



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

FIFTH SECTION

CASE OF ANTONOV v. UKRAINE

(Application no. 28096/04)

JUDGMENT

STRASBOURG

3 November 2011

FINAL

03/02/2012

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

In the case of Antonov v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power-Forde,

Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 11 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 28096/04) 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, Mr Viktor Timofeyevich Antonov (“the applicant”), on 13 July 2004.

2. The applicant was represented by Mr D.V. Antonov, a lawyer practising in Donetsk, and Mr V.V. Skyba of the Centre for Democracy and Freedom, Donetsk. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that the State authorities had failed to take all reasonable measures to establish the circumstances of his son’s accidental death.

4. On 22 June 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 1940 and lives in Kirove, Dzerzhynsk.

6. On 3 March 1998 Igor Antonov, the applicant's adult son was hitchhiking on an intercity motorway and was hit by a car being driven by V.L. Soon after the accident Igor Antonov died in the hospital.

A. Official investigation of the death of the applicant's son

7. On 3 March 1998 (the date of the accident) a Krynychansky Road Police expert examined the accident site and drew up an accident report.

8. On 9 March 1998 an expert facility of the Krynychansky Road Police concluded, on the basis of the accident report, that the driver had not been able to avoid the collision in view of the sudden appearance of the victim on the road.

9. On 14 March 1998 the Krynychansky Road Police produced a one-page statement refusing to initiate criminal proceedings against the car driver, referring to the findings by the expert facility.

10. On 8 July 1998 the Pyatykhatsky District Prosecutors' Office revoked this decision and initiated criminal proceedings in respect of the accident. The case was transferred to the Pyatykhatsky Police Department and subsequently to the Dnipropetrovsk Regional Police Department.

11. On 7 August 1998 a post-mortem examination of Igor Antonov was conducted.

12. On 10 August 1998 the applicant was admitted to the proceedings as an injured party.

13. On 28 August 1998 an expert assessment was carried out on the vehicle which had hit Igor Antonov.

14. On 17 September 1998 the criminal proceedings were discontinued, for want of evidence that V.L. had been at fault in hitting the applicant's son.

15. On 28 November 1998 the Dnipropetrovsk Regional Prosecutors' Office revoked this decision, having found it insufficiently substantiated, and remitted the case for further investigation.

16. Between November 1998 and September 2002 the investigating authorities ordered the criminal proceedings to be discontinued on five occasions for want of evidence of criminal conduct on the driver's part. All of these decisions were subsequently quashed by the supervising police officials or the Prosecutors' Office on account of procedural omissions in the investigation.

17. On 20 November 1998 and 19 July 2001, in response to complaints by the applicant, the Prosecutors' Office acknowledged that the investigation had been carried out with a number of procedural flaws.

18. On 31 October 2002 the criminal proceedings were again discontinued for want of evidence of a crime.

19. On 15 November 2002 the Prosecutors' Office approved this decision and archived the case file materials. The applicant appealed before

the Babushkinsky District Court of Dnipropetrovsk (hereafter “the Babushkinsky Court”).

20. On 3 March 2003 the Babushkinsky Court dismissed the applicant’s appeal. The applicant further appealed to the Dnipropetrovsk Regional Court of Appeal (hereafter “the Court of Appeal”).

21. On 21 January 2004 the Court of Appeal quashed the ruling of 3 March 2003 and ordered an additional investigation of the facts of the accident. The court found that the investigation had been carried out in violation of a number of procedural norms; the instructions of the Prosecutors’ Office revoking the previous decisions to discontinue the proceedings had not been carried out; also, the conclusions concerning the material circumstances of the case had been poorly substantiated. In particular, the investigating authorities had failed to establish the precise site of the collision as well as to determine which part of the victim’s body had been hit. Furthermore, they had failed to justify the findings concerning the distance between the victim and the vehicle at the moment of the victim’s appearance on the road as well as those concerning the victim’s speed. The reconstruction of the events had been carried out in absence of the eyewitnesses and any bystanders. No information had been collected as regards the disappearance of the victim’s clothes and shoes, which could have served as important physical evidence. The court further found that the expert opinions, which formed the basis of the conclusions by the investigation, were based on data collected with procedural flaws and could therefore not be deemed reliable.

