



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

FIFTH SECTION

DECISION

Application no. 17473/15
Veronika Sergeyevna ABUSISI
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 8 September 2015 as a Chamber composed of:

Josep Casadevall, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

Helena Jäderblom,

Aleš Pejchal,

Síofra O'Leary, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 5 April 2015,

Having deliberated, decides as follows:

THE FACTS

A. The circumstances of the case

The applicant, Ms Veronika Sergeyevna Abusisi (Abu Sisi), is a Ukrainian national, who was born in 1978. In 1998 she married Dirar Abu Sisi of Palestinian origin, born in Jordan. It appears from the available information that by 2011 the couple and their six children lived in Palestine, where Mr Abu Sisi occupied the post of technical director of a power plant in Gaza.

The facts of the case, as submitted by the applicant, may be summarised as follows. On 27 January 2011 the applicant's husband arrived in Ukraine and on 9 February 2011 he lodged an application for a residence permit with the Department of the Interior of the Kharkiv Region.

On 18 February 2011 the applicant's husband boarded a night train in Kharkiv bound for Kyiv, where he was supposed to meet up with Y.A., his brother.

On 19 February 2011 O.Sh., an acquaintance of the applicant's husband, notified the Railway Police that the latter had disappeared from the train and demanded a criminal investigation of his purported abduction. In a statement given to the police O.Sh. explained that on 18 February 2011 he had dropped Dirar Abu Sisi at the train station in Kharkiv. At about 10.55 p.m. on that day Dirar Abu Sisi had told him by telephone that he had been on his way to Kyiv in seat 36 of carriage 6 on train no. 63. The following day, having unsuccessfully attempted to contact Dirar Abu Sisi by telephone, O.Sh. had called Y.A. and learned that Dirar Abu Sisi had not arrived in Kyiv. O.Sh. had then managed to identify and contact A.Z., the attendant of train carriage no. 6, who had told him that at about 1.30 a.m. on 19 February 2011 two strangers had taken Dirar Abu Sisi off the train at Poltava Station without any explanation.

On 20 February 2011 Y.A. also contacted the Railway Police and made a similar submission.

On 21 February 2011 the applicant came to Ukraine and alerted the prosecutor's office, the State Security Service, the National Ombudsman and other authorities to her husband's purported abduction.

On 27 February 2011 the applicant received a brief telephone call from her husband informing her that he was in custody in Petah Tikva, Israel. He provided her with the contact details of M.O., his lawyer there, who confirmed by telephone the information provided by her husband.

On 16 March 2011 the State Border Control Service of Ukraine informed the National Ombudsman, who had made an enquiry on the applicant's behalf, that the only information they had in their database concerning Dirar Abu Sisi was that he had lawfully entered Ukraine on 27 January 2011.

On 17 March 2011 T.I., an investigator with the Poltava Railway Police, refused to institute criminal proceedings concerning the applicant's husband's purported abduction owing to lack of evidence of a crime. He noted that A.Z., the carriage attendant, had told the police that he had not noticed any criminal or other unusual activity during the trip and that the information provided by Dirar Abu Sisi's relatives and acquaintances had been insufficient to raise a reasonable suspicion that he had been abducted or otherwise forced to leave the train.

On 25 March 2011 the Ministry for Internal Affairs of Ukraine informed the National Ombudsman that, according to the information obtained from the Israeli law-enforcement authorities, Dirar Abu Sisi had been detained on suspicion of having been involved in terrorist activity as a member of Hamas. They also noted that, following an order of a competent court in Israel, the information concerning the applicant's husband's arrest had been

classified and was not subject to disclosure. On 12 May 2011 the Security Service of Ukraine provided similar information to the applicant.

On 28 March 2011 the Israeli Prison Department issued a certificate confirming that Dirar Abu Sisi was being held in Shikma Prison, Ashkelon, Israel.

On 26 April 2011 the applicant complained of her husband's purported abduction to the United Nations Human Rights Committee.

On 17 May 2011 the United Nations Human Rights Committee informed the applicant that in order for her complaint to be registered, she needed to provide further substantiation and to show that she had duly exhausted domestic remedies.

On an unspecified date the applicant, represented by A.K., a lawyer practising in Ukraine, instituted proceedings in the Pecherskiy District Court of Kyiv ("the Pecherskiy Court") complaining that the General Prosecutor's Office had failed to act in investigating her husband's disappearance.

