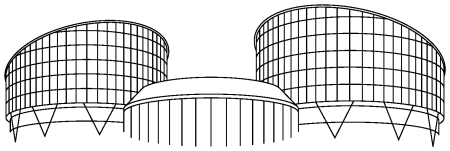

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PRILUTSKIY v. UKRAINE

(Application no. 40429/08)

JUDGMENT

STRASBOURG

26 February 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Prilutskiy v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 January 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 40429/08) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Igor Valentynovych Prylutskyy ("the applicant"), on 31 July 2008.

2. The applicant was represented by Mr S. Skryl, a lawyer practising in Kherson. The Ukrainian Government ("the Government") were represented by their acting Agent at that time, Mr M. Bem.

3. The applicant alleged that the State had failed to take appropriate preventive measures to protect his son in a life-threatening situation and that the criminal proceedings in connection with the death of his son had been ineffective.

4. On 3 September 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Donetsk.

A. Car accident

6. On the night of 30 September 2006 the applicant's son (born in 1984) took part in "AutoQuest", a location-based driving game in the city of Donetsk. In accordance with the rules of the game, the participants were divided into teams and each team had to move by car to different locations in the city. On arrival at an intermediary destination each team had to solve a riddle in order to establish the next destination point, and the winner was the team that reached the final destination first.

7. The applicant's son was in the team of P., who was the driver. During the game P. lost control of the car and collided with a pillar. As a result of the accident, P. was injured and his three passengers, including the applicant's son, died.

B. Domestic proceedings

8. On 1 October 2006 the Donetsk Region police department opened an investigation under Article 286 § 3 of the Criminal Code in connection with the fatal car accident.

9. On 3 October 2006 the applicant was admitted to the proceedings as a victim.

10. On 19 February 2007, in reply to an enquiry from the applicant concerning the investigation, the Donetsk City prosecutor's office informed him that the case was complicated and the police had to order various expert examinations; the activities of the organisers of the driving game were also being examined.

11. On 23 February 2007 the police refused to institute criminal proceedings against the organisers of the driving game.

12. On 10 July 2007 the board of forensic psychiatric experts completed their examination and found that at the time of the accident P. had been aware of his actions and able to control them. Following the injuries sustained in the accident, P. had developed a chronic mental disability. He was diagnosed with a complicated organic impairment of the brain and amnestic syndrome. The experts found that at the time of the examination P. had no longer been aware of his actions or able to control them and that he should therefore undergo mandatory psychiatric treatment.

13. On 24 October 2008, in reply to a complaint lodged by the applicant about the ineffectiveness of the investigation, the Donetsk Region prosecutor's office maintained that the criminal investigation was being carried out in accordance with the requirements of the Code of Criminal Procedure and that there had been no grounds to change the investigator in the criminal proceedings.

14. On 5 February 2009 the case file was referred to the Kuybashevskyy District Court of Donetsk ("the first-instance court") in order to determine

whether it was appropriate to apply compulsory medical measures in respect of P.

15. On 15 March 2010 the chairman of the Donetsk Region Council of Judges requested that the chairman of the first-instance court ensure prompt consideration of the criminal case. He noted that the court hearings had been repeatedly adjourned and the length of the proceedings had not been reasonable.

16. On 28 February 2011 the board of forensic psychiatric experts issued a report repeating their previous conclusions as to P.'s mental state.

17. On 8 June 2011 the first-instance court found that P. had committed a crime by violating the traffic safety regulations, which had resulted in the death of the applicant's son and the two other passengers. The court noted that P. had collided with a pillar because he had exceeded the speed limits and had lost control of the car. It further noted that, according to the forensic psychiatric examination reports of 10 July 2007 and 28 February 2011, P. had been mentally aware of and able to control his actions at the time of the accident but had later developed a mental disability; at the time of the examinations, P. had been suffering from an organic brain impairment and amnestic syndrome; as a result, he had no longer been aware of or able to control his actions and needed to be provided with compulsory medical treatment, namely outpatient psychiatric assistance. Bearing those medical reports in mind, the court ordered the compulsory medical measures.

18. The applicant appealed, claiming that he was a doctor by profession and could see that the medical findings were wrong. He further complained of a breach of procedural rules, arguing that P. should have been brought to the court room for the hearings.

19. On 24 January 2012 the Donetsk Regional Court of Appeal quashed the decision of 8 June 2011 and remitted the case for additional pre-trial investigation. The court noted that there were witness statements, including those obtained at the pre-trial stage of the proceedings, which suggested that at the time of the accident P. might have made a sharp turn in order to avoid hitting a pedestrian who had been crossing the road. The court considered that the facts had not been established properly and that additional investigatory measures were required.

