Lex Humana, Petrópolis, v. 14, n. 1, p. 443-454, 2022, ISSN 2175-0947

JUDICIAL REVIEW OF THE ACTIVITIES OF PRELIMINARY INVESTIGATION AGENCIES TO REDRESS THE HARM CAUSED BY THE CRIME

REVISÃO JUDICIAL DAS ATIVIDADES DOS ÓRGÃOS DE INVESTIGAÇÃO PRELIMINAR PARA REPARAR OS DANOS CAUSADOS PELO CRIME*

Dmitriy Ivanov
Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation (MGIMO-University), Moscow, Russia
dmitriy.a.ivanov@bk.ru

Aleksandr Grinenko
Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation (MGIMO-University), Moscow, Russia
aavgrinenko@yandex.ru

Ekaterina Rasskazova
Russian State Social University, Moscow, Russia
e.n.rasskazova@bk.ru

Elmir Alimamedov
Finance University under the Government of the Russian Federation, Moscow, Russia
alimamedov.e.n@mail.ru

Lubov Zolochevskaya
Moscow University of the Ministry of Internal Affairs of Russia named by V.Ya. Kikot, Moscow, Russia
l.s.zolochevskaya@mail.ru

Abstract: The article consider the main directions of judicial control over the activities of the investigator, inquirer to compensate for the damage caused by a crime at the stage of the preliminary investigation. Authors used methods of knowledge, which allowed a comprehensive review of the relevant areas of judicial control. Using the methods of analysis of materials of criminal cases, authors have concluded that more than a third of the compensation for damage is provided by court decisions on petitions of investigators to seize the property of guilty persons. The results have shown that in this case, an important role is played by an effective judicial control, which is carried out from the moment of initiation of a criminal case and the end of the preliminary investigation. The authors analyzed the system of the implementation of judicial control over such procedural actions and decisions of state bodies and officials involved in criminal prosecution, as: seizure of property and the return of criminal cases by the court to the prosecutor. All this is due to the fact that these procedural actions and decisions play an important role in ensuring compensation for damage caused by a criminally punishable act.

Keywords: Pre-trial proceedings. Judicial control. Investigative actions. Harm caused by crime.

* Artigo recebido em 04/04/2022 e aprovado para publicação pelo Conselho Editorial em 05/07/2022.

Resumo: O artigo considera as principais direções do controle judicial sobre as atividades do investigador, inquiridor para compensar os danos causados por um crime na fase da investigação preliminar. Os autores utilizaram métodos de conhecimento, que permitiram uma revisão abrangente das áreas relevantes do controle judicial. Usando os métodos de análise de materiais de casos criminais, os autores concluíram que mais de um terço da indenização por danos é fornecida por decisões judiciais sobre petições de investigadores para apreender os bens de pessoas culpadas. Os resultados demonstraram que, neste caso, um papel importante é desempenhado por um controle judicial efetivo, que é realizado a partir do momento de início de um caso criminal e do término da investigação preliminar. Os autores analisaram o sistema de implementação do controle judicial sobre tais ações processuais e decisões dos órgãos e funcionários estatais envolvidos no processo penal, como: apreensão de bens e devolução de casos criminais pelo tribunal ao procurador. Tudo isto se deve ao fato de que estas ações e decisões processuais desempenham um papel importante para garantir a compensação de danos causados por um ato criminalmente punível.

Palavras-chave: Procedimentos prévios ao julgamento. Controle judiciário. Ações investigativas. Danos causados pelo crime.

1. INTRODUCTION

Beginning to consider the peculiarities of judicial control over this type of activity of officials conducting a preliminary investigation, its main directions should be highlighted. Thus, based on the statutory sequence of stages of criminal proceedings, we pay attention to the features of judicial control over the following procedural actions and decisions: attachment of property (Article 115 of the Code of Criminal Procedure of the Russian Federation); return of criminal cases by the court to the prosecutor (Article 237 of the Code of Criminal Procedure of the Russian Federation).

