

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

FIFTH SECTION

CASE OF PELESHOK v. UKRAINE

(Application no. 10025/06)

JUDGMENT

STRASBOURG

8 December 2016

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



In the case of Peleshok 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 Anne-Marie Dougin, *Acting Deputy Section Registrar*,

Having deliberated in private on 15 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 10025/06) 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, Mrs Mariya Kuzmivna Peleshok ("the applicant"), on 15 February 2006.

2. The applicant, who had been granted legal aid, was represented by Mr O.V.Levytskyy, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna of the Ministry of Justice.

3. The applicant alleged that the investigation into her allegations of ill-treatment inflicted by private individuals had been ineffective.

4. On 20 August 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1935 and lives in the city of Ternopil, Ukraine.

A. Infliction of bodily injuries on the applicant

6. The applicant stated that in 1999 she had lent 21,500 United States dollars (USD) to Mrs Sh. She also stated that the loan had been repaid in part, and as of June 2002, a debt of USD 13,400 remained outstanding.

7. According to the applicant, on the morning of 30 July 2002 Mrs Sh. and Mrs Sh.'s husband beat her in the front yard of their house after the

applicant had asked them to repay the outstanding debt. She also alleged that the incident had occurred in public "in front of passers-by who eye-witnessed it".

8. In the testimonies she gave to the police after the criminal investigation had been opened (see paragraph 15 below), the applicant specified that in the course of the conflict Mrs Sh. had struck her on the head with a wet towel, then punched her on the head and on her breast, and Mr Sh. had also punched her on the head.

9. According to the statements of Mr and Mrs Sh. and several other witnesses who were interrogated by the police (see paragraphs 16 and 23 below), the applicant and Mrs Sh. had a confrontation on 29 July 2002. No injuries were inflicted on the applicant in the course of that dispute.

10. On 30 July 2002 the applicant was taken by ambulance to the emergency unit of the Ternopil Town municipal hospital, being admitted there at 5.30 p.m. According to the medical records, at the time of the applicant's admission she was diagnosed with a brain concussion but no other traumatic injuries. On 31 July 2002 the doctors diagnosed bruising to the applicant's breast.

11. The applicant remained in hospital from 30 July to 23 August 2002.

B. Investigation into the incident

12. On 30 July 2002 the applicant's husband lodged a complaint with the Ternopil Town police department. He claimed that Mrs Sh. and her husband had punched the applicant in the head and breast in the yard of their house.

13. On 9 August 2002 the police refused a request to institute criminal proceedings against Mr and Mrs Sh. for lack of corpus delicti.

14. On 4 September 2002 the Ternopil Regional Bureau of Forensic Medical Examinations (*Обласне бюро судово-медичної експертизи*) carried out a forensic medical examination. The forensic experts recorded that on 30 July 2002 the applicant had been admitted to hospital. Upon hospitalisation the applicant stated that at 11.00 a.m. that morning she had been beaten by "an acquaintance". The forensic experts also found that the applicant had sustained a brain concussion and had a bruise on the right side of her chest. As she had suffered from the brain concussion for more than three weeks, this injury was qualified as a bodily injury of medium severity. The bruise was qualified as a light bodily injury.

15. On 29 October 2002 the Ternopil deputy prosecutor quashed the decision of 9 August 2002 and instituted criminal proceedings against Mr and Mrs Sh.

16. On 30 October 2002 the police questioned Mrs Sh. The Government provided copies of her testimony, which are, however, incomplete. It would appear that Mrs Sh. stated that she had borrowed USD 8,100 from the

applicant without signing any formal documents, and had subsequently repaid this sum. She also testified that on 29 July 2002 the applicant and the applicant's husband had come to her house and demanded the interest on the above amount. Mrs Sh. refused to pay the interest and there had been a dispute with the applicant, following which the applicant left.

17. On 19 November 2002 the police questioned the applicant's husband as a witness.

18. On 2 and 4 January 2003 the police questioned three individuals, Mrs P., Mr Pukh. and Mr Pa., who were eye-witnesses to the incident.

19. On 3 January 2003 the deputy head of the investigation office of the Ternopil Town police department (*заступник начальника СВ ТМВ УВСУ в Тернопільській області*) ordered an additional forensic medical examination.

