



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

FIFTH SECTION

CASE OF IGOR SHEVCHENKO v. UKRAINE

(Application no. 22737/04)

JUDGMENT

STRASBOURG

12 January 2012

FINAL

04/06/2012

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

In the case of Igor Shevchenko 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,

Ann Power-Forde,

André Potocki, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 22737/04) 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 Igor Aleksandrovich Shevchenko (“the applicant”), on 4 June 2004. The applicant having died on 24 March 2010, his mother, Mrs Lidiya Afanasyevna Shevchenko, expressed the wish to pursue the application.

2. The applicant, who was severely disabled and recognised in 2005 as legally incapable, was represented by his mother. The applicant’s mother, who had been granted legal aid, was represented by Mrs Lyudmyla Tsybulko, a lawyer practising in Kharkiv, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that the investigation of the traffic accident as a result of which he had become disabled, had been lengthy and ineffective.

4. On 7 July 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). Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Mr Mykhaylo Buromenskiy to sit as an *ad hoc judge* (Rule 29 § 1(b)).

THE FACTS

5. The applicant was born in 1979.

I. THE CIRCUMSTANCES OF THE CASE

6. On 26 January 1993 the applicant, in the presence of numerous witnesses, was hit by a car on a pedestrian crossing. He sustained grievous bodily injuries and was diagnosed, *inter alia*, with serious head injury, concussion, spinal cord haematoma, a broken lower jaw, and other serious injuries. From that time on, and until his death on 24 March 2010, he was severely disabled. In particular, between 1993 and 1996 he was in a coma and later he had been suffering from persistent after-effects of the head injury, was unable to take care of himself and in 2005 was declared legally incapable by the court.

A. Criminal proceedings

7. On 5 February 1993 the Investigation Unit of the Kharkiv State Department of the Ministry of Internal Affairs (*слідчий відділ ХДВ УМВС України в м. Харкові*) (hereinafter “the Investigation Unit”) instituted criminal proceedings against the driver, K., for a violation of traffic rules.

8. On 27 October 1993 the applicant’s mother was declared a victim of the alleged crime, since the applicant was a minor and had serious health problems.

9. On 30 November 1994 the investigation was completed and the case was transferred to the Frunzensky District Court, Kharkiv.

10. On 9 December 1994 the case was returned by the court for additional investigation.

11. On 25 January 1995 the Investigation Unit terminated the criminal proceedings in the case for absence of proof of K.’s guilt.

12. On 7 April 1995 the Kharkiv Prosecutor quashed this decision.

13. On 23 October 1995 the Investigation Unit terminated the criminal proceedings on the same grounds as before.

14. On 16 April 1997 this decision was quashed by the Kharkiv Prosecutor and the case was sent for further investigation.

15. On 28 January 1998 the investigation was completed and the case was transferred to the Frunzenskiy District Court, Kharkiv. It was later transferred to the Kominternovskiy District Court, also Kharkiv.

16. On 22 March 2000 the court returned the case for further investigation.

17. On 25 April 2000 the Kharkiv Regional Court, upon an application for review lodged by the Kharkiv Prosecutor, quashed the decision of

22 March 2000 and transferred the case to the Kominternovskiy District Court for consideration on the merits.

18. On 10 August 2001 the latter court returned the case for further investigation.

19. On 26 September 2001 the Kharkiv Regional Court of Appeal (formerly the Kharkiv Regional Court) upheld this decision.

20. On 19 June 2002 the case was sent back to the court after additional investigation.

21. On 27 July 2002 the Kominternovskiy District Court returned the case for further investigation.

22. On 15 August 2002 the case was transferred for investigation to the Poltava Regional Police Department (*слідче управління УМВС України в Полтавській області*).

23. By a letter of 10 December 2002 the General Prosecutor's Office informed the applicant's mother that, in order to clarify inconsistencies in previous expert conclusions, a new technical forensic examination of K.'s car had been ordered. It stated that it would be conducted in spring 2003.

24. On 7 November 2003 the investigation was terminated and the case transferred to the Kharkiv Regional Prosecutor for further transfer to a court.

25. On 12 November 2003 the case was sent back to the Poltava Regional Police Department.

26. On 30 December 2003 the case was transferred to the Central Department of the Ministry of Internal Affairs of Ukraine in order to determine its territorial jurisdiction.

27. On 21 August 2004 K. died.

28. On 23 September 2004 the Investigation Unit terminated the criminal proceedings on account of K.'s death.

29. No copies of the above decisions were submitted by the parties. Copies are available only of the decisions of 5 February 1993 and 23 September 2004.

B. Civil proceedings

30. On 20 December 2005 the applicant's mother instituted proceedings in the Frunzenskiy District Court, Kharkiv, against the Frunzenskiy District Department of the Pension Fund of Ukraine and against the Labour and Social Security Department of the Frunzenskiy District Council, Kharkiv, claiming various payments allegedly due to the applicant and compensation for non-pecuniary damage. On 17 February 2006 the court dismissed the applicant's mother's claims. On 6 April 2006 the Kharkiv Regional Court of Appeal upheld this decision. No appeal was lodged on points of law.