2. MATERIALS AND METHODS

The methodological basis of the study is a general scientific systematic method of knowledge, which allowed a comprehensive review of the relevant areas of judicial control over the activities of preliminary investigation to redress the harm caused by the crime.

In preparing this study, the authors applied the following scientific methods:

- the formal-logical method, consisting in the analysis of the actual directions of judicial control over the activities of preliminary investigation bodies to compensate for the damage caused by the crime at the stage of the preliminary investigation;

- the comparative legal method, which analyzes the peculiarities of judicial control over the activities of bodies of preliminary investigation to compensate for the damage caused by a crime at the stage of the preliminary investigation;

- the statistical method, including the collection and analysis of data on the number of criminal case files, the return of criminal cases by the court to the prosecutor due to violations of the principle of legality in criminal proceedings;

- the specific sociological method used in sociological interviews with investigators and heads of investigative agencies.

3. RESULTS AND DISCUSSION

Speaking about judicial control over the seizure of property, we note that the content of Part 5 of Article 165 of the Code of Criminal Procedure of the Russian Federation, which regulates the procedure for production of this procedural action in cases that are not time-sensitive, i.e. without a court decision, does not exclude the appeal of such actions by interested persons under the provisions of Article 125 of the Code of Criminal Procedure of the Russian Federation. It is important to emphasize that interested persons may appeal the legality and validity of certain actions of officials, implemented during the arrest of property and violating their rights in the course of this procedural action.

A number of authors (Ivanov et al., 2022, p. 199) rightly argue that the seizure of property, being a multipurpose procedural action, may apply both to the suspect, accused or persons who are financially responsible under law for their actions, and other persons.

In connection with the above, it is important to note that, in order to clarify the provisions of Part 1 of Article 115 of the Code of Criminal Procedure of the Russian Federation, the Constitutional Court of the Russian Federation also reflected its position on the seizure of property. Thus, according to the Decree of the Constitutional Court of the Russian Federation No. 1-P (January 31, 2011), "The provision of Part 1 of Article 115 of the Code of Criminal Procedure of the Russian Federation stipulating the seizure of property is a very important provision. The provision of Part 1 of Article 115 of the Code of Criminal Procedure of the Russian Federation stipulating in order to ensure the execution of the sentence in the part of the civil claim does not contradict the Constitution of the Russian Federation, since in its constitutional and legal meaning it means that the property may be seized only by that person, which under the law bears material responsibility arising from the infliction of harm on the suspect or the accused".

Despite the official position of the Constitutional Court of the Russian Federation, in current investigative and judicial practice there is an acute question about the possibility

of seizing the property of third parties who do not have the status of a suspect or defendant, but who bear material responsibility under the law for the actions of persons who have committed crimes.

At the same time, it should be noted that seizure of property is widely used with respect to both suspects, defendants and other persons on the basis of the prescriptions of Part 3 of Article 115 of the Code of Criminal Procedure of the Russian Federation. If there is sufficient and reliable evidence of deliberate actions of the accused aimed at concealing property obtained by criminal means or subject to confiscation, the courts seize property that has left the possession of the accused, including property registered to persons who are in actual (unregistered) marital relations with them.

However, the practice of application of Part 3 of Article 115 of the Code of Criminal Procedure of the Russian Federation currently studied by the authors is very contradictory and heterogeneous. Here are opposite in their legal nature procedural decisions taken by investigators, interrogators and courts regarding the seizure of property of third parties.

In a criminal case against the general director of "Indigo" LLC L., who had embezzled budgetary funds while receiving subsidies under a program of additional measures to promote employment of parents with many children, parents raising disabled children and unemployed people, the Leninsky District Court of Tambov seized two items of immovable property, the title to which was registered in the name of S., who was in a close relationship with the accused without officially registering her marriage.

