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Стаття надійшла до редакції: 22.04.2022

**УДК 342.951**
**DOI: 10.36550/2522-9230-2022-12-248-253**

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## THEORETICAL AND PRACTICAL APPROACHES TO THE DIVISION OF ADMINISTRATIVE RESPONSIBILITY INTO PERSPECTIVE AND NEGATIVE

The issues related to increase in number of foreigners and stateless citizens who stay illegally within the territory of Ukraine are considerably relevant today, and, unfortunately, their topicality will be ever-greater in future. Currently the issue of refoulement and deportation is referred to the competence of administrative courts. So, implementing legally provided authorities, the administrative courts shall decide the public-law disputes on the claims of public bodies about adoption of measures of a coercive character provided by art. art. 288-289 of the Administrative Court Procedure Code of Ukraine according to the statutory procedural order.

Accordingly, the purpose of the present paper is a definition of topical issues of consideration by the administrative courts of proceedings on the cases on the administrative claims related to refoulement or compulsory deportation and detention of foreigners or stateless persons.

In order to achieve the purpose, the paper includes the study of opinions of scientists in the field of administrative law towards understanding and correlation of corresponding definitions (administrative legal proceedings, proceedings on the cases on the administrative claims related to refoulement or compulsory deportation and detention of foreigners or stateless persons); Regulations of the Administrative Court Procedure Code of Ukraine; provisions of other regulatory documents.

It was emphasized that the content of protection of rights and freedoms is based on the activity focused on removal of obstacles in exercise of rights and freedoms and on fight against default in correlative obligations and abuse of law.

The paper gives reasons for the fact that the liability may be incurred only for objectified behavior of person, i.e. for his/her activity or omission to act. In such a case, his/her thoughts and intention that were not implemented by him/her can not be considered as the reasons for legal assessment. The paper also emphasizes that the protection from illegal acts, removal of their causes and conditions facilitating the administrative and delictual endeavor is beyond the scope of administrative courts.

The paper gives reasons for the fact that judge's discretion relates to the establishment of: firstly, the facts that appear to the judge to be necessary for dispute essential resolution; secondly, the way of dispute resolution; thirdly, the regulation itself that applies in this particular case.

As a result, the authors came to the conclusion that today there is a negative transformation of implementation of prospective (negative) liability of person for actions (omission to act) that were not and would never be performed by him/her, but only for thoughts and intentions. We believe, that it is not a correct practice due to the fact that it defies a principle of the administrative law presented in the form of statement that the liability may be incurred only for objectified behavior of person, i.e. for his/her activity or omission to act. In such a case, his/her thoughts and intention that were not implemented by him/her can not be considered as the reasons for legal assessment.

**Key words:** administrative law, administrative liability, administrative legal proceedings, administrative and delictual procedure, relations of administrative obligations, sanction, action, foreigner.

**Кузьменко О., Чорна В. ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ ПІДХОДИ ДО ПОДІЛУ АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ НА ПЕРСПЕКТИВНУ ТА НЕГАТИВНУ**

В даній статті визначено, що питання, пов'язані зі збільшенням кількості іноземців та громадян без громадянства, які нелегально перебувають на території України, сьогодні є значною актуальністю, і, на жаль, у майбутньому їхня актуальність буде дедалі більшою. Наразі питання видворення та депортації віднесено до компетенції адміністративних судів. Так, реалізуючи передбачені законом повноваження, адміністративні суди вирішують публічно-правові спори за позовами державних органів про вжиття заходів примусового характеру, передбачених ст. ст. 288-289 Кодексу адміністративного судочинства України в установленому законом процесуальному порядку.

В роботі проведено дослідження думок науковців у галузі адміністративного права щодо розуміння та співвідношення відповідних дефініцій (адміністративне судочинство, провадження у справах за адміністративними позовами щодо видворення чи примусового видворення та затримання). іноземців або осіб без громадянства); Регламент КАС України; положення інших нормативних документів.

Підкреслено, що зміст захисту прав і свобод ґрунтується на діяльності, спрямованій на усунення перешкод у здійсненні прав і свобод та на боротьбу з невиконанням відповідних обов'язків і зловживанням правом.

