UDC 343.1
DOI: 10.32518/2617-4162-2022-5-22-28

Соціально-правові студії. 2022. Т. 5, № 1
Social and Legal Studios. 2022. Vol. 5, No. 1

Some Problems of Making a Procedural Decision to Close Criminal Proceedings in Connection with the Release of a Person from Criminal Liability

Roman I. Blahuta, Iryna V. Basysta*
Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. In judicial practice, there are situations when, as of the day of the decision of the appellate court, the statute of limitations for bringing the accused to criminal responsibility has expired, and the defense does not take the initiative to release the person from criminal liability. Accordingly, the court in no way responds to the existence of this circumstance and does not decide on the application (non-application) of the grounds contained in paragraph 1 of Part 2 of Article. 284 of the CPC, or another, to make a procedural decision to close the criminal proceedings. Therefore, the aim is to try to answer the question of which of the procedural decisions, under the described conditions and circumstances, should be made by the court: to close the criminal proceedings in connection with the release of a person from criminal liability or a person should be released in the court of cassation from punishment? Due to the applied formal-logical method and systematic analysis, it was found that Part 2 of Art. 284 of the CPC concerns cases of closing criminal proceedings exclusively by the court. It was stated that in paragraph 1 of this part of the article, among the grounds for closing the criminal proceedings, the legislator provides and "...in connection with the release of a person from criminal liability." At the same time, it has been proven that the right of a person to be released from criminal liability, if there are grounds for it, judges often do not depend on their own duty to explain to a person such a right so that he can use it. It is established that the responsibilities enshrined in Art. 285 of the CPC apply not only to courts of first instance, but also to appellate instances. Research methods such as sampling, system-structure, induction and deduction have been used to argue that in circumstances where a court conviction has entered into force, a person should be exempt from the court of cassation, this is stated in Part 5 of Art. 74 of the Criminal Code of Ukraine, on the grounds provided for in Art. 49 of the Criminal Code of Ukraine. At the same time, it is proved that the court has hindered the adoption of such a procedural decision by the approach that the legislator laid down in the construction of paragraph 1, part 2 of Art. 284, art. 440 of the CCP

Keywords: release from punishment, appeal proceedings, cassation appeal, statute of limitations for criminal prosecution

Introduction

Various approaches have been developed in science and judicial practice to the declared issues, but primarily, the reason for this situation is that the current provisions of the CPC of Ukraine [1] and the Criminal Code of Ukraine [2] (hereinafter – the CCU) do not provide unambiguous answers. Thus, only the court has the authority to close criminal proceedings in connection with the release of a person from criminal liability (paragraph 1 of part 2 of article 284 of the CPC of Ukraine) [1]. Part 2 of Article 285 of the CPC of Ukraine [1] states that if available (which follows from the provisions of the CPC and the Criminal Code of Ukraine) release from criminal liability, the person is explained the right to such release. Judges often do not make such a right of a person with their own duty to explain to the person this right and legal consequences in case the person uses it or, conversely, does not use it. As a result, requests in the form of a request for release from criminal liability are submitted before the cassation hearing and even during it [3]. Given such realities, there is a problem of unambiguous understanding of which of the two procedural decisions, which follow from the existing provisions of the current CPC [1] and the Criminal Code of Ukraine [2], the court must take if there are established grounds: to close criminal proceedings with the release of a person from criminal liability or should the person be subject to release from punishment in the court of cassation? After all, under identical conditions, in one case, the court of cassation must release such a person from punishment, as stated in part 5 of Article 74 of the Criminal Code of Ukraine [2], on the grounds provided for in Article 49 of the Criminal Code of Ukraine [2], and in otherwise – there is an opportunity for the cassation instance to release from criminal liability and close the criminal proceedings, as regulated in paragraph 1, part 2 of Art. 284 of the Criminal Procedure Code of Ukraine [1]. Because Article 440 of the CPC of Ukraine [1] refers to the closure of criminal proceedings by the court of cassation, which obviously occurs after the verdict enters into force and the court establishes the circumstances provided for in Article 284 of the CPC of Ukraine [1]. In this case, Yu.V. Baulin noted that it is impossible to get rid of what has already happened [4, p. 191-192, 194], ie from criminal liability, when the sentence has already entered into force on the basis of the provisions of Article 532 of the CPC of Ukraine [1]. Therefore, in such a situation, it is illogical to make a decision on release from criminal liability [4, p. 191-192, 194]. After all, under such

Suggested Citation **Article's History**: Received: 27.12.2021 Revised: 25.01.2022 Accepted: 23.02.2022

Blahuta, R.I., & Basysta, I.V. (2022). Some problems of making a procedural decision to close criminal proceedings in connection with the release of a person from criminal liability. *Social and Legal Studios*, 5(1), 22-28.