20. On 13 January 2003 the expert commission of the Ternopil Regional Bureau of Forensic Medical Examinations confirmed the findings of the expert examination of 4 September 2002. In addition, the experts noted that the applicant's brain concussion and the bruise had been inflicted by a blunt object and could not have been sustained by falling. The experts also stated that the dynamics of the applicant's clinical picture corresponded to her allegation that the injuries had been inflicted on her on 30 July 2002. They finally concluded that the brain concussion had been caused by a series of blows to the head.

21. On 14 January 2003 the police questioned Mr Sh. as a suspect. He gave the same testimony as his wife (see paragraph 16 above).

22. Between 15 January and 27 January 2003 multiple face-to-face confrontations were carried out between the applicant, the suspects and various witnesses who had been questioned earlier, including Mr T., Mr Pa., Mrs P. and Mr Pukh.

23. On 25 February 2003 the deputy head of the investigation office of the Ternopil Town police department terminated the criminal proceedings against Mr and Mrs Sh. for lack of evidence that a crime had been committed. Two accounts of events were noted in that decision, one suggested by the applicant and another one put forward on the basis of the statements of Mr and Mrs Sh. and two witnesses, T. and B. According to this second account of events, there had been a verbal confrontation between the applicant and Mrs Sh. on 29 July 2002 in the yard of the latter's house, during which no injuries had been inflicted on the applicant. It was noted in the decision that numerous witnesses had been questioned, face-to-face interrogations had been held and forensic medical examinations had been carried out. It was concluded that, in view of the conflicting witness statements, it was impossible to establish whether the incident had occurred on 29 or 30 July 2002 and the police did not have sufficient evidence to prosecute Mr and Mrs Sh.

24. On 4 March 2003 the Ternopil Town Prosecutor quashed the above decision and ordered an additional investigation.

25. On 4 April 2003 the police again terminated the criminal proceedings against Mr and Mrs Sh. They noted that Mr and Mrs Sh. testified that they had borrowed USD 8,100 from the applicant and had subsequently repaid this sum. Mr and Mrs Sh. maintained that on 29 July 2002 the applicant had come to their house together with her husband and had demanded the interest on the above amount. According to them, the applicant had with her a small pot containing an unknown liquid, which she said was acid. She had threatened to pour the acid into the eyes of the Sh.'s child. Mr Sh. called the police, but the applicant and her husband had left before they arrived. The police concluded that the evidence obtained as a result of the investigative measures was insufficient to prosecute Mr and Mrs Sh. and the identity of the applicant's assailant had not been established.

26. Between March 2003 and September 2006 the criminal proceedings in the applicant's case were terminated on eight occasions (on 4 April 2003, 5 June 2003, 5 August 2003, 14 September 2003, 28 December 2003, 17 May 2004, 27 August 2004 and 16 February 2005). All of these decisions were quashed by a senior prosecutor who ordered an additional inquiry, finding repeatedly that the investigation of the case had been "incomplete".

27. In particular, in the decision of 5 May 2003 the deputy head of the investigation office of the Ternopil Town police department ordered that a reconstruction of the incident be staged with a view to establishing the facts of the case and in order to support or rebut the conflicting statements of the witnesses. He ordered specifically that it be established in the course of the reconstruction whether the witnesses (including T. and B.) could in fact have been able to observe the incident from the street outside the yard, as claimed by them. In a later decision, of 8 December 2004, a senior prosecutor from the Ternopil Regional Prosecutor's Office noted, inter alia, the need to also question the ambulance personnel who had conveyed the applicant to the emergency unit on 30 July 2002.

28. On 6 May 2003 the police questioned Mr K., a taxi driver. He testified that on 30 July 2002 he had been driving his taxi and had picked up the applicant and her husband on the street where the house of Mr and Mrs Sh. is located. He added that the applicant had been in distress and held her hands to her head.

29. On 17 January 2004 the first deputy Ternopil City Prosecutor (*перший заступник прокурора міста Тернополя*) noted that the investigating officer had failed to follow instructions and take the investigative measures required by the decision of 5 May 2003 (see paragraph 27 above).

30. In 2004 disciplinary proceedings were instituted against investigating officer Z. for certain procedural violations, as a result of which the investigation became protracted. The outcome of these proceedings is unknown.