У статті обґрунтовано, що відповідальність може наставати лише за об'єктивну поведінку особи, тобто за її діяльність чи бездіяльність. При цьому не реалізовані ним думки та наміри не можуть бути підставою для правової оцінки. У документі також наголошується, що захист від протиправних дій, усунення їх причин і умов, що сприяють адміністративним та правопорушним діям, виходить за межі адміністративних судів.

У статті обґрунтовується той факт, що дискреційне право судді стосується встановлення: по-перше, фактів, які видаються судді необхідними для вирішення спору по суті; по-друге, спосіб вирішення спору; по-третє, саме регулювання, яке застосовується в даному конкретному випадку.

У результаті автори дійшли висновку, що на сьогоднішній день відбувається негативна трансформація реалізації перспективної (негативної) відповідальності особи за дії (бездіяльність), які не були і ніколи не будуть вчинені нею, а лише за думки і наміри. Вважаємо, що це не є правильною практикою через те, що вона суперечить принципу адміністративного права, викладеному у формі твердження про те, що відповідальність може бути притягнута лише за об'єктивну поведінку особи, тобто за її/її діяльність чи бездіяльність. діяти. При цьому не реалізовані ним думки та наміри не можуть бути підставою для правової оцінки.

**Ключові слова:** адміністративне право, адміністративна відповідальність, адміністративне судочинство, адміністративно-деліктний порядок, адміністративно-зобов'язальні відносини, санкція, позов, іноземець.

**Problem statement.** Currently Ukraine and its legal system are in the state of comprehensive reforms that cause the development of new approaches to the development of law and legislation that shall be oriented to the building of well-developed of social and constitutional state. Current trends of legal system reformation require new content and execution according to general European standards the main purpose of which is increase in safety of citizens. Development and implementation of means and the efficient tools oriented to the exercise of established rights of human and citizen.

Moreover, the proposed current legislative innovations have rather politicized content; they do not have a well-balanced interrelation to the applicable laws and regulations of various levels being taken as a basis of legal system of state, resulting, consequently, in disorder, discontinuity, chaotic and inconsistent development of Ukrainian legislation.

**Analysis of research and publications on the problem under consideration.** Certain issues of consideration by the administrative courts of proceedings on the cases on the administrative claims related to refoulement or compulsory deportation and detention of foreigners or stateless persons were the subjects of research of: L.V. Koval "Administrative Law of Ukraine" (1998); V.I. Olefir "Administrative and legal fight against irregular migration in Ukraine" (1999); O.V. Kuzmenko "Administrative and legal opposition to irregular migration in Ukraine" (2000); R.M. Myroniuk "Administrative and legal procedure of refoulement of foreigners and stateless persons outside the territory of Ukraine" (2002); V.S. Stefaniuk "Judicial administrative procedure" (2003); I.B.Koliushko, R.O. Kuibida "Administrative justice: European experience and offers for Ukraine" (2003); M.M.Maksiuta "Improvement of the activity of law enforcement authorities towards prevention and fight against human trafficking" (2005); O.O. Bielievska "Special aspects of administrative liability of foreigners in Ukraine" (2008); D.V. Holoborodko "Administrative claim on compulsory deportation of foreigners and stateless persons from the territory of Ukraine in the activity of internal affairs authorities" (2008); Ye.S. Herasymenko "Administrative refoulement of foreigners and stateless citizens" (2009); O.V. Anina "Foreigners and stateless citizens in the administrative and delictual procedure of Ukraine" (2012); V.I. Halunko "Administrative liability of foreigners and stateless citizens" (2011); L.L. Savranchuk "Public administration of processing and issue of visa documents for entrance of foreigners and stateless citizens into Uraine" (2012); M.M. Arekelian "Proceedings on the cases on the refoulement of foreigners and stateless persons in the administrative court" (2013) etc.

