

JURISPRUDENCE

LEGAL ISSUES OF PROCEDURAL INDEPENDENCE OF THE INVESTIGATOR WHEN PRODUCING INVESTIGATIVE AND OTHER PROCEDURAL ACTIONS

Zhamieva R.,

Associate Professor of the Karaganda University named after Academician E.A. Buketova of the Republic of Kazakhstan, PhD

Tulaganova G.,

Professor of the Tashkent State Law University of the Republic Uzbekistan, Doctor of Law

Ibratova F.

Associate Professor of the Tashkent State Law University of the Republic Uzbekistan, Doctor of Law

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Abstract

The article deals with the issues of procedural independence of the investigator as a person responsible for the course and results of his activities. Analyzed are such concepts as "independence", "discretion", "conviction" and "legal consciousness" of the investigator, their relationship with his procedural independence. It is concluded that planning is understood as a set of organizational measures aimed at the most effective and complete investigation of a specific criminal case, resulting in the preparation of a preliminary investigation plan.

Keywords: investigator, procedural actions, independence of the investigator, criminal procedural legislation.

The tasks of the criminal procedural legislation of the Republic of Uzbekistan are determined by the rapid and complete disclosure of crimes, the exposure of the perpetrators and the provision of the correct application of the law so that everyone who committed a crime is subject to fair punishment and not a single innocent person is prosecuted and convicted.

This norm permeates the entire content of the activities of the bodies and officials responsible for criminal proceedings, aims them at the implementation of the assigned tasks and at the same time at the all-round protection of the individual from unlawful influence on the part of anyone.

The investigator is one of the main participants in the criminal proceedings on the part of the prosecution. It is he who is entrusted with the important task of initiating criminal cases when signs of crime are detected, carrying out a preliminary investigation and preparing materials of a criminal case so that the court has the opportunity to deliver a legal, reasonable and fair sentence in this criminal case¹.

The legislator has endowed the investigator with a wide range of powers corresponding to his really important role in pre-trial proceedings². It is very important not only for the investigator to exercise his powers, but also his interaction with other bodies and

officials (the prosecutor, the head of the investigation department, department, department, group, the bodies of operational-search activity, the court). It is in this interaction that the procedural independence of the investigator is manifested as a person responsible for the course and results of his activities³.

Analysis of the legal literature shows that the main focus of research remains judicial independence and independence⁴. However, due attention has not been paid to the procedural independence of the investigator.

In this regard, it is important to conduct a comprehensive study of such concepts as "independence", "discretion", "conviction" and "legal consciousness" of the investigator, their relationship with his procedural independence⁵. The problem of correlating the procedural independence of the investigator with departmental control and prosecutorial supervision requires further development⁶. In the production of investigative and other procedural actions, the procedural independence of the investigator is manifested to the greatest extent. Article 36 of the Code of Criminal Procedure of the Republic of Uzbekistan states that all decisions on the direction of the investigation and the production of investigative actions are taken by the investigator independently. This provision means that the

¹ Плеснёва, Л. П. (2017). Содействие при производстве следственных и иных процессуальных действий как форма взаимодействия следователя с органами дознания. Сибирский юридический вестник, (2).

² Барышова, М. В., Белый, В. С., Глущенко, В. М., Ибра-това, Ф. Б., Новиков, А. Н., & Пронькин, Н. Н. (2019). Социальное предпринимательство: научные исследования и практика.

³ Балакшин, В. С. (2011). Независимый-зависимый следо-ватель. Законность, (10), 29.

⁴ Ибратова Ф. Б. Банкротство ликвидируемого субъекта предпринимательства: проблемы и решения //Norwegian Journal of Development of the International Science. – 2021. – №. 58-2.

⁵ Колоколов, Н. А. (2014). «Великое противостояние»: следователь vs прокурор. Вестник Московского универ-ситета МВД России, (10).

