

Category of case No. **308/9708/19: Civil cases (from 01.01.2019); Action proceeding cases; Non-contractual disputes, of which; about compensation for damage, of which.**

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Court proceedings number: **61-18782цк21**



The Supreme
Court

Resolution

In the name of Ukraine

April 14, 2022

City of Kyiv

case No.308/9708/19

proceeding No.61-18782цк21

The Supreme Court by the panel of judges of the Third Judicial Chamber of the Civil Cassation Court consisting of:

presiding judge - Falovska I. M.,

judges: Ihnatenko V. M. (judge-rapporteur), Karpenko S. O., Serdiuk V. V., Strilchuk V. A.,

participants in the case:

plaintiff - PERSON_1, acting in her own interests and in the interests of minor children PERSON_2 and PERSON_3,

defendant - the Russian Federation,

in expedited proceedings, the court considered the cassation appeal of PERSON_1, acting in her own interests and in the interests of minor children PERSON_2 and PERSON_3, the judgment of the Zakarpattia Court of Appeal of September 1, 2021, by the panel of judges: Hotra T. Yu., Sobosloi H. H., Kondor R. Yu.

HAS FOUND AS FOLLOWS:

Descriptive part

Summary of claims

In August 2019, PERSON_1, acting in her own interests and in the interests of minor children PERSON_2, INFORMATION_1, PERSON_3, INFORMATION_2, filed a lawsuit against the Russian Federation (hereinafter - RF) for compensation for moral damage caused by the armed aggression of the RF against Ukraine.

The claims are based on the fact that on 11 November 2006 she married PERSON_4. Two children were born in the marriage: PERSON_2, INFORMATION_1, and PERSON_3, INFORMATION_2.

On 14 December 1994, the plaintiff's husband, PERSON_4, was called up for military service. Since June 1997 he served in the military unit A1778. Since October 2013, he was the chief sergeant of the sniper platoon of military unit A1778. In the period from May 18, 2014, he was in a crisis area, and from May 19, 2014 to August 06, 2014 he was involved in hostilities in the Donetsk and Luhansk regions related to the protection of the sovereignty of Ukraine.

INFORMATION_3 year during the execution of a combat mission PERSON_4 received an explosive injury and multiple shrapnel penetrating wounds of the torso, not compatible with life. The incident occurred in the area of Luhansk, Luhansk region, at Luhansk International Airport (Heorhiivka town, Lutuhyn district, Luhansk region) at approximately 3:10 a.m., during the shelling of Luhansk International Airport by mercenaries of the occupying authorities of the RF in the Luhansk region with the BM-21 "Hrad". As a result of the injury, the plaintiff's husband, senior warrant officer PERSON_4, died.

PERSON_1 stated that she and her children had suffered non-pecuniary damage as a result of those events. As a result of the loss of her husband and father - PERSON_4, who died as a result of the RF's military aggression against Ukraine, and given the special cynicism with which the RF violates fundamental human rights and freedoms in Ukraine, the plaintiff and her children experience continuous, unstoppable mental pain and suffering. They have lost their peace of mind and faith in the future, constantly feel insecure and frustrated, which does not allow them to communicate properly with others and maintain a normal lifestyle.

PERSON_1 believes that the direct actor, whose actions caused moral damage to the plaintiff and her children, is a foreign country - the Russian Federation, its Armed Forces, as well as military units created by it, supported, sponsored and controlled by the RF and armed with means use of which poses an extreme danger to others.

The plaintiff stated that the illegal actions of the RF violated the inalienable right of her husband, PERSON_4, to life, guaranteed by Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention), as well as the right of PERSON_1 and her children to respect family life established by Article 8 of the Convention.

The above testifies to the numerous violations by the Russian Federation of the legal rights of PERSON_1, PERSON_2 and PERSON_3, and, consequently, that such violations of the Convention are grounds for compensation for non-pecuniary damage caused to the plaintiff and her children.

Therefore, the plaintiff asked to recover from the RF in her favor and in favor of her children PERSON_2, PERSON_3 the non-pecuniary damage in the amount of 5,104,800.00 UAH, equivalent to 180,000.00 EUR at the official rate of the National Bank of Ukraine (hereinafter - NBU) as of the day of filing the lawsuit, i.e. 1,701,600.00 UAH to each, which is equivalent to 60,000.00 EUR at the official rate of the NBU.

Summary of court decisions

By the decision of the Uzhhorod City District Court of the Zakarpatia region of February 2, 2021, the claim was denied.

The decision of the court of first instance was motivated by the fact that every other sovereign state can be a defendant in the courts of the state only with its explicit or tacit consent, expressed through authorized persons. However, in this case, there is no consent of the competent authorities of the RF to bring a claim against it and involve it in the case as a defendant.

