

## Features of appealing the acts of the President of Ukraine

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The President of Ukraine is the guarantor of state sovereignty, territorial integrity of Ukraine, observance of the Constitution of Ukraine, human and citizen rights and freedoms. However, the legality of acts issued by the President of Ukraine has recently become quite often subject of judicial review by administrative courts. In this regard, the issue of the effectiveness of judicial protection against unlawful acts, acts or inactivity of the President of Ukraine has not only theoretical but also practical interest for many scientists and practicing lawyers. In accordance with Art.21, 22 of the Law of Ukraine "On the Judiciary and the Status of Judges", local administrative courts are the courts of first instance, administering justice in the manner prescribed by the procedural law, review administrative cases and the procedure for examining certain categories of cases and the jurisdiction of local courts are determined by law<sup>2</sup>.

In accordance with Art.20 of the Code of Administrative Proceedings of Ukraine (here in after - CAP of Ukraine) local administrative courts as first-instance courts are: local general courts as administrative courts, district administrative courts, appellate administrative courts, and the Supreme Administrative Court of Ukraine (here in after - SACU)<sup>3</sup>. At the same time, the peculiarities of determining the jurisdiction of an administrative dispute over its subject matter lie in the fact that it covers not only the subject matter, but also the category of the case, for which at the time of application to the administrative court it is necessary to establish three key components: the subject matter of the dispute; legal status of one of the parties to the dispute (or a local government or state

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<sup>2</sup> The Law of Ukraine "On the Judiciary and the Status of Judges" [Electronic resource]: <http://zakon2.rada.gov.ua/laws/show/1402-19/>.

<sup>3</sup> The Code of Administrative Admittance of Ukraine [Electronic resource]: <http://zakon2.rada.gov.ua/laws/show/2747-15>.

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authority or people's deputy of Ukraine or the President of Ukraine and other state bodies or their officials); and also which administrative court is competent to consider the dispute (the district administrative court or the local general court or the administrative court of appeal or the SACU) (article 18 of the CAP of Ukraine).

It should be noted that a number of administrative cases of a particular category are being resolved and are considered exclusively in the SACU, as in the administrative court of first instance. For example, cases of appealing against acts, actions (inaction) of the President of Ukraine, the specifics of the production of which are defined in Art.171-1 CAP of Ukraine<sup>4</sup>. Bevzenko V.V. notes that the President of Ukraine is characterized by a uniform form of participation in administrative proceedings - as a defendant<sup>5</sup>. At the same time, the powers of the President of Ukraine provided by Art. 106 of the Constitution of Ukraine - there are more than 30. Thus, on the basis and in compliance with the Constitution and laws of Ukraine, the President of Ukraine issues decrees and orders that are binding on the territory of Ukraine<sup>6</sup>. However, under the previous version of art.171-1 CAP of Ukraine, which defined the rules of procedure for cases involving the President, there were no restrictions, the right to appeal against a normative legal act is with those persons for whom it was applied, as well as persons who are subjects of legal relations. Theoretically, any person who believed that somehow the illegal presidential decree violates his rights and interests (for example, when appointing another person as a result of the competition) had the right to appeal against the act of the President of Ukraine if he considered that he had been adopted in violation of the principle of legality. In practice, the Supreme Court of Ukraine (here in after - the SCU) applied such cases to the norm of Art. 171 CAP of Ukraine, which had nothing to do with this, but allowed "to flog" the citizen-plaintiff without ensuring the consideration of the case on the merits. In judicial practice, there are cases when individuals challenge regulations that, in their opinion, do not correspond to the current legislative acts. If the issue does not concern the constitutionality of the disputed document, such disputes are legally subject to review by way of administrative proceedings. However, it happens that the administrative court, when considering disputes over the legality of the decrees of the President of Ukraine, refuses to open proceedings, citing the fact that consideration of such disputes belongs to the powers of the Constitutional Court, and not to the administrative court<sup>7</sup>.

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<sup>4</sup> The Code of Administrative Admittance of Ukraine [Electronic resource]:

<http://zakon2.rada.gov.ua/laws/show/2747-15>.