⁶ Ibratova F., Esenbekova F. GENESIS AND EVOLUTION OF LEGISLATION ON CONCEPTIONAL PROCEDURES IN THE REPUBLIC OF UZBEKISTAN //Polish Journal of Science. – 2021. – №. 38-2. – С. 20-24.

investigator, at his own discretion, has the right to establish the general direction of pre-trial proceedings in a criminal case⁷. At the same time, such a discretion should not be speculative, but based on a thorough study of the initial information, which makes it possible to identify the most promising areas of preliminary investigation⁸. Such activities of an investigator are fully covered by the provisions of Article 95 of the Code of Criminal Procedure of the Republic of Uzbekistan, which enshrine the freedom of assessment of evidence by the investigator, combined with the need to use the totality of evidence available in a criminal case.

The term "direction of investigation" in the Code of Criminal Procedure of the Republic of Uzbekistan occurs when characterizing the procedural independence of an investigator. In our opinion, the direction of investigation is understood as the general movement of pre-trial proceedings in a criminal case, the advancement and verification of investigative versions, as well as the determination of the sequence of production of certain procedural actions.

The definition of the general direction of pre-trial proceedings in a criminal case is very fully covered by the term "planning"⁹. Planning is understood as a set of organizational measures aimed at the most effective and complete investigation of a specific criminal case, resulting in the drawing up of a preliminary investigation plan. Drawing up a plan belongs to the exclusive prerogative of the investigator, and he should not approve this document from other officials - be it the head of the investigative unit or the prosecutor.

If the head of the investigative unit or the prosecutor has a desire to help the investigator in improving the preliminary investigation plan, they have the right to propose that he make appropriate changes to the plan. However, such proposals are optional for the investigator, even if they were made in writing and signed, respectively, by the head of the investigative unit or the prosecutor¹⁰. In order for the proposals to become official, the head of the investigative unit must either give the investigator written instructions on the direction of the case or on the performance of certain investigative actions (Article 37 of the Code of Criminal Procedure of the Republic of Uzbekistan), or decide to create a group of investigators (Article 354 of the Code of Criminal Procedure of the Republic of

Uzbekistan), join it as the head of a group of investigators and draw up a preliminary investigation plan on your own behalf.

In the first case, the written instructions of the head of the investigative unit can be appealed by the investigator to the prosecutor, but this does not suspend their execution. Therefore, having received such instructions in the form of a document, the investigator is obliged to immediately make the appropriate changes to the preliminary investigation plan¹¹. In the second case, the investigator does not have the right to appeal against the decision of the head of the investigative unit on the conduct of the preliminary investigation by the investigative group, since the creation of the investigative group simultaneously "transfers" the powers of the investigator to the powers of the head of this investigation group¹².

The next component of the investigator's activities to determine the direction of the investigation is the ability to determine the sequence of production of certain procedural actions¹³. The effectiveness of both each procedural action and the preliminary investigation as a whole depends on how correctly such a sequence is determined.

As a general rule, the investigator has the right to independently determine the sequence of investigative actions, and also not to coordinate this sequence with the head of the investigative unit and the prosecutor¹⁴. On the other hand, since the head of the investigative unit and the prosecutor have the right to give written instructions on the direction of the investigation, within the framework of their powers, they can also propose a certain sequence of certain investigative and other procedural actions. However, in cases where the investigator will combine these investigative and other procedural actions with those that he himself planned to carry out, the presence of written instructions in no way means a prohibition on the performance of the actions planned by the investigator¹⁵.

Another manifestation of the procedural independence of an investigator is his ability to independently make decisions on the performance of investigative actions, except in cases where the law provides for obtaining a prosecutor's sanction. Note that this opportunity is in a certain way combined with other powers of the investigator¹⁶. Thus, the provision contained in Article 36 of the Code of Criminal

⁷ Багмет, А. М. (2014). Следователь-судья на досудебной стадии. Расследование преступлений: проблемы и пути их решения, (4), 337-339.

