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**ADMINISTRATIVE APPEAL AS AN OUT-OF-COURT
PROCEDURE FOR THE PROTECTION OF THE
RIGHTS OF INDIVIDUALS AND LEGAL ENTITIES**

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ADMINISTRATIVE APPEAL AS AN OUT-OF-COURT PROCEDURE FOR THE PROTECTION OF THE RIGHTS OF INDIVIDUALS AND LEGAL ENTITIES

Illia YURIICHUK¹

Abstract

In administrative law, there are two major ways of contesting allegedly unlawful decisions/acts: the administrative appeal and the judicial review (court action). While the administrative appeal is an attempt to solve the dispute at administrative level, the judicial review is an adversarial proceeding by which an individual transfers the conflict with a public authority to the (administrative) courts. In principle, the administrative appeal and the judicial review are independent, and the rules for their exercise normally do not interfere with one another.

One of the forms of legal protection of a person in relations with public administration authorities is the institution of administrative appeal, the purpose of which is to fully and timely prevent and eliminate any violations of law and discipline in the activities of public authority. It ensures the active and proactive participation of citizens in the protection of their rights in administrative manner. The right to administrative appeal of decisions, actions or inactivity of authority directly to them or to administrative bodies, which are higher in the system of hierarchical subordination, is an important and necessary mechanism for pre-trial settlement of a dispute between a citizen and the relevant authority.

The resolution of such disputes within the framework of administrative appeal provides an opportunity for business entities, individual citizens to protect their interests, identify shortcomings in the work of public authorities and promptly eliminate them, save time and effort, bypassing the judicial form of protection.

Keywords:

Administrative appeal; procedure; judicial review; unlawful decisions, acts or inactivity; public authority; protection of the rights, freedoms and interest.

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I. MAIN PARAGRAPH

The right to administrative appeal of decisions, actions or inactivity of subjects of authority directly to themselves or to administrative bodies, which are higher in the system of hierarchical subordination, is an important and necessary mechanism for pre-trial settlement of a dispute between a citizen and the relevant authority. The resolution of such disputes within the framework of an administrative appeal enables business entities, individual citizens to protect their interests, identify shortcomings in the work of public authorities and promptly eliminate them, save time and effort, bypassing the judicial form of protection.

Despite the considerable scientific interest of scientists by the outlined problem, it is difficult to call the institution of administrative appeal perfect in Ukraine, as evidenced by the obsolescence of many norms of the current legislation in this area of legal regulation, the weak effectiveness of their implementation, the incompatibility of a significant part of legal norms with realities, numerous complaints from citizens about decisions, actions (inaction) of officials of the subjects of power and etc.

All this once again underlines the need for a scientific study of the institution of administrative appeal in order to work out an optimal mechanism for ensuring legality and discipline in the activities of public administration bodies.

First of all, it should be noted that some researchers use the expression “pre-trial appeal” to designate the phenomenon under consideration. We agree with D.V. Luchenko who notes this approach is not entirely correct, because the adjective “pre-trial” indicates the supposedly inextricable link between judicial and pre-trial means of appeal, while the latter, although they may precede an administrative dispute, constitute a separate way of protecting rights, the use of which does not always entail the trial and moreover does not affect the course of the latter [11, p. 97-98].. With this in mind, the correct, in our opinion, is the use of the term “out-of-court appeal” as a set of mechanisms for appealing decisions, actions or inaction of subjects of power not related to going to court.

According to Part 2 of Art. 3 of the Constitution of Ukraine [14], “the rights and freedoms of a person and their guarantees determine the content and focus of state activity. The state is responsible to the person for their activities. The approval and maintenance of human rights and freedoms is the main duty of the state. One of the guarantees of ensuring human rights and freedoms, imposes on the state the relevant obligations, is the practical implementation of the right of appeal of any actions or

inactivity of entities that violate his rights, including public authorities. The presence of this right predetermines the necessity of foreseeing in the state procedures that ensure the practical realization by a person of his right of appeal. Without their availability, this right will not be an effective way of implementation and will remain purely declarative.

