



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MERKULOVA v. UKRAINE

(Application no. 21454/04)

*This version was rectified on 8 June 2011
under Rule 81 of the Rules of Court.*

JUDGMENT

STRASBOURG

3 March 2011

FINAL

03/06/2011

*This judgment has become final under Article 44 § 2 of the Convention. It
may be subject to editorial revision.*

In the case of Merkulova v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,

Karel Jungwiert,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 8 February 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21454/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Ms Nataliya Volodymyrivna Merkulova (“the applicant”), on 4 June 2004.

2. The applicant was represented by Mr S. Kyrychenko¹, a lawyer practising in Kherson. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that the criminal investigation of the circumstances leading to her son's premature death had been ineffective and that the relevant proceedings, in which she had been a civil party, had lasted an unreasonably long time.

4. On 21 October 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Dudarkiv.

1. Rectified on 8 June 2011: the text was “Mr S. Kirpichenko”.

6. On 30 April 1997 Oleksandr Lanetskyy, the applicant's son, was beaten up by A.Y., an acquaintance. The next day he felt ill and was admitted to hospital for in-patient treatment. On 14 May 1997, after several operations, Oleksandr Lanetskyy died in hospital.

7. On 15 May 1997 the Bilozerskyy District Prosecutor's Office instituted criminal proceedings against A.Y. for inflicting grievous bodily harm on Oleksandr Lanetskyy. On the same day the applicant was granted leave to join the proceedings as an injured party.

8. On 19 May 1997 A.Y. was placed under an obligation not to abscond.

9. On 20 May 1997 a medical expert gave an assessment, according to which Oleksandr Lanetskyy's death was a direct effect of the injuries inflicted on him by A.Y.

10. On 16 October 1997 another forensic assessment was carried out by a panel of experts, which confirmed the direct link between the injuries and Oleksandr Lanetskyy's eventual death.

11. On 27 October 1997 the applicant's civil claim was accepted for examination by the court.

12. Between May and November 1997 the investigative authorities carried out numerous interviews of witnesses, two reconstructions of the crime scene and other measures. On 17 November 1997 the case was referred to court for trial.

13. On 20 March 1998 the Nova Kakhovka Town Court referred the case back for additional investigation on account of numerous procedural shortcomings in the investigation.

14. On an unspecified date A.Y. went into hiding and on 16 April 1998 he was placed on the wanted list.

15. On several occasions the applicant complained to various authorities about omissions by the police during their inquiries into A.Y.'s whereabouts, in particular their failure to react promptly when she had notified them of his probable home visits.

16. Following A.Y.'s disappearance the criminal proceedings against him were suspended. However, on several occasions they were reopened in order to carry out certain investigative measures, such as the examination of additional witnesses.

17. On 27 August 2000 and 20 November 2001 the General Prosecutor's Office acknowledged that the police had failed to take all the necessary steps to trace A.Y.

18. On 16 October 2002 the failings of the police were further acknowledged by the Kherson Department of the Ministry of the Interior, which decided to transfer responsibility for the investigation to the Kherson Regional Police and advised them of additional measures to be taken to establish A.Y.'s whereabouts.

19. In May 2003 the applicant instituted civil proceedings against the Kherson Regional Police and the State Treasury, seeking damages on

account of the police's omissions in investigating the case against A.Y. Her claims were rejected by the courts at three levels of jurisdiction, the final decision being taken on 5 October 2005 by the Supreme Court of Ukraine.

20. In the meantime, on 19 June 2003 A.Y. was arrested in the Magadan Region of the Russian Federation and detained pending extradition to Ukraine.

21. On 6 October 2003 the Magadan Regional Court released A.Y. following the expiry of the time-limit established by the provisions of a relevant bilateral treaty concerning extradition for preparation of the necessary paperwork.