*Corresponding author

conditions, a person is already "considered to be subject to lawful conviction for a crime previously committed by him", quite correctly sums up O.P. Horokh [5, p. 271]. Therefore, it is logical to release this person from punishment, not from criminal liability [4, p. 194]. It should be emphasised that, in general, the institution of exemption from criminal liability is very controversial, which follows from the analysis of substantive and procedural law, and can be traced in scientific discourses. Thus, the institute of exemption from criminal liability has already been considered by O.O. Dudorov in the plane of its constitutionality [6, p. 40-48], and Yu.V. Baulin, among other things, criticised the approach that "through the release of criminal liability is its differentiation" [4, p. 192]. In the criminal procedural perspective, this institution was "inspected" by G. Ros in relation to the presumption of innocence, ans he found a number of inconsistencies between them [7, p. 232-237]. And although its conclusions were made under the previous CCP, ie before 2012, they are, for the most part, relevant in terms of doctrine. However, these researchers did not analyse the current array of case law on the declared issues, which, unfortunately, is not characterized by unity. The generaliaed list of components of the issue crystalliaed during the consideration in the Cassation Criminal Court of the Supreme Court of the case No. 521/8873/18 (proceedings No. 51-413kmo21) [3; 8], during which the judges of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court, substantiating their position in the decision of September 23, 2021 [8], transferred the criminal proceedings to the Joint Chamber and invited members of the Scientific Advisory Board to join the Supreme Court to join this discussion by preparing relevant scientific conclusions [9]. In particular, it should be emphasised that in this criminal proceeding before the cassation hearing the defense filed a petition to the court of cassation to release the person from criminal liability under Article 49 of the Criminal Code of Ukraine [3; 8; 9]. It seems that the above only emphasises the relevance of the declared problem and the practical urgency of its solution.

Notably, attempts have already been made in the scientific conclusion to present their own beliefs and arguments to them [10]. *The purpose of this publication* is another attempt to give an already detailed answer to the question of which of the procedural decisions, under the described conditions and circumstances, should be taken by the court: to close criminal proceedings in connection with the release of a person from criminal liability or a person should to be released from punishment in the court of cassation? It is proved that in the circumstances when the conviction of the court came into force, the person should be subject to release from the court of cassation from punishment, as referred to in Part 5 of Art. 74 of the Criminal Code of Ukraine, on the grounds provided for in Art. 49 of the Criminal Code of Ukraine. At the same time, it was stated that the approach to which the legislator laid down in the construction of item 1 part 2 of Art. 284, art. 440 of the CPC, so it must be adjusted.

The Right of a Person to be Released from Criminal Liability, if There are Grounds for it, Depends on the Obligation of the Court to Explain to the Person this Right

It should be emphasised that only the court, among other things, closes criminal proceedings in connection with the release of a person from criminal liability (paragraph 1 of Part 2 of Article 284 of the CPC of Ukraine) [1] in cases provided by the Law of Ukraine on Criminal Liability (Part 1 of Article 285 CPC of Ukraine) [1]. A person has the right to have the charges against him or her tried in court as soon as possible or to have them terminated by closing the proceedings (part 1 of Article 283 of the CPC of Ukraine) [1], and the prosecutor is obliged to take some of the actions listed in part 2 of Article 283 of the CPC of Ukraine as soon as possible after notifying the person of suspicion, having, of course, collected the relevant body of evidence and having proper grounds.

At the same time, among the general provisions of criminal proceedings during the release of a person from criminal liability, part 2 of Article 285 of the CPC of Ukraine provides clarification of the right to such release, and part 3 of this article specifies aspects of this right and clarification [1]. However, the legislator in this article does not specify the subjects who are endowed with the corresponding duty to explain these provisions to the suspect, accused. However, it seems to us that this was done to avoid overloading the text of the CPC of Ukraine, because from Article 284 of the CPC of Ukraine and other provisions of the CPC of Ukraine, which regulate procedural activities, both in pre-trial investigation and court *to raise the issue* of exemption from criminal liability, if there are grounds for it, is available, both for the suspect and the accused, both in the pre-trial investigation and in the court stages [11, p. 64]. Moreover, cases of completion of pre-trial investigation, inter alia, by an indictment, and not only by a procedural decision in the form of a request for release from criminal liability, provide a further possibility, if identified, to release the person from criminal liability in court.

Based on the above, it is obvious that the requirement of the legislator to clarify the person suspected of being charged with a criminal offense and in respect of which the possibility of exemption from criminal liability the right to such release (Part 2 of Article 285 CPC of Ukraine) applies not only subjects that are authorised to conduct pre-trial investigation, but also the court of first and appellate instance, including [11, p. 66].

