



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

FIFTH SECTION

CASE OF SERGIYENKO v. UKRAINE

(Application no. 47690/07)

JUDGMENT

STRASBOURG

19 April 2012

FINAL

19/07/2012

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

In the case of Sergiyenko v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 20 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 47690/07) 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 Volodymyr Ivanovych Sergiyenko (“the applicant”), on 9 October 2007.

2. The applicant was represented by Mr O.A. Sakhnenko, a lawyer practising in Kryvyi Rig. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs V. Lutkovska, from the Ministry of Justice.

3. The applicant alleged, in particular, that the criminal proceedings concerning the death of his son and the examination of his civil claim within those proceedings had been excessively long.

4. On 1 February 2011 the application was communicated 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 1949 and lives in Kryvyi Rig.

6. On 1 October 2002 the applicant’s son was hit by the vehicle of Mr B., who fled from the scene of the accident.

7. On 2 October 2002 the police examined the scene of the accident, traced and located Mr B., examined his vehicle and conducted a medical examination of Mr B.

8. On 9 October 2002 the applicant's son died in hospital as a result of his injuries sustained in the accident.

9. On 11 October 2002 the Zhovtnevy District Police Department instituted criminal proceedings against Mr B. for causing a traffic accident resulting in the death of the applicant's son and for leaving him in danger after the accident. Mr B. was questioned the same day.

10. On 15 October 2002 the applicant was recognised as a civil claimant within the criminal proceedings.

11. Between October 2002 and January 2003 the investigation team conducted technical, medical forensic expert examinations, questioned the suspect, the applicant and several witnesses and conducted a number of other investigative actions.

12. On 20 January 2003 the criminal proceedings were terminated for lack of *corpus delicti* in the actions of Mr B.

13. On 17 February 2003 the Zhovtnevy District Prosecutor's Office quashed the decision of 20 January 2003 and remitted the case for further investigation. The investigator in the case was replaced.

14. On 5 April 2003 the investigator ordered a repeated technical expert examination. The examination was completed on 6 June 2003.

15. On 23 October 2003 the Main Investigative Department of the Ministry of the Interior noted the ineffectiveness of the investigation in the case and ordered the investigator to take appropriate investigative actions.

16. Between November 2003 and April 2004 the investigator questioned a number of witnesses.

17. On 27 April 2004 the investigator conducted a repeated on-site reconstruction of the events. Another on-site reconstruction was scheduled for 9 June 2004 and postponed on several occasions. It was finally conducted on 28 July 2004.

18. On 30 July 2004 the investigator, upon the applicant's request, ordered additional medical, technical and trace evidence examinations. They were completed on 22 February 2005.

19. On 6 May 2005 the case was given to another investigator, who ordered additional medical, technical and trace evidence examinations on the same day.

20. On 20 June 2006 the technical examination was completed.

21. On 6 July 2006 the investigator in the case was replaced.

22. On 18 July 2006 the investigator ordered an additional medical examination. It was completed on 19 August 2006.

23. Between October 2006 and April 2007 the investigation team questioned several witnesses and conducted a number of confrontations.

24. On 12 December 2007 the case was transferred to the Kryvyy Rig City Police Department for further investigation.

25. On 1 February 2008 a new investigator in the case was appointed.

26. On 20 February 2008 the investigator in the case was replaced.

27. On 3 June 2008 the investigator ordered additional medical, technical and trace evidence examinations. They were completed on 31 June 2008.

28. On 10 September 2008 Mr B. was charged with a breach of traffic rules causing the death of the applicant's son. At the same time, the charge of leaving a person in danger after the accident was dropped.

29. On 9 October 2008 the criminal investigation was completed and the case was transferred to the Zhovtnevy District Court of Kryvyy Rig (hereinafter – “the District Court”) for examination.

30. On 18 November 2008 the District Court held a preparatory hearing.

31. On 21 January 2009 the applicant lodged a civil claim, which he later reformulated on several occasions.

32. On 9 December 2009 the District Court found Mr B. guilty of a breach of traffic rules causing death and sentenced him to four years' imprisonment. It also awarded the applicant 80,000 Ukrainian hryvnias (UAH), the equivalent of 7,175 euros (EUR), in compensation for non-pecuniary damage and UAH 29,798, the equivalent of EUR 2,672, in compensation for pecuniary damage.

33. On 18 and 24 December 2009 respectively the defendant and the prosecutor appealed against the judgment. The former claimed his innocence; the latter considered the sentence too lenient.

34. On 25 December 2009 the applicant submitted his objections to the defendant's appeal, considering that the judgment of 9 December 2009 had been well-founded and lawful.

35. On 3 February 2010 the Dnipropetrovsk Court of Appeal upheld the decision of the first-instance court. This decision was not appealed against and it became final.

