



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

FIFTH SECTION

CASE OF KHAYLO v. UKRAINE

(Application no. 39964/02)

JUDGMENT

STRASBOURG

13 November 2008

FINAL

13/02/2009

This judgment may be subject to editorial revision.

In the case of Khaylo v. Ukraine,

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

Rait Maruste, *President*,

Karel Jungwiert,

Volodymyr Butkevych,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 39964/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mr Sergey Fyodorovich and Mrs Svetlana Ivanovna Khaylo (“the applicants”), husband and wife, on 10 August 2002.

2. The applicants, who had been granted legal aid, were represented by Mr V.F. Sanzharevskyy, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. In their initial application the applicants alleged, in particular, violations of Article 2 of the Convention on account of an ineffective investigation of the death of their relative and of Article 6 § 1 on account of the length of criminal proceedings relating to their pecuniary interests. On 26 November 2003 the applicants added to their application, complaining, in particular, of the disproportionate use of force by police officers during their apprehension, the ineffective investigation of this incident and their allegedly unlawful apprehension and detention. The applicants referred to Articles 3 and 5 § 1(c) of the Convention in respect of these complaints.

4. On 28 June 2005 the Court declared the application partly inadmissible and decided to communicate the above complaints to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1954 and currently live in Kyiv.

A. The death of the first applicant's cousin and related proceedings

1. Background

6. In 1998 the applicants paid Mrs N.T. and Mrs T.T. the purchase price of a house located at D. street in Dnipropetrovsk and moved into it. Instead of registering the transaction in accordance with the applicable law, however, the applicants had the nominal house owners issue an authorization to Mr B., to whom the first applicant owed a debt, allowing him to perform any transactions relating to the house. As a result of the first applicant defaulting on his debt, in September 1999 Mr B. signed this house over as a gift to his daughter, although the applicants continued to live in it.

7. In 1999 Mr B. instituted civil proceedings against the applicants seeking repayment of the debt and various compensatory payments. The applicants lodged a counterclaim, seeking to confirm the validity of their unregistered purchase of the house. By the final decision of 29 August 2007 the claims of both parties were dismissed.

8. Since 1999 the applicants also lodged numerous complaints with law enforcement authorities alleging that they had been deprived of their house and money by gang members and that their lives were in danger on account of threats from Mr B. In support of their allegations, the applicants submitted tapes of their telephone conversations with Mr B., in which he had referred to his organized crime connections.

9. Criminal proceedings were instituted, in which Mr A.Kh., the first applicant's cousin and a member of the applicants' household, born in 1957, acted as one of the witnesses.

10. On 3 May 2001 the applicants' family was provided with police bodyguards to secure their safety in connection with these proceedings. On 1 November 2001 the measure was lifted with reference to the first applicant's inappropriate behaviour towards the guards. By the final decision of 2 September 2002 the Supreme Court upheld the earlier decisions finding the lifting of the measure lawful. The applicants subsequently made unsuccessful attempts to have the matter reopened.

11. Mr B. was eventually tried, but acquitted of extortion, as the applicants' tapes were not admitted as permissible evidence. However the

applicants insisted on bringing various other criminal actions against him, some of which appear to be currently pending.

2. The investigation of the death of the first applicant's cousin

12. At 9 a.m. on 30 April 2002 the applicants informed the Zhovtnevyi District Police that they had found Mr A.Kh. dead in his bed in the annex to their house at D. street.

13. On the same day several police officers and medical experts in presence of lay witnesses broke into the annex which was purportedly locked from the inside. A decomposing corpse was found in the bed on its back, with the head on the pillow. The group recorded no traces of a struggle or other evidence suggesting homicide. Pictures of the site were taken; however, they could not be developed on account of a defect in the film. The body was taken to the mortuary. However, as 1 May was a national holiday, the autopsy was not carried out until 2 May 2002. According to the applicants, no precautions were taken to prevent decomposition of the body in the mortuary.

14. Following the autopsy of 2 May 2002, the experts found it impossible to establish the cause of the death as the body had significantly decomposed. They further noted that no broken bones or other visible injuries could be found on the body. Finally, they suggested that the death, which must have occurred on or around 28 April 2002, was likely to have been caused by atherosclerosis of brain and heart vessels.

15. On 20 May 2002 the police decided not to institute a criminal investigation in relation to the death having found no appearance of a homicide.