Thus, summing up the analysis, we can say that the court of first instance and the appellate court have a duty in accordance with the provisions of Article 285 of the CPC of Ukraine [1] to explain to a person prosecuted that at the time of trial or appeal The statute of limitations for bringing this person to criminal responsibility and the possibility of such release and the right to object to the closure of criminal proceedings on this non-rehabilitative basis have expired. Notably, the Joint Chamber of the Criminal Court of Cassation of the Supreme Court in its decision of 6 December 2021 in case No. 521/8873/18 (proceedings № 51-413km221) chose the same position, recognising the release of a person from criminal liability in connection with the expiration of the statute of limitations, the imperative duty of the court of first, appellate instances [3].

Failure of the Court of Appeal (First Instance) to Clarify the Provisions of Article 285 of the CPC of Ukraine is a Significant Violation of the Requirements of the Criminal Procedure Law within the Meaning of Part 1 of Article 412 of the CPC of Ukraine

Among the list of paragraphs of Part 2 of Article 412 of the CPC of Ukraine [1], which determines which of the violations of criminal procedure law should be considered significant, i.e. those "which prevented or could prevent the court to make

a lawful and reasonable court decision", paragraph 1 provides what the judgment shall in any case be set aside if "If there were grounds for the court to close the criminal proceedings, it was not closed" [1]. In the present case, this ground for setting aside the judgment in Case 521/8873/18 (proceedings 51-413 kmo21) [3] should have been applied. In turn, the joint chamber of the Criminal Court of Cassation in the decision of December 6, 2021 in the already mentioned proceedings chose a slightly different position and did not take into account the stated grounds. The Joint Chamber proceeded only from the fact that it had established the fact of unlawful conduct of the appellate proceedings without the participation of the accused; "The requirements of the criminal procedure law were violated, which led to the incorrect application of the criminal law." Part 1 of Article 438 of the CPC of Ukraine [1] was applied to overturn a court decision [3].

It seems that along with the mentioned undoubted violations of the requirements of the criminal procedure law, it is also necessary to explain to the person that at the time of the trial, based on the existing obligation of the court of first and appellate instance, in accordance with Article 285 or the appellate review, the statute of limitations for bringing that person to criminal responsibility has expired. The possibility of such release from criminal liability and its consequences for this person are also explained. Exemption from criminal liability is the basis for closing the criminal proceedings by the court (paragraph 1 of part 2 of Article 284 of the CPC of Ukraine) [1]. Therefore, the implementation of the above actions by the court and the establishment of the court's consent to such release from criminal liability can in fact be regarded as one of the steps towards the decision to close the proceedings. In turn, failure of the court of first or appellate instance to clarify the provisions of Article 285 of the CPC of Ukraine [1] to a person, as a result of which, if there are grounds for the court to close the criminal case, was considered a significant violation of Part 1 of Article 412 of the CPC of Ukraine.

There is an exception to the above, when the court decision should not be revoked, if the proceedings were not closed if there are grounds for such closure by the court. In the case we are considering, this is a situation when the materials of the proceedings confirm that the suspect or accused is exempt from criminal liability, including on such non-rehabilitative grounds, which is regulated in Article 49 of the Criminal Code of Ukraine [2] (expiration of the statute of limitations for criminal prosecution), *objected to this*. As a result, on the basis of Part 3 of Article 285 of the CPC of Ukraine [1], pre-trial investigation and court proceedings were conducted in full in the general order.

In the Circumstances when the Conviction of the Court Came into Force, the Person Should be Subject to Release in Court of Cassation from Punishment, as Referred to in Part 5 of Art. 74 of the Criminal Code of Ukraine, on the Grounds Provided for in Art. 49 of the Criminal Code of Ukraine

It is worth noting that globally at the heart of this issue is the idea of improving existing legal mechanisms to protect citizens from violations of their rights, in particular, during criminal proceedings, making the final decision on punishment or release. Its various aspects and components, including international [12, p. 257-267], are constantly in the field of view of scientists. Researchers, logically, justifiably advise to start with criminal policy [13, p. 282-293], resorting to the implementation at the level of the apparatus [14] and improving the existing individual components [15]. The aspect of introduction of humane approaches and respect for human dignity in special standards is also acute [16, p. 277]. We agree with the author's vision that a prerequisite for the development of the latest effective means of combating criminal offenses, among other things, is an in-depth study [17, p. 262]. After all, "now criminal law, as a means of protecting human rights and freedoms in national and international law is characterized by imperfect adaptation to rapidly changing social circumstances, which, accordingly, leads to problems in their legal protection" [18, p. 248-253]. Criminal procedural law is no exception, and when the issue concerns both of them, namely those legislative omissions that are interdependent, one should not hope for the unity of scientific and practical approaches. In this regard, it should be emphasised that the institution of exemption from criminal liability is very controversial not only among practitioners but also in scientific circles unanimity on its constitutionality [6, p. 40-48], individualisation or differentiation, consistency with the principles of criminal proceedings, in particular with the presumption of innocence, etc., is also absent [7; 19; 20]. In turn, considering the comprehensive at the dissertation level the institution of release from punishment, O.P. Horokh also did not establish absoluteness about him, moreover, comparing the substantive and procedural norms, he came to the conclusion that the legislator clearly could not solve this problem with dignity in the current CPC. "… and the question of the possibility of sentencing without sentencing has become even more confusing" [5, p. 139], therefore recommends an illustrative example of the wording of the article, which provides for the adoption of a conviction without sentencing [5, p. 140].