According to the ruling of the Zakarpatia Court of Appeal of September 1, 2021, it was sent to the Ministry of Justice of Ukraine to instruct the Ministry of Foreign Affairs of Ukraine to submit a request to the Russian Embassy in Ukraine for consent for the court of Ukraine to consider a civil case on the claim of PERSON_1, acting in her own interests and in the interests of minor children PERSON_2, PERSON_3, against the RF for compensation for moral damage caused as a result of the armed aggression of the RF against Ukraine; copies of the appeal and the ruling on the opening of the appeal proceedings. The court suspended the proceedings in this case until receiving the response of the competent authority of the foreign state, the Russian Embassy in Ukraine, to such an order or until a response is not received within a reasonable time from the moment of proper confirmation of receipt by this embassy of the said procedural documents.

The ruling of the court of appeal was motivated by the fact that the defendant in this case is a foreign state - the Russian Federation, which can be an independent defendant. However, there is no information that the local court sent a relevant request regarding the consent of the RF to be a defendant in this case and received a response to it, and there is also no evidence that requests were sent to the Russian embassy through the Ministry of Foreign Affairs of Ukraine. In the absence of the consent of the diplomatic mission, a foreign state may not acquire the procedural status of a defendant in civil proceedings.

Under such circumstances, the court of appeal concluded that it was necessary to send a request to the Embassy of the Russian Federation in Ukraine regarding consent or disagreement on the consideration of the said civil case by the court of Ukraine and suspended the proceedings until a response was received.

By the ruling of the Zakarpatia Court of Appeal dated January 27, 2022, the appeal proceedings in case No. 308/9708/19 were resumed; the case was scheduled for consideration on March 30, 2022 at 14:00 p.m.

The ruling of the court of appeal was motivated by the fact that a copy of the statement of claim had been handed over to the Embassy of the Russian Federation on December 16, 2021, that is, the circumstances that had caused the suspension of the case disappeared, so the proceedings in the case needed to be resumed.

Arguments of the parties

Summary of the requirements of the cassation complaint and generalization of its arguments

In the cassation appeal filed with the Supreme Court in November 2021, PERSON_1, acting in her own interests and in the interests of minor children PERSON_2 and PERSON_3, requests to cancel the ruling of the Zakarpatia Court of Appeal of September 1, 2021 and send the case for further consideration to the court of appeal, citing the incorrect application of the substantive law by the court of appeal and violation of the rules of procedural law.

The cassation appeal is motivated by the fact that the Zakarpatia Court of Appeal incorrectly applied the rules of the first part of Article 79 of the Law of Ukraine On Private International Law and its conclusions that the Russian Federation has judicial immunity in this case are erroneous.

The appellant states that today the concept of limited immunity is applied in the legislation and case law of the vast majority of the developed countries of the world, which provides for granting immunity to the state and its property only in connection with activities of a sovereign nature, refusing immunity to those activities that are not related to the execution by the state of its sovereign functions.

PERSON_1, having analyzed the decisions of the courts of Italy, Belgium, France, Austria and Germany, came to the conclusion that all those countries embraced the concept of limited immunity of the state as fundamental in modern international law.

The appellant refers to the fact that the European Court of Human Rights (hereinafter referred to as the ECtHR), considering the case of Oleynikov v. Russia, in its judgment of March 14, 2013, concluded that the UN Convention on Jurisdictional Immunities of States and Their Property of 2004 applies in accordance with customary international law even if the state concerned has not ratified the Convention in question, provided that it has not objected to it.

The Russian Federation did not ratify the Convention, but did not object to it either, it signed the Convention on December 01, 2006 (paragraph 66 of the ECtHR judgment Oleynikov v. Russia of March 14, 2013).

PERSON_1 is convinced that the Supreme Court applied the provisions of the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and Their Property when considering case No. 796/165/18, in which the Russian Federation acted as a defendant.

Paragraph 75 of the Resolution of the Supreme Court of January 25, 2019 in case No. 796/165/18 states that Ukraine has not ratified the above-mentioned international conventions, however, the concept of limited jurisdictional immunity of the state set out in them is applied in accordance with customary international law, taking into account the ECtHR judgment in the case of Oleynikov v. Russia of 14 March 2013.

Therefore, taking into account the ECtHR judgment in the case of Oleynikov v. Russia of 14 March 2013 and the Resolution of the Supreme Court of January 25, 2019, the provisions of the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and Their Property are subject to application by Ukrainian courts in accordance with customary international law.

