



The Court delivers its Grand Chamber judgment in the *Janowiec and Others* case

In today's Grand Chamber judgment in the case of *Janowiec and Others v. Russia* (application nos. 55508/07 and 29520/09), which is final¹, the European Court of Human Rights held:

By a majority, that it had **no competence to examine the complaints under Article 2 (right to life)** of the European Convention on Human Rights;

By a majority, that there had been **no violation of Article 3 (prohibition of inhuman or degrading treatment)** of the Convention; and,

Unanimously, that Russia had **failed to comply with its obligations under Article 38 (obligation to furnish necessary facilities for examination of the case)** of the Convention.

The case concerned complaints by relatives of victims of the 1940 Katyń massacre – the killing of several thousands of Polish prisoners of war by the Soviet secret police (NKVD) – that the Russian authorities' investigation into the massacre had been inadequate.

The Court found that it was not competent to examine the adequacy of an investigation into the events that had occurred before the adoption of the Convention in 1950. Furthermore, by the time the Convention entered into force in Russia, the death of the Polish prisoners of war had become established as a historical fact and no lingering uncertainty as to their fate – which might have given rise to a breach of Article 3 in respect of the applicants – had remained.

The Court underlined that Member States were obliged to comply with its requests for evidence and found that Russia, in refusing to submit a key procedural decision which remained classified, had failed to comply with that obligation. The Russian courts had not conducted a substantive analysis of the reasons for maintaining the classified status.

Principal facts

The applicants are 15 Polish nationals who are relatives of 12 victims of the Katyń massacre. The victims were police and army officers, an army doctor and a primary school headmaster. Following the Red Army's invasion of the Republic of Poland in September 1939, they were taken to Soviet camps or prisons and were later killed, along with more than 20,000 other prisoners of war, on order of the highest officials of the USSR, without trial in April and May 1940. They were buried in mass graves in the Katyń forest near Smolensk, and also in the Pyatikhatki and Mednoye villages.

After railroad workers, and then the German army, had discovered mass graves near the Katyń forest, an international commission conducted an exhumation in 1943, during which three of the applicants' family members were identified. The remains of the others have not been recovered or identified, but their names were mentioned on lists of Polish prisoners of war on the basis of which

¹ Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

the lists for the 1940 execution was drawn up. The families stopped receiving correspondence from the prisoners in 1940 and have not had any news from them.

In 1990 the USSR officially acknowledged the responsibility of the Soviet leaders for the killing of Polish prisoners of war and a criminal investigation into the mass murders was started. The proceedings lasted until September 2004 when the Russian Chief Military Prosecutor's Office decided to discontinue it. In December 2004, 36 out of a total of 183 volumes of files from the investigation were classified as "top secret". The text of the decision to discontinue the Katyń criminal investigation was also classified.

The applicants' requests to be provided with copies of that decision and of documents relating to their relatives were rejected by the military prosecutor's office. The Russian courts confirmed those decisions in judgments eventually upheld by the Supreme Court in May 2007 (as regards the applicants in the first case) and January 2009 (as regards the applicants in the second case). The courts found in particular that, being foreign nationals, the applicants had no right to access classified materials. An application by the Russian non-governmental organisation Memorial seeking to have the decision of September 2004, to discontinue the Katyń investigation, declassified was likewise rejected by the courts.

On 26 November 2010, the Russian Duma adopted a statement about the "Katyń tragedy", in which it reiterated that the "mass extermination of Polish citizens on USSR territory during the Second World War" had been carried out on Stalin's orders and that it was necessary to continue "verifying the lists of victims, restoring the good names of those who perished in Katyń and other places, and uncovering the circumstances of the tragedy...".

Complaints, procedure and composition of the Court

Relying in particular on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the Convention, the applicants complained that the Russian authorities had not carried out an effective investigation into the death of their relatives and had displayed a dismissive attitude to all their requests for information about their relatives' fate.

