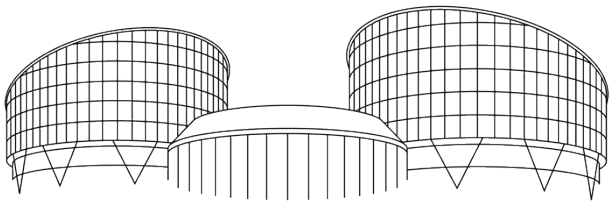

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SOLOMAKHIN v. UKRAINE

(Application no. 24429/03)

JUDGMENT

STRASBOURG

15 March 2012

FINAL

24/09/2012

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

In the case of Solomakhin v. Ukraine**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 7 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 24429/03) 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 Sergey Dmitriyevich Solomakhin ("the applicant"), on 22 July 2003. The applicant having died in September 2010, Mrs Vera Petrovna Solomakhina, his mother, expressed the wish to pursue the application.

2. The applicant was represented by Ms I. Gavrilenko, a lawyer practising in Donetsk. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicant alleged, in particular, that the court proceedings in his case were excessively lengthy and that his health had suffered as a result of medical malpractice.

4. On 6 May 2008 the Court declared the application partly inadmissible and decided to communicate the above complaints under Articles 6 and 8 of the Convention to the Government. It also decided to rule on the admissibility and merits of the remaining parts of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lived in Donetsk. He died on 13 September 2010.

6. On 23 November 1998 the applicant sought medical assistance from the Donetsk City Hospital No. 16 (*Центральна міська клінічна лікарня № 16 м. Донецька* – "the Hospital"), where he was diagnosed as having an acute respiratory disease. He was prescribed out-patient treatment.

7. On his next visit to the Hospital on 27 November 1998 the applicant was tested for his reaction to a vaccination against diphtheria. The test showed no susceptibility to diphtheria antigens.

8. On 28 November 1998 the applicant was vaccinated against diphtheria. According to the applicant, the vaccination was contraindicated for him.

9. On 30 November 1998 the applicant was examined by a doctor, who indicated that the applicant's state of health had improved and that the treatment had given positive results. He was diagnosed with tracheobronchitis, which was confirmed during his further visits to the doctor on 3, 4 and 7 December 1998.

10. From 28 December 1998 the applicant spent more than half a year at different medical institutions receiving treatment for a number of chronic diseases (for instance, pancreatitis, cholecystitis, hepatitis, colitis).

11. On 4 February 1999 the Chief Doctor of the Hospital reprimanded doctor Ya. and nurse Sh. for vaccinating the applicant although he had consistently objected to the vaccination and while he was being treated for an acute respiratory infection. He considered that they had violated the rules concerning vaccinations and ordered them to pass a test on those rules.

12. On 26 April 1999 the applicant instituted proceedings in the Budyonnovskiy District Court in Donetsk against the local department of public health (*Донецький міський відділ охорони здоров'я*) and the Hospital, seeking compensation for damage to his health. He alleged that the vaccination on 28 November 1998 had been conducted whilst he was ill and had resulted in him suffering from a number of chronic diseases. He also complained that the vaccine had been of poor quality as it had been uncertified, had expired and had been stored in inappropriate conditions. He complained that the doctors had tried to falsify the relevant medical records and to conceal the negative effects of the vaccination.

13. Between 30 May and 30 June 2000, 17 July 2000 and 29 January 2001, 2 and 30 January 2002 and 4 March 2002 and 17 February 2003 medical expert examinations were conducted into the applicant's allegations.