The summary of opinions described in the researches enables (with corresponding assumptions) to speak to the fact of establishment of administrative legal proceedings as the judicial control in the field of enforcement of legitimacy of application of compulsory measures to the foreigners. Proceedings on the cases on refoulement of foreigners shall be carried out to the extent of administrative legal proceedings, so major academic papers in the field of administrative procedure (V.B. Averianov, I.P. Holosnichenko, S.V. Kivalov, I.B. Koliushko, A.Yu.Osadchyi, O.M. Paseniuk, V.I. Palko, V.H. Perepeliuk, A.V. Rudenko, O.A. Serheichuk, M.I. Smokovych) became the outstanding factors of their theoretical processing. Theoretical developments of subjection to a jurisdiction in the administrative procedure (R.V. Vatamaniuk, V.S. Biluha), time limits in the administrative procedure (M.O. Soroka, V.A. Lypa), procedural status of the parties to the administrative legal proceedings (I.H.Ditkevych, V.M. Bevzenko) were used during characterization of procedural institutes defining the specific

natures of proceedings on the cases on refoulement of foreigners.

**Goal of research** is a definition of topical issues of consideration by the administrative courts of proceedings on the cases on the administrative claims related to refoulement or compulsory deportation and detention of foreigners or stateless persons.

**Statement of basic materials.** Legal policy of modern Ukraine is a part of state policy being the plan of actions adopted and implementable by the government. It shall be oriented to enforcement of rights and freedoms of human and citizen, consolidation of legality and public order, building of legal nation and high legal culture of society and individuals [1, c. 76]. However, the activity of state towards definition and theoretical justification of needs in imposition and repeal of prohibitions to the activity of particular entities; allocation and adjustment of administrative liability for their violations shall be focused on satisfaction of will and interests of social groups and objectivization of public interests. Relation between state policy and law is rather natural in that respect. This relation: a) objectifies the laws, gives the meaning of practical factor in public life of society to it; б) requires from political decisions to be complied with legal provisions [2]. So, the adoption of such enactments that satisfy the parochial political interests of political parties or certain politicians is impossible. In view of this we can not admit the possibility of implementation of prospective (negative) liability for actions that were not and would never be performed by person. Let's explain the thought of authors in details.

Ukrainian legislation includes some statutory enactments providing the prospective (negative) liability. For example, the Act of Ukraine "On legal status of foreigners and stateless citizens" was passed in 2011, and the Act "On prevention of corruption" [3] was passed in 2014, and the Administrative Court Procedure Code. Let's review the content of their particular dictates.

So, the Act of Ukraine "On legal status of foreigners and stateless persons" provides the *compulsory deportation* of foreigners and stateless citizens. This implies the refoulement of foreigners or stateless persons from Ukraine provided that they did not implement the decision on refoulement within the established time limit without good cause or there are the justified reasons to believe that the foreigner or stateless person would avoid the implementation of such a decision except for the cases of detention of the foreigner or stateless person for illegal crossing of state border of Ukraine outside of posts of inspection of state border of Ukraine and their extradition to the border authorities of neighboring state. Firstly, this kind of liability has the different names in various laws and regulations. However, it defines the same kind of compulsion and procedure of application (the attention of scientists was focused on this issue repeatedly). For example, part 3 art. 24 of the Code of Ukraine on the Administrative Violations provides the possibility of application of *administrative refoulement* outside the territory of Ukraine to the foreigners and stateless persons for commission of administrative offences, violating the public order seriously [4]; the Act of Ukraine "On Immigration" provides the refoulement (art. 13) provided that the person, in respect of which the decision on cancellation of permit for immigration was adopted, failed to leave Ukraine, and in such a case this person is subject to *refoulement* according to the procedure provided by the law of Ukraine [5]; art. 3 of the Act of Ukraine "On refugees and persons who need the additional or temporary protection" establishes that the refugee or the person who needs the additional protection or to whom the temporary protection was provided, can not be *expelled* or compulsory deported to the country where there is a danger for their life of freedom according to their race, religion, nationality, citizenship (patriality), belonging to certain social group or commitment to political opinions, as well as for any other reasons recognized by international treaties or international organizations, the member of which Ukraine is, as the persons that can not be deported to the countries of origin [6]. Such free use of terms results in widespread conflicts of law in judicial proceeding concerning application of corresponding coercive measures to guilty foreigners and stateless persons.