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 of operation and maintenance of his vehicle, has caused a human death or inflicted grievous bodily harm, may be divested of his driver's licence 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.

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. THE *LOCUS STANDI* OF MRS SHEVCHENKO

34. The applicant died in March 2010. On 13 April 2010 the applicant's mother informed the Court that she wished to pursue the application.

35. The respondent Government did not submit any comments in this respect.

36. The Court observes that in various cases in which an applicant has died in the course of Convention proceedings it has taken into account statements from the applicant's heirs or close family members expressing a wish to pursue the application (see, among other authorities, *Bitiyeva and X v. Russia*, nos. 57953/00 and 37392/03, § 92, 21 June 2007). The Court considers that the applicant's mother, who stated her intention of continuing the proceedings, has a legitimate interest in obtaining a finding that there had been a breach of her son's procedural rights under the Convention. Accordingly, the Court finds that the applicant's mother has standing to continue these proceedings.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

37. The applicant complained that the investigation of the traffic accident as a result of which he had become disabled had been lengthy and ineffective. He relied on Articles 2, 6 § 1 and 13 of the Convention.

38. 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, § 25, 13 January 2011, and *Anna Todorova v. Bulgaria*, no. 23302/03, § 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

1. *Compatibility ratione materiae*

39. The Government maintained that the applicant’s complaints under Article 2 of the Convention were incompatible *ratione materiae* with the Convention since the applicant had neither died as a result of the accident, nor had State agents been responsible for it.

40. The applicant disagreed. He submitted that between 1993 and 1996 he had been in a coma. Afterwards he was completely paralysed and suffered severe pain. He further insisted that the State had an obligation to conduct an effective investigation into events which had placed a person’s life in danger.

41. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 54, ECHR 2002-II). This positive obligation entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. In particular, such obligation indisputably applies in the context of designing a legislative framework for road traffic safety (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; and *Anna Todorova v. Bulgaria*, cited above, § 72).

42. The Court further notes that Article 2 of the Convention may also be applicable when there has not been loss of life, however, the circumstances of the case and the nature of inflicted injuries indicate that the applicant's life was in serious danger (see *Krivova v. Ukraine*, no. 25732/05, § 45, 9 November 2010).

43. In the present case, the applicant was in coma between 1993 and 1996. He became severely disabled, completely lost personal autonomy and was later declared legally incapable. In such circumstances the Court considers that the traffic accident had placed the applicant's life in serious danger, and thus Article 2 of the Convention is applicable to the present case.

44. Therefore, the Court dismisses the Government's objection in this respect.

2. *Compatibility ratione temporis*

45. The Government submitted that the present application is inadmissible as regards the applicant's complaints about the alleged violation of Article 2 of the Convention, on account of the lengthy investigation of the traffic accident which resulted in bodily injuries to the applicant, since this part of the application fell outside the Court's jurisdiction *ratione temporis*. The traffic accident took place on 26 January 1993, while the Convention entered into force in respect of Ukraine on 11 September 1997, which was more than four years after the accident. The Government referred to the Court's decisions in the cases of *Moldovan and others v. Romania* (no. 41138/98, 13 March 2001), and *Kholodovy v. Russia* (no. 30651/05, 14 September 2006).

46. The applicant disagreed.

47. The Court notes that the procedural obligation to carry out an effective and prompt investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by acts concerning the substantive aspects of Article 2, it can give rise to a finding of a separate and independent "interference". In this sense it can be considered to be a detachable obligation, arising out of Article 2 and capable of binding the State, even when the substantive act took place before the critical date (see *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009, and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 136, 138, 18 September 2009). At the same time, for the procedural obligations imposed by Article 2 to come into effect a significant proportion of the procedural steps required by this provision will have been, or ought to have been, taken after the critical date (see *Šilih*, cited above, § 163).

48. In the present case the accident in question happened three and a half years before the Convention entered into force in respect of Ukraine, however, the investigation continued for another seven years after that date.

In view of this, the Court finds that the alleged interference with Article 2 of the Convention in its procedural aspect, which took place after 11 September 1997, falls within the Court's temporal jurisdiction. It rejects, therefore, the Government's objection in this respect.

3. *Exhaustion of effective domestic remedies*

49. The Government further submitted that since the applicant had failed to institute separate civil proceedings against K, as the owner of the car, "any of his civil-law claims under Article 2 of the Convention were inadmissible in view of his failure to exhaust domestic remedies prior to his application to the Court". In their further observations the Government added that after K's death such a civil claim could be lodged by the applicant against "the owner of the vehicle".

50. The applicant stated that he had brought a civil claim in the course of the criminal proceedings, but since the latter had been terminated because of the death of K., he had not been able to lodge a separate claim.