22. On 17 November 2003 the General Prosecutor's Office of the Russian Federation consented to the extradition of A.Y.

23. On 8 June 2004 A.Y. was arrested in Samara (Russian Federation).

24. In August 2004 A.Y. was extradited to Ukraine.

25. On 10 November 2004 the case was sent for trial in the Komsomolsky District Court of Kherson.

26. On several occasions in 2005 the court ordered the appearance of witnesses G., S. and R., and instructed the local police to ensure their appearance. On 4 May 2005 the court addressed a letter to the Ministry of the Interior, noting that its instructions had repeatedly not been fulfilled and requesting the Ministry's intervention to ensure the taking of the necessary measures to establish the witnesses' whereabouts and summon them for the hearings.

27. In August 2005 the court ordered a new forensic assessment of the causes of Oleksandr Lanetsky's death, finding that the previous assessments had lacked some important details.

28. On 30 November 2005 the new panel of experts concluded that there was no direct causal link between the applicant's son's injuries and his death. Instead, the injuries caused by A.Y. were of intermediate gravity and had not been life-endangering at the time they had been inflicted. Oleksandr Lanetsky's eventual death had resulted from post-surgery intussusceptions and inflammatory processes.

29. On an unspecified date in April 2006 the Komsomolsky District Court issued a separate ruling (*окрема ухвала*) to the Komsomolsky District Prosecutor, noting that the latter's representative had come to the hearing of 28 April 2006 unprepared for the deliberations, thus making it necessary to adjourn the hearing. The court requested the prosecutor to take measures to prevent such incidents in the future.

30. On 3 May 2006 the Komsomolsky District Court convicted A.Y. of inflicting grievous bodily harm on the applicant's son, resulting in his death. It noted that the conclusion of the last forensic expert assessment concerning the lack of a direct link between the injuries and the death contradicted other evidence in the case file and should therefore be

disregarded in this part. The court further sentenced A.Y. to seven years' imprisonment and partly allowed the applicant's civil claim against him.

31. On 1 September 2006 the Kherson Regional Court of Appeal modified that judgment. It found that the final medical expert assessment should take precedence and that there was no direct causal link between A.Y.'s actions and Oleksandr Lanetsky's death in hospital after several operations two weeks after the incident. The court reclassified A.Y.'s actions as inflicting moderate bodily harm and sentenced him to almost two and a half years' imprisonment². It further remitted the applicant's civil claim to the trial court for fresh consideration.

32. On 27 November 2007 the Supreme Court of Ukraine quashed the decision of 1 September 2006, finding that the Court of Appeal had re-evaluated the facts without having explored them at a hearing, and remitted the case to that court for a fresh examination on appeal.

33. On 4 April 2008 the Kherson Regional Court of Appeal sentenced A.Y. to almost two and a half years' imprisonment³ and remitted the civil claim to the trial court for fresh consideration.

34. On 26 May 2009 the Supreme Court quashed that decision and remitted the case for a fresh appellate review. It noted, in particular, that the Court of Appeal had not duly complied with its previous instructions and had failed to substantiate its preference for the 2005 forensic expert assessment over other evidence in the case file.

35. On 4 August 2009 the Kherson Regional Court of Appeal quashed the sentence of 3 May 2006 and remitted the case to the first-instance court for fresh consideration. It found, in particular, that the first-instance court had failed to substantiate its preference for the 1997 forensic expert assessment over the one conducted in 2005.

36. On 29 March 2010 the Komsomolsky District Court convicted A.Y. of having inflicted grievous bodily harm on the applicant's son and sentenced him to seven years' imprisonment. It further awarded the applicant 3,534.50 Ukrainian hryvnias (UAH) in respect of pecuniary damage and UAH 50,000 in respect of non-pecuniary damage.

37. On 13 July 2010 the Kherson Regional Court of Appeal upheld that judgment.

38. The parties have not informed the Court whether the Court of Appeal's judgment has become final or whether a cassation appeal has been lodged against it.

2. Rectified on 8 June 2011: "two and a half years' imprisonment" replaced with "almost two and a half years' imprisonment".

3. *Id.*

II. RELEVANT DOMESTIC LAW

39. The relevant provisions of the Constitution and the Code of Criminal Procedure can be found in the judgment in the case of *Sergey Shevchenko v. Ukraine* (no. 32478/02, §§ 36-39, 4 April 2006).