16. The applicants appealed maintaining that Mr A.Kh. could have been killed late 28 April 2002 by a gang in which Mr B. was involved or by other members of organized crime groups who feared him as an important witness in criminal proceedings, in which the applicants were the aggrieved parties. They noted, in particular, that they had found rubber gloves and a hammer of an unknown origin on the table in his room, which could have been used to murder Mr A.Kh. Furthermore, Mr A.Kh.'s height according to his records had been 196 cm, while the height of the autopsied corpse was recorded as being 177 cm. Finally, Mr A.Kh. had no record of atherosclerosis or any other life-threatening illness.

17. On 4 June 2002 the Dnipropetrovsk Prosecutors' Office remitted the case for additional investigation. It found, in particular, that in light of the second applicant's report about having seeing Mr A.Kh. alive on the evening of 28 April 2002, it was strange that his body had decomposed so rapidly. It further noted that a photographic record of the site had not been prepared, the deceased's medical record had not been checked and the applicants' assertion that he could have been killed by individuals involved in organized crime had not been investigated.

18. Subsequently on numerous occasions (20 June 2002, 18 July 2002, 21 October 2002, 7 January 2003 and 26 March 2003) the law enforcement authorities refused to initiate criminal proceedings having found no evidence of a homicide. All of these decisions were subsequently annulled by the prosecutors' office (on 10 July 2002, 27 September 2002, 2 January 2003, 12 February 2003 and 1 October 2003) as having been based on only superficial inquiries.

19. On 22 October 2003 the Zhovtnevy District Prosecutors' Office refused to initiate criminal proceedings. Following additional questioning, it found, in particular, that the difference in height could have been due to a clerical error by mortuary personnel. As regards the gloves and the hammer, although certain witnesses had recalled seeing them, these objects were no longer available and it was not possible to determine their origin. Furthermore, although no mention of atherosclerosis or any other life-threatening illness had been found in Mr A.Kh's medical records, regard being had to the fact that the annex had been locked from inside, no traces of any struggle or disorder had been noticed in the room and no injuries had been found on the body, there was no reason to suspect a homicide.

20. On 6 April 2004 the Zhovtnevy District Court of Dnipropetrovsk annulled this decision and remitted the case for additional investigation. It referred to several omissions in the preliminary inquiries, such as the failure to measure the body at the site, failure to establish a probable cause of death against the absence of any record concerning atherosclerosis and the superficial examination of the door to the annex. In particular, the results of the investigation stated that the door could only be locked from the inside, while, according to a photographic record of the scene, the door had both a lock and a padlock.

21. On 1 February 2005 the law enforcement authorities refused to institute criminal proceedings.

22. On 21 April 2005 the General Prosecutors' Office annulled this decision, having found that the circumstances of the case could only be established within the framework of criminal proceedings. The investigation was transferred to the Poltava Regional Prosecutors' Office.

23. On 10 March 2006 the Prosecutors' Office discontinued the criminal proceedings having found no evidence of a homicide. It noted, in particular, that due to the lapse of time witnesses could not accurately recall certain details. On the other hand, the witnesses clearly recalled having seen no traces of a struggle or other signs of a homicide. Mr B., implicated by the applicants as being involved in the murder, could not be interviewed as he had moved abroad. His son-in-law denied any family involvement in Mr A.Kh.'s death. The discrepancy in the records concerning Mr A.Kh.'s height appeared to be due to a typographical error by the mortuary registrar. The gloves on the table had been left by one of the medical experts. As regards the hammer, the first applicant had mentioned having taken it

together with the gloves and Mr A.Kh.'s linen, but its existence was doubtful as he had refused to surrender these objects without explanation. The investigation further found that the applicants' hypothesis that Mr A.Kh. had been killed late on 28 April 2002 was improbable, in particular, as the case file records contained a certificate from Mr A.Kh.'s employer that he had undergone a medical test on the morning of 29 April 2002.

B. The events of 15 and 16 October 2002 and related proceedings

24. In June 1999 the first applicant offered the family's other house, located at V. street in Dnipropetrovsk, as collateral for a bank loan of 200,000 hryvnyas (UAH). In June 2000 the house at V. street was sold in default at a public auction to Mr R.K. In September 2002 Mr R.K. leased it out to Mr S.K., who moved in with his family.

25. The applicants unsuccessfully attempted to secure the criminal conviction of the individuals implicated in the sale and instituted civil proceedings, claiming back the house. As appears from scarce documents presented by the applicants, these proceedings are currently still pending.

26. Pending examination of their proceedings for annulment of the sale, on 15 October 2002 the applicants broke the lock on the door and entered the house with their three acquaintances – Mrs Ch., Mrs S. and Mr O.V. They refused to leave the house at the tenants' request. An argument and a fight between the tenants and the applicants broke out. The police were allegedly called, but the applicants explained that they were the owners of the house and the police left. Several hours later Mrs Ch. and Mrs S. left, while the applicants and Mr O.V. remained for the night.