20. Following the additional investigation, the case was referred to the first-instance court on 31 October 2012. The investigative authorities considered that P. had exceeded the speed limit, in violation of the traffic regulations; he had lost control of the car and caused the accident which had resulted in the deaths of his three passengers. P.'s actions amounted to a crime. However, due to the mental disability that he had developed after the accident, it was proposed that the court impose compulsory medical measures in respect of P.

21. As of 26 March 2013 the proceedings were pending.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of Ukraine of 5 April 2001 (as worded at the relevant time)

22. Article 286 of the Criminal Code provides:

"1. The violation of traffic safety regulations or the misuse of a vehicle by a driver, if this has caused injuries of medium severity to a victim –

shall be punishable either by a fine of up to one hundred times the tax-free monthly income, or by correctional work for up to two years, or by detention for up to six months, or by restriction of liberty for up to three years, combined, if required, with a driving ban for up to three years.

2. The same actions, if they have caused the death of a victim or grievous bodily injury to the victim – ...

3. The actions provided for by the first paragraph of this Article, if they caused the death of several persons –

shall be punishable by imprisonment for a period of between seven and twelve years combined with a driving ban for up to three years.

..."

B. Code of Criminal Procedure of 28 December 1960 (in force at the relevant time)

23. The relevant provisions of the Code of Criminal procedure can be found in the judgment of *Muravskaya v. Ukraine* (no. 249/03, §§ 35 and 36, 13 November 2008).

C. The Law on automobile roads of 8 September 2005 ("the Automobile Roads Act 2005")

24. Section 36 of the Act provides that the procedure for using public roads for street festivities and other mass events should be established by the local authorities with the approval of the State bodies responsible for roads management and those responsible for traffic safety. Sports competitions, such as cross, motor and cycle races, may be conducted on public roads with the permission of the State bodies responsible for road management and those responsible for traffic safety, in accordance with the procedure provided for in the legislation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

25. The applicant complained that the State had failed to take appropriate steps to protect his son's life during a driving game. He also complained that the criminal proceedings in connection with his son's death in a car accident had been ineffective.

26. The applicant relied on Articles 2 and 13 of the Convention. The Court considers that the complaints fell to be examined solely under Article 2, which provides, in so far as relevant, as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Positive obligation to protect life in a life-threatening situation

(a) The parties' submissions

28. The Government submitted that during the driving game P. had been obliged to strictly abide by the road traffic regulations established by the State. Failure to observe those regulations was punishable by various sanctions, including criminal ones. According to the conclusions of the investigative authorities, the death of the applicant's son and the other passengers had been caused by P.'s failure to abide by the traffic regulations, including by observing speed limits. The Government therefore argued that the life-threatening situation had been caused exclusively by the individual who had been driving the car and that, in so far as the State was concerned, it had taken appropriate legislative and administrative measures to ensure road traffic safety.

29. The applicant claimed that the State had failed in its positive obligations under Article 2. He insisted that the authorities had been aware of the systemic nature of the driving games in Donetsk and should have taken relevant administrative measures, namely the licensing of such activities to ensure the protection of life in such games.

(b) The Court's assessment

(i) General principles

30. Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, amongst many authorities, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

31. The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 covers a wide range of sectors (see *Ciechońska v. Poland*, no. 19776/04, §§ 62-63, 14 June 2011) and, in principle, will arise in the context of any activity, whether public or not, in which the right to life may be at stake (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71, ECHR 2004-XII and *Brincat and Others v. Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, § 101, 24 July 2014). It entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. Those regulations must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (see *Öneryıldız*, cited above, §§ 89-90).

32. Still in the field of dangerous activities, the positive obligations under Article 2 should not be unduly impaired by paternalistic interpretations, bearing in mind that the notion of personal autonomy is an important principle underlying the Convention guarantees, primarily those pertinent to private life. The Court has observed that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned, and improper State interference with this freedom of personal choice may give rise to an issue under the Convention (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 60 and 61, ECHR 2002-III).

33. The scope of the positive obligation must be interpreted in a way that does not impose an unrealistic or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the

Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case (see *Osman v. the United Kingdom*, 28 October 1998, § 116, Reports of Judgments and Decisions 1998 VIII).

(ii) Application to the present case

34. The applicant's son took part in a form of entertainment that implied moving by car to various locations in the city; every time a team arrived at a destination point, it had to solve a riddle in order to establish the next destination. The team's performance thus depended on both the resolution of the intellectual assignments and the manner in which it travelled between the destination points. As to the second aspect, it is not in dispute that the participants of the game had to abide by the traffic regulations established by the State, even though they were travelling by car with a specific entertainment purpose. The observance of the traffic regulations was ensured by legislative measures providing various sanctions, including criminal ones. The preventive and deterrent capacity of the available legislative framework is not in question.

35. In respect of the general legislative and administrative measures, the only observation made by the applicant was that such entertainment should have been subjected to licensing to ensure closer supervision by the State. In that regard the Court notes that the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the State's margin of appreciation (see *Ciechońska, cited above,* § 65). It must now be examined whether specific operational measures were indispensable for the purpose of compliance with the positive obligations under Article 2.

