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FEATURES OF THE APPLICATION OF DETENTION IN GUARD UNDER THE CONDITIONS OF THE STATE OF MARTIAL

The article is devoted to the issue of the application of preventive measures in the conditions of martial law. It has been established that detention is an exclusive preventive measure, which can be applied only if it is proven that milder preventive measures are not able to prevent the risks provided for in Art. 177 of the CPC of Ukraine.

It is noted that the procedure for canceling a preventive measure for completing military service under conscription during mobilization, for a special period, or changing a preventive measure for other reasons is also special. Thus, in the case of the introduction of martial law in Ukraine or some of its localities, implementation of measures to ensure national security and defense, repel and deter armed aggression of the Russian Federation and/or other states against Ukraine, a suspect, an accused person, who during a pre-trial investigation or trial in custody, except for those who are suspected of committing crimes against the foundations of national security of Ukraine, as well as criminal offenses provided for in clearly defined articles of the Criminal Code of Ukraine, have the right to apply to the prosecutor for the cancellation of this preventive measure in order to undergo military service under conscription during mobilization, for a special period.

In addition, the change of preventive measures is possible only under certain conditions, namely, in one case, the request is justified by the desire to use the funds pledged for the purposes of the defense of Ukraine, and in the second, such a change is possible only in places of active hostilities.

Keywords: *detention, preventive measures, revocation of preventive measure, criminal proceedings, martial law, pre-trial investigation.*

Statement of the problem and its relevance. By Decree of the President of Ukraine No. 64/2022 of February 24, 2022, martial law was introduced in Ukraine in connection with the military aggression of the Russian Federation against Ukraine [2]. The full-scale invasion of the Russian Federation on the territory of Ukraine necessitated the implementation of many measures aimed at ensuring the operation of the main institutions of the state. The Criminal Procedure Code (hereinafter – CPC) of Ukraine has also undergone changes, in particular, Section IX¹ “Special regime of pre-trial investigation, trial under martial law” and the issue of the application of preventive measures.

Thus, changes regarding the implementation of pre-trial investigation, trial under martial law, the powers of the investigating judge, the head of the prosecutor’s office, the terms of the pre-trial investigation, the application of preventive measures, the procedure for the end of the pre-trial investigation and others were reflected in the Laws of Ukraine “On Amendments to the Code of Criminal Procedure of Ukraine regarding the procedure for canceling a preventive measure for military service under conscription during mobilization, for a special period or its change for other reasons” No. 2125-IX dated 15.03.2022, “On Amendments to the Criminal Code and the Code of Criminal Procedure of Ukraine regarding the improvement of responsibility for collaborative activity and specifics of the application of preventive measures for committing crimes against the foundations of national and public security” No. 2198-IX dated 04.14.2022, “On Amendments to the Criminal Code of Ukraine regarding the improvement of certain provisions of pre-trial investigation in conditions of martial law” No. 2462-IX dated 07/27/2022, “On Amendments to the Criminal Procedure Code of Ukraine regarding the selection of preventive measures for servicemen who committed war crimes during martial law” No. 2531-IX dated 08/16/2022.

These innovations cause discussions and are the basis for new scientific research.

Analysis of recent research and publications. Separate aspects of the application of preventive measures at different times were studied by Y. M. Groshevy, A. L. Dal, V. S. Zelenetsky, O. V. Kaplina, M. A. Pogoretsky, O. I. Tyshchenko, L. M. Loboyko, L. D. Udaloa, P. L. Fries, O. G.

Shilo and others. Taking into account the changes taking place today in the criminal procedural legislation, the question of the application of preventive measures becomes more relevant, in particular, the question of their application in the conditions of martial law.

The purpose of the article. The purpose of the article is to analyze changes in criminal proceedings regarding the procedure for applying preventive measures under martial law.

Presentation of the main research material. Of course, the issue of preventive measures is always relevant during the pretrial investigation of a criminal offense. However, under martial law, law enforcement and judicial bodies face many challenges that they could not even imagine in peacetime.

T. Fomina and V. Rogalska draw attention to certain features in the application of preventive measures, in particular, “regarding the choice of detention; extension of terms of detention; the procedure for changing preventive measures in the form of bail and house arrest; cancellation of a preventive measure for military service under conscription during mobilization, for a special period; making a decision on detention for the purpose of pretext, as well as detaining a person without a decision of an investigating judge or a decision of the head of the prosecutor’s office” [7].