22. Between November 2004 and February 2007 the criminal proceedings were discontinued three more times for want of evidence of a crime and subsequently resumed following the revocation of these decisions by the Prosecutors’ Office.

23. On 27 February 2007 the investigating authorities again discontinued the proceedings for want of evidence of a crime. The Prosecutors’ Office approved this decision. In May 2007 the applicant appealed before the Babushkinsky Court, seeking resumption of the investigation.

24. On 15 August 2007 the Babushkinsky Court quashed this decision, finding, in particular, that the investigating authorities had failed to reconcile various pieces of evidence and had not complied with the instructions of the Court of Appeal of 21 January 2004 as regards rectification of the omissions of their previous investigation.

25. On 16 July 2009 and 12 April 2011 the Babushkinsky Court quashed two further decisions to discontinue the proceedings (taken on 6 February 2009 and 3 April 2010 respectively) and ordered a further investigation, finding that the law-enforcement authorities had not completely remedied earlier shortcomings as they had been instructed, and had closed the proceedings prematurely.

26. On 29 April 2011 the Dnipropetrovsk Regional Court of Appeal annulled the decision of 12 April 2011 and remitted the case for a fresh consideration.

B. Other proceedings

27. On 28 August 2001 the Pyatykhatsky District Police separated the applicant's complaint concerning the disappearance of his son's belongings from the proceedings concerning investigation of the circumstances of his death. The parties did not inform the Court about the outcome of these proceedings.

28. On 28 February 2008 the Court of Appeal of the Autonomous Republic of the Crimea, acting as the court of cassation, remitted for fresh consideration the applicant's civil action against the investigator Sh., in which he was seeking damages for inadequate investigation of his son's death.

29. On 17 September 2008 the Supreme Court of Ukraine refused the applicant leave to appeal in cassation against the rulings of the lower courts dismissing his civil claim against the law-enforcement authorities for failure to carry out an effective investigation into his son's death.

30. On 19 November 2008 the Donetsk District Administrative Court refused to consider the applicant's complaint of omissions on the part of the law-enforcement authorities investigating his son's death. The court claimed to have no jurisdiction over the subject matter of the complaint, as the shortcomings of the investigation could only be assessed by a criminal court within the framework of examination of the criminal case. On 8 May and 25 November 2009 the Donetsk Administrative Court of Appeal and the Higher Administrative Court, respectively, upheld this decision.

II. RELEVANT DOMESTIC LAW

A. Relevant criminal law provisions

31. According to Article 215 of the Criminal Code of Ukraine of 1960 a driver, who, having breached the rules of road safety or correct use of his vehicle, has caused a human death, could be divested of his driver's licence for up to a five-year term and sentenced to a term of imprisonment of up to ten years. Article 286 of the Criminal Code of Ukraine of 2001, which replaced the above provision, reduced the maximum term of imprisonment for the same offence to eight years and the maximum term of revocation of the drivers' licence to three years.

B. Other relevant provisions of domestic law

32. The relevant provisions of the Constitution of Ukraine and the Code of Criminal Procedure of Ukraine can be found in the judgment in the case of *Muravskaya v. Ukraine* (no. 249/03, §§ 35-36, 13 November 2008).

33. The relevant provisions of the Civil Code of Ukraine and the Code of Civil Procedure of Ukraine can be found in the judgment in the case of *Fedina v. Ukraine* (no. 17185/02, §§ 43-45, 2 September 2010).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

34. The applicant complained that the State authorities had failed to take all reasonable measures to establish whether or not V.L. had been at fault in respect of his son's death and that the relevant criminal proceedings were lengthy and unfair. He relied on Articles 2, 6 § 1 and 13 of the Convention in respect of these complaints.

35. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the complaint at issue falls to be examined under Article 2 of the Convention, which is the relevant provision (see, *mutatis mutandis*, *Mikhalkova and Others v. Ukraine*, no. 10919/05, §§ 24-25, 13 January 2011, and *Anna Todorova v. Bulgaria*, no. 23302/03, §§ 74, 84-87, 24 May 2011). This provision, in so far as relevant, reads as follows:

“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

36. The Government alleged that this part of the application was inadmissible for non-exhaustion of domestic remedies. In particular, the applicant should have instituted an administrative action against the law-enforcement authorities, challenging the omissions of their investigation. While the applicant admittedly had lodged some complaints to this end in civil proceedings, a civil court was not the proper forum for examining them, so the civil remedies were futile from the very beginning.

37. The applicant disagreed. He submitted that he had exhausted all the remedies available under the domestic law for his complaint, including numerous complaints to various competent executive authorities, civil

actions and an administrative action. None of these remedies, available in theory, proved to be effective in practice.

38. The Court points out that it appears from the case file materials that the applicant did in fact avail himself of the remedy referred to by the Government (see paragraph 30 above). In particular, he aired his complaint of omissions by the law-enforcement authorities' in the administrative courts at three levels of jurisdiction. The latter refused to examine his complaint on the merits, referring to lack of jurisdiction over questions of quality of criminal investigations. The remedy suggested by the Government has therefore proved to be ineffective in the applicant's case. The Government's objection should therefore be dismissed.

39. The Court further notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The submissions of the parties

40. The applicant alleged that Ukraine had not put in place an adequate framework to protect his son's life. Although legislative provisions had rightfully been adopted envisaging criminal liability for causing innocent deaths by negligent driving, the enforcement framework, including the conduct of the investigating, judicial and other pertinent authorities, had divested the legislative framework of any meaning.

41. In particular, the State was under an obligation to respond to Igor Antonov's death by verifying, through an official investigation, whether or not the driver's actions fell within the ambit of the applicable criminal-law provisions. In the meantime, the investigation had been perfunctory and had not led to the establishment of relevant facts. The courts had acted unprofessionally in handling the applicant's complaints about specific omissions on the part of the investigating authorities and had proved incapable of restraining the investigating authorities' casual attitude. In the general climate of corruption, neglect for human rights and incompetence encountered by the applicant in his communications with the authorities in the context of the criminal investigation of his son's death, there could be no domestic avenue of redress for his son's killing which could reasonably be expected to be effective in practice.

42. The Government agreed that they had an obligation to conduct, on their own initiative, an official investigation of the circumstances of Igor Antonov's death and to take all reasonable measures to establish the relevant facts, including the extent to which the driver had possibly been at fault in respect of negligent driving. They further submitted that since

Article 2 obligations generally required the State to take reasonable measures to establish the identity of those responsible for unnatural deaths, a civil action against the driver or the vehicle owner could not constitute an effective remedy in the context of the present complaint. In particular, the only remedy inherent in civil litigation, a compensatory payment, could not be regarded as sufficient redress for the applicant's son's death.

43. The Government further submitted that they had carried out the investigation in good faith. In particular, a number of investigative activities had been carried out, including questioning of witnesses, reconstructions of the accident scene and various expert assessments. Since at the time of compiling the Government's observations the investigation was still under way, more detailed comments on its peculiarities could be prejudicial to its independence and impartiality.

2. The Court's assessment

(a) General principles

44. The Court reiterates that the first sentence of Article 2 of the Convention requires the States, in particular, to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life in context of any activity, whether public or not, in which the right to life may be at stake (see, among other authorities, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 89-90, ECHR 2004-XII; *Kalender v. Turkey*, no. 4314/02, § 51, 15 December 2009; and *Krivova v. Ukraine*, no. 25732/05, § 44, 9 November 2010). It further requires that, where a life-threatening injury or a death occurs, an effective independent judicial system is set up to ensure enforcement of the aforementioned legislative framework by providing appropriate redress (see, for example, *Anna Todorova v. Bulgaria*, no. 23302/03, § 72, 24 May 2011). This obligation indisputably applies in the context of designing a framework for protection of life from road traffic accidents (see, for example, *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007; *Al Fayed v. France* (dec.), no. 38501/02, §§ 73-78, 27 September 2007; *Railean v. Moldova*, no. 23401/04, § 30, 5 January 2010).

