FIFTH SECTION

CASE OF GOROVENKY AND BUGARA v. UKRAINE

(Applications nos. 36146/05 and 42418/05)

JUDGMENT

STRASBOURG

12 January 2012

FINAL

12/04/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Gorovenky and Bugara v. Ukraine,

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

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Angelika Nußberger, *judges,*
Mykhaylo Buromenskiy, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in two applications (nos. 36146/05 and 42418/05) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Ukrainian nationals, Mr Leonid Oleksandrovych Gorovenko (the father of A. Gorovenko), Mrs Nadiya Vitaliyivna Gorovenko (the mother of A. Gorovenko), Mrs Tetyana Oleksandrivna Bugara, Mr Oleksandr Volodymyrovych Bugara and Ms Viktoriya Volodymyrivna Bugara (the wife and children of V. Bugara) ("the applicants"), on 29 September 2005.

2. The applicants were represented by Mr V.O. Korsanyuk, a lawyer practising in Dnipropetrovsk. The Ukrainian Government ("the Government") were represented by their Agents, Mr Y. Zaitsev and Mrs V. Lutkovska, of the Ministry of Justice of Ukraine.

3. The applicants' relatives were shot by D., a police officer who was off-duty. The applicants alleged, in particular, that the State had failed to comply with its positive obligation under Article 2 of the Convention as it had failed to exercise the requisite control over the procedure for equipping police officers with a weapon. They also alleged that no effective remedy existed with respect to their complaint.

4. On 11 May 2010 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1). Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Mr Mykhaylo Buromenskiy to sit as an ad hoc judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1938 and lives in the town of Novomoskovsk, Ukraine. The second applicant was born in 1941 and died in 2006. The third, fourth and fifth applicants were born in 1960, 1984 and 1992 respectively and live in the town of Pyatykhatky, Ukraine.

6. The facts of the case, as submitted by the applicants, may be summarised as follows.

A. Events of 22 November 1999

7. On 22 November 1999, shortly after midnight, D., the then deputy head of the criminal investigation department (*заступник начальника відділення карного розшуку*) at the Pyatykhatky District Police Office (*П'ятихатський районний відділ УМВС України в Дніпропетровській області*), was on his way back from a private trip in a car driven by an acquaintance of his, Mr V. Bugara. The third applicant was also in the car. Having quarrelled with Mr V. Bugara, D., who was drunk, deliberately fired on and instantly killed him, using the police gun which he carried on him at all times. D. then attempted to shoot the third applicant but missed. The third applicant managed to run away.

8. After that D. tried to stop passing cars. Mr A. Gorovenko, who happened to be driving by at that time, stopped and spoke to D., who pretended that his car had broken down and asked for help. However, Mr A. Gorovenko suspected that something was wrong and tried to get away. D. shot Mr A. Gorovenko and attempted to shoot R., who was a passenger in Mr A. Gorovenko's car, and seriously wounded her.

9. Soon D. was apprehended by passers-by and taken to the police station.

B. Police internal investigation into the incident

10. Shortly after the incident the police launched an internal investigation. The report, signed on 23 November 1999, brought to light a number of "causes and pre-conditions" stemming from poor regulation by the Pyatykhatky District and Dnipropetrovsk Regional Police Offices which had led to the incident in question. It mentioned, among other things, that the superior officers had failed to adequately examine D.'s character when recruiting and promoting him. In particular, several incidents which demonstrated D's unsuitability for service in the police department were

mentioned. When studying at police college D. had been dismissed from the position of section commander for alcohol abuse. In 1994 he had inflicted light bodily injuries on Sh. and had been sanctioned on three occasions for disciplinary offences. It was further mentioned that his superior officers had failed to enforce and maintain discipline over their subordinates. In particular, several incidents involving police officers from the Pyatykhatky District Police Office were referred to. The superior officers had failed to exercise due control when permitting their subordinates to keep and carry police guns at all times. The report stated that the superior officers had not checked the conditions in which D. kept his police gun at home and had not supervised D.'s behaviour when he was off duty. Furthermore, although D. was known to abuse alcohol, his superiors had not withdrawn his police gun in due time. In particular, on 13 November 1999, while the elections of the President of Ukraine were taking place and the police were operating under a special "reinforced" regime, D. had returned home intoxicated.