The appellant notes that the non-public nature of the actions of the Russian Federation during the armed aggression against Ukraine, the use of its own military units and equipment without identification marks, the complete denial of the participation of Russian military personnel in hostilities on the territory of our state and other actions clearly indicate that the armed aggression of the Russian Federation against Ukraine is not an act of public authority committed for public purposes. Accordingly, the specified activity of the Russian Federation cannot be considered as having a sovereign nature and it cannot be subject to judicial immunity.

PERSON_1 also refers to the fact that the provisions of the first part of Article 79 of the Law of Ukraine On Private International Law cannot be applied to legal relations in cases of compensation for property and / or moral damage caused as a result of the armed aggression of the Russian Federation against Ukraine, since their participants and the circumstances do not meet the criteria specified in paragraph 2 of the first part of Article 1 of the Law of Ukraine On Private International Law.

The plaintiff is convinced that the exercise of her right to access to justice directly depends on the actions of the Russian Federation, which is not only disinterested in considering such a case in court, but also, due to the appealed ruling of the court of appeal, has received an unlimited opportunity to obstruct such consideration.

The appellant considers the very idea of obtaining the consent of the aggressor country to bring it to justice unacceptable.

As the grounds of the cassation appeal against the ruling of the Zakarpattia Court of Appeal dated September 01, 2021, the appellant determined violations by the court of appeal of Articles 79 and 80 of the Law of Ukraine On Private International Law, Article 32 of the Vienna Convention on Diplomatic Relations of 1961, as well as violation of Article 2 of the Civil Procedure Code of Ukraine, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

No rejoinders (replies) to the cassation appeal were received by the court of cassation.

Proceedings in the court of cassation

According to the ruling of the Supreme Court of January 21, 2022, cassation proceedings were opened and the case was requested from the court of appeal.

The said case was submitted to the Supreme Court.

Pursuant to a Supreme Court ruling of February 21, 2021, case No. 308/9708/19 was assigned to trial.

The court of cassation proceeded from the fact that there is no need to additionally notify the defendant - the Russian Federation about the opening of cassation proceedings in the case (ruling of January 21, 2022) and the appointment of the case for consideration (ruling of February 21, 2022) in connection with the commission of an armed aggression against Ukraine and the denial of the sovereignty of the Ukrainian state.

Information about these procedural decisions is published in the Unified State Register of Court Decisions, the information of which is publicly available on the Internet, and the judicial review of the case was promptly announced on the official website of the Supreme Court.

The facts of the case established by the courts

It is established that PERSON_4 died INFORMATION_3 at the age of 37, death certificate series NUMBER_1.

According to an extract from the minutes of the meeting of the Central Military Medical Commission for the Establishment of the Causal Relationship of Diseases, Wounds, Concussions, Injuries, Mutilations (minutes of August 22, 2014 No. 2404), the injury and cause of death of PERSON_4 INFORMATION_3 year are associated with the performance of military service duties.

By the decision of the Berdychiv city district court of the Zhytomyr region dated May 31, 2019 in case No. 274/1970/19, which entered into force, the legal fact of death of PERSON_4, INFORMATION_4, during the performance of military service INFORMATION_3 in the area of Heorhiivka town, Lutuhyn district, Luhansk region of Ukraine due to the armed aggression of the Russian Federation against Ukraine.

The deceased PERSON_4 was survived by his wife PERSON_1 and two minor children: PERSON_2 and PERSON_3, who were his dependents.

The reasoning

The position of the Supreme Court

Under article 3, paragraph 3, of the Civil Procedure Code of Ukraine, proceedings in civil cases are conducted in accordance with the laws in force at the time of the commission of individual procedural actions, consideration and resolution of the case.

Article 402, part 1, of the Civil Procedure Code of Ukraine provides that the appeal shall be examined by the court of cassation in accordance with the rules governing the consideration of the case by the court of first instance in expedited proceedings without notification of the parties to the case, taking into account article 400 of the Code.

Pursuant to part 2, Article 389 of the Civil Procedure Code of Ukraine, the grounds for an appeal in cassation against a judicial decision referred to in paragraphs 2 and 3 of part one of the present article include an incorrect application by a court of the rules of substantive law or a violation of the provisions of procedural law.

The Supreme Court, after examining the civil case file and following up on the arguments of the cassation appeal, found that the appeal in cassation was subject to partial satisfaction in the light of the following.

Reasons from which the Supreme Court proceeded and applicable rules of law

In accordance with Article 263 of the Civil Procedure Code of Ukraine, a judicial decision must be based on the principles of the rule of law and must be lawful and justified. A lawful decision is the one made by a court in accordance with the provisions of substantive law in compliance with the provisions of procedural law. A court decision must correspond to the task of civil proceedings defined by this Code. In selecting and applying the rule of law to disputable legal relations, the court shall take into account the conclusions on the application of the relevant rules of law set out in the judgments of the Supreme Court. A justified decision is the one made on the basis of fully and comprehensively clarified circumstances, which the parties refer to as the basis for their claims and objections, confirmed by evidence that were examined in court.