At the same time, the authors revealed a fact indicating the seizure of property and its further confiscation by a court decision, in case the accused managed to sell it. Thus, the Investigative Committee of Russia is trying to recover 350 million rubles, which disappeared at the cannery of the Russian Federal Penitentiary Service. According to "Kommersant", the Moscow City Court refused to release the property, including the Lexus RX450H car, belonging to the son of Pavel Belikov, director of FSUE "Konservny Zavod FSIN of Russia" accused of the theft of 350 million rubles. It happened in spite of the fact that lawyers assured that everything arrested before the court decision had been resold to other persons. The court decided that the property may have been purchased with the embezzled funds from the budget and hence, it may be seized even after the resale, as it will be used to pay off the property damage.

In terms of scientific component regarding this example are justified and logical arguments, Kokoreva, Lavrova (2016), Nguyen, Pushkarev et al., (2021) who argue that in

the presence of evidence confirming the belonging to the suspect, the accused property of which is registered by another person, such property may also be seized.

At the same time in the investigative and judicial practice there are examples of other, completely opposite decisions regarding the seizure of property of persons who are not suspects or defendants. In particular, in the criminal case investigated by the Investigative Department of the Ministry of Internal Affairs of Russia for the city of Bryansk against B. on charges of embezzlement of budget funds when receiving subsidies paid under the departmental target program "State Support of Small and Medium Entrepreneurship in the Bryansk region", the court refused to seize the car Audi A 8, which at the time of the appeal to the court was registered to the mother of B., despite the sufficient data indicating the purchase of the car with funds received as a result of the

The principled position of the court on the issue of seizure of property of relatives of the accused (suspects) and other persons can be confirmed by the example of the criminal case initiated in the Investigation Department of the Ministry of Internal Affairs of Russia in the Orenburg region against the director of GUP "Oblkinovideo" under Part 1 of Article 201 of the Criminal Code, where during the preliminary investigation the court granted the request of the investigator and arrested the property belonging to the accused P. and his wife. The appellate instance of the Orenburg Regional Court denied the defense's motion to remove the seizure of the property of P's wife. The court motivated its decision by the fact that in accordance with Article 256 of the Civil Code of the Russian Federation the property acquired by the spouses during their marriage is their joint property.

Analysis of investigative practice and court decisions allows us to conclude that the main reasons for the courts' refusal to seize property are the following: ownership of bank accounts and property by legal entities and not by the accused; encumbrances on immovable property (mortgages), outstanding arrests on bank accounts; lack of sufficient evidence in the materials submitted to the court that the property belongs to the suspect (accused); lack of claims from the victims; applications for a judicial review of the property of the accused.

In some cases, court refusals to seize property are due to the failure of an investigator or inquirer to conduct a set of investigative actions aimed at identifying property owners. Also, refusals of courts are caused by the fact that the suspects (accused) have the only housing which was supposed to be seized. Increasingly often there are cases

of refusal to arrest cryptocurrencies, because their status is not regulated in the law (Pushkarev et., 2022, p. 111-125).

The most frequent reason for the courts' denial of requests for the seizure of property is that the person whose property is being seized does not have the status of a suspect (accused) in a criminal case (Pushkarev et al., 2021, p. 395-406).

Thus, according to the materials of the criminal case initiated by the Investigation Department of the Department of Internal Affairs in ZAO, Main Department of Internal Affairs of Russia for Moscow, it was established that, acting as part of an organized criminal group, Sh., K. and G., between January and July 2013, committed theft of money received from 35 victims, by deception under the pretext of supplying cars. During the investigation of the criminal case, on January 23, 2014, a statement on Sh.'s account was seized from Svyaznoy Bank (ZAO), as a result of which it was established that his account contained 779,204 rubles. However, the court refused to satisfy the investigator's petition, justifying this decision by the fact that at the time of his petition to the court Mr. Sh. had the procedural status of a witness.

Despite the facts revealed by the authors of the failure of the courts to satisfy applications for seizure of property and unresolved this issue, the Investigation Department of the Ministry of Internal Affairs of Russia states the increase in the effectiveness of the preliminary investigation bodies in the Ministry of Internal Affairs of Russia of regional information databases containing information about the rights to real estate, vehicles, shares and other securities of suspects (accused) to establish their property and property rights. At the same time, more than half of the investigative units increased the share of the value of seized property in the amount of damage (in criminal cases sent to court).

