Andreyeva O.I., Doctor of Law, Associate Professor◆

Decision of an issue of the choice as a restraint measure of custody: enforcement problems

Abstract: A conclusion about the choice as a restraint measure of custody should be based on the proofs confirming a presence of the grounds provided by the law (art. 97 of the CPC) just for this measure of coercion and impossibility to choose other one.

Decision about application of an arrest should not be based on intuition and suppositions; it should be applied a presumption to leave of an accused person on freedom.

Keywords: measure of restraint; custody; grounds; presumption of innocence; arguments.

Effectual organization of criminal prosecution is possible only upon presence in disposal of the law enforcement bodies of the measure of public coercion, restricting the rights and freedoms of the persons getting into a sphere of criminal proceeding. Measure of restraint provided by the CPC of the RF is variety of preventive measures of criminal-procedural coercion concluding in deprivation or restriction of the freedom of an accused, and in extremely cases – suspected person. It is applied to the individuals not recognized as accused in committing of crime, and therefore it should have an exceptional and proportionate nature. Non-proportionate measures are the measures, which goal can be reached with more mild means. Based on this, the main assignment of criminal process is to achieve the goal with less restriction of the rights and freedoms of a man. An application of the measures of a restraint should be the minimum necessary, if it does not contradict to the interests of protection of a person and public security.

◆**Andreyeva Olga Ivanovna** - Doctor of Law, Associate Professor, a head of the Department of the criminal process, prosecutor's supervision and law enforcement activity (Russia). E-mail: univer_tgu@rambler.ru

The grounds for a choice of the restraint measures are stated in article 97 of CPC of RF. They are as follows: a presence of the sufficient grounds to believe that an accused will not evade an inquiry, preliminary investigation and a court; accused will be continued his criminal activity; to threaten a witness, other participants of criminal proceeding, to destroy the proofs or with other way he will be interfere with production on criminal case. A list of the grounds is exhaustive. This means that if indicated grounds are absent then a measure of restraint cannot be chosen. In addition, according to article 99 of CPC of RF, it should be taken into account the seriousness of accusation, the data about personality of an accused, his age, state of health, family status, occupation and other circumstances.

Usually the bodies of preliminary investigation practically in each petition are indicated the grounds provided by article 97 of the CPC of RF as reason to custody: possibility that an accused evades an inquiry, preliminary investigation and a court (this motivation is inherent to more than 70% of the petitions) (1). At the time, they either motivate these assertions (3%) or substantiate a presence of the stated ground with that:

- an accused committed serious or especially serious crime (65%), or a deliberate grave crime (7%);
- he does not live in the registration place or does not have registration (34%);
- violated the written undertaking not leave or was wanted (3%);
- earlier was sentenced (3%).

Thus, it turns out that the presence of such ground as possibility that an accused will evade an inquiry, preliminary investigation and a court is substantiated by the bodies of preliminary investigation with the circumstances, which should be taken into account upon presence and proving in order to solve an issue about the choice of a specific measure of restraint.

The European Court on Human Rights emphasized in its decisions that danger of evasion from justice cannot measure only in dependent on severity of possible punishment. It should determine with considering of a number of other factors, which can either confirm existence of a danger of evasion from justice or do it so trivial that this cannot be a justification of custody (3). Under this it is necessary to take into

account a nature of an accused, his moral features, means, communication with the state, in which he prosecuted on the law, and its international contacts (4). In addition, the European Court on Human Rights pointed out that under substantiation of possible escape it is necessary to take into account whole number of the factors, including those, which would allow supposing that the consequence and danger of an escape are the less harm then continuation of imprisonment (5, p. 26).

More definitely spoken out in this issue (though on other reason) the Constitutional Court of the RF in §3 of motivational part of the Definition from 25 December 1998, indicating: "in this case it is necessary to take into account that fixed in the parts of forth, fifth and sixth of article 97 of the CPC of RSFSR the order extension of an arrest time is applied, as it provided by the part first of article 89 of CPC of RF, only under presence of a sufficient proofs that an accused will be able to escape an inquiry or preliminary investigation, to impede of establishing of the truth on a case or to continue his criminal activity" (2).

In more 40% petitions are contained the following ground of a choice of the measure restraint in custody: an accused will be able to continue his crime activity. As rule, in substantiation is pointed out, that the accused committed a grave (especially grave) crime, previously convicted, does not work, being under a conditional measure of punishment he committed crime or did it during a trial period.

In some petitions (23%) necessity of a choice of the measure restraint in custody is given reason with such ground as possibility of threats of an accused to a witness, other participants of criminal proceeding or possibility to destroy evidence, and also with other way to create obstacles to the production on criminal case. In substantiation is emphasized that the accused committed a grave crime, including during a grant of parole, he violated previously chosen measure of restraint, repeatedly convicted and others.

