

PECULIARITIES IN EXAMINATION OF COMPLAINTS IN THE ORDER OF THE PROVISIONS OF THE ARTICLE 313 OF CRIMINAL PROCEDURE CODE

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Free access to justice is guaranteed at all procedural stages, namely the protection of human interests, rights and freedoms in criminal proceedings, including the observance by the judge of the person's right to examine the complaint about the actions and illegal acts of a criminal investigative body or of the body performing operative investigative activities in a fair manner. The complaint about the actions and illegal acts of a criminal investigative body or of the body performing operative investigative activities, is examined by the investigating judge, respectively the task of the investigating judge is to prohibit any alleged abuse of the criminal investigation bodies and of the bodies performing operative investigative activities, in which the legitimate rights and interests have been violated by these bodies, in case if the person disagrees with the result of an examination of his/her complaint by the prosecutor or did not get a response to his/her complaint from the prosecutor within the timeframe provided by law. In the same context, it should be mentioned that the regulations of art.313 CPC, aim to ensure free access to justice and the right of any person to a fair trial.

Keywords: complaint, investigating judge, court, criminal investigative body, body performing operative investigative activities, constitutional rights and freedoms.

PARTICULARITĂȚILE EXAMINĂRII PLÂNGERILOR ÎN ORDINEA ART. 313 AL CODULUI DE PROCEDURE PENALĂ

Accesul liber la justiție este garantat în toate fazele procedurale, respectiv apărarea intereselor, drepturilor și libertăților omului în cadrul procesului penal, presupune inclusiv și respectarea de către judecător a dreptului persoanei de a examina plângerea împotriva acțiunilor și actelor ilegale ale organului de urmărire penală și ale organelor care exercită activitate specială de investigații în mod echitabil. Plângerea împotriva acțiunilor și actelor ilegale ale organului de urmărire penală și ale organelor care exercită activitate specială de investigații, se examinează de către judecătorul de instrucție, respectiv sarcina judecătorului de instrucție este de a interzice orice pretins abuz ale organelor de urmărire penală și organelor care exercită activitate specială de investigații, în care drepturile și interesele legitime au fost încălcate de aceste organe, în cazul în care persoana nu este de acord cu rezultatul examinării plângerii sale de către procuror sau nu a primit răspuns la plângerea sa de la procuror în termenul prevăzut de lege. În aceeași ordine de idei, este de menționat, că reglementările art. 313 CPP, au drept scop de a asigura accesul liber la justiție și dreptul oricărei persoane la un proces echitabil.

Cuvinte-cheie: plângere, judecător de instrucție, instanță de judecată, organ de urmărire penală, organ care exercită activitate specială de investigație, drepturi și libertăți constituționale.

PARTICULARITÉS DE L'EXAMEN DES PLAINTES DANS L'ORDRE DE L'ART. 313 DU CODE DE PROCÉDURE PÉNALE

Le libre accès à la justice est garanti à tous les stades de la procédure, respectivement la défense des intérêts, des droits et des libertés de l'homme dans le cadre de la procédure pénale, suppose, y compris,

le respect par le juge du droit de la personne d'examiner la plainte contre les actions et les actes illégaux de l'organe de poursuite pénale et des organes exerçant une activité d'enquête spéciale de manière équitable. La plainte contre les actions et les actes illégaux de l'organe de poursuite pénale et des organes exerçant une activité spéciale d'enquête, est examinée par le juge d'instruction, respectivement la tâche du juge d'instruction est d'interdire tout abus allégué des organes de poursuite pénale et des organes exerçant une activité spéciale d'enquête, dans laquelle les droits et intérêts légitimes ont été violés par ces organes, si la personne n'est pas d'accord avec le résultat de l'examen de sa plainte par le procureur ou n'a pas reçu de réponse à sa plainte de la part du procureur dans le délai prévu par la loi. Dans le même ordre d'idées, il convient de mentionner que le règlement de l'art.313 du CPC vise à garantir le libre accès à la justice et le droit de toute personne à un procès équitable.

Mots-clés: plainte, juge d'instruction, cour, organe de poursuite, organe exerçant l'activité spéciale d'enquête, droits et libertés constitutionnels.