36. The Court notes that the entertainment at issue was a private initiative without the involvement of the authorities. The applicant's son, an adult, enjoyed a freedom to act and decided to participate in the game of his own free will, having taken upon himself the responsibility to follow the existing rules. The domestic authorities did not identify the activity in question as a "sport competition" or "festive" to be covered by section 36 of the Automobile Roads Act 2005. The applicant did not claim that he or anyone else had applied to the police or other authorities asking them to take any specific measures before the entertainment. Neither did he specify which preventive operational measures should have been taken by the authorities against the background that all the participants remained bound by the traffic regulations and the responsibilities arising in case of their breach. Likewise, there is no information before the Court that the available

legal framework was not sufficient to ensure the requisite protection of life or that it had to be reinterpreted in light of these new activities.

37. Even if the authorities were in possession of certain general information about such forms of entertainment, the applicant does not claim that they were so widespread a social phenomenon that their growth had to alert the authorities on a necessity to put in place additional measures to protect the public. It has not been established in the present case that the danger that emanates from these games was different from an inherent danger of road traffic, and as such called for a special regulation of these activities. Furthermore, there is no information that the authorities were aware of the exact time and place of the game in which the applicant's son took part and died.

38. Accordingly, the circumstances of the present case do not lead the Court to the conclusion that the State failed in its positive obligation to protect life in a life-threatening situation.

39. There has therefore been no violation of Article 2 in that regard.

2. Procedural obligations under Article 2

(a) The parties' submissions

40. The Government submitted that the criminal investigation had been opened immediately after the accident and that investigative measures were carried out comprehensively and promptly. The national authorities had taken all necessary steps in order to collect the evidence and to establish the circumstances of the death of the applicant's son. Certain delays had occurred during the proceedings but those had not been attributable to the State. The applicant had been given appropriate access to the case file and had been able to participate effectively in the proceedings. Overall, the procedural requirements under Article 2 of the Convention had been complied with.

41. The applicant disagreed and maintained his complaint.

(b) The Court's assessment

42. The Court notes that the Government did not contend that the applicant could have effectively pursued the matter arising from the car accident outside the framework of the criminal proceedings, which had been instituted immediately after the accident and were still pending at the time when the parties were exchanging their observations (compare *Sergiyenko v. Ukraine,* no. 47690/07, §§ 40 and 42, 19 April 2012). The Court will therefore confine itself to examining whether the criminal proceedings concerning the death of the applicant's son in the car accident satisfied the criteria of effectiveness required by the procedural guarantees of Article 2 of the Convention (see *Antonov v. Ukraine,* no. 28096/04, §§ 47-

49, 3 November 2011; *Prynda v. Ukraine*, no. 10904/05, § 54, 31 July 2012; and *Zubkova v. Ukraine*, no. 36660/08, § 38, 17 October 2013).

43. The Court reiterates that the effectiveness of an investigation implies a requirement of promptness and reasonable expedition. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Šilih v. Slovenia* [GC], no. 71463/01, § 195, 9 April 2009). Moreover, with the lapse of time the prospects that any effective investigation can be undertaken will increasingly diminish.

44. The Court notes that as of 26 March 2013, that is, about six years and six months after the car accident, the proceedings were still pending before the domestic authorities. However, there is nothing to suggest that the duration of the criminal investigations and the further proceedings before the courts was justified. The Government did not argue that this case was different from a common traffic accident which should have been concluded speedily. In that regard the Court notes that following the prolonged proceedings before the first-instance court the judicial authorities requested that the court accelerate the proceedings, as they were concerned with the unjustified delays in the case (see paragraph 15 above). More than five years and three months after the proceedings were opened, the Court of Appeal remitted the case for additional investigation, considering that the facts had not been established properly and that further investigative measures were required. In reaching that conclusion the Court of Appeal referred, among other things, to the witness statements which had been available at the pre-trial investigation stage (see paragraph 19 above).

45. Having regard to its well-established case-law and to the facts of the present case, the Court finds that the domestic proceedings aimed at scrutinising the circumstances of the death of the applicant's son were not compatible with the procedural requirements of thoroughness and promptness under Article 2 of the Convention.

46. There has therefore been a procedural violation of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

48. The applicant claimed 500,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government did not provide any comments on that claim.

50. The Court considers that the applicant must have suffered distress and anxiety on account of the violation it has found. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

51. The applicant also claimed EUR 960 for the costs and expenses incurred before the Court.

52. The Government did not provide any comments on that claim.

53. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to allow the claim in full.

C. Default interest

54. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS THE COURT UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 2 of the Convention concerning the State's positive obligation to protect life;

3. *Holds* that there has been a procedural violation of Article 2 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 960 (nine hundred and sixty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President