden of proof is not provided by measures of legal liability, but rather by the interest (rather than coercion) pursued by the parties in criminal proceedings (Vapniarchuk, 2017, pp. 351–352). In fact, this issue is poorly researched and therefore of scientific interest.

The purpose of the article is to determine the correlation between the rights and duties of the parties to criminal proceedings with regard to proving the need (or lack thereof) for application of measures to ensure criminal proceedings.

2. Principles of the concepts of «duties» and «rights» of the parties to criminal proceedings

An important rule (condition for the legitimacy) of the application of measures to ensure criminal proceedings is the «duty» of proving, which, in accordance with the provisions of the CPC, is imposed on the investigator and the prosecutor, and in some cases (although this is not provided for in part three of Article 132 of the CPC) – on the party to the criminal proceedings that files the motion. In this context, it should be noted that in the vast majority of cases, it is the investigator and the prosecutor that are responsible for proving to the investigating judge and the court the existence of grounds for applying measures to ensure criminal proceedings, and therefore they shall justify the need to apply a particular measure. In this case, it is the duty of the prosecution to prove the necessity of applying measures to ensure criminal proceedings.

However, before describing it, two terms should be correlated: «duty to prove» and «burden of proof», enabling to clearly define the actors of the respective duty and burden in criminal proceedings. The analysis of doctrinal sources in this regard enables to agree with those scholars who argue for the position of distinction between these legal phenomena. When distinguishing between these categories, a num-

ber of scholars proceed from the subject matter of proving, justifying their opinion by the fact that the burden of proof in criminal proceedings is a legal phenomenon, implying the procedural need of a certain actor of proving to defend its legal position with positive and objectively achievable statements, due to the interest of the procedural need (Vapniarchuk, 2017, pp. 351–352). This scientific position is worth supporting and can be extrapolated with regard to proving the necessity of applying measures to ensure criminal proceedings.

The literature review reveals that the legislator has established a rebuttable presumption against the use of measures to ensure criminal proceedings (Kivalov, Mishchenko, Zakharchenko, 2013), which is associated with the assumption that the effectiveness of criminal proceedings can be achieved without the use of these measures. That is why the burden of proof in this case is defined as the need for the investigator, prosecutor to provide appropriate, admissible, reliable and sufficient evidence that the application of a measure to ensure criminal proceedings is necessary to ensure the effectiveness of criminal proceedings (Hloviuk, 2013, pp. 84–89). We advocate this but consider it appropriate to once again emphasise that it is the responsibility of the prosecution to prove the necessity of applying measures to ensure criminal proceedings (as well as extending their validity). In this context, it is worth referring to the ECHR case-law, according to which placing the burden of proof on the detainee in such matters amounts to an inverted rule of Article 5 of the Convention: a provision that considers detention an exceptional derogation from the right to personal freedom, which is permissible only in exhaustively listed and clearly defined cases.

In our opinion, the following provisions stipulate that the investigator and the prosecutor have the duty to prove the circumstances provided for in part three of Article 132 of the CPC: first, the need to prove the legality and validity of the respective measure is dictated by the interest of the criminal prosecution authority in its application; second, the proving is carried out in the order of using the authority to initiate such a decision (Lastochkina, 2005, p. 7); third, no one has the right to compel the criminal prosecution authority to prove; fourth, refusal to prove or improper proving does not entail sanctions against the investigator or prosecutor, but it also does not allow them to achieve the desired result – to apply measures to ensure criminal proceedings.

The literature review reveals that the duty to prove is logically conditioned by the following circumstances: first, it is the investigator who directly conducts the pre-trial investigation, as well as the prosecutor who is entrusted with procedural guidance of the pre-trial investigation, should not only determine the need to apply measures to ensure criminal proceedings, but as the actors most aware of the actual grounds for their application, provide the court with relevant arguments confirming such a need, and persuade it to make the appropriate procedural decision (issue a ruling); second, the value of the judicial procedure for deciding on the application of these measures, in particular, is that, being independent and impartial, the court issues a ruling based on its own conviction that there are sufficient grounds for this, which is the result of the investigation of the circumstances and evidence provided by the parties (Bandurka, Blazhivskyi, Burdol, Farynnyk, 2012).

In this aspect, the perspective that if the duty of the investigator or prosecutor to prove to the investigating judge the existence of grounds for the application of measures to ensure criminal proceedings is legally binding, it effectively eliminates the possibility of these persons filing an unreasonable motion with the investigating judge deserves support, as in this case, the initiative itself is levelled and the court's decision is quite predictable not in favour of the initiator of the motion (Hroshevyi, Tatsii, Tumaniants, 2013, pp. 259–260). Another thing is that, according to law enforcement practice, cases of filing ungrounded «initiatives» are not uncommon and, unfortunately, the burden of proof is not currently correlated with the justification of the relevant motion. However, this is another aspect of this issue, which concerns the legal consciousness of both the prosecution and the investigating judge, whose exclusive competence is to decide on the application of measures to ensure criminal proceedings during the pre-trial investigation.