The judgment being appealed does not meet these requirements.

According to part one of Article 4 of the Civil Code of Ukraine, each person has the right, in the manner prescribed by this Code, to apply to the court for the protection of their violated, unrecognized or disputed rights, freedoms or legitimate interests.

The provisions of this article are based on the norms of the Constitution of Ukraine, which establish the obligation of the state to ensure the protection of the human and citizen rights and freedoms by court (Article 55).

According to Article 2 of the Civil Procedure Code of Ukraine, the task of civil proceedings is fair, impartial and timely consideration and resolution of civil cases in order to effectively protect violated, unrecognized or disputed rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the state.

The right to take legal action (the right to procedural protection) is guaranteed by the Constitution and the laws of Ukraine.

Article 129 of the Constitution of Ukraine enshrines the basic principles of legal proceedings, which are constitutional guarantees of the right to judicial protection.

Article 129, paragraph 8, part 1 of the Constitution of Ukraine, among the basic principles of legal proceedings, defines the provision of the right to an appeal review of a case and, in cases specified by law, a cassation appeal against a court decision.

Suspending the proceedings, the court of appeal pointed out that there was no information that the local court had sent a relevant request regarding the consent of the RF to be a defendant in this case and received a response to it, and there was also no evidence that requests had been sent to the Russian embassy through the Ministry of Foreign Affairs of Ukraine. Thus, in the absence of the consent of the diplomatic mission, an embassy may not acquire the procedural status of a defendant in civil proceedings. Therefore, the court of appeal suspended the proceedings pending a response to the court's request.

The Supreme Court does not agree with this conclusion of the court in view of the following.

In accordance with paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will decide the dispute concerning his rights and obligations of a civil nature.

The European Court of Human Rights has noted that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and criteria such as the complexity of the case, the conduct of the applicant and the relevant authorities, and the importance of the dispute to the applicant (judgments in the cases of *Pelissier and Sassi v. France*, Application No. 25444/94, and *Frydlender v. France*, Application No. 30979/96).

In accordance with Article 251, paragraph 8, part one of the Civil Procedure Code of Ukraine, the court is obliged to discontinue the proceedings in the event of filing a letter of request for the provision of legal assistance, serving a subpoena or other documents to a foreign court or other competent authority of a foreign state.

Article 79, part one, of the Law of Ukraine On Private International Law establishes judicial immunity, according to which bringing a suit against a foreign state, involving a foreign state in a case as a defendant or a third party, imposing a seizure of property owned by a foreign state and located in the territory of Ukraine, the use of other means of securing a claim and foreclosure on such property may be allowed only with the consent of the competent authorities of the relevant state, unless otherwise provided by an international treaty of Ukraine or the law of Ukraine.

As provided for by part four of Article 79 of the Law of Ukraine On Private International Law, in cases where, in violation of the norms of international law, Ukraine, its property or representatives in a foreign state are not provided with the same judicial immunity, which, according to parts one and two of this article, is provided for foreign states, their property and representatives in Ukraine, the Cabinet of Ministers of Ukraine may take appropriate measures against this state, its property, permitted by international law, unless measures of a diplomatic nature are not enough to resolve the consequences of the said violation of the norms of international law.

Thus, the Law of Ukraine On Private International Law establishes judicial immunity in respect of a foreign state in the absence of the consent of the competent authorities of the respective state to involve it in the case in the national court of another state.

At the same time, the international legal norms on the jurisdictional immunity of a state are unified in two conventions: the European Convention on State Immunities, adopted by the Council of Europe on May 16, 1972, and the UN Convention on Jurisdictional Immunities of States and Their Property, adopted by General Assembly resolution 59/38 of 2 December 2004. These Conventions embody the concept of limited state immunity, determine the form in which a state can waive immunity ("express waiver of immunity" based on an international treaty or contract, or "implied waiver of immunity" when a foreign state enters into a judicial process and files a counterclaim in the court of a foreign state), as well as fix the list of categories of cases in which the state does not enjoy immunity in the court of another state member.

Both the 1972 European Convention on State Immunities (Article 11) and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (Article 12) provide that a Contracting State may not invoke immunity from jurisdiction in proceedings before a court of another Contracting State normally competent to hear cases concerning pecuniary compensation (reparation) in the event of death or bodily injury to a person or damage to property or loss thereof as a result of acts or omissions of the state, if such act or omission has taken place in whole or in part in the territory of the forum state.