In our opinion, detention is an exceptional preventive measure. According to Part 2 of Art. 177 of the Criminal Code of Ukraine, the basis for applying a preventive measure is the existence of a well-founded suspicion that a person has committed a criminal offense, as well as the existence of risks that give the investigating judge, the court, sufficient grounds to believe that the suspect, accused, convicted person may carry out the actions provided for in part one of this article. Investigators and prosecutors do not have the right to initiate the application of a preventive measure without the grounds provided for in this Code [1]. Based on this, detention can be applied only if it is proven that milder preventive measures are not able to prevent the risks provided for in Art. 177 of the CPC of Ukraine.

At the same time, the Law of Ukraine “On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine on Improving Responsibility for Collaborative Activities and Features of the Application of Preventive Measures for Crimes Against the Basics of National and Public Security” supplements Art. 176 part, which stipulates that during martial law to persons who are suspected or accused of committing crimes provided for in Articles 109–1141, 258–2585, 260, 261, 437–442 of the Criminal Code of Ukraine, in the presence of risks specified in Art. 177 of the Criminal Procedure Code of Ukraine, the preventive measure specified in clause 5, part 1 of this article [6] is applied, i.e. only detention. In this case, there is no alternative choice of a preventive measure for persons who are suspected or accused of committing certain crimes of the national security of Ukraine and public safety.

In addition, the Law of Ukraine “On Amendments to the Criminal Procedural Code of Ukraine regarding the selection of a preventive measure for servicemen who committed war crimes during martial law” supplements Art. 176 of the Criminal Code of Ukraine, part of which stipulates that during martial law, military personnel who are suspected or accused of committing crimes provided for in Articles 402–405, 407, 408, 429 of the Criminal Code of Ukraine shall be subject exclusively to the preventive measure specified in Clause 5 h 1 of this article [4], i.e. detention again.

These provisions contradict the Constitution of Ukraine, but as scientists note, such a concession in accordance with Art. 15 of the Convention on the Protection of Human Rights and Fundamental Freedoms, is recognized as permissible during war or other public danger that threatens the life of the nation, within the limits required by the urgency of the situation, and provided that such measures do not conflict with other obligations under international law. In addition, in accordance with Part 3 of Art. 15 of the Convention, a state using the right to derogate from its obligations must fully inform the Secretary General of the Council of Europe about the measures it has taken and the reasons for taking them. It must also notify the Secretary General of the Council of Europe of the time when such measures have ceased to be applied, and the provisions of the convention are fully applied again [7].

That is why, in our opinion, even under martial law, the decision to detain a person in custody must be motivated and take into account all the circumstances of the criminal proceedings.

In addition, the Law of Ukraine “On Amendments to the Code of Civil Procedure of Ukraine Regarding Improvement of Certain Provisions of Pre-Trial Investigation in Martial Law” amended Art. 615 of the Criminal Procedure Code of Ukraine, which regulates the special regime of criminal proceedings under martial law, which are designed to regulate the procedure for the appointment of a preventive measure in the form of detention in the absence of an objective opportunity to properly exercise the powers of investigative judges and courts [3].

In particular, in accordance with para. 12 h. 1 st. 615 of the Criminal Procedure Code “if, under conditions of martial law, there is no objective possibility to bring the detained person to the investigating judge, the court within the time limit provided by Art. 211 of the Criminal Procedure Code of Ukraine, consideration of the petition for the selection of a preventive measure in relation to her is carried out using available technical means of video communication in order to ensure the remote participation of the detained person.

If it is impossible to bring the detained person to the investigating judge, the court within the time limit stipulated by Art. CPC of Ukraine, in order to consider a petition for the selection of a preventive measure against him or to ensure his remote participation during the consideration of the corresponding petition, such a person is immediately released” [1].

Continuing the topic of a preventive measure in the form of detention, it is necessary to pay attention to the issue of its cancellation in the conditions of martial law. The Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine Regarding the Procedure for Canceling a Precautionary Measure for Completion of Military Service Upon Conscription During Mobilization, for a Special Period, or Changing it for Other Reasons” Chapter IX¹ of the Criminal Procedure Code of Ukraine was supplemented by Art. 616, which regulates the procedure for the cancellation of a preventive measure for military service under conscription during mobilization, for a special period or changing the preventive measure for other reasons [5].

Thus, in the case of the introduction of martial law in Ukraine or some of its localities, implementation of measures to ensure national security and defense, repel and deter armed aggression of the Russian Federation and/or other states against Ukraine, a suspect, an accused person, who during a pre-trial investigation or trial in custody, except for those who are suspected of committing crimes against the national security of Ukraine, as well as crimes provided for in Articles 115, 146–147, 152–156, 186, 187, 189, 255, 2551, 257, 258–262, 305–321, 330, 335–337, 401–414, 426–433, 436, 437–442 of the Criminal Code of Ukraine, has the right to apply to the prosecutor with a request to cancel this preventive measure for military service under conscription during mobilization, on a special period.