51. The Court reiterates that although in some situations compliance with the positive obligation to secure life entails resort to criminal-law remedies (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 93, ECHR 2004-XII, as well as *Al Fayed v. France* §§ 73-78, and *Railean*, cited above, § 28), if the infringement of the right to life is not intentional, Article 2 does not necessarily require such remedies; the State may meet its obligation by affording victims a civil-law remedy, either alone or in conjunction with a criminal-law one, enabling any responsibility of the individuals concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; and *Šilih*, cited above, § 194). However, that remedy should exist not only in theory; it must operate effectively in practice, within a time-span allowing the case to be examined without unnecessary delay (see *Calvelli and Ciglio*, cited above, § 53 *in fine*; *Byrzykowski v. Poland*, no. 11562/05, § 105 *in fine*, 27 June 2006; *Dodov v. Bulgaria*, no. 59548/00, §§ 83 *in fine* and 95, ECHR 2008-...; *Šilih*, cited above, § 195; *G.N. and Others v. Italy*, no. 43134/05, § 96, 1 December 2009; and *Oyal v. Turkey*, no. 4864/05, § 74, 23 March 2010).

52. The Court notes that the applicant did not submit any evidence in support of his statement that a civil claim had been lodged by him within criminal proceedings. However, since the Government did not contest this statement the Court considers that, in the circumstances, the applicant would not have been required to lodge a separate civil claim against K. The Government's objection in this respect should therefore be dismissed.

4. Conclusion

53. The Court notes that this 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

54. The applicant stated that the investigation of the traffic accident had been ineffective.

55. The Government reiterated that the applicant should have lodged a separate civil claim against K.

56. The Court reiterates its case-law mentioned above (see paragraphs 41-42 and 51) and further notes that the State's positive obligation under Article 2 of the Convention requires that, where a life-threatening injury or a death occurs, an effective independent judicial system is set up to provide appropriate redress (see, for example, *Anna Todorova*, cited above, § 72). Such a system must make provision for an independent and impartial official investigation procedure capable of establishing the cause of the injuries and identifying those responsible with a view to their punishment (see *Öneryıldız*, cited above, § 94; *Railean*, cited above, § 28; *Kalender v. Turkey*, no. 4314/02, § 53, 15 December 2009; and *Pereira Henriques v. Luxembourg*, no. 60255/00, §§ 56-57, 9 May 2006).

57. In the present case the investigation, in so far as it fell within the Court's temporal jurisdiction, lasted for seven years.

58. The Court notes that the parties failed to submit copies of decisions taken by the national authorities in the applicant's case. However, it follows from the available documents that the proceedings in the case were protracted. In particular, after completion of the investigation in January 1998 the case was under consideration in the local court for more than two years before being sent back for further investigation in March 2000. This decision of 22 March 2000 was quashed by the Kharkiv Regional Court, however more than one year later, in September 2001, the same court upheld another decision taken subsequently by the first-instance court to send the case for further investigation. Thus, for more than one year the case was not considered on the merits but was sent back and forth between the first and second instances.

59. Further on, after additional investigations carried out between September 2001 and June 2002, the case was sent back again for investigation by the first-instance court in July 2002. Since that time the case has been transferred from one investigation authority to another for no clear reason, until the death of the accused in August 2004.

60. The Court notes that the applicant's case was not complicated. In particular, the offender was identified, there were numerous witnesses to the accident, and the only remaining question was whether the driver had breached the traffic rules. However, in addition to three and a half years after the accident, after the Convention entered into force in respect of Ukraine the investigation lasted for seven more years and ended not with a final decision but because the accused person died. The Government did not show that such a lengthy investigation was justified, either by the necessity to perform numerous indispensable procedural steps, by the applicant's behaviour, or by other relevant reasons. In addition it included long periods when no investigation or consideration on the merits of the applicant's case took place.

61. The foregoing considerations are sufficient to enable the Court to conclude that the investigation of the traffic accident as a result of which the applicant became severely disabled, was lengthy and ineffective.

62. There has accordingly been a violation of Article 2 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. The applicant complained under Article 2 of the Convention that the pension paid to him had been unsatisfactory and that his living conditions had been difficult.

64. 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.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed 11,500,000 euros (EUR) in respect of non-pecuniary damage. He further claimed costs for his medical treatment

which, according to him, could vary from 36,500 US dollars to 547,500 US dollars.

68. The Government stated that the amounts claimed were excessive and unsubstantiated.

69. The Court notes that the applicant did not submit any evidence in support of the pecuniary damage alleged; it therefore rejects this claim. On the other hand, deciding on an equitable basis, it awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Default interest

70. 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 under Article 2 of the Convention concerning ineffective investigation of the traffic accident involving the applicant 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's heirs, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias 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;

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

Done in English, and notified in writing on 12 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President