Thus, we can state that the proportion of compensation for damage caused by crimes through the arrest of property is significantly higher than the proportion of voluntary compensation and seizure of stolen property during seizures and searches. Seizure of property is widely used when there is evidence of intentional actions of the accused aimed at concealing property obtained by criminal means or subject to confiscation. At the same time, the courts also seize property that has left the possession of the suspect or the accused both before the initiation of the criminal case and during the preliminary investigation, including property registered in the name of persons in actual (unregistered) marriage relations with them.

Summarizing the intermediate conclusion regarding the implementation of judicial control over the seizure of property, we cannot but note the critical importance of seizure of property used to ensure full and real compensation for the harm caused by crime. In particular, the analysis of analytical materials submitted by investigative units showed that more than a third of compensated damage is provided by court decisions on motions of investigators to seize the property of guilty persons.

Further, it should be noted that contradictory and unresolved is the question of the time interval of this measure of procedural coercion.

In this case, the law of criminal procedure establishes that the arrest imposed on the property, or certain restrictions to which the seized property is subjected, is cancelled on the basis of a ruling or determination of the person or body in charge of the criminal case, when the application of this measure of procedural coercion or certain restrictions to which the seized property is subjected, is no longer necessary, and also when the court-imposed arrest on the property has expired or when the arrest has been refused to extend (Part 9 of Article 115 of the Code of Criminal Procedure of the Russian Federation).

The need to control the decision on the seizure of property is also evidenced by the facts revealed by the authors during the study of criminal case files. Thus, in the Investigation Department of the Department of Internal Affairs of the Pskov region in order to ensure the property damage caused to the state, the car belonging to Mr. A. was arrested, who was accused of committing a crime under Part 1 of Article 198 of the Criminal Code. During the pre-trial proceedings, the accused compensated, in installments, the property damage caused to the state, which was specified in the indictment. By the time the criminal case was considered in court, the accused A. fully compensated the property damage caused by him to the state (paid the tax fees, which had not been paid by him to the relevant budget), in connection with which the court cancelled the seizure of property.

In connection with the above, of interest is the scientific position of N.A. Kolokolov, who is convinced that the need for seizure of property may disappear in the following cases: "1) material damage, for the reimbursement of which the arrest was imposed, was compensated voluntarily; 2) there is no evidence that the property was obtained by criminal means; 3) the case has been terminated proceedings" (Kolokolov, 2004, p. 59).

We allow ourselves to supplement the opinion of the above scholar with arguments that voluntary compensation of harm from the suspect (accused) must be reliably established and proven during the preliminary investigation, as well as the harm caused by a

criminal act must be compensated to the victim in full. Thus, we believe that only in the presence of the above circumstances the court may satisfy the complaint of the person concerned to cancel the seizure of property.

Based on the above, the authors concluded that it is necessary to supplement Part 9 of Article 115 of the Code of Criminal Procedure of the Russian Federation with the third sentence: "Arrest imposed on property, or certain restrictions to which the seized property is subjected, shall be cancelled on the basis of a ruling, determination of the person or body in the proceedings of which the criminal case is conducted, when during the preliminary investigation it is reliably established that the harm caused by the crime has been voluntarily compensated by the suspect, accused in full".

There is also a need to consider the judicial control function of the court over the activities of the investigator, inquirer to compensate for the damage caused by the crime through the prism of the power to return criminal cases to the prosecutor on the basis of the provisions of Clause 1, Paragraph 1 of Article 237 of the Code of Criminal Procedure of the Russian Federation to remove obstacles to its consideration by the court in cases of violations of the requirements of the criminal procedural law in drawing up an indictment (indictment act, accusatory ruling).

Given the subject matter of this study, the authors point out those typical mistakes made by investigators, inquirers in compiling the final procedural documents on a number of criteria.