27. At about 10 a.m. on 16 October 2002 the tenants called the police again, complaining about the applicants' and Mr O.V.'s obnoxious behaviour: smoking inside the house, putting pressure on them to leave, threatening them and swearing at them. Several police officers from the special detachment responsible for keeping order in courts entered the premises and ordered the applicants and Mr O.V. to follow them out of the house. The applicants and Mr O.V. protested. The first applicant and Mr O.V. were eventually restrained and handcuffed and the group was brought to the police station. According to the police records, the applicants stayed in the police station from 11 a.m. to 14 p.m. pending the drawing up of a report about an administrative offence. According to the applicants, they stayed in the police station for seven hours.

28. On the same date the first applicant and Mr O.V. stood trial before the Zhovtnevyi Court accused of "malicious resistance to the lawful demands of law-enforcement officers" (an administrative offence). They were accused, in particular, of grabbing the officers by their uniforms, pushing them, threatening and swearing at them in response to their

demands to cease disorderly conduct. The court discontinued the administrative proceedings having found that the defendants' conduct at the house warranted a criminal investigation on account of the possible trespass of the dwelling. The case was remitted to the Zhovtnevy District Prosecutors' Office. Subsequently (on 23 October 2002) the Prosecutors' Office decided not to press charges in relation to the trespass. They found that the defendants' actions could potentially qualify as infliction of minor bodily injuries on Mr S.K. and vigilantism, which could be prosecuted privately by the aggrieved party.

29. At the same time, following the first applicant's medical examination of 17 October 2002, he was certified as having sustained light bodily injuries (several bruises and a scratch on a finger), which could have been inflicted on or around 16 October 2002. On 21 November 2002 the second applicant was certified as having sustained in the same period light bodily injuries resulting in short-term health problems (cerebral concussion, for which she had undergone out-patient treatment).

30. The applicants sought to institute criminal proceedings against the police officers for assault and battery, infliction of bodily injuries, disorder, racketeering, abuse of office and premeditated unlawful apprehension and detention.

31. On 14 November 2002 and 17 December 2002 their requests were rejected following preliminary inquiries and the interviews of the parties involved for lack of any evidence suggesting criminal conduct on the officers' behalf.

32. On 10 October 2003 the Zhovnevy Court remitted the case for additional investigation. The court found, in particular, that the investigation had only established that the applicants were apprehended for good cause, while having failed to establish how the injuries had been inflicted on the applicants and whether the infliction of these injuries could be justified by the circumstances of the case.

33. On 10 December 2003 the Dnipropetrovsk Regional Court of Appeal upheld this decision.

34. On 3 February 2004 the Prosecutors' Office refused to initiate criminal proceedings. It found, in particular, that the cerebral concussion as well as other injuries had been sustained in the course of the fight with the tenants on 15 October 2002 and that the force used by the police officers to restrain and arrest the applicants had not been disproportionate. The investigation referred, primarily, to the testimonies of the police officers and other parties involved. In particular, the applicants testified that they had been battered by the tenants on 15 October 2002; the tenants complained that they had been forced to defend themselves against the applicants, who had beaten them; Mrs Ch. and Mrs S. reported having seeing Mr S.K.'s wife beating the second applicant with a slipper on the head and banging her head against the wall. Several other witnesses reported having seen the

police officers taking the first applicant and Mr O.V. handcuffed out of the house, while the latter were resisting and swearing.

35. On 24 May 2004 the Zhovtnevyi Court upheld this decision following contested proceedings. On 27 April 2005 the Dnipropetrovsk Regional Court of Appeal rejected the applicants' appeal.

C. Proceedings concerning repayment of the loan for transportation of humanitarian aid

1. Criminal proceedings concerning fraud

36. In July 1999 the applicant lent UAH 130,000 to Messrs V. and R., who were leaders of local NGOs. They had requested the loan allegedly for the arrangement of transportation of humanitarian aid (clothes and shoes) donated by a U.S.-based foundation, although according to relevant documentation the donor was responsible for all transportation costs. Subsequently the first applicant was repaid some one third of the loan and given some 4,000 kilos of goods from the humanitarian aid cargo, which he stored in the house at D. Street and subsequently surrendered to the police.