In line with this research, it is important for the legislator to determine the moment when a person will be prosecuted. In particular, during the pre-trial investigation the suspicion is formulated in the procedural document – notification of suspicion and the person is directly informed about the suspicion of committing a criminal offense in the manner prescribed by the CPC of Ukraine. It is also important that at this stage of the procedural activity there is an initial moment of bringing a person to criminal responsibility [11, p. 65], because according to paragraph 14 of part 1 of Article 3 of the CPC of Ukraine under criminal prosecution should be understood "… stage of criminal proceedings, which begins from the moment of notifying a person of suspicion of committing a criminal offense" [1].

This legislative wording generally follows from the Decision of the Constitutional Court of Ukraine No. 9-rp/1999 [21], although the legislator brought it in line with other provisions of the CPC of Ukraine in 2012 [1]. Since the said Decision of the Constitutional Court of Ukraine was adopted under the conditions of the then wording of the third part of Article 80 of the Constitution of Ukraine and the CPC of 1960 [22], the current procedural decisions were analysed. And in accordance with the requirements of the CPC of 1960 [22], the initial procedural decision of the investigator, prosecutor and, accordingly, the procedural document for criminal prosecution was the decision to prosecute as a defendant.

From the analysis of Part 1 of Article 42 of the current CPC of Ukraine [1] it follows that one of the cases of acquiring the status of a suspect is to notify the person of the suspicion.

Another case of a person acquiring the status of a suspect is drawing up a notice of suspicion, but not serving it conditioned upon failure to establish the location of the person, if measures are taken for service in the manner prescribed by the CPC of Ukraine for service [1]. The date and time of notification of suspicion and other data in accordance with Part 4 of Article 278 of the CPC of Ukraine [1] shall be immediately entered by the investigator, prosecutor in the Unified Register of Pre-trial Investigations [1]. Accordingly, based on such data entered into the Unified Register of Pre-trial Investigations, the technical possibility of generating information on bringing a person to criminal responsibility is provided. The current form of the certificate of criminal prosecution, absence (presence) of a criminal record or restrictions provided by the criminal procedural legislation of Ukraine [23] is logical and approved.

Denying the thesis that "through the release from criminal liability is realised and its differentiation", Yu.V. Baulin quite rightly sums up that "the subject of such differentiation is the legislator, who in advance, before committing a crime, differentiates potential criminal liability for different categories of crimes and criminals." At the same time, the court that decides on exemption from criminal liability "individualises the approach to determining the fate of a person, as not only does not apply the scale of differentiation of criminal liability, which laid down by the legislator, but, on the contrary, refuses to impose legislation on this person. restrictions for the crime committed by her "[4, p. 192].

At the same time, there are those researchers who consider it impossible to apply exemption from criminal liability of persons who have not yet been found guilty by a court verdict of a crime [24]. Partially agreeing, I would like to note that the "procedural steps" to such "application" may be the completion of the pre-trial investigation by the prosecutor's request to the court to release the person from criminal liability. Obviously, the researcher's approach should also be correlated with the initial moment of bringing a person to criminal responsibility and, based on this, *the opportunity to ask questions,* concluding the pre-trial investigation, for further release from criminal liability. After all, this is one of the forms of its completion, according to Part 2 of Article 283 of the CPC – the preparation of the prosecutor's petition [1]. It is also not easy to unequivocally agree with the arguments in the legal literature that acquitting a person as an institution of criminal and, in part, criminal procedural law is not in line with constitutional provisions, including the presumption of innocence. We support those well-known researchers [4, p. 196-197], which by their own counterarguments level such a concept. After all, it is necessary to proceed from the conceptual and comprehensive legislative understanding of the institution of exemption from criminal liability, which is impossible without criminal procedural approaches. At the same time, even considering them, one should not start from only one of all possible and available in part 2 of Article 283 of the CPC of Ukraine [1] forms of termination of pre-trial investigation – appeal to the court to release the person from criminal liability 283 of the Criminal Procedure Code of Ukraine) [1]. The analysis of judicial practice shows quantitatively, and the provisions of the CPC of Ukraine [1], in turn, provide that there is a release from criminal liability of persons convicted by a court conviction, not just those who have not been convicted. The urgent issue is that the court (in our case it did cassation) clearly and timely clarify when objectively there are grounds for release from criminal liability and adequately, in unison with the provisions of Part 8 of Article 284 of the CPC, Article 285 of the CPC of Ukraine [1], reacted to its existence. Of course, opponents may point to Article 440 of the CPC of Ukraine [1], which stipulates that the court of cassation also has the power to overturn a conviction or ruling and close criminal proceedings [1]. But then where is the place of procedural economy? Moreover, similar powers are provided for in Article 417 of the CPC of Ukraine for the court of appeal [1].

