

The Supreme Court

## **Ruling**

By the name of Ukraine

6 August 2020

Kyiv city

Case No 522/12832/18

Court proceeding No 61-23339cB19

### **The Supreme Court in composition of judges from the Second Court Division of Cassation Civil Court:**

Zayceva A.Yu. (Presiding Judge), Burlakova S.Yu., Korotenko E.V.,

parties to the case:

**applicant** – [person 1],

**interested parties:** the Main Division of State Migration Service of Ukraine in Odesa Oblast, the Prymorsky District Department in Odesa City of the Main Division of State Migration Service of Ukraine in Odesa Oblast

had ruled in writing procedure without notifying the participants of the civil case started by the application of [person 1], interested parties: the Main Division of State Migration Service of Ukraine in Odesa Oblast, the Prymorsky District Department in Odesa City of the Main Division of State Migration Service of Ukraine in Odesa Oblast, about setting the fact of permanent residence on the territory of Ukraine

by the cassation appeal of the Main Division of State Migration Service of Ukraine in Odesa Oblast against both the decision of Prymorsky District Court of Odesa City dated 18 March 2019 and issued by the judge Naumenko A.V., and the ruling of Odesa Appeal Court dated 31 October 2019 and issued by the panel of judges: Tsyura T.V., Hirnyak L.A., Seheda S.M.,

### THE COURT FOUND:

#### **1. Descriptive Part**

##### **Brief state of applicant's claims**

In July 2018 [person 1] filed the application to the court with claim to set the fact of her permanent residence on the territory of Ukraine as of 24 August 1991.

The claim grounds on the fact that [person 1] was born on [information 2] in Odesa city. In 1977 she obtained the passport of former USSR citizen, lost it in 1997, and this is the reason why she has no documents to set her identity. The fact of residence on the territory of Ukraine is confirmed by information from the place of work, witness statements, and the setting of the fact is necessary for obtaining the passport of citizen of Ukraine.

The Main Division of State Migration Service of Ukraine in Odesa Oblast (further – Division of SMS) asks the court to refuse the satisfaction of the claims concerned, citing a

cause that [person 1] did not provide the court with evidence that she was a former USSR citizen, lives in Ukraine on legal grounds, as well as she applied to authorities of migration service with the application to confirm belonging to the citizenship of Ukraine.

### **Brief content of first instance court's decision**

Prymorsky District Court of Odesa City by the decision dated 18 March 2019 ruled in favour of the application. It set the fact of permanent residence of [person 1], [information 1], on the territory of Ukraine as of 24 August 1991.

The decision was motivated by that that applicant proved the fact of both her birth and continuous work on the territory of Ukraine from 5 September 1986 until 17 May 1993, as well as the fact of losing the document to set the identity; that is why the application is well grounded.

### **Brief content of the ruling of appeal court**

The Odesa Appeal Court by the ruling dated 31 October 2019 upheld the decision of Prymorsky District Court of Odesa City dated 18 March 2019.

The ruling of the appeal court was motivated by that that arguments of the district court are correct, grounded on existing in the case evidence, which were evaluated in the right manner. Claims in the appeal do not overrule that arguments and do not show violation of material or procedural rules. Herewith the court relied upon that that the case has evidence to prove the fact of permanent legal residence of the applicant on the territory of Ukraine as of 24 August 1991, and the claims of the appeal towards absence of the relevant evidence are having no basis behind it.

### **Brief state of cassation appeal and the argument in it**

In December 2019 the division of SMS filed to the Supreme Court the cassation appeal with claims to overrule both the decision of Prymorsky District Court of Odesa City dated 18 March 2019 and the ruling of Odesa Appeal Court dated 31 October 2019, with basis of misuse of material norms and violation of procedural norms by the courts, and the claim to issue a new decision, in which to refuse to satisfy the application.

The cassation appeal is motivated by the courts' failure to take the account to that fact that setting the fact of residence as of 1991 on the territory of Ukraine does not affect personal rights of [person 1] and in no way deals with them. Additionally it specified that issue of belonging, acquisition of and granting the citizenship of Ukraine is within the competence of it, so far setting the fact of residence of applicant directly affected its interests and need to be qualified as dispute about the right with the consequence of impossibility to rule the issue within the affirmative proceedings.

### **Progress of the case**

By the court order of the Supreme Court dated 2 March 2020 the cassation proceeding in that case was open, the materials of the case were requested from the court of first instance.

On 16 March 2020, the Supreme Court obtained the case No 522/12832/18.

