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

Press Release
issued by the Registrar of the Court

ECHR 026 (2023)
25.01.2023

Eastern Ukraine and flight MH17 case declared partly admissible

In its decision in the case of **Ukraine and the Netherlands v. Russia** (applications nos. 8019/16, 43800/14 and 28525/20) the Grand Chamber of the European Court of Human Rights has declared the applications partly admissible. The decision is final and will be followed by a Grand Chamber judgment on the merits at a later date.

The case concerns complaints related to the conflict in eastern Ukraine involving pro-Russian separatists which began in spring 2014. The Government of Ukraine principally complained about alleged ongoing patterns ("administrative practices") of violations of a number of articles of the European Convention on Human Rights by separatists of the "Donetsk People's Republic" ("DPR") and the "Lugansk People's Republic" ("LPR") and by members of the Russian military. The Government of the Kingdom of the Netherlands complained about the shooting down of Malaysia Airlines flight MH17 in eastern Ukraine on 17 July 2014, which resulted in the deaths of 298 people, including 196 Dutch nationals. The applicant Governments claimed that their complaints fell within the jurisdiction of the Russian Federation. Since it was alleged that many of the administrative practices were ongoing, the Court considered the evidence up to 26 January 2022, the date of the hearing on admissibility in the case.

Among other things, the Court found that areas in eastern Ukraine in separatist hands were, from 11 May 2014 and up to at least 26 January 2022, under the jurisdiction of the Russian Federation. It referred to the presence in eastern Ukraine of Russian military personnel from April 2014 and the large-scale deployment of Russian troops from August 2014 at the latest. It further found that the respondent State had a significant influence on the separatists' military strategy; that it had provided weapons and other military equipment to separatists on a significant scale from the earliest days of the "DPR" and the "LPR" and over the following months and years; that it had carried out artillery attacks upon requests from the separatists; and that it had provided political and economic support to the separatists.

It held that there was sufficient evidence to satisfy the burden of proof at the admissibility stage of administrative practices in violation of a number of Articles of the Convention and it declared the majority of the complaints by the Government of Ukraine admissible. Likewise, the evidential threshold for the purposes of admissibility had been met in respect of the complaints of the Government of the Netherlands concerning the downing of MH17 which were therefore also declared admissible.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicants in this case are Ukraine and the Kingdom of the Netherlands. The Russian Federation is the respondent State.

In early March 2014, pro-Russian protests began across eastern regions of Ukraine, including the Donetsk and Luhansk regions ("Donbass"). Some of the protestors formed armed groups and the violence rapidly escalated, with pro-Russian separatists seizing public buildings. In mid-April, the government of Ukraine launched an "Anti-Terrorist Operation" to re-establish control over territory controlled by the separatist armed groups. On 11 May 2014, the separatists held "referendums" in the territory they controlled and subsequently declared the independence of the "Donetsk People's Republic" ("DPR") and the "Lugansk People's Republic" ("LPR"). The fighting intensified and on 17 July 2014 Malaysian Airlines flight MH17 was downed near Snizhne, in the Donetsk region. All 298

civilians aboard were killed. A ceasefire agreement was reached in September 2014 and a line of separation was established. The ceasefire was subsequently broken and over the ensuing years further ceasefires were agreed and then breached. At the date of the admissibility hearing in the case, the conflict was ongoing. The case concerns allegations of violations of human rights in the context of these events in Donbass.

Complaints, procedure and composition of the Court

The case encompasses three inter-State applications.