It should be clarified at once that we do not consider the current situation to be acceptable, when the wording "exemption from criminal liability" is used in legislative formulations and, accordingly, in case law, in cases *where the conviction has already entered into force*. It seems that this approach is not entirely correct and does not comply with certain provisions of the Criminal Code of Ukraine. In this sense, more extensively resorting to doctrinal approaches, we fully share the scientific position that it is only about the possibility of release from punishment, as part of such responsibility "[4, p. 198]. If the conviction of the court has entered into force, the person is considered to be subject to lawful conviction for a crime committed by him before [5, p. 271].

Continuing our consideration of the issues declared in this matter, we agree that those researchers are quite right when they say that "it is not necessary to talk about release from criminal liability when it has already occurred, i.e. the conviction has entered into force. Exemption from this real criminal liability, in contrast to potential criminal liability (which is already in the potential is enshrined in the sanctions of criminal law, but this potential does not come true) is not possible as such" [4, p. 194]. O.P. Horokh, who is a well-known expert in this field, analyzing the case law of the Supreme Court of Ukraine (decision of 27 July 2010 in the case No. 5-2347km10) agrees with her and notes that "… if the grounds for release from criminal liability at the time of trial there was no case, and they arose after a considerable period of time after the verdict of the court of first instance, the court must release the convict from punishment on the basis of Part 5 of Art. 74, paragraph 2, part 1 of Art. 49 of the Criminal Code" [5, p. 271]. Moreover, the author concludes this provision as relevant and recommends its application to the courts of appeal of Ukraine [5, p. 289]. However, the researcher did not refer to the provisions of the CPC of Ukraine in force in this regard since 2012 and did not express his opinion on the current situation, because the decision referred to by the scientist was made by the Supreme Court of Ukraine provisions of the CPC of 1960 [22]. There is also no understanding of such a word formation as "a significant period of time after the verdict." Very interesting and worthy of approval in terms of the declared issues, is the introduction of the cited scientist such an approach as "the expiration of the statute of limitations is favorable…" [5, p. 289-290].

There are more radical proposals of these and other scientists. In particular, the members of the working group working on the draft of the new Criminal Code of Ukraine are inclined to transform the institution of exemption from criminal liability into the institution of exemption from punishment [24], which does not seem to be fully consistent with criminal proceedings at some stages. turn, on pre-trial investigation. If there are grounds for this, this first stage, among other things, as mentioned above, may end with a prosecutor's request to the court to release the person from

criminal liability (paragraph 2 of Part 2 of Article 283 of the CPC [1]), which is logical. The initial moment of bringing a person to criminal responsibility in such circumstances is available, so it is possible to initiate such an issue in the pre-trial investigation, talking about the final release of the court from criminal liability. However, it is not possible to initiate the issue of release from punishment at the first stage of the criminal process, because it is illogical. It seems that we can talk about him only after the court has passed a conviction. But on the other hand, the current wording of paragraph 1 of part 2 of Article 284, Article 440 of the CPC of Ukraine and other related articles of the CPC of Ukraine [1], where the legislator *should lay down an approach to the powers of courts of different instances also for release from punishment by the court of cassation.*

Conclusions

Obligations enshrined in Part 8 of Article 284, Article 285 of the CPC of Ukraine apply not only to the courts of first instance, but also to the appellate instance. The person has the right to object to the closure of criminal proceedings on the non-rehabilitative basis of paragraph 1 of part 2 of Article 284 of the CPC of Ukraine. The execution of the above actions by the court and the establishment by the court of the person's consent to such release from criminal liability can in fact be regarded as one of the steps towards the decision to close the proceedings. In turn, failure of the court of first or appellate instance to clarify the provisions of Article 285 of the CPC of Ukraine to a person, as a result of which "if there were grounds for the court to close the criminal case was not closed" within the meaning of Part 1 of Article 412 of the CPC of Ukraine.

