

PROSPECTS FOR IMPROVING ADMINISTRATIVE AND LEGAL SUPPORT FOR THE APPLICATION OF AN URGENT RESTRAINING ORDER

ПЕРСПЕКТИВИ УДОСКОНАЛЕННЯ АДМІНІСТРАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ЗАСТОСУВАННЯ ТЕРМІНОВОГО ЗАБОРОННОГО ПРИПISУ

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The article identifies the prospects for improving the administrative and legal support for the application of an urgent restraining order, which is a type of special measures to respond to manifestations of domestic violence. It is determined that the ratification of the Istanbul Convention and the need to amend the current legislation of Ukraine on combating domestic violence in this regard have a positive impact on the protection of the rights of victims. The purpose of the study is to determine the prospects for improving the administrative and legal support for the application of an urgent restraining order in Ukraine. In the course of writing this article, the following methods were used: dialectical, comparative and axiological. The author reveals the essence of the concept of an urgent restraining order and identifies its main features. The author emphasizes that it is appropriate to use the phrase

“special measures to combat domestic violence” rather than “special measures to combat domestic violence”. It is emphasized that the functions of an urgent restraining order are aimed not only at combating but also at preventing domestic violence, since they also aim to influence the personality of the offender in order to prevent the recurrence of domestic violence. A comparative analysis of the UAE and Spanish legislation on the application of an urgent restraining order is made, which may be appropriate for Ukraine to adopt. The author formulates promising directions for improving the administrative and legal support for the application of an urgent restraining order, namely: 1) strengthening of administrative liability for failure to comply with an urgent restraining order; 2) determination at the legislative level of the possibility to extend the term of an urgent restraining order until the end of consideration in court of the affected person’s application for a restraining order. The article is of a theoretical nature and identifies the prospects for improving administrative and legal support in accordance with the subject matter of the study.

Key words: *improvement; domestic violence; urgent restraining order; court; offender; victim; police authorities.*

У статті визначено перспективи удосконалення адміністративно-правового забезпечення застосування термінового заборонного припису, який є різновидом спеціальних заходів реагування на прояви домашнього насильства. Визначено, що ратифікація Стамбульської конвенції та необхідність у зв’язку з цим внесення змін до чинного законодавства України з протидії домашньому насильству позитивно впливають на захист прав постраждалих осіб. Мета дослідження полягає у визначенні перспектив удосконалення адміністративно-правового забезпечення застосування термінового заборонного припису в Україні. В процесі написання даної статті були використані такі методи: діалектичний, компаративний та аксіологічний. Розкрито сутність поняття термінового заборонного припису, виокремлено його головні ознаки. Акцентовано, що доречним є використання сполучення «спеціальні заходи протидії домашньому насильству», а не «спеціальні заходи щодо протидії домашньому насильству». Наголошено, що функції термінового заборонного припису спрямовані не лише на протидію, але й на запобігання домашньому насильству, тому що мають також за мету вплинути на особу кривдника задля недопущення повторного вчинення домашнього насильства. Здійснено порівняльний аналіз законодавства ОАЕ та Іспанії щодо застосування термінового заборонного припису, який може бути доречним для запозичення Україною. Сформульовано перспективні напрямки удосконалення адміністративно-правового забезпечення застосування термінового заборонного припису, а саме: 1) посилення адміністративної відповідальності за невиконання термінового заборонного припису; 2) визначення на законодавчому рівні можливості продовжувати термін дії термінового заборонного припису до закінчення розгляду у суді заяви постраждалої особи про видачу обмежувального припису. Стаття має теоретичний характер та визначає перспективи удосконалення адміністративно-правового забезпечення відповідно до предмета дослідження.

Ключові слова: *удосконалення; домашнє насильство; терміновий заборонний припис; суд; кривдник; постраждала особа; органи поліції.*

