



Failure to duly account for a conscript's death allegedly driven to suicide by his supervisors' bullying

In today's Chamber judgment in the case of **Mosendz v. Ukraine** (application no. 52013/08), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

two violations of Article 2 (right to life) and a violation of Article 13 (right to an effective remedy) of the European Convention on Human Rights

The case concerned the death of the applicant's son (D.M.), while he was on guard duty, during his mandatory military service.

The Court held that the authorities had not effectively investigated and duly accounted for D.M.'s death, and that they had not adequately protected his life. The Court, having noted widespread concern over the existence of hazing (*didivshchyna*²) in the Ukrainian army, found in particular that limiting the responsibility for D.M.'s death to wrongdoings of individual officers instead of allocating responsibility to upper hierarchical authority levels was especially worrying.

Principal facts

The applicant, Tetyana Mosendz, is a Ukrainian national who was born in 1950 and lives in Sevastopol (Ukraine).

On 25 April 1999 at 6.30 p.m., her son (D.M.), who was performing mandatory military service at the time, was found dead with gunshot wounds to his head after he had been reported missing from guard duty at 5 a.m. The weapons entrusted to him for guard duty were found near his body, together with three empty cartridges on the ground.

A criminal investigation was opened into the death. Discrepancies arose in the various witnesses' statements as to the discovery of D.M.'s body: one officer stated that he had discovered him leaning against the concrete fence surrounding an abandoned factory while a soldier submitted he had been found 40 metres from the fence after soldiers had carried his body and placed it there in order to give him first aid. These discrepancies were not addressed.

On 27 April 1999 D.M. was buried in the village where Ms Mosendz' brother lived. His body was delivered in a closed coffin and the funeral took place in the applicant's absence and without her knowledge.

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

² "Didivshchyna", which literally means "grandfatherism", is the name given to the informal system of fresh conscripts being brutalized by more senior soldiers in the military forces of certain former Soviet Republics, in particular, Russia and Ukraine.

In May 1999, the post-mortem report concluded that at least two shots had been fired in a single round, as there was only one entry wound and two exit wounds. Given that no other injuries or traces of a struggle were discovered, the conclusion was reached that D.M. had committed suicide.

The investigation was closed and re-opened on several occasions. On 21 March 2000 a forensic chemical examination of the holes in the concrete fence near which the body of D.M. had reportedly been found was completed. Its conclusion was that the three holes had originated from gunshots. On 23 February 2005 however, a ballistics test established that the holes had not originated from gunshots.

Relying on soldiers' statements, notably that D.M. had had a dispute with sergeants K. and V. before taking up guard duty on 24 April 1999, the Military Prosecutor's Office opened a criminal case against the two sergeants on suspicion of aggravated abuse of authority.

On 25 December 2004 a forensic medical examination of D.M.'s exhumed body was completed. The panel's report stated that the initial examination of May 1999 had failed to record a second gunshot entry wound to D.M.'s head and had incorrectly located the two exit wounds. Referring to the body's position, the length of D.M.'s arms and the technical characteristics of his assault rifle, the panel confirmed the finding of suicide.

On 13 October 2005, sergeant K. was found guilty of bullying D.M., which had led to his suicide. Sergeant V. was relieved from criminal liability as the charge against him had become time-barred – he had gone into hiding and more than ten years had passed.

On 4 May 2006, Ms Mosendz lodged a civil claim, seeking compensation for non-pecuniary damage, alleging that the Ministry of the Interior had failed to ensure law and order in its military forces, which had enabled the ill-treatment of her son and his death. While a first instance court dealt with the claim under the rules of administrative proceedings, higher administrative courts eventually declined jurisdiction over the case finding that it was to be dealt with by civil courts. Accordingly, the proceedings were terminated on 18 October 2011.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment), the applicant complained about the ill-treatment of her son by senior sergeants and about his death, which she did not believe to have been by suicide as reported by the authorities. She further complained that the Ukrainian authorities had been unwilling to adequately investigate the matter. Under Article 13 (right to an effective remedy), she also complained that she had not been able to bring compensation proceedings against the State authorities concerning the ill-treatment and death of her son.

The application was lodged with the European Court of Human Rights on 14 October 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Paul **Lemmens** (Belgique),

Aleš **Pejchal** (République tchèque), *judges*,
and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 2

The Court first assessed whether the authorities had given a plausible explanation for the death of Ms Mosendz' son. It noted that suicide had been the only version considered by the authorities and that gross discrepancies and omissions in the investigation had raised doubts as to their good faith in establishing the truth.

Indeed, the Court found it surprising that it had taken 13 hours to find D.M.'s body and noted a serious discrepancy, which was striking given the importance attached to the body's position in the forensic report establishing suicide as the cause of death, in the witnesses' statements regarding D.M.'s body discovery. The Court further noted that his body had been given to his relatives in a closed coffin and buried without the knowledge of his mother. The Court was also struck by the deficiencies and contradictory findings of the forensic reports: the 1999 examination had not reported one gunshot wound to D.M.'s head while wrongly indicating the location of another and the 2000 forensic examination and the 2005 ballistic test had reached opposite conclusions as to the origin of the three holes in the concrete fence.

The authorities had contented themselves with insufficiently established facts and had shown no effort to further establish, in particular, the involvement of sergeant V., who had successfully evaded justice until the charges against him had become time-barred. This omission had had a negative impact not only on the outcome of the case under investigation, but also on public confidence in the rule of law. The Court concluded that the authorities had not effectively investigated and duly accounted for the death of D.M., whose life they had not adequately protected, in violation of Article 2.

As established at the national level, D.M. was driven to suicide by bullying and ill-treatment at the hands of his hierarchical military supervisors, and not by a frustrating life situation unrelated to his being in the army. Therefore Ukraine was to bear responsibility for his death. Lastly, having regard to the widespread concern over the existence of *didivshchyna*, or hazing, in the Ukrainian army, the Court did not rule out the existence of a broader context of coercive hazing in the military unit where D.M. had been serving. In her 2004 Report, the Ombudsman³ wrote that *didivshchyna* was "one of the most horrifying problems in the army", that had "not only acquired the status of an integral element of the military, but, regrettably, also become a "visiting card" for [the Ukrainian] army and one of the main reasons why young people [were] discouraged from military service". In these circumstances, limiting the responsibility for D.M.'s death to wrongdoings of individual officers instead of allocating responsibility to upper hierarchical authority levels was especially worrying.

Consequently, the Court held that there had been a violation of Article 2 as regards the positive obligation of the State to protect D.M.'s life while under its control and to adequately account for his death, and as regards the procedural obligation to conduct an effective investigation into the matter.

In the light of that finding, the Court considered that no separate issue arose under Article 3.

³ the Parliamentary Commissioner for Human Rights

Article 13

Because of a jurisdictional conflict between the national civil and administrative courts Ms Mosendz' claim for damages had remained without examination and she had been denied an effective remedy in respect of her complaints under Articles 2 and 3 of the Convention, in violation of Article 13.

Article 41 (Just satisfaction)

The Court held that Ukraine was to pay Ms Mosendz 20,000 euros in respect of non-pecuniary damage.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.