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Some Issues of Determining Subject Matter Jurisdiction: the Experience of Ukraine and Germany

Anatolii P. Getman
Yaroslav Mudryi National Law University
Kharkiv, Ukraine

Mykola P. Kucheryavenko*
Yaroslav Mudryi National Law University
Kharkiv, Ukraine
**e-mail: pershuy.prorektor@nlu.edu.ua*

Joerg Pudelka
Leiter GIZ-Rechtsprogramm Zentralasien
Eschborn, Deutschland

Abstract
The article examines the issues of delimitation of judicial jurisdictions in the categories of cases arising out of the challenges posed by martial law in Ukraine. The relevance of the study is stipulated by the growing controversy over the issues of delimitation of judicial jurisdictions in the categories of disputes which concern socially vulnerable groups of the population and are becoming more and more widespread. The purpose of the article is to study the issues of delimitation of judicial jurisdictions based on a comparative legal analysis of legislation and case law of Ukraine and Germany. In order to achieve this goal and solve the tasks stipulated by it, the following scientific methods were used: systematic, formal legal, comparative legal, analysis and synthesis, generalisation and critical analysis. The author examines domestic and German procedural legislation which defines the rules for delimitation of subject matter jurisdiction. The author highlights the issues of resolving cases related to establishing the fact of cohabitation of a woman and a man in the same family without marriage, which is necessary for further exercise of the person's right to receive a one-time financial assistance. The author examines the conditions and possibilities for a court to go beyond the established subject matter jurisdiction with a view to ensuring proper protection of a person's right in Germany. The author proves that it is impossible to apply such an approach in Ukraine without appropriate amendments to the existing procedural acts. On this basis, the author critically analyses the case law of the Supreme Court and draws relevant conclusions.

Keywords: *delimitation of judicial jurisdiction; administrative jurisdiction; legal fact, access to justice.*

Окремі питання визначення предметної юрисдикції: досвід України та Німеччини

Анатолій Павлович Гетьман
Національний юридичний університет імені Ярослава Мудрого
Харків, Україна

Микола Петрович Кучерявенко*
Національний юридичний університет імені Ярослава Мудрого
Харків, Україна
**e-mail: pershuy.prorektor@nlu.edu.ua*

Йорг Пуделька
Правова програма GIZ у Центральній Азії
Ешборн, Німеччина

Анотація
У статті розглядається проблематика розмежування судових юрисдикцій у категоріях справ, виникнення яких спричинено викликами воєнного стану в Україні. Актуальність дослідження зумовлена загостренням суперечок щодо вирішення питань розмежування судових юрисдикцій за категоріями спорів, які стосуються соціально вразливих верств населення і стають чим далі більш розповсюдженими. Мета статті полягає в дослідженні проблематики розмежування судових юрисдикцій на основі порівняльно-правового аналізу законодавства, а також судової практики України та Німеччини. Задля досягнення поставленої мети та вирішення обумовлених нею завдань було використано такі наукові методи: системний, формально-юридичний, порівняльно-правовий, аналізу та синтезу, узагальнення та критичного аналізу. Досліджено вітчизняне та німецьке процесуальне законодавство, що визначає правила розмежування предметної юрисдикції. Висвітлено проблематику вирішення справ, пов'язаних із встановленням факту спільного проживання жінки і чоловіка однією сім'ю без укладання шлюбу, що необхідно для подальшої реалізації права особи на отримання одноразової грошової допомоги. Досліджено умови і можливості виходу суду за межі встановленої предметної юрисдикції з метою належного захисту права особи в Німеччині. Доведено неможливість застосування такого підходу в Україні без відповідного внесення змін до чинних процесуальних актів. На цій підставі здійснено критичний аналіз практики Верховного Суду та сформульовано відповідні висновки.

Ключові слова: *розмежування судової юрисдикції; адміністративна юрисдикція; юридичний факт; доступність правосуддя.*

Introduction

The current state of events in public life, caused by the fundamental changes influenced by the war in Ukraine, has affected the adjustment of all spheres: politics, economics, and legislation. The fundamental changes in the functioning of the state, the lives of citizens, both those who remained in Ukraine and those who are outside Ukraine, could not but lead to the emergence of new categories of disputes, peculiarities of clarifying their nature and ways of resolving them. The emergence of new aspects of disputed legal relations also caused the consideration and adjustment of subject matter jurisdiction and the limits of dispute resolution by administrative courts.

It should be noted that the uniformity and unity of relations in peacetime acquires a completely different colour in martial law. Ordinary events in the private law regime are transformed into a more complex phenomenon, which may give rise to conflict over the nature and means of dispute resolution. Legal relations embody a double influence. On the one hand, it is a real social relation, and on the other hand, it is a rule of law. That is why clarification of the content of a legal relationship requires and implies analysis of the content and role of a legal rule; the content of the actual relations to be regulated by law; and the legal relationship itself [1, p. 223].

