

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

FIFTH SECTION

CASE OF GORYAYEVA v. UKRAINE

(Application no. 58656/10)

JUDGMENT

STRASBOURG

6 October 2016

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



In the case of Goryayeva v. Ukraine,

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

André Potocki, *President,*
Ganna Yudkivska,
Síofra O'Leary, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 13 September 2016,

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

PROCEDURE

1. The case originated in an application (no. 58656/10) 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 Zoya Georgiyivna Goryayeva ("the applicant"), on 24 September 2010.

2. The Ukrainian Government ("the Government") were represented most recently by their Agent, Mr I. Lishchyna.

3. On 12 April 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1938 and lives in Mykolayiv.

5. The applicant's son, A.G., was born in 1966. Among other health conditions, he suffered from tuberculosis, Aids and drug addiction. He also had an infected phlegmon (inflammation) on his right shin.

6. On 4 May 2007 A.G. was arrested on suspicion of drug-related crimes and placed in a temporary detention centre ("the ITT") belonging to the Mykolayiv police.

7. On 7 May 2007 the Tsentralnyy District Court of Mykolayiv ordered A.G.'s pre-trial detention.

8. During his detention in the ITT, he was attended by the ambulance doctors who provided him with requisite medical treatment. On 19 May 2007 he was transferred to the surgical ward of the local hospital where he was treated for his phlegmon. Following the treatment the doctors

considered that he could be held in detention facilities. The applicant was returned to the ITT.

A. Death of the applicant's son

9. According to the results of the domestic investigations, at about 9.30 p.m. on 23 May 2007 an ITT officer heard moaning coming from the cell where A.G. was detained. At that time, A.G. was alone. The officer checked the cell and saw him with his mouth open, breathing heavily and repeating that he felt bad and needed air. ITT officers removed him from the cell and took him to the entrance area to get some fresh air, where they carried out first aid. An ambulance arrived at 9.43 p.m. and confirmed that A.G. was dead.

10. According to the post-mortem examination report, A.G. died from ischaemic heart disease, which had been aggravated by acute heart failure. Linear strangulation bruises were found on his neck, which indicated interrupted asphyxiation. According to the report, asphyxiation had been attempted ten minutes before death, and could have aggravated A.G.'s chronic illnesses.

B. Domestic inquiries and investigations into the incident

11. On more than fifteen occasions between 2007 and 2012 the investigators at the local prosecutor's office, having conducted pre-investigation inquiries, refused to initiate criminal proceedings in connection with the death of the applicant's son. Their decisions were quashed as unsubstantiated by supervising prosecutors and the courts, and further pre-investigation inquiries were ordered.

12. On 14 December 2012 the authorities initiated criminal proceedings, in accordance with the 2012 Code of Criminal Procedure.

13. On 27 March 2013 an investigator at the prosecutor's office of the Zavodskyy District of Mykolayiv terminated the criminal proceedings, finding no elements of a crime on the part of the ITT officers in question.

14. On 24 July 2013 the Zavodskyy District Court of Mykolayiv quashed the decision of 27 March 2013 as unfounded, noting that the investigator had failed to take the necessary measures in the case.

15. On 3 October 2013 the investigator terminated the criminal proceedings, concluding that there was no evidence to suggest that the ITT staff had caused the death of the applicant's son. He admitted that certain pieces of evidence could not be obtained. In particular, bed linen and a rope fashioned from bed linen, which had been found in the cell, could not be examined any further, as they had been destroyed after the post-mortem examination. For the same reasons, it was not possible to carry out a reconstruction of the events. He further noted that on 24 May 2007 a site

inspection had been carried out, but no video-recordings or sketches of the scene had been made, and no photographs had been taken.

16. Relying on the available evidence, the investigator found that, shortly before his death, the applicant's son had unsuccessfully attempted to commit suicide by asphyxiating himself with a rope which he had produced from the bed linen. According to the latest medical findings, his death had been caused by interrupted mechanical asphyxiation; the visible injuries on his neck suggested that heart failure had resulted from the attempted strangulation.

17. As regards the applicant's son's condition during his detention, the available medical evidence suggested that A.G. had not had any acute condition necessitating his admission to hospital during his detention in the ITT; on the other hand, he had been medically supervised within the ITT. Furthermore, his serious illnesses, such as the tuberculosis and HIV, suggested that his physical condition would have gradually deteriorated in any event. Having examined the case, the investigator concluded that the ITT officers could not have envisaged the fatal developments. He added that the applicant's son had been provided with appropriate nutrition and had not refused food.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of domestic law can be found in *Muravskaya v. Ukraine* (no. 249/03, §§ 35 and 36, 13 November 2008), and *Nagorskiy v. Ukraine* (no. 37794/14, § 38, 12 January 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

19. The applicant complained that her son had been murdered in the temporary detention facility and that, in any event, the domestic authorities were responsible for his death. She further argued that there had been no effective investigation into the circumstances surrounding his death.

20. The applicant relied on Article 2 of the Convention, the relevant part of which reads:

> "1. 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."

A. Admissibility

1. Allegations of murder and failure to protect the life of the applicant's son

(a) Cause of death

21. The Court reiterates that, in assessing evidence, it has generally applied the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

22. In the present case, the domestic authorities provided an explanation for the death of the applicant's son. They suggested that he had died from acute heart failure, resulting from attempted asphyxiation shortly before his death. That conclusion was based on the reliable medical evidence which was coherent with other pieces of evidence collected by the domestic authorities. The available evidentiary material further suggested that the applicant's son had attempted to commit suicide. The authorities provided a detailed account of facts relating to the incident, specifying in particular that the applicant's son had been alone in the cell at the relevant time, thereby excluding any possible aggression by other inmates. The material obtained by the authorities did not point to any indication that the asphyxiation might have been attempted by anybody but the applicant's son himself.