On 22 August 2011 the Pecherskiy Court held a hearing in the applicant's absence, having noted that she had been duly informed of the date and time, as shown in a return slip of the summons contained in the case file. The court further dismissed the applicant's allegations against the General Prosecutor's Office and stated that, in so far as the applicant's submissions could be understood as challenging the refusal of the Railway Police to institute criminal proceedings, this complaint fell under the jurisdiction of the Leninskiy District Court of Poltava ("the Leninskiy Court"). The Pecherskiy Court then decided to forward the relevant parts of the case file to the Leninskiy Court for examination.

On 21 October 2011 the Leninskiy Court dismissed the complaint. A copy of that decision was not provided to the Court by the applicant.

In the meantime, on 19 September 2011, the applicant had contracted Y.K., a lawyer practising in Kyiv, to represent her in Ukraine.

As of 20 January 2012 Y.K. was also mandated to represent Dirar Abu Sisi before the Ukrainian courts and other authorities.

On 31 August 2012 Y.K., acting on Dirar Abu Sisi's behalf, challenged the decision of the Railway Police of 17 March 2011 before the Poltava transport prosecutor.

On 12 September 2012 his complaint was rejected on the grounds that the decision of 17 March 2011 had been well-founded.

Following a further appeal to court, on 14 November 2012 the Poltava Regional Court of Appeal ("the Regional Court") discontinued the proceedings on the grounds that they related to essentially the same matter which had already been finally decided by the Leninskiy Court decision of 21 October 2011.

On 18 December 2012 Y.K. lodged an appeal against the decision of 21 October 2011.

On 4 February 2013 the Leninskiy Court decided that the appeal of 18 December 2012 had procedural shortcomings. Among other issues, it was lodged outside the statutory time-limit without an extension request. The court gave the applicant's counsel a period within which to rectify the issues with the appeal.

A rectified appeal was lodged. In this document, Y.K. noted that he had only learned of the decision taken by the Leninskiy Court on 21 October 2011 in the course of the court proceedings instituted with a view to challenging the decision of the Railway Police of 17 March 2011. The applicant, for her part, had only learned of it from Y.K.'s electronic mail in the beginning of December 2012.

On 1 April 2013 the Leninskiy Court rejected the request for an extension of the time-limit, finding that no good reason for missing it had been provided.

On 29 May 2013 the Regional Court upheld the decision of 1 April 2013.

On 16 July 2013 Y.K., who had not been present at the court hearing, obtained a copy of the decision of 29 May 2013.

On 13 October 2013 Y.K. lodged a cassation appeal against the decisions of 1 April and 29 May 2013 with the Higher Specialised Civil and Criminal Court ("the Higher Court").

On 21 October 2013 the Higher Court refused to consider the appeal of 13 October 2013, having found that it had been lodged outside the three-month statutory time-limit which began on the date of the appellate court's decision that was to be appealed against. It further noted that in this situation it fell to the appellant to obtain an extension of the time-limit from the Leninskiy Court in order to lodge a cassation appeal.

On an unspecified date Y.K. requested that the Leninskiy Court extend the time-limit. He stated that the delay in lodging his cassation appeal had been a result of the technical difficulties in establishing contact with the applicant, who had been in Gaza, an area of constant political unrest and tension, and also a result of the delay in notifying him of the decision of 29 May 2013.

On 9 December 2013 the Leninskiy Court rejected the request for extension of the time-limit for lack of sufficient reasoning.

On 27 January and 9 October 2014 the Regional Court and the Higher Court, respectively, upheld the decision of 9 December 2013. The Higher Court noted, in particular, that Y.K. had failed to provide good reasons for not lodging the appeal between 16 July (when he had received a copy of the decision of 29 May 2013) and 29 August 2013 (when the three-month statutory time-limit for lodging a cassation appeal expired).

According to public sources, on 30 March 2015 Dirar Abu Sisi was convicted by the Beersheba District Court of membership of a terrorist organisation and production of illegal weaponry after pleading guilty to several incriminating charges. He is still in custody in Israel.

B. Relevant domestic law

The relevant provisions of the Code of Criminal Procedure of 1960 (“the CCU”), in operation at the material time, read as follows¹:

Article 236-1. Appeal to court against a decision to refuse to institute proceedings

“An appeal against a decision of an ... investigator... refusing to institute criminal proceedings may be lodged by a person whose interests it concerns, or his or her representative, with the local district (town) court ... within seven days of the date on which a copy of the decision was received ...”

Article 383. Court decisions which may be reviewed in cassation proceedings

“Judgments and rulings of the court of appeal taken following appeal proceedings may be reviewed in cassation proceedings.

