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

# FIFTH SECTION

# DECISION

Application no. 18180/11
Emiliya Ivanivna KOTSUPYR
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 30 November 2023 as a Committee composed of:

Stéphanie Mourou-Vikström*, President*,
Mattias Guyomar,
Kateřina Šimáčková*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 18180/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 9 March 2011 by a Ukrainian national, Ms Emiliya Ivanivna Kotsupyr ("the applicant"), who was born in 1942, lives in Novyy Rozdil and was represented by Mr Ilkiv, a lawyer practising in the same town;

the decision to give notice of part of the application concerning the ineffectiveness of the investigation and the lack of an effective remedy in that respect under Articles 2 and 13 of the Convention to the Ukrainian Government ("the Government"), represented by their Agent, most recently Mrs M. Sokorenko, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated, decides as follows:

## SUBJECT MATTER OF THE CASE

1. The case concerns the alleged lack of an effective investigation into the death of the applicant's son, K. The applicant relies on Articles 2 and 13 of the Convention in this regard.

2. K. was an electrician at a municipal housing company, "Rozdilzhytloservis" ("the company"). On 26 January 2006 K. was working

together with his colleagues on restoring the electricity supply to a residential building. At around 12.30 p.m., after K. had complained that he was unwell, he was taken to hospital.

3. Initially K. was diagnosed with vegetative-vascular dystonia; however, the next day he was diagnosed with a post-traumatic brain hematoma. On 30 January 2006 K. was transferred to an emergency hospital, where he explained that he had fallen while working alone in a basement, hit his head on a concrete floor and lost consciousness. K. was examined and diagnosed with a subarachnoid haemorrhage and brain injury. K.'s state of health improved, and on 20 February 2006 he was discharged from the hospital and was supposed to, but did not, resume work.

4. On 24 February 2006 K. died at home.

## I. CRIMINAL INVESTIGATION

5. On the same day an assistant prosecutor of the Mykolayiv Local Prosecutor's Office ("the prosecutor's office") examined K.'s body and did not find signs of a violent death. He ordered a forensic medical examination and questioned the applicant and M., a relative of K., who testified that on 26 January 2006 K. had been hospitalised after hitting his head on a water pipe at work.

6. On 3 March 2006 the prosecutor's office dismissed the applicant's complaint and declined to open a criminal case about K.'s death because no crime had been involved.

7. On 4 April 2006 a medical forensic report ("the first forensic report") concluded that the cause of K.'s death had been purulent meningitis which had led to a sudden brain swelling. The expert had found no sign of a head injury.

8. On the same day, relying on the first forensic report, the prosecutor's office declined to open a criminal case on the applicant's complaint against the municipal authorities for an alleged breach of the safety at work rules. On 5 May 2006 the applicant complained about that decision to a prosecutor, referring to statements made by K.'s colleagues A. and Ch. that K. had hit his head, as well as to the diagnosis.

9. On 3 July 2006 the expert panel report found that the diagnosis and medical treatment of K. had been appropriate. Having examined the first forensic report, the expert panel, however, found "no convincing data in respect of K. having purulent meningitis".

10. On 5 July 2006 the prosecutor's office declined to open a criminal case on the applicant's complaint of an alleged violation of the safety at work rules and medical negligence because there had been no crime. It stated, relying on the department's report of 23 June 2006 (see paragraph 18 below), that there had been no dangers at K.'s work on the day of the alleged accident and no intentional or negligent actions that could have led to his death. As

regards medical negligence, the prosecutor's office, relying on the expert panel's report of 3 July 2006, concluded that there had been no omissions on the part of the doctors either. It mentioned but did not comment on the expert panel's conclusion that there was a lack of "convincing data in respect of K.'s purulent meningitis".

11. Between 2009 and 2011 the applicant lodged several complaints with the criminal investigating authorities claiming, in particular, that negligence by the company's work safety officers had led to K.'s death, or that they and the department's officials had abused their powers when investigating K.'s death, or that the investigator F. from the prosecutor's office had abused his powers by declining to open a criminal case. Following this, the authorities had conducted several pre-investigation inquiries, in each case declining to open a criminal case because there had been no crime, though some of those decisions had been quashed by their supervising authorities. On 21 January 2011 the applicant was informed that, following her complaint, F. had been disciplined.

