

Ivantsov Volodymyr Oleksandrovych, Kharkiv National University of Internal Affairs, Associate Professor at the Department of Administrative Activity of Police

Chyshko Kateryna Oleksandrovna, Kharkiv National University of Internal Affairs, Senior Lecturer at the Department of Administrative Activity of Police

Problems of surface inspection as a police measures

The adoption of the Law of Ukraine On The National Police¹ (hereinafter – the Law) was a reflection of the legal reform of Internal Affairs of Ukraine. As a result, the police, like a not perfect soviet element, were liquidated, and the National Police was created to replace them, as the central executive authority that serves the people on the European model.

The undeniable advantage of the current Law become the definition of the content, grounds and limits of the application of actions or a set of actions of a preventive or compulsory nature, that restricts certain human rights and freedoms – police measures. A special place among the latter is occupied by a “superficial check”, which is unquestionably a new normatively fixed complex category, in fact it is: 1) visual inspection of a person; 2) carrying on the surface of a person's clothing by hand, a special device or a tool; 3) visual inspection of a thing or vehicle. Despite the existence of many positive changes in the outlined issue, the use of surface verification as a police measure is not without some problematic issues.

It should be noted that stopping a person is a compound surface test, because the latter, in addition to visual inspection, is hardly possible without a person stopping. Therefore, the wording “a policeman can stop people and / or inspect them to perform a superficial check of the person” (part 2 of Article 34 of the Law) is not very correct. Thus, a person who has been stopped for a superficial check cannot be considered to have been subjected to administrative detention or

¹ On The National Police: Law of Ukraine of 02.07.2015 number 580-VIII // Statements of Supreme Council of Ukraine. - 2015. - No 40-41, art. 379.

detention in the understanding of the Criminal Procedure Code of Ukraine (hereinafter – The Code of Criminal Procedure), since surface verification cannot last more than a few minutes. In turn, the provisions of part 2 of article 34 of the Law fully comply with article 209 of The Code of Criminal Procedure, according to which “a person is detained from the moment when she by force or through obedience to order, is compelled to remain close to an authorized official or in a room determined by an authorized official”.² In such circumstances, during a surface inspection, a person may be considered detained, although in fact this is not the case, because a superficial check does not provide for the detention of a person. We can state that a superficial check is a preventive police action not related to detention, according to The Code of Criminal Procedure, because “superficial verification” and “detention” are completely different legal categories. Differentiation past may hold for the purpose of their application.

Surface verification is carried out in order to prevent the commission of offenses in a broad sense (as a preventive measure), and cannot continue for a considerable period of time, and therefore cannot be recognized as detention or administrative detention. On the contrary, the application of surface verification can precede the immediate detainment of a person. It must be understood that a person stopped for a superficial check by a policeman is next to him not by force or order (no force is applied to a person and no requirement is made to stay in place), but through the correspondence of the police right to nominate a claim, which leads to the duties of a citizen. Unlike a superficial check, a person is detained for the purpose of preventing unlawful acts or for clarifying the involvement of a detainee in a committed criminal offense. In this case, in case of detection of traces of the commission of an offense, depending on its type, a person may be subjected to administrative detention (articles 261-263 of The Code of Administrative Offenses of Ukraine³ (hereinafter – The Administrative Code) or

² The Criminal Procedural Code of Ukraine of 13.04.2012 No. 4651-VI // Statements of Supreme Council of Ukraine, 2013, No. 9-10, No. 11-12, No. 13, art.88.

³ Code of Ukraine on Administrative Offences of 07.12.1984 № 8073-X // Statements of Supreme Council of the Ukrainian SSR, 1984 addition to the number 51, art.1122.

detained in accordance with the provisions of article 208 of The Code of Criminal Procedure.

If, during a superficial inspection, any traces of an offense are found, the policeman ensures their safety and inspection in accordance with the requirements of article 237 of the Code of Criminal Procedure (part 7 of article 34 of the Law). In turn, according to part 1 of article 237 of The Code of Criminal Procedure with the aim of “detecting and fixing information on the circumstances of the commission of a criminal offense”, the investigator and the prosecutor conduct an inspection of the terrain, premises, things and documents.⁴ So, a policeman who has discovered the traces of an offense cannot independently seize things that are also an object of increased danger for both the police officer and others (for example, firearms, explosives etc.). As a result, it is not clear how a policeman who is not an investigator (usually a police patrol policeman) can inspect and ensure the safety of any traces of the offense. A comprehensive analysis of the current regulatory and legal provisions gives grounds to offer us the following legal mechanisms for exercising the powers of the police and documenting the relevant facts in accordance with the provisions of The Code of Criminal Procedure. The importance of a correct approach to documenting the fact of the seizure of such items is due to the requirements of article 86 The Code of Criminal Procedure “Admissibility of Evidence”.