***Ukraine v. Russia (re Eastern Ukraine)* (no. 8019/16)** concerns Ukraine's allegations of a pattern ("administrative practice") of continuing violations of a number of Articles of the European Convention on Human Rights by Russia in the context of the conflict in eastern Ukraine from spring 2014. The allegations referred, among other complaints, to unlawful military attacks against civilians which caused many fatalities, including the shooting down of flight MH17, and the summary execution and beating to death of civilians and Ukrainian soldiers who were *hors de combat*; the torture of civilians and Ukrainian soldiers; forced labour; abductions, unlawful arrests and lengthy detentions; attacks on journalists and the blocking of Ukrainian broadcasters; destruction of private property; and a prohibition on teaching in the Ukrainian language. They allege that those of Ukrainian ethnicity and those who supported Ukrainian territorial integrity were specifically targeted. They rely on Articles 2 (right to life), 3 (prohibition of torture, inhuman and degrading treatment), 4 § 2 (prohibition of forced labour), 5 (right to liberty and security), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination) of the Convention and Articles 1 (protection of property), 2 (right to education), and 3 (right to free elections) of Protocol No. 1.

Ukraine v. Russia (re Eastern Ukraine) originated in two applications (nos. 20958/14 and 42410/15) against Russia lodged, respectively, with the Court by Ukraine on 13 March 2014 and 26 August 2015 in respect of events in Crimea and eastern Ukraine. On 11 June 2018, all complaints in respect of eastern Ukraine were placed under application no. 8019/16 and the application was given the new name *Ukraine v. Russia (re Eastern Ukraine)*. On 16 December 2020, the Court adopted an admissibility decision in respect of events in Crimea and declared a number of the complaints admissible.

The Court applied Rule 39 of the Rules of Court (interim measures) to the case. It called upon Russia and Ukraine to refrain from measures, in particular military action, which might bring about violations of the civilian population's Convention rights, notably under Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment).

See press releases of 26.11.2014 and 01.10.2015.

***Ukraine v. Russia (II)* (no. 43800/14),** lodged on 13 June 2014, concerns the alleged abduction of three groups of children in eastern Ukraine between June and August 2014 and their temporary transfer to Russia. The Government of Ukraine submit that there has been a violation of Article 3, Article 5 and Article 8 (right to respect for private life) of the Convention and Article 2 of Protocol No. 4 (freedom of movement) in respect of these incidents taken both individually and as a pattern ("administrative practice").

See press releases of 26.11.2014 and 01.10.2015.

***The Netherlands v. Russia* (no. 28525/20),** lodged on 10 July 2020, concerns the downing on 17 July 2014 of flight MH17. The Government of the Kingdom of the Netherlands allege that the Russian Federation was responsible for the downing of flight MH17, that it did not carry out an effective investigation and that its conduct following the downing of the aircraft caused intense pain and

suffering to the victims' next of kin. They submit that there has been a violation of Article 2, Article 3 and Article 13 (right to an effective remedy) of the Convention.

See press release of 15.07.2020

For a full description of the complaints in the case, please see the decision of the Court.

On 7 May 2018 the Chamber dealing with *Ukraine v. Russia (re Eastern Ukraine)* (no. 8019/16) decided to relinquish jurisdiction in favour of the Grand Chamber (see press release of 09.05.2018).

On 27 November 2020 the Grand Chamber in *Ukraine v. Russia (re Eastern Ukraine)* (no. 8019/16) decided to join to that application the two inter-State applications *Ukraine v. Russia (II)* (no. 43800/14) and *The Netherlands v. Russia* (no. 28525/20), which were pending before a Chamber. This decision was taken in accordance with Rules 42 § 1 and 71 § 1 of the Court's Rules of Court in the interests of the efficient administration of justice. See press release of 04.12.2020.

The Government of Canada, the Human Rights Law Centre of the University of Nottingham, the MH17 Air Disaster Foundation and the applicants in individual cases concerning the downing of MH17 (next of kin of the victims), were given permission to make written submissions as third parties in respect of the complaints in *The Netherlands v. Russia* (no. 28525/20).

A Grand Chamber hearing was held on 26 January 2022. Representatives of all three Governments participated in the hearing and made oral submissions before the Court. The Chair of the MH17 Air Disaster Foundation was included in the delegation of the Kingdom of the Netherlands and also addressed the Court.