ОСОБЕННОСТИ РАССМОТРЕНИЯ ЖАЛОБ В ПОРЯДКЕ, ПРЕДУСМОТРЕННОМ СТАТЬЕЙ 313 УГОЛОВНО-ПРОЦЕССУАЛЬНОГО КОДЕКСА

Свободный доступ к правосудию гарантируется на всех этапах судопроизводства, а именно защита интересов, прав и свобод человека в ходе производства по уголовному делу, а также предполагает соблюдение судьей прав человека на объективное рассмотрение жалобы в отношении действий и незаконных актов органов уголовного преследования и органов, осуществляющих специальную розыскную деятельность на справедливой основе. Жалоба в отношении действий и незаконных актов органов уголовного преследования и органов, осуществляющих специальную розыскную деятельность рассматривается судьей по уголовному преследованию, соответственно, задача судьи заключается в том, чтобы запретить любые предполагаемые злоупотребления органами уголовного преследования и органами, осуществляющими специальную розыскную деятельность, в которых законные права и интересы были нарушены этими органами, в случае несогласия лица с результатами рассмотрения жалобы прокурором или неполучения от прокурора ответа на жалобу в предусмотренный законом срок. В этом же ключе, следует отметить, что положения статьи 313 УПК направлены на обеспечение свободного доступа к правосудию и права любого человека на справедливое судебное разбирательство.

Ключевые слова: жалоба, судья по уголовному преследованию, суд, орган уголовного преследования, орган осуществляющий специальную розыскную деятельность, конституционные права и свободы.

Introduction

According to the provisions of article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) states that any person whose rights and freedoms recognized by this Convention have been violated has the right to an effective remedy by a national court, even then, when the infringement is due to persons who have acted in the exercise of their official duties [1].

Respectively, in this regard falls the examination by the investigating judge of the complaints against the illegal acts of the prosecutor, of the criminal investigation bodies and of the bodies exercising special investigative activity if the person does not agree with the result

of the examination of his/her complaint by the prosecutor or has not received a response to his/her complaint from the prosecutor within the time limit provided by law.

Article 10 of the Universal Declaration of Human Rights of December 10, 1948 provides for: “Everyone has the right to equal treatment to be heard fairly and publicly by an independent and impartial tribunal, which will decide either on his/her rights and obligations or on the merits of any criminal charge brought against him/her” [2].

The topicality of this subject is justified by the fact that the investigating judge is responsible for prohibiting any alleged abuse of criminal prosecution bodies and bodies carrying

out special investigative activities, in which the rights and legitimate interests have been violated by these bodies, in case that the person does not agree with the result of the examination of his / her complaint by the prosecutor or did not receive an answer to his / her complaint from the prosecutor within the term provided by law.

General aspects regarding the examination of complaints in the provisions of art. 313 of Criminal Procedure Code

Article 6 of the Convention guarantees the right to a fair trial, the relevant party to whom it states that: *“Everyone has the right to a fair trial of his/her case, publicly... by a court ... which will decide ... on ... the merits of any criminal charge directed against him/her”* [3] In the same order of ideas, it is to refer also to article 20 of the Constitution of the Republic of Moldova, according to which everyone has the right to effective satisfaction of the competent courts against acts infringing his or her legitimate rights, freedoms and interests [4].

According to the provisions of art. 313 paragraph (1) of the Code of Criminal Procedure, complaints against illegal actions and acts of the criminal investigation body and of the bodies exercising special investigative activity may be submitted to the investigating judge by the suspect, accused, defender, injured party, other participants in the trial or by other persons whose rights and legitimate interests have been violated by these bodies, if the person does not agree with the result of the examination of his/her complaint by the prosecutor or has not received a response to his/her complaint from the prosecutor within the term provided by law [5].

As a result, the provisions of paragraph 1 state that the holders have the right to lodge complaints against the illegal actions and acts of the criminal investigation body and of the bodies carrying out special investigative activity, the suspect, the accused, the defense

counsel, the injured party, and other participants in the trial or by other persons whose rights and legitimate interests have been violated by these bodies.

In the light of the above, the provisions of paragraph (2) of the same article indicate that the following may be challenged before the investigating judge:

1) refusal of the criminal investigation body:

a) to receive the complaint or denunciation regarding the preparation or commission of the crime;

b) to satisfy the steps in the cases provided by law;

c) to initiate criminal proceedings;

d) to release the detained person for violating the provisions of art. 165 and 166 of this Code;

e) to release the detainee in violation of the period of detention or the period for which the arrest was authorized.

2) the orders regarding the cessation of the criminal investigation, the filing of the criminal case or the removal of the person from the criminal investigation;

3) other actions that affect the constitutional rights and freedoms of the person.

We must therefore draw attention to the fact that not every action of the criminal investigation body or of the body carrying out special investigative activity can be challenged before the investigating judge, but only that which has affected a legal right governed by substantive or procedural law, that is, *the constitutional rights and freedoms* of the person.