INTRODUCTION

Today, Ukraine continues to conduct active public awareness campaigns aimed at preventing domestic violence. Such activities bring about positive changes in people’s minds, as evidenced by statistics. Statistics show that in 2023, the National Police of Ukraine registered more than 291 thousand cases of domestic violence, which is 20% more than in 2022. At the same time, the number of registered criminal offenses increased by 80% (from 1498 to 2701), and the number of detected administrative offenses increased by 36%. In turn, the Analytical Center of the Ministry of Internal Affairs of Ukraine predicts an increase in the number of administrative offenses to 21% and criminal offenses to 30% in 2024 [1]. On the one hand, this is due to an increase in cases of domestic violence, on the other hand, victims have become more aware and able to distinguish its manifestations, know where to turn and believe in the protection of their rights by the state. The ratification of the Istanbul Convention and the proposed amendments to the current Ukrainian legislation on combating domestic violence in this regard have a positive impact on the protection of the rights of victims. Prioritizing the protection of the life and health of a survivor of domestic violence is

one of the main differences in the current legislation. An urgent restraining order is a type of special response to domestic violence and is intended to provide the victim with a sense of greater security. Therefore, improving the administrative and legal support for the application of an urgent restraining order is part of the domestic and foreign policy of the state, for which human rights are one of the highest values.

LITERATURE REVIEW

The following scholars have thoroughly studied this issue. I. Gorbach-Kudrya revealed the administrative and legal basis for the application of special measures to combat domestic violence, clarified the concept of «urgent restraining order» and algorithmized the issuance of an urgent restraining order against the perpetrator [2]. T. Rekunen and N. Udalova considered the current problems of the perpetrator’s liability in the administrative process and made a comparative analysis of the urgent restraining order and the restrictive order [3]. Ye. Horbunova analyzed the issues of administrative and legal support in the fight against domestic violence, emphasizing that an urgent restraining order is, by nature, an administrative act of an unfavorable nature for a person and, therefore, requires a mandatory motivation that complies

with the principle of reasonableness, which is an element of the concept of good administration [4].

At the same time, the complexity and diversity of scientific views on the issue of administrative and legal support for the application of an urgent restraining order in Ukraine necessitates determining the prospects for its improvement.

AIMS AND OBJECTIVES

The purpose of the article is to determine the prospects for improving the administrative and legal support for the application of an urgent restraining order in Ukraine. The objectives of the study are to identify promising areas for such improvement based on the analysis of the provisions of legal acts, scientific positions and legislation of certain foreign countries.

METHODOLOGY AND RESEARCH METHODS

The methodological basis of the study is a combination of dialectical, comparative and axiological methods, which reveal the essence and peculiarities of the administrative and legal support of the application of an urgent restraining order in Ukraine, and outline the main areas for its improvement on the basis of legislative provisions and scientific work on the relevant issues.

RESULTS

According to the provisions of the Istanbul Convention, States are obliged to take the necessary legislative or other measures to ensure that the competent law enforcement authorities respond promptly and effectively to all acts of violence falling within the scope of the Convention by providing appropriate and timely protection to the victims. In addition, Chapter VI of the Istanbul Convention provides for three types of measures, namely: emergency banning orders (Article 52 - Emergency banning orders), restraining or protective orders (Article 53 - Restraining or protective orders) and protective measures (Article 56 - Protective measures) [5]. Analyzing Section V of the Law of Ukraine «On Prevention and Combating Domestic Violence», it should be noted that an urgent restraining order against the perpetrator is one of the special measures to combat domestic violence, which is applied by authorized police units as a response to domestic violence and is aimed at timely termination of domestic violence, avoidance of danger to life and health of victims and prevention of continuation or recurrence of such violence [6].

I.A. Gorbach-Kudria points out a number of shortcomings in the legal definition of an urgent restraining order. Firstly, it is appropriate to use the phrase «special measures to counteract domestic violence» rather than «special measures to counteract domestic violence», since it is inappropriate in Ukrainian scientific language to combine a preposition with a verbal noun. Second, an urgent restraining order is a police measure that,

according to the principle of legal analogy, is «applied» or «used» but not «taken». Thirdly, the legislator indicates the functions of an urgent restraining order as a preventive measure («prevention of recurrence»), although it is a measure to combat domestic violence [2, pp. 39-40].

We agree with the opinion and reasoning of the scholars on the appropriateness of using the phrase «special measures to combat domestic violence» because special measures are used to stop domestic violence, and do not oppose the cessation of domestic violence. At the same time, an urgent restraining order can be «applied,» «used,» and «enforced,» but not «issued,» although that is what the Domestic Violence Act says. One of the meanings of the verb «to use» is to use or apply something for a purpose [7 p. 401]. In other words, the words «apply», «use» and «be used» are synonymous. The functions of an urgent restraining order are not only to counteract domestic violence, but also to prevent it, as they also aim to influence the personality of the perpetrator in order to prevent the repeated commission of domestic violence.