The guarantee of the effectiveness of such procedures is their fixing in the legislation of the country. Legal certainty of the appeal procedure provides a person with the opportunity to effectively use it, which leads to the launch of the state control mechanism over the activities of its bodies and their officials [16: 72]. As a result, an effective appeal has either prevented the violation of human rights, or prompted the public authorities to restore the violated rights.

We understand that the institution will be effective when it meets the objective of its regulation in practice. In administrative relations, what is effective is that which generally contributes to the main purpose of administrative procedures, i.e. to balance the parties' rights and assert the public interest in accordance with the purpose and content of sector-specific regulations.

Any legal remedy must be (1) easily accessible and well publicized, (2) simple to understand and use, (3) speedy, with established time limits for action, and the parties kept informed of progress, (4) fair with a full and impartial investigation, (5) effective, namely addressing all the points at issue, and providing appropriate redress, and (6) informative, i.e. providing information to management so that service can be improved [9: 40].

So, the administrative appeal is a request addressed to a public authority by which the aggrieved person requests administrative measures to be taken regarding an administrative act: annulment, modification, or even issuance of a new act (when this has been refused by the administration). Judicial review, on the other hand, is an adversarial proceeding by which an individual transfers the conflict with a public authority to the (administrative) courts.

As Dacian C. Dragos notes, the administrative appeal can be addressed to the authority that issued the unlawful act—contestation, opposition, recours gracieux, appeal in reconsideration, remonstrance—or to its superior body—hierarchical appeal, recourse. There is also the so-called quasi-hierarchical appeal, external appeal, or sometimes recours de tutelle¹ addressed to an agency that is not the superior body of the issuer of the act but has the power to control such decisions, in its quality of specialized control agency or overseeing body. The administrative appeal may be used

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not just for administrative acts but for administrative contracts as well, alongside conciliation, arbitration, or mediation [3: 539].

The importance of administrative appeal is expressed as an additional mechanism for the protection of the rights, freedoms and legitimate interests of a person and citizen, [1] the institution of administrative appeal is regarded as an important guarantee of ensuring the rights of citizens and strengthening the rule of law. At the same time, the administrative appeal must be distinguished from the judicial form of protection, which is complementary and not mutually exclusive human rights mechanisms. A characteristic feature of the coexistence of judicial protection and administrative appeal is the freedom of a person to choose the forms, methods and means of protecting his rights.

So, with regard to administrative appeal, first of all, one should mention the main advantage of judicial appeal, which manifests itself, firstly, in the higher qualification of judges, secondly, in greater independence and disinterest of judges, and, thirdly, as A.Y. Osadchiy says [12: 11], this is the final decision of a court decision to resolve an administrative-legal dispute.

In general, it is worth agreeing with the above, but this cannot be taken into account. The greater qualification and independence of judges compared to officials of public authorities authorized to consider administrative complaints is only presumed and in no way means less “qualified” consideration of administrative complaints. In addition, judicial appeal is characterized not only finality the court decision, but also some of the related shortcomings of the court proceedings (a complex procedural procedure and hourliness). But the administrative appeal procedure has such advantages as low cost and efficiency, accessibility, ease of implementation, evaluation from the standpoint of not only legality, but also expediency. All this makes it possible to speak about the future effectiveness of the institution of administrative appeal as a form of protecting the rights of citizens (including in the activities of law enforcement agencies). However, today the legal mechanism for the implementation of the right of appeal does not fully ensure the effective effectiveness of the administrative appeal, which, against the background of the judicial form of protection, is basically only a formal one [13: 84].

Without diminishing the importance of judicial protection of the rights of a person, it is worth noting the importance of preserving and updating the institution of administrative appeal. The direct advantages of administrative appeal against the judiciary include its efficiency, efficiency, less formalization [17: 71]. By the way, an effective administrative appeal significantly reduces the burden on the judiciary. Indicative in this sense is foreign experience. For example, in Germany, administrative appeal is a

mandatory stage, but even despite the significant “weeding out” of much potential litigation at the administrative appeal stage and the fundamentally excellent financial capabilities of our countries, plaintiffs in administrative courts in Germany wait months to hear the case. [8: 175].