14. On 2 June 2003 the court found against the applicant. With reference to the conclusions of the medical expert examiners, the court established that the applicant's diseases had no causal link to his vaccination. It noted that the applicant had not had an allergic reaction or showed other signs that would normally have appeared within several days following the vaccination. The only disease that could be associated with the vaccination was urticaria (commonly known as hives), which the applicant had suffered from more than eight months after the vaccination and which could not therefore have had any causal link to it. The court also established that the applicant had not had any acute symptoms of any disease upon vaccination and therefore that his vaccination had not violated any medical rules. Furthermore, the epidemic situation in the Donetsk region had called for his vaccination against diphtheria. The court noted that no physical force had been applied to the applicant and that, being an adult of sound mind, he could have refused to have the vaccination, as he had done before on several occasions. The court noted that although the vaccination had not been performed in the vaccination room as required by the regulations, it had been conducted by a qualified nurse in a doctor's office, in a doctor's presence, with prior verification of the applicant's reaction to such a vaccination, and it had not caused the applicant to have any negative side-effects. The court also noted that the applicant's allegations about the quality of vaccine had been speculative and had not been confirmed by any evidence. The court observed that none of the applicant's diseases had had a causal link to the vaccination and that the applicant had spent so much time in hospital because he had been attempting to obtain disabled status. The court also examined the applicant's allegations about the alleged falsification of medical records and rejected them as unsubstantiated.

15. On 19 March 2008 and 22 August 2008 respectively the Donetsk Regional Court of Appeal and the Supreme Court upheld the above judgment.

16. On 13 September 2010 the applicant died of a heart attack. By letter of 26 September 2011 the applicant's mother informed the Court of her wish to pursue the application.

II. RELEVANT DOMESTIC LAW

A. Health care and control of diseases Act 1994 ("the Act")

17. The relevant section of the Act reads as follows:

Section 27
Preventive vaccination

"Preventive vaccinations against tuberculosis, polio, diphtheria, whooping cough, tetanus and measles are compulsory in Ukraine.

...

Groups of the population and categories of employees subject to preventive vaccination, including those which are compulsory, and the procedure for and scheduling of their implementation shall be specified by the Ministry of Health of Ukraine ..."

B. Guidelines on the organisation and conduct of preventive vaccinations

18. These guidelines, approved by the Ministry of Public Health of Ukraine on 25 January 1996, provide for the organisation of vaccinations, set out a list of contraindications and side-effects and the procedure for informing the appropriate parties of any negative side-effects after vaccination.

III. RELEVANT INTERNATIONAL MATERIALS

19. On 19 March 1997 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1317 (1997) on vaccination in Europe. The relevant part of this recommendation states:

"...

3. The recent diphtheria epidemic in some of the newly independent states is an example of the risks confronting us. Tens of thousands of cases have been reported since the outbreak of the epidemic in 1990, and thousands have died of a disease generally believed to have been wiped out. Other pockets of infection may attain epidemic proportions at any time: poliomyelitis, tuberculosis, tuberculous meningitis, pertussis, etc.

4. The diphtheria epidemic very clearly demonstrated that health risks could not be contained locally. With millions of people now free to travel from one country to another, it has not been possible to halt such epidemics. The eruption of ethnic conflicts producing mass movements of refugees has created new problems in this respect, and the austerity imposed by economic reforms has worsened the situation.

...

6. The Assembly therefore recommends that the Committee of Ministers invite member states:

i. to devise or reactivate comprehensive public vaccination programmes as the most effective and economical means of preventing infectious diseases, and to arrange for efficient epidemiological surveillance;

ii. to grant increased assistance as a matter of urgency, internationally co-ordinated through the World Health Organization (who) and Unicef in particular, to countries suffering from the diphtheria epidemic, in order to supply adequate quantities of vaccines and medicines and train a medical staff qualified to handle and administer the vaccine with the following aims:

a. to achieve a high immunisation level among the population;

...

7. The Assembly furthermore invites the Committee of Ministers:

i. to define a concerted pan-European policy on population immunisation, in association with all partners concerned, for example who, Unicef and the European Union, aimed at the formulation and observance of common quality standards for vaccines, and to ensure an adequate supply of vaccines at a reasonable cost ...”