<sup>5</sup> Bevzenko V.M. Subjects of authority in administrative court of Ukraine: dissertation. Dr. Lawr. Sciences: 12.00.07 Administrative Law and Process; finance law; information law / VM Bevzenko. - Kharkov; 2010. - 35 p. (p. 18).

<sup>6</sup> The Constitution of Ukraine [Electronic resource]: <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

<sup>7</sup> As the adoption of new procedural codes strengthens the authority of the President [Electronic resource]:

[https://lb.ua/blog/victor\\_neganov/371805\\_yak\\_priynyattya\\_novih\\_protseualnih.html](https://lb.ua/blog/victor_neganov/371805_yak_priynyattya_novih_protseualnih.html).

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An interesting case No. 21-403a16 of 26.04.2016 considered the SCU, and in its decision noted that the decision of the SACU, which denied the opening of proceedings in the case, is not based on the correct application of the rules of substantive and procedural law. Therefore, this decision is subject to cancellation with the transfer of the case back to the SACU to resolve the issue of acceptance of the claim by the court, because taking the decision, the SACU proceeded from the fact that the claim is not subject to review by way of administrative proceedings, as the content of the claim refers to the unconstitutionality of the appealed Decree, assessment for compliance with the Constitution refers to the powers of the Constitutional Court of Ukraine<sup>8</sup>. At the same time, the possibilities of appealing the acts of the President of Ukraine are also limited territorially. In particular, the acts, acts and inaction of the President of Ukraine can be appealed only to the SACU, as in the first instance court in this category of case, and not in the relevant district administrative court or at the local council in the nearest territorial administrative court of appeal. This is not very good, because SACU is territorially located in Kiev, and therefore, to participate in court hearings on such cases, citizens are forced to travel exclusively to the capital. The question of whether there can be talk about the physical accessibility of administrative proceedings for people geographically remote from the capital is actually unresolved. In addition, according to the Unified State Register of Judicial Decisions, it follows that the SACA has already opened proceedings on approximately 2,000 administrative claims by citizens regarding appeals against acts, actions or inactivity of the President of Ukraine, however, no claims have been satisfied. Moreover, not a single decision taken on this issue has even been changed by the SACU towards satisfying the claims of the plaintiff (or plaintiffs) after it was abolished in the SCU as in the court of cassation instance<sup>9</sup>.

The fact of non-observance of the principles of independence and impartiality of the court in the case of appeal against the decree of the President of Ukraine was also of interest. It was confirmed by the decision of the European Court of Human Rights on January 19, 2017 in the case of "Kulikov and Others vs. Ukraine". So the decision established that the applicants had exhausted possible national remedies, since they had failed to appeal their release to the SACU or other courts in vain. At the same time, the applicants complained to the European Court of Human Rights on Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (here in after referred to as the Convention) that the proceedings with respect to their release from judicial posts of national courts were unfair and contrary to the principle of an independent and impartial tribunal. Decision of the court: Regarding the applicants complaints under Article 6 § 1 of the Convention that the national authorities that examined the applicants cases were not independent and impartial. In the case of "Alexander Volkov", the court found that the proceedings in the Supreme Council of Justice and the Verkhovna Rada of Ukraine were characterized by a large number of systemic and general shortcomings that cast doubt on the principles of independence and impartiality, and a

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<sup>8</sup> Practice of the Supreme Court of Ukraine: Case on the Lawfulness of the Presidential Decree [Electronic resource]: <http://sud.ua/ru/news/publication/91375-praktika-vsy-delo-o-zakonnosti-ykaza-prezidenta>.

<sup>9</sup> The only state register of court decisions [Electronic resource]: <http://www.reyestr.court.gov.ua>.  
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further review of the case by a court than there was a violation of Article 6 § 1 of the Convention concerning all applicants about non-observance of principles of independence and impartiality of court ".<sup>10</sup>

In addition, the Decree of the President of Ukraine from 11 December 2009 No. 1040/2009 "On the creation of the national nature park "Seversko-Donetskiy", which was appealed by the Kremen district council of Lugansk region and the Decree of the SACU of 21.10.2010 No. P-155 /10 in accordance with Part 3 of Art.112 CAP of Ukraine is recognized as illegal. Note that the basis for the recognition of this decree of the President was a statement of October 20, 2010, which was received directly from the Administration of the President of Ukraine, in which the defendant himself (the President of Ukraine) requests acceptance of the administrative claim. In this regard, considering that the actions of the defendant to recognize the administrative suit are not contrary to the law and do not violate anybody's rights, freedoms or interests, the panel of judges came to the conclusion that it is possible for the respondent to accept the administrative claim<sup>11</sup>.