In the present case, the judgment *should not* be overturned by the Court of Cassation if the case file confirms that the suspect or accused in respect of whose release was pending due to the expiration of the statute of limitations *objected*. As a result, on the basis of Part 3 of Article 285 of the CPC of Ukraine pre-trial investigation and court proceedings were conducted in full in the general order. In circumstances when the conviction of the court has unequivocally entered into force, because the cassation proceedings are underway, if there are established grounds, *the court of cassation should release such a person from punishment* , as referred to in part 5 of Article 74 of the Criminal Code of Ukraine, provided by Article 49 of the Criminal Code of Ukraine. At the same time, the approach taken by the legislator in the construction of paragraph 1 of part 2 of Article 284, Article 440 of the CPC of Ukraine and other articles of the CPC of Ukraine is an obstacle to the adoption of such a procedural decision.

References

[1] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from http://zakon2.rada.gov.ua/laws/show/4651-17/page8.
[2] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[3] Resolution of the Joint Chamber of the Criminal Court of Cassation of the Supreme Court in case No. 521/8873/18. (2021, December). Retrieved from https://reyestr.court.gov.ua/Review/101829954.
[4] Baulin, Yu.V. (2013). Exemption from criminal liability. *Bulletin of the Association of Criminal Law of Ukraine*, 1(1), 185-207.
[5] Horokh, O.P. (2019). *Release from punishment and from the service of sentence under the Criminal Code of Ukraine*. (Doctoral dissertation, National University of Kyiv-Mohyla Academy, Kyiv, Ukraine).
[6] Dudorov, O. (2009). On the constitutionality of the institution of exemption from criminal liability. *Journal of the National Prosecution Academy of Ukraine,* 1, 40-48.
[7] Ros, H. (2009). Closing a criminal case with the release of a person from criminal liability and the presumption of innocence. *Law of Ukraine*, 10, 232-237.
[8] Judgment of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court in case No. 521/8873/18. (2021, September). Retrieved from https://reyestr.court.gov.ua.
[9] Appeal of the judge of the Criminal Court of Cassation of the Supreme Court Vyacheslav Volodymyrovych Nastavny in case No. 521/8873/18 (proceedings No. 51-413 kmo 21) with the registration entry number of the Supreme Court 591/0/26-21. (2021, October).
[10] Scientific Opinion of NKR Member at the Supreme Court Iryna Basysta on Issues Related to Exemption from Sentence under Article 49, Part 5 of Article 74 of the Criminal Code of Ukraine in the case No. 521/8873/18 (proceedings No. 51-413 kmo 21). (November, 2021).
[11] Basysta, I.V. (2022). Is the court obliged to explain to the person that at the time of the appellate review the statute of limitations for bringing this person to criminal responsibility had expired? In *Materials of scientific readings dedicated to the memory of Professor T. Denisova* (pp. 62-68). Zaporizhzhia.
[12] Shchur, B.V., & Basysta, I.V. (2021). ECHR decision to refuse to waive the immunity of a person under article 1 of the Protocol no. 6: Individual interpretations of the essence and consequences. *Journal of the National Academy of Legal Sciences of Ukraine,* 28(3), 257-267.
[13] Shepitko, M.V. (2020). To the problem of structure and classifications of criminal policy formation. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 282-293.
[14] Horbova, A.O., Galagan, V., Basysta, I., Riabchynska, O., & Hayrapetyan, A. (2019). Institute of financial ombudsman: European models of functioning and introduction in Ukraine. *Journal of Legal, Ethical and Regulatory Issues*, 22(2S), 1-6.
[15] Nadybska, O., Fedotova, H., Shcherbyna, S., Chornous, Yu., & Basysta, I. (2020). Children's rights ombudsman: Experience of Ukraine and foreign countries. *Journal of Legal, Ethical and Regulatory Issues,* 23(2). Retrieved from https://www.abacademies.org/articles/childrens-rights-ombudsman-experience-of-ukraine-and-foreign-countries-9134.html.
[16] Kryklyvets, D.Ye., Kerniakevych-Tanasiichuk, Yu.V., Fidria, Yu.O., Muzychuk, K.S., & Sasko, O.I. (2021). The process of pardoning those sentenced to life sentences and long terms of imprisonment as a criterion for increasing the liberality of the judicial system. *Journal of the National Academy of Legal Sciences of Ukraine,* 28(2), 277-287.