12. On 14 July 2011 the Regional Prosecutor's Office quashed the prior decisions declining to open a criminal case and ordered the prosecutor's office to carry out another pre-investigation inquiry and to order a forensic report to reconcile the inconsistencies between the first and the second (see paragraph 20 below) forensic reports. The report produced on 12 April 2012 ("the third forensic report") concluded that the cause of K.'s death had been meningitis, but the experts could not establish whether it had developed through a head injury or because of K.'s pre-existing condition. They noted that K. had had a renal disease prior to the accident, and that his head scan and histological samples had not been available for assessment because they had been destroyed in 2009. The prosecutor's office then questioned the applicant, K.'s colleagues, and company officers. The applicant stated that K. had been working without a hard hat and had hit his head against a metal hook. K.'s colleague A. stated that they had been working together on that day and that K. had fallen from a chair and had hit his head against the wall. Other witnesses had either just seen K. sitting outside on a bench complaining of feeling unwell, or had heard from him that he had hit his head against a pipe or a concrete corner. The company's head engineer, Ku., observed that there was no requirement to wear protective headgear for the type of work K. did. However, the company's work safety officer, Ko., noted that protective equipment had been required for K.'s work on that day, and that he had been given a hard hat. As a result, on 5 October 2012 the investigator from the prosecutor's office again declined to open a criminal case on the applicant's complaints of breaches of the safety at work rules and abuse of power by the company officers and the department officials because there had been no crime. He noted that the experts who had written the third forensic report had not been able to establish the cause of K.'s death and that there were no witnesses to his injury

(the investigator in declining to open a criminal case had stated that A. had not seen K. hit his head but had only heard about it). As regards protective equipment for K.'s head, the investigator in declining to open a criminal case noted that according to Ku. a hard hat had not been required for K.'s work on that day.

13. On 7 February 2013, after the new Criminal Procedure Code of Ukraine, which excluded the investigating authorities' discretion in opening criminal cases, took effect, the local police department instituted criminal proceedings into the death of K. as allegedly caused by breaches of the safety at work rules by officers of the company. On 31 July 2013, after reviewing the materials from the previous inquiries, the police terminated the proceedings because there had not been any crime.

14. On 12 March 2014 the criminal investigation materials were returned from the police to the prosecutor's office. It appears from the case file that there have been no further investigations since then.

## II. INTERNAL INVESTIGATION AND RELATED PROCEEDINGS

15. On 9 March 2006, after the applicant had submitted K.'s sick leave certificates, the company appointed a committee to investigate his accident. It was noted that the accident had not been work-related. According to the explanations submitted by K.'s colleagues, on 26 January 2006 six of them had been working on restoring the electricity supply to a residential building. One of K.'s colleagues testified that even on the way to work he had been complaining about a headache. K. was working on the ground floor of the building and at one point had gone down into a basement where he had allegedly left his hat. Later he was seen on a bench, without his hat and very grey in the face.

16. On 17 March 2006 the committee informed the Regional Work Safety Department ("the department") that it had concluded that K.'s accident had not been work-related.

17. On 14 April 2006 the department ordered the company to investigate again whether the accident had been work-related. On the same day the company appointed a new investigating committee.

18. On 15 May 2006 the new committee produced a report, saying that K.'s accident had not been work-related as there was no evidence that he had sustained any injury at work. On 23 June 2006 a special investigation committee appointed by the department issued its own report. It had established that on 26 January 2006 at 12.15 p.m. K. was sitting on a bench outside the basement in which he had been working and that he looked sick. In reply to his supervisor's question as to what the matter was, K. had replied that nothing had happened, but that he felt unwell. He had not complained of having hit his head, and there was no blood or sign of injury. The department concluded that K. had not been working in dangerous or hazardous conditions

on that day, had not been involved in physically demanding work, and had not undertaken any physical exertion. Consequently, it ruled out the influence of a work-related factor on his health and, relying on the first forensic report, it concluded that there had not been any work-related accident and that K.'s death was a result of meningitis.

