THE ESSENCE OF DISCRETIONARY POWERS OF A JUDGE IN ADMINISTRATIVE PROCEEDINGS: CONCEPT, CONTENT, LEGAL ASPECT

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УДК 351.74 : 342.922

DOI: https://doi.org/10.71404/LAW.UA.2024.4.33

The article is devoted to the illumination of the discretionary powers of a judge in administrative proceedings. The article analyzes various scientific approaches to understanding the concept of «discretion,» «judicial discretion,» powers, functions. The attention is focused on the highlighted features of procedural legislation and judicial practice, which provide for the peculiarities of judge's discretion in modern conditions. It has been determined that discretion in administrative proceedings makes it possible to single out certain elements of this phenomenon, but there is no common understanding and interpretation both among scientists and in legislation. The exercise of discretionary powers by the administrative court determines the formation of judicial practice for the consideration and resolution of certain categories of administrative cases, as a result of which complex and ambiguous public law disputes are resolved without delay, without waiting for the improvement of legal regulation. The article draws attention to the fact that administrative courts are called upon to resolve public law disputes, to promote the restoration of violated rights, freedoms and interests in the field of public law relations, to restore law and order in the public sphere. Accordingly, administrative decisions regarding individuals adopted by the subjects of power, regardless of the method of their adoption, the level and place of the subject of power in the relevant system, their legal basis, motivation, method and form of adoption, are subject to judicial control.

The author emphasizes that when exercising judicial discretion, judges, guided by the principles of the rule of law, can deviate from purely legal regulation and decide cases on the basis of legal principles. The author proposes under judicial discretion to understand the authority of the court to choose between the options of decisions provided by the Code of Administrative Justice of Ukraine, guided by the principle of the rule of law and the circumstances of the case, in order to make a legitimate and justified decision in the case. In addition, judicial discretion gives the court the right to choose, and the court should, as far as possible, make decisions that correspond to the individual characteristics of a particular administrative case, in accordance with the principles of administrative proceedings. It is established that further scientific studies of judicial discretion can provide courts with practical recommendations aimed at improving the nature of administrative proceedings and the exercise of judicial discretion by courts.

Keywords: administrative proceedings, discretion, administrative proceedings, public-legal dispute, discretionary powers, rule of law.

According to the Constitution of Ukraine, one of the principles of the functioning of our state is the division of power into three branches: by legislative, executive and judicial. Based on this principle, each branch of government is independent and independent. Therefore, the courts, when considering public law disputes and decision-makers, do not have the authority to transfer the functions of the and public administration to themselves and give them instructions on how to apply and use their decisions. On the other hand, as enshrined in Art. 125 of the Constitution of Ukraine [1], administrative courts are created and operate in order to protect the rights, freedoms and interests of a person in the field of public legal

relations. Therefore, it requires the administrative court, checking the legality of decisions, actions or inaction of subjects of power, to assess the implementation of the latter's discretionary full-weight. In this connection, the actual problem of judicial practice remains the issue of the content and peculiarities of judicial discretion in administrative proceedings.

Issues of judicial discretion of research in various aspects such domestic scientists as M. Baranets, V. Bevzenko, Ya. Bernazyuk, O. Gubskaya, V. Ilykov, T. Kolomoets, I.Marochkina, T. Minka, L. Nalyvaiko, S. Priluets-kiy, V. Stefanyuk, S. Shtogun, etc. Despite the considerable attention of domestic scientists devoted to judicial discretion, many problematic issues remain controversial and require separate study and solution.

The article is aimed at clarifying the content and essence of discretionary powers of administrative courts in resolving public law disputes. Presentation of the main material. According to Article 1 of the Law of Ukraine "On the Judicial System and Status of Judges" dated June 02, 2016 and in accordance with the constitutional principles of separation of powers, justice in Ukraine is carried out by independent and impartial courts established by law. Judicial power is exercised by professional judges and, in cases determined by law, by juries through the administration of justice within the framework of appropriate judicial procedures [2]. In turn, the judiciary, created to resolve social conflicts, is designed to protect the rights and freedoms of man and citizen.

Administrative courts are called upon to resolve public-legal disputes, promote the restoration of violated rights, freedoms and interests in the field of public-legal relations, restore law and order in the public sphere. Consequently, any managerial decision regarding a person made by the subject of power regardless of the method of adoption, the level and place of the body in the relevant system, legal grounds, motives, method and forms of adoption is subject to judicial control.