37. In December 1999 the applicants lodged various criminal complaints about having been allegedly defrauded by Messrs V. and R., who had never repaid the sum loaned to them for the transportation of humanitarian aid. Eventually, on 21 April 2000 the Dnipropetrovsk Prosecutor instituted a criminal investigation into the circumstances surrounding the transportation and distribution of the cargo. The alleged perpetrators were questioned in these proceedings as witnesses.

38. Although it appears that no formal charges were brought against Messrs V. and R., on 28 April 2000 the first applicant was admitted in the proceedings as an aggrieved party and eventually (in September 2001) as a civil claimant. The second applicant appears to have been questioned only as a witness.

39. On 30 October 2000 the proceedings were discontinued for lack of evidence of criminal conduct towards the aggrieved party.

40. On 26 December 2000 the General Prosecutors' Office ordered the resumption of the proceedings.

41. Between April 2000 and February 2004 the investigative authorities interviewed numerous recipients of the aid and officials involved in its distribution; ordered several financial expert assessments, commissioned the collection of information from the U.S.A. donor organization and examined several volumes of documents concerning the distribution of the aid.

42. Messrs V. and R. acknowledged having received the money from the first applicant. However, they alleged that a portion of it had been repaid in cash. The remaining amount was, in their opinion, the price paid by the first applicant for purchasing part of the cargo. The first applicant intended to

sell it for profit, in spite of the fact that he had been aware of the statutory ban on selling humanitarian aid and about the official undertaking of the U.S. donor to pay all transportation costs. The applicant had received his part of the cargo in October 1999, so Messrs V. and R. had discharged their civil obligation in his respect.

43. The first applicant, for his own part, disputed the exact amount of cash repaid to him and contended that he had never intended to sell the goods. He had merely agreed to store a portion of the cargo as a guarantee for repayment of the remainder debt.

44. On 10 February 2004 the investigation concluded that the circumstances of the case warranted investigation into Messrs V.'s and R.'s possible abuse of office in handling humanitarian aid. As regards their involvement in defrauding the first applicant, on 11 February 2004 the proceedings were discontinued for lack of evidence of criminal conduct and in view of the private-law nature of the dispute between the parties. Both applicants appealed against this decision. Their appeals were dismissed by the courts of three levels of jurisdiction on 27 May and 20 September 2004 and 24 May 2005 respectively.

45. In the meantime, on 19 July 2005 the proceedings were re-opened pursuant to an order of the General Prosecutors' Office and finally discontinued on 28 December 2006, essentially on the same grounds as before. The applicants' appeals against the decision to discontinue the proceedings were rejected by the courts of three levels of jurisdiction.

2. Civil proceedings against Messrs V. and R.

46. In March 2002 the applicants instituted civil proceedings in the Zhovtnevy District Court of Dnipropetrovsk seeking various compensatory payments from Messrs V. and R.

47. On 11 April 2006 the Zhovtnevy Court left their action without consideration referring to the applicants' numerous failures to appear at the hearings. The court noted, in particular, that the second applicant had appeared only once (on 21 May 2002). Neither applicant had appeared at the hearings scheduled for 4 October, 7 November and 13 December 2005, 20 January, 27 February, 20 March and 11 April 2006, having presented either unsatisfactory or no excuses. In light of all of the above, the court concluded that the applicants had no genuine interest in pursuing their case and left their action without consideration.

48. The applicants appealed. They have not informed the Court about the outcome of the appeal.

D. Other events and proceedings

49. In September 2003 Mr R. was hospitalised with cerebral concussion and bruises all over his body. On 29 October 2005 a criminal investigation

of the incident was discontinued in view of the probability that Mr R., being heavily intoxicated, had fallen from an elevated surface. The applicants demanded the resumption of the investigation, alleging that Mr R. had been battered by gang members in order to prevent his testifying in criminal proceedings related to their property interests. Their appeals were ultimately dismissed by the courts as lacking *locus standi*.

50. The applicants further contended that the gang members made several attempts to kill them, in particular in June 2002 by way of instigating a traffic accident.

II. RELEVANT DOMESTIC LAW

51. The relevant provisions of the Constitution and the Code of Criminal Procedure can be found in the judgments in the cases of *Sergey Shevchenko v. Ukraine* (no. 32478/02, §§ 36-39, 4 April 2006), and *Yakovenko v. Ukraine* (no. 15825/06, §§ 46-47, 25 October 2007).

52. According to Article 221 of the Code of Civil Procedure of 18 July 1963, the courts were obliged to suspend civil proceedings in the event of the impossibility of determining the case pending determination of a criminal case. The new Code of Civil Procedure, adopted on 18 March 2004, reflected the same obligation in Article 201.