In practice, the issue of delimitation of judicial jurisdictions often arises. This issue periodically becomes the subject of scientific research aimed at developing universal approaches to the delimitation of judicial jurisdictions. Such research was carried out by T. Kolomoyets [2; 3], V. Kolpakov [4], O. Paseniuk [5], M. Smokovych [6], S. Stetsenko [7, pp. 389-390] and others. At the same time, the extraordinary circumstances that arose in our country on 24 February 2022 and are still in force today have caused new problems in the delimitation of administrative jurisdiction in cases involving the need to establish certain facts. These issues have not previously been the subject of scientific research. Thus, there is an urgent need to fill this gap, which is defined by the authors of the study as the main goal. This task is particularly relevant given that the uncertainty of the boundaries of judicial jurisdiction is considered by scholars and ECHR practice as a restriction of the right to a fair trial [8; 9].

When it comes to the proper protection of human rights and freedoms, it is sometimes necessary to resolve complex issues, some of which fall within the jurisdiction of different courts. In such cases, a person should not only be aware of the rules of delimitation of court jurisdictions, but also clearly understand the sequence of certain actions aimed at achieving the expected result. The question arises whether it is not possible to simplify the path

for a person seeking judicial protection. After all, its complexity is not conducive to the proper enforcement of a person's right to a fair trial. Let us try to deal with this issue by examining the experience of administrative courts in Germany [10] and Ukraine.

Literature review

The issue of delimitation of judicial jurisdictions has been relevant for a long time. The study of the principles of delimitation of jurisdiction of administrative courts and courts of general jurisdiction is devoted to the works of such scholars as O. Paseniuk [5], M. Smokovych [11], T.O. Kolomoyets [2], V.K. Kolpakov [4], V.V. Gordeev, L.G. Bzova [12], O. Nehoda [13].

The studies of these authors analyse in detail the legal category of "judicial jurisdiction", define general approaches to the delimitation of judicial jurisdictions, and outline the problematic issues of such delimitation based on the analysis of judicial practice.

O. Nehoda, formulating her own approaches to solving the problem of delimitation of judicial jurisdictions, notes that the resolution of the issue of court competence in each particular case depends on the nature of the disputed legal relationship. Administrative jurisdiction includes cases arising out of a dispute between Part icipants in public law relations. In contrast, civil jurisdiction covers disputes of a private law nature [13].

V.V. Gordeev and L.G. Bzova emphasise the problematic nature of correct determination of the jurisdiction of a dispute in many cases. In their opinion, this is due not only to imperfect legislation, but also to the dogmas existing in science and practice. In the authors' opinion, special problems in determining the jurisdiction arise if, when determining the criteria for such determination, the law proceeds from various inconsistent features, which may result in the same dispute being formally considered by courts of different jurisdictions [12]. As a result of the study, V. Gordeev and L. Bzova outline the conditions for the correct determination of the subject matter jurisdiction of administrative courts, namely: the need to take into account the subject matter of legal relations; the subject matter of the dispute and the nature of the disputed substantive legal relations; and the essence of the dispute.

The issue of delimitation of judicial jurisdictions under martial law has not been adequately reflected in scientific research. Certain issues are covered in the article "Jurisdiction to consider the issues of establishing the fact of the death of a citizen of Ukraine during military service, in particular, in defence of the Motherland (Supreme Court in case No. 201/10689/23)", prepared by Lawyers' association "Lugovy, Dichko and Part ners" [14].

This publication describes the course of consideration of a particular case in courts of various instances, as well as the content of the relevant court acts. The authors do not express their own position on the issue, nor do they conduct a scientific analysis of the dispute over the delimitation of judicial jurisdictions.

Materials and Methods

Based on the subject matter of the study – the procedural legislation of Germany and Ukraine establishing the rules for the delimitation of judicial jurisdictions – the main method of analysis is the formal legal method. The formal legal method was used to determine the content of legal provisions and analyse the intentions of the legislator when drafting them. It allowed us to systematise the information obtained from legal acts and identify the key aspects of the regulation of the issues of jurisdictional delimitation in both countries.

The formal logical method was used to identify the grounds for identifying shortcomings in national court practice and to find ways to correct them.

The comparative legal method is used to study specific elements of the legal systems of Germany and Ukraine by comparing the same legal provisions, institutions, principles, etc. and the practice of their application. The comparative legal method will allow us to find the best ways to solve the identified problems and eliminate the shortcomings based on the best positive practices of each of the countries under study.

The choice of the comparative method makes it possible to identify common and distinctive features of the legislation of the Federal Republic of Germany and Ukraine, as well as approaches to resolving situations where issues constituting a single legal case are subject to resolution in different judicial jurisdictions. This allows the researchers to identify positive practices and innovations in both systems, as well as to identify opportunities for improvement in each country.

The method of critical analysis will be used to assess the compliance of German and Ukrainian judicial practice with international standards, the requirements of the current national legislation of each country, as well as the case law of the European Court of Human Rights. This method will help to identify erroneous approaches to resolving the issues of delimitation of judicial jurisdictions.

In order to update the information and highlight the latest legislative changes in both countries, we will conduct a systematic analysis of official documents, including draft laws, regulations and other sources.

The functional method is used to determine the areas of legal influence of the Supreme Court's practice and the importance of its proper formation.

The methods of analysis, synthesis, induction, deduction and analogy were also used to formulate proposals and recommendations for solving the scientific and practical problem.