THE LAW

I. AS TO THE *LOCUS STANDI* OF MRS SOLOMAKHINA

20. The applicant died on 13 September 2010, while the case was pending before the Court. It has not been disputed that Mrs Slomakhina (his mother) is entitled to pursue the application on his behalf and the Court sees no reason to hold otherwise (see, among other authorities, *Benyaminson v. Ukraine*, no. 31585/02, § 84, 26 July 2007, and Horváthová v. Slovakia, no. 74456/01, §§ 25-27, 17 May 2005). However, reference will still be made to the applicant throughout the present text.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him everyone is entitled to a ... hearing within a reasonable sted that argument and considered, in particular, that this case had beetime by [a] ... tribunal ...”

22. The Government conten particularly complex, given the necessity to have an expert examination of the applicant's medical file and his state of health

23. The period to be taken into consideration began on 26 April 1999 and ended on 22 August 2008. It thus lasted nine years and almost four months for three levels of jurisdiction.

A. Admissibility

24. 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

25. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case; and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

26. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender v. France*, cited above).

27. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Although the case in question was admittedly a complex one and required forensic medical examination of the applicant's medical conditions, such complexity could not justify the length of the proceedings which exceeded nine years for three levels of jurisdiction, including almost five years before the court of appeal. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. Referring to Article 2 of the Convention, the applicant complained of damage to his health as a result of alleged medical malpractice. In particular, he submitted that the vaccination on 28 November 1998 had resulted in him suffering from a number of chronic diseases. The Court, which is master of the characterisation to be given in law to the facts of the

case, decided on its own motion to examine the complaint raised by the applicant under Article 8 of the Convention, which is the relevant provision and which provides insofar as relevant as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

29. 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

1. The parties' submissions

30. The applicant insisted that he had been vaccinated during the acute stage of an illness and that the doctors had not checked all relevant contraindications to vaccination in his case. He claimed that he had been administered an expired vaccine of poor quality and that it had been done against his will. All of these failings had resulted in his serious health problems, which the doctors at fault and judges had conspired to conceal and who had therefore falsified medical records and court documents. He considered that there had been no reason for interfering with his private life, as there had been not been an outbreak of diphtheria in his home town at the relevant time and the vaccine had been strongly contraindicated for him.

31. The Government agreed that the compulsory vaccination had constituted an interference with the applicant's private life. They contended, however, that such interference had been justified in the present case. They noted that under section 27 of the Law on health care and control of diseases 1994, preventive vaccination against diphtheria had been compulsory and the Ministry of Public Health had been entrusted to specify the procedure for and terms of such vaccination. The Ministry had done so in its guidelines (Order No. 14 of 25 January 1996).

32. The Government further contended that the interference had pursued the legitimate aim of the protection of public health against diphtheria, which was a highly infectious and virulent disease. Given the complicated epidemiological situation in the country and in the region in which the

applicant had resided, the interference had been necessary to protect the health of the applicant and of the public at large. The Government noted that the applicant's fitness for vaccination and possible contraindications had been checked by the doctors prior to the vaccination. In addition, they noted that, while being compulsory, the vaccination had not been forced or violently imposed, and therefore that the applicant, being an adult of thirty-four years of age at the time of the events, could have refused to have the vaccination, as he had done previously on many occasions. They finally noted that the applicant's allegations about the quality of the vaccine and the negative side-effects of the vaccination on his health had been thoroughly examined by the doctors and the courts and had been found unsubstantiated. They considered that the findings of the domestic authorities, who had had the primary task of interpreting the law and assessing the proof adduced, should not be called into question.

2. The Court's assessment

33. The Court reiterates that according to its case-law, the physical integrity of a person is covered by the concept of "private life" protected by Article 8 of the Convention (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91). The Court has emphasised that a person's bodily integrity concerns the most intimate aspects of one's private life, and that compulsory medical intervention, even if it is of a minor importance, constitutes an interference with this right (see *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX, with further references). Compulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as guaranteed by Article 8 § 1 (see *Salvetti v. Italy* (dec.), no. 42197/98, 9 July 2002, and *Matter v. Slovakia*, no. 31534/96, § 64, 5 July 1999).

34. The Court notes that in the instant case, as was uncontested by the parties, there has been an interference with the applicant's private life.