First of all, we note the need to accurately reflect in these procedural documents the data on the nature and extent of the harm caused by the crime. In this context, an interesting fact revealed by B.A. Tugutov, who studied criminal cases in the archives of Zaigrayevsky District Court of the Republic of Buryatia in 2012. In particular, "in the criminal case against I., accused of violating traffic rules that resulted in the death of a man by negligence, when drawing up an indictment, the investigator did not reflect the information that the person recognized as the victim had made a civil claim for compensation for moral damage from the accused. In connection with the above-mentioned violations the victim petitioned for the return of the criminal case to the prosecutor, which was satisfied by the court. The court ruling stated that the violations of Article 220 of the Code of Criminal Procedure of the Russian Federation were essential, as the injured party had not been identified in the case, and the omission of information on the nature and extent of the harm caused to the victim by the crime violated the right of the defendant to a defense" (Tugutov, 2014, p. 86-87).

It should be clarified that the failure of investigators, inquirers to comply with the requirements of criminal procedural law regarding the resolution of the issues of compensation for the damage caused by the crime, also served as a reason for the return of criminal cases by courts under Article 237 of the Code of Criminal Procedure of the Russian Federation.

The following fact, revealed by the authors as a result of studying the materials of criminal cases, is characteristic from this point of view. The investigator of the Investigative Division of the Department of Internal Affairs for the Mitino district of Moscow. In the resolution calling Ya. accused of committing robbery against R. he accused him of stealing a cell phone worth 8,195 rubles with a SIM card worth 150 rubles, which had money in the account of 100 rubles, but the total amount of property damage caused to the victim was 6,300 rubles instead of the total amount of damage of 8,445 rubles.

Further we note the following criterion by which the court can assess the quality and completeness of information reflecting the activities of the investigator, inquirer on compensation of harm, in the final procedural documents of pre-trial proceedings. A significant moment here is the presence in the indictment (indictment decision, accusatory act of information), information indicating the measures taken during the preliminary investigation, which are aimed at creating legal guarantees for the compensation of harm caused by crime.

However, as the analysis of the materials of criminal cases shows, it is not possible to unequivocally assert that the investigators, inquirers, comply with this prescription and indicate in the indictment (bill of indictment, indictment decree) the measures they took to ensure compensation for damages.

It should be said that the absence in these documents of information on the measures taken by the investigator, the inquirer, aimed at ensuring compensation for harm, is the basis for the court to return the criminal case to the prosecutor in accordance with Clause 1, Paragraph 1 of Article 237 of the Code of Criminal Procedure of the Russian Federation. This court decision shall result in the prosecutor's return of the criminal case to the preliminary investigation body for elimination of the revealed violations in accordance with the requirements of Clause 15 of Part 2 of Article 237 of the Code of Criminal Procedure of the Russian Federation. In turn, all of the above entails disciplinary measures in respect of the investigator, interrogator and their direct supervisors.

The next most common reason for the return of criminal cases by courts is the presentation of distorted testimony by trial participants regarding the nature and extent of the harm caused by a criminally punishable act, or the lack thereof.

In particular, the indictment in the criminal case accusing K. of committing crimes under Part 2, Article 167, Part 2, Article 158 of the Criminal Code of the Russian Federation, investigated by the Department of IAB for the Teply Stan District of Moscow, misrepresented the victims' testimony regarding the amount of property damage caused. Thus, according to the indictment it follows from the testimony of victim M. that she suffered pecuniary damage in the amount of 10,412 rubles. However, the specific amount of damage to property was not clarified to victim M. in the course of interrogation. According to the testimony of the other victim the amount of the property damage was 20,000 rubles and not 6,857 rubles, as indicated in her testimony in the indictment.

At the same time, we note that the determining moment in the establishment of property damage, especially in criminal cases of acquisitive crimes, is the testimony of victims. However, as the facts from the studied materials of criminal cases presented by the authors show, investigators, inquirers in most cases indicate the amount of property damage from the words of property owners, without specifying its value taking into account wear and tear. In addition, there are cases when not actually caused property damage is taken into account, but taking into account the indexation of lost profits, which is definitely a procedural error of officials conducting the preliminary investigation.