For comparison, the procedure and peculiarities of appealing the acts of the President of the country in the system of administrative legal proceedings of other countries draws special attention to the experience of the organization and activities of administrative courts in Germany, as a state close to Ukraine in geographical and legal terms, and also as a member of the European Union to which it gravitates Ukraine. It should also be noted that, both in Ukraine and in Germany, the president of the country performs the functions of the head of state with a parliamentary form of government, formally approves or confirms the political (state) decisions of parliament or government. So, in accordance with Art.45, 47 of the Administrative Procedure Code of Germany it is determined that any natural or legal person who claims to be violated or will be violated in the future by legislation or any authority may submit an application to the appropriate administrative court of first instance within one year after the publication of the legal act. At the same time, the system of German administrative courts is made up of the Federal Administrative Court (the Court of Cassation), the Higher Administrative Court (the Court of Appeal) and the administrative courts of the federal states<sup>12</sup>. At the same time, in Germany, the Federal President is only the executor of decisions taken by other authorities. More serious political powers the Federal President has only in exceptional cases. First of all, he performs representative functions - he represents the country in the international arena and accredits diplomatic representatives. In addition, he has the right to pardon prisoners. In this regard, the decisions and actions of the Federal President rarely touch or violate the rights, freedoms or interests of German citizens, and therefore are rarely subject to judicial

<sup>10</sup> Judgment of the European Court of Human Rights in the case of "Kulikov against Ukraine" [Electronic resource]: [http://zib.com.ua/files/Kulykov\\_prot\\_y\\_ukrainy.pdf](http://zib.com.ua/files/Kulykov_prot_y_ukrainy.pdf).

<sup>11</sup> 9. Decree of the President of Ukraine No. 1040/2009 dated December 11, 2009 "On the establishment of the national natural park "Siversky-Donetsk "[Electronic resource]: [http://zakon2.rada.gov.ua/laws/show/v155\\_760-10](http://zakon2.rada.gov.ua/laws/show/v155_760-10).

<sup>12</sup> Administrative Code of Germany [Electronic resource]: <http://dejure.org/gesetze/VwGO>.

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review<sup>13</sup>. At the same time, the decision of the Second Senate of the Federal Constitutional Court of February 16, 1983 - 2 BvE 1/8, found the Federal President's decision to dissolve Parliament illegitimate, since the latter had no opportunity to verify whether the liquidation of the Bundestag would be politically acceptable or inappropriate, and therefore there are no legal requirements to the procedure for making such a decision, and therefore the Federal President should refuse to dissolve the Bundestag<sup>14</sup>.

Thus, assessing the results and peculiarities of appealing against the acts of the President of Ukraine, it should be noted that in spite of the fact that this type of case is decided solely in the SACU, which is territorially removed by many Ukrainian citizens, the amount of administrative and public disputes is very significant. In addition, at the domestic level, administrative suits against the acts of the President of Ukraine, as a rule, SACU does not satisfy or even refuse to open procedure on them, and their decisions on the merits can be obtained at the level of the European Court of Human Rights. But in Germany, despite the fact that the acts of the Federal President can be appealed in any administrative court of the federal lands, legal disputes of this category are not common and recognition of their illegality, if any, can be obtained inside the country.

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<sup>13</sup> Official website of the Federal President of Germany [Electronic resource]:<http://www.bundespraesident.de/DE/Amt-und-Aufgaben/Wirken-im-Inland/Reden-und-Ansprachen/reden-und-ansprachen-node.html>.

<sup>14</sup> Official website of the Federal Constitutional Court of Germany [Electronic resource]:  
[http://www.bundesverfassungsgericht.de/entscheidungen/es19830216\\_2bve000183.html](http://www.bundesverfassungsgericht.de/entscheidungen/es19830216_2bve000183.html).