Secondly, the main point of the present paper lies in the fact that according to the Act of Ukraine "On legal status of foreigners and stateless persons" the compulsory deportation may be applied to the foreigner provided that: "or there are the justified reasons to believe that the foreigner or stateless person would avoid the implementation of a decision about the refoulement" [7]. At the same time, the Administrative Court Procedure Code of Ukraine also provides (art. 289) that "in the event of availability of justified reasons to believe that the foreigner or stateless person, in respect of which the administrative claim on refoulement was filed, does not have a document that enables her to leave Ukraine, would avoid the implementation of a decision about his/her refoulement and prevent carrying out the procedure of refoulement or provided that there is a risk of his/her escape", the administrative court shall be entitled to adopt certain preventive and stop measures. Further it is specified in clause 3 art. 289 that "bailment and recognizance release can not apply to the foreigners and stateless citizens to whom such measures applied before, as well as in respect of which there are sufficient data on their involvement in preparation and/or carrying out the terrorist activity". Consequently, it was established that the guilt of person shall be proved on the basis of reasons of "whether there is a risk of his/her escape", "in the event of availability of justified reasons to believe that such a person would avoid the implementation of a decision", "in respect of which there are sufficient data on their involvement in preparation and/or carrying out the terrorist activity". So, none of mentioned actions is not an offence and does not have a set of all elements of administrative offences. The information on future illegal behavior does not have the marks of guilty and set of all elements of the offence. These definitions are more used in criminal law. So, the terrorist activity (involvement, preparation and/or carrying out) according to Section IX "Crimes against public safety", (art. 258) the act of terrorism, (art. 258-1), involvement into commission of act of terrorism, (art. 258-2) public calls for commission of act of terrorism, (art. 258-3) building a terrorist group or the

terrorist organization (art. 258-4) facilitation the commission of the act of terrorism, (art. 258-5) financing of terrorism are the regulations of the Criminal Code of Ukraine and shall be determined to be the crimes providing the criminal responsibility. In view of this they shall not be considered at the administrative courts as a reason for refusal in adoption of decision to foreign citizens and stateless persons in the form of: bailment and recognizance release [8].

Ukrainian law provides that the legal responsibility shall be incurred upon the availability of three reasons: firstly, it is the regulatory reason, including the regulation that establishes the set of elements of the offence; secondly, it is the actual reason (offence); thirdly, it is the procedural reason (enabling legislation and jurisdictional act). So, the obtained information shall confirm fairly and accurately the availability of the foreigner's intention to avoid the departure, as well as it shall conttain the "stamp" of future illegal behavior. It is incomprehensible in which forms such information, as well as the warranties of the fact that the person would avoid the departure rather than he/she will change his/her intentions at the last moment, may be objectified [9]. So, according to Ukrainian law, the foreign citizen and stateless person may be compulsory deported for thoughts and considerations. However, the Constitution of Ukraine warrants to every person the right to liberty of world view, thoughts, beliefs and prohibits to consider the assumption to be the guilty evidence.