The signs of an urgent restraining order are that

- 1) It is applied by authorized police units;
- 2) the basis for its application is the existence of a real and immediate threat to the life or health of the victim or survivor in order to immediately stop domestic violence, prevent its continuation or recurrence. In other words, at the time of issuing the above-mentioned order, the person against whom it is issued is not found guilty of committing domestic violence in criminal or administrative proceedings [3, p.122];
- 3) taken at the request of the affected person or on the initiative of an employee of an authorized unit of the police based on the results of a risk assessment;
- 4) valid for up to 10 days;
- 5) is appealed to the court on the general grounds provided for appealing decisions, actions or omissions of employees of authorized units of the National Police.

Thus, an urgent restraining order is applied by the police in case of a threat to the victim and to immediately counteract an act of domestic violence. That is, when such an order is issued, the abuser is not found guilty of domestic violence in criminal proceedings or an administrative offense case. In general, this approach is to some extent similar to the detention of a suspect during or after the commission of a crime, provided that a set of signs indicate that the person committed the crime (Article 208 of the CPC), which occurs before the start of the pre-trial investigation (i.e. before the «opening of criminal proceedings»). In accordance with this analogy, T. Rekunenko and N. Udalova believe that the application of an urgent restraining order should be accompanied by other procedural actions

of the police, namely, drawing up a protocol on an administrative offense (Article 173-2 of the Code of Administrative Offenses) or entering information about a criminal offense into the Unified Register of Pre-trial Investigations [3, pp. 122-123].

Order of the Ministry of Internal Affairs of Ukraine No. 654 «On Approval of the Procedure for Issuing an Urgent Restraining Order against an Abuser by Authorized Police Units» dated 01.08. 2018 [8] regulates the administrative procedure for applying an urgent restraining order against an abuser, which is carried out on the basis of the results of the risk assessment provided for by the Order of the Ministry of Social Policy and Ministry of Internal Affairs of Ukraine No. 369/180 «On Approval of the Procedure for Conducting a Risk Assessment of Domestic Violence» of 13.03.2019 [9].

An urgent restraining order is issued against the perpetrator by a police officer of an authorized police unit after the risk of domestic violence is assessed according to the level of danger: high, medium, low. The assessment of the risk of domestic violence is carried out by answering 27 questions, the list of which is approved by the Order of the Ministry of Social Policy and the Ministry of Internal Affairs of 13.03.2019¹ 369/180. The answers to the questions can be as follows: «Yes», «No», «Unanswered/Unknown» and are provided as a result of communication/interview with the affected person or his/her representative, clarification of the circumstances of the conflict and identification of factors and conditions that cause or may cause danger to this person.

An urgent restraining order against the perpetrator is mandatory if the police officer identifies a high level of danger.

An Emergency Restraining Order may be issued at the discretion of a police officer when the danger level is determined to be low or moderate, and there are no other factors/circumstances that may determine the danger level.

An Emergency Restraining Order may include:

- 1) an obligation to leave the person's place of residence (stay);
- 2) a prohibition on entering and remaining in the place of residence (stay) of the person concerned;

For comparison, in the UAE, the Domestic Violence Protection Act empowers the Public Prosecutor to issue a protection order on his own initiative or on the basis of a victim's request in order to prevent acts of violence and to protect the victim, his welfare and economic status [10]. The list of measures that the prosecutor may apply in a protection order is not exhaustive. Therefore, it may include any procedure that the prosecutor deems appropriate and necessary to ensure effective protection of the violated rights of the person.

It should be noted that the Domestic Violence Act gives the highest priority to the safety of the victim,

even over the property rights of persons to housing. Therefore, the law allows for the issuance of an urgent injunction against a dwelling solely owned by the perpetrator, provided that the dwelling is a place of common residence or stay for the victim and the perpetrator. In addition, the National Police are authorized to evict the perpetrator from such a dwelling if the urgent restraining order requires the perpetrator to leave the victim's place of residence or stay and the victim refuses to do so voluntarily.

If the perpetrator is a person who is under the age of eighteen on the day the order is issued and who shares a place of residence (stay) with the victim, the urgent restraining order may not contain an obligation to leave the victim's place of residence (stay) and may not prohibit the perpetrator from entering and staying at the victim's place of residence (stay) [6].