36. On 18 February 2010 Mr B. was arrested by the police and sent to prison to serve his sentence.

II. RELEVANT DOMESTIC LAW

A. Civil Code 1963

37. Article 450 of the Civil Code, as in force until 1 January 2004, provided as follows:

“Organisations and persons whose activities give rise to an increased hazard to their environment (transport organisations, industrial enterprises, buildings, car owners etc.) shall be obliged to compensate [any] damage caused by the source of that

increased hazard unless they can prove that the damage resulted from *force majeure* or from intentional actions on the part of the victim.”

B. Civil Code 2004

38. The relevant provision of the Civil Code, as in force since 1 January 2004, reads:

Article 1187. Compensation for damage caused by a source of increased danger

“...

5. A [natural or legal] person involved in an activity constituting a source of increased hazard shall be responsible for [any] damage caused [by that activity] unless [he, she or it] can prove that the damage has resulted from *force majeure* or from intentional actions on the part of the victim.”

THE LAW

I. THE ALLEGED INEFFECTIVENESS AND THE LENGTH OF THE INVESTIGATION INTO THE DEATH OF THE APPLICANT’S SON

39. The applicant complained about the length of the criminal proceedings and the length of the examination of his civil claim within those proceedings. He referred to Articles 2 § 1 and 6 § 1 of the Convention, which read insofar as relevant as follows:

Article 2 § 1

“1. Everyone’s right to life shall be protected by law...”

Article 6 § 1

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

A. Admissibility

1. *Non-exhaustion of domestic remedies*

40. The Government maintained that domestic legislation had provided for a special procedure for seeking compensation for material and non-pecuniary damage in a case like the present. It had been open to the applicant to institute civil proceedings against Mr B. and to claim compensation for the damage caused by the source of increased hazard – in this case, the vehicle. The applicant could have had recourse to this civil remedy, which had not been dependent on the outcome of any criminal investigation. Given that the applicant had not instituted such proceedings, the Government considered that the application was inadmissible because the applicant failed to exhaust available domestic remedies.

41. The applicant did not submit any observations within the set time-limit.

42. The Court notes that the remedy suggested by the Government is not intended to address the issue of the length of the investigation and trial in the present case, but rather is an alternative civil remedy. In this respect the Court reiterates that, although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case (see *Fedina v. Ukraine*, no. 17185/02, § 62, 2 September 2010, with further references). In the circumstances of the present case, even if the applicant could have recourse to a civil remedy, which was not dependent on the outcome of any criminal investigation, any relevant findings in the criminal proceedings would have influenced the outcome of the civil proceedings and the amount of compensation, which could be different depending on finding of a guilt of Mr B. Therefore, the Government's objection in respect of the applicant's complaint under Article 2 § 1 of the Convention must be rejected.

43. The Court further notes that the applicant could have claimed damages from Mr B., both within the criminal proceedings and in separate civil proceedings. The applicant chose the former remedy and exhausted it. The Court reiterates that under its established case-law, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef v. Malta* [GC], no. 17056/06, § 58, 15 October 2009). The Court notes that both remedies served the same

purpose and were equally available to the applicant. The Government did not demonstrate that in the circumstances of the present case that separate civil proceedings would *a priori* have been a more effective remedy than the examination of a civil claim within the criminal proceedings. The Court therefore also dismisses this objection of the Government in respect of the applicant's complaint under Article 6 § 1 of the Convention.

2. Otherwise as to admissibility

44. The Court notes that this application is not inadmissible on any other grounds and is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It must therefore be declared admissible.

B. Merits

45. The applicant complained about the length of the investigation and trial. He submitted no further observations in reply to those of the Government.

46. The Government maintained that the domestic authorities had acted with due diligence from the outset and that there had been no delays that could have affected the effectiveness of the investigation and the establishment of the facts of the case. They also noted that the number of investigative actions taken in the criminal case in question had demonstrated the willingness of the authorities to conduct a thorough investigation of the case.

47. As to the length of the examination of the applicant's civil claim, the Government noted that the applicant had been recognised as a civil claimant in the criminal case on 15 October 2002. The proceedings had been terminated by the decision of the Dnipropetrovsk Regional Court of Appeal on 3 October 2010. According to the Government, the proceedings had therefore lasted for six years, three months and nineteen days and this length had been reasonable in the circumstances of the case.

48. The Court reiterates that Article 2 does not concern only deaths resulting from the use of force by agents of the State. In the first sentence of its first paragraph it lays down a positive obligation on the Contracting States to take appropriate steps to safeguard the lives of those within their jurisdiction. That obligation applies in the context of any activity in which the right to life may be at stake, including deaths resulting from road traffic accidents, and calls for an effective judicial system which can determine the cause of death and bring those responsible to account (see *Anna Todorova v. Bulgaria*, no. 23302/03, § 72, 24 May 2011, with further references).