THE LAW

I. SCOPE OF THE CASE

53. The Court notes that, after the communication of the application to the respondent Government, the applicants introduced new complaints about facts which arose subsequent to communication, without reference to any Convention article. In particular, they complained about the alleged unfairness of the proceedings instituted by them against several governmental entities and of the eviction proceedings instituted against them by Mr B.'s daughter; about facts surrounding the deaths of their granddaughter and the first applicant's mother; about the allegedly unlawful arrest of the first applicant by police in 2005 and about the placement of the first applicant's photograph on the police's "wanted" public announcement board.

54. In the Court's view, the new complaints are not an elaboration of the applicants' original complaints lodged more than three years earlier and on which the parties have commented. The Court considers, therefore, that it is

not appropriate now to take these matters up in the context of the present application (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

55. The applicants complained that the investigation of the death of Mr A.Kh., their relative, had not been effective, as required by Article 2 of the Convention. This provision provides, in so far as relevant, as follows:

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

A. Admissibility

56. The Government submitted that the applicants had not exhausted effective domestic remedies as they had preferred to complain about the ineffectiveness of the investigation to the prosecutorial authorities rather than to the courts.

57. The applicants submitted that Mr A.Kh. was a member of their immediate family and that he shared their house. They further generally contended that all remedies theoretically available to them under domestic law to complain about an ineffective investigation were ineffective in practice.

58. The Court considers that the Government’s preliminary objection raises issues concerning the effectiveness of the criminal investigation which are closely linked to the merits of the applicants’ complaints. Thus, it considers that these matters fall to be examined below under the substantive provisions of the Convention.

B. Merits

1. The parties’ submissions

59. The Government contended that the investigation of the death of the applicants’ relative was both prompt and thorough. Although the authorities failed to establish the cause of his death, the investigation conclusively excluded the possibility that Mr A.Kh. had been killed.

60. The applicants submitted that the investigation was marked with a number of serious procedural flaws and unnecessary delays. In particular, the criminal proceedings were not instituted until three years after Mr A.Kh. had died, although the applicants had implicated specific individuals in his murder. These individuals should have been promptly questioned. Furthermore, the police never seized and examined the alleged tools of the murder (hammer and gloves). The body was kept non-refrigerated in the

mortuary for two days. This fact substantially affected the effectiveness of the autopsy, which was in any event unnecessarily delayed and perfunctory in nature. Mr A.Kh.'s medical records were not analysed against the experts' suggestion that he could have died of atherosclerosis. Moreover, the fact that Mr A.Kh.'s height according to the mortuary records was 177 cm, while his records indicated 196 cm cast doubt as to whether the findings genuinely related to the body of Mr A.Kh.

61. Overall, the applicants maintained that the investigative authorities had failed to act promptly and diligently in investigating Mr A.Kh.'s alleged murder and did not take all the steps which could have been reasonably expected of them to establish the cause of his death.

2. The Court's assessment

62. Analysing the facts of the present case in light of the general principles concerning the duty of the States to ensure an effective investigation of suspicious deaths (see e.g. *Gongadze v. Ukraine*, no. 34056/02, §§ 175-177, ECHR 2005, and *Sergey Shevchenko v. Ukraine*, no. 32478/02, §§ 63-65, 4 April 2006), the Court notes at the outset that the Government have presented no documents shedding light on the steps taken by the investigative authorities to discharge this duty.

63. In so far as the Court can judge from the documents submitted by the applicants, Mr A.Kh., aged 44, who had no record of any active illness, was suddenly found dead in his bed on the morning of 30 April 2002. Three years later the General Prosecutors' Office explicitly acknowledged that the circumstances of this death warranted the initiation of criminal proceedings. The Court, for its own part, recalls that Mr A.Kh.'s death occurred against the background of his participation as a witness in several criminal proceedings potentially involving organized crime. Although none of these proceedings resulted in eventual convictions, the applicants' fears of reprisals were at one point recognized by the authorities to the point where the allocation of bodyguards to the family was warranted. This measure had been lifted, with reference to the first applicant's inappropriate conduct towards the guards, only several months before Mr A.Kh. was found dead (see paragraph 10 above). In light of all the above, the Court considers that the State authorities were under a Convention duty to investigate the circumstances of Mr A.Kh.'s death.