Analog of the indicated ground is a creation of obstacles to the justice as the ground to detent and taking into custody that provided by article 5 of the European Convention on protection human rights and main freedoms. Considering the issues of validity taking into custody, the European Court on Human Rights in its decisions repeatedly noted that the longer is lasted investigation the less chances has the state to

use this reason for taking into custody of a person. The Court also recognized that this ground cannot be used for long custody if it were absent any actual proofs of a danger of possibility entering in conspiracy with other suspected individuals and creation the obstacles of the investigation interests.

In our opinion, it inadmissible is a practice when in substantiation of that an accused will be able to exercise influence on the participants of a process and in final on the investigation, the bodies of preliminary investigation are indicated that the second accused in committing of crime gave written undertaking not leave (material 11-65/03 of the Soviet District Court of Tomsk city). Inadmissible are also cases when ruled by a court decision is substantiated, for instance, such formulation: "an accused can, according to an investigator, threaten to a witness".

Thus, in validity of a conclusion on presence the grounds to choose as a measure of restrain taking into custody, the bodies carrying out preliminary investigation is mainly led such circumstances, which should be additionally taken into account under presence of these grounds. Whereas, the bodies and officials, who initiating a petition in a court about election of such measure of restraint, should submit the proofs on presence grounds provided by article 97 of CPC of RF, and further in validity of a choice specific measure of restraint and impossibility of election more mild measure one – the evidence confirming the circumstances of election just taking into custody.

As rule, the bodies of preliminary investigation in justification of submitted petition are attached the documents containing information that in committing of crime is suspected a person in respect of whom is considered an issue on election of a measure of restraint. This resolution on initiation of criminal case (100%), protocol of detention (76.92%), the records of interrogation of the witnesses, victims, statements of victims, records of inspection of a place of incident, identification, resolution on brought as accused (100%), the records of interrogations of a suspected, accused, information on personality (100%) and others.

Usually, the evidences directly indicating on presence of the grounds provided by article 97 of CPC of RF are absents in the materials of a case. At the same time, in petitions of the bodies of preliminary investigation are called the grounds for election

of a measure of restraint taking into custody, is not provided by the CPC of RF, such as possibility of an accused to create the obstacles to establishing of the truth on a case, antisocial way of life of an accused.

The opinion of a person or body, accepting a decision about application of this measure of restraint, should be based on a base of specific evidences confirming a presence of the grounds provided by article 97 of CPC of RF. In addition, an inquirer, investigator, prosecutor should indicate in a petition one of the grounds provided by this article and substantiate why in this case is impossible application of other, more mild measure of restraint.

As an accused is not recognized by a court as a guilty then it should be applied the presumption of innocence and remaining him on a freedom. The bodies of prosecution are obliged to prove in each specific case that accused should not be on freedom as other measure of restraint cannot provide a proper behaviour of the accused on a freedom.

Article 108 of CPC of RF is provided that upon necessity of election as a measure of restraint taking into custody, a prosecutor and also investigator and inquirer with consent of prosecutor initiate in court appropriate petition. The petition on election as a measure of restraint taking into custody is considered, as rule, with participation of an accused (100%), prosecutor (50%), investigator (80%), and defender (65%). If a prosecutor does not participate in any reasons in consideration of the petition then it would be given a proper instruction to an investigator (96%). In some cases (15%), in connection with participation in other process, under consideration of the petition were absent defenders (it was testified by their applications).

Really, article 108 of CPC of RF is provided that failure to appear without valid excuse of the parties (if they notified in time) is not an obstacle for examination of a petition (except non appearance of an accused). But, first, this provision should not violate the right to qualified defense of an accused. Second, it is not always ascertained the reasons of non-appearance of a defender (15%), though there were the order of a lawyer in the materials of the cases. It turns that acceptance of decision to examine a petition on election as a measure of restraint taking into custody in absence

of a defender is admissible only after elucidation the reasons of his absence and an opinion of an accused in respect of whom it is examined.

As show analysis of the materials, in most part of the cases (88%) from appeals to a court with petition about election as a measure of restraint taking into custody a court makes a decision on election such measure. Frequently, a court does not pointed out why it does not consider it possible to apply milder measure of restraint, rejects the arguments of a defender or an accused and accepts reasons of a prosecutor.

Thus, taking into custody individuals expecting a court proceeding should not be a common rule, and restriction of the rights of a personality, coercion in criminal proceeding are not admissible until an individual does not violate his obligations or will nor be presented the proofs allowing to be consider that an accused (suspected) person will commit an action forbidden by the law.

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