31. On 23 September 2006 the police took two procedural decisions in the case. By the first decision the police terminated the criminal proceedings against Mr and Mrs Sh., reiterating the reasons given in the decision of 4 April 2003. By the second decision the criminal investigation of the case was stayed until the identity of the person who inflicted the injuries on the applicant could be established.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of Ukraine, 2001

Article 122. Intentional bodily injury of medium severity

"1. Intentional bodily injury of medium severity, that is to say, intentional injury which does not endanger life or result in the consequences provided for by Article 121 of this Code, but which has caused a long-lasting health disorder or a significant permanent reduction of less than one third in an individual's capacity to work, shall be punishable by ..."

B. Code of Criminal Procedure, 1960

32. The relevant extracts of Articles 4, 25, 97, and 100 of the Code, in force at the material time, provide:

Article 4. The obligation to institute criminal proceedings and investigate a crime

"The court, prosecutor or investigating officer must, to the extent that it is within their power to do so, institute criminal proceedings in every case where evidence of a crime has been discovered and take all necessary measures provided by law to establish whether a crime has been committed and the identity of the perpetrators thereof and to punish them."

Article 25. Supervision by the prosecutor in criminal proceedings

"Supervision of the observance of the law by bodies of inquiry and the investigative authorities shall be carried out by the Prosecutor General of Ukraine and the inferior prosecutors.

Resolutions of the prosecutor issued in accordance with the law shall be binding for all the enterprises, institutions, organisations, officials and citizens."

Article 97. Obligation to accept applications or communications with regard to crimes and the procedure for their examination

"A prosecutor, investigating officer, body of inquiry or a judge shall accept applications and communications regarding a committed or an intended crime, including ones concerning cases which are outside their competence.

Following an application or communication about a crime the prosecutor, investigating officer, body of inquiry or a judge shall, within a period of three days, take one of the following decisions:

(1) institute criminal proceedings;

(2) refuse to institute criminal proceedings;

(3) remit the application or communication for further examination as appropriate according to the rules on jurisdiction ..."

Article 100. Supervision by the prosecutor over the lawfulness of the institution of criminal proceedings

"... If proceedings have been instituted without lawful grounds, the prosecutor shall terminate them, and in cases where no investigative measures have been taken, shall quash the decision instituting those criminal proceedings.

In cases of unjustified refusal to institute criminal proceedings by an investigating officer or a body of inquiry, the prosecutor shall by his resolution quash the decision of the investigating officer or body of inquiry and institute proceedings."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

33. The applicant complained that the investigation into her complaints of ill-treatment had been lengthy and ineffective. She relied on Articles 6 and 13 of the Convention.

34. The Court notes at the outset that the applicant who was 67 year-old at the material time was subjected to a treatment which resulted in actual bodily injuries that were classified by the domestic authorities as being of "medium severity". The Court finds that this treatment attained a minimum level of severity required to fall within the scope of Article 3 of the Convention (see, *mutatis mutandis*, *Bouyid v. Belgium* [GC], no. 23380/09, § 87, ECHR 2015). Being the master of the characterisation to be given in law to the facts of the case (see, for instance, *Margaretić v. Croatia*, no. 16115/13, § 75, 5 June 2014), the Court therefore decides that the applicant's complaint falls to be examined under the procedural limb of Article 3 of the Convention, which reads as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

35. The Government maintained that the applicant had lost her victim status. In particular, they claimed that the applicant had failed to challenge the prosecutor's decision of 23 September 2006 discontinuing criminal proceedings and throughout the period subsequent to the above date had failed to request the reopening of the investigation. They argued that the applicant had not lodged any new complaints with the prosecutor's office after the above date and therefore had no interest in pursuing her complaints.

36. The applicant pointed out that the investigation in the case had been suspended on 23 September 2006 for failure to identify the perpetrators, even though the identity of the persons responsible for the assault had been known to the applicant and to the investigating authorities. The applicant also claimed that, four years after the incident had taken place and the information on the identity of the perpetrators and the circumstances of the incident had been brought to the attention of the authorities, her attempts to challenge the decision suspending the criminal proceedings had proved ineffective.