19. On 25 July 2006 the applicant filed a civil claim against the company in the Mykolayiv Local Court ("the court") asking for recognition of her right to compensation for the death of K., for a certificate of a work-related accident to be issued and for compensation for non-pecuniary damage. Under the Ukrainian social security laws in force at the material time, compensation for bereavement and non-pecuniary damage was payable by the Social Security Fund of Ukraine provided the accident had been recognised as work-related. On 6 November 2006 the applicant filed an administrative claim against the department challenging its report of 23 June 2006 and seeking a further investigation into the death of K.

20. On 18 June 2007 a medical forensic report ("the second forensic report") which had been ordered by the court in the civil proceedings concluded that K.'s death had been caused by a closed head injury which had occurred around one month before his death.

21. On 4 September 2007 the court adjourned the civil proceedings pending the resolution of the applicant's administrative claim.

22. On 11 September 2008 the court partly allowed the administrative claim, quashed the department's report of 23 June 2006 and ordered a further investigation. On 1 June 2009 this judgment was quashed on appeal and the proceedings were terminated, as the dispute had to be dealt in civil proceedings. The applicant then took her civil claim against the company further by making complaints against the department. In the updated version of her claim of 3 June 2009 she asked the court to set aside the department's report of 23 June 2006, to order a further investigation, to find the company's violation of the accident investigation rules, and to award her compensation for non-pecuniary damage.

23. On 18 January 2010 the court resumed the civil proceedings. On 16 March 2010 the applicant withdrew her claim against the company for compensation for non-pecuniary damage. On 16 June 2010 the court partly allowed her remaining claim and ordered a further investigation by the department. The court examined inconsistencies in the witnesses' statements: some had said that K. had hit his head against the wall, some had said that he had fallen and hit his head against a concrete floor, while according to another witness K. had hit his head against a metal pipe. All those inconsistencies were to be reconciled. The explanations which K. had given at the emergency hospital remained to be assessed. On 16 May 2011 this judgment became final. On 22 August 2011 the applicant's cassation appeal on points of law was dismissed.

24. On 2 April 2013 the department issued an additional investigation report, from the investigation ordered in the judgment of 16 June 2010, concluding that the accident with K. had not been work-related. It found that in the afternoon of 26 January 2006 K. had been feeling unwell at work and was taken to hospital. There were no objective data in the witness statements or medical documentation to confirm that K. had injured his head at work. The investigating committee could not question K.'s colleagues as they had left the company in the meantime, and it had not studied the site of accident as it had considered that issue irrelevant at that stage. Consequently it could not establish whether K. had sustained any injury or other external damage to his head at work on 26 January 2006, and had concluded, relying on the third forensic report, that K. had died of meningitis, although the cause of its development (whether injury or a pre-existing condition) could not be established.

## THE COURT'S ASSESSMENT

25. The applicant complained that the investigation into the death of her son had been unduly protracted and ineffective. She relied on Articles 2 and 13 of the Convention. Her complaints fall to be examined solely under the procedural limb of Article 2 (see *Igor Shevchenko v. Ukraine*, no. 22737/04, §§ 37-38, 12 January 2012).

26. The Government stated in their observations that the authorities had acted on their own initiative in trying to establish the facts of K.'s death, and that the fact that decisions declining to open a criminal case had been quashed on several occasions did not of itself signify that the investigation had been ineffective. In particular, they pointed out that the repeated quashing of the decisions not to open a criminal case had led to the third forensic report being ordered, and that F., who had been reviewing the applicant's complaints, had been disciplined (see paragraph 11 above). Finally, the Government stressed that the applicant had not challenged the police's decision of 31 July 2013 to terminate the criminal proceedings.

27. The applicant argued in her comments that her son had been working in dangerous conditions and had been under the control of the State, since the company was owned by the municipality. She stressed that the company had not provided her son with protective headgear, and that the investigation of his accident had been initiated only after she had made her complaint. Lastly, she points out that even after almost eight years of investigations, both criminal and civil, the Ukrainian authorities could not explain how her son had injured his head at work on 26 January 2006.

28. The general principles relevant to the present case have been summarized in *Nicolae Virgiliu Tănase v. Romania* [GC] (no. 41720/13, §§ 134-35, 157-61, and 163, 25 June 2019). The Court reiterates that in cases concerning the unintentional infliction of death and/or lives being put at risk

unintentionally, the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained (see *Nicolae Virgiliu Tănase*, cited above, § 159).

29. The applicant did not allege that the death of her son had been caused intentionally. Nor do the facts of the case suggest that.