64. The Court further notes that the preliminary inquiry was carried out immediately after the body was found. However, the flaws which marked this inquiry, were such as to instigate subsequent orders by supervising authorities to conduct further investigations. In particular, the examination of the premises, in which the body was found, was judged as unsatisfactory. The photographs were taken with a defective film; the body was not measured; the door was not examined sufficiently to determine whether it could have been locked from the outside. The applicants' assertion that

particular individuals could have organized Mr A.Kh.'s murder was not checked. Furthermore, the Court notes that the case file materials contain no record concerning the collection of forensic and corporal evidence. On the contrary, as noted in the subsequent domestic decisions, some objects, which could have been used as evidence (such as linen, gloves and hammer allegedly seen by witnesses) were not seized and examined.

65. As regards the quality of medical evidence, the Court recalls that in coming to the probable conclusion of death by atherosclerosis, the experts relied on the absence of any broken bones or other visible injuries. A possibility of a non-mechanical injury, such as gas or substance poisoning appears not to have been explored. Moreover, the failure of the experts to examine the deceased's medical history coupled with a possible mistake in recording his height undermines the credibility of the Government's allegation that due care was exercised in this respect. As regards the applicants' contention that the authorities were also at fault for the body's rapid decomposition, the Court notes that no evidence has been presented to this effect. However, it recalls that in its decision of 4 June 2002 to remit the case for further investigation, the Prosecutors' Office marked it unusual that the body had significantly decomposed by 2 May, given that 28 April had been recorded as the probable date of the death and in circumstances where the body had been stored in the mortuary since the morning of 30 April.

66. Subsequent numerous remittals of the case for additional investigations and initiation of criminal proceedings three years after the death did not, in the Court's opinion, sufficiently redress the deficiencies of the initial inquiry. Analyzing the decision of 10 March 2006, by which the criminal proceedings were eventually discontinued, the Court is particularly struck by an auxiliary mention of a medical certificate from Mr A.Kh.'s employer dated 29 April 2002. It notes that the contents of this certificate were not incorporated into the analysis of the probable cause of the death and the employer appears not to have been questioned. Furthermore, it appears that the investigation made no attempts to reconcile the fact that on 29 April the deceased had undergone a medical check up with the fact that on the morning of 30 April his body was found in an allegedly significantly decomposed state and with the mortuary record proposing 28 April as the most probable date of the death.

67. Furthermore, the Court notes the investigation's liberal attitude towards the first applicant's refusal to surrender corporal evidence (linen, hammer and gloves) allegedly in his possession. According to the decision of 22 October 2003 not to institute criminal proceedings, these objects were no longer available, while the decision of 10 March 2006 to discontinue the investigation has it that the first applicant, who might have still had them at the material time, was requested to surrender them. However, following his unexplained refusal, the authorities appear not to have taken any procedural

actions to find out whether he did, in fact, possess these objects and, if so, to compel their surrender.

68. Even considering that the decision of 10 March 2006 can be further challenged before the domestic authorities, the Court doubts that the initial deficiencies of the investigation can now be sufficiently redressed. As indicated in this decision, the lapse of time made it no longer possible to collect certain evidence. In particular, Mr B., implicated by the applicants in the alleged murder, had moved abroad and a number of other witnesses could no longer recall the details questioned about.

69. In these circumstances, the Court concludes that the Government's preliminary objection (see paragraph 56 above) concerning non-exhaustion of domestic remedies must be dismissed. It further finds that there has been a violation of the procedural limb of Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

70. On 26 November 2003 the applicants added to their initial application and complained about the excessive use of force by the police officers during their apprehension on 16 October 2002. They further complained about ineffectiveness of the investigation into the incident. The applicants referred to Article 3 of the Convention, which provides as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

71. The Government pleaded that the above complaint should be declared inadmissible, as by adding to their initial application the applicants abused their right of petition. In the alternative, they submitted that the complaint was raised before the Court more than six months after the events complained about. It was, therefore, inadmissible for having been lodged out of time.

72. The applicants did not comment on these submissions.

73. The Court observes that a finding of abuse of right of petition might be made in extraordinary circumstances, in particular, if it appears that an application was clearly unsupported by evidence or outside the scope of the Convention, or if the application was based on untrue facts in a deliberate attempt to mislead the Court (see e.g. *Ismoilov and Others v. Russia*, no. 2947/06, § 103, 24 April 2008). The Court is unable to find any indication of abuse in the present application.

74. The Court does not find it necessary to address the Government's submissions concerning exhaustion of domestic remedies and observance of the six-months time-limit for lodging the application, as it finds the applicants' complaint in any way inadmissible for the reasons stated below.