35. The Court further notes that such interference was clearly provided by law and pursued the legitimate aim of the protection of health. It remains to be examined whether this interference was necessary in a democratic society.

36. In the Court's opinion the interference with the applicant's physical integrity could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region. Furthermore, according to the domestic court's findings, the medical staff had checked his suitability for vaccination prior to carrying out the vaccination, which suggest that necessary precautions had been taken to ensure that the medical intervention would not be to the applicant's detriment to the extent that would upset the balance of interests between the

applicant's personal integrity and the public interest of protection health of the population.

37. Furthermore, the applicant himself failed to explain what had prevented him from objecting to the vaccination, when previously he had objected on several occasions. There is no evidence before the Court to prove that the vaccination in question had actually harmed the applicant's health.

38. The Court also notes that the applicant's allegations were thoroughly examined by the domestic courts and found unsubstantiated. The domestic courts found only one insignificant irregularity in the vaccination procedure, namely, making the vaccination outside the special vaccination room. This, they found, did not in any way affect the applicant's health. They also established that none of the known side-effects of the vaccination were manifested by the applicant. They did so on the basis of several medical expert reports. The findings of the domestic courts were based on a large amount of medical data collected upon the motion of the applicant and of the courts. These findings appear to be grounded on a sufficient evidential basis and their conclusions are not arbitrary or manifestly unreasonable. The applicant did not submit any evidence to challenge the findings of the domestic authorities.

39. In view of the above considerations, the Court finds no violation of Article 8 of the Convention in the present case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 54,892.53 hryvnias (UAH) (approximately 4,600 euros (EUR)) in respect of pecuniary damage and UAH 700,000 (approximately EUR 58,700) in respect of non-pecuniary damage.

42. The Government considered that there was no causal link between the applicant's claim of pecuniary damage and his complaints. They also contended that the claimed non-pecuniary damage was unsubstantiated, that the amount was excessive and that it did not correlate to the awards given by the Court in comparable cases against Ukraine.

43. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On

the other hand, it awards the applicant's mother EUR 2,400 in respect of non-pecuniary damage.

B. Costs and expenses

44. The applicant also claimed UAH 3349.02 (EUR 302.59) and UAH 489.95 (EUR 44.27) for costs and expenses.

45. The Government maintained that not all the claims were relevant and invited the Court to award only the expenses that were confirmed and related to the proceedings in question.

46. 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 considers it reasonable to award the sum of EUR 100 covering costs under all heads.

C. Default interest

47. The Court considers it appropriate that the default interest rate 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 8 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant's mother, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 100 (one hundred euros), plus any tax that may be chargeable to the applicant's mother in respect of costs and expenses, 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 amounts 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 15 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Dean Spielmann
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Boštjan M. Zupančič is annexed to this judgment.

D.S.
C.W.

CONCURRING OPINION OF JUDGE BOŠTJAN M. ZUPANČIČ

1. I hesitated to go along with this judgment because of the question of causal link which allegedly had not been established between the procedure of administering the vaccination on the one hand and the death of the applicant on the other hand. The applicant claimed that the vaccination had been done against his will, which implies that there was no prior and informed consent. The "informed" consent implies that the patient in such circumstances must be instructed as to all the potential risks of administering any kind of medical treatment, which he must thereafter consent to in a genuinely informed way. Failing that, we cannot speak of a full consent, whereas here – in contrast to the usual medical situation – we seem to speak of a forceful administration of diphtheria vaccine without any consent on the part of the applicant and, indeed, against his so expressed will. As per his submissions, these failings had resulted in serious health problems (§ 30 of the judgment).

2. Admittedly, the Ukrainian courts have summoned three experts to testify concerning the possible causal connection between the diphtheria vaccine injection, on the one hand, and the serious medical problems resulting in death of the applicant on the other hand.

3. Perhaps it would be useful to sketch the basic problem concerning discrepancy between scientific perception of causation on the one hand and the legal/judicial insistence concerning the finding of a "true cause" in each criminal or tort situation, in which the consequence – in this case, death – is part of the definition of the tort or the crime in question. It is notorious that in medical cases the causal link is practically impossible to "prove". This impossibility, however, is occurring on the legal/judicial side – rather than on the medical/scientific side.