⁸ Ibratova, F. B., Kirillova, E. A., Smoleń, R., Bondarenko, N. G., Shebzuhova, T. A., & Vartumyan, A. A. (2017). Special features of modern legal systems: cases and collisions.

⁹ Esenbekova, F. T. (2019). Esenbekova FT, Okyulov O., Ruzinazarov Sh., Ibratova FB Features of the approval of the world agreement by the economic court: practice and theory. Editorial team, 10(39), 90.

¹⁰ Okyulov O. et al. GENERAL PROVISIONS ON INVALIDITY OF TRANSACTIONS IN BANKRUPTCY PROCEDUR //Norwegian Journal of Development of the International Science. – 2021. – №. 68. – С. 18-21.

¹¹ Ибратова, Ф. Б. (2019). ПРАВОВЫЕ ПРОБЛЕМЫ МИРОВОГО СОГЛАШЕНИЯ ПРИ РАССМОТРЕНИИ ДЕЛ О БАНКРОТСТВЕ В ЭКОНОМИЧЕСКИХ СУДАХ

РЕСПУБЛИКИ УЗБЕКИСТАН. In ПЕРСПЕКТИВЫ РАЗВИТИЯ НАУКИ В СОВРЕМЕННОМ МИРЕ (pp. 163-170).

¹² Ковтун, Н. Н. (2010). О понятии и содержании понятия "судебный следователь"(судебный судья)". Российский судья, (5), 15-20.

¹³ Ibratova F. Bankrotlik to 'g 'risidagi ishlarda prokuror ishtiroki.

¹⁴ Быков, В. М. (2012). Следователь как участник уголовного процесса со стороны обвинения. Законность, (7), 3-9.

¹⁵ Драпкин, Л. Я., & Шуклин, А. Е. (2011). Следователь: профессиональная характеристика и основные методы деятельности. Российский юридический журнал, (1), 203-210.

¹⁶ Волгин, Ю. Г., & Шлее, И. П. (2018). Отдельные вопросы разработки профессиональной пробы профессии"

Procedure of the Republic of Uzbekistan that the investigator has the right to independently make decisions on the direction of the investigation, on the performance of investigative and other procedural actions indicates that the indication of the independence of the investigator extends its action not only to the choice of the general course of the investigation, but also for those cases when he needs to carry out a specific investigative action.

So, the investigator, based on the evidence available in the criminal case, can independently determine which investigative or other procedural action from among those enshrined in the Code of Criminal Procedure of the Republic of Uzbekistan it is advisable for him to carry out in order to establish the circumstances that are significant for the criminal case.

Part three of Article 36 of the Code of Criminal Procedure of the Republic of Uzbekistan provides for the possibility If the investigator disagrees with the instructions of the prosecutor to involve a person in the case as an accused, on the qualification of the crime and the scope of the charge, to initiate a petition for the application of a preventive measure in the form of detention or house arrest to establish an additional prohibition (restriction) on house arrest, on the suspension of a passport (travel document) on the application of measures of procedural coercion in the form of removing the accused from office, placing a person in a medical institution, on making a submission to the prosecutor to file a motion with the court to refuse to initiate a criminal case or on the termination of the criminal case on the basis of an act of amnesty, on the referral of the case to the court or on the termination of the case, on the return of the completed case for additional investigation, the investigator has the right to submit the case to a higher prosecutor with a written statement of his objections. In this case, the superior prosecutor, by his decision, either cancels the instruction of the inferior prosecutor, or entrusts the investigation of the case to another investigator.