11. It was decided that two officers (including the head of the Pyatykhatky District Police Office) were to be dismissed and six others subjected to disciplinary sanctions.

C. Criminal proceedings against D.

12. On 22 November 1999 the local prosecutor's office instituted criminal proceedings against D. In the course of these proceedings the applicants brought civil claims against both D. and the Dnipropetrovsk Regional Police Office (*Управління МВС в Дніпропетровській області*), seeking compensation for pecuniary and non-pecuniary damage.

13. By a judgment of 14 November 2000 the Dnipropetrovsk Regional Court (from June 2001 – "the Dnipropetrovsk Regional Court of Appeal") found D. guilty of multiple murders, among other crimes, and sentenced him to life imprisonment. The court found that in March 1999 a decision had been taken allowing D. to carry a gun at all times. However, D. had systematically contravened the provisions of the Police Act both while on duty and at home and had abused alcohol on numerous occasions. The court awarded the two applicants' families amounts totalling 57,786.12 and 62,532.26 Ukrainian hryvnias (UAH)[1] respectively in compensation for pecuniary and non-pecuniary damage − the sums to be paid by D. The court further decided that the applicants' claim against the Dnipropetrovsk Regional Police Office should be examined in separate civil proceedings.

14. On the same date the Dnipropetrovsk Regional Court issued a special ruling (*окрема ухвала*) informing the head of the Dnipropetrovsk Regional Police Office of "serious deficiencies in the activities of the Pyatykhatky District Police Office". Referring to the above-mentioned

[1] About 12,364.70 and 13,380.30 euros (EUR) respectively at the material time.

findings, the court stated that D. had shot two persons with his police gun, which he had been using in the course of his duties. It went on to say:

> "Such deliberate disregard for the [Police Act] by a police officer [...], the serious deficiencies in the maintenance of discipline over subordinate officers, and the lack of proper control over the issuing and keeping of police guns in [the Pyatykhatky District Police Office] were the cause of [the incident in question]"

15. The first and second applicants appealed against the judgment and on 16 January 2001 the Supreme Court of Ukraine dismissed their appeal. The judgment became final.

16. By a letter of 9 September 2005, the Dnipropetrovsk Regional Court of Appeal notified the applicants that in 2004 D. had paid them UAH 5[1] in total. According to the applicants, the judgment of 14 November 2000 remains unenforced in the part concerning the compensation award.

D. Proceedings against the Dnipropetrovsk Regional Police Office and the local department of the State Treasury of Ukraine

17. In February 2003 the applicants brought actions against the Dnipropetrovsk Regional Police Office and the local department of the State Treasury of Ukraine before the Babushkinskyy District Court of Dnipropetrovsk, seeking compensation for non-pecuniary damage. In support of their claims they relied on the findings in the judgment, the special ruling of 14 November 2000 and the internal investigation report of 23 November 1999.

18. On 5 March 2003 the court rejected the applicants' claims. In so doing the court reasoned as follows:

> "... According to the legislation in force, redress for non-pecuniary damage has to be made by the person who has caused it by his own malicious acts. A finding of guilt and a link of causality between the impugned acts and the damage are the necessary conditions for liability."

> "The claimants' argument that negligent acts and omissions by the administration of the Dnipropetrovsk Regional Police Office brought about the detrimental consequences in issue and caused non-pecuniary damage to the claimants cannot be accepted as no causal link between the acts and omissions of the Dnipropetrovsk Regional Police Office and the consequences in question was established by the internal investigation.
>
> According to section 441 of the Civil Code, an organisation has to pay compensation for damage caused by its employees in the course of their employment.
>
> It was established in the course of the criminal proceedings that [D.], being the deputy head of the criminal investigation department at the Pyatykhatky District

[1] About EUR 0.70.

Police Office, had committed the crimes while off duty and for purely violent motives.

In the light of the foregoing, the court has reached the conclusion that the claims should be rejected."