49. 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-...).

50. In line with the above, while identification and punishment of those responsible for a 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*, cited above, §§ 66-67), 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 v. Slovenia* [GC], no. 71463/01, § 211, 9 April 2009; *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 70, 28 July 2009; *Antonov v. Ukraine*, no. 28096/04, §§ 50-51, 3 November 2011).

51. Turning to the facts of the present case, the Court notes that the authorities took a number of measures aimed at discharging their positive obligation under Article 2 of the Convention. The person responsible for the death of the applicant's son was promptly identified and number of investigative actions, including an on-site reconstruction of events, questioning and different forensic examinations, were conducted within the following months. 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.

52. At the same time, the Court observes that the traffic accident and the death of the applicant's son occurred in October 2002, whereas the final decision concerning Mr B.'s punishment was taken in February 2010 – more than seven years later. It notes that despite the substantial number of investigative measures taken, the investigation was criticised by the national authorities themselves for a lack of efficiency (see paragraph 15 above). Furthermore, the criminal proceedings in question were marked by numerous changes of investigator and an unusually high number of repeated expert examinations. It could be accepted that in certain circumstances a repeated expert examination might be required to clarify the circumstances of the case. At the same time, in the Court's opinion, the fact that the same type of forensic examination was ordered several times (see paragraphs 11, 14, 18, 22 and 27 above) within the same criminal case suggests the lack of a comprehensive approach to the collection of evidence during the pre-trial investigation phase. The Court considers that a delay of seven years in bringing to accountability the person responsible for the death of the applicant's son was incompatible with the State's obligation under Article 2 of the Convention to carry out an effective investigation of suspicious deaths.

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

54. 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 to also examine the case under Article 6 § 1 of the Convention (see *Šilih v. Slovenia*, cited above, § 216).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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.”

56. The applicant did not submit a claim for just satisfaction within the set time-limit. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* by six votes to one that there has been a violation of Article 2 of the Convention under its procedural limb;
3. *Holds* by six votes to one that there is no need to examine the complaint under Article 6 § 1 of the Convention.

Done in English, and notified in writing on 19 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President

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

D.S.
J.S.P.

PARTLY DISSENTING OPINION OF JUDGE NUSSBERGER

I respectfully disagree with the majority's opinion that mere delays in investigating a death caused by a road accident – not an intentional killing – are to be considered as a violation of Article 2. As the investigation was successful in the end and compensation was paid, I see only a violation of Article 6 § 1, not of Article 2 of the Convention.

The Court has constantly widened the scope of applicability of Article 2 of the Convention. The procedural obligation under Article 2 has been applied not only in cases where the State could be held responsible for a person's death, but also where private persons were responsible (see *Anna Todorova v. Bulgaria*, no. 23302/03, § 72, 24 May 2011, and *Šilih v. Slovenia* ([GC], no. 71463/01, § 192, 9 April 2009). This approach has been applied in respect of deaths resulting from medical negligence (see *Šilih*, cited above) and also in respect of fatal road-traffic accidents (see *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007). However, up to now the Court has found a violation of the procedural limb of Article 2 only where the investigation was not only long and ineffective, but also, as a consequence of the length and of the lack of diligence, the perpetrator could either not be identified or his or her responsibility could not be proven, so that ultimately the victim was deprived of any redress (see *Anna Todorova*, cited above; *Šilih*, cited above; and *Dvořáček and Dvořáková v. Slovakia*, no. 30754/04, 28 July 2009, which became final on 28 October 2009). Contrary to the approach taken in the present case, delays in the investigation have up to now been considered as a violation of Article 6 alone (see *Fedina v. Ukraine*, no. 17185/02, 2 September 2010). Consequently, in *Rajkowska v. Poland*, cited above, the Court did not find a violation because the driver responsible for the accident was ultimately convicted of the offence and sentenced.

The present case is the first case in which the Court has found a violation of Article 2 despite the fact that the perpetrator was identified and punished and compensation was paid. It is true that the victim had to wait seven years before that result was achieved. This, however, is a problem of inefficiency in long civil and criminal proceedings, which is covered by Article 6 of the Convention. I do not therefore see any need for a further widening of the scope of applicability of Article 2. There is no lacuna to be filled. This departure from settled case-law does not improve the protection of victims, but rather mitigates the stigmatizing effect which the finding of a violation of Article 2 should have. Article 2 ranks as one of the most fundamental provisions of the Convention (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324). Therefore it matters whether a State is reproached for having violated Article 2 or Article 6. Delays in investigating a road accident cannot be equated with an intentional killing by State agents. In my view, this departure from the case-law blurs the nuanced approach to different types of human rights violations enshrined in the Convention.