[17] Panov, M.I., Kharytonov, S.O., & Haltsova, V.V. (2021). Object of criminal offence: Modern interpretations. *Journal of the National Academy of Legal Sciences of Ukraine,* 28(2), 262-269.
[18] Haltsova, V.V., Kharytonov, S.O., Khramtsov, O.M., Zhytnyi, O.O., & Vasyliev, A.A. (2021). Criminal law as a means of protecting human rights and freedoms in the modern world. *Journal of the National Academy of Legal Sciences of Ukraine,* 28(3), 248-256.
[19] Kozak, O.S. (2008). Implementation of the principle of guilt in the release of a person from criminal liability. *Our Law*, 2, 59-65.
[20] Nazymko, Ye.S. (2011). Socially dangerous act and the institution of release from criminal liability: Current issues of relations. *Bulletin of Luhansk State University of Internal Affairs named after E. Didorenko*, 2, 115-123.
[21] Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Ministry of Internal Affairs of Ukraine regarding the official interpretation of the provisions of Part 3 of Article 80 of the Constitution of Ukraine (case of parliamentary immunity) case No. 1-15/99. (1999, October). Retrieved from https://zakon.rada.gov.ua/laws/show/v009p710-99#Text.
[22] Criminal Procedure Code of Ukraine. (2007). Kyiv: Palivoda A.V.
[23] Certificate of criminal prosecution, absence (presence) of a criminal record or restrictions provided by the criminal procedure legislation of Ukraine. (n.d.). Retrieved from https://my.gov.ua/info/service/bydepartment-1531/4565/details.
[24] Horokh, O.P. (2021). Exemption from punishment under the draft of the new Criminal Code of Ukraine. *Scientific Notes of the National University "Kyiv-Mohyla Academy". Legal Sciences,* 8, 3-15.

Список використаних джерел

[1] Кримінальний процесуальний кодекс України: офіц. текст від 13.04.2012 р. URL: http://zakon2.rada.gov.ua/laws/show/4651-17/page8 (дата звернення: 04.02.2022).
[2] Кримінальний кодекс України: офіц. текст від 05.04.2001 р. URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text (дата звернення: 04.02.2022).
[3] Постанова об'єднаної палати Касаційного кримінального суду Верховного Суду від 06.12.2021 р. у справі № 521/8873/18 (провадження № 51-413кмо21). URL: https://reyestr.court.gov.ua/Review/101829954 (дата звернення 04.02.2022).
[4] Баулін Ю.В. Звільнення від кримінальної відповідальності. *Вісник Асоціації кримінального права України.* 2013. № 1(1). С. 185–207.
[5] Горох О.П. Звільнення від покарання та його відбування за кримінальним правом України: дис. … докт. юрид. наук: 12.00.08 / Національний університет «Києво-Могилянська академія». Київ, 2019. 674 с.
[6] Дудоров О. Про конституційність інституту звільнення від кримінальної відповідальності. *Вісник Національної академії прокуратури України.* 2009. Вип. 1. С. 40–48.
[7] Рось Г. Закриття кримінальної справи зі звільненням особи від кримінальної відповідальності та презумпція невинуватості. *Право України.* 2009. Вип. 10. С. 232–237.
[8] Ухвала Першої судової палати Касаційного кримінального суду Верховного Суду від 23.09.2021 р. у справі № 521/8873/18 (провадження № 51-413кмо21). URL: https://reyestr.court.gov.ua (дата звернення 4.02.2022).
[9] Звернення судді Касаційного кримінального суду у складі Верховного Суду Вячеслава Володимировича Наставного у справі № 521/8873/18 (провадження № 51-413 *кмо* 21) із реєстраційним вхідним номером Верховного Суду 591/0/26-21 від 25.10.2021.
[10] Науковий висновок члена НКР при Верховному Суді Ірини Басистої з питань, пов'язаних зі звільненням від призначеного покарання на підставі статті 49, частини 5 статті 74 КК України (на виконання звернення від судді Касаційного кримінального суду у складі Верховного Суду Вячеслава Володимировича Наставного у справі № 521/8873/18 (провадження № 51-413 кмо 21) від 22.11.2021 р.
[11] Басиста І.В. Чи зобов'язаний суд роз'яснити особі те, що на момент апеляційного розгляду закінчились строки давності притягнення цієї особи до кримінальної відповідальності? Збірник матеріалів наукових читань, присвячених пам'яті професора Т.А. Денисової. Запоріжжя, 2022. С. 62–68.
[12] Shchur B.V., Basysta, I.V. ECHR decision to refuse to waive the immunity of a person under article 1 of the Protocol no. 6: Individual interpretations of the essence and consequences. *Journal of the National Academy of Legal Sciences of Ukraine.* 2021. Vol. 28, No. 3. P. 257–267.
[13] Shepitko M.V. To the problem of structure and classifications of criminal policy formation. *Journal of the National Academy of Legal Sciences of Ukraine*. 2020. Vol. 27, No. 4. P. 282–293.
[14] Institute of financial ombudsman: European models of functioning and introduction in Ukraine / A.O. Horbova et al. *Journal of Legal, Ethical and Regulatory Issues*. 2019. Vol. 22, No. 2S. P. 1–6.
[15] Children's rights ombudsman: Experience of Ukraine and foreign countries / O. Nadybska et al. *Journal of Legal, Ethical and Regulatory Issues.* 2020. Vol. 23, No. 2. URL: https://www.abacademies.org/articles/childrens-rights-ombudsman-experience-of-ukraine-and-foreign-countries-9134.html (accessed date: 04.02.2022).
[16] The process of pardoning those sentenced to life sentences and long terms of imprisonment as a criterion for increasing the liberality of the judicial system / D.Ye. Kryklyvets et al. *Journal of the National Academy of Legal Sciences of Ukraine.* 2021. Vol. 28, No. 2. P. 277–287.
[17] Panov M.I., Kharytonov S.O., Haltsova V.V. Object of criminal offence: Modern interpretations. *Journal of the National Academy of Legal Sciences of Ukraine.* 2021. Vol. 28, No. 2. P. 262–269.