### **The facts of the case**

The courts set that [person 1] was born on the territory of Ukraine on 2 February 1961 in Odesa city that is confirmed by the birth certificate issued on 31 January 2018 [No 1], reissued by Prymorsky District in Odesa City Civil Registry Department of Main Territorial Division of Justice in Odesa Oblast.

From 1977 [person 1] was registered at the address: [address 1] that is confirmed by the copy of form A, issued by district authority No 3 of Odesa City Council to whom it may concern.

On 29 June 1977 [person 1] had obtained the passport of former USSR citizen [No 2], issued by Department of Internal Affairs of Illichivsk District Administration of Odesa City that is confirmed by the copy of form No 1.

From 5 September 1986 until 17 May 1993 [person 1] worked at Odesa Direction of UkrPost Public Corporation that is confirmed by the statements of 11 April 2018 No 51-k and 11 April 2018 No 53 issued by the Odesa Direction of UkrPost Public Corporation.

It was set from the tracking card of 27 October 2017 No 8515 that [person 1] enlisted in tracking of Odesa City Center for Tracking Homeless People.

[Person 1] had lost the passport of former USSR citizen that is confirmed by the statement of Prymorsky District Department in Odesa City SMS of Ukraine in Odesa Oblast of 12 January 2018 No 5115, in which it is set that [person 1] applied with an application to issue the passport of citizen of Ukraine instead of the loosen passport of former USSR citizen.

The aim of setting the fact that are legally significant the applicant identified obtaining the passport of citizen of Ukraine.

## **2. The Motives**

### **Position of the Supreme Court**

On 8 February 2020 the Law of Ukraine of 15 January 2020 No 460-IX ‘On Revision of Commercial Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Administrative Procedural Code of Ukraine, towards improvement of procedure to hear the court cases’ came into force, part II chapter II Final and Transitional Provisions set that submitted cassation appeals against court decisions and still pending before the day that law came into force shall be heard according to the rules existing before that law came into force.

Inasmuch as the Supreme Court obtained the cassation appeal before 8 February 2020, it must be by the Supreme Court heard according to the rules of CPC of Ukraine in version existed before 8 February 2020.

According to part two of Article 389 of CPC of Ukraine a ground for filing a cassation appeal is misuse of material norms or violation of procedural norms by the court.

According to part one of Article 400 of CPC of Ukraine during the hearing the case within the cassation procedure the court shall verify within the claims set in the cassation appeal a correctness of use of the material or procedural norms by the courts of first or appeal instance, and it cannot set or/and presume the facts not set within the decision or refused by the courts, and it cannot decide the issue of proof or falsity as to one or another piece of evidence, or give preference to one piece over other piece of evidence.

The Supreme Court in composition of the panel of judges from the Second Court Division of Cassation Civil Court verified the correctness of use of the legal norms by the appeal court within the claims of cassation appeal, and ruled that cassation appeal shall be not uphold because of the following arguments.

### **The motives of the Supreme Court and the relevant rules of law**

According to Article 15 of Civil Code of Ukraine everyone is entitled to apply to the court for the protection of their violated, unrecognized or disputed rights.

According to part one of Article 293 of CPC of Ukraine an affirmative proceeding – is a type of special civil proceedings, civil cases on confirmation of the presence or absence of legal facts relevant for the protection of the rights and interests of a person or the creation of conditions of performing his\ her personal non-property or property rights, or confirmation of presence or absence non-disputed rights are considered in order of.

Para 5 part two of Article 293 of CPC of Ukraine state that the court hear within an affirmative proceedings the cases to establish the facts of legal significance.

According to part two of Article 315 of CPC of Ukraine other facts that affect the occurrence, change or termination of personal or property rights of a physical person may also be established in accordance to the court order if other procedure of its defining is not set by law.

According to paras 1, 2 of part one of Article 3 of the Law of Ukraine ‘On Citizenship of Ukraine’ the following persons shall be citizens of Ukraine: (1) all citizens of the former USSR that were permanent residents of Ukraine on the date of proclamation of its independence (August 24, 1991); (2) persons regardless of race, color, political, religious and other persuasions, sex, ethnic and social origin, property status, place of residence, language or other distinctions, which persons lived in Ukraine and were not foreign subjects on the date of enactment of the Law of Ukraine ‘On Citizenship of Ukraine ( November 13, 1991).

The Rules of Consideration Applications and Submissions Regarding Citizenship of Ukraine and Execution of Decision Taken, adopted by the Order of President of Ukraine No 215 dated 27 March 2001, with changes, state that all citizens of former USSR, who has not the stamp regarding registered place of residence within the passport of former USSR citizen in order to prove the fact of their permanent residence on the territory of Ukraine as of 13 October 1991, shall be directed to the procedure of confirmation of their belonging to the citizenship of Ukraine. In such case the court decision on establishing the fact of permanent residence of the person on the territory of Ukraine as of 24 August 1991 or 13 October 1991 is one document to prove that fact.