The applications were lodged with the Court on 19 November 2007 and 24 May 2009 respectively. They were communicated to the Russian authorities respectively in October 2008 and November 2009. The Court declared admissible, on 5 July 2011, the applicants' complaint under Article 2, namely that the Russian authorities failed to carry out an adequate criminal investigation into the circumstances surrounding the deaths of their relatives. At the same time, the Court joined to its examination of the merits of the complaint the issue of its temporal jurisdiction, in other words, whether the Court could examine the adequacy of an investigation into the events which had occurred before Russia ratified the Convention. In the same decision, the Court also declared admissible the applicants' complaint under Article 3.

A Chamber hearing was held on 6 October 2011. On 16 April 2012, the Court delivered its Chamber judgment in the case. It held, by a majority, that there had been a violation of Article 3 in respect of ten of the applicants and no violation of Article 3 in respect of the remaining five applicants; and a breach of Russia's obligation to cooperate with the Court under Article 38 (obligation to furnish necessary facilities for examination of the case). The Court also found that it could not examine the merits of the complaint under Article 2.

The case was referred to the Grand Chamber of the Court under Article 43 (referral to the Grand Chamber) on 24 September 2012 at the request of the applicants. A Grand Chamber hearing was held on 13 February 2013.

The Polish Government intervened in the proceedings both before the Chamber and the Grand Chamber as a third party in accordance with Article 36 of the Convention (third party interventions).

Furthermore, the following organisations were granted leave to submit written comments as third parties in the proceedings before the Grand Chamber: Open Society Justice Initiative; Amnesty International; the Public International Law and Policy Group; Memorial; the European Human Rights Advocacy Centre; and, the Transitional Justice Network.

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

Josep **Casadevall** (Andorra), *President*,
Guido **Raimondi** (Italy),
Ineta **Ziemele** (Latvia),
Isabelle **Berro-Lefèvre** (Monaco),
Corneliu **Bîrsan** (Romania),
Peer **Lorenzen** (Denmark),
Alvina **Gyulumyan** (Armenia),
Khanlar **Hajiyev** (Azerbaijan),
Dragoljub **Popović** (Serbia),
Luis **López Guerra** (Spain),
Kristina **Pardalos** (San Marino),
Vincent A. **de Gaetano** (Malta),
Julia **Laffranque** (Estonia),
Helen **Keller** (Switzerland),
Helena **Jäderblom** (Sweden),
Krzysztof **Wojtyczek** (Poland),
Dmitry **Dedov** (Russia),

and also Erik **Fribergh**, *Registrar*.

Decision of the Court

Article 2

As regards the question of whether it could examine the adequacy of an investigation into events which had occurred before Russia ratified the European Convention on Human Rights, the Court held that there had to be a “genuine connection” between the event concerned and the entry into force of the Convention and that that connection had to be determined by the following criteria: firstly, the period of time between the event and the entry into force of the Convention had to have been reasonably short and not exceeding in any event ten years, and secondly, a major part of the investigation ought to have been carried out after the entry into force.

The Court considered that the applicants’ relatives had to be presumed to have been executed by the Soviet authorities in 1940. It was undisputed that the applicants’ family members had been in custody in 1939 and 1940 under full control of the Soviet authorities. Their names were on lists of Polish prisoners of war liable to execution without exception and the families had not heard from their relatives since 1940. However, given that Russia had ratified the Convention in May 1998, thus 58 years after the execution of the applicants’ relatives, the Court found – endorsing the Chamber judgment of April 2012 – that that period of time was too long in absolute terms for a “genuine connection” to be established between their death and the entry into force of the Convention in Russia.

The investigation into the origin of the mass burials had only been formally terminated in 2004, thus after the entry into force of the Convention in Russia. A number of key investigative steps – in particular excavations, forensic studies, interviews with potential witnesses to the killings – had been taken in the early 1990s. However, the Court observed, on the basis of the information available in the case file and in the parties’ submissions, that no real investigative steps had been taken after

May 1998. No relevant piece of evidence had come to light since that date. The Court concluded that neither criterion to find a “genuine connection” between the events in question and the entry into force of the Convention had been fulfilled.