Ukraine is not a party to any of these conventions. However, the conventions reflect a trend in the development of international law regarding the recognition of certain limits within which a foreign state is entitled to claim immunity in civil proceedings.

In its judgment of 14 March 2013 in the case of *Oleynikov v. Russia*, the ECtHR held that the provisions of the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property apply "in accordance with customary international law, even if that State has not ratified it", and the court must take this fact into account when deciding whether the right of access to a court within the meaning of Article 6 paragraph 1 of the Convention (paragraph 68, paragraph 31) has been respected.

In its judgment of 23 March 2010 in the case of *Cudak v. Lithuania*, the ECtHR also recognized the existence of customary rules in matters of state immunity, the predominance of the theory of limited state immunity in international practice, but noted that the restriction must pursue a legitimate aim and be proportionate to such a goal.

Thus, it can be concluded that a state may not invoke immunity in cases involving damage to health or life, if such damage is caused in whole or in part in the territory of the forum state and if the person who caused the damage was at that time in the territory of the forum state.

The peculiarity of the legal status of the state as a subject of international relations is the existence of its immunity based on the general principle of international law "equal over equal has no power and jurisdiction". However, a necessary condition for adhering to this principle is the mutual recognition of the sovereignty of the country, so when the Russian Federation denies the sovereignty of Ukraine and commits a war of conquest against it, there are no obligations to respect and observe the sovereignty of this country.

The court of cassation notes that the Supreme Court has reviewed cases on the establishment of a fact of legal significance, in which the complainants appealed to the courts and asked to establish the fact of forced displacement after 2014 from the occupied part of the territories of the Luhansk and Donetsk regions, which occurred as a result of the armed aggression of the Russian Federation against Ukraine and the occupation of part of the territory of the Luhansk and Donetsk regions of Ukraine by the Russian Federation.

Thus, in a ruling of 21 November 2018 in case No. 2-0/381/134/16 (proceedings No. 61-3789cb18), the Supreme Court found that in November 2014, the forced relocation of PERSON_2 from the occupied part of the Luhansk region occurred as a result of the armed aggression of the Russian Federation against Ukraine and the occupation of part of the Luhansk region of Ukraine by the Russian Federation. At the same time, the Supreme Court came to the conclusion that the responsibility for violating the rights and freedoms of a person and a citizen defined by the Constitution and laws of Ukraine in the temporarily occupied territory, including part of the Luhansk region, is assigned to the Russian Federation as an occupying state in accordance with the norms and principles of international law, established in Article 5 of the Law of Ukraine On Ensuring Civil Rights and Freedoms and the Legal Regime in the Temporarily Occupied Territory of Ukraine, part four of Article 2 of the Law of Ukraine On Features of State Policy on Ensuring the State Sovereignty of Ukraine in Temporarily Occupied Territories in the Donetsk and Luhansk Regions, and confirms the fact that forced relocation in November 2014 of PERSON_2 from the occupied territory of Luhansk region occurred due to armed aggression of the Russian Federation against Ukraine and the occupation of part of the territory of Luhansk region by the Russian Federation.

Similar conclusions regarding the forced relocation of persons from the occupied territories of Luhansk and Donetsk regions due to the armed aggression of the Russian Federation against Ukraine are set out in the Supreme Court resolutions: of August 21, 2018 in case No. 752/6366/16-ц (proceedings No. 61-20978cb18), of August 21, 2018 in the case No. 428/8076/16-ц (proceedings No. 61-190cb18), of June 6, 2018 in the case No. 428/13977/16-ц (proceedings No. 61-3831cb18).

Under such circumstances, since 2014, it is a well-known fact that the Russian Federation is committing armed aggression against Ukraine.

According to the Resolution of the Verkhovna Rada of Ukraine of April 14, 2022 on the statement of the Verkhovna Rada of Ukraine On the Commission of Genocide by the Russian Federation in Ukraine, the actions of the Armed Forces, political and military leadership of Russia during the armed aggression against Ukraine which began on February 24, 2022, were recognized as genocide of the Ukrainian people, and the Chairman of the Verkhovna Rada of Ukraine was instructed to send this statement to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the OSCE Parliamentary Assembly, the NATO Parliamentary Assembly, governments and parliaments of foreign states. The Chairman of the Verkhovna Rada of Ukraine is authorized to appeal to the Prosecutor General's Office, the Ministry of Foreign Affairs of Ukraine and the Ministry of Justice of Ukraine to take urgent measures to properly document the facts of the commission by the Armed Forces of the Russian Federation and its political and military leadership of the genocide of the Ukrainian people, crimes against humanity, war crimes, and others serious crimes on the territory of Ukraine and initiating the prosecution of all perpetrators.