45. An effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law (see e.g. *Railean*, cited above, § 27 and *Fedina*, cited above, § 62). However, where an accident has been caused by pure negligence without aggravating circumstances, the Court may be satisfied if the legal system affords victims a remedy in the civil courts, enabling any liability of the parties concerned to be established and any appropriate civil redress, such as an order for damages to be obtained (see *Furdik v. Slovakia* (dec.), no. 42994/05, 2 December 2008; *Fedina*, cited above, § 66; *Krivova*, cited above, § 50;

Ciechońska v. Poland, no. 19776/04, § 77, 14 June 2011; and *Anna Todorova*, cited above, §§ 79-80).

46. In principle, the States should have a margin of appreciation in deciding how a system for the enforcement of a regulatory framework protecting the right to life must be designed and implemented (see *Furdik* (dec.), cited above). What is important, however, is that whatever the mode of the investigation, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress (see, for example, *Ciechońska*, cited above, § 71). Any deficiency in the investigation, undermining its ability to establish the cause of the death or those responsible for it may bring to the finding that the Convention requirements have not been met (see *Pereira Henriques v. Luxembourg*, no. 60255/00, § 57, 9 May 2006). This requires by implication that the investigation be prompt and free from unnecessary delays (see e.g. *Railean*, cited above, § 33).

(b) Application of the general principles to the present case

47. Turning to the facts of the present case, the Court notes that the applicant complains in essence only that the criminal proceedings were ineffective, and that he never attempted to lodge a civil claim against the vehicle owner or the driver who had fatally hit his son. This element distinguishes the present case from a number of other accidental death cases, in which the Court, in assessing whether the State had complied with its Article 2 obligations, attached significant weight to whether or not a compensatory civil remedy was available to an aggrieved party (see, for example, *Rajkowska* (dec.), cited above; *Fedina*, cited above, § 66; *Krivova*, cited above, §§ 50-51; *Ciechońska*, cited above, § 77; and *Anna Todorova*, cited above, § 80).

48. It appears from the Court's recent case-law that the Ukrainian legislative framework envisages the possibility for the relatives of accident victims to institute civil proceedings or to lodge a claim in criminal proceedings for the purpose of obtaining monetary compensation for the injury or death. Compensation could have been obtained, in particular, where a defendant's negligence has been shown (see *Lovygina v. Ukraine* (dec.), no. 16074/03, 22 September 2009 and *Krivova*, cited above, §§ 17 and 32) or under strict liability rules, where an inherently hazardous activity was the cause of the death (see *Fedina*, cited above, §§ 43, 44 and 66). According to the Civil Code of 1963, in force at the time of Igor Antonov's death, car owners were expressly listed as strictly liable for damage caused by their vehicles (see *Fedina*, cited above, § 43).

49. It is doubtful, however, whether these remedies would have been appropriate in the applicant's situation. In particular, it appears that the applicant was in any event precluded from lodging a civil claim within the

criminal-proceedings framework, since without an official indictment there was no defendant to lodge such a claim against (see *Kositsina v. Ukraine* (dec.), no. 35157/02, 15 January 2008). As regards a possibility to institute separate civil proceedings based on negligence or strict liability rules, without awaiting the outcome of the official investigation, the Court notes that the Government themselves have pleaded that these remedies would have been ineffective in the applicant's case. In these particular circumstances the Court can neither hold against the applicant that he did not avail himself of such remedies, nor is it called upon to assess their potential effectiveness *in abstracto* (see *Dodov v. Bulgaria*, no. 59548/00, § 86, ECHR 2008-, and *Dobrev v. Bulgaria*, no. 55389/00, §§ 112-114, 10 August 2006). It will therefore confine itself to examining whether the criminal investigation into Igor Antonov's death met the minimum criteria of effectiveness required by Article 2 of the Convention.