23. Despite the concerns expressed below as to the effectiveness of the domestic inquiries and investigations, the Court does not find any sufficient grounds to call into question the findings of the domestic authorities. Moreover, there appears to be no evidence whatsoever in support of the applicant's version of events. In such circumstances, the Court accepts the version of events provided by the domestic authorities and dismisses the applicant's assertion as to the alleged murder of her son as manifestly ill-founded.

(b) Operational measures to protect life

24. The Court further reiterates that, in certain well-defined circumstances, Article 2 may imply a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself. For such a positive obligation to arise, it must be established that the authorities knew,

or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Keenan v. the United Kingdom*, no. 27229/95, §§ 89 and 92, ECHR 2001-III).

25. As to the present case, the applicant's son had never been diagnosed as suffering from any psychiatric condition, nor does it appear from the information concerning his medical condition that there was any omission on the part of medical staff or prison personnel in identifying such a condition (see, by contrast, *Shumkova v. Russia*, no. 9296/06, § 93, 14 February 2012; *Renolde v. France*, no. 5608/05, § 122, ECHR 2008 (extracts); and *Keenan*, cited above, § 94). There is no indication that the applicant's son ever expressed any intention to kill or injure himself during his time in the detention facility (see, by contrast, *Volk v. Slovenia*, no. 62120/09, § 86, 13 December 2012). In such circumstances, it cannot be concluded that the authorities were under a positive obligation to take specific preventive measures in relation to the applicant's son before his attempted suicide.

26. Finally, nothing suggests that the authorities failed in their obligation to provide the applicant's son with requisite supervision and assistance. The ITT officers went to his cell as soon as they heard his moaning and, in response to his complaint regarding the lack of fresh air, removed him from the cell and took him outside. They gave him first aid and called an ambulance, which arrived within thirteen minutes. The Court finds no failing on the part of the domestic authorities which could raise an issue under Article 2 of the Convention.

(c) Conclusion

27. Having regard to the above considerations, the Court holds that this part of application is manifestly ill-founded and must be dismissed in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Procedural obligations under Article 2 of the Convention

28. The Court notes that this part of application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

29. The applicant maintained that the domestic inquiries and investigations had been ineffective.

30. The Government submitted that the national authorities had taken all necessary steps in order to collect evidence and establish the circumstances of the applicant's son's death. They maintained that the procedural requirements under Article 2 of the Convention had been complied with.

31. The Court reiterates that, where a person is in custody and under the control of the authorities and death occurs in circumstances leaving room for allegations to be made regarding the intentional taking of life, the State must ensure an effective official investigation (see *Šilih v. Slovenia* [GC], no. 71463/01, §§ 156-57, 9 April 2009, and *Pozhyvotko v. Ukraine,* no. 42752/08, § 38, 17 October 2013). This obligation concerns the means to be employed, and not the results to be achieved. The authorities must take all reasonable steps to secure the evidence concerning an incident (see *Muravskaya*, cited above, § 41). The effectiveness of an investigation implies a requirement of promptness and reasonable expedition. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law (see *Šilih*, cited above, § 195). Moreover, with the passage of time, the prospects that any effective investigation can be undertaken will increasingly diminish (see *Prilutskiy v. Ukraine*, no. 40429/08, § 43, 26 February 2015).

32. In the present case, the domestic authorities examined the matter between 2007 and 2012, exclusively by way of pre-investigation inquiries and without opening a full investigation. The Court has found that this investigative procedure does not comply with the principles of an effective remedy, because an inquiring officer can take only a limited number of procedural steps within that procedure, at a point where victims have no formal status and are therefore excluded from participating effectively in the procedure (see *Skorokhodov v. Ukraine*, no. 56697/09, § 34, 14 November 2013, with further references). It is notable that more than fifteen decisions to terminate the pre-investigation inquiries were taken in that period, and all of them were quashed as unfounded by the supervising authorities, which each time remitted the case for a new round of inquiries. The repetition of such remittal orders discloses a serious deficiency (see, for example, *Spinov v. Ukraine*, no. 34331/03, § 56, 27 November 2008).

33. Subsequently, when the authorities opened a full-scale investigation in December 2012, they had to admit that important pieces of evidence had been destroyed and initial procedural steps had not been properly carried out, which complicated any further comprehensive analysis. The last decision to terminate the investigation was taken more than six years and five months after the incident, and the available material does not suggest that such lengthy domestic proceedings were justified.

34. The Court, having regard to its well-established case-law in this field, considers that the circumstances of the present case suggest that the

domestic inquiries and investigations were not compatible with the procedural requirements of Article 2 of the Convention.

35. It holds that there has been a violation of that provision.

II. 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."

A. Damage

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

38. The Government contended that that claim was groundless.

39. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of a violation in the present case. Ruling on an equitable basis, the Court awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

40. The applicant did not submit any claims under this head. The Court therefore makes no award.

C. Default interest

41. 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 ineffectiveness of the domestic investigation into the death of the applicant's son admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 2 of the Convention in its procedural limb;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) plus any tax that may be chargeable thereon, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable on 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	André Potocki
Deputy Registrar	President