30. The Court also reiterates that an effective criminal investigation may be necessary in exceptional circumstances, such as, for example, where a life was lost or put at risk because of the conduct of a public authority which goes beyond an error of judgment or carelessness, or where a life was lost in suspicious circumstances or because of the alleged voluntary and reckless disregard by a private individual of his or her legal duties under the relevant legislation (see *Nicolae Virgiliu Tănase*, cited above, § 160).

31. The Court finds no circumstances in the present case requiring a criminal-law remedy. An effective criminal investigation would be required in the context of *inter alia* dangerous industrial activities such as, for example, waste-collection (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71 ECHR 2004-XII), exposure to asbestos in the workplace (see *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, § 81, 24 July 2014), or deep-sea diving operations (see *Vilnes and Others v. Norway,* nos. 52806/09 and 22703/10, § 223, 5 December 2013). In contrast, the nature of K.'s work had not been inherently dangerous. In reaching this conclusion the Court also sees no reason to question the findings of the domestic authorities as to the nature of K.'s work (see paragraphs 10, 18 above).

32. The Court will therefore assess the effectiveness of the civil-law remedy sought by the applicant which, in the context of the domestic law (see paragraph 19 above), constituted a combination of civil proceedings and workplace accident investigations. If the Court is dissatisfied with the effectiveness of those in practice, it would then consider whether the criminal investigation, which was not required but was nevertheless carried out in the present case, could have been effective (see *Nicolae Virgiliu Tănase*, cited above, § 169).

33. The Court has no doubt that the consideration of the applicant's claim by the courts taken together with the investigations carried out by the department would in principle be capable of providing an effective fact-finding forum in relation to K.'s death. In particular, the civil courts ordered the second forensic report, which established an alternative cause for K.'s death (see paragraph 20 above), as well as questioning as witnesses the colleagues of K. who had provided different versions of the circumstances of his death (see paragraph 23 above). By their final judgment, the courts awarded the applicant with the relief she had sought and ordered the

department to conduct an additional investigation to reconcile the inconsistencies identified in those testimonies (ibid.). It is therefore the outcome of that additional investigation that shows whether the civil remedy as a whole was effective.

34. The additional investigation report was issued almost two years after the court's decision ordering it had become effective (see paragraphs 23-24 above). However, the reason for this protraction can be found in the reopening during that period of the criminal proceedings, which the applicant had sought (see paragraph 12 above). Given that the department relied in its additional investigation on the third forensic report commissioned within the reopened criminal proceedings, the overall duration of those proceedings, from 14 July 2011 to 5 October 2012, will not be taken into account in assessing the promptness of the civil proceedings. The remaining time, up to 2 April 2013, after the report was issued was, in the Court's view, reasonable.

35. As regards the applicant's disagreement with the outcome of the civil proceedings, the Court reiterates that the procedural obligation to set up an effective judicial system is not an obligation of result but of means only. The fact that proceedings end unfavourably for the victim (or the next-of-kin) does not of itself mean that the respondent State has failed in its positive obligations under Article 2 of the Convention (see *Nicolae Virgiliu Tănase*, cited above, § 170).

36. In the circumstances of this case, it cannot be said that the department could have done much more than they did. The developments in the testimony given by the witnesses in the various proceedings as to what K. could have hit his head against (floor, wall, corner, pipe, metal hook) and the inevitable difficulties arising from the passage of time made it difficult to assess what had happened. The fact that the department did not question K.'s colleagues after they had left the company cannot be considered a crucial defect. The department relied instead on the third forensic report and material from other inquiries, none of which shed any more light on events. Accordingly, the Court is satisfied with the process of the civil proceedings taken as a whole which, in its view, met the requirements of an effective justice system.

37. Since the civil proceedings met the requirements of Article 2 of the Convention under its procedural limb, it is not necessary for the Court to make any assessment of the criminal proceedings.

38. In the light of the above, it cannot be said that the State failed to provide an effective judicial system in relation to the death of the applicant's son. Therefore, the application must be rejected under Article 35 §§ 3 (a) and 4 of the Convention as manifestly ill-founded.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 11 January 2024.

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| Martina Keller<br>Deputy Registrar | Stéphanie Mourou-Vikström<br>President |