37. The Court reiterates that an applicant will be deprived of the status of "victim" where the national authorities have acknowledged, either expressly or in substance, the breach of the Convention and then afforded appropriate redress for it (see *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). The Court notes that the applicant complained essentially of the Government's failure to comply with the positive obligation implied in Article 3 of the Convention to conduct an effective investigation into her complaints of ill-treatment. Since the question of whether the domestic authorities discharged their obligation to conduct an effective investigation is inextricably linked to the substance of the applicant's complaint, the Court will join the Government's objection concerning the applicant's victim status to the merits.

38. The Court considers that the Government's other objection concerning the failure to appeal against the police decision of 23 September 2006 is equally closely linked to the substance of the applicant's complaints under Article 3 of the Convention. The Court therefore decides to join both the Government's objections to the merits.

39. The Court furthermore notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other grounds for declaring it inadmissible having been established, it must therefore be declared admissible.

B. Merits

1. The submissions of the parties

40. The applicant argued that the investigation had failed to meet the requirements of promptness, thoroughness and impartiality. She pointed out specifically the fact that Mrs Sh., a suspect in the case, was first questioned on 30 October 2002, which was three months after the incident had occurred. She also argued that, given that the case was not particularly complex, the overall length of the investigation had been excessive. Lastly, the applicant claimed that because of the authorities' failure to establish who was responsible for inflicting the bodily injuries she suffered, she had had no opportunity to vindicate her rights, including by lodging a civil claim against her assailant(s).

41. The Government argued that the State cannot be held directly responsible for the actions of private individuals. They also pointed out that the prosecution authorities had taken a number of investigative measures, in particular, questioning numerous witnesses – including multiple face-to-face confrontations between those witnesses – and had ordered several forensic medical examinations. Having examined the totality of the evidence in their possession, they had found no grounds for prosecuting Mr and Mrs Sh. They submitted that in the circumstances, the measures taken by the prosecution authorities had been sufficient and that the manner in which the investigation had been conducted had been satisfactory in the light of the criteria laid down in the Court's case-law.

2. The Court's assessment

(a) General principles

42. The Court reiterates that, according to its well-established case-law, Article 3 of the Convention gives rise to a procedural obligation to conduct an effective official investigation into alleged ill-treatment, even if such treatment has been inflicted by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, § 151, ECHR 2003-XII; *Biser Kostov v. Bulgaria*, no. 32662/06, § 78, 10 January 2012; and *Muta v. Ukraine*, no. 37246/06, § 59, 31 July 2012).

43. The minimum standards of effectiveness laid down by the Court's case-law include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, *mutatis mutandis*, *Menesheva v. Russia*, no. 59261/00, § 67, ECHR 2006-III).

44. The kind of investigation that will achieve those purposes may vary according to the circumstances. However, whatever method of investigation is selected, the authorities must act as soon as an official complaint has been lodged (see, *mutatis mutandis*, *Batı and Others v. Turkey*, nos. 33097/96

and 57834/00, § 133, ECHR 2004-IV (extracts)). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, *mutatis mutandis*, *Bouyid,* cited above, § 121, ECHR 2015).

45. Further, in cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often given consideration to delays in the opening of investigations and taking of statements (see *Timurtaş v. Turkey*, no. 23531/94, § 89, ECHR 2000-VI, and *Tekin v. Turkey*, 9 June 1998, § 67, Reports 1998-IV) and the length of the preliminary investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001).

46. Lastly, not every investigation must necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the facts prove to be true, to the identification and punishment of those responsible (see, *mutatis mutandis*, *Mikheyev v. Russia*, no. 77617/01, § 107, 26 January 2006).

(b) Application of the general principles to the present case

47. The Court observes that on 30 July 2002 the applicant's husband complained to a local police department that his wife had been beaten by the individuals whom he identified in his complaint. The matter was therefore duly brought before the competent authorities at a time when they could reasonably have been expected to investigate the allegations of ill-treatment.

48. The complaint was subsequently substantiated by the findings of a forensic medical examination (see paragraph 14 above) attesting to the applicant's brain concussion and a bruise on her body. The applicant's claim was therefore shown to be "arguable" and the domestic authorities were thus placed under an obligation to conduct an effective investigation which would meet the above requirements of Article 3 of the Convention.

