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

FIFTH SECTION

DECISION

Application no. 63882/14
Vitaliy Oleksandrovych LAZEBNYK
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 16 March 2023 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. 63882/14) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 19 September 2014 by a Ukrainian national, Mr Vitaliy Oleksandrovych Lazebnyk, who was born in 1982 and lives in Kyiv ("the applicant") who was represented by Ms L. V. Opryshko, a lawyer practising in Kyiv;

the decision to give notice of the application concerning to the Ukrainian Government ("the Government"), represented by their Agent, Ms Olga Davydchuk, of the Ministry of Justice;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the applicant's complaint under Article 10 of the Convention that the attack to which he had been subjected as a media professional had not been properly investigated by the authorities.

2. The applicant was working as a photographer for the Ukrainian news website tochka.net.

3. According to the applicant, on 4 May 2012 he learned that a group of persons had attacked a church in Kyiv and had started smashing property located in the churchyard. The applicant arrived at the yard in his capacity as a photographer and started taking photos for tochka.net. Several journalists

were on the spot, observing the event and video-recording it. Suddenly the applicant felt blows on his head and body. He was hit from behind and did not see the offender. The applicant was taken to hospital where he was approached by a police officer who told him that it was likely that he had been hit by T., the park manager.

4. The same day, 4 May 2012, the applicant lodged a complaint with the Dniprovskyy District Police Office stating that he had been attacked by an unknown person and requesting the institution of a criminal investigation into the matter. He did not specify under which provision of the Criminal Code those proceedings were to be instituted. The police instituted a pre-investigation inquiry into the applicant's complaint, which was later transferred to the Kyiv Police Office.

5. In a letter of 13 May 2012, drafted by an investigator dealing with the applicant's case, it was stated that, having watched the video-recording seized from one of the journalists present during the events on 4 May 2012, the police had established that during the attack:

> "a conflict arose between [T.], the manager of the park where the church was located, and the journalists present on the spot because T. wanted to prevent them from taking photos and video-recording of the attack [on the church]".

6. The Kyiv Police Office established that during the conflict the applicant had been attacked by T., whose actions had been directed against all the journalists present and not against the applicant personally. The Kyiv Police Office decided that the attack on the journalists, including the applicant, had to be investigated as a crime under Article 171 of the Criminal Code ("Obstruction of the lawful professional activities of a journalist"). The applicant's case file was transferred to the Dniprovskyy District Prosecutor's Office.

7. On 25 May 2012 the Dniprovskyy District Prosecutor's Office issued a decision noting that, during the pre-investigation inquiry, several journalists who had been present during the events of 4 May 2012 had stated that they had seen an unknown man hitting the applicant from behind with a metal bar. T. was also questioned and stated that on 4 May 2012 he had seen a group of persons smashing property in the churchyard. According to T., these persons had been directed by several people with cameras and video cameras, also present in the yard. T. said that when he was attacked by one of the masked persons smashing property, he had grabbed a metal bar and swung it, to try to protect himself. Y. and M., who worked at the church and also witnessed the events, confirmed T.'s statements and said that they had not seen him hitting anyone with the metal bar. The applicant's superior, Ko., was questioned and said that the applicant worked for tochka.net as a photographer. According to Ko., the applicant was not a journalist within the meaning of the Ukrainian legislation, but he certainly was a journalist within the generally accepted understanding of this term.

8. At the end of the decision of 25 May 2012 the Prosecutor's Office stated:

> "... accordingly, the victim of a crime under Article 171 of the Criminal Code must be a professional journalist. Taking into consideration that there is no evidence that there was any obstruction to the professional activity of a journalist, because [the applicant] is not a professional journalist [according to the Ukrainian legislation], [the prosecutor's office decides] to refuse to institute a criminal investigation ... under Article 171 of the Criminal Code."

9. The applicant did not appeal against the decision of 25 May 2012.

10. On 17 September 2012 the police instituted a criminal investigation into the attack on the applicant under Article 296 of the Criminal Code ("Hooliganism").

11. In June 2013 the police investigators suggested that the applicant institute private prosecution proceedings under Article 125 of the Criminal Code ("Intentional infliction of light bodily injuries") concerning the events on 4 May 2012, but the applicant refused to do so. In his observations the applicant explained that he did not consider private prosecution proceedings to be an effective remedy in his case.

12. In July 2013 the applicant's representative sent letters to the Dniprovskyy District Prosecutor's Office asking to be informed of any developments in the applicant's case.