75. Assuming that the injuries sustained by the applicants had been so serious as to attract application of Article 3 of the Convention, the Court observes that, following an official inquiry into the use of force by police officers, the law-enforcement authorities established that those injuries had been caused during their fight with private persons. This conclusion was based on the examination of medical evidence and the testimonies of numerous witnesses, including the applicants and their witnesses (Mrs S. and Mrs Ch.). The decision not to prosecute the police officers was subsequently upheld by courts at two levels of jurisdiction following contested proceedings, in which the applicants participated and were able to present all necessary arguments to defend their interests. In these circumstances, the Court does not find any reason to suspect the police involvement in causing the injuries in question. The complaint about a violation of the substantive limb of Article 3 of the Convention has therefore not been made out.

76. As regards the complaint under the procedural limb of Article 3, the Court notes that the investigation was discontinued and resumed on several occasions. It reiterates that, since remittal is usually ordered because of errors committed by the authorities whose decisions are appealed against, the repetition of such orders within one set of proceedings may disclose a deficiency in the prosecution system (see *Kozinets v. Ukraine*, no. 75520/01, § 61, 6 December 2007). However, subsequent to the decision taken by the Zhovtnevyi Court on 10 October 2003 instructing the law-enforcement authorities to focus on establishing the probable cause of the injuries and to evaluate the proportionality of the force used, the initial inefficiencies appear to have been duly addressed. In particular, as noted above, a number of witnesses were questioned and the missing facts were established with reasonable probability. In these circumstances, the Court finds that the applicants have not made out an arguable claim under the procedural limb of Article 3 of the Convention.

77. It follows that their complaints under Article 3 of the Convention must be dismissed pursuant the requirements of Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

78. On 26 November 2003 the applicants further complained that on 16 October 2002 they were apprehended and detained in the police for several hours in spite that they had not done anything unlawful. They relied on Article 5 § 1 of the Convention, which as far as relevant reads as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...

79. The Government raised the same objections concerning the abuse of the right of petition and the non-observance of the six-month rule as in respect of the complaint under Article 3 of the Convention (see paragraph 71 above).

80. The applicants did not comment on the issue.

81. The Court notes that the Government's plea concerning the abuse of right of petition must be rejected for the same reasons as above (see paragraph 73 above).

82. As regards the Government's submission concerning the non-observance of the six-month rule, the Court notes that where no effective remedy is available, the six-month period runs from the act alleged to constitute a violation of the Convention (see e.g., *Antonenkov and Others v. Ukraine*, no. 14183/02, § 32, 22 November 2005). In absence of any plea concerning non-exhaustion on the Government's behalf, the Court will normally assume that an applicant exhausted all the remedies, which, in the particular circumstances of his case, could have been effective (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006, and *Dobrev v. Bulgaria*, no. 55389/00, §§ 112-114, 10 August 2006).

83. Applying these principles to the present case, the Court recalls that in their requests to institute criminal proceedings against the police officers, the applicants listed a number of purported crimes, including that of premeditated unlawful apprehension and detention. The domestic authorities, however, consistently refused to institute criminal proceedings, holding, in particular, that there was no case to answer in this respect, as the applicants had been arrested by the police in response to their disorderly conduct, for which they subsequently stood trial. These findings were upheld by the courts in the course of adversary proceedings. In light of this reasoning by domestic authorities and in the absence of any indication from the Government that another remedy was available to the applicants in respect of the modalities of their detention, the Court must conclude that there were no effective remedies to exhaust in respect of the applicants' complaint under Article 5 in the context of the present case. The six-month period for the Article 5 complaint lodged in November 2003 had therefore begun to run from 16 October 2002. The Government's objection as to the non-observance of the six-month rule must therefore be upheld.

84. It follows that the complaint must be rejected in accordance with Article 35 §§ 1, 3 and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF CRIMINAL PROCEEDINGS CONCERNING FRAUD

85. The applicants complained under Article 6 § 1 of the Convention that the length of the criminal proceedings concerning the alleged fraud of Messrs V. and R. was unreasonable. The respective provision, in so far as relevant, reads as follows:

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

86. The Government submitted that Article 6 § 1 was not applicable to the proceedings at issue.

87. The applicants generally disagreed.

88. The Court notes at the outset that, according to the case file materials, the first applicant joined the criminal proceedings concerning fraud allegedly committed by Messrs V. and R. as an injured party and subsequently as a civil claimant. The second applicant's status in these proceedings appears to be only that of a witness, although she had initially sought the institution of the proceedings and subsequently lodged complaints about their discontinuation, examined by domestic courts. However, regardless of whether the second applicant can be considered a party to the proceedings, the Court finds that both applicants' complaints about their duration are in any event inadmissible for the reasons set out below.