Art. 6 pt. 44) Code of Criminal Procedure, stipulates that the fundamental defect in the previous procedure, which affected the pronounced decision is the essential violation of the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, by other international treaties, the Constitution of the Republic of Moldova and other national laws.

Moreover, in spite of these legal provisions, concrete circumstances, considered to be a fundamental defect, are to be invoked in the complaint to the investigating judge, with an indication of the legal rules which lay down the rights and freedoms claimed to be essentially infringed, the essence of those infringements in relation to procedural criminal rules and other national laws, international conventions and treaties, how and to what extent the alleged infringements would have affected the contested decisions, omitting the argument of the illegality of the contested decisions in this respect and the indication of concrete errors of law in the given chapter.

The complaint against illegal acts and acts of the prosecuting body and bodies exercising special investigative activity shall be submitted to the investigating judge provided that the prior appeal has been respected, that is to say, the fulfillment by the petitioner or applicant of the provisions laid down in Article 298, 299¹ Code of Criminal Procedure.

On the basis of the above, we would like to mention that if the petitioner has filed a complaint against the acts and illegal acts of the prosecuting body and the bodies exercising special investigation activity directly to the investigating judge without having complied with the prior appeal procedure, to this end, a termination shall be issued stating that the complaint lodged, with an explanation of the order of appeal of the document or proceedings, is inadmissible, in the manner provided for in article 298-299² Code of Criminal Procedure.

It should be noted that in examining these complaints, the prosecutor is the one who is obliged to present the relevant materials in court, i.e., the burden of proof is on the prosecutor. But taking into account the principle of adversarial proceedings and equality of arms in the process, both parties are on an equal footing and are entitled to argue their position, to present evidence that would confirm or refute what

is disputed. It is pertinent to note that all the evidence relied on by the parties is to be assessed by the investigating judge and from the point of view of the source of such evidence, in order to be based on a decision on the complaint.

During the examination of the complaint, the investigating judge must not exceed certain limits. The investigating judge is not entitled to assume the obligations of the criminal investigation body, only to rule on the arguments invoked in the complaint, having the obligation to find and remove violations of the rights and legitimate interests of persons with the obligation of the criminal investigation body to liquidate detected violations that have affected fundamental rights. Last but not least, the investigating judge should not comment on the evidence administered, which would confirm or not the guilt of the persons concerned in the criminal case.

At the same time, the investigating judge must not rule in advance on issues that may subsequently be the subject of a judicial investigation in the trial on the merits (point 5.10 of the Decision of the Plenum of the Supreme Court of Justice No. 7 of July 4, 2005) [6, p. 14].

As a result, it is pertinent to mention that on the examination of the complaints in the provision of article 313 Code of Criminal Procedure, the general conditions for judging a case on the merits are not extended, these categories of complaints are examined within certain limits.

The investigating judge is competent to verify the compliance of the procedural documents issued by the criminal investigation body and the prosecutor with the legal provisions and procedural norms and that they should not be adopted with fundamental violations that invalidate them.

At the same time, the investigating judge may not subrogate the role of the prosecutor or the court of first instance to assessing the evidence and the legal qualification of the person's actions, assessing the degree of guilt or innocence of the perpetrator, lack or insufficiency

of evidence, this role belongs exclusively to the prosecutor in the criminal investigation or the court of first instance in the trial of the case, but it cannot be blamed on the investigating judge in the judicial procedure of the judicial control. Finally, the intended role of the investigating judge in examining the complaint in the provision of art. 313 Code of Criminal Procedure, is to verify whether or not the rights and legitimate interests of the person were violated as a result of the issuance of the decision by the criminal investigation body, if the person did not receive a response to the complaint or received an answer but was exceeded the term provided by law, if the rights and legitimate freedoms of the suspect, the accused, the defender, the injured party, other participants or persons interested in the criminal proceedings have been affected or restricted.

Paragraph (5) in Article 313 of the Code of Criminal Procedure stipulates that, the investigating judge, taking the complaint into account, shall adopt an end obliging the prosecutor to liquidate the detected infringements of the rights and freedoms of the human or legal person and, where appropriate, declare the act or procedural action under appeal null and void.

Finding that the contested acts or actions were carried out in accordance with the law and that the rights or freedoms of the person or legal person were not violated, the investigating judge ruled on the rejection of the complaint. The copy of the conclusion is sent to the person who filed the complaint and to the prosecutor.

In the light of the above, it should be pointed out that the court is not the criminal prosecution body, it should not be in favor or against the prosecutor or the petitioner, but it should only be in the interests of the law.