The Russian Federation has been performing the above actions since 2014 and continues as of the time of this decision. Thus, after the start of the war in Ukraine in 2014, the court of Ukraine, considering a case where the Russian Federation is identified as the defendant, has the right to ignore the immunity of this country and consider cases on compensation for damage caused to an individual as a result of armed aggression of the Russian Federation, on a lawsuit filed against this foreign country.

The preamble of the Law of Ukraine On Ensuring Civil Rights and Freedoms and the Legal Regime in the Temporarily Occupied Territory of Ukraine establishes that Ukraine is a sovereign and independent state in accordance with the Constitution of Ukraine. The sovereignty of Ukraine extends to all its territory which within the existing border is integral and inviolable. The stay of units of armed forces of other states on the territory of Ukraine in violation of the procedure established by the Constitution and laws of Ukraine, the Hague Conventions of 1907, IV Geneva Convention of 1949, as well as contrary to the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons of 1994, the Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 1997 and other international legal acts is the occupation of part of the sovereign state of Ukraine and an international illegal act with all the consequences provided by international law.

The preamble to the Law of Ukraine On Features of State Policy on Ensuring the State Sovereignty of Ukraine in Temporarily Occupied Territories in the Donetsk and Luhansk Regions establishes that the Verkhovna Rada of Ukraine proceeding from the fact that, in accordance with paragraphs "a", "b", "c", "d" and "g" of Article 3 of United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression) of December 14, 1974, the use of armed force by the Russian Federation against Ukraine constitutes a crime of armed aggression and grossly violates the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons of December 05, 1994, and the Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of May 31, 1997; noting that in the light of the provisions of the Fourth Hague Convention on the Laws and Customs of War on Land and its Annex: the Laws and Customs of War on Land of 18 October 1907, the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, one of the consequences of the armed aggression of the Russian Federation against Ukraine was the temporary occupation of part of Ukraine; considering that the Russian Federation is committing a crime of aggression against Ukraine and is temporarily occupying part of its territory with the help of the armed forces of the Russian Federation; Noting that the actions of the Russian Federation on the territory of certain regions of the Donetsk and Luhansk regions, the Autonomous Republic of Crimea and the city of Sevastopol blatantly violate the principles and norms of international law, in particular through: systematic non-compliance with the ceasefire and continued shelling of civilian facilities and infrastructure causing numerous civilian casualties, military personnel of the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine; is adopting this law, which is aimed at defining the features of the state policy to ensure the state sovereignty of Ukraine in the temporarily occupied territories in the Donetsk and Luhansk regions.

The Russian Federation has ceased to be a member of the Council of Europe in the context of the procedure initiated in accordance with Article 8 of the Statute of the Council of Europe. The relevant Resolution of the Council of Europe CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, was adopted by the Committee of Ministers on March 16, 2022. The Committee of Ministers of the Council of Europe stated that the aggression of the Russian Federation against Ukraine is a serious violation by the Russian Federation of its obligations under Article 3 of the Charter of the Council of Europe.

The Supreme Court took into account that in the case under review, PERSON_1 acting in her own interests and on behalf of young children filed a lawsuit against the Russian Federation for compensation for moral damage caused to her and her children in connection with the death of her husband and father of her children as a result of the armed aggression of the Russian Federation on the territory of Ukraine.

In this category of disputes (concerning compensation for damage caused to an individual, his property, health, life as a result of the armed aggression of the Russian Federation), the defendant foreign state does not enjoy judicial immunity against consideration of such court cases by the courts of Ukraine.

In such conclusions, the Supreme Court is guided by the fact that the actions of a foreign state went beyond its sovereign rights, since any foreign state does not have the right to intervene by armed aggression in another country.

Article 2, part one, paragraph 4, of the UN Charter establishes the principle according to which all members of the United Nations refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other way incompatible with the purposes of the United Nations.

According to Article 1, part one, of the UN Charter, the United Nations pursues the goal of maintaining international peace and security and, to this end, to take effective collective measures to prevent and eliminate threats to the peace and acts of aggression or other violations of the peace and to carry out by peaceful means in accordance with the principles of justice and international law, settling or resolving international disputes or situations that may lead to a breach of the peace.

International law codifies the grounds for limiting the judicial immunity of a foreign state due to physical harm to a person or damage to property, the so-called "tort exception". The conditions necessary for the application of the "tort exception" are: 1) the principle of territoriality: the place of act/omission must be in the territory of the forum state; 2) the presence of the author of the act/omission in the territory of the forum state at the time of the act/omission (of an agent or official of a foreign state); 3) act/omission can be attributed to the state; 4) liability for acts/omissions is provided for in the law of the forum state; 5) causing death, physical damage to a person, damage to or loss of property; 6) causal link between acts/omissions and death, physical damage to a person or damage to or loss of property.