An urgent restraining order shall be terminated in the event of

- 1) Expiration of the period for which it was issued;
- 2) administrative detention is applied to the offender as a form of administrative punishment;
- 3) imposing a preventive measure in the form of detention on the perpetrator in criminal proceedings.

The experience of Spain in the application of an urgent injunction seems to be useful for borrowing. The Spanish police recognize four levels of risk of domestic violence: low, medium, high and very high. At the same time, the legislation clearly defines the measures that the police must take according to the level of risk identified:

1) Level 1 (low risk): Familiarize the victim with the permanent (24-hour) contact telephone numbers of the nearest police authorities; Contact the victim periodically by telephone; Inform the offender that the victim is under police protection; Familiarize the victim with self-defense recommendations and ways to avoid possible incidents; Provide detailed information about the mobile remote assistance service.

2) Level 2 (medium risk): Take the measures required for level 1, plus; Conduct regular surveillance at home, at work, and at the entrances and exits of educational institutions; Accompany the victim during as many proceedings (judicial or administrative) or requests for assistance as necessary; Teach the victim certain self-defense techniques; provide the victim with a mobile device (remote assistance service), if possible.

3) Level 3 (High Risk): Apply the measures required for Levels 1 and 2, as well as; Provide ongoing monitoring of the victim during the high-risk period until the circumstances related to the abuser no longer pose an immediate threat; Encourage the survivor to move to a shelter or the home of a relative, if she has not already done so, at least for the first few days and especially if the offender has not yet been arrested; Periodically monitor the direction of movement of the offender [11, p. 23].

The Spanish police must periodically reassess the risk of the offender's actions:

- very high - after 72 hours
- high - after 7 days
- medium - after 30 days;
- low - after 60 days [11, p. 25].

This is noteworthy because, as a rule, the offender has a tendency to repeat his illegal actions against the victim. That is why the state should not only issue an urgent injunction once, but also create a system of monitoring and control over the actions of the perpetrator in order to educate him in the spirit of respect for women's rights and prevent the commission of new similar actions.

DISCUSSION

An Emergency Restraining Order serves to temporarily protect the victim from the offender. The victim can use the specified period of validity of the urgent restraining order to apply to the court for a restraining order, which has a wider range of measures to respond to the offender and a longer period of validity. At the same time, in our opinion, the current legislation lacks the possibility of extending an urgent restraining order, in particular, in cases where the injured person has applied to the court for a restraining order during the validity of the urgent restraining order, but the court has not resolved the issue. In such a case, it would be advisable to extend the term of the urgent restraining order until the end of the court's consideration of the injured person's application for a restraining order.

The issue of increasing administrative liability for failure to comply with an emergency injunction was also discussed. As of today, failure to comply with an urgent restraining order is subject to administrative liability in the form of a fine of ten to twenty tax-free minimum incomes, or community service for a period of thirty to forty hours, or administrative arrest for up to ten days. The draft law «On Amendments to the Code of Ukraine on Administrative Violations in Connection with the Ratification of the Council of Europe Convention on Preventing and Combating Violence

against Women and Domestic Violence (Istanbul Convention)» proposes to increase the administrative liability for failure to comply with an urgent restraining order by supplementing the sanction of the article with correctional labor for up to one month with deduction of twenty percent of earnings [12]. In our opinion, even taking into account the above draft law, administrative liability for failure to comply with an urgent restraining order is not sufficient to correct the offender, and therefore we believe that the sanction of the article should provide for community service for a period of forty to sixty hours, or correctional labor for up to one month with a deduction of twenty percent of earnings, or administrative arrest for a period of ten to fifteen days.

CONCLUSIONS

An emergency restraining order is a fairly effective means of preventing and combating domestic violence and serves as a first line of defense for victims. It is the effectiveness of non-judicial protection of victims of domestic violence that determines the development of judicial protection and the occurrence of new and repeated cases of domestic violence in the future. Improving the administrative and legal support for the application of an urgent restraining order will help to reduce the incidence of primary domestic violence and the repeated victimization of victims.

In summary, a number of positive changes have already been implemented in Ukraine. At the same time, the introduction of real innovations in this area is often characterized by incomplete reforms and lack of consistency in their implementation.

The ways to improve the administrative and legal support for the application of an urgent restraining order are as follows: strengthening the administrative liability for failure to comply with an urgent restraining order; determining at the legislative level the possibility of extending the term of an urgent restraining order until the end of the consideration of the application for a restraining order by the affected person in court.

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