Thus, the investigating judge, after examining the complaint in collaboration with the arguments of the participants in the trial, of the evidence presented, will verify the legality and

validity of the contested decisions, whether or not the constitutional rights were violated, given that the criminal prosecution body has the obligation to take all necessary steps to establish the objective truth in order to conduct an effective investigation.

Moreover, the ECtHR has stated that the authorities must always make a serious effort to find out what has happened and must not rely on hasty or unfounded conclusions to stop the investigation or put them in their decisions and take all necessary steps, reasonable and available by law to provide evidence of the incident.

Obviously, the investigating judge is to state all the arguments put forward in the complaint as a consequence of failing to comply with these matters, thereby affecting the person's right to access justice.

Finally, the court must find with certainty whether or not the solution adopted by the prosecutor in the case is contrary to the factual and legal situation, whether or not it has fully examined the circumstances of the case or not.

In other words, the legal purpose of any official investigation of the facts alleged on reasonable grounds to be prejudicial is to take measures, to exhaust all possible means of administering evidence to establish the circumstances of the case, and in the event that compliance is raised, a regulation aimed at protecting the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, they require the organization of an effective judicial investigation system at the end of which there is no appearance of arbitrary assessment of the circumstances giving rise to the crime or investigation.

In view of the above, the court is to find out what circumstances constitute or not the violation of the right to a fair trial, guaranteed by art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which gives the right to a reasoned decision, the national courts being obliged to motivate

their solutions and conclusions, to provide answers to all questions that are relevant to the outcome of the process.

At the same time, the court, following the examination of the complaint, is to ascertain whether or not the criminal investigation body has fulfilled all possible procedural actions, in compliance with the rigors of art. 252 of the Code of Criminal Procedure, which states that *the purpose of the criminal investigation is to collect the necessary evidence regarding the existence of the crime, to identify the perpetrator, to determine whether or not it is appropriate to prosecute under the law and to establish its liability, and according to the provision of art. 254 (1) of the Code of Criminal Procedure, the criminal investigation body is obliged to take all the measures provided by law for the investigation in all aspects, complete and objective of the circumstances of the case to establish the truth.*

According to the provision of art. 19 (3) of the Code of Criminal Procedure, *the criminal investigation body has the obligation to take all measures provided by law for the investigation in all aspects, complete and objective, of the circumstances of the case, to highlight both the circumstances proving the guilt of the suspect, accused, defendant, as well as those who exonerate him/her, as well as the circumstances that mitigate or aggravate his/her liability.*

It should also be noted that the European Court of Human Rights has reiterated in its practice that the extent of the State's obligations regarding the thorough and resultant investigation of any act alleged to be criminal, depends on the nature of the petitioner's complaint.

The fulfillment of these obligations does not imply the right to initiate a criminal investigation against a third party or to be sentenced to criminal sanctions, nor any obligation of result which would imply that any criminal prosecution must end with a conviction. In particular,

in the event of compliance with a regulation aimed at protecting the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, they require the organization of an effective judicial inquiry system at the end of which there is no appearance of appreciation, arbitrary of the circumstances that gave rise to the deed. The form of the investigation may vary depending on the circumstances without the need to initiate criminal proceedings in all cases.

Paragraph (6) of Article 313 of the Code of Criminal Procedure provides that the conclusion of the investigating judge shall be irrevocable, with the exception of the termination of the refusal to prosecute, the removal of the person from prosecution, the cessation of the prosecution, the classification of the criminal case and the resumption of the prosecution, which may be appealed to the court of appeal within 15 days of the date of delivery.

Moreover, the remedy against the conclusion of refusal to prosecute, removal of the person from prosecution, bringing the criminal proceedings to an end, classifying the criminal case and resumption of prosecution ensures not only the right to double degree of jurisdiction but also compliance with the provisions of Article 13 of the Convention, governing the right to effective redress. Respectively, the decisions of the investigating judge regarding the refusal to initiate criminal proceedings, the removal of the person from criminal prosecution, the cessation of criminal proceedings, the filing of the criminal case and the resumption of criminal proceedings are likely to be appealed to the court of appeal within 15 days from the date of pronouncement. In its turn, the court of appeal, being invested with the role of ensuring the judicial control of the contested decisions, will examine the appeal submitted in accordance with the provisions of art. 437-451 Code of Criminal Procedure.

However, with regard to this chapter, several problems of interpretation are provided.

Thus, according to recommendation No. 71 regarding the judgment of the appeal against the decisions adopted in the order provided by art. 313 of the Code of Criminal Procedure, mentions that according to the judicial practice adopted by the courts of appeal, in case there are sufficient grounds to admit the declared appeal, according to art. 449 (1) pt. 2) let. c) Code of Criminal Procedure, the courts order the annulment of the conclusion of the investigating judge, with the sending of the case for retrial in the court of first instance, because it is necessary to administer new evidence [7, p. 2].