49. The Court notes that the refusal of 9 August 2002 to open a criminal investigation following the applicant's complaints was quashed by a prosecutor on 29 October 2002. On the latter date a criminal investigation was opened. The Court furthermore notes that during the period – amounting to almost four years – between 29 October 2002 and 23 September 2006, when the last decision to terminate the criminal investigation was taken, nine decisions were taken by the domestic authorities refusing the institution of criminal proceedings against Mr and Mrs Sh. for lack of *corpus delicti* or terminating such proceedings. All these decisions were subsequently set aside by the supervising authority as unfounded and additional inquiries were ordered.

50. The Court observes that on 23 September 2006 the investigating officer of the Ternopil Town police department took two separate procedural decisions. The first decision concerned the termination of the criminal proceedings against Mr and Mrs Sh. on the grounds that the evidence obtained in the case was insufficient to prosecute them. The second decision suspended the criminal investigation in the case until the identity of the persons responsible for the assault on the applicant could be established. It follows that the investigation of the applicant's case remains pending at the present time, but no procedural decisions have been taken, nor have there been any other developments in the case since the investigation was suspended on 23 September 2006. The Court observes that, following a fourteen-year investigation, the authorities have failed to establish the facts of the case and the circumstances in which the injuries were inflicted on the applicant. Since the various witnesses have made conflicting statements, the date on which the injuries were sustained and the identity of the assailant(s) remain unclear.

51. The Court considers that the multiple repetition of orders for additional investigation may be indicative of deficiencies in the manner in which the investigation was conducted. It notes specifically that the reasoning on which the decision of 23 September 2006 not to prosecute Mr and Mrs Sh. was based is identical to that contained in the decision of 4 April 2003 taken three years earlier. Despite the specific instructions given by the deputy head of the prosecution office of the Ternopil Town police department on 5 May 2003 (see paragraph 27 above), no measures have been taken with a view to clarifying the facts of the case or verifying the two different accounts of events put forward to the police, nor have any other reasons for the termination of the criminal investigation been advanced. These deficiencies were, at least in part, acknowledged by the domestic authorities (see paragraph 29 above).

52. Turning to the Government's objections, it remains to be established whether the applicant was required, under the rule on exhaustion of domestic remedies, to appeal against the decision of 23 September 2006 on the termination of criminal proceedings against Mr and Mrs Sh.

53. The Court notes that the applicant's allegations of ill-treatment were initially considered by a prosecutor who found that the applicant had a *prima facie* case and decided to open a criminal investigation. The subsequent decisions to terminate the investigation were repeatedly overruled by the senior prosecutors and the investigation was resumed.

54. The Court refers to its findings in *Kaverzin v. Ukraine* (no. 23893/03, 15 May 2012) which indicated that in the Ukrainian criminal law system the procedures of appeal to hierarchically superior prosecutors and to the courts have not been proved capable of providing adequate redress (see *Kaverzin*, cited above, § 97). The Court also notes that, despite the applicant's reluctance to contest the decision terminating the criminal

proceedings against Mr and Mrs Sh., the investigation of the case has not been conclusively terminated (see paragraph 50 above). However, no progress whatsoever can be shown to have been made from September 2006 to the present time.

55. In the light of these findings, the Court considers that the applicant cannot be reproached for not having had recourse to a remedy which proved incapable of providing redress in respect of her complaints of ineffective investigation.

56. In the light of the foregoing, the Court dismisses the Government's objections and, taking into account the manner in which the investigation has been handled, the multiple repetition of the orders to quash and then resume the investigation, and the overall length of the investigation – which remains pending fourteen years after the events complained of, and ultimately has failed to establish the facts of the case – finds that the authorities have failed to discharge their obligation to conduct an effective investigation into the allegations of ill-treatment in the present case.

57. There has accordingly been a violation of Article 3 of the Convention under its procedural head.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

60. The Government argued that the sum claimed by the applicant was excessive.

61. The Court, ruling on an equitable basis, awards the applicant EUR 7,500 in respect of non-pecuniary damage.

B. Costs and expenses

62. The applicant did not claim any costs and expenses.

C. Default interest

63. 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 application admissible;

2. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 7,500 (seven thousand five hundred euros), to be converted into Ukrainian hryvnas at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 December 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anne-Marie Dougin Acting Deputy Registrar	André Potocki President