

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

FIFTH SECTION

CASE OF BUCHYNSKA v. UKRAINE

(Application no. 35493/10)

JUDGMENT

STRASBOURG

30 April 2015

This judgment is final but it may be subject to editorial revision.



In the case of Buchynska v. Ukraine,

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

Vincent A. De Gaetano, *President,*
Ganna Yudkivska,
André Potocki, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 7 April 2015,

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

PROCEDURE

1. The case originated in an application (no. 35493/10) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Ms Iryna Volodymyrivna Buchynska ("the applicant"), on 30 May 2010.

2. The applicant was represented by Ms O.V. Tkachenko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agents, then Mr N. Kulchytskyy and Ms O. Davydchuk.

3. On 6 February 2012 the application was communicated to the Government.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1980 and lives in Zhytomyr.

5. At about 9 a.m. on 7 August 2002 two men, one of them wearing a mask, entered the applicant's house, tied the applicant and took the valuables belonging to her and other household members. Subsequently, the unmasked man put a revolver in the applicant's ear and fired a shot. The applicant survived, having sustained a permanent disability. To this day the bullet remains in her head.

6. On the day of the assault, the Zhytomyr police instituted criminal proceedings into the incident, examined the crime scene, collected fingerprints and other evidence, questioned the applicant's household members and neighbors and ordered several expert assessments.

7. On 9 August 2002 the applicant was admitted in the proceedings as an injured party.

8. On several occasions the applicant identified the photos of various persons presented by the police as those of the unmasked offender. Among them, on 24 September 2002 she identified a certain V.P.

9. On an unspecified date I. K., V.P.'s partner, acknowledged to the police that she had seen a revolver in his possession. She also noted that at about 8 a.m. on 7 August 2002 V.P. had left their home for an appointment with his friend S.K. On that date he had returned home at about 1 p.m., wearing a new suit and carrying some money, which, according to him, had been entrusted to him by S.K. for safekeeping.

10. On 25 September 2002 A.V., V.P.'s neighbor, identified S.K. on a photograph, as V.P.'s friend.

11. On 8 October 2002 I.K. also identified S.K. on a photograph as V.P.'s friend.

12. On several occasions in October 2002 the authorities questioned S.K. as a witness.

13. On 18 October 2002 the investigation was suspended on the ground that all possible measures to locate the perpetrators had been exhausted.

14. On 5 November 2002 the Zhytomyr City Prosecutor's Office revoked this decision, having found that additional measures were warranted.

15. Two further decisions to suspend the proceedings taken on 26 November and 16 December 2002, respectively, were, in turn, revoked by the prosecutor's office on 4 December 2002 and 8 January 2003.

16. According to the applicant, in January 2003 she informed the investigator in charge of her case that she suspected that O.M., her cousin, had been the masked offender. Having assured her that he would conduct the necessary inquiries, the investigator left this information without any follow-up.

17. On 31 March 2003 the proceedings were suspended on the ground that all possible measures to locate the perpetrators had been exhausted. According to the applicant, she was not informed of this decision and kept soliciting the authorities to investigate her suspicions in respect of O.M.

18. On 24 June 2003 the applicant and several other members of her family complained to the Zhytomyr Regional Prosecutor's Office of the length of the proceedings and the failure of the investigator to react to the applicant's suspicions with respect to O.M.

19. On 25 July 2003 the prosecutor's office informed the complainants that the proceedings had been suspended since 31 March 2003. On the same date it revoked the suspension decision, noting that the measures taken to identify the perpetrators had not been comprehensive, and transferred the case to the Korolyovskiy District Prosecutor's Office in Zhytomyr for supervising further investigative activities.

20. On 4 September 2003 O.M. was arrested and remanded in custody. On the same date he confessed to his participation in the crime and identified S.T. as his accomplice.

21. On 5 September 2003 S.T. was arrested. He denied his involvement in the crime and presented various pieces of evidence that he had been in Moscow, Russia, on the date of the incident.

22. On 6 September 2003 the applicant identified S.T. as the second offender during an identification parade.

23. On 12 September 2003 O.M. retracted his confession alleging that it had been given under duress. Since that time he pleaded innocent and presented various pieces of evidence that he had been at his job as a vendor of ice-cream at the time of the incident.

24. On 3 February 2004 the criminal proceedings in respect of O.M. and S.T. were discontinued for want of evidence of their involvement in the incriminated offence. The applicant appealed, insisting that O.M. and S.T. had been the perpetrators.