Thirdly, the Administrative Court Procedure Code of Ukraine provides in the art. 289 that the judge of the administrative court of Ukraine may adopt the following decisions in respect of the foreigners and stateless persons: "1) detention of the foreigner or stateless person for the purpose of identification and (or) enforcement of refoulement outside the territory of Ukraine; 2) detention of the foreigner or stateless person for the purpose of enforcement of his/her extradition according to international readmission agreements of Ukraine; 3) bailment of the foreigner or stateless person by the enterprise, institution or organization; 4) obligation of the foreigner or the stateless person to stand bail" [10]. In this regard we would like to admit the following: functional authorities of judge are the possibilities to commit various procedural acts and to take the organizational measures focused on the enforcement of case consideration. Kind and extent of functional authorities of judge shall be defined by corresponding function of judicial power. According to art. 2 of the Administrative Court Procedure Code of Ukraine the task of administrative legal proceedings is a fair, impartial and well-timed resolution of disputes in the field of public relations by courts for the purpose of the efficient protection of rights, freedoms and interests of natural persons, rights and interests of legal entities from violations on the part of the authorities [11]. But in practice the question arises whether the administrative courts actually perform the above-mentioned tasks, especially in terms of taking decisions provided for in Art. 289 regarding foreigners and stateless persons, as well as other proceedings on certain categories of administrative cases, since administrative proceedings are aimed at resolving a public dispute, protecting the rights and interests of citizens from violations by the authorities, if any the violation took place. It is not clear how the task of protecting and resolving a legal dispute regarding the detention and compulsory deportation of foreigners and stateless persons is being implemented. And on what basis the administrative court has the right to make decisions regarding foreigners and stateless persons about: 1) bailment of the foreigner or stateless person by the enterprise, institution or organization; 2) obligation of the foreigner or the stateless person to stand bail; 3) the detention of a foreigner or a stateless person with the placement to the Migrants Accommodation Centre for the foreigners and stateless persons who are illegally staying in Ukraine. Such a decision does not resolve a public-legal dispute about the right of a person, does not fulfill the task of protecting the rights and freedoms of a person. These are measures of a discontinuous nature, which are used to stop the unlawful actions of a person, the consequences of unlawful actions, and bringing the person to justice. And protection of rights or freedoms occurs when there are: a) non-fulfillment of a legal obligation as a correlation of rights or freedoms; b) Abuse of law that impedes the exercise of rights or freedoms; c) a dispute about the existence of the very right or freedom [12]. So, the content of the protection of rights and freedoms is based on the activity aimed at the removal of obstacles in the exercise of rights and freedoms, at the fight against default in correlative obligations and abuse of the law. Protection, in its turn, means the preventive activity of state and non-state formations in preventing offences against the rights of citizens, eliminating the causes and conditions conducive to administrative and delictual invasions [13]. However, the task of administrative courts does not include the protection from unlawful acts, the elimination of their causes and conditions conducive to administrative and delictual invasions! Justification of the position that the main purpose of the detention and compulsory deportation of the foreigners and stateless persons is a protection of individuals and legal entities from the unlawful activities of this category of persons, but this is not a task laid down in the basis of administrative legal proceedings!

At the same time, as V.K. Kolpakov says, the foreigners and stateless persons can not have duties that would be correlated with the legitimate interests of Ukrainian citizens. As regards the prohibition on the violation of the rights of citizens, it should be noted that different types of liability for such actions are provided by other and more specific regulations [14]. So, we believe that the transfer to the consideration and adoption of a decision on the detention and compulsory deportation to the competence of the administrative court as a necessity of protection of the rights and legitimate interests of citizens of Ukraine is unjustified and wrong.

At the same time, we consider to be unfavorable the right of the administrative court to adopt the decision about the application of following measures: to take a person on bail; to release on bail; the detention of a foreigner or stateless person with placement to the Migrants Accommodation Centre for the foreigners and stateless persons who are illegally staying in Ukraine. It is the court that determines "the authorized person of enterprises, institutions

or organizations that deserve special trust (bailsman), bailsman for the performance of assigned duties by a foreigner or a stateless person" [15].

Actually, the Ukrainian legislation provides for the right of the court at its discretion. The concept of "discretion" means a decision, a conclusion, and an opinion. Exercising his/her functions the judge makes power decisions based on the rules of law. Essentially, the judge's discretion is his/her right to choose the most appropriate way to solve the task set before him/her. The law has a general character and regulates social relations in general terms. In the specific case, the judge, within the limits of the law, must independently choose the most reasonable and appropriate way of resolving the dispute in order to achieve the goal of restoring justice. At the same time, "the definition of the beneficence of an authorized person, enterprise, institution and organization" goes beyond the concept of discretion and has a subjective nature in relation to the adoption of the said decision. Accordingly, the judge's discretion concerns the establishment of: firstly, the facts that appear to the judge necessary to resolve the dispute substantially; secondly, the way of resolving a dispute; and thirdly, the very regulation to be applied in this particular case [16].

Although the Criminal Procedure Code provides for a personal bail (Art. 180), it consists in the provision by individuals, considered to be trustworthy by the investigating judge and by the court, a written commitment that they go bail for the performance of assigned obligations by suspected or accused person [17]. At the same time, it is impossible to equal the functions assigned to administrative courts and functions assigned to courts that hear criminal proceedings.

