

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

FIFTH SECTION

CASE OF DAVYDENKO v. UKRAINE

(Application no. 45903/16)

JUDGMENT

STRASBOURG

30 March 2023

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



In the case of Davydenko v. Ukraine,

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

Stéphanie Mourou-Vikström*, President*,
Lado Chanturia,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 45903/16) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 22 July 2016 by two Ukrainian nationals, Ms Nataliya Mykolayivna Davydenko ("the first applicant") and Mr Ivan Mykolayovych Davydenko ("the second applicant"; together "the applicants"), who were born in 1964 and 1958 respectively and, according to the most recent available information, live in Kyiv, and were represented by Mr I. I. Pyatak, a lawyer practising in Kyiv;

the decision to give notice of the application to the Ukrainian Government ("the Government"), represented by their then Agent, Mr I. Lishchyna;

the parties' observations;

Having deliberated in private on 9 March 2023,

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

SUBJECT MATTER OF THE CASE

1. The applicants' property was destroyed in a fire which they believed was caused by arson. The case concerns their complaint that the authorities failed to take effective steps to investigate the incident and thus failed to fulfil their positive obligations under Article 1 of Protocol No. 1. The applicants also relied on Article 6 § 1 and Article 13 in that connection.

2. Four construction workers, Mr B., Mr D., Mr M. and Mr T., were building a cottage for the applicants on their land. The applicants were not on the premises. On 17 April 2009, after a dispute (by telephone) between the applicants and the workers over pay, the workers broke windows in the cottage, destroyed some construction materials and stole some tools. On the same day a fire occurred on the applicants' plot, causing damage to a trailer and to the cottage under construction. The applicants believed that the construction workers had intentionally set the property on fire.

3. On 26 April 2009 a fire expert confirmed in a report that the fire had been caused by arson. On the same day criminal proceedings were instituted on suspicion of "intentional destruction of property by arson".

4. On 14 May 2009 the investigation was reclassified as concerning a suspected offence of a serious breach of fire safety rules.

5. In June 2010 the construction worker T. died.

6. On 25 October 2011 a commission of experts appointed by the investigator concluded that the fire had been caused by arson.

7. On 5 December 2011 the investigating authority discontinued the investigation in respect of the "serious breach of fire safety rules" and reinitiated proceedings in respect of the intentional destruction of property by arson.

8. On 11 September 2012 the criminal proceedings were discontinued. The investigating authority concluded that even though the workers B., D. and M. had in fact broken windows in the cottage and had therefore committed acts which could be characterised as offences of "intentional destruction of property", the damage caused by those acts amounted to under the equivalent of 7,235 euros, the threshold for such acts to be criminally punishable.

9. On 31 October 2012 the Kyiv Shevchenkivskyi District Court quashed that decision. It held that the investigating authority, in taking it, had erred in separating the damage caused by fire and the other damage to the property and had failed to refute the possibility that both actions had been part of the same criminal plan.

10. On 11 November 2014 the proceedings were discontinued in respect of (i) the fire, on the grounds that its cause could not be established with any certainty, and (ii) the remainder of the damage to property, on the same grounds as those previously given (see paragraph 8 above).

11. On 24 and 29 December 2014 the Boryspil Court quashed the decisions of 11 November 2014. The court held that the investigators had failed to assess the statements of the workers denying their involvement in the fire in the context of other evidence. Regarding the property damage not caused by the fire, the court took the same position as before.

12. On 13 October 2015 the prosecutor decided to discontinue the investigation on the following grounds.

(i) According to a summary of the collected evidence set out in the decision, the workers stated that on the relevant day T. had been extremely drunk. Because of the dispute with the second applicant over pay, they had decided to abandon the construction site and three of them had left but T. had initially stayed behind. T. had then joined the other three workers and they had gone to a train station, where they had taken a train bound for Kyiv. Those statements were corroborated by other witnesses, apparently the applicants' neighbours.

(ii) The expert reports had identified arson as the source of the fire and concluded that there had been two independent sources of fire, one in the trailer and one in the cottage.

(iii) On the basis of that evidence, the prosecutor found it established that because the workers B., D. and M. had left the plot several hours before the fire had started, while T. had stayed behind, the involvement of those three workers in starting the fire could be ruled out. The fire had most probably

been caused by T. He and the three other workers had not had a common plan to destroy the property. Since T. had died, the criminal proceedings against him had been discontinued.

13. On 16 November 2015 the Boryspil Court quashed the decision of 13 October 2015, stating that the prosecutor had failed to check the witnesses' statements concerning their movements and telephone calls on the day of the incident against the records of their telephone calls and the train schedule for that day. Therefore, the categorical conclusion as to the absence of a common plan to destroy property was not substantiated and was premature.

14. In January 2017 the Kyiv regional prosecutor's office informed the applicants that in April 2016, because of the unsatisfactory progress of the investigation, responsibility for it had been reassigned from the Boryspil district police to the Baryshiv district police. The officers previously in charge of the investigation had been reprimanded.

15. On 22 January 2020 the Boryspil prosecutor's office applied to the Baryshiv Court to discontinue the investigation since any prosecution for the investigated offences had become time-barred ten years after the offences had been committed.