Moreover, the eleventh paragraph of the third part of Article 382 of the Code of Criminal Procedure of the Republic of Uzbekistan establishes the authority of the prosecutor to transfer a criminal case from the body of inquiry to the investigator, from one investigator of the prosecutor's office to another, and in the cases and procedure established by the Code of Criminal Procedure of the Republic of Uzbekistan - from one body of preliminary investigation to another. That is, from the meaning of this article it is understood that the authority of the prosecutor to transfer a criminal case from one investigator to another is absent, except for cases when it comes to investigators of the prosecutor's office. Thus, the norm of Article 36 of the Criminal Procedure Code regarding the transfer of a criminal

case from one investigator to another does not fully comply with the requirements of Article 382 of the Criminal Procedure Code of the Republic of Uzbekistan.

Based on the foregoing, we consider it appropriate to amend the current CPC and state the last sentence of part three of Article 36 of the CPC of the Republic of Uzbekistan in the following edition:

"In this case, the higher-ranking prosecutor, by his decision, cancels the instruction of the lower-level prosecutor or refuses to satisfy the request of the investigator". This will allow them to boldly appeal, in their opinion, illegal or untimely, instructions of the prosecutor to a higher prosecutor.

Thus, the procedural independence of the investigator in the conduct of investigative and other procedural actions is expressed in the fact that the investigator has the right to independently: 1) make decisions on the performance of an investigative or other procedural action, with the exception of cases directly established by law¹⁷; 2) determine the sequence of investigative and other procedural actions, as well as the start time of a certain action; 3) establish the circle of participants in an investigative or other procedural action; 4) determine tactical techniques that are advisable in the production of an investigative or other procedural action; 5) to record in the protocol information relevant to the criminal case.

The procedural independence of the investigator is most fully manifested when he makes procedural decisions in a criminal case¹⁸. That is why the legislator, in part 2 of Article 36 of the Code of Criminal Procedure of the Republic of Uzbekistan, indicated that, among other powers, the investigator has the right to independently make decisions on the direction of the investigation and the production of investigative actions. In this regard, it seems very expedient to determine what are the procedural decisions of the investigator and what is their legal nature.

"Strengthening the law ..., preventing offenses and strengthening the fight against crime, ensuring law and order in general at the current stage of economic reforms should become an urgent task for every responsible leader, and especially law enforcement agencies"¹⁹. The procedural decision of the investigator can be described using the following most characteristic features: 1) preparation, adoption and execution of the decision should be aimed at achieving the purpose of criminal proceedings²⁰; 2) the decision is made within the competence of the investigator; 3) the investigator, when making a procedural decision, is obliged to be guided by the requirements of the principles of criminal procedure; 4) in the course of making a decision, an assessment is made of the

следователь, оперуполномоченный". Профессиональное образование в России и за рубежом, (1 (29)).

¹⁷ КУЗЬМИНА, О. В. (2010). Следователь как субъект обжалования судебных решений на досудебной стадии уголовного процесса. Уголовное право, (3), 85-89.

¹⁸ Ibratova F. Legal Problems of the Concepts Legality, Justification and Justice by Judicial Acts //Middle European Scientific Bulletin. – 2021. – T. 16.

²⁰ Sh R., Ibratova F., Zh K. THE NATURE OF JUDICIAL DECISIONS IN THE CONDITIONS OF THE DIGITAL TRANSFORMATION OF THE JUDICIAL POWER OF UZBEKISTAN //Sciences of Europe. – 2021. – №. 79-3. – С. 10-12.

available evidence, the provisions of the current legislation, and on this basis, a conclusion is made about the direction of further activities²¹; 5) the conclusion is fixed in the corresponding document²².

Thus, the procedural decision of the investigator can be defined as a legal act aimed at achieving the purpose of criminal proceedings, in which this official, within the limits of his competence, guided by the criminal procedural principles, based on the available evidence characterizing a certain situation, based on the study of the provisions of the current legislation makes a conclusion about the direction of further activities and fixes this conclusion in the corresponding document.