[18] Criminal law as a means of protecting human rights and freedoms in the modern world / V.V. Haltsova et al. *Journal of the National Academy of Legal Sciences of Ukraine.* 2021. Vol. 28, No. 3. P. 248–256.
[19] Козак О.С. Реалізація принципу винності діяння при звільненні особи від кримінальної відповідальності. *Наше право*. 2008. Вип. 2. С. 59–65.
[20] Назимко Є.С. Суспільно небезпечне діяння та інститут звільнення особи від кримінальної відповідальності: актуальні питання співвідношення. *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка.* 2011. Вип. 2. С. 115–123.
[21] Рішення Конституційного Суду України у справі за конституційним поданням Міністерства внутрішніх справ України щодо офіційного тлумачення положень частини третьої статті 80 Конституції України (справа про депутатську недоторканність**) від** 27.10 1999 р., справа № 1-15/99. URL: https://zakon.rada.gov.ua/laws/show/v009p710-99#Text (дата звернення: 04.02.2022).
[22] Кримінально-процесуальний кодекс України. Київ: Паливода А.В., 2007. 200 с.
[23] Довідка про притягнення до кримінальної відповідальності, відсутність (наявність) судимості або обмежень, передбачених кримінально-процесуальним законодавством України. URL: https://my.gov.ua/info/service/bydepartment-1531/4565/details (дата звернення 05.02.2022).
[24] Горох О.П. Звільнення від покарання за проєктом нового Кримінального кодексу України. *Наукові записки НаУКМА. Юридичні науки.* 2021. Т. 8. С. 3–15.

Окремі проблеми прийняття процесуального рішення про закриття кримінального провадження у зв'язку зі звільненням особи від кримінальної відповідальності

Роман Ігорович Благута, Ірина Володимирівна Басиста

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. У судовій практиці наявні ситуації, коли станом на день ухвалення рішення судом апеляційної інстанції вже закінчився строк давності притягнення обвинуваченого до кримінальної відповідальності, а сторона захисту не виступає з ініціативою про звільнення особи від кримінальної відповідальності. Відповідно й суд жодним чином на існування цієї обставини теж не реагує та не вирішує питання про застосування (не застосування) підстави, що міститься в п. 1 ч. 2 ст. 284 КПК, чи іншої, для прийняття процесуального рішення про закриття кримінального провадження. Тому й поставлено за мету спробувати дати відповідь на запитання щодо того, котре із процесуальних рішень, за описаних умов і обставин, повинно бути прийняте судом: про закриття кримінального провадження у зв'язку зі звільненням особи від кримінальної відповідальності чи особа мала би підлягати звільненню в суді касаційної інстанції від покарання? Завдяки застосованому формально-логічному методу та системного аналізу, з'ясовано, що ч. 2 ст. 284 КПК стосується випадків закриття кримінального провадження виключно судом. Констатовано, що у п. 1 цієї частини статті, серед підстав для закриття кримінального провадження, законодавцем передбачено й «…у зв'язку зі звільненням особи від кримінальної відповідальності». Водночас доведено, що право особи бути звільненою від кримінальної відповідальності, за наявності до цього підстав, судді нерідко не узалежнюють із власним обов'язком роз'яснити особі таке право, щоб вона могла ним скористатися. Встановлено, що обов'язки, закріплені у ст. 285 КПК стосуються не лише судів першої, а й апеляційної інстанції. Такі методи дослідження, як вибірка, системно-структурний, індукція та дедукція були використані під час наведення та відстоювання аргументів щодо того, що за обставин, коли обвинувальний вирок суду набрав законної сили, особа мала би підлягати звільненню в суді касаційної інстанції від покарання, як про це йдеться у ч. 5 ст. 74 КК України, на підставах, передбачених ст. 49 КК України. Водночас, доведено, що на заваді прийняття такого процесуального рішення судом є той підхід, який законодавець заклав у конструкцію п. 1 ч. 2 ст. 284, ст. 440 КПК

Ключові слова: звільнення від покарання, апеляційне провадження, касаційне оскарження, строк давності притягнення до кримінальної відповідальності