Judgments of the local courts ... other rulings (decisions) of these courts ... which impede further examination of the case, rulings of the appellate courts taken with respect to these judgments [or] rulings (decisions) ... may also be reviewed in cassation proceedings.”

Article 386. Time-limits for appeals in cassation

“Cassation appeals against the court decisions mentioned in the second paragraph of Article 383 of the present Code may be lodged within three months of the date on which they enter into force ...”

Article 402. Decisions and rulings of the court entering into force and their enforcement

“... Decisions and rulings of the appellate and cassation courts shall enter into force immediately upon their delivery, except in cases envisaged by this Code ...”

COMPLAINTS

1. Referring to the Court’s findings in the cases of *Çakıcı v. Turkey* ([GC], no. 23657/94, § 98, ECHR 1999-IV); *Timurtaş v. Turkey* (no. 23531/94, § 95, ECHR 2000-VI); and *Orhan v. Turkey* (no. 25656/94, § 358, 18 June 2002), the applicant complained that she had suffered inhuman treatment contrary to Article 3 of the Convention on account of the Ukrainian authorities’ blatant refusal to conduct a thorough and effective investigation of the circumstances of her husband’s disappearance.

1. The Code of Criminal Procedure of 1960 was replaced by the new Code of Criminal Procedure of 13 April 2012. However, pursuant the transitional provisions contained in the new Code, the domestic courts continued to apply the old Code in the proceedings concerning the applicant’s case, as these proceedings had been instituted before the adoption of the new Code.

2. The applicant further complained under Article 5 of the Convention that her husband had been unlawfully abducted in Ukraine.

3. Finally, the applicant complained under Article 17 of the Convention that her husband's abduction had been carried out either with the active participation or the passive acquiescence of the Ukrainian authorities, who had subsequently refused to conduct an effective investigation in order to cover up their own involvement in the affair.

THE LAW

1. The applicant first complained that she had suffered inhuman treatment contrary to Article 3 of the Convention on account of the Ukrainian authorities' failure to conduct a thorough and effective investigation of the circumstances of her husband's disappearance.

The Court reiterates that, according to its established practice, the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 depends on the presence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation (see, for example, *Orhan*, cited above, § 358, and *Imakayeva v. Russia*, no. 7615/02, § 164, ECHR 2006-XIII (extracts)).

The Court next observes that the facts of the present case are materially different from those in the *Çakıcı*, *Timurtaş* and *Orhan* cases, cited by the applicant in support of her complaint. In particular, in those cases the State authorities – which were found responsible by the Court for placing the applicants' relatives in unacknowledged detention – had not divulged any information whatsoever as to their subsequent fate, leaving the applicants in a state of futile search, distress and constant uncertainty for years. By contrast, in the present case the applicant's husband was missing for a period of less than a month. The authorities of the respondent State supplied the applicant with the information concerning his detention in Israel and the Israeli authorities confirmed this information by the end of March 2011. There is therefore no question of a failure of the respondent State to account for the applicant's husband's fate in the present case. While the applicant's desire to have the circumstances in which her husband disappeared from a train in Ukraine and turned up in custody in Israel officially elucidated is understandable, the way in which the Ukrainian authorities responded to her inquiries cannot in itself have caused her suffering of a dimension and character reaching the Article 3 threshold (see, *mutatis mutandis*, *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 237-240, 8 April 2004 and *Lyubov Efimenko v. Ukraine*, no. 75726/01, §§ 83-85,

25 November 2010). The present complaint must therefore be rejected as manifestly ill-founded in accordance with Article 35 §§ 1, 3(a) and 4 of the Convention.

2. The applicant next complained under Article 5 of the Convention that her husband had been abducted and arbitrarily detained in Ukraine until he had been illegally transported to Israel.

The Court reiterates that in order to bring an application, an applicant must be able to claim to be a victim of a violation of the Convention within the meaning of Article 34. This means that the individual concerned must be able to show that he or she was “directly affected” by the measure complained of (see, as recent authorities, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, § 96, ECHR 2014 and *Lambert and Others v. France* [GC], no. 46043/14, § 89, 5 June 2015). In some exceptional circumstances the Convention institutions have accepted that a third party could act in the name of and on behalf of a direct victim, where there was a risk that otherwise the latter would have been deprived of effective protection of his or her rights, and where there was no conflict of interests between the victim and the applicant (see, for example, *Lambert and Others*, cited above, §§ 93-95 and 102). However, normally, where the application is not lodged by the victims themselves, it is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim on whose behalf they purport to act before the Court (see, among other authorities, *Post v. the Netherlands* (dec.), no. 21727/08, 20 January 2009; *Nencheva and Others v. Bulgaria*, no. 48609/06, § 83, 18 June 2013; and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 102).