With regard to the study of issues related to the procedural independence of the investigator, all decisions made by him in the course of criminal proceedings, in our opinion, it is advisable to subdivide into four groups: 1) procedural decisions taken at the stage of initiation of a criminal case; 2) procedural decisions aimed at collecting, checking evidence and choosing measures of procedural compulsion; 3) procedural decisions granting one or another status to persons involved in criminal proceedings; 4) final procedural decisions of pre-trial proceedings. It seems that this classification makes it possible to highlight in more detail the problems that arise when the investigator exercises his procedural powers in the course of making and executing decisions²³.

The main number of procedural decisions taken by an investigator in a criminal case pending in his proceedings is aimed at collecting and checking evidence²⁴. Proof is included in the content of the preliminary investigation activities. In accordance with part 1 of Article 87 of the Code of Criminal Procedure of the Republic of Uzbekistan, evidence is collected through the production of investigative and judicial actions. Undoubtedly, the implementation of any investigative action must be preceded by an appropriate decision.

The current criminal procedure legislation provides for a different procedure for the production of investigative actions: by order of the investigator; without a written order from the investigator; by order of the investigator with the sanction of the prosecutor. For example, the law establishes that a preventive measure in the form of taking into custody can be applied at the request of the prosecutor or investigator, agreed with the prosecutor in cases where it is impossible to apply another, less severe, preventive measure²⁵. Thus, the legislator establishes the functioning of two forms of control, in other words, ensures the ratio of prosecutorial supervision and

judicial control. Taking into account the limiting nature of the specified preventive measure, through prosecutorial supervision, the legislator seeks to prevent possible unjustified requests by the investigator to apply a preventive measure in the form of detention²⁶.

In the interaction of the investigator and the head of the investigative unit, it should be noted that when executing the orders of the head of the investigative unit, the investigator must be endowed with the legislatively established opportunity to appeal this decision of the head of the investigation department, department, group and his deputy to the prosecutor²⁷. Thus, the fourth part of Article 37 of the Code of Criminal Procedure of the Republic of Uzbekistan provides that the appeal of the received instructions to the prosecutor does not suspend their execution, except for the cases provided for by the third part of Article 36 of the Code of Criminal Procedure of the Republic of Uzbekistan. Although the article itself does not provide for the possibility of appealing the decisions of the head of the investigation department, department, group and his deputy to the prosecutor. Perhaps the legislator had in mind such a possibility, but, in our opinion, the possibility of the investigator's action is not quite precisely defined. Based on this, we consider it appropriate to supplement Article 36 of the Code of Criminal Procedure of the Republic of Uzbekistan with a third part of the following content:

"If the investigator disagrees with the instructions of the head of the investigation department, department, group and his deputy, the investigator has the right to appeal the instruction to the supervising prosecutor with a written statement of his objections".

The procedural independence of the investigator in a certain way manifests itself in the performance of investigative actions, for which the issuance of a decision by the investigator is required.

When drawing up a written decision, the investigator independently evaluates the initial evidence and determines the necessity or expediency of carrying out an investigative action. According to the general rule enshrined in Article 382 of the Code of Criminal Procedure of the Republic of Uzbekistan, the prosecutor has the right to give written instructions on the performance of certain investigative actions and personally carry out certain investigative actions. Since this rule does not contain any reservations, it follows that such instructions also apply to those investigative actions that are carried out on the basis of the

²¹ Ibratova F. BANKRUPTCY OF A LIQUIDATED BUSINESS ENTITY: PROBLEMS AND SOLUTIONS //Norwegian Journal of development of the International Science No. – 2021. – Т. 58. – С. 45.

²² Чехов, А. (2018). Следователь. Strelbytskyy Multimedia Publishing.

²³ Esenbekova, P., Okyulov, O., Esanova, Z., & Ibratova, F. (2021). Decision of the court of first instance on civil affairs and its content.

²⁴ Ibratova F. TERMS IN CIVIL LAW AND THEIR APPLICATION IN LEGAL PROTECTION OF CITIZENS IN THE REPUBLIC OF UZBEKISTAN.