19. On 10 July 2003 and 4 April 2005 the Dnipropetrovsk Regional Court of Appeal and the Supreme Court of Ukraine respectively rejected appeals by the applicants.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

20. The Instruction on the Regulations for the Permanent Keeping and Bearing of Police Firearms, Ammunition and Special Equipment by Police Officers was adopted on 25 January 1995 by order no. 60 of the Ministry of the Interior (*Інструкція про порядок постійного збереження і носіння табельної зброї, боєприпасів і спеціальних засобів працівниками міліції, затверджена наказом МВС України № 60 від 25 січня 1995 р.*). It sets forth the requirements for police officers to be permitted to keep and bear firearms, ammunition and special equipment at all times, the procedure for applying for such permits, and the conditions under which firearms, ammunition and special equipment must be kept and carried by police officers. In particular, according to part 2.3 of the Instruction, it is forbidden to issue guns to those persons who do not have appropriate equipment for its safe keeping at work and at home. The superior officers are ordered "to strengthen their supervisory role" in the implementation of this Instruction.

21. The provisions of the Constitution of Ukraine and the 1963 Civil Code of Ukraine regarding the responsibility of the State for acts or omissions by its agents are set out in *Lovygina v. Ukraine* (dec.), no. 16074/03, 22 September 2009.

22. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which provides, *inter alia*:

"11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

(a) Specify the circumstances under which law enforcement officials are authorised to carry firearms...

...

(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them.

...

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorised to do so only upon completion of special training in their use."

23. The commentary to Article 37 of the European Code on Police Ethics (Explanatory Memorandum of the Recommendation (2001) 10 of the Committee of Ministers of the Council of Europe to member States on the European Code on Police Ethics) reads *inter alia* as follows:

"...The importance of recruitment of suitable personnel to the police, as well as their training cannot be underestimated ...

THE LAW

I. JOINDER OF THE APPLICATIONS

24. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

25. The applicants complained that by failing to supervise the keeping and use of firearms by police officer D. the State had not complied with its positive obligations as provided in Article 2 of the Convention, which reads 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

26. The Government did not submit observations on the admissibility of this complaint.

27. The Court notes that this complaint 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. Submissions of the parties

28. The applicants indicated that there had been numerous incidents both remote in time and recent when D. had abused alcohol and had behaved violently. He had nevertheless been allowed to carry a weapon day and night. The failure of his superior officers to monitor compliance with the conditions for the use of firearms by their subordinates had been expressly acknowledged in the internal police investigation and in the court decisions of 14 November 2000. However, these conclusions had been ignored by the national courts in the civil proceedings for compensation, in breach of Article 2 of the Convention.

29. The Government submitted that in the present case the State had fully complied with its procedural obligation under Article 2 of the Convention by conducting an effective investigation and convicting D.

30. The Government further maintained that in the present case, unlike in the case of *Osman v. the United Kingdom* (28 October 1998, *Reports of Judgments and Decisions* 1998-VIII), the State authorities had not known of the existence of a real and imminent risk to the life of the applicants' relatives. Moreover, D. had not been acting in his official capacity. Although the internal investigation had established "some flagrant violations and shortcomings in the organisation of the working processes of the relevant police department", the national courts had not established any causal link between these shortcomings and D.'s actions. Therefore, the Government considered that in the present case the State had complied with its positive obligations under Article 2 of the Convention.

2. The Court's assessment

31. The Court notes at the outset that the applicants' relatives were shot by a police officer, D., who was off duty. The incident in question occurred during a private trip which did not concern a planned police operation or a spontaneous chase (see, *mutatis mutandis*, *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 289, 26 April 2011). Therefore, D.'s private acts of serious criminal character cannot, in principle, engage the State's responsibility under the substantive limb of Article 2 of the Convention only because he happened to be its agent (see *Enukidze and Girgvliani*, cited above, § 290).

32. Nonetheless, the Court reiterates that 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 *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; *Osman v. the United Kingdom*, § 115, cited above; and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II; *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 67-68, ECHR 2002-VIII). It may apply in situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act (see *Osman* and *Paul and Audrey Edwards*, both cited above), and in cases raising the obligation to afford general protection to society (see *Maiorano and Others v. Italy*, no. 28634/06, § 107, 15 December 2009). In the latter circumstances such positive obligation 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.