In determining whether the Russian Federation is subject to judicial immunity in a case under review, the Supreme Court took into account the following:

- the subject of the claim is compensation for moral damage caused to an individual, citizens of Ukraine, as a result of the death of another citizen of Ukraine;
- the place of infliction of damage is the territory of a sovereign state - Ukraine;
- it is assumed that the damage was caused by Russian agents who violated the principles and objectives enshrined in the UN Charter on the prohibition of military aggression committed against another state - Ukraine;
- the commission of acts of armed aggression by a foreign state is not an exercise of its sovereign rights, but indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state - Ukraine, which is enshrined in the UN Charter;
- the national legislation of Ukraine is guided by the fact that, as a general rule, damage caused in Ukraine to an individual as a result of the illegal actions of any other person (entity) can be compensated by a decision of the court of Ukraine (according to the principle of general tort).

In addition, the Supreme Court took into account that the jurisdiction of the courts of Ukraine extends to any legal dispute and to any criminal charge. In cases provided by law, courts also consider other cases (part three, Article 124 of the Constitution of Ukraine). That is, the Supreme Court proceeds from the fact that in the case of a tort exception, any dispute that a citizen of Ukraine has on its territory, even with a foreign country, in particular the Russian Federation, can be considered and resolved by the court of Ukraine as a proper and competent court.

Consequently, the ruling of the court of appeal to submit to the Embassy of the Russian Federation a request for consent or opposition to the consideration by the Ukrainian court of the said civil case, a copy of the appeal and a ruling on the opening of appeal proceedings, and the suspension of proceedings pending a response from the competent authority of the foreign state - the Russian Embassy in Ukraine, or failure to provide such a response within a reasonable time from the time of proper confirmation of receipt by the Russian Embassy of the said procedural documents, are subject to cancellation, since the commission of armed aggression against Ukraine by the Russian Federation has not stopped since 2014, the Russian Federation denies the sovereignty of Ukraine, therefore there are no obligations to respect and observe the sovereignty of this country. Therefore, there is no need to send a request for consent to participate in the case to the embassy of this country and stop the proceedings pending a response from the Russian Federation or notice of service of such a request is received.

The court of cassation also draws attention to the fact that by Decree of the President of Ukraine No. 64/2022 of February 24, 2022, in connection with the military aggression of the Russian Federation against Ukraine, martial law was introduced in Ukraine from 05:30 on February 24, 2022 for a period of 30 days and Decree of the President of Ukraine No. 133/2022 of March 14, 2022 extended the period of martial law in Ukraine from 05:30 on March 26, 2022 for a period of 30 days.

In connection with the full-scale invasion of the Russian Federation into the territory of Ukraine on February 24, 2022, Ukraine severed diplomatic relations with Russia, which makes it impossible from that date to send various requests and letters to the Russian Embassy in Ukraine, given the termination of its work on the territory of Ukraine.

The Supreme Court established grounds for concluding that, starting from 2014, there is no need to send requests to the Russian Embassy in Ukraine regarding the consent of the Russian Federation to be a defendant in cases on compensation for damage in connection with the commission of armed aggression by the Russian Federation against Ukraine and its disregard for sovereignty and territorial integrity of the Ukrainian state. And since February 24, 2022, such sending is also impossible due to the termination of diplomatic relations between Ukraine and the Russian Federation.

Given that martial law has been imposed in Ukraine in connection with Russia's ongoing full-scale armed aggression against Ukraine, which has violated its sovereignty, obtaining Russia's consent to be a defendant in this case is currently inappropriate. The suspension of the proceedings would result in an unreasonable delay in the hearing of the case, which would not contribute to the best interests of the plaintiff.

The court of cassation takes into account that the court of appeal resumed the proceedings on the case, however, this does not affect the fact that the appealed ruling of the court of appeal was adopted contrary to the laws of Ukraine, including the laws of Ukraine On Ensuring Civil Rights and Freedoms and the Legal Regime in the Temporarily Occupied territory of Ukraine, On Features of State Policy on Ensuring the State Sovereignty of Ukraine in Temporarily Occupied Territories in the Donetsk and Luhansk Regions, and is subject to cancellation since complying with the procedure of notifying the aggressor country of its participation in the case and suspending the proceedings will not help to protect the rights of the plaintiff and the principle of the effectiveness of the judicial process in the face of aggression.

The Supreme Court took into account that resolving the issue of judicial immunity in this category of cases is of fundamental importance for the formation of a uniform law enforcement practice, and therefore, despite the resumption of proceedings by the court of appeal, the court of cassation is obliged to provide an assessment of the legality and validity of the appealed ruling of the court of appeal and take a decision in this case in accordance with the above principles, after making a legal opinion on the limitation of the judicial immunity of a foreign state in this category of disputes.