The next is, regarding the obligation of a foreigner and stateless person to stand bail, this measure also raises a lot of questions regarding the amount of bail, which is determined by the court, taking into account the property and family status of a foreigner or stateless person. Currently, the impartial procedure for determining the property status of a foreigner or a stateless person in Ukraine is not established by law. However, the limits of the bail are established pursuant to Part 7 of Art. 289. The bail is determined by the court taking into account the property and family status of a foreigner or stateless person in the range from one hundred to two hundred amount of the subsistence level for able-bodied persons and is paid to the account within five working days from the day of adoption of the decision about the bailment by the court. (starting from December 1, 2018, the subsistence level is equal to 1853 UAH, respectively, the amount of the bail varies from 1853000 UAH to 3706000 UAH, the limit exceeds 100 thous. US dollars). So, the judge is entitled to establish the limits of the bail at his/her discretion. In consideration of Art. 9 of the Administrative Court Procedure Code of Ukraine, administrative courts adopt measures prescribed by law that are necessary to clarify all the circumstances of the case, including the identification and reclaim of evidence on their own initiative, as well as the court examines administrative cases, not merely according to the statement of claim filed accordingly to the Code, within the limits of the claims. The court may go beyond the requirements of the claim, if it is necessary for the efficient protection of rights, freedoms, rights of the person and citizen, other holders of rights in the field of public-legal relations from violations on the part of authorities. Accordingly, in the case of the application of measures applied to foreigners and stateless persons during detention and compulsory deportation, the main purpose and function is the protection of the right of the authorized person or (i) the public order. Consequently, it follows that in the substantive aspect the measure applied by the court must ultimately give rise to the substantive consequences for the parties in the field of public-legal relations. On this occasion, we would like to point out that in view of the above, we consider that issues of compulsory deportation and detention of foreign citizens and stateless persons should be subordinated to courts of general jurisdiction, since these issues are not covered by the tasks of administrative legal proceedings.

Fourthly, Clause 13 of Art. 289 provides for "the conditions upon which it is impossible to provide for the compulsory deportation of a person", namely: 1) the lack of cooperation between a foreigner or a stateless person during the procedure for his/her identification; 2) lack of information from the country of citizenship of the foreigner or the country of origin of the stateless person or documents necessary for identification of the person. In this regard, it is necessary to recall the fundamental principles of law - the inevitability of punishment and legitimacy in the application of measures of state coercion. It is the inevitability of punishment that is the most effective measure restrains the individual from malfeasances. The inevitability of punishment is also an indicator of respect for the law, and therefore the legislator is obliged to develop and implement such a system of enforcement measures that makes impossible not to comply with this principle. Recognition of the impossibility of the enforcement of compulsory deportation is an indicator of the weakness of the state, and it can not be admitted and accepted.

**Conclusions.** In view of the aforesaid, it should be noted that two kinds of legal responsibility – prospective (positive) and retrospective (negative) are generally determined in legal theory of Ukraine. The prospective (positive) legal responsibility is a fulfillment of duties towards the society, constitutional state, group of persons and particular person in good faith. The retrospective (negative) legal responsibility includes the specific legal relations between the state and the offender as a result of state and legal coercion characterized by disapproval of the offence and the offender, assignment of obligation to the offender to be subjected to the imprisonment and unfavorable consequences of personal, material, organizational nature for the offence committed by him/her.

Today there is a negative transformation of implementation of prospective (negative) liability of person for actions (omission to act) that were not and would never be performed by him/her, but only for thoughts and intentions. We believe, that it is not a correct practice due to the fact that it defies a principle of the administrative law presented in the form of statement that the liability may be incurred only for objectified behavior of person, i.e.

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Стаття надійшла до редакції: 21.04.2022

**УДК 342.9**
**DOI: 10.36550/2522-9230-2022-12-253-258**

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## АДМІНІСТРАТИВНІ ПОСЛУГИ У СФЕРІ ОХОРОНИ ЗДОРОВ'Я

Одним із напрямків адміністративної реформи в Україні є розвиток сфери надання адміністративних послуг фізичним та юридичним особам. Дослідження правових засад надання адміністративних послуг у сфері охорони здоров'я має на меті удосконалення організаційно-правових умов захисту прав пацієнтів медичної сфери. Метою статті є дослідження правових засад надання адміністративних послуг у сфері охорони здоров'я.

Правові засади реалізації прав, свобод і законних інтересів фізичних та юридичних осіб у сфері надання адміністративних послуг врегульовані Законом України «Про адміністративні послуги». Адміністративна послуга – це