In view of the aforesaid the law set the establishing in court proceeding of legal facts towards occurrence, change or termination property or non-property rights, including the facts which create by itself right of a person to confirm belonging to citizenship of Ukraine.

In order of affirmative proceedings, the cases shall to be heard if: according to law such facts create judicial consequences, i.e. they affect occurrence, change or termination property or non-property rights of persons; there is no other way to establish such facts according to law; the applicant has no other possibility to renew or obtain the document lost that confirms the fact of legal value; establishing of the fact did not raise issue of

dispute about the right.

The court which heard the case before set that the aim of establishing the fact of legal value was prescribed by the applicant as obtaining the passport of citizen of Ukraine.

[Person 1] had applied an application to obtain the passport of citizen of Ukraine instead of the lost passport of former USSR citizen, but she was refused in issuance of new passport because of non-confirmation of citizenship of Ukraine; that is to certify the statement of Prymorsky District Department of MD SMS of Ukraine in Odesa Oblast No 5115 dated 12 January 2018.

The court of first instance ruled (the appeal court affirmed) correctly to satisfy the application of [person 1], inasmuch as establishing the fact of her residence on the territory of Ukraine as of 24 August 1991 has legal value for issuance of the passport of citizen of Ukraine, that is proved by the existing within the case evidence.

According to part six of Article 294 of CPC of Ukraine if the court finds during the hearings the existence of the dispute about the right to be decided in order of litigation, the court set aside the application and clarify to the parties that they have a right to file a lawsuit on common grounds.

**Belonging to the citizenship of Ukraine confirms according to the Law of Ukraine ‘On Citizenship of Ukraine’ and can be linked to the fact of permanent residence on the territory of Ukraine as of certain moment.** The applicant stated that the establishing of that fact is necessary for confirmation of citizenship of Ukraine she has obtained as well as all citizens of former USSR, which lived permanently on the territory of Ukraine as of the moment of issuance of declaration of independence of Ukraine, with an aim to obtain the passport of citizen of Ukraine. **Therefore, there is no a dispute about the right between the applicant and the interested party in that case.**

European Court of Human Rights (further – ECtHR) in the case ‘Bellet v. France’ stated that Article 6 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (further – the Convention) has the guarantees of fair justice, amongst other aspects, an access to justice. The level of access to justice set by national legislation must to be sufficient for provision of right to a fair trial according to the principle of rule of law in the democratic society. For the access to justice to be effective a person must have a clear practical opportunity to file a complaint against actions, which are violation of her/his rights.

A particularly strict interpretation by the domestic courts of a procedural rule (excessive formalism) may deprive applicants of their right of access to a court (Pérez de Rada Cavanilles v. Spain, ECtHR decision dated 28 October 1998, and Běleš and Others v. the Czech Republic, ECtHR decision dated 12 November 2002).

A formal interpretation of legal rules does not need to have a place as far as access to justice must be not only factual, but a real one (De Geouffre de la Pradelle v. France, ECtHR decision dated 16 December 1992).

In view of the aforesaid the Supreme Court ruled that the argument of cassation appeal does not refute ruling of the court of instance before, they can be merged to re-evaluation of evidence and disagreement from the side of appellant with court decisions.

Other arguments within the cassation appeal is same to the arguments within the appeal made to appeal court, they were the subject of hearings at the appeal court, which verified and disposed them in compliance with Article 367, 368 of CPC of Ukraine.

According to part 3 of the Article 401 and part 1 of the Article 410 of the Civil Procedural Code of Ukraine, which was in force as of the date of the filing of the cassation appeal, the cassation court dismisses the cassation appeal, and leaves the court decisions unchanged in cases if it recognizes that it complies with the material and procedural law norms and the grounds for its annulment are absent.

The disputable court decisions comply with the demands of the Law and the grounds for their annulment are absent.

In accordance with the Articles 400, 401, 409, 410, 416 of the Civil Procedural Code of Ukraine, the Supreme Court in composition of judges from the Second Court Division of Cassation Civil Court

**RULED:**

The cassation appeal of the Main Division of State Migration Service of Ukraine in Odesa Oblast shall be rejected.

The decisions of Prymorsky District Court of Odesa City dated 18 March 2019 and the ruling of Odesa Appeal Court dated 31 October 2019 leave unchanged.

The ruling comes into force on the date of its adoption, is final, and is not subject to appeal.

Judges: A.Yu. Zaycev, S.Yu. Burlakov, E.V. Korotenko