The Supreme Court concluded that sending a request to the Russian Embassy and suspending the proceedings did not meet the requirements of Articles 251, 252 of the Civil Procedure Code Ukraine, and the conclusion of the court of appeal that there were grounds for sending a request to the Russian Embassy and suspending the proceedings was erroneous.

The Russian Federation, having committed an unprovoked and full-scale act of armed aggression against the Ukrainian state, numerous acts of genocide of the Ukrainian people, is not entitled to further invoke its judicial immunity, thereby denying the jurisdiction of the courts of Ukraine to consider and resolve cases on compensation for damage caused by such acts to a citizen of Ukraine.

The Supreme Court proceeds from the fact that the said aggressor country did not act within the limits of its sovereign right to self-defence, on the contrary, it treacherously violated all the sovereign rights of Ukraine, acting on its territory, it is therefore clear that it will not enjoy its judicial immunity in this category of cases.

In view of the above, the ruling of the Zakarpatia Court of Appeal dated September 01, 2021 is subject to cancellation with the return of the case to the court of appeal.

Conclusions on the results of the cassation appeal consideration

According to Article 409, paragraph 2, part one, of the Civil Procedure Code of Ukraine, the court of cassation, based on the results of consideration of the cassation appeal, has the right to cancel the judgments of the courts of the first and appellate instances in whole or in part and transfer the case in whole or in part for a new trial, in particular, according to the established jurisdiction or to continue consideration.

According to part six of Article 411 of the Civil Procedure Code of Ukraine, the grounds for cancelling judgments of the court of first and appellate instances and sending the case for further consideration are a violation of the norms of substantive or procedural law that resulted in the ruling of an illegal decision of the court of first instance and (or) a decision of the court of appeal which hinder further proceedings.

Considering the foregoing, the Supreme Court came to the conclusion that the appeal in cassation be granted in part and that the judgment of the court of appeal, which was rendered in violation of the norms of substantive and procedural law, be cancelled, since there were no grounds for sending the case for further consideration, as requested by the appellant, since the decision of the court of appeal has reopened the case.

Conclusions on the application of the law provisions

The jurisdiction of the courts of Ukraine extends to any legal dispute and to any criminal charge. In cases provided by law, courts also consider other cases (part three, Article 124 of the Constitution of Ukraine).

In determining whether the Russian Federation is subject to judicial immunity in a case under review, the Supreme Court took into account the following:

- the subject of the claim is compensation for moral damage caused to individuals, citizens of Ukraine, as a result of the death of another citizen of Ukraine;
- the place of infliction of damage is the territory of a sovereign state - Ukraine;
- it is assumed that the damage was caused by Russian agents who violated the principles and objectives enshrined in the UN Charter on the prohibition of military aggression committed against another state - Ukraine;
- the commission of acts of armed aggression by a foreign state is not an exercise of its sovereign rights, but indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state - Ukraine, which is enshrined in the UN Charter;
- the national legislation of Ukraine is guided by the fact that, as a general rule, damage caused in Ukraine to an individual as a result of the illegal actions of any other person (entity) can be compensated by a decision of the court of Ukraine (according to the principle of general tort).

The Supreme Court proceeds from the fact that in the case of a tort exception, any dispute that a citizen of Ukraine has on its territory, even with a foreign country, in particular the Russian Federation, can be considered and resolved by the court of Ukraine as a proper and competent court.

Regarding court costs

According to part thirteen of Article 141 of the Civil Procedure Code of Ukraine, if the court of appeal or cassation, without remitting the case for a new trial, changes the decision or adopts a new one, this court accordingly changes the distribution of court costs.

Since, based on the results of the cassation review, the decision of the court of appeal is subject to cancellation, the Supreme Court does not distribute court costs.

Guided by Articles 400, 409, 411, 416, 419 of the CPC of Ukraine, the Supreme Court by the panel of judges of the Third Judicial Chamber of the Civil Cassation Court

HAS HELD:

To uphold the cassation appeal of PERSON_1, acting in her own interests and in the interests of minor children PERSON_2 and PERSON_3, in part.

To cancel the ruling of the Zakarpatia Court of Appeal of September 01, 2021.

The decision of the court of cassation comes into force from the moment of its adoption, is final and not subject to appeal.

29.04.22, 10:39

Presiding judge

Judges:

The Unified State Register of Court Decisions

I. M. Falovska

B. M. Ihnatenko

C. O. Karpenko

V. V. Serdiuk

V. A. Strilchuk