It is necessary to take into account the economic aspect of our life, because the effectiveness of judicial protection largely depends on its timeliness. Mainly by way of administrative appeal, the opportunity to review the decision on its expediency. In addition, it must be remembered that the court, even recognizing the contested decision as illegal, cannot take a positive decision instead of an administrative body, and the person still has to wait for the body to execute the court decision and take the corresponding administrative act [10: 147]. In this sense, an administrative appeal is an additional guarantee for the protection of the rights and legitimate interests of a person.

After analyzing this category, we consider it necessary to distinguish between positive and negative aspects of the procedure for appealing decisions, actions or omissions of the state and its bodies in an administrative manner compared with judicial appeals.

The advantages of administrative appeal include: its efficiency, less formalized and cost-effective; the rapid elimination of violations of the law and the application of penalties to the guilty parties; effective administrative appeal significantly reduces the burden on the judicial branch of government; identification of deficiencies in the work of the organs, decision which are appealed; if the complaint is resolved, the body (official) that made the decision on the complaint is obliged to take the necessary measures to restore the violated right, as well as to oblige the persons responsible for this violation to apologize to the complainant in writing, and at the request of the complainant to inform the interested handling complaints of individuals; due to consideration of the complaint, the authorized body or official does not only cancel the appealed decision, but also can change it.

The disadvantages of appealing decisions, actions or inaction of public authorities in the administrative procedure include the following: the speed and efficiency are positive only on simple issues, in other cases it can only cause harm; the interest of the body in the protection of its departmental interests; a significant number of legal acts regulating administrative appeal creates problems in the process of appealing decisions by citizens. After all, departmental rule-making in the field of administrative procedures is too voluminous and extensive. Not always every citizen has access to this mass of subordinate acts, which are often not published in official sources accessible to the public. It should be noted that this negative

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point, rather, indicates the problems of codification of legislation in Ukraine, rather than the shortcomings in the institution of administrative appeal [2:119].

From a comparative perspective, there are two major systems of administrative appeals – mandatory and optional.

The first one, adopted by a large number of legal systems (for instance, Germany, the Netherlands, Hungary, Slovenia, Poland, Serbia, Denmark, Czech Republic, Romania, etc.), precludes an action to court in the absence of a prior administrative appeal. At the level of EU law, in specific areas, administrative appeals are required prior to launching procedures by the Commission – regarding infringements of Union law by Member States, aids granted by Member States or when it comes to access to Union documents, appeals of servants within the Union civil service and in procedures of EU agencies. In the case of the mandatory appeal, which is more formalist than the optional one, the proceedings are to be conducted, within clear time limits, in an adversarial manner, and the final decision is subjected to extensive rules of motivation.

The second type of appeal (*recours administratif*), promoted by the French legal system and those inspired by it (partially Belgium, Italy), attaches certain effects to the exercise of an administrative appeal (prorogation of the time limits for bringing an action in a court of law) without making it mandatory. The rules that govern the optional appeal have typically a jurisprudential source and are quite flexible. The claimant does not have to prove that there is a specific interest at stake; there usually is no requirement to conform to formal provisions, and, often, there is no time limitation for appeal.

No jurisdiction confines itself to only one system of administrative appeals. Even where the appeal is optional, there are instances where special legislation makes its use mandatory (for instance, in France) [3: 540-541].

An important place in the institute of administrative appeal is the right of citizens to appeal decisions, actions or omissions of public authorities. It can be defined as ensured by administrative law the right to appeal in order to protect rights and legitimate interests, as well as the expression of social freedom and the embodiment of international standards in the field of human and citizen rights. The right to appeal is enshrined in Article 40 of the Constitution of Ukraine [14], which stipulates that everyone has the right to send individual or collective written appeals or to personally contact the state authorities, local self-government bodies and officials of these bodies who are obliged to consider the appeal and give a reasoned response within the statutory period. The norms of the constitution are the norms of direct action and establish general legal provisions, are more