In this regard, we should also draw attention to the fact that if the courts order the annulment of the conclusion of the investigating judge, with the referral of the case to the court of first instance, because it is necessary to administer new evidence, the reasonable time is violated, conducting the criminal investigation.

Or, para. (3) in art. 313 of the Code of Criminal Procedure, provides that the complaint is examined by the investigating judge within 10 days. As a result, the term of 10 days is a narrower term, namely aiming to comply with the provisions of art. 20 of the CPP. Consequently, the Supreme Court of Justice concludes that the ground provided by the legislator in art. 449 para. (1) pt. 2) let. c) Code of Criminal Procedure, namely, when the case is sent to a new retrial, because it is necessary to administer additional evidence, does not refer to the examination of the appeal against the conclusion of the investigative judge provided by art. 437 para. (1) point 31) Code of Criminal Procedure, but it is a solution regulated by the legislator for cases when the merits are judged, i.e., when challenging the sentence handed down by judges on minor offenses for which the law provides exclusively non-custodial sentences, sentences pronounced by the Supreme Court of Justice. (art. 437 para. (1) pt. 1), 3)) [8, p. 3].

By acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Republic of Moldova has undertaken to guarantee the protection of the rights and freedoms proclaimed by the Convention of all persons under its jurisdiction.

From the provisions of the Constitution of the Republic of Moldova (art. 4 paragraph 2), as well as from the decision of the Constitutional Court no. 55 of October 14, 1999 "Regarding the interpretation of some provisions of art. 4 of the Constitution of the Republic of Moldova, it follows that the Convention is an integral part of the domestic legal system and, respectively, is to be applied directly like any other law of the Republic of Moldova, except that the provisions of the Convention take precedence over other domestic laws. [9, p. 14].

Conclusions

In conclusion, we will mention that, according to the provisions of the criminal procedural legislation, the criminal process aims to protect the person, society and the state from crimes, as well as to protect the person and society from illegal acts of persons with positions of responsibility in their activity related to investigating alleged crimes, committed, so that any person who has committed a crime is punished according to his/her guilt and no innocent person is held criminally liable and convicted.

In this respect, the task of the investigating judge is to prohibit any alleged abuse of the prosecuting authorities and the bodies carrying out special investigative activities.

The purpose of examining the complaints in the order of art. 313 of the Code of Criminal Procedure, is for the court to find the circumstances that constitute the non-observance of the right to a fair trial, guaranteed by art. 6 of the Convention, moreover, according to the legal provisions and the judicial practice, the investigating judge in the process of criminal prosecution, examining the complaint

submitted according to the provisions of art. 313 of the Code of Criminal Procedure, is not entitled to assume the obligations of the criminal investigation body, only to rule on the arguments invoked in the complaint.

In conclusion, we draw attention to the fact that the rules of international and national law regulate and guarantee the right of every participant in the proceedings to participate in the examination of complaints against illegal acts of the prosecutor, of the criminal investigation bodies and special investigative bodies.

Respectively, the right of the person to examine complaints against illegal acts of the prosecutor, criminal prosecution bodies and special investigative bodies presupposes that the prosecutor, the petitioner and other persons interested in the trial are entitled to hear the material of the case, to present evidence which would confirm or refute the arguments put forward in the complaint. It is important to mention that the regulations of art. 313 of the Code of Criminal Procedure, aims to ensure free access to justice and the right of any person to a fair trial.

Last but not least, it is necessary to outline that the conduct of the criminal trial takes place by the criminal investigation body, and as a judicial body with its own attributions in the conduct of the criminal trial, the investigating judge, in the criminal investigation phase, is not entitled to assume the obligations of the criminal investigation body, having only to rule on all the arguments invoked in the complaint and, respectively, to verify whether the contested acts or actions were carried out in accordance with the law and whether the human or legal person's rights or freedoms were not violated, by the criminal investigation body. The investigating judge shall not be entitled to prejudge on matters which may subsequently be the subject of judicial investigation in the proceedings as a matter of substance, nor shall the investigating judge require the prosecutor to take a

decision or other decision in the outcome of the review or, where appropriate, to appreciate the evidence administered in a certain way, especially at the discretion of the petitioner or prosecutor, and thus to check only respect for human rights and freedoms when adopting the decision, i.e., to exclude any abuse by the prosecuting bodies and bodies exercising special investigative activity.

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