4. The scientists are well aware of the epistemological axiom to the effect that no consequence in the real world is "caused" by a single preliminarily necessary condition. Every consequence in the real world, in which it occurs as an event, is a product of innumerable necessary conditions which, by definition, are all indispensable if the consequence in question is to occur. For example, the authors of the Model Penal Code of the United States of America have, many decades ago, in fact done away with the theory of causation. They have adopted the *sine qua non* causation theory, which in reality is the denial of causation itself. It admits as a legally relevant "cause" any necessary (s*ine qua non*) condition without which the result in the crime in question, for example death, would not have occurred.

5. It is patently clear, especially so in the scientific community, that there is no such thing as causation or causal link. In the legal community, however, the juries are insufficiently conscious of the fact that the decision making by judges and other protagonists proceeds by scanning the necessary conditions for the consequence in question and then – more or less intuitively, i.e. with insufficient consciousness – choosing the critical necessary condition as the legally satisfying "cause" for the consequence in question. The scan that is so performed, however, is not a scan of objective reality.

6. On the contrary, what judges and others look for is the blameable necessary condition, albeit objectively existing, to which the blame of the law can be attached, so that at the end of the process, be it criminal or concerning tort, a culprit is identified, condemned and punished.

7. In most standard tort cases as well as in criminal ones the establishment of the causal link – i.e., the finding of the blameworthy necessary condition – does not represent a problem. In medical cases (See for example *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, 17 January 2002) the necessary condition somehow does not seem to be sufficient. The problem recurs in insanity cases, where most of the jurisdictions require the psychiatrist to testify as to the real existence of a mental illness, as the cause, and the insanity of the defendant as a consequence. If that "causal link" is not accepted by the court, then the insanity defence will fail, although the defendant in question may be genuinely mentally ill in the first place.

8. In standard medical cases where medical negligence or faulty drugs, as allegedly in this case, are to blame, it is practically impossible to have a waterproof testimony from a medical or any other kind of expert. In the best of scenarios, the experts will testify to the effect that the consequence in question is "not incompatible" with the necessary condition (medical negligence, faulty drugs, etc.).

9. This is perhaps a paradigmatic situation that vividly illustrates the communication gap between the scientific community, on the one hand, and the legal/judicial community. Epistemologically, scientists as well as medical doctors are not either trained or conditioned to look for a blameworthy "cause". While every doctor or scientist will, when establishing diagnosis, try to establish the cause of the symptoms, he is not looking for the legal consequences such as necessarily arise in the adversarial context of any trial. This is why the epistemological debate in the scientific community is objective and reasonable. The moment that very same debate is put on the stage of the adversarial theatre the objectivity and

reasonableness become charged with potential consequences of the outcome of the trial. What was reasonable in the sense of "relative" before, suddenly becomes a discrete "yes" or "no" proposition, for which the expert appointed by the court must take full responsibility. What before was a full spectrum of experiment, suddenly becomes a "yes" or "no" proposition which commonly, moreover, may have dire consequences for the protagonists in the trial.

10. I have dealt with this kind of problem in *Tătar v. Romania* (no. 67021/01, 27 January 2009) and *Băcilă v. Romania* (no. 19234/04, 30 March 2010) and the issue is always the same. The modern doctrine of the principle of precaution offers an elegant solution to this legal enigma by transferring *a priori* the burden of proof onto the appropriate party. In *Tătar* and *Băcilă* cases, clearly this ought to have been the Romanian State. In our case, the burden of proof, if we were to be guided by the principle of precaution, ought to have been on the company which had produced the vaccine and on the doctors who have injected it in an allegedly irreproachable way. If that burden were to be placed on them they would make an extra effort to show that the vaccine had in fact been produced and administered *lege artis* and the case would be, without undue burdening of the experts, resolved. This would have occurred, of course, if those who carried the burden were able to show that the allegations on the part of the applicant were in fact without any scientific basis.