

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

FIFTH SECTION

CASE OF POBOKIN v. UKRAINE

(Application no. 30726/14)

JUDGMENT

STRASBOURG

6 April 2023

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



In the case of Pobokin v. Ukraine,

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

Carlo Ranzoni*, President*,
Mattias Guyomar,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 30726/14) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 7 April 2014 by a Ukrainian national, Mr Maksym Dmytrovych Pobokin ("the applicant"), who was born in 1983 and lives in Kyiv and who, having been granted legal aid, was represented by Ms Y.V. Naumenko and Ms Y.O. Zakrevska, lawyers practising in Kyiv;

the decision to give notice of the complaints concerning ineffective investigation of ill-treatment to the Ukrainian Government ("the Government"), who were represented by their Agent, Mr I. Lishchyna, of the Ministry of Justice, and to declare the remainder of the application inadmissible;

the parties' observations;

aving deliberated in private on 16 March 2023,

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

SUBJECT MATTER OF THE CASE

1. The case concerns the alleged failure to investigate an incident of violence by a private security guard perpetrated against a person with disabilities, purportedly entailing progressive impairment to the person's health. The applicant relied on Articles 6 and 13 of the Convention.

I. BACKGROUND TO THE CASE AND SUBSEQUENT INVESTIGATION

2 The applicant suffered from moderate speech and motor impairments classified as a medium-degree disability due to cerebral palsy. On 9 October 2008, while picking up his sister from school, he was forcibly led out of the building by Mr M., a security guard. Apart from abrasions on his chest and back, the above-mentioned incident allegedly caused the applicant a great deal of distress and his state of health deteriorated rapidly. Furthermore, he was later diagnosed with stuttering, dysarthria, weight loss, insomnia, increased fatigue and other complaints. On that account, in 2012 the category of his disability was changed permanently to the most severe degree of disability («*перша група інвалідності довічно*»).

3. Several hours after the above-mentioned incident, the applicant lodged a complaint with the police. According to his account of events, Mr M., supposedly unable to understand the applicant because of his stutter, started swearing at him, grabbed him and hit him on the back, causing him to fall. Mr M. then grabbed the applicant by the scruff of his neck, dragged him down the stairs and through the hallway to the front doors of the school and pushed him out.

4. On the same day Mr M. gave a witness statement to the police, asserting that he had gently led out "an odd-looking young man". In his later statements Mr M. admitted having used force to walk the applicant down the stairs. Subsequently, the police also questioned a teacher, a head teacher, and a watchwoman, whose statements concurred with Mr M.'s version of events, although none of the women had witnessed the incident; the watchwoman had merely seen Mr M. leading the applicant out of the building holding his wrist.

5. A medical examination carried out on 13 October 2008 in the course of "pre-investigation enquiries" characterised the applicant's injuries resulting from the incident as "minor" within the meaning of domestic law. The police first refused to open an investigation into the incident, finding no signs of a crime, and only on 16 December 2008 a local prosecutor instituted a fully-fledged investigation.

6. On 4 March 2009 the police recognised the applicant as an aggrieved party in the proceeding. It further appointed his mother to act as his legal guardian (*законний представник*) as if the applicant were a minor or an incapacitated adult, although she stressed that her son had full legal capacity.

7. In 2009 the police suspended the proceedings several times without informing the applicant because "it was impossible to identify the perpetrator".

8. The applicant and his mother lodged multiple appeals drawing attention to the gradual deterioration of his health allegedly resulting from the incident. Despite this, both forensic examinations commissioned by the police in 2009 and 2012 without the parties concerned being consulted only looked at the initial medical documents concerning the physical injuries and answered the same questions as the forensic report of 13 October 2008. Their findings essentially reiterated the conclusions contained in that initial report.

9. Upon the applicant's complaints, in 2013 the Darnytsia District Court twice reproached the police for their persistent failure (i) to assess the long-term physical and psychological impact of the violent incident on the applicant's health, (ii) to question all witnesses, including V., the applicant's sister, who that day had come to the hallway with other pupils, and (iii) to clarify discrepancies between different witness accounts, including by holding witness confrontations. The same issues were also raised by the prosecution as reasons behind the multiple remittals of the case for further investigation. In 2012 and 2014 the prosecutors informed the applicant that

they were considering bringing a disciplinary case against the relevant police officials for failing to thoroughly investigate his complaint.

10. On 4 April 2014 the police questioned V. for the first time. She testified that on 9 October 2008 she had seen her older brother visibly distressed and covered in sand. According to V., the demeaning treatment the applicant had allegedly suffered at the hands of Mr M. had had a profound traumatic effect on him and his condition had immediately and seriously deteriorated.

11. The above-mentioned questioning and the applicant's questioning on 28 October 2014 were the only investigative measures undertaken during 2014. The latter, it appears, was the last step taken to date in the criminal proceedings, which are still pending.

II. CIVIL PROCEEDINGS

12. On 17 April 2009 the applicant lodged a civil claim for damages against the private security agency that employed Mr M.

13. The final decision was delivered by the Higher Specialised Civil and Criminal Court of Ukraine on 28 July 2014. The court allowed the applicant's claim in part, awarding him compensation for non-pecuniary damage and rejecting the claim in respect of pecuniary damage. Relying on material from the criminal case file – in particular, it would appear, Mr M.'s statements – it was concluded that the applicant's resistance to Mr M.'s legitimate demand for him to leave the school premises was to blame, at least in part, for his injuries and the extent of the harm that he had suffered. At the same time, the courts found that, in the absence of a forensic medical assessment concerning the long-term effects of the incident on the applicant's health, there was insufficient evidence for it to conclude that the deterioration of his condition and the requisite medical expenses were linked to the assault. On 6 March 2019 the decision was enforced by the Bailiffs Service and the applicant received 7,000 Ukrainian Hryvnias (UAH) (approximately 230 Euros (EUR) at the time).