As for the main stages of this article, they are aimed at conducting a comparative legal analysis of the legislation of the Federal Republic of Germany and Ukraine regulating the rules for delimitation of court jurisdictions in complex cases.

The first stage involves defining the object and subject matter of the study, as well as formulating the actual problem to be studied. In the context of this study, it is determined that the object is the subject matter jurisdiction of administrative courts, and the subject matter is the legislation and case law of the Federal Republic of Germany and Ukraine.

The second stage involves a systematic analysis of existing scientific papers, monographs and legislation on the chosen topic. Primary and secondary data are collected, which form the basis for further analysis.

At the third stage, the choice of methods and approaches to be used for comparative legal analysis is justified. In particular, it is determined whether the legal or comparative method will be used, as well as the choice of criteria for assessing legislation.

This stage involves conducting the analysis itself, taking into account the selected methods and approaches. The article examines the common and distinctive features of determining the subject matter jurisdiction of administrative courts in the Federal Republic of Germany and Ukraine. Based on the results obtained, the author formulates conclusions.

At the final stage, the authors justify the choice of methods and approaches used, formulate conclusions and identify possible prospects for further research in this area.

Results and Discussion

The war in Ukraine has had severe consequences for society. This includes the destruction of residential buildings, infrastructure, business facilities, loss of territory, etc. But the most acute and painful is the loss of lives of our fellow citizens. The latter makes the issue of resolving the category of disputes related to the receipt of a lump sum payment in connection with the death of a serviceman very important. Every day, more and more citizens need this social assistance, which is not always easy to obtain, since, for example, when a man and a woman lived as a family

without registering a marriage, the receipt of financial assistance must be preceded by the establishment of the relevant fact. This, in turn, requires an application to a court of general jurisdiction. Whereas disputes regarding the payment of one-off financial assistance are within the jurisdiction of the administrative court due to the public law nature of these legal relations.

There are five independent jurisdictions in Germany (administrative, social, financial, labour and general jurisdiction), the origin of which has a historical basis. The distinction between these jurisdictions is sometimes disputed, but there are certain fixed rules that play an important role in this regard and have been confirmed by the case law of the highest courts over the decades. Pursuant to Art. 40(1) of the German Arbitration Code, administrative courts in Germany have jurisdiction over all public law disputes that are not assigned by law to another court (for example, § 51 SGG refers all public law disputes of a social nature to the competence of social courts). The question of when a dispute is a public law dispute has long been a subject of controversy and to some extent remains controversial in the literature today [15, pp. 21-24].

General approaches to determining jurisdiction in Germany

Let us analyse the experience of Germany in resolving jurisdictional disputes. According to the established case law of the highest courts in Germany and the prevailing opinion in the academic literature, the legal nature of the rule that resolves the dispute is crucial. For example, it may be a rule governing the right to receive a lump sum social benefit.

The question of how to determine the legal nature of norms is also not uncontroversial, but according to the so-called modified subject theory, it can generally be assumed that a norm is public law if it authorises or obliges the subject of authority as such. This is certainly the case with rules that satisfy claims for social benefits to a public authority. These norms give a citizen the right to direct a claim to the state for a certain benefit, provided that the conditions of such a norm are met. Thus, in the case at hand, we are undoubtedly dealing with a public law rule. In this respect, it is also irrelevant whether certain features of the legal relationship (for example, living together in a common household or being married) are of a civil law nature. The decisive factor is the legal effect of the rule: does it authorise or oblige the holder of public authority as such? If so, the rule is of a public law nature, which is confirmed in this case [16]. As a result, the challenged provision will be public law, which means that the legal relationship will be public law, and therefore, the administrative proceedings will be initiated in accordance with Art. 40(1) of the German Code of Administrative Procedure. This also does not exclude the fact that civil law issues may play a role

in the course of the proceedings, in which case they would also have to be decided by the administrative court. Thus, in this particular case, the administrative court will determine whether there is a common household, interpret and apply the relevant civil law provisions and, if necessary, collect evidence to clarify the facts relevant to the decision [10].

German legal doctrine stipulates that no one has the right to expect that civil law matters should be dealt with by civil courts alone and public law matters by administrative courts alone. There may be some arguments in favour of this, such as a particularly high level of expertise due to the specialisation of judges. On the other hand, the effectiveness of legal protection, which is, after all, even guaranteed by Art. 19(4) of the Basic Law, is a very valuable asset. After all, if citizens are forced to clarify each legal issue separately according to its legal nature in different courts, this will make legal protection less effective and more time-consuming and expensive for them. Furthermore, it would be doubtful that abstract legal issues, such as the validity of a marriage or the running of a joint household, could actually be clarified by means of a legal action in individual cases before the courts.

According to German procedural law, the need for legal protection generally arises only if the plaintiff can actually improve his or her legal position if the claim is granted. This means that, as a rule, the claimant must file a claim directly to improve his or her legal position, and all other issues related to the case are considered in the same proceedings. The fact that the administrative court sometimes has to clarify a previous civil law issue or vice versa is acceptable, especially since all judges in Germany are so-called full jurists, i.e. they have comprehensive legal knowledge in all areas of law. This is confirmed by Art. 17(2) of the Law on the Judiciary of Germany [17]. As a result, an administrative court (possibly even a social court specialising in social law) will have to examine the entitlement to social assistance, and in doing so it will have to examine all factual conditions, even if some of them are of a civil law nature.