The decision was given by the Grand Chamber of 17 judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Georges **Ravarani** (Luxembourg),
Marko **Bošnjak** (Slovenia),
Pere **Pastor Vilanova** (Andorra),
Ganna **Yudkivska** (Ukraine),
Krzysztof **Wojtyczek** (Poland),
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Jon Fridrik **Kjølbro** (Denmark),
Yonko **Grozev** (Bulgaria),
Stéphanie **Mourou-Vikström** (Monaco),
Tim **Eicke** (the United Kingdom),
Lətif **Hüseynov** (Azerbaijan),
Jovan **Ilievski** (North Macedonia),
Jolien **Schukking** (the Netherlands),
Erik **Wennerström** (Sweden),
Anja **Seibert-Fohr** (Germany),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar.*

The position of the Russian Federation before the Court

The Russian Federation ceased to be a High Contracting Party to the European Convention on Human Rights as from 16 September 2022. This followed resolutions by the Committee of Ministers of the Council of Europe on 16 March 2022 (CM/Res(2022)2) and the Plenary of the European Court on 22 March 2022.

It follows from the terms of Article 58 of the Convention that a State which ceases to be a Party to the Convention once it has ceased to be a member of the Council of Europe is not released from the obligations contained in the Convention in respect of any act performed by that State prior to the date on which it is no longer a Party to the Convention. The Court's resolution stated that it "shall retain jurisdiction to deal with applications against the Russian Federation concerning actions and omissions which may constitute a violation of the Convention occurring up to 16 September 2022".

Following the decision of the former judge elected in respect of the Russian Federation to withdraw from sitting in this case, the President decided to appoint an *ad hoc* judge for the Russian Federation from among the other judges sitting in the case.

Decision of the Court

Preliminary observations and scope

The Court underlined the role of inter-State cases in the protection of the public order of Europe by enabling States to ensure the collective enforcement of Convention rights regardless of nationality or other interests. It noted that this case was one of five inter-State cases pending with Russia as the respondent State in relation to events in Ukraine from 2014 onwards and that around 8,500 individual applications are pending against Ukraine, Russia or both in relation to the conflict in Ukraine.

Since the underlying facts in this case occurred before 16 September 2022, the Court was competent to examine the complaints. In assessing the complaints of continuing violations, the Court explained that it would consider the evidence available to it up to 26 January 2022, the date of the admissibility hearing in the case.

The Court stated that on 16 September 2022 the interim measures indicated on 13 March 2014 in this case ended upon the Russian Federation's ceasing to be a High Contracting Party to the Convention.

Jurisdiction

The Court held that Russia had had effective control over all areas in the hands of separatists from 11 May 2014 on account of its military presence in eastern Ukraine and the decisive degree of influence it enjoyed over these areas as a result of its military, political and economic support to the "DPR" and the "LPR". It found it established beyond any reasonable doubt that there had been Russian military personnel present in an active capacity in Donbass from April 2014 and that there had been a large-scale deployment of Russian troops from, at the very latest, August 2014. It further found that the respondent State had a significant influence on the separatists' military strategy, that it had provided weapons and other military equipment to separatists on a significant scale from the earliest days of the "DPR and the "LPR" and over the following months and years and that it had carried out artillery attacks following requests by the separatists. There was also clear evidence of political support being provided to the "DPR" and the "LPR" and the Russian Federation had played an active role in their financing. The complaints of the Government of Ukraine concerning events which had occurred wholly within the territory in separatist hands from 11 May 2014 therefore fell within the jurisdiction of the Russian Federation ("spatial jurisdiction").