13. On 10 September 2013 the Dniprovskyy District Police Office issued a decision closing the criminal investigation instituted on 17 September 2012 under Article 296 of the Criminal Code. In the decision it was stated that, during the investigation, T. had been questioned and had said that on 4 May 2012 he had swung a metal bar to protect himself and it was possible that he had hit someone. The applicant was also questioned and said that it could not be ruled out that T. had taken him for one of the attackers and had hit him with a metal bar. It was further stated in the decision that T. had inflicted light bodily injuries on the applicant (Article 125 of the Criminal Code) but a criminal investigation into this kind of crime could be instituted only in the framework of private prosecution proceedings, which could be initiated only upon a victim's request, whereas the applicant had refused to lodge such a request. The criminal investigation instituted under Article 296 of the Criminal Code could not be continued because it was clear that T.'s attack on the applicant had not been motivated by "disrespect to society", one of the distinctive features of the crime of hooliganism within the meaning of Article 296. At the end of the decision of 10 September 2013 it was stated that the decision could be challenged before a court within ten days of receipt of a copy of it.

14. On 10 October 2013 the applicant received a copy of the decision of 10 September 2013.

15. On 16 October 2013 the applicant appealed against the decision of 10 September 2013.

16. On 20 March 2014 the Kyiv Court of Appeal examined the applicant's appeal and found it to be unsubstantiated. The Court of Appeal noted that the investigation into the attack on the applicant had been thorough. As regards the applicant's submission that the authorities had not investigated whether

T.'s actions were aimed at obstructing journalistic activity, the Court of Appeal noted that the applicant had not appealed against the decision of 25 May 2012. The decision of 20 March 2014 was not subject to appeal and became final.

17. The applicant complained under Article 10 of the Convention that the State authorities had not properly investigated the attack, which had been aimed at preventing him from collecting and imparting information of public interest. In particular, the investigation had been too lengthy and insufficiently thorough and had not led to the punishment of the offender.

THE COURT'S ASSESSMENT

18. The Government submitted that the authorities had properly investigated the attack on the applicant. Furthermore, the latter had not challenged the decision of 25 May 2012 and had refused to lodge an application for institution of criminal proceedings under Article 125 of the Criminal Code.

19. According to the applicant, the investigation into his case could be effective only if carried out under Article 171 or Article 296 of the Criminal Code. In the course of such proceedings a link between the applicant's professional activity and the attack on him could be established. However, as under the Ukrainian legislation the applicant was not treated as a "journalist", the authorities had refused to institute an investigation under Article 171 of the Criminal Code. The decision of 20 March 2014 had not been subject to appeal. The applicant had refused to request the institution of proceedings under Article 125 because he did not consider it to be an effective remedy. In the framework of those proceedings it would be impossible to establish whether there was a link between the attack on the applicant and his professional activity as a journalist. The applicant submitted that the attack on him was a matter of public interest and that therefore an investigation could not be conducted in the framework of a private prosecution. On 4 May 2012 the applicant had asked the authorities to investigate the attack, without indicating any specific provisions of the Criminal Code. This should have enabled the authorities to carry out their investigation under any provisions they might see fit, without requiring the applicant to lodge a separate application under Article 125.

20. The Court observes that it is not required to examine the Ukrainian legislative framework for protection of journalists *in abstracto* but must confine itself to the circumstances of the case before it (see, *mutatis mutandis*, *Brogan and Others v. the United Kingdom*, Series A no. 145-B, § 53, 29 November 1988). The Court reiterates that the general principles applicable to the protection of journalists are summarised in *Özgür Gündem v. Turkey* (no. 23144/93, § 44, ECHR 2000-III).

21. The Court considers that for the purposes of Article 10 of the Convention, it is the quality of investigation which is important, not the

legislative provision under which it was carried out. The Court observes that shortly after the attack a number of investigative measures were taken by the domestic authorities and the perpetrator was quickly identified.

22. The authorities duly investigated whether there was a link between the applicant's professional activity and the attack on him. The Court observes that the materials in the case file do not contain conclusive evidence proving that the applicant was attacked because he was a media actor (photographer). In this context, the Court notes that during the investigation the applicant himself expressed doubts as to whether the attack had been premeditated and specifically aimed at preventing him from exercising his professional activities (see paragraph 13 above).

23. The Court further notes that the investigation into the attack could have been continued and could have led to the punishment of the offender if the applicant had agreed to lodge a separate complaint under Article 125 of the Criminal Code. From the text of this provision, it follows that private prosecution proceedings can be instituted only following a request by a victim, but it is unclear whether such a request must explicitly refer to the victim's wish to have the proceedings instituted under this particular provision, or whether a general complaint without any indication of a particular provision suffices. In any event, the Court considers that if the applicant had wished the perpetrator to be punished, he had an opportunity to lodge a complaint explicitly referring to Article 125, as he was instructed to do by the authorities. The Court further observes that the applicant did not appeal against the decision of 25 May 2012.

24. In conclusion, the Court finds that the attack on the applicant was properly investigated and that his arguments to the contrary are unsubstantiated. The application must thus be rejected as manifestly ill-founded in accordance with Article 35 §§ 1, 3 and 4 of the Convention.

25. In these circumstances the Court does not find it necessary to examine the remainder of the Government's objections.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 6 April 2023.

Martina Keller Deputy Registrar	Carlo Ranzoni President