89. The Court observes, first of all, that the criminal proceedings complained of did not relate to the determination of criminal charges against the applicants. Thus, the criminal limb of Article 6 § 1 does not apply (see e.g. *Kositsina v. Ukraine* (dec.), no. 35157/02, 15 January 2008). Article 6 § 1 under its “civil head” may, however, be applicable to criminal proceedings, where an applicant shows that from the moment when he joined them as a civil party until their conclusion the civil component remained closely connected with the criminal component, i.e., the criminal proceedings affected the civil component. In other words, the applicant must show that prosecution for a criminal offence was indissociable from his ability to exercise a right to bring civil proceedings in domestic law (see e.g. *Perez v. France* [GC], no. 47287/99, §§ 67-70, ECHR 2004-I, and *Serdyuk v. Ukraine*, no. 15002/02, § 25, 20 September 2007). The Convention, however, does not confer any right to “private revenge” or to an *actio popularis*. Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see e.g. *Perez*, cited above, § 70). Where an applicant has an effective possibility in domestic law to assert his civil rights regardless of the outcome of criminal proceedings, which serve a purely punitive purpose, applicability of

Article 6 § 1 reaches its limits, even where within the framework of the criminal proceedings an applicant might have lodged a pecuniary claim (see *Sigalas v. Greece*, no. 19754/02, §§ 27-30, 22 September 2005 and *Garimpo v. Portugal* (dec.), no. 6752/01, 10 June 2004).

90. Turning to the circumstances of the present case, the Court recalls that the object of the applicants' criminal complaint lodged against Messrs V. and R. in 1999 was their failure to repay in good time the debt owed to the first applicant. In 2002 the applicants also raised this complaint in civil proceedings, which, according to the case file materials, have been pending since that date in parallel to the criminal proceedings. The trial court, bound by domestic law to suspend the proceedings pending the outcome of the criminal case, should it establish that the findings by the criminal court would be decisive for the determination of the parties' civil rights and obligations, has never resorted to this option. On the contrary, the criminal proceedings were discontinued on several occasions with reference to the private-law nature of the dispute between the parties. Their resumption appears attributable largely to the public interest in establishing the facts concerning possible abuse in the handling of humanitarian aid. As regards the establishment of the facts related to the applicants' pecuniary interests, it should be noted that Messrs V. and R. never denied the fact that they had a debt to the first applicant. The only matters disputed were the amount, which had been repaid, and the obligation to pay further amounts in light of the fact that the first applicant had received some 4,000 kilos of goods from the humanitarian aid cargo. The civil proceedings concerning this dispute were eventually discontinued on account of the applicants' systematic failure to appear at the hearings.

91. In light of all the above, the Court does not find that criminal proceedings concerning the alleged fraud against the applicants attract the application of Article 6 § 1. The applicants' complaint about the unreasonable duration of these proceedings must therefore be dismissed pursuant the requirements of Article 35 §§ 3 and 4 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

92. Further, the applicants complained under Article 6 § 1 of the unfairness and the length of all criminal and civil proceedings in which they were involved. They further complained under Article 2 of the Convention about alleged attempts on their lives and under Article 1 of Protocol No. 1 about having been deprived of their houses and money by gang members. Lastly, generally referring to Articles 8, 10, 13, 14 and 17 of the Convention, Article 2 of Protocol No. 1, Article 2 of Protocol No. 4 and Articles 2 and 3 of Protocol No. 7 the applicants alleged that the State authorities were corrupt and inefficient in handling their complaints and had

failed to protect their family and property from brutal assaults by gang members.

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

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

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. 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

96. The applicants initially claimed 1,000,000 euros (EUR) in respect of pecuniary and non-pecuniary damage allegedly sustained on account of the numerous violations of their Convention rights. Subsequently they submitted that the above amount no longer sufficed, however, they failed to indicate the exact total amount of their new claim within the time-limit allotted by the Court for this purpose.

97. The Government submitted that there was no causal link between the amount claimed and the matters examined by the Court.

98. The Court recalls that it has found a breach of the Convention only with regard to effectiveness of the investigation into the death of the first applicant's cousin. The Court does not discern any causal link between this breach and the pecuniary damage alleged. It therefore rejects this claim. On the other hand, the Court finds that the applicants must have suffered non-pecuniary damage. Having regard to the particular circumstances of the case and ruling on an equitable basis, the Court awards the applicants jointly EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

99. The applicants did not submit any separate claim under this head. The Court therefore makes no award.

C. Default interest

100. 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 violation of Article 2 of the Convention in connection with ineffective investigation of the death of the applicants' relative admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 2 of the Convention under its procedural limb;
3. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the National currency 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President