16. On 13 October 2020 the Baryshiv Court rejected that application. The court observed that the most recent document in the file contained instructions from the prosecutor, issued in 2017, on the steps which had to be taken to advance the investigation. Since then, nothing had been done in the case. Under such circumstances, the discontinuation of proceedings as time-barred would be contrary to the rules of criminal procedure, notably those requiring the investigating authorities to take all measures provided for by law to establish the facts of the criminal offence and to identify the guilty party.

17. It appears that the investigation is still pending.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

18. The Court, being the master of characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia*, nos. 37685/10 and 22768/12, § 114, 20 March 2018), finds it appropriate to examine the applicants' complaint under Article 1 of Protocol No. 1.

A. Scope of the complaint and admissibility

19. The Court notes at the outset that no issue of compliance with the State's positive obligations arises in respect of property damage other than that caused by the fire, since the domestic authorities established, notably on

the basis of the workers' own statements, their responsibility in that regard (see paragraph 12 above). The applicants did not allege that they had been unable to lodge a civil claim against the guilty parties on the basis of those admissions and findings. The only matter before the Court is compliance with the State's obligations in respect of the arson.

20. The Government referred to Articles 1173, 1174 and 1177 of the Civil Code as possible avenues by which the applicants could obtain compensation. The Court observes that in *Petlyovanyy v. Ukraine* ((dec.), no. 54904/08, 30 September 2014) and *Bakulin v. Ukraine* ((dec.), no. 5687/07, § 33, 12 February 2019), it found that compensation under the above-mentioned provisions of the Code was dependent on further elaboration of the procedure and the conditions for obtaining such compensation in domestic law. The Government did not identify any developments in the domestic law that would allow the Court to change that assessment.

21. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

22. The relevant principles of the Court's case-law have recently been restated in *Korotyuk v. Ukraine* (no. 74663/17, § 36, 19 January 2023).

23. The Court does not find convincing the Government's argument that the applicants could have lodged a civil claim without waiting for the completion of the criminal proceedings. The Government failed to specify on which domestic provisions or principles of responsibility such a claim could be based or to cite any case-law to show that such a claim had a prospect of success.

24. Likewise, it was not possible for the applicants to lodge a civil claim within the framework of criminal proceedings since under domestic law such a claim could only be lodged once a suspect or accused was identified (see, for example, *Korotyuk*, cited above, § 43).

25. The authorities found it established that the applicants were victims of the criminal offence of arson (see paragraphs 3, 6 and 12 above). However, the authorities failed, within the framework of the criminal proceedings, to identify the persons responsible for it.

26. The applicants, in their observations, identified a specific step that the domestic authorities could have taken to advance the investigation, namely a confrontation interview between them and the surviving workers. That measure does not appear to have been futile, impossible to implement or disproportionate.

27. The domestic courts repeatedly found the investigation insufficient and the decisions to discontinue the proceedings ill-founded and premature (see paragraphs 11, 13 and 16 above). The prosecutor's office also considered

that additional steps were required to advance the investigation (see paragraphs 14 and 16 above). The domestic authorities, without citing any reasons, failed to take those steps.

28. Those premature decisions to discontinue the proceedings were based on a failure to examine the whole incident comprehensively, were criticised by the domestic courts (see paragraph 11 above) and delayed the process.

29. As a result, the investigating authority first examined the situation comprehensively in October 2015, that is, almost six and a half years after the incident and more than five years after the death of T., who, according to the outcome of the investigation itself, had played a key role in the incident (see paragraphs 5 and 12 above). In other words, because of the unjustified delay, the first comprehensive examination of the events occurred long after the expiry of the three-year statutory limitation period for any claims for damages.[1]

30. Although domestic law allows the courts to extend the statute of limitations for good reason shown,[2] even accepting the investigating authority's provisional conclusion that T. had acted alone and the other workers had had no involvement in the arson, T.'s involvement was only examined more than five years after his death and the Government and the applicants agreed that, under domestic law, no claim for damages could be lodged against T.'s heirs.

31. The Court finds, in view of the combination of those circumstances, that any civil proceedings had no prospect of success, that being the direct consequence of the flagrant and serious deficiencies which characterised the criminal investigation. The State therefore failed to fulfil its positive obligations in respect of the applicants' property.

32. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. The applicants claimed 13,572.20 euros (EUR) in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage and EUR 1,200.36 in respect of costs and expenses.

34. The Government contested those claims.

35. The Court, in view of the nature of the violation found, finds no causal connection between the violation and the pecuniary damage alleged (see *Korotyuk*, cited above, § 61).

36. The Court awards the applicants jointly EUR 3,000 in respect of non-pecuniary damage.

[1] Article 257 of the Civil Code of 2003.
[2] Article 267 § 5 of the Civil Code.

37. The Court awards the applicants jointly EUR 700 in respect of costs and expenses, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants jointly, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), in respect of non-pecuniary damage;
      (ii) EUR 700 (seven hundred euros), in respect of costs and expenses, plus any tax that may be chargeable to the applicants;
   (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 30 March 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Stéphanie Mourou-Vikström President