The Government of Ukraine also complained about the bombing and shelling of areas outside separatist control. The Court said that because the victims were outside the areas controlled by separatists, these complaints did not come within Russia's spatial jurisdiction. It was therefore relevant to consider whether these complaints could fall within Russian jurisdiction on account of the authority or control of agents of the Russian State ("personal jurisdiction"). This required a careful examination, by reference to the specific facts of the incidents alleged, of whether the relevant incidents were "military operations carried out during the active phase of hostilities" and

therefore excluded from personal jurisdiction on that basis (see *Georgia v. Russia (II)*). This was so closely connected to the merits of the case that the Court decided to join it to the merits. This issue will therefore be examined at the merits stage of the proceedings.

As regards the complaints of the Government of the Kingdom of the Netherlands, the Court found that the downing of flight MH17 had occurred wholly within the territory in the hands of the separatists. It further found that the painstaking criminal investigation into the incident which had taken place in the context of the international joint investigation team ("JIT") had provided a great deal of clarity as to the circumstances of the downing of flight MH17. There was no evidence of fighting to establish control in the areas directly relevant to the missile launch site or the impact site such that any ensuing context of chaos might be said to preclude jurisdiction being established. The complaints therefore fell within the spatial jurisdiction of Russia.

An objection of the respondent State as to the Court's subject matter jurisdiction (*ratione materiae*) over complaints concerning armed conflict was also rejected. The Court emphasised that the Convention's safeguards continued to apply in situation of international armed conflict. However, the Convention guarantees were to be interpreted in harmony with other rules of international law, including relevant provisions of international humanitarian law. In particular, the Court will determine at the merits stage of the proceedings how Article 2 should be interpreted, having regard to the content of international humanitarian law.

Admissibility of the complaints

The general situation in eastern Ukraine during the relevant period

The Court explained that where a party alleged an administrative practice, it had to show a repetition of identical or analogous acts amounting to a pattern and official tolerance of those acts by the higher authorities of the State. In such a case, domestic remedies would clearly be ineffective at putting an end to the violations and so the rule on exhaustion of domestic remedies was not applicable.

The Court accepted that the Ukrainian Government had provided sufficiently substantiated prima facie evidence of both the repetition of acts in violation of the Convention and official tolerance, referring notably to the evidence of the monitoring missions of the Organization for Security and Cooperation in Europe (OSCE) and the Office of the UN High Commissioner for Human Rights (OHCHR), witness statements and NGO reports. It declared admissible the complaints of administrative practices:

- in breach of Article 2, consisting of unlawful military attacks against civilians and civilian objects, including the shooting down of flight MH17, the shooting of civilians and the summary execution and torture or beating to death of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*;

- in breach of Article 3, consisting of the torture of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*, including instances of sexual violence and rape, and inhuman and degrading conditions of detention;

- in breach of Article 4 § 2, consisting of forced labour;

- in breach of Article 5, consisting of abductions, unlawful arrests and lengthy unlawful detentions;

- in breach of Article 9, consisting of deliberate attacks on, and intimidation of, various religious congregations not conforming to the Russian Orthodox tradition;

- in breach of Article 10, consisting of the targeting of independent journalists and the blocking of Ukrainian broadcasters;

- in breach of Article 1 of Protocol No. 1, consisting of the destruction of private property including civilian homes and vehicles, the theft and looting of private and commercial property, and the unlawful appropriation of private property without compensation;

- in breach of Article 2 of Protocol No. 1, consisting of the prohibition of education in the Ukrainian language; and

- in breach of Article 14, taken together with the above Articles, consisting of the targeting of civilians of Ukrainian ethnicity or citizens who supported Ukrainian territorial integrity.

The remaining complaints of administrative practices in application no. 8019/16 were declared inadmissible.

Flight MH17

The Court had to determine, firstly, the objection of the respondent Government that domestic remedies had not been exhausted. It noted the blanket denial of the Russian authorities of any involvement in the downing of the flight, the fact that the events had occurred outside Russian sovereign territory by perpetrators whose identities had not been known at the time, and the political dimension of the case implicating State agents in the commission of a crime condemned by the UN Security Council. In the light of these circumstances, the Court found that the Government of Russia had failed to show that there was an effective remedy available in Russia in respect of the complaints.