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

14. Being the master of the characterisation to be given in law to the facts of the case, the Court finds it appropriate to examine the applicant's allegations under the procedural limb of Article 3 of the Convention.

A. Admissibility

15. The Government argued that the applicant had lost "victim" status within the meaning of Article 34 of the Convention because he had received compensation for his injuries in the civil proceedings.

16. The Court reiterates that Article 3 of the Convention requires that the authorities conduct an effective official investigation into alleged ill-treatment even if such treatment has been inflicted by private individuals (see *Kosteckas v. Lithuania*, no. 960/13, § 40, 13 June 2017). The civil remedy relied on by the Government cannot be regarded as sufficient for the fulfilment of a Contracting State's obligations under Article 3 of the Convention, as it is aimed at awarding damages rather than identifying and punishing those responsible (see, *mutatis mutandis*, *Gäfgen v. Germany* [GC], no. 22978/05, § 119, 1 June 2010, and *Beganović v. Croatia*, no. 46423/06, § 56, 25 June 2009).

17. The Court thus rejects the Government's objection. It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

18. The applicant contended that the authorities had failed to effectively investigate the incident of violence against him, taking into account the full scope of the physical and psychological harm resulting from it.

19. The Court has summarised the general principles concerning the effectiveness of an investigation into arguable allegations of ill-treatment in *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 116-123, ECHR 2015) and *Muta v. Ukraine* (no. 37246/06, §§ 59-62, 31 July 2012).

20. In the present case, it was not contested that the applicant's treatment by Mr M. and the injuries allegedly resulting from it were sufficiently serious to amount to ill-treatment falling within the scope of Article 3 and the procedural obligations deriving from that Article.

21. However, during the first two months after the incident the applicant's complaint was examined in so-called "pre-investigation enquiries", a procedure that has been found in various contexts not to be compliant with the principles of an effective remedy (see *Skorokhodov v. Ukraine*, no. 56697/09, § 34, 14 November 2013). It is also notable that during those two months the police took several decisions refusing to open a criminal investigation (see paragraph 5 above).

22. The Court further notes that it was not until March 2009 that the applicant was formally recognised as an aggrieved party in the proceedings (see *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, § 311, 1 July 2010, and *Skorokhodov*, cited above, § 34). Even then, the authorities

failed to enable his effective participation. The available evidence shows that they consistently withheld information about most of their decisions from the applicant or at least considerably delayed the provision of such information (see, *mutatis mutandis*, *Chernega and Others v. Ukraine*, no. 74768/10, §§ 165-166, 18 June 2019). In addition, in the absence of any obstacles preventing the applicant from participating personally in the criminal proceedings, although this could have required the involvement of a qualified intermediary and/or technical aids in view of his speech impairment, the police assigned his mother the status of legal guardian, which implied a denial of the applicant's legal capacity (see paragraph 6 above).

23. The manner in which the police established the facts of the events also illustrates the failure to investigate the case thoroughly (see *Skorokhodov*, cited above, §§ 34-35, and *Mihhailov v. Estonia*, no. 64418/10, § 119, 30 August 2016). Firstly, despite several requests from the applicant and the supervisory authorities, no witness confrontations were held, even though there were contradictions between witnesses' statements (see paragraph 4 above). It is also notable that, apart from the adults questioned by the police, at least part of the incident was witnessed by pupils at the school, but none of them was questioned apart from the applicant's sister, whose interview took place more than five years after the events in question (see paragraphs 9 and 10 above).

24. The Court also notes that at no point during the proceedings did the authorities consider formally regarding Mr M. as a suspect. The Court has held in various contexts that failure to initiate a formal investigation against an alleged culprit may compromise the validity of evidence (see, *mutatis mutandis*, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 118, 3 May 2007; and *M.C. and A.C. v. Romania*, no. 12060/12, §§ 120-121, 12 April 2016).

25. Besides the issue of promptness and the findings of the first forensic examination, which took place on 13 October 2008 in the context of the "pre-investigation enquiries", the very nature of which prevented the commissioning of a full-scale forensic assessment (see *Grigoryan and Sergeyeva v. Ukraine*, no. 63409/11, §§ 61-63, 28 March 2017, and *Chernega and Others*, cited above, § 167), the Court notes that both of the forensic medical assessments commissioned by the authorities only looked at the documents drawn up in the immediate aftermath of the incident, without taking into account the ample additional medical documentation made available by the applicant to the authorities which indicated the gradual deterioration of his health; moreover, they did not order, *inter alia*, a physical examination of the applicant (see *Mihhailov*, cited above, § 116).

26. Lastly, it should be noted that the criminal proceedings in the current case have lasted for over ten years and are still formally pending, although any prosecution would now be time-barred. The domestic authorities have themselves recognised many of the above-mentioned shortcomings of the

investigation into the incident of 9 October 2008 and have criticised its dilatory nature (see paragraph 9 above). The Court sees no reason to depart from the domestic authorities' overall assessment of the quality of the investigation (see *Muta*, cited above, § 65, and *Sizarev v. Ukraine*, no. 17116/04, § 127, 17 January 2013) and finds that there has been a violation of Article 3 of the Convention under its procedural limb.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. The applicant claimed 22,907 Euros (EUR) in respect of pecuniary damage, EUR 10,000 in respect of non-pecuniary damage and EUR 2,400 in respect of costs and expenses incurred before the Court.

28. The Government considered those claims unjustified and excessive.

29. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

30. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria and bearing in mind that the applicant's representative has already been paid EUR 850 under the Court's legal aid scheme, the Court rejects the applicant's claim.

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;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, 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 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 April 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Carlo Ranzoni President