As noted by M.P. Kucheriavenko, the peculiarities of the nature of legal relations, clarification of the nature of legal regulation on the border of several branches of law involves determining the place of such relations in the system of legal regulation. This process should combine the search for and determination of the most optimal legal form and the conditionality of such form by the real behaviour of the parties to the relationship [1, p. 224]. The actual behaviour of the parties to legal relations is based on the nature of social relations, which is reflected in the relevant legal form, legal means of regulating relations between the Part ies, stimulating and guaranteeing such dynamics of legal relations, which is in the interest of

all those who have to reach an agreement in forming a balance of public and private interests.

Resolving jurisdictional issues in practice

Thus, in Germany, the issue of delimiting the jurisdiction of courts does not hinder the proper and full protection of human rights. The German legal tradition allows for the jurisdiction of a particular court to be extended beyond the jurisdiction of a particular court if such extension is necessary to ensure the proper protection of the protected right.

In particular, in the case of contact with the state and the derivation of possible claims from this contact, it is important to make a clear distinction, according to which it is not the legal relationship itself, but the claims arising from it that determine the jurisdiction of the court. For example, the Federal Administrative Court in the case of an Afghan who, as an informant for the German Foreign Intelligence Service (BND), sought protection from threats in a lawsuit brought by Germany, ruled that the administrative proceedings were not subject to the request.

Although the plaintiff had worked on behalf of the BND in Afghanistan and, in particular, had been infiltrated into Islamist and terrorist networks, he was subsequently "switched off" due to a lack of information. The Federal Administrative Court describes the legal relationship between the BND and the informant as private law, although it also served public purposes (averting danger, public safety). Ultimately, this situation can be compared to a private company towing an improperly parked car on behalf of a public transport authority. The fact that the actions ultimately also serve the fulfilment of public tasks does not mean that the legal relationship should be assessed as public law, especially if the person concerned does not have his own public law decision-making powers. In this case, it acts exclusively within the framework of private law.

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The plaintiff in this case argued that there was a contractual relationship between the parties that obliged him, the plaintiff, to receive and transmit information of importance to the intelligence services in exchange for a monetary reward. For this purpose, he was to infiltrate and spy on terrorist organisations. The contract was aimed at providing security, or rather, intelligence support to the Bundeswehr in military-like operations. The fact that the Federal Intelligence Service appears to be using forms of private law and does not convert each of its agents to the status of a civil servant does not change the public law nature of the "spy contract". A public law "espionage contract" gives rise to a continuing duty to protect. The defendant was obliged to effectively prevent in good faith the specific dangers arising from the performance of the espionage contract. The only decisive factor here is that the danger to his life in which he is currently undisputedly placed is based on a risk which the Federal Intelligence Service objectively took and from which it derived or intended to derive benefit. The Federal Intelligence Service, as a public law client, was therefore obliged to effectively avert this danger. As a result, the applicant wanted to obtain a new identity card and financial support to move to another location. The Federal Administrative Court had already dismissed the claim as inadmissible for lack of administrative proceedings and gave the following reasons: The question of whether a dispute is a matter of public or civil law depends on the nature of the legal relationship from which the claim arises. As a rule, it depends on whether the parties involved are in a sovereign relationship of supremacy and subordination to each other and whether the sovereign power holder applies special legal principles of public law. However, a public law dispute may also be based on a relationship of equality. Relations of equality are public law relations if the legal rules governing the legal relationship do not apply to everyone, but are a special right of the state or other public authorities, which, at least on the one hand, applies only to public authorities. Thus, the difference between a public law and a private law contract depends on its subject matter and purpose. The legal nature of the contract is determined by whether the subject matter of the contract is governed by public or civil law.

In accordance with these principles, disputes regarding any continuing obligations arising from the agreement between the plaintiff as a confidential adviser and the Federal Intelligence Service to provide information in exchange for monetary remuneration may be considered in the courts of general jurisdiction.

By cooperating with the Federal Intelligence Service, a confidential adviser does not become a member of the public service – as this is neither a permanent nor even a professional activity – and does not become a trustee of the public authority, as sovereign powers are not related to his or her function. This is because the provision of information to the Federal Intelligence Service serves the fulfilment of its tasks, but is not a sovereign activity of the informant. Similarly, the generally accepted principle of mandatory and legitimate administrative activity does not imply that administrative activity is always carried out in a public law form. On the contrary, according to the established case law, when the state uses private forms of organisation to perform its tasks, the private law system is only supplemented, modified and imposed in certain respects on public law obligations, without the need to refer the administrative action itself to public law; as a result, general courts have a say in deciding on such public law obligations of administrative action under private law within their jurisdiction.

The legal basis of the relationship between the confidential adviser and the Federal Intelligence Service is a civil law contract aimed at obtaining intelligence information of importance to the intelligence service, for which the confidential adviser is remunerated as a freelance employee on a fee basis.