In accordance with Article 9 of the CAS of Ukraine, the court considers administrative cases only on a claim filed in accordance with the requirements of the CAS of Ukraine, within the framework of the claims. The court may go beyond the claims if it is necessary for the effective protection of the rights, freedoms, interests of man and citizen, other subjects in the field of public legal relations from violations by the subjects of power. In accordance with paragraph 10 of Part 1 of Article 245 of the CAS of Ukraine, the administrative court, if the claim is satisfied, may choose another way to protect the rights, freedoms, interests of man and citizen, other subjects in the field of public legal relations from violations by subjects of power, which does not contradict the law and provides effective protection of such rights, freedoms and interests [3].

The above-mentioned provisions of the CAS of Ukraine give grounds to speak about the recognition of the discretionary powers of the administrative court and the ability to interfere at its own discretion (judicial discretion, judicial discretion) within the limits of the powers of a state authority or local self-government.

Judicial discretion is potentially possible even in relation to those controversial legal relations that are regulated by absolutely certain legal norms. This possibility is due to the recognition of the principle of the rule of law, on the basis of which a judge, in order to make a fair decision, has the right to deviate from the clear unambiguous instructions of legal norms and decide a specific case, guided by the principles of law. In such a situation, judicial discretion consists in the judge's choice between the possibilities of applying positive and natural law [4; 5].

In fact, the limits of judicial discretion (judicial discretion) are objective and subjective criteria for the legality of a discretionary decision. The objective criteria (limits) of judicial discretion (that is, those that have an objective external manifestation) include, in particular, legal norms, generalization of judicial practice, decisions of higher courts, claims of the parties, provisions of the contract between the parties. The list of subjective limits of judicial discretion (that is, those that do not have a clear external objectification) is much wider than the previous list.

Thus, the subjective limits of judicial discretion include the principles of law and the criteria of justice, reflected in the justice consciousness of the judge; the concept of legal un-

derstanding inherent in the judge considering the case; the judge's understanding of his own role in the legal system, the social and political effect of his decision; public relations themselves, which must be resolved through a court decision; trends in judicial practice in certain categories of disputes; the general content of legislation on a particular issue, its essence and direction; degree of validity of each of the possible solutions, etc. subjective limits of judicial discretion indicate that the final result of the court's exercise of its discretionary powers (that is, a discretionary decision) largely depends on the judge's legal awareness, since it determines the judge's perception of the existence of discretionary powers, methods and limits of their implementation [4; 6; 7].

It is necessary to agree with L. M. Moskvich, which, when following the process of exercising the powers of a judge, must also take into account the subjective aspect: after all, they are realized by a person who is endowed with appropriate social and psychophysiological characteristics that significantly affect the decision-making process [8, p. 10].

Modern legal science, unfortunately, does not sufficiently pay attention to the problem of judicial discretion. The lack of scientific research and proper legal regulation of discretion in legislation is replaced by judicial interpretation and is carried out in court decisions. At the same time, judicial practice is also ambiguous in these issues.

As noted by O. Gubskaya, jurisprudence and doctrinal administrative-procedural science took two positions on the issue of the content (limits) of legal verification by the courts of administrative acts issued within the free ¬ court. In general, there are two separate groups of legal systems that differ in the scope of judicial control over the implementation of discretion of administrative bodies. In the first group of legal systems, the principle of full judicial control operates. The second group of States recognizes a fairly broad administrative flexibility, both at the level of facts and at the level of legal consequences, following the basic principle: as a rule, a judge does not and should not replace an administrative authority. This approach is primarily aimed at objective judicial review and is therefore applied in systems that focus on objective legal analysis (as opposed to judicial review based on subjective rights, that is, the German approach) [9; 10; 11, p. 202; 12].