Based on the results of the consideration of the petition, the prosecutor has the right to apply to the investigating judge or the court hearing the criminal proceedings with a request to cancel the preventive measure in the form of detention for military service during mobilization for a special period [1].

Such a petition must be motivated and contain both a statement of the circumstances that indicate that a person is subject to military service during mobilization, for a special period, and a conclusion about the person’s suitability for military service under martial law conditions, and a statement of the circumstances that indicate that there are no risks provided for in Part 1 of Art. 177 of the Criminal Procedure Code of Ukraine and the risk of evasion of the person, in respect of whom it is proposed to cancel the preventive measure in the form of detention, from completing military service upon conscription during mobilization, for a special period.

An investigating judge or a court hearing a criminal proceeding considers a request for the cancellation of a preventive measure in the form of detention for the completion of military service during the mobilization period, for a special period immediately.

The suspect, the accused, in respect of whom the preventive measure in the form of detention in custody has been canceled, must immediately, but no later than 48 hours from the moment of the announcement of the decision on the cancellation of the preventive measure in the form of detention in custody, appear at the appropriate territorial center of recruitment and social support in the place registration [1].

It is necessary to pay attention to the peculiarities of the change of preventive measures under martial law, in particular, the change of bail as a preventive measure of criminal proceedings to a personal commitment and the change of a preventive measure in the form of house arrest to a preventive measure in the form of a personal commitment.

In accordance with the amendments made by the Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine regarding the procedure for canceling a preventive measure for completing military service under conscription during mobilization, for a special period or its change for other reasons”, at the request of the suspect, the accused, the investigating judge, the court has the right to make a decision to change the preventive measure in the form of a pledge to a personal commitment, if the corresponding petition is justified by the desire to use the funds transferred as a pledge (in full or in part) for depositing into special accounts of the National Bank of Ukraine for the purposes of the defense of Ukraine.

In places of active hostilities, at the request of the suspect, the accused, the investigating judge, the court has the right to consider the issue of changing the preventive measure in the form of house arrest to the preventive measure in the form of a personal commitment [5].

Conclusions. Therefore, the change of preventive measures is possible only under certain conditions, namely, in one case, the request is justified by the desire to use the funds pledged for the purposes of the defense of Ukraine, and in the second, such a change is possible only in places of active hostilities.

It should be noted that the desire to use the pledged funds (in full or in part) for depositing into special accounts of the National Bank of Ukraine for the purposes of the defense of Ukraine must be the individual's desire and at the same time voluntary. Therefore, in the court session, it should be clarified whether there was no influence on the suspect or the accused during the pre-trial investigation regarding the desire to transfer funds for the needs of the defense of Ukraine.

Thus, in the conditions of martial law, the implementation of criminal proceedings requires the establishment of special procedures. Innovations in criminal procedural legislation regarding the application of preventive measures are relevant and necessary, although they have certain shortcomings and require further research and analysis.

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О.В. Кузьменко, ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ТРИМАННЯ ПІД ВАРТОЮ В УМОВАХ ВОЄННОГО СТАНУ

Стаття присвячена питанням застосування запобіжних заходів в умовах воєнного стану. Встановлено, що винятковим запобіжним заходом є тримання під вартою, яке може бути застосоване лише, якщо буде доведено, що більш м'які запобіжні заходи не здатні запобігти ризикам, які передбачені ст. 177 КПК України.

Зазначено, що особливою є й процедура скасування запобіжного заходу для проходження військової служби за призовом під час мобілізації, на особливий період або зміна запобіжного заходу з інших підстав. Так, у разі введення в Україні або окремих її місцевостях воєнного стану, здійснення заходів із забезпечення національної безпеки і оборони, відсічі і стримування збройної агресії Російської Федерації та/або інших держав проти України підозрюваний, обвинувачений, який під час досудового розслідування або судового розгляду тримається під вартою, крім тих, які підозрюються у вчиненні злочинів проти основ національної безпеки України, а також кримінальних правопорушень, передбачених чітко визначеними статтями Кримінального кодексу України, має право звернутися до прокурора з клопотанням про скасування цього запобіжного заходу для проходження військової служби за призовом під час мобілізації, на особливий період.

Крім того, зміна запобіжних заходів можлива лише за певних умов, а саме, в одному випадку – клопотання обґрунтовується бажанням використати кошти, передані в заставу для цілей оборони України, а в другому, така заміна можлива лише у місцях ведення активних бойових дій.

Ключові слова: тримання під вартою, запобіжні заходи, скасування запобіжного заходу, кримінальне провадження, воєнний стан, досудове розслідування.