The respondent Government also alleged that the complaints had been lodged out of time. The Court noted that given the absence of effective remedies, the normal starting point for the running of the six-month time-limit[1] for lodging an application would be the date of the incident itself, namely 17 July 2014. However, it found that in this case such an approach would be incompatible with the interests of justice and the objectives of the six-month time-limit. On the date of the incident, there had been a real lack of clarity as to the precise circumstances surrounding the downing of the aircraft, including the identities of the perpetrators, the weapon used and the extent of any State's control over the area where it had been downed. It was not unreasonable for the Government of the Kingdom of the Netherlands to have waited for sufficiently credible and specific evidence before lodging their application. It would also be artificial for the Court to ignore the investigative steps taken in the Netherlands and in the context of the JIT. These investigative steps had begun promptly and had continued regularly and diligently since then in a transparent and open manner. Russia's assistance in the investigation had been frequently and consistently sought. The investigation and the evidence gathered had been highly publicised. Given the allegation that the State itself, at the highest level of Government, bore responsibility for the Convention breach alleged, it was also relevant to have regard to other international remedies pursued by the Netherlands, involving invoking Russia's international responsibility. In the exceptional circumstances of the application, the Court found that the complaints had been lodged in time.

The Court concluded that there was sufficiently substantiated prima facie evidence, notably in the material gathered by the JIT, to support the allegations of the Dutch Government under Articles 2, 3 and 13 and the complaints were declared admissible.

Alleged abductions of children

The respondent Government objected that the Government of Ukraine had failed to exhaust domestic remedies in respect of these complaints.

However, the Court accepted that the three incidents, which had taken place over a short period of time and had involved 85 children, some of whom had been particularly vulnerable, could be seen as

[1] The six-month time-limit has since been reduced to four months with the entry into force of Protocol No. 15 to the European Convention on Human Rights on 1 August 2021 (see press release).

a pattern ("administrative practice") of violations. Since there was no need to exhaust domestic remedies where an administrative practice was alleged, and in view of the evidence in the case file, the Ukrainian Government's complaint of an administrative practice in violation of Articles 3, 5 and 8 of the Convention and Article 2 of Protocol No. 4 to the Convention was declared admissible.

As regards the allegations of individual violations, the Court noted that unlike the allegations concerning the downing of flight MH17, the allegation concerning the groups of children had not been met with a blanket denial by the Russian authorities: the underlying fact of the transfer of the Ukrainian children to Russia was agreed by the parties. Although the investigative committee of the Russian Federation had concluded that there had been no forcible transfer of the children, the Court's consistent practice was to require applicants to challenge conclusions of the investigative body before a court in Russia before lodging an application to the European Court. The Government of Ukraine could therefore have challenged this conclusion and put before the Russian authorities their own evidence, in the form of witness statements, challenging the investigative committee's findings. As regards the allegations of individual violations arising from the three incidents, the Court said that the Government of Ukraine had not shown that remedies in Russia had no prospect of success. The individual complaints were accordingly declared inadmissible.

Overall decision and implications

This current decision relates to the admissibility of the applications. In the next stage of the procedure, the question whether there has been a violation of the Convention in respect of the admissible complaints will be examined by the Court. A judgment will be adopted in due course.

Concerning other cases in respect of the conflict in Ukraine

Aside from the present case, there are currently four other Ukraine v. Russia inter-State applications and over 8,500 individual applications pending before the Court concerning the events in Crimea, eastern Ukraine, the Sea of Azov and the armed attack which began in February 2022. Among the individual applications are the cases *Ayley and Others v. Russia* (no. 25714/16) and *Angline and Others v. Russia* (no. 56328/18), lodged by relatives of people who were killed in the MH17 disaster.

For further information, see the Q & A on inter-State cases.

The decision is available in English and French.

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