The Court also reiterated that there might be extraordinary situations which did not satisfy the “genuine connection” standard, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention could constitute a sufficient basis for recognising the existence of a connection. This might be the situation of serious crimes under international law, such as war crimes, genocide or crimes against humanity. However, even in those cases the “Convention values” clause could not be applied to events which had occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. The Grand Chamber therefore upheld the Chamber’s finding that in the circumstances of the present case there were no elements capable of providing a bridge from the distant past into the recent post-entry-into-force period. Accordingly, the Court had no temporal jurisdiction to examine the complaint under Article 2.

Article 3

In its case-law, the Court had accepted that the suffering of family members of a “disappeared person”, who had gone through a long period of alternating hope and despair, might justify finding a violation of Article 3 on account of the indifferent attitude of the authorities towards their quests for information. However, in the applicants’ case, the Court’s jurisdiction only extended to the period starting in May 1998, the date of the entry into force of the Convention in Russia. After that date, no lingering uncertainty as to the fate of Polish prisoners of war had remained. Even though not all of the bodies had been recovered, their death had been publicly acknowledged by the Soviet and Russian authorities and had become an established historical fact. It necessarily followed that what could initially have been a “disappearance” case had to be considered a “confirmed death” case.

The magnitude of the crime committed in 1940 by the Soviet authorities was a powerful emotional factor. However, from a purely legal point of view, the Court could not accept it as a reason for departing from its case-law on the status of family members of “disappeared persons” and conferring that status on the applicants, for whom the death of their relatives was a certainty. The Court therefore considered that their suffering had not reached a dimension and character distinct from the emotional distress inevitably caused to relatives of victims of a serious human rights violation. The Court accordingly found no violation of Article 3.

Article 38

In the proceedings before the Chamber, the Russian Government had not complied with the Court’s request to provide it with a copy of the decision of September 2004 to discontinue the Katýn investigation, referring to its top-secret classification. In the proceedings before the Grand Chamber, the Government had submitted a number of additional documents, which did not, however, include the September 2004 decision.

The Court underlined that only the Court itself could decide what kind of evidence the parties were required to produce for the due examination of a case and that the parties were obliged to comply with its requests for that evidence. The Russian Government had referred to the fact that the decision had been classified at national level and that national laws prevented it from communicating classified material to international organisations in the absence of guarantees as to its confidentiality. However, the Court found that a mere reference to a deficiency of national law which made it impossible to communicate sensitive documents to international bodies was an insufficient explanation to justify the withholding of information requested by it.

While the Court was not well equipped to challenge the judgment by national authorities that security considerations were involved, the concept of the rule of law required that measures affecting fundamental human rights had to be subject to some form of adversarial proceedings

before an independent body competent to review the reasons for such a decision. However, the Russian courts' judgments in the declassification proceedings did not contain a substantive analysis of the reasons for maintaining the classified status. The courts had referred to an expert report issued by the Russian Federal Security Service which had found that the decision terminating the criminal proceedings included material which had not been declassified, but they had not scrutinised the assertion that that material should be kept secret more than 70 years after the events. Moreover, the courts had not addressed in substance Memorial's argument that the decision brought to an end the investigation into a mass murder of unarmed prisoners, one of the most serious violations of human rights committed on orders from the highest-ranking Soviet officials. Finally, they had not performed a balancing exercise between the alleged need to protect the information held by the Federal Security Service (a successor to the Soviet KGB which had carried out the execution of the Polish prisoners of war), on the one hand, and the public interest in a transparent investigation into the crimes of the previous totalitarian regime, on the other hand.

Given the restricted scope of the judicial review by the Russian courts, the Court was unable to accept that the submission of a copy of the September 2004 decision could have affected Russia's national security. Lastly, the Russian Government could have asked for appropriate procedural arrangements to accommodate the security concerns, such as the holding of a hearing behind closed doors, but they had not done so.

The Court concluded that Russia had failed to comply with its obligations under Article 38.

[Just satisfaction \(Article 41\)](#)

The Court, by a majority, dismissed the applicants' claim for just satisfaction.

Separate opinions

Judges Gyulumyan and Dedov each expressed a concurring opinion. Judge Wojtyczek expressed a partly concurring and partly dissenting opinion. Judges Ziemele, de Gaetano, Laffranque and Keller expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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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.