25. On 28 April 2004 the prosecutor's office revoked the decision to discontinue the proceedings and ordered further investigative measures to verify the applicant's allegations as well as O.M.'s and S.T.'s alibis.

26. On five further occasions between 2004 and 2006 (in particular, on 1 and 23 June 2004, 23 February, 30 May and 10 November 2005) the proceedings against O.M. and S.T. were discontinued, these decisions having been subsequently quashed with reference to insufficiency of the measures taken to verify the relevant facts. Eventually, on 25 April 2006 the proceedings against S.T. and O.M. were again closed for want of evidence that they had committed the incriminated offence. The decision referred, in particular, to testimonies by several witnesses and various sources of corporeal and forensic evidence in support of the defendants' alibis and cited various reasons, why they considered the applicant's submissions to be inconsistent and improbable.

27. On 6 July 2005 the General Prosecutor's Office informed the applicant that following her complaints of inactivity on the part of the investigative authorities, the case had been transferred to the Vinnytsya Regional Prosecutor's Office for further investigation.

28. On numerous occasions throughout the course of the investigation (in particular, on 14 July 2004, 15 August 2005, 25 April and 26 July 2006, 25 July 2008, 5 March 2009, 21 January and 20 August 2010, 11 March and 22 June 2011) the investigator in charge of the case requested the police to locate and question S.K. and V.P. as witnesses in connection with the proceedings at issue. A request to this end was also submitted to the Interpol and to the Polish police authorities. The parties did not inform the Court concerning any follow-up on these requests.

29. On eleven occasions between August 2005 and April 2012 (in particular, on 30 May, 19 August, 17 September 2005, 9 January,

8 February, 7 March, 27 April 2006, 31 March 2008, 20 July 2009, 11 October 2010 and 13 December 2011) the criminal proceedings in the applicant's case were suspended on the ground that the measures available to the investigation had been exhausted without the perpetrators having been identified. These decisions were revoked by various branches of the prosecutor's office, which found that the measures taken had not been exhaustive.

30. On 27 August 2007 the General Prosecutor's Office acknowledged, in response to the applicant's complaint, that the case had been protracted.

31. On 22 October 2007 the Vinnytsya Prosecutor's Office reprimanded the Vinnytsya Police for inactivity in the investigation and ordered the officers responsible to speed it up.

32. On 1 July 2012 the K. family from Zhytomyr was robbed, several of its members having been shot.

33. On 7 July 2012 S.K. was arrested in Zhytomyr on suspicion of having committed the crime in respect of the K. family and remanded in custody.

34. By August 2012 S.K. confessed of having been involved in the above crime, as well as in a series of other robberies, assaults and murders, including the one in respect of the applicant. He further divulged that some of these crimes, including the one in the applicant's respect, had been committed by him together with V.P.

35. The proceedings concerning V.P. were closed with reference to his death.

36. On 7 November 2012 the Deputy Zhytomyr Regional Prosecutor signed the bill of indictment accusing S.K. of numerous episodes of criminal activity. The evidence cited in respect of his assault on the applicant consisted, primarily, of S.K.'s own confessions and the sources collected in 2002 (see paragraphs 8-11 above).

37. On 9 November 2012 S.K. was committed to stand trial before the Korolyovskiy District Court in Zhytomyr.

38. As of June 2014 the case was pending before the first-instance court.

THE LAW

I. THE ALLEGED INEFFECTIVENESS OF THE INVESTIGATION INTO THE ASSAULT ON THE APPLICANT

39. The applicant submitted that the competent authorities had failed to conduct an effective and prompt investigation into an attempt on her life. She relied on Articles 2, 6 and 13 of the Convention.

40. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the complaint at issue falls to be examined under Article 2 of the Convention, which is the relevant provision (see e.g. *Dudnyk v. Ukraine*, no. 17985/04, § 27, 10 December 2009). This provision, in so far as relevant, reads as follows:

> "1. Everyone's right to life shall be protected by law ..."

A. Admissibility

41. The Government did not comment on the admissibility of the present aspect of the case.

42. The Court considers that the applicant has sustained a life-threatening injury bringing her complaint within the ambit of Article 2 of the Convention (see as a recent authority *Igor Shevchenko v. Ukraine,* no. 22737/04, §§ 42-44, 12 January 2012). It further notes that the complaint at issue is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is also not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

43. The applicant alleged that she had been assaulted by S.T. and O.M. Protracted failure of the authorities to collect corroborating evidence and bring these persons to justice indicated that they had been unprofessional and corrupt. She also submitted that the investigation as a whole had been perfunctory, marked by periods of inactivity, routine failures of the authorities to inform her of the decisions taken and to account for her interests and procedural rights.