Case law of Ukrainian courts and modern approaches to resolving jurisdictional disputes

When considering Ukrainian case law on jurisdictional disputes, it is interesting to give examples that illustrate the peculiarities of the current state of legal relations. In Ukraine, the situation with regard to the court's decision on the application for establishing the fact of cohabitation of a man and a woman without registration of marriage in peacetime is clear, but in the current situation it is fundamentally different. Russia's military attack on Ukraine has also led to the fact that the establishment of such a fact takes into account fundamentally new circumstances, which may affect the subject matter jurisdiction. The death of a man who was called up for military service gives rise to the right of a woman to receive a one-off financial assistance in connection with his death [18]. The fact that the marriage between such persons was not registered adds to the complexity

of resolving such disputes. In this case, the applicant, when applying to the court to establish the fact that a man and a woman lived as a family without registering a marriage, stated that establishing such a fact was necessary to receive a one-off financial assistance.

Logically, the exercise of her right to a one-off financial assistance should have been carried out in the following order. First, such a person must apply to a court of general jurisdiction to establish the fact of cohabitation with the deceased husband. Simultaneously with the establishment of this fact, the person acquires the status that allows him or her to apply to an authorised entity for a one-time financial assistance in connection with the death of a serviceman with whom such a person lived as a family without registering a marriage.

In other words, it is the establishment of the fact of living as a family without registering a marriage with the deceased serviceman that should determine the legal fact that gives rise to certain legal consequences, namely, the right to receive a one-time financial assistance [19]. Otherwise, a person has no legal grounds for filing a relevant application, as he or she cannot prove that he or she is the proper subject of such an application.

In case No. 290/289/22, the Courts of first instance and appeal established the fact that a man and a woman lived as one family, based on the proof and validity of the applicant's claims. In this case, the applicant stated that she was entitled to a one-off financial assistance in connection with the death of her husband (who, following the military attack on Ukraine by the Russian Federation and the declaration of martial law, was called up for military service and died), and requested that the fact of her living with him as one family without registration of marriage be established [18]. As correctly noted by the courts of first instance and appeal, the fact sought to be established by the applicant was of legal significance to her, as it was related to her right to receive a one-off financial assistance provided for by the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of Their Families" [19].

The Ministry of Defence of Ukraine, acting as the interested Party in this case, disagreed with the applicant's arguments and filed a cassation appeal with the Supreme Court, arguing that the rules of jurisdiction of general courts had been violated.

In upholding the cassation appeal, the Supreme Court referred to the resolution of the Grand Chamber of the Supreme Court dated 10 April 2019 in case No. 320/948/18 (proceedings No. 14-567цс18) [20], which concluded that cases on fact-finding are considered in a separate proceeding, subject to certain conditions. Namely, if: according to the

law, such facts give rise to legal consequences, i.e., they determine the emergence, change or termination of personal or property rights of citizens; the current legislation does not provide for another procedure for their establishment; the applicant has no other opportunity to obtain or restore a lost or destroyed document certifying a fact of legal significance; the establishment of a fact is not connected with the subsequent resolution of a dispute about law. The current civil procedural legislation refers to the jurisdiction of the court to establish facts on which the emergence, change or termination of subjective rights of citizens depends.

In analysing the situation, the court found that the applicant had applied to the court to establish a fact in order to exercise her right to receive a one-off social allowance paid by the Ministry of Defence of Ukraine (a public authority). The court also noted that the decision of this body (in case of unsatisfaction of the application for one-time social assistance) should be appealed against in administrative proceedings.

In doing so, the court concluded that the applicant's claims were related to proving the existence of grounds for recognising (confirming) her certain social and legal status, which is not related to any civil rights and obligations, their emergence, existence and termination. Accordingly, by their subject matter and possible legal consequences, such claims are related to the applicant's public law relations with the state, and therefore cannot be resolved in civil proceedings.

Drawing a line under this case, the SC noted that the applicant's claim to establish the fact of living as one family without registering a marriage with her husband, who died while Part icipating in hostilities and ensuring the implementation of measures for national security and deterring the armed aggression of the Russian Federation, is not subject to resolution in civil proceedings. This dispute is subject to administrative, not civil, proceedings [18].

Following the logic of the Supreme Court, jurisdiction in this category of cases should be determined by the purpose for which a person wants to establish a particular fact. In doing so, the Supreme Court is leading us down an obviously wrong path, since there are no legal grounds for an administrative court to accept such an application for consideration. Thus, without establishing the fact of cohabitation with the deceased husband, a person cannot apply to the Ministry of Defence of Ukraine for a one-time social assistance (since he cannot prove that he is a proper applicant). Thus, a situation arises where there are no grounds for applying to an administrative court, as there is no dispute with the public authority. In the same case, if an applicant applies to the Ministry of Defence of Ukraine

for a one-time financial assistance without providing documents proving her status, she will receive a reasoned refusal to satisfy her application. This application can then be appealed to an administrative court. However, the prospects of such an appeal are obviously negligible. Thus, the person finds himself in a vicious circle, which deprives him of any opportunity to exercise his right to judicial protection.

Pursuant to Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter – the Convention) [21], everyone is entitled to a fair and public hearing within a reasonable time by an independent and imPart ial tribunal established by law.