THE LAW

I. COMPLAINT ABOUT THE ALLEGED INEFFECTIVENESS AND THE LENGTH OF THE INVESTIGATION INTO OLEKSANDR LANETSKYY'S DEATH

40. The applicant complained that the authorities had lacked diligence in investigating the circumstances of Oleksandr Lanetskyy's death, and that as a consequence the investigation had been ineffective and the criminal proceedings against A.Y. had lasted an unreasonably long time. She relied on Article 6 § 1 and Article 13 of the Convention, which read as follows, in so far as relevant:

Article 6 § 1

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

41. The Court, which is master of the characterisation to be given in law to the facts of the case (see, as a recent authority, *Castravet v. Moldova*, no. 23393/05, § 23, 13 March 2007), finds that the complaint about ineffective investigation of Oleksandr Lanetskyy's death also falls to be examined under the procedural limb of Article 2 of the Convention, the relevant part of which reads as follows:

Article 2

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law ...”

A. Admissibility

42. The Government submitted that the complaint that the investigation had been ineffective was inadmissible *ratione personae*, as the person at fault for Oleksandr Lanetskyy's lethal injuries had been identified and convicted. The applicant could therefore no longer claim to be a victim of the violations complained about. They also submitted that Article 6 § 1 of the Convention was inapplicable to the proceedings at issue in its criminal limb, as the proceedings had not concerned the determination of a criminal charge against the applicant.

43. The applicant maintained that notwithstanding the immediate identification of A. Y. as the person at fault for her son's injuries, the authorities had not been able to secure his conviction and punishment for a period exceeding ten years. It was only on account of her active involvement in the proceedings and numerous complaints about their ineffectiveness that some measures had eventually been taken.

44. As regards the Government's objection concerning the applicant's victim status, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Gäffen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010-...). The Court notes that in the present case the investigation into the circumstances of Oleksandr Lanetskyy's death has lasted some thirteen years and it is unclear whether the criminal proceedings against A.Y. have come to an end. No pronouncement at national level has ever been made concerning the sufficiency of the measures taken in the course of the investigation into Oleksandr Lanetskyy's death for discharging the State's Convention duty under Article 2. The applicant thus cannot be said to have lost her victim status in respect of this complaint, irrespective of A.Y.'s conviction (see, *mutatis mutandis*, *Şandru and Others v. Romania*, no. 22465/03, §§ 62-64, 8 December 2009). The Government's objection must therefore be dismissed.

45. As regards the applicability of Article 6 § 1 of the Convention, the Court agrees with the Government that this provision is not applicable to the present case under its criminal head. On the other hand, it reiterates that the applicant acted as a civil claimant in the criminal proceedings against A.Y. Those proceedings therefore concerned the determination of her civil rights. On numerous occasions the Court has found Article 6 to be applicable to civil-party claims in criminal proceedings and has examined relevant complaints on the merits (see, for example, *Perez v. France* [GC], no. 47287/99, §§ 73-75, ECHR 2004-I; and *mutatis mutandis*, *Baglay v. Ukraine*, no. 22431/02, §§ 9 and 25, 8 November 2005, and

Sergey Shevchenko, cited above, § 79). The Court does not find any reason to depart from its case-law on the subject in the present case.

46. The Court finds that the applicant's complaints about the alleged ineffectiveness of the investigation into Oleksandr Lanetsky's death and the length of the criminal proceedings against A.Y. are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

47. The applicant alleged that the investigation of her son's death had been ineffective, as it had been marked by prohibitive delays and a lack of diligence on the part of the authorities in collecting evidence and securing A.Y.'s conviction. She submitted, in particular, that during the pre-trial investigation the authorities had not collected all the necessary evidence; that they had been at fault for A.Y.'s escape, as they had refused to arrest him and place him in custody; that during the time when he was in hiding, they had not taken all the necessary measures to establish his whereabouts, and had refused to react to her notifications that he had arrived home for a visit; and that the judicial proceedings had been marked by numerous unnecessary delays and periods of inactivity.