44. The Government alleged that there had been no violation of the Convention, as the competent authorities had thoroughly pursued all possible leads. The fact that O.M. and S.T. had not been brought to trial could not be held against them, since the relevant decision had been based on ample array of exculpatory evidence, while the applicant's relevant submissions had been improbable and confused. Furthermore, other persons were identified as the perpetrators, one of them having died and the other having been brought to trial.

45. The Court reiterates that the State's positive obligation under Article 2 of the Convention requires that, where a life-threatening injury or a death occurs, an effective independent judicial system is set up to provide appropriate redress. Such a system must make provision for an independent and impartial official investigation procedure capable of establishing the cause of the injuries and identifying those responsible with a view to their

punishment (see, among other authorities, *Igor Shevchenko,* cited above, § 56).

46. Insofar as the applicant complains of the authorities' refusal to prosecute S.T. and O.M., the Court notes that the last decision in this respect dated 25 April 2006 was taken after a number of investigating steps, including forensic examinations, confrontations and interviews, during which the suspects' alibis were verified and the applicant's submissions in their respect found to be inconsistent and improbable. The applicant did not appeal against it before the domestic authorities. In these circumstances, the Court, mindful of its subsidiary role, considers that it is not its task to determine whether the substantive conclusions reached by the investigation in respect of O.M.'s and S.T.'s innocence were correct (see e.g. *Lobach v. Ukraine* (dec.), no. 9276/02, 22 September 2009 and *Kachurka v. Ukraine*, no. 4737/06, § 49, 15 September 2011). It further notes that the applicant's allegations of bias and corruption on the part of the investigating authorities are not supported by any evidence other than their refusal to prosecute the above persons and are therefore unsubstantiated.

47. On the other hand, insofar as the applicant complains more generally that the investigation had been marked by unnecessary delays and various omissions, the Court notes that as of June 2014 the proceedings, initiated on 7 August 2002 (the date of the incident), were pending before the trial court. By that time their overall duration had therefore been almost twelve years. The Court reiterates that a substantial delay in an investigation concerning an assault on life can in and of itself undermine public confidence in the maintenance of the rule of law and raise an issue under Article 2 of the Convention, unless it is justified by objective circumstances (see e.g. *Merkulova v. Ukraine*, no. 21454/04, §§ 50-51 and 61, 3 March 2011 and *Kachurka*, cited above, § 50).

48. Viewing the materials on file in light of its jurisprudence (see e.g. *Merkulova,* cited above, §§ 52-62, 3 March 2011; *Igor Shevchenko,* cited above, §§ 57-62, 12 January 2012 and *Kachurka,* cited above, §§ 51-57) the Court considers that the Government in the present case have not provided sufficient justification for the twelve-year duration of the proceedings. It notes, in this regard, that the domestic authorities themselves admitted various omissions, delays and irregularities in their letters to the applicant and in orders remitting the case for further investigation following repeated decisions to suspend or discontinue the proceedings (see paragraphs 14-15, 19, 25-26 and 29-31 above). The Court also notes that it is not clear from the case-file why the authorities never questioned V.P. identified by the applicant as a perpetrator in September 2002, and dropped this lead without probing S.K. as a suspect (see paragraphs 8-13 above). It is also not clear what actions, if any, apart from the repeated orders demanding the police to locate S.K. and V.P. were taken in fact to find them until S.K.'s arrest in his hometown in 2012.

49. Overall, based on the materials on file, the Court cannot come to a conclusion that the authorities had done everything in their power to ensure prompt and comprehensive action in collecting evidence, locating and bringing to justice the persons responsible for the assault on the applicant's life.

50. There has therefore been a violation of Article 2 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

51. In addition, the applicant complained that the manner in which the authorities treated her case amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, in particular, on account of their attitude towards her demands to prosecute O.M. and S.T. She also complained under Article 1 of Protocol No. 1 that by refusing to bring the offenders identified by her to trial, the authorities likewise deprived her family of a possibility to reclaim stolen property or obtain compensation.

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

56. The Government submitted that this claim was exorbitant and unsubstantiated.

57. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. On the other hand, it recognizes that the applicant must have suffered anguish and distress on account of the events leading to the finding of the violation in the present case. Ruling on

an equitable basis, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant has not lodged any separate claim under this head. The Court therefore finds no call to make any award.

C. Default interest

59. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the ineffective investigation of the assault on the applicant's life admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 30 April 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Vincent A. De Gaetano
President