In resolving the issue of the limits of judicial discretion, international standards of legal proceedings can also serve [13; 14]. For example, the Committee of Ministers of the Council of Europe formulated principles that serve as meaningful guarantees of a fair decision (some of them, for example, equality, timeliness are also procedural guarantees). Exercising discretionary powers administrative authority: pursues only the purpose for which it is endowed with such powers; adheres to the principle of objectivity and impartiality, taking into account only those factors that relate to a particular case; adheres to the principle of equality before the law, preventing unfair discrimination; ensures an appropriate balance between the adverse effects that its decision may have on the rights, freedoms or interests of individuals, and the aim pursued; makes its decision within a period acceptable from the point of view of the issue that is being resolved; ensures consistent application of general administrative regulations while taking into account the specific circumstances of each case. All these principles of compliance with the purpose of authority, impartiality, equality and non-discrimination, proportionality, reasonableness of the term, validity are embodied in part 2 of article 2 of the CAS of Ukraine [15; 16, p. 22].

Thus, judicial discretion in administrative proceedings allows, in addition to its ambiguous understanding and interpretation, to single out certain features of this phenomenon. The exercise of discretionary powers by the administrative court determines the formation of judicial practice for the consideration and resolution of certain categories of administrative cases, as a result of which complex and ambiguous public law disputes are resolved without delay, without waiting for the improvement of legal regulation. By implementing judicial discretion, the judge, guided by the principles of the rule of law, can deviate from purely legal regulation and decide the case on the basis of the principles of law.

Summarizing the above, it should be noted that the discretion in the proceedings should

be understood as regulated by the norms of the CAS of Ukraine the powers of the court in choosing the options for a decision, guided by the rule of law and the circumstances of the case in order to make a legitimate and reasonable decision in the case. Moreover, judicial discretion puts before the court the right to choose, while the court must make a decision that should be based as much as possible on the principles of administrative proceedings and correspond to the individual characteristics of a particular administrative case. Further scientific study of judicial discretion will improve the state of administrative proceedings, provide practical recommendations to the courts aimed at improving the implementation of discretionary powers by the latter.

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СУТНІСТЬ ДИСКРЕЦІЙНИХ ПОВНОВАЖЕНЬ СУДДІ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ: ПОНЯТТЯ, ЗМІСТ, ПРАВОВИЙ АСПЕКТ

Стаття присвячена висвітленню дискреційним повноваженням судді в адміністративному судочинстві. У статті здійснено аналіз різних наукових підходів щодо розуміння поняття «дискреція», «судова дискреція», повноваження, функції. Акцентовано увагу на висвітлені особливостей процесуального законодавства та судової практики, які передбачають особливості дискреції судді в сучасних умовах. Встановлено, що дискреція в адміністративному судочинстві дозволяє виокремити певні елекменти цього явища, проте в єдиного розуміння та тлумачення відсутнє як серед науковців так і в законодавстві. Здійснення адміністративним судом дискреційних повноважень обумовлює формування судової практики з розгляду та вирішення окремих категорій адміністративних справ, в наслідок чого складні та неоднозначні публічно-правові спори вирішуються безвідкладно, не чекаючи удосконалення нормативно-правового регулювання. У статті звертається увага на те, що адміністративні суди покликані вирішувати публічно-правові спори, сприяти поновленню порушених прав, свобод та інтересів у сфері публічно-правових відносин, відновлювати правопорядок у публічній сфері. Відповідно, судовому контролю підлягають адміністративні рішення щодо фізичних осіб, прийняті суб'єктами владних повноважень, незалежно від способу їх прийняття, рівня та місця суб'єкта владних повноважень у відповідній системі, їх правової основи, мотивації, способу та форми прийняття.

Автор наголошує, що при здійсненні суддівського розсуду судді, керуючись принципами верховенства права, можуть відступати від суто правового регулювання і вирішувати справи на основі правових принципів. Автор пропонує під суддівським розсудом розуміти передбачене Кодексом адміністративного судочинства України повноваження суду обирати між варіантами рішень, керуючись принципом верховенства права та обставинами справи, з метою ухвалення законного і обґрунтованого рішення у справі. Крім того, суддівський розсуд надає суду право вибору, і суд повинен, наскільки це можливо, ухвалювати рішення, які відповідають індивідуальним особливостям конкретної адміністративної справи, відповідно до принципів адміністративного судочинства. Встановлено, що подальші наукові дослідження суддівського розсуду можуть надати судам практичні рекомендації, спрямовані на вдосконалення природи адміністративного судочинства та здійснення судами суддівського розсуду.

Ключові слова: *адміністративне судочинство, дискреція, адміністративне судочинство, публічно-правовий спір, дискреційні повноваження, верховенство права*