48. The Government objected to this view. They noted that the offender had been promptly identified and that numerous investigative measures had been taken to collect the evidence, including an examination of the site of the incident, two reconstructions of the crime scene, several forensic expert assessments and over forty witness interviews. The Government also pointed out that essential evidence had been collected within the first few months following the incident and that a major delay had been due to A.Y.'s hiding in Russia for some six years, for which the national authorities could bear no liability. Finally, they noted that notwithstanding this delay, A.Y. had eventually been brought to justice, having been sentenced to a prison term and ordered to pay damages to the applicant. In the light of all the above and in particular A.Y.'s conviction, the investigation could not be considered ineffective for Article 2 purposes.

49. The Court reiterates that Article 2 of the Convention requires by implication that there should be some form of effective official investigation when individuals have died as a result of the use of force (see, *mutatis mutandis*, *Kaya v. Turkey*, 19 February 1998, § 86, *Reports of Judgments and Decisions* 1998-I). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life. This is not an obligation of result, but of means. The authorities must have taken all reasonable steps to secure the evidence concerning the incident (see *Gongadze v. Ukraine*, no. 34056/02, § 176, ECHR 2005-XI).

50. The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory; above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays (see *Šilih v. Slovenia* [GC], no. 71463/01, § 195, ECHR 2009-...). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force or a disappearance may generally be regarded as essential in ensuring public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, as a recent authority, *Dudnyk v. Ukraine*, no. 17985/04, § 33, 10 December 2009).

51. In line with the above, while identification and punishment of those responsible for the death and the availability of compensatory remedies to the applicant are important criteria in the assessment of whether or not the State has discharged its Article 2 obligation (see, among other authorities, *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007, and *Fedina v. Ukraine*, no. 17185/02, §§ 66-67, 2 September 2010), in a number of recent cases before the Court the finding of a violation was largely based on the existence of unreasonable delays and a lack of diligence on the authorities' part in conducting the proceedings, regardless of their final outcome (see, for example, *Šilih*, cited above, § 211, 9 April 2009; *Şandru and Others*, cited above, §§ 73 and 77-80; *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 70, 28 July 2009; *Agache and Others v. Romania*, no. 2712/02, §§ 79-84, 20 October 2009; and *Mojsiejew v. Poland*, no. 11818/02, §§ 57-58, 24 March 2009).

52. Turning to the facts of the present case, the Court notes that the authorities have taken a number of measures aimed at discharging their positive obligation under Article 2 of the Convention. In particular, within two weeks of Oleksandr Lanetsky's beating and one day of his death criminal proceedings were instituted to examine the relevant circumstances. The person who was responsible for the beating was promptly identified, and a number of steps to collect the evidence (including interviews of witnesses and forensic assessments) were taken within the first few months following the incident. The Court further notes that the perpetrator was eventually committed for trial, convicted and sentenced to a term of imprisonment. The applicant was also awarded damages.

53. At the same time the Court observes that Oleksandr Lanetsky was injured in April 1997 and died in May 1997, whereas the last decision concerning A. Y.'s punishment was taken in July 2010. It is not clear from the case file whether that decision has become final or whether a cassation appeal has been lodged against it. In any event, it has taken the authorities at least thirteen years to prosecute and punish the offender. Out of this time,

the period starting from 11 September 1997 falls within the Court's jurisdiction *ratione temporis*.

54. Examining to what extent this period may be justified by objective circumstances, the Court finds that it can be analysed in terms of three main sub-periods: the active phases of the pre-trial investigation, during which A.Y. was available; the period during which A.Y. was in hiding; and the judicial proceedings.

55. Firstly, as regards the active investigation period, it lasted less than one year in total (May to November 1997 and August to November 2004). While this period included no serious delays, the Court cannot reach the same conclusion with regard to the diligence of the authorities in the collection of evidence. It observes, in the first place, that after the case had initially been sent for trial, the Nova Kakhovka Town Court found in March 1998 that the procedural shortcomings were such that an additional investigation was warranted (see paragraph 13 above).

56. The Court also notes that, regard being had to the subsequent focus of the judicial proceedings and the disagreements between various panels of judges concerning the cause of Oleksandr Lanetskyy's death, the investigative authorities do not appear to have collected exhaustive evidence on the matter (in particular, they did not explore and reject the theory of medical negligence). On the basis of the available evidence, the Court cannot rule out the possibility that insufficient diligence in the initial collection of evidence led to subsequent delays during the judicial phase.