1. If, in a superficial inspection, the police officer has detected signs of a specific offense, namely: if this person was caught while committing a crime or attempting to commit it; if immediately after the commission of a crime, an eyewitness, including a victim, or a combination of obvious signs on the body, clothing or place of incident indicates that this person has just committed a crime; if there are reasonable grounds to believe that it is possible to escape in order to evade the criminal liability of a person suspected of committing a grave or especially grave corruption offense attributed by law to the jurisdiction of the

⁴ The Criminal Procedure Code of Ukraine of 13.04.2012 number 4651-VI // Statements of Supreme Council of Ukraine, 2013, number 9-10, number 11-12, number 13, art.88.

National Anti-Corruption Bureau of Ukraine,⁵ he has the right to detain a person in accordance with the criminal procedure legislation, as well as to search the detainee under part 3 of article 208 The Code of Criminal Procedure.

Under the circumstances proposed by us, a policeman as an authorized official can make a detention in the understanding of The Code of Criminal Procedure. In this case, the policeman may be guided by the provisions of article 45 of the Law. In particular, within the framework of the described legal mechanism in the case of a person being detained, the police officer has the right to apply in particular such special means: handcuffs and other means of limiting mobility; rubber and plastic batons; devices, grenades, ammunition and small-sized explosive devices for the destruction of obstacles and forced opening of premises; devices, grenades and ammunition of light and sound action, means of acoustic and microwave effects; devices for shooting cartridges equipped with rubber or similar in their properties missiles of non-lethal force; means, equipped with safe smoke-forming preparations.

In addition, the norms of parts 11 and 12 of article 46 of the Law provide for the right of a police officer to alert a combat weapon not only during the detention of a person, but also during the demonstration of the last thing or thing that a policeman needs to inspect, “if he believes that in the current situation, there may be grounds for its application” (part 11) or “when detaining persons for whom a police officer has a suspicion of committing a grave or especially serious crime. And also when checking documents from such persons, a policeman can alert firearms and warn a person about the possibility of using it” (part 12).⁶ The implementation of such police activities should ensure the personal safety of the police and other people.

2. In case of detection of traces of an offense, if there is no possibility of even an approximate evaluation of its attribution to the corresponding type

⁵ The Criminal Procedure Code of Ukraine of 13.04.2012 number 4651-VI // Statements of Supreme Council of Ukraine, 2013, number 9-10, number 11-12, number 13, art.88.

⁶ On The National Police: Law of Ukraine of 02.07.2015 number 580-VIII // Statements of Supreme Council of Ukraine. - 2015. - No 40-41, art. 379.

(criminal or administrative), we suggest a separate legal mechanism for the actions of the policeman. An example of such a situation may be the identification of firearms or explosives in a person, which may constitute a crime under articles 263, 263-1 of The Criminal Code of Ukraine or administrative violation in accordance with articles 190-193, 195-2 of The Administrative Code. Under such circumstances, the requirement of the police officer to independently show the contents of personal belongings can immediately endanger both the policeman and others. At the same time, once again we note that the policeman has no right to seize things himself, which is probably the subject of an offense. At the same time, unlike the previous mechanism, it is necessary to understand that the implementation of detention according to the provisions of The Criminal Procedure Code can by no means always be legal proceeding from the content of article 208. As a consequence, we consider it possible for the police to commit the following actions.

In the case of a superficial inspection, if the person himself shows the contents of personal belongings or a vehicle, the police officer has the right to bring the weapon to combat readiness in accordance with article 46 of the Law. In the event of a person refusing to independently show the contents of a thing or vehicle in order to ensure the safety of traces of a “possible” offense, the police officer has the right to use physical force – “to ensure personal safety and / or the safety of others”.

3. When performing a superficial inspection, since a person must independently show the contents of personal items, in practice there are cases when a person refuses to “cooperate with the police”, that is, show the contents of the things or the vehicle's salon. Such inactivity of a person is a manifestation of an administrative offense – “malicious disobedience to a lawful demand or order of a policeman” (article 185 of The Administrative Code). Such a conclusion is possible to be made based on the provisions of the Supreme Court of Ukraine decision “on malicious disobedience to the lawful demands or orders of the police officer while performing his official duties”, according to which “malicious

disobedience is the refusal to perform persistent, repeatedly repeated legal requirements or instructions ... Or a refusal expressed in a defiant form, which indicates a clear disregard”.⁷

The execution of an administrative offense by the person to whom the superficial verification was carried out is the basis for administrative detention (articles 260, 262 of The Administrative Code). Conducting administrative detention is inextricably linked with the implementation of the inspection in accordance with the provisions of article 264 of The Administrative Code and as consequence - withdrawal of “things and documents being an instrument or direct object of an offense” (article 265 of The Administrative Code). At the same time, documenting the fact of seizure of things that could be the subject of a crime (firearms, narcotic drugs and psychotropic substances) within the framework of proceedings for administrative offenses is quite legal, as it is expressly provided for in The Administrative Code. In turn, this approach to ensuring the personal safety of the policeman and other people, as a whole, does not exclude the possibility of providing police with safety and inspection of any traces of an offense under article 237 of The Criminal Procedure Code.

⁷ Regarding malicious disobedience to legitimate demands or orders of a police officer in the performance of his official duties: Decision of the Supreme Court of Ukraine of 10.07.1998. [Electronic resource].- Access mode : <http://zakon0.rada.gov.ua/laws/show/n0054700-98>.