The authors state that these facts are not isolated, and in this regard concludes that it is necessary to eliminate the identified gaps and shortcomings in the activities of the investigator, inquirer to ensure reparation of damage caused by crime by activating judicial control over this type of activity.

4. CONCLUSIONS

Thus, based on the results of the study of current areas of judicial control over the activities of bodies of preliminary investigation to compensate for damage caused by a crime at the stage of preliminary investigation, it will be logical and reasonable to make the following conclusions.

1) Summarizing the conclusion regarding the effectiveness of the court's activities on consideration of applications for seizure of property, we cannot but note the critical

importance of application by court decision of a measure of procedural coercion in the form of seizure of property to ensure compensation for the harm caused by the crime. The analysis of analytical materials submitted by investigative units showed that more than a third of compensated damage is provided by court decisions on petitions of investigators, inquirers to arrest the property.

2) In order to improve the efficiency of solving the tasks of identifying the property which may be arrested by the courts in order to secure claims, other property claims or possible confiscation, it is advisable to add the third sentence to Part 9 of Article 115 of the Criminal Procedural Code of the Russian Federation: "The arrest imposed on the property, or certain restrictions to which the arrested property is subjected, shall be cancelled on the basis of a ruling, determination of the person or body in charge of the criminal case, when during the preliminary investigation it is reliably established that the harm caused by the crime has been voluntarily compensated in full by the suspect, accused".

REFERENCES

Ivanov, D.A., Tishutina, I.V., Dyablova, Yu.L., Artemova, V.V., Khmelev, S.A. (2022). Seizure of property: Counteraction to the investigation of crimes and the execution of a sentence. Jurídicas CUC, 18(1), 199-216.

Kokoreva, L.V., Lavrova, O.N. (2016). Seizure of property: The procedure for assessing the property located in the home of the suspect, the accused, immediately at the time of the investigative action: methodological recommendations. Staroteryaevo: Moscow Regional branch of the Moscow University of the Ministry of Internal Affairs of Russia named after V.Ya. Kikot.

Kolokolov, N.A. (2004). Methods of behavior of the main judicial control actions at the stage of preliminary investigation: A scientific and practical guide. Moscow: Yurlitinform.

Nguyen, T.V., Pushkarev, V. V., Tokareva, E. V., Makeev, A. V., & Shepeleva, O. R. (2021). Compensation for Damage Caused by a Crime in the Socialist Republic of Vietnam and the Russian Federation. Jurnal Cita Hukum, 9(2), 211–220. https://doi.org/10.15408/jch.v9i2.21738.

Pushkarev, V. V., Poselskaya, L. N., Skachko, A. V., Tarasov, A. V., & Mutalieva, L. S. (2021). Criminal Prosecution of Persons Who Have Committed Crimes in The Banking Sector. Cuestiones Políticas, 39(69), 395–406. https://doi.org/10.46398/cuestpol.3969.25

Pushkarev, V.V., Skachko, A.V., Gaevoy, A.I., Vasyukov, V.F., Alimamedov, E.N. (2022). Managing the Investigation of Cryptocurrency Crimes in The Russian Federation. REICE: Revista Electrónica De Investigación En Ciencias Económicas, 10(19), 111–125.

Resolution of the Constitutional Court of the Russian Federation No. 1-P. (January 31, 2011). "On the Case of Checking the Constitutionality of the Provisions of Parts One, Three and Nine of Article 115, Paragraph 2 of Part One of Article 208 of the Criminal Procedure Code of the Russian Federation and paragraph nine of paragraph 1 of Article 126 of the Federal Law "On Insolvency (Bankruptcy)" in in connection with the complaints of the closed joint-stock company "Real Estate-M", limited liability company "Solomatinsky bread-receiving enterprise" and citizen L.I. Kostareva". Collection of Legislation of the Russian Federation, No. 6, St. 897.

Tugutov, B.A. (2014). The functions of the prosecutor at the judicial stages of the criminal process: Diss. ... cand. jurid. Sciences. Moscow.