3. Particularities of the duty of the burden of proof in criminal proceedings

Good faith fulfilment of the burden of proof a priori requires the initiator of the motion, the prosecutor, to personally participate in the court hearing on the motion. Therefore, the failure of the investigator or prosecutor to appear at the hearing of the motion, in our opinion, is in fact a failure of these entities to fulfil their duty to prove the circumstances justifying the need to apply the relevant measure to ensure criminal proceedings. This, in turn, deprives the investigating judge of the opportunity to fully and comprehensively clarify the set of circumstances with which the law relates the decision on their application. If the investigator or prosecutor fails to appear at the appointed time, the investigating judges should also reject such

motions, given that one of the general principles of criminal proceedings is the adversarial nature of the parties (Article 22 of the CPC), which provides for the prosecution and the defence to independently defend their legal positions, and the court only creates the necessary conditions for the parties to exercise their procedural rights and fulfil their procedural duties. Therefore, the prosecution shall ensure personal appearance and the presentation of relevant evidence (Chvankin, 2014).

In addition, it is even provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms (Law of Ukraine On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols Nos. 2, 4, 7 and 11 to the Convention, 1997) that the presumption in favour of liberty (Article 5) is underlined by the imperative requirement to ensure that, firstly, deprivation of liberty is no longer than absolutely necessary and, secondly, that it is returned immediately if it is unjustified. The second requirement is evidenced by the provision that anyone deprived of his or her liberty has the right to a trial. This indicates that the burden of proof is on those who deprived a person of their liberty: they shall prove not only that powers to apply this measure are within the context of one of the grounds specified in Article 5 of the Convention, but also that its application was lawful under the specific circumstances of the deprivation of liberty. Such a burden inevitably means that those who may exercise powers that may result in deprivation of liberty shall conduct a critical analysis of the situation in order to ensure that the limits set by the law are always respected in the actual exercise of these powers (Kononenko, 2012, pp. 127–131). The question of the respective «duty to refute» the arguments of the investigator or prosecutor by the defence remains open, since the CPC of Ukraine, Article 132, part 5, does provide that «when considering the application of measures to ensure criminal proceedings, parties to criminal proceedings should present to investigating judge or court evidence on circumstances to which they refer.» However, does this mean that the duty to prove is shifted to the defence (Bushchenko, 2017)? In our opinion, in this particular case, it is not a duty to apply measures to ensure criminal proceedings, and the driving force should be interest. That is, if the prosecution is interested in applying measures to ensure criminal proceedings, it is the prosecution that should initiate and collect the necessary arguments to make a decision on their application. If the defence is interested in applying (or not applying) measures to ensure criminal proceedings, it is the defence that should select the necessary arguments, and in our opinion, both parties should have equal opportunities to both collect the necessary arguments (proof of their position) and prove them. However, on the part of the defence, this only concerns proving the absence of the need for application of measures to ensure criminal proceedings (and is positioned as an interest, not a duty), while on the part of the prosecution, the use of the term «interest» is questionable, since the actors cannot be interested, but they shall take all possible measures to prove the suspect's guilt, so it is necessary to use the term «duty to prove the need to apply measures to ensure criminal proceedings. In the light of this conclusion, the most reasonable position is that the defence shall not prove the opposite, and the failure of the investigator or prosecutor to prove the need to apply a measure to ensure criminal proceedings entails the rejection of the motion; this does not apply only to those measures to ensure criminal proceedings that the investigating judge has the right to choose on his/her own initiative: summons, forced appearance before court, and monetary penalty (Hloviuk, 2013, pp. 84–89).

Furthermore, it is necessary to conceptually distinguish between «the party's duty to prove the circumstances to which it refers» and «the party's duty to prove the absence of risks that necessitate the application of the measure» (Bandurka, Blazhivskyi, Burdol, Farynnyk, 2012), as the party shall prove that the circumstance to which it refers exists but does not have to prove that this circumstance excludes any risk. This latter is not a circumstance within the meaning of Article 132 of the CPC but is the subject of judicial review. The presence or absence of a risk, as well as the possibility or impossibility of preventing such a risk, are not circumstances in this sense. While the rule of Article 132 of the CPC applies in the former case, it does not in the latter. The duty to prove the risks and necessity of detention always remains with the prosecutor, as the defence always has the presumption of liberty, as set out in Article 29 of the Constitution and Article 5 of the Convention (Bandurka, Blazhivskyi, Burdol, Farynnyk, 2012).