²⁵ Тулаганова Г. НЕКОТОРЫЕ ВОПРОСЫ ПРЕСТУПЛЕНИЙ ПРОТИВ ОСНОВ ЭКОНОМИКИ В УСЛОВИЯХ ПРЕДОТВРАЩЕНИЯ РАСПРОСТРАНЕНИЯ ПАНДЕМИИ КОРОНАВИРУСА //Review of law sciences. – 2020. – №. 2.

²⁶ Рустамбаев М.Х // Усиление гарантий защиты прав человека в уголовном процессе. – Народное слово. - 30 июня 2007г.

²⁷ Ибратова, Ф. Б. (2015). Гражданско-правовые проблемы признания банкротами индивидуальных предпринимателей в Республике Узбекистан. Вопросы современной юриспруденции, (5-6 (47)).

investigator's decision²⁸. At the same time, in this case, the requirements of the principle of freedom of assessment of evidence (Article 95 of the Criminal Procedure Code of the Republic of Uzbekistan) are violated, since the investigator has to issue decisions on the performance of investigative actions on his own behalf, based not on his inner conviction, but on the written instruction of the prosecutor. It seems that in this case, the procedural independence of the investigator is significantly violated, since the investigator is legally responsible for the decisions he makes, and in such a situation he will also be responsible for decisions made on the basis of written instructions from the prosecutor.

The foregoing necessitates a number of amendments to the current legislation²⁹. First of all, in the Criminal Procedure Code of the Republic of Uzbekistan it should be indicated that in the protocols of investigative actions, and in cases where their production requires the issuance of an investigator's decision, in these decisions, it should be mandatory to indicate that this investigative action is carried out on the written instructions of the prosecutor. In this case, the prosecutor who gave the written instructions must, along with the investigator, bear legal responsibility in cases where these investigative actions are carried out without sufficient grounds for that.

For this purpose, Article 90 "Securing evidence in the protocols" of the Code of Criminal Procedure of the Republic of Uzbekistan should be supplemented with part 4 of the following content:

"If the investigative action was carried out on the written instructions of the prosecutor, a corresponding note is made in the protocol".

Note that in accordance with Article 382 of the Code of Criminal Procedure of the Republic of Uzbekistan, the prosecutor has the right to terminate or suspend criminal proceedings, to give consent to the termination of the case by the investigator in cases where this is provided by law. There is no doubt that this gives the prosecutor the opportunity to make a very important decision that significantly affects the rights and legitimate interests of the persons involved in the criminal proceedings. At the same time, it is unclear in which case the prosecutor is endowed with these powers - either in all criminal cases in respect of which he exercises supervision, or only in those of them in which he personally carried out pre-trial proceedings in the manner provided for in Article 382 Code of Criminal Procedure of the Republic of Uzbekistan.

Comparing the content of this provision with the provision that an investigator has the right to appeal to a higher prosecutor, a written instruction from the prosecutor to terminate a criminal case (Article 36 of the Code of Criminal Procedure of the Republic of Uzbekistan) makes it possible to conclude that in cases where a criminal case is in the proceedings of an investigator, the prosecutor makes a decision is not entitled to suspend or terminate proceedings on it.

It follows from this that the norm we have investigated requires clarification. Part seventeen of Article 382 of the Code of Criminal Procedure of the Republic of Uzbekistan should be stated as follows:

"Initiates criminal cases or refuses to initiate them, terminates or suspends proceedings in cases in its proceedings, gives consent to the dismissal of the case by the investigator in cases where it is provided for by law, approves the indictment or ruling, sends cases to court".

The investigator, being in a certain relationship with the prosecutor, should not, however, lose his initiative in resolving certain issues.

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²⁹ Ibratova F. Problems of a settlement in bankruptcy cases in economic courts //Norwegian Journal of Development of the International Science. – 2019. – №. 28-3.

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