57. Secondly, a major delay in the proceedings resulted from A.Y.'s disappearance for a period exceeding six years (April 1998 to August 2004). While the applicant blamed the Government for failing to prevent his absconding, her arguments were limited to the allegation that A.Y. should have been placed in custody pending trial. She did not submit any evidence that the Government had failed to take reasonable measures in the face of a foreseeable risk that A.Y. would decide to abscond. The Court is therefore not convinced that the Government were responsible for A.Y.'s escape and thus for the entire six-year delay in his trial and conviction.

58. On the other hand, the Court cannot accept the Government's view that the period at issue should be entirely excluded from consideration. The Court notes, on the one hand, that a number of investigative measures (such as questioning witnesses or preparing forensic assessments) clearly did not require A.Y.'s presence and that some such measures did in fact take place during that time (see paragraph 16 above). At the same time the Court notes that the Government have not produced any evidence that the prosecutor's office had put in place a reasonable action plan for the establishment of A.Y.'s whereabouts in good time. On the contrary, on several occasions the authorities themselves acknowledged that the relevant measures had been lacking (see paragraphs 17-18 above). The Court considers, therefore, that A.Y.'s disappearance alone cannot justify the six-year delay in his trial.

59. Thirdly, as regards the judicial proceedings, the Court notes that they have lasted from November 2004 until at least July 2010, that is, five years and eight months. This period was marked by repeated referrals of the case for reconsideration between the courts at three levels of jurisdiction. During the last round of proceedings, however, the decisions were given by two levels of courts only. While the matter before the courts was of a certain complexity, in particular on account of contradictory evidence as regards the direct cause of Oleksandr Lanetskyy's death, the Court finds that the judicial examination featured certain delays, which cannot be explained by this complexity.

60. In particular, it observes that the initial consideration of the case by the trial court was delayed in view of several failures of the law-enforcement authorities to secure the appearance of important witnesses (see paragraph 26 above) and to prepare for judicial deliberations (see paragraph 29 above); that the cassation review proceedings were marked by some two years of inactivity on the Supreme Court's part (see paragraphs 32-34 above); and that the case was remitted for reconsideration several times on account of the lower courts' failures to provide sufficient justification for their conclusions (see paragraphs 32, 34 and 35 above). In the light of the above, the Court cannot conclude that A.Y.'s trial was conducted with the promptness and diligence required to comply with the State's positive obligation under Article 2.

61. Regard being had to all the above, in particular the lack of a comprehensive approach to the collection of evidence during the pre-trial investigation phase, the insufficient activity of the authorities in establishing A.Y.'s whereabouts during his six years in hiding and various delays and remittals in the judicial proceedings against him, the Court considers that a nearly thirteen-year delay in securing his conviction was incompatible with the State's obligation under Article 2 of the Convention to carry out an effective investigation of suspicious deaths.

62. There has therefore been a violation of the procedural limb of Article 2 of the Convention in the present case.

63. Having regard to the particular circumstances of the present case and to the reasoning which led it to find a violation of Article 2 in its procedural limb, the Court considers that it is not necessary also to examine the case under Article 6 § 1 (see *Šilih*, cited above, § 216) and Article 13 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

64. The applicant also complained under Article 3 of the Convention that the suffering she had experienced on account of the omissions by the authorities and the delays in the proceedings amounted to inhuman and

degrading treatment, and invoked Articles 10 and 14 of the Convention in relation to the facts of the present case.

65. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

66. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

68. The applicant claimed 3,000,000 Ukrainian hryvnias (UAH) in respect of non-pecuniary damage.

69. The Government submitted that this claim was exorbitant and unsubstantiated.

70. The Court considers that the applicant suffered anguish and distress on account of the events leading to the finding of the violation in the present case. Ruling on an equitable basis, it awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

72. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the ineffective investigation of Oleksandr Lanetsky's death admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of the procedural limb of Article 2 of the Convention;
3. *Holds* that there is no need to examine the complaints under Article 6 § 1 and Article 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of Ukraine at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President