The concept of "court established by law" includes, in particular, such a component as compliance with all rules of jurisdiction and jurisdiction. In addition, Art. 6 of the Convention, which is Part of the national legislation by virtue of Art. 9 of the Constitution of Ukraine [22], enshrines the principle of access to justice. According to the standards of the European Court of Human Rights (hereinafter – the ECHR), access to justice is understood as the ability of a person to obtain judicial protection without hindrance as access to independent and imPart ial dispute resolution under the established procedure based on the rule of law.

For the right of access to court to be effective, a person must have a clear factual opportunity to challenge an act that interferes with his or her rights (ECtHR judgment of 04 December 1995 in the case of Belle v. France) [23].

The right to a fair trial and the issues of its enforcement at the levels of the ECHR case law and domestic legal proceedings are discussed in detail in the monographic study by D.V. Luchenko and N.A. Polyakh "Application of the European Court of Human Rights Case Law in Administrative Proceedings of Ukraine" [8] and will not be discussed in detail in this article. We will only note that the position of the Supreme Court expressed in the above-mentioned resolution makes it impossible for the applicant to exercise her right to a fair trial, since the current procedural legislation of Ukraine does not provide opportunities for its exercise in the manner specified by the court.

In this regard, it is worth recalling the four main problem areas mentioned by Y. Matat concerning the issue of access to justice in the context of Art. 6 of the Convention. Among them, a prominent place is occupied by the conflict of judicial jurisdictions [24].

Returning to the above case, it seems logical and, most importantly, legitimate to take the approach that the exercise of a person's right to a one-time financial assistance in such circumstances consists of two successive stages. The first is to decide on cohabitation, and the second is to receive a

one-off financial assistance. These stages require a more detailed analysis, which should begin with the question of which courts have jurisdiction over each of the components of this case.

1. Establishment of the fact that a man and a woman live together as a family without marriage.
The fact of cohabitation of a man and a woman without marriage registration can be established by a court only from 1 January 2004 (after the entry into force of the Family Code of Ukraine), since the CFC of Ukraine did not provide for legal consequences for a man and a woman who lived together without marriage registration [25].

Pursuant to Art. 19(1) of the Civil Procedure Code of Ukraine [26], this category of cases is within the subject matter jurisdiction of general courts.

Pursuant to Art. 293(1) of the Civil Procedure Code of Ukraine, such a case must be considered in a special proceeding, which is used to consider civil cases on confirmation of the presence or absence of legal facts relevant to the protection of the rights, freedoms and interests of a person. This type of non-action civil proceedings also deals with cases on establishing the fact of a man and a woman living as a family without registering a marriage. Thus, the procedure for special proceedings provides for consideration of cases on establishing facts in the presence of certain conditions, which stipulates: a) such facts give rise to certain legal consequences (emergence, change or termination of personal or property rights) – which implies clarification of the purpose of establishing such a fact; b) the current legislation does not establish another procedure for their resolution, does not provide for another out-of-court procedure for establishing a legal fact; c) the applicant has no other opportunity to obtain a document certifying a fact that gives rise to legal consequences, for which he or she has to pay a fee [Ibid].

2. Exercise of the right to receive a one-time financial assistance in connection with the death of a spouse.
In the process of exercising this right, a dispute may arise between the applicant and the public authority. Thus, according to Part one of Art. 16 of the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of Their Families" [19], a one-time financial assistance in case of death, disability or Part ial disability without establishing disability of servicemen, persons liable for military service and reservists called up for training (or check-up) and special training or for service in the military reserve is a state-guaranteed payment made to persons who are entitled to receive it in accordance with this Law.

Art. 16-1 of the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of their Families" [Ibid] provides that in the cases

specified in subparagraphs 1-3 of Art. 16 (2) of this Law, family members, parents and dependents of a deceased serviceman, person liable for military service or reservist are entitled to receive a one-time financial assistance. It was in order to prove her right to receive the one-off financial assistance that the applicant had to apply to the court to establish the fact of living together as a family with the deceased serviceman.

The mechanism for awarding and paying a one-time financial assistance in case of death, disability or Part ial disability without disability (hereinafter referred to as the assistance) to servicemen, persons liable for military service and reservists called up for training (or check-up) and special training or for service in the military reserve is set out in the Procedure approved by the Cabinet of Ministers of Ukraine on 25 December 2013 No. 975 [27]. This Procedure establishes the procedure for applying to the authorised bodies for the payment of a one-off financial assistance.

In case of refusal to satisfy such application, a person has the right to apply to an administrative court. Art. 5(1) of the Code of Administrative Procedure of Ukraine (hereinafter – the CAP of Ukraine) [26] provides for the right of every person to apply to an administrative court if he or she believes that his or her rights, freedoms or legitimate interests have been violated by a decision, action or inaction of a public authority. Pursuant to Art. 19(1) of the CAP of Ukraine, the jurisdiction of administrative courts extends to cases involving public law disputes, including disputes between individuals or legal entities and public authorities regarding appeals against their decisions (individual legal acts), actions or inaction (paragraph 1(1) of this Art.) [Ibid].

