



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

FOURTH SECTION

CASE OF RAILEAN v. MOLDOVA

(Application no. 23401/04)

JUDGMENT

STRASBOURG

5 January 2010

FINAL

28/06/2010

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

In the case of Railean v. Moldova,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 23401/04) against the Republic of Moldova 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 Mihail Railean (“the applicant”), on 26 May 2004.

2. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Grosu.

3. The applicant alleged, in particular, that the domestic authorities had failed to conduct an appropriate investigation into his son's death, contrary to their obligations under Article 2 of the Convention.

4. The application was allocated to the Fourth Section of the Court. On 6 November 2008 the President of that Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3). On the same date the Ukrainian Government were informed of their right to intervene in the proceedings in accordance with Article 36 § 1 of the Convention and Rule 44 § 1(b), but they did not communicate any intention to avail themselves of this right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Krutoyarovka, Ukraine.

6. On 2 January 2001 the applicant's son was hit by a car and died a few hours later in hospital. The driver fled from the scene of the accident. A criminal investigation was initiated, but was suspended on 14 November 2001 because it had been impossible to identify the driver. The car had belonged at some stage to a police officer (S.) working in Chişinău. On the same day, a prosecutor sent a letter to the applicant informing him of the decision taken and of his right to read that decision in the prosecutor's office.

7. On 29 November 2002 Mr Papuc, the Moldovan Minister of Internal Affairs, informed the applicant that the investigation had established the identity of the driver, and that the case had been sent for further investigation by the prosecution. According to the letter, the criminal investigation had started on 11 January 2001. In response to the applicant's complaint that his son had been killed in order to obtain his internal organs for a transplant, the Minister informed him that the autopsy of the applicant's son's body had not revealed any missing internal organs.

8. On 8 September 2003 a prosecutor decided to reopen the investigation into the applicant's son's death. He found that the decision of 14 November 2001 (see paragraph 6 above) had been taken unlawfully since the investigation into the circumstances of the case had been carried out "in a manifestly unilateral and superficial manner". He noted, in particular, that during the interviews in early 2001 witness R.H., who had said that she was a passenger in the car which had hit the applicant's son, had mentioned that her son B.H., who was 13 years old at the time and could not be held criminally liable, had been driving the car at the time of the accident. B.H. confirmed that statement. However, subsequently both withdrew their statements. B.H. declared that I., his relative living in Tatarbunar, had been driving the car. Moreover, it became clear during the investigation that B.H. did not know how to drive a car. The prosecutor had not identified and interviewed the driver of the taxi which had allegedly taken R.H. home from the scene of the accident. The list of telephone calls made by R.H. and by S. before and after 2 January 2001 had not been obtained and analysed. In addition, eyewitness P.O. remembered the face of the driver and subsequently recognised him at an identity parade as being officer S.

9. In reply to a complaint made by the applicant on an unknown date, on 31 January 2003 the Prosecutor General's Office informed him that operational measures were being taken to identify the person responsible for his son's death.

10. On an unspecified date in August 2004 the applicant wrote to the Prosecutor General's Office, asking about the reasons for the delays in the investigation. He also inquired as to why no complaint had been lodged and no investigation had been carried out into the theft of the car which had hit his son. If that car had not been stolen, then it was unclear why its owner had not been prosecuted.

11. In a letter dated 10 October 2004, the Prosecutor General's Office informed the applicant that it had established a failure to perform, in a timely manner, the required investigation and operational measures. Consequently, the decision to discontinue the investigation was annulled and the case was sent for further investigation. The case was transferred to a group of prosecutors from the Chişinău prosecutor's office, under the supervision of the Prosecutor General's Office. The letter ended with apologies to the applicant for the delay in investigating the case.

12. In a letter to the Prosecutor General's Office in August 2004, the applicant complained about the failure to exhume his son, as he had requested earlier, in order to verify whether any of his internal organs had been removed. He also complained about the failure to initiate a criminal investigation into the alleged hijacking of the car which had hit his son, which led him to believe that this had only been an excuse for not prosecuting the policeman who owned the car. He finally stated that he did not have the means to hire a lawyer or travel to Moldova in order to examine the materials in the case file, but asked for a copy of the decision to discontinue the proceedings to be sent to his address in Ukraine.

The applicant addressed similar letters to the President of Moldova and the Human Rights Centre.