The applicant’s complaint under Article 5 of the Convention concerns the alleged abduction and detention of her husband. There is nothing in the materials received to indicate that the applicant’s husband wishes to lodge an application before the Court or that he has authorised the applicant to represent his interests in the Convention proceedings. There is also no evidence in the case file that the applicant’s husband is detained in conditions which preclude him from communicating with the applicant and the outside world. To the contrary, it appears from the case file, that the applicant’s husband has had a lawyer representing him in Israel. There has also been a lawyer designated to represent his interests in the proceedings in Ukraine, whose mandate was not questioned by the Ukrainian courts. In these circumstances the Court finds no special considerations enabling it to conclude that the applicant has standing to raise the present complaint in her husband’s stead in the Convention proceedings without his explicit authorisation.

Notwithstanding the foregoing, the Court also notes that as early as 17 March 2011 the investigator with the Railway Police refused to institute an investigation into the purported abduction of the applicant’s husband,

finding that there was no evidence that a crime had been committed. This decision was not appealed against within the applicable seven-day time-limit in accordance with domestic procedure rules (see Article 236-1 of the CCU, cited in the Relevant domestic law section above). Thus neither the applicant's husband, nor the applicant on his behalf, availed themselves in good time of an ordinary domestic remedy for their complaints.

It appears from the case file that the Pecherskiy Court took the initiative in resolving this omission by interpreting part of the applicant's complaint concerning the purported inactivity of the prosecutor's office as challenging in substance the decision of the Railway Police of 17 March 2011. This part of the applicant's action was redirected to the Leninskiy Court for examination and a decision rejecting it was pronounced on 21 October 2011. The decision of the Leninskiy Court was also not appealed against within the applicable time-limit and became final. Again, a remedy ordinarily available in the domestic legal order was not used. There is nothing in the case file to suggest that this remedy would have been *a priori* ineffective in the present case or that there were other special circumstances warranting an exemption from the general rule on exhaustion (compare and contrast *Kaverzin v. Ukraine*, no. 23893/03, §§ 90-99, 15 May 2012). It follows that the applicant and her husband have not properly exhausted available domestic remedies for the abduction complaint.

This conclusion cannot be altered by the attempts (since the final decision) by Y.K., the applicant's and her husband's lawyer, to reopen the proceedings. There is nothing in the case file to indicate that the applicant, her husband and Y.K. (contracted by the applicant on 19 September 2011 and by her husband on 20 January 2012) encountered difficulties in communication or data collection of such a dimension and character that it became impossible for them to challenge the decision of 17 March 2011 before 31 August 2012, to learn of the decision of 21 October 2011 before November 2012 or to lodge a cassation appeal against the decision of 29 May 2013 before the expiry of the three-month statutory time-limit. In this respect the Court reiterates that it is incumbent on the interested parties to display special diligence in the defence of their interests and to take the necessary steps to apprise themselves of developments in the proceedings (see, among other authorities, *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001; *mutatis mutandis Aleksandr Shevchenko v. Ukraine*, no. 8371/02, § 27, 26 April 2007 and *Gurzhyy v. Ukraine* (dec.), no. 326/03, 1 April 2008). The Court further notes that Y.K. substantiated his requests for leave to appeal against the decisions of 21 October 2011 and 29 May 2013 outside the time-limits by submitting in a very general manner that he had encountered difficulties in obtaining the relevant information and establishing communication with his clients. His submissions to this effect lacked any details. As a result, the Court does not find that the

domestic courts abused their procedural powers in refusing to extend the relevant time-limits.

Overall, the Court concludes that the applicant lacks standing to lodge a complaint concerning her husband's purported abduction in the Convention proceedings and that the substance of the relevant complaint has not been duly aired at the domestic level. It follows that the present complaint must be rejected as inadmissible in accordance with Article 35 §§ 1, 3(a) and 4 of the Convention.

3. Finally, the applicant also complained that the Ukrainian authorities had refused to investigate the circumstances of her husband's disappearance in order to cover up their own involvement in the affair.

The Court refers to its findings concerning the applicant's victim status and non-exhaustion as set out in connection with the complaint brought under Article 5 of the Convention above and finds that for the same reasons it is enjoined from considering complaints concerning the same facts under any other provisions of the Convention or its Protocols which may be applicable. This complaint must likewise be declared inadmissible under Article 35 §§ 1, 3(a) and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Done in English and notified in writing on 1 October 2015.

Claudia Westerdiek
Registrar

Josep Casadevall
President