Thus, in accordance with the requirements of the current legislation of Ukraine, a person who cohabited with a deceased serviceman as a family without marriage may exercise his/her right to a one-time financial assistance in connection with the death of such a serviceman by applying in succession
– to a court of general jurisdiction to establish the fact of cohabitation of a man and a woman as a family without marriage;
– to the authorised bodies with an application for payment of a one-time financial assistance;
– to an administrative court in case the authorised body refuses to satisfy the application for a one-time financial assistance payment.

At the same time, an appeal to an administrative court is not a mandatory step in exercising this right. If the authorised body satisfies the application for the payment of a one-off financial assistance, the person will have no grounds for further appeal.

As correctly stated in the resolution of the Supreme Court of 31.01.2024 in case No. 595/76/23, given that the purpose of administrative proceedings is to effectively protect the rights, freedoms and interests of individuals, the rights and interests of legal entities from violations by public authorities, an appeal to an administrative court is preceded by an appeal of a person to a public authority, following the consideration of which the person acquires the right to appeal to the court of administrative jurisdiction against decisions, actions or omissions of such a public authority. This corresponds to the purpose and tasks of administrative proceedings as defined in Art. 2 of the CAP of Ukraine [28].

In view of the above, the Supreme Court's determination in this case of the procedure for exercising the right to judicial protection by exclusively applying to an administrative court is not only illogical, but also contrary to the current procedural legislation of Ukraine.

The Grand Chamber of the Supreme Court noted that when deciding whether to accept an application for the establishment of a fact of legal significance, the judge, in particular, is obliged to clarify the issue of jurisdiction and jurisdiction, that is, the judge must check whether the application can be considered in court at all and whether its consideration is not within the powers of another body [29(33-35)]. According to Part 1 of Art. 19 of the Code of Administrative Procedure of Ukraine, the jurisdiction of administrative courts extends to cases in public law disputes, disputes of individuals and legal entities with public authorities regarding appeals against their decisions, actions or inaction. At the same time, based on Part 1 of Art. 1 of the Civil Code of Ukraine, civil law regulates personal non-property and property relations based on legal equality, free expression of will and property independence of their Part icipants.

In determining the nature of such relations, it is necessary to distinguish between: 1) the establishment of the fact of cohabitation, which expresses the relationship between a man and a woman characterised by civil law; 2) the fact of the right to receive a one-off financial assistance in connection with the death of a man. It is clear that in such a situation, such relations are fundamentally different both in nature and in terms of their subjects. The plaintiff's claim to establish a certain social and legal status based on the civil law nature of the relationship - the fact of cohabitation of a man and a woman – does not in any way imply the Part icipation of the Ministry of Defence of Ukraine in establishing such a fact. It is the establishment of the fact of cohabitation of the deceased man and woman that will give rise to the legal fact of the right to receive a one-off financial assistance in connection with the death of the husband.

The conclusion of the Supreme Court that the subject matter and possible legal consequences of this dispute exist in the field of public law relations and are not subject to resolution in civil proceedings appears [30] superficial and unfounded. Emphasising that the court must take into account the legal purpose of the applicant's application to the court, the Supreme Court concludes that the applicant's status is of legal importance only in public law relations "The Supreme Court, taking into account the statutory task of civil proceedings, recognises that it is inadmissible to initiate court proceedings in civil proceedings in order to assess the circumstances that are the subject of proof in administrative proceedings" [Ibid]. In fact, this situation involves two related but not identical stages, which differ in the purpose of the applicant's application. The first stage is to establish the fact of cohabitation between a man and a woman, which is the purpose of the application. The second stage is to establish the grounds for receiving the one-off financial assistance. The second stage cannot arise without the completion of the first stage; the result of the first stage (establishing the fact of cohabitation) is precisely the legal fact that triggers the second stage and creates a relationship between the applicant and the Ministry of Defence of Ukraine.

The Supreme Court's conclusion that "in such circumstances it is necessary to close the proceedings, since this dispute is subject to administrative, not civil, proceedings ... The Supreme Court considers it appropriate to explain to the applicant the right to file a corresponding claim with the administrative court" is also surprising [Ibid]. This is an interesting conclusion, but we would like to understand on what basis an applicant may file a claim with an administrative court. Pursuant to Art. 19 of the Code of Administrative Procedure of Ukraine, the jurisdiction of administrative courts extends to cases in public law disputes. The exhaustive list of types of such disputes does not include such a category of disputes as those relating to the establishment of the fact of cohabitation between a man and a woman. That is why it is unclear how a court can explain to a plaintiff how to file a claim with an administrative court if the Code of Administrative Procedure of Ukraine excludes such a ground.

Courts of administrative jurisdiction function as certain safeguards against arbitrariness of the state, an effective tool for protecting the rights and interests of legal entities and individuals. The above-mentioned position of the Supreme Court actually destroys the ability of a person to protect his or her rights and interests. It was in the context of "... a specialised court, where in the process a person was provided with certain procedural guarantees of protection in a dispute by a subject of power, that it was a truly revolutionary step towards the development of democracy" [31, p. 42].

It is clear that this situation is also due to the existing conflicts of legislative norms, which relate to contradictions between the norms of the same regulatory act and the norms between separate acts of a sectoral nature and between the norms of acts belonging to different sectors [32]. That is why the courts should take a very balanced and reasonable approach to resolving disputes of a complex nature and content. It is sad to come across examples when the proposals contained in court decisions cannot be implemented, and this makes it impossible and destroys the exercise of a person's right to judicial protection.