However, for example, when considering a motion for temporary access to items and documents, it becomes necessary (and therefore the prosecution is obliged) to prove that there are sufficient grounds to believe that the «necessary» items or documents are or may be in the possession of the relevant individual or legal entity; by themselves or in combination with other items and documents of the criminal proceedings, in connection with which the motion

is filed, are essential for establishing important circumstances in criminal proceedings; do not constitute or do not include items and documents containing a secret protected by law, the duty to prove is on the party to the criminal proceedings (Article 163 of the CPC). Similarly, when considering the motion of a party to criminal proceedings on a forced appearance before court during proceedings, the duty to prove the motion's validity should be on the party filing it. In our opinion, in this context, the defence should prove the need to apply measures to ensure criminal proceedings, since it (the burden of proof) is provided not by measures of legal liability, but by the interests of the defence, which are the driving force in determining the form of legal conduct by its actors. Moreover, the burden of substantiating the circumstances that preclude the application of criminal proceedings cannot be placed on the defence: otherwise, it would contradict the principle of the presumption of innocence. If the defence party refers to circumstances that preclude the application of criminal proceedings, they shall also provide the investigating judge or court with evidence of the circumstances to which they refer (Hloviuk, 2013, pp. 84–89).

4. Conclusions

The investigator and the prosecutor are responsible for proving to the investigating judge and the court the existence of grounds for applying measures to ensure criminal proceedings, and therefore they shall justify the need to apply a particular measure. In this case, it is the duty of the prosecution to prove the necessity of applying measures to ensure criminal proceedings. With regard to the defence, in this context, arguments are made for granting the right to prove the absence of the need to apply measures to ensure criminal proceedings, since the burden of proof is not provided by measures of legal liability, but rather by the interests of the defence. That is, if the prosecution is interested in applying measures to ensure criminal proceedings, it is the prosecution that should initiate and collect the necessary arguments to make a decision on their application. If the defence is interested in applying (or not applying) measures to ensure criminal proceedings, it is the defence that should select the necessary arguments, and in our opinion, both parties should have equal opportunities to both collect the necessary arguments (proof of their position) and prove them. However, on the part of the defence, this only concerns proving that there is no need to apply measures to ensure criminal proceedings (and is positioned as an interest, not a duty). On the part of the prosecution, the use of the term «interest» is questionable, since the actors cannot be interested, but they shall take all possible measures to prove the suspect's guilt, so it is necessary to use the term «duty to prove the need to apply measures to ensure criminal proceedings.

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ОБОВ'ЯЗКИ ТА ПРАВА СТОРІН КРИМІНАЛЬНОГО ПРОЦЕСУ ЩОДО ЗАСТОСУВАННЯ ЗАХОДІВ ЗАБЕЗПЕЧЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ

Анотація. ***Мета.*** Метою статті є визначення співвідношення прав та обов'язків сторін кримінального процесу стосовно доведення необхідності (або відсутності необхідності) застосування заходів забезпечення кримінального провадження. ***Результати.*** У статті розглядається співвідношення прав та обов'язків сторін кримінального процесу щодо доведення необхідності застосування заходів забезпечення кримінального провадження. Зазначено, що доказування перед слідчим суддею, судом наявності підстав застосування заходів забезпечення кримінального провадження покладено на слідчого та прокурора, у зв'язку з чим вони повинні обґрунтувати необхідність застосування того чи іншого заходу. У цьому разі йдеться про обов'язок доказування стороною обвинувачення необхідності застосування заходів забезпечення кримінального провадження. ***Висновки.*** Стосовно сторони захисту в цьому контексті наводяться доводи щодо надання права доказування відсутності необхідності застосування заходів забезпечення кримінального провадження, оскільки тягар доказування забезпечується не заходами юридичної відповідальності, а саме інтересами захисту. Тобто якщо у застосуванні заходів забезпечення кримінального провадження зацікавлена сторона обвинувачення, саме вона повинна бути ініціатором та зібрати необхідні доводи для прийняття рішення про їх застосування. Якщо у застосуванні (або не застосуванні) заходів забезпечення кримінального провадження зацікавлена сторона захисту, то саме вона повинна підібрати необхідні аргументи, і, на нашу думку, обидві сторони повинні бути рівні у можливості як зібрати необхідні аргументи (докази своєї позиції), так і довести їх. Але з боку сторони захисту це стосу-

ється лише доведення відсутності необхідності застосування заходів забезпечення кримінального провадження (і позиціонується як зацікавленість, а не обов'язок). А з боку сторони обвинувачення сумнівним виглядає використання терміна «зацікавленість», оскільки суб'єкти не можуть бути зацікавлені, а вони саме зобов'язані прийняти всі можливі заходи для доведення вини підозрюваного, тому необхідним є використання терміна саме «обов'язок» довести необхідність застосування заходів забезпечення кримінального провадження.

Ключові слова: кримінальне провадження, заходи забезпечення, сторони кримінального процесу, доведення, застосування, обов'язки та права.

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