50. In this regard the Court notes that, while the site was examined on the date of the accident, the criminal investigation was initiated only four months later. This delay inevitably led to the deterioration of important evidence (including decomposition of the corpse, disappearance of possible marks on the road surface and so on). Further, the investigation has lasted over twelve years and has been characterised by more than ten remittals of the case for re-examination and collection of additional materials. On various occasions the domestic authorities themselves acknowledged that the investigating officers had acted without due diligence when collecting evidence and ignored instructions given by their hierarchical superiors and domestic courts.

51. In as much as the criminal investigation, characterised by repeated remittals for re-investigation and numerous shortcomings in collection of evidence, failed to shed sufficient light on the facts surrounding the death of the applicant's son within a reasonable timeframe, it also cannot be discerned that the civil-law remedy, if available, would have been able to remedy these shortcomings.

52. The Court concludes that the legal system as a whole, faced with an arguable case of a negligent act causing death, failed to provide an adequate and timely response consonant with the State's obligation under Article 2 of the Convention to provide an effective judicial system. There has therefore been a violation of that provision.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. In addition, the applicant complained under Article 1 of Protocol No. 1 about the disappearance of his son's belongings, either from the accident site or from the hospital in which he died. He also generally complained about corruption, neglect of human rights and incompetence within the public governance system, and cited Articles 1, 17, 18 and 53 of

the Convention and Article 3 of Protocol No. 7 in connection with the facts of the present case.

54. 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 matter complained of is within its competence, it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

55. 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

56. 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

57. The applicant initially claimed the global sum of 100,000 euros (EUR) in respect of damage and costs allegedly sustained by him on account of violations of his Convention rights. Subsequently, within the time-limit allotted by the Court for providing claims for just satisfaction, the applicant updated his claims and sought EUR 100,000 in compensation for non-pecuniary damage only. In addition, he claimed 24,023.15 Ukrainian hryvnias (UAH) in pecuniary damages, comprising expenses for correspondence with the Court, translation and copying documents, legal, court and translation fees, compensation for Igor Antonov's lost or stolen belongings, transport and mobile communication costs and medical expenses.

58. The Government noted that the applicant had arbitrarily modified his submissions. They further noted that in any event his submissions with respect to non-pecuniary damage had been exorbitant and unsubstantiated. As regards pecuniary damage, they accepted that it was reasonable to reimburse the applicant his postal expenses.

59. The Court does not discern any causal link between the violation found and the alleged cost of the disappeared belongings of Igor Antonov; it therefore rejects this claim. As regards the remainder of the claims concerning “pecuniary damage”, in the Court's view they should be considered under the head of “Costs and expenses” below. As regards the applicant's claim for non-pecuniary damage, the Court considers that the applicant must have suffered anguish and distress on account of the facts

giving rise to the finding of a violation in the present case, that cannot be made good by a finding of a violation alone. Ruling on an equitable basis, the Court awards the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

60. The applicant claimed UAH 1,000.10 in correspondence expenses; UAH 1,126.31 in copying expenses; UAH 197.45 in computer services; UAH 1,236.60 in transportation fees; UAH 4,356.12 in medical expenses; UAH 1,882.17 in domestic court and expert assessment fees; UAH 6,034 in legal fees; UAH 1,980 in translation fees; UAH 1,136.00 in mobile telephone communication expenses. He presented voluminous documentation, containing receipts and other documents in evidence of the payment of the above expenses.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for medical bills and mobile telephone communication costs and awards the applicant EUR 1,200 to cover other costs.

C. Default interest

62. 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 complaint concerning the failure of the State to take reasonable measures to establish the circumstances of Igor Antonov's death admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 2 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 1,200 (one thousand two

hundred euros) in costs and expenses, plus any tax that may be chargeable to the applicant in respect of these amounts, to be converted into the national currency of Ukraine at the rate applicable on 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Claudia Westerdiek
Registrar

Dean Spielmann
President