The court's awareness of the erroneousness of its position is evidenced by the Decision of 31 January 2024 in case No. 595/76/23, which states the following. Art. 245 (2) of the Code of Administrative Procedure of Ukraine sets out the list of court decisions that an administrative court is authorised to make in the event of a claim being upheld. This list does not include the establishment of a fact of legal significance. In other words, in case of resolution of a case in administrative proceedings, the establishment of a fact of legal significance must be determined by the court in the operative Part of the court decision, which is not provided for by the CAP of Ukraine.

At the same time, the analysis of the above civil procedural rules shows that the current civil procedural legislation refers to the jurisdiction of civil courts to establish facts on which the emergence, change or termination of subjective rights of citizens depends. The current legislation does not provide for any other judicial procedure for confirming a fact of legal significance, except for consideration of cases on establishing a fact of legal significance in civil proceedings [33].

Analysing the above case law, it can be noted that in resolving such a dispute, attention should be paid to the distinction between a legal fact and a complex legal fact. This is how the fact of cohabitation and the grounds for receiving a one-off financial assistance are related. It is reasonable to assume that the factual composition involves a set of independent life circumstances, legal facts, each of which gives rise to independent legal consequences [1, p. 477]. The factual composition, combining independent integral legal facts only in their totality, gives rise to certain consequences. At the same time, a separate legal fact already has legal significance, which implies its independent role in the dynamics of legal regulation. The integrity of legal facts, which are elements of the factual composition, only in their unity cause legal consequences.

On this basis, the fact of cohabitation is, by its very nature, a legal fact that can give rise to many relations. In peacetime, this most often led to the resolution of certain property disputes, the future of children, etc. The war in Ukraine has added another specific aspect to the significance and

consequences of establishing such a legal fact. That is why it is logical to distinguish between the legal fact of cohabitation and the complex legal fact that gives rise to the grounds for receiving one-off social assistance. Such a complex legal fact includes: 1) a certain regime of relations between a man and a woman, the fact of cohabitation; 2) the special status of a man – a military servant; 3) the death or injury of a man.

Conclusions

The war in Ukraine has led to a significant increase in the number of issues (social benefits, mobilisation, etc.) related to the deaths of servicemen. Often, the resolution of such issues is impossible without first going to court to establish a certain fact. The search for legitimate ways to optimise such a procedure in order to make it easier for the applicant is a humanitarian goal that is being pursued in Germany and Ukraine in different ways.

Unlike German law, Ukrainian procedural law does not allow administrative courts to go beyond their jurisdiction, even in cases where such a move would help a private person to exercise his or her right.

The Supreme Court's attempts to change the procedure and grounds for determining judicial jurisdiction by formulating its own case law is a wrong way to go, which will not only fail to optimise the procedure for resolving certain categories of disputes, but may also lead to a violation of a person's right to a fair trial, as the European Court of Human Rights has repeatedly pointed out in its judgments.

Proper judicial protection of individual rights must be based on strict compliance with the requirements for the subject matter jurisdiction of the courts. At the same time, any attempts to optimise (accelerate) the procedure for resolving a case or to bypass the mandatory stages set out in the law should be guaranteed to lead to the only result – the cancellation of decisions made in this way.

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Anatolii P. Getman
Doctor of Legal Sciences, Professor
Rector
Yaroslav Mudryi National Law University
61024, 77 Hryhorii Skovoroda Str., Kharkiv, Ukraine
e-mail: rector@nlu.edu.ua
ORCID 0000-0002-1987-2760

Mykola P. Kucheryavenko
Doctor of Legal Sciences, Professor
First Vice-Rector
Yaroslav Mudryi National Law University
61024, 77 Hryhorii Skovoroda Str., Kharkiv, Ukraine
e-mail: pershuy.prorektor@nlu.edu.ua
ORCID 0000-0002-8020-5748

Joerg Pudelka
Richter a.D. (Berlin/Deutschland)
Ph.D. in Law
Leiter GIZ-Rechtsprogramm Zentralasien
65760 Dag-Hammarskjöld-Weg 1, Eschborn, Deutschland
e-mail: joerg.pudelka@giz.de
ORCID 0000-0003-2220-1404

Анатолій Павлович Гетьман
доктор юридичних наук, професор,
ректор
Національний юридичний університет імені Ярослава Мудрого
61024, вул. Григорія Сковороди, 77, Харків, Україна
e-mail: rector@nlu.edu.ua
ORCID 0000-0002-1987-2760

Микола Петрович Кучерявенко
доктор юридичних наук, професор,
перший проректор
Національний юридичний університет імені Ярослава Мудрого
61024, вул. Григорія Сковороди, 77, Харків, Україна
e-mail: pershuy.prorektor@nlu.edu.ua
ORCID 0000-0002-8020-5748

Йорг Пуделька
суддя у відставці (Берлін, Німеччина),
доктор філософії у галузі права
Керівник правової програми GIZ у Центральній Азії
65760, Даґ-Гаммаршельд-Вег 1, Ешборн, Німеччина
e-mail: joerg.pudelka@giz.de
ORCID 0000-0003-2220-1404

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