13. S. was eventually charged and put on trial. On 23 May 2007 he was acquitted by the Botanica District Court since it had not been proved that he had committed the crime. It was established that he had sold the car a couple of weeks before the accident. That judgment was upheld by the Chişinău Court of Appeal on 26 September 2007.

14. On 22 November 2007 the prosecutor lodged an appeal in cassation with the Supreme Court of Justice, requesting S.'s conviction and referring to evidence showing that he had been driving his car at the time of the accident.

15. On 9 December 2008 the Supreme Court of Justice upheld the lower court's judgment, finding that it had not been established that S. had been in the car at the time of the accident.

II. RELEVANT DOMESTIC LAW

16. The relevant provisions of the Code of Criminal Procedure ("the CCP"), in force before 12 June 2003, read as follows:

“Article 195. Complaints against acts of the prosecutor in charge of the investigation.

Complaints against acts of the prosecutor in charge of the investigation or other investigative measures shall be addressed to the hierarchically superior prosecutor.”

“Article 195¹. Challenging before the court the actions of the investigation authority or the prosecutor.

The ... victim ... may challenge before the court the actions of the investigation authority or the prosecutor, if the relevant complaint has been rejected by the prosecutor.

The persons mentioned in paragraph (1) of the present Article may challenge in court ... decisions concerning the suspension ... of an investigation ...”.

17. Article 93 of the Code of Criminal Procedure, as in force at the material time, provided that after receiving a complaint about a criminal offence the investigating body could request only supplementary material or explanations but could not conduct any investigative measures until after criminal proceedings had been formally instituted. It had to decide within three days whether or not to institute criminal proceedings. In exceptional cases such a decision was to be taken within fifteen days.

THE LAW

18. The applicant complained of a violation of Article 2 of the Convention in that no effective investigation was carried out into the circumstances of the accident which resulted in the death of his son. Article 2 § 1 of the Convention reads:

“Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ...”

19. The applicant also complained of a violation of Article 6 of the Convention since he had not obtained any decision concerning the investigation into his son's death. The relevant part of Article 6 reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

20. The Government disputed this.

I. ADMISSIBILITY

A. The Government's preliminary objection

21. The Government submitted that the applicant had failed to exhaust available domestic remedies. In particular, he had failed to challenge in court the decision of 14 November 2001 to suspend the investigation (see paragraph 6 above), as he was allowed to do under Articles 195 and 195¹ of the Code of Criminal Procedure in force at the relevant time (see paragraph 16 above).

22. The Court considers that the issue raised by the Government is closely related to the substance of the complaint under Article 2 of the Convention. It will therefore examine this objection together with the arguments concerning the complaint under Article 2.

B. The applicant's complaint under Article 6 of the Convention

23. The applicant complained of a violation of Article 6 of the Convention in view of the alleged failure to provide him with the relevant decisions concerning his son's case. The Court considers that this complaint raises essentially the same issue as that raised under Article 2 of the Convention, namely, whether the authorities complied with their procedural obligations under Article 2. It will therefore not examine this complaint separately.

C. Conclusion as to admissibility

24. The Court considers that the applicant's complaint under Article 2 of the Convention raises questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and that no other grounds for declaring this complaint inadmissible have been established. The Court therefore declares this complaint admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

25. The applicant complained of a violation of Article 2 of the Convention as a result of the failure to carry out a full and timely investigation into his son's death. Moreover, he was not kept fully informed

of the course of the proceedings and did not receive any decisions made during the investigation phase.

26. The Government submitted that a thorough investigation had been carried out immediately after the car accident which had resulted in the applicant's son's death. Witnesses had been heard on the same day and the house of the main suspect (S.) had been searched, his telephone tapped for a month, and information concerning the sale of his car to a third person verified. The obligation to carry out an effective investigation was one of means, not of result, so that when it was impossible to identify the person responsible for another person's death the State could not be held responsible. The investigators verified all the versions of the applicant's son's death and found that he had died as a result of an accident. On 20 April 2006 the investigation was completed and the case was submitted to the trial court. Moreover, the applicant had not submitted any evidence that he had tried to obtain access to any materials of the case and was refused such access. Furthermore, the prosecutors had kept him informed of the course of the investigation.

27. The Court reiterates that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III), Article 2 § 1 imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII).

28. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be an effective official investigation when individuals have died in suspicious circumstances. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. The mere fact that the authorities have been informed of the death will give rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances in which it occurred (see *Sabuktekin v. Turkey*, no. 27243/95, § 98, ECHR 2002-II (extracts); *Kavak v. Turkey*, no. 53489/99, § 45, 6 July 2006; and *Al Fayed v. France* (dec.), no. 38501/02, 27 September 2007). The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect

the right to life (see *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II).

29. The scope of the above-mentioned obligation is one of means, not of result. Thus, the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death, or the person or persons responsible will risk falling foul of this standard (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V, and *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007).

30. The Court recalls that in the above-cited *Al Fayed* and *Rajkowska* cases it was not disputed that the State's obligations under Article 2 of the Convention arose in the context of a death resulting from a traffic accident. In the present case, the Court notes that a number of investigative measures were carried out on the day of the fatal accident (2 January 2001), as described by the Government (see paragraph 26 above).

31. However, it is also clear from the Minister of Internal Affairs' letter to the applicant that the criminal investigation into the matter started only on 11 January 2001, that is, nine days later. In this connection the Court reiterates its finding that “in accordance with Articles 93, 96 and 109 of the Code of Criminal Procedure, no investigative measures at all could be taken in respect of the offence allegedly committed [...] unless criminal proceedings were formally instituted ...” (see, *mutatis mutandis*, *Guțu v. Moldova*, no. 20289/02, § 61, 7 June 2007). This suggests that the failure to initiate a criminal investigation as soon as it became clear that a hit-and-run offence resulting in the victim's death had occurred may have limited the authorities' ability to carry out all reasonable investigative measures aimed at discovering the identity of the driver responsible for the applicant's son's death. The Government submitted no reasons for the delay.

32. The Court observes that in 2003 the prosecuting authority found that the investigation had been “manifestly unilateral and superficial” (see paragraph 8 above). A number of serious deficiencies in the investigation made in 2001 were identified, and the decision suspending the examination was annulled. The Court notes that B.H. told the prosecutors that his relative I. had been driving the car at the time of the accident, and identified the place where I. lived. However, it appears from the documents submitted to the Court that no attempt was made to find that person and verify his whereabouts at the time of the accident. The Court also notes that if it was considered that B.H. had been driving the car, it appears from the documents that nobody was prosecuted for letting an underage person without a driving licence drive a car. Similarly, the owner of the car at the

time of the event was only questioned as a witness and was never charged with any crime, even though in the official version of events it still remains unclear who was driving the car, which belonged to R.H. at some stage. In a subsequent letter to the applicant on 10 October 2004 the Prosecutor General's Office also acknowledged deficiencies in the investigation (see paragraph 11 above).

33. The Court further notes that the investigation lasted for over five years (January 2001 - 20 April 2006, see paragraphs 6 and 26 above), with interruptions, which the authorities themselves subsequently considered unlawful (see paragraph 8 above) and protracted (see paragraph 11 above). The Court considers that such a long period of investigation, in the absence of complicating factors (apart from the disappearance of the perpetrator) and with the shortcomings mentioned above does not satisfy the requirement of promptness implied in the procedural obligation under Article 2 of the Convention.

34. The Court notes that starting from 2002 the applicant made complaints to various State authorities, including the Prosecutor General's Office and the President of Moldova, and that he was informed that while the investigation had been suspended, measures aimed at identifying the perpetrator were ongoing (see paragraphs 7 and 9 above). Moreover, following his complaints the investigation was reopened, but continued for another three years. In such circumstances, the Court considers that a challenge in court to the decision of 14 November 2001 to suspend the investigation could not offer sufficient redress since the court could only order the investigator to reopen the investigation (see, for example, *Corsacov v. Moldova*, no. 18944/02, §§ 15, 21-32 and 34-44, 4 April 2006), which was exactly what he obtained from the Prosecutor General's Office. Therefore, the Government's objection concerning the applicant's failure to exhaust available domestic remedies must be rejected.

35. There has, accordingly, been a violation of Article 2 in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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.”

37. The applicant did not make any claims for just satisfaction.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's preliminary objection regarding non-exhaustion of domestic remedies and *declares* the application admissible;
2. *Holds* that there has been a violation of Article 2 of the Convention under its procedural limb and *dismisses* in consequence the Government's above-mentioned preliminary objection.

Done in English, and notified in writing on 5 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President