regulated by laws and acts of bylaws. the leading place among them belongs to the Law of Ukraine “On Appeals of Citizens” dated 02.10.1996 No. 393/96-BP (hereinafter - the law), according to which the appeals of citizens should be understood in written or oral form sentences (comments), statements (petitions) and complaints, the latter are the object of our study [15]. In Ukraine, the definition of the complaint was formulated back in 1924 by M.D. Zagryatskov. The author under the administrative complaint understood the open appeal of the interested person to the hierarchically higher administrative authorities for changing or eliminating the wrong administrative order or omission due to its insufficient factual or legal validity [5: 32]. In our time, according to the law, a complaint is a request to restore the rights and protect the legitimate interests of citizens violated by actions (inaction), decisions of state bodies, local governments, enterprises, institutions, organizations, associations of citizens, officials. It is precisely because of the filing of a complaint that a citizen gets the opportunity to report to the relevant state body on the application of illegal actions against him, including measures of administrative procedural coercion. The purpose of filing such a complaint is to protect and restore the violated rights and legitimate interests of the citizen. From the provisions of the law it is clear that the legislator is “presumed”, implies the legitimacy of the position of a citizen who believes that a specific decision, action or inaction in the field of management violates his rights, creating the basis for the realization of the right of appeal [4: 366].

The right of appeal is recognized for all citizens, regardless of their social and property status, race or nationality, attitude to religion, place of residence. It should also be noted that the right to appeal decisions, actions or omissions of state bodies is also recognized for persons who are not citizens of Ukraine, that is, foreigners, stateless persons and bipatrides, legally located on its territory [2: 119]. However, this provision seems rather dubious and restricts human rights, because people who are on the territory of Ukraine should also have the right to administrative appeal, even if their stay is illegal.

The legal foundation of the administrative appeal can be found in the citizens’ right to address petitions to the government, a fundamental right that has found its recognition in many constitutions or modern legislations. The right to petition is then supplemented with the administrative principle of revocation—according to which administrative decisions may be revoked by their issuer.

An administrative appeal has a threefold rationale. Firstly, from the perspective of public authorities, it offers them a chance to make good on their duty to reconsider allegedly unlawful acts²⁴; the prospective lawsuit

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should make public authorities assess again, perhaps more carefully than before, their initial decision; the appeal avoids formal court proceedings, the costs of a lawsuit, and the possibility of having to pay compensation—not to mention the prospect of having its image affected by losing a lawsuit. Secondly, administrative appeals evidently protect in the same time private parties who have allegedly been aggrieved thereby; proceedings offer the participants the possibility of having a disputed decision annulled in a simple, fast, and free-of-charge proceeding. In this respect, the administrative appeal is usually much more beneficial for individuals than court trial. On the other hand, if the appeal is flatly rejected by the public authorities, the claimant has an opportunity to reassess his/her chances of winning in court and make a more informed decision in this direction based on the reasoning put forward by the public authority—it basically provides a test run for a full-blown court trial. Thirdly, the court's excessive caseload is sensibly eased when administrative appeals do their job in keeping parties out of court [3: 542-543].

The basis of the administrative appeal is a complaint against the decision, actions or inaction of the subjects of power. It can be considered in two aspects. Firstly, the information contained in the complaints is always information about the violation by the public administration authorities of the requirements of legislative and sub-legal regulatory acts; secondly, it is a method of protecting the rights and legitimate interests of citizens from violations of the law, which are allowed by officials of public administration authorities. As M.V. Karaseva said, one of the main functions of the constitutional right of appeal is to be a means of protecting the rights and legitimate interests of citizens [7: 25].

The guarantees for timely and correct resolution of a citizen's complaint are as follows:

- firstly, the right of complaint in our country is ensured by the Constitution - an act of higher legal force;
- secondly, there are no restrictions on the actions of the bodies (officials) that can be appealed;
- thirdly, the law prohibits the use of any administrative influences for filing a complaint, and the state is obliged to ensure the integrity and security of the person who makes the complaint;
- fourthly, an important guarantee is also the application of various measures of responsibility to persons who did not decide on the complaint or did not take it in time [10: 147].

As Professor N.Y. Hamanev rightly noted, the law can serve as a guarantor if it is adequate to the economic and political situation in the country, and the clarity, clarity, concreteness of the law is an important

indicator of the legal culture of society. Studies of such an important democratic institution as the right of complaint demonstrate the need to critically rethink the laws in force in this area, the practice of their application in order to develop appropriate proposals for their improvement, aimed at further democratization of this institution [6: 16].

The worst case scenario, as far as the rationale for administrative appeals goes, is when the public authority is silent in response to the administrative appeal— administrative silence. In such a case, the claimant will confront the public body for the first time in court without being able to benefit from a test run during administrative appeal proceedings. Even in this case, the administrative appeal must receive some consideration in the course of the court proceedings in the sense that the attitude of the public authority could be deemed culpable. The administrative silence should be considered when deciding on the costs of litigation. The judge should address separately the fact that the public authority has not answered the administrative appeal in due time, consequently pushing the claimant to go to court. The other variant is that the party desists altogether because of cost of court litigation, in which case the administrative appeal has not had the envisaged effect.

Besides protecting the public authorities (and, hence, the public interest) and private parties by allowing public authorities to reform allegedly unlawful acts, the second important function of administrative appeals is relieving administrative courts of cases that can be solved at administrative level.

Another argument as to administrative appeals being more suited for solving administrative disputes than courts comes from the fact that judges may not always have the ability to grasp the full realities of the public administration, especially in the context of the extraordinary development of the tasks performed by public bodies, and that public administrators are better equipped to do this.

A noticeable advantage of the administrative appeal in those jurisdictions that pay reverence to the legality principle is its wide scope. The claimant can invoke not only legality aspects but also opportunity ones or issues pertaining to the principle of good administration, while as in court the decision will be mainly assessed by applying legality standards.²⁸ The administrative appeal can resort also to the “benevolence of the administration” in order to resolve the matter, where no strong legality arguments can be put forward.

When analyzing the pros and cons of the administrative appeal, it may be argued that an appeal to the issuing authority (recourse in reconsideration) has against it the subjectivity of the issuer in reassessing its

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decision, but on its side the fact that it is “the appeal to the best informed authority.”

The hierarchical appeal is justified, on the other hand, by the necessity of a less subjective control of the contested decision; the subjectivity is not excluded³¹ but tempered, and the superior body has, supposedly, more diverse means of action than the subordinated body [3: 543-544].

Considering the above, the most essential features of an appeal in comparison with other types of appeals, as a means of ensuring legality and discipline in the activities of public administration bodies are the following:

- complaints have a large amount of information about violations of the law and discipline in the activities of public administration bodies compared with other types of appeals;

- the right to file a complaint is an absolute, unlimited and inalienable individual right, which is provided for by the Basic Law of Ukraine. The constitutional provision on the possibility of appealing decisions, actions or inaction of officials of the executive authorities is an important achievement of the Ukrainian state towards strengthening the rule of law, respecting the rights and legitimate interests of citizens;

- Art. 55 of the Basic Law [14] establishes the obligation of public authorities and their officials to consider appeals and provide a reasonable response to them within the prescribed period;

- the reason for filing a complaint is a decision, actions or inaction of civil servants of public administration bodies in connection with the performance of official duties;

- the dual nature of the complaint is also its peculiarity: on the one hand, it is a way of protecting the rights, freedoms and legitimate interests of individuals and legal entities, and on the other hand, signals the existing shortcomings in the work of public administration bodies, contributes to eliminating the latter, improving its work, and .P. ;

- persons whose rights have been violated have the right to file a complaint not only with a higher authority, but also directly to the court;

- a complaint may be a definite basis for the application of other means of ensuring legality and discipline in the activities of public administration bodies, in particular control and supervision [10: 149].

If to sum up, we should say that administrative appeal plays an important role in protecting the rights, freedoms and legitimate interests of individuals in the activities of public authorities as a significant means of ensuring the rule of law in public administration. Administrative appeal substantially complements judicial and other forms of protection of the rights of individuals, foreseeing the comparison with them of an assessment

of not only the legality, but also the expediency, as well as the cheapness, efficiency, availability and simplicity of such protection.

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