33. However, the positive obligation is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources (see, amongst other authorities, *Keenan v. the United Kingdom*, no. 27229/95, § 90, ECHR 2001-III, and *A. and Others v. Turkey*, no. 30015/96, §§ 44-45, 27 July 2004). In particular, the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation.

34. For the Court, and having regard to its case-law, the State's duty to safeguard the right to life must be considered to involve the taking of reasonable measures to ensure the safety of individuals and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see *Ciechońska v. Poland*, § 66, cited above).

35. In this respect the Court notes that, although D.'s guilt in murdering two persons cannot be denied, it was acknowledged by the national authorities on several occasions that D.'s superiors had failed to appropriately assess his personality and, despite previous troubling incidents involving D., had allowed him to carry a weapon, which had led to the incident in question (see paragraphs 10 and 14).

36. Moreover, the national law expressly forbids issuing guns to police officers who do not have appropriate equipment for their safe storage, and it was acknowledged by the internal investigation that it had never been checked where D. had stored his gun at home. In particular, the absence of a safe storing place could be the reason of D.'s carrying the gun with him at

all times while on and off duty, which factored into the lethal outcome of D.'s quarrel with his victims.

37. However, in the civil proceedings for compensation the national court disregarded the above-mentioned findings and held that no causal link existed between the failure of the police officers to comply with the law in force and correctly assess the case when allowing their subordinates to carry a weapon, and the lethal incident involving this subordinate. For the national authorities the fact that D. was off duty was enough to exclude any possible responsibility on the part of his superiors, despite clear conclusions to the contrary in the internal investigation and the criminal case materials. The applicants' arguments to the contrary were not taken into consideration.

38. The Court reiterates that the States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria (see, *mutatis mutandis*, *Abdullah Yilmaz v. Turkey*, no. 21899/02, §§ 56-57, 17 June 2008). In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny.

39. It follows that in the present case the police officer, who deliberately shot two persons with his police gun, was issued with the gun in breach of the existing domestic regulations, since it was not checked where he would be keeping it when off duty, and his personality was not correctly assessed in the light of his previous history of disciplinary offences.

40. In these particular circumstances, the Court concludes that in the present case there was a breach of the State's positive obligations under Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

41. The applicants complained that the respondent State had refused to assume its liability for the death of A. Gorovenko and V. Bugara caused by its agent and, accordingly, to redress the damage as provided for in Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

42. The Government considered that these complaints were inadmissible because of the applicants' non-compliance with the six-month rule. In particular, at the material time the law in force did not provide for a

possibility to claim compensation from the State for any damage inflicted by a State official who was not acting in his/her official capacity. It had been established in the present case that at the time of the incidents D. had been off duty. Therefore, the applicants' claim for damages lodged against the State bodies had been devoid of any prospect of success from the very beginning. Consequently, the six-month time-limit should be calculated from the date of the incidents, namely, 22 November 1999. Given that the applicants had lodged their complaints on 29 September 2005, the Government considered that the applications were inadmissible in the part relating to the applicants' complaints about the absence of an effective domestic remedy for their complaints under Article 2 of the Convention.

43. The applicants disagreed.

44. The Court notes that on 14 November 2000 the national court, in its decision in the criminal case instituted against D., expressly mentioned that the applicants' claim against the Dnipropetrovsk Regional Police Office should be examined in separate civil proceedings. Therefore, the Government's argument that no such action was possible must be rejected.

45. The Court further notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

B. Merits

46. The applicants reiterated their complaints that the State had failed to award compensation.

47. The Government noted that as no causal link had been established by the national courts between the shortcomings in the organisation of the police department's work and the actions of D., the applicants had no grounds to claim compensation from the State for damage inflicted by D.

48. The Court considers that this complaint has the same factual background as the issues examined under Article 2 of the Convention. Moreover, in finding a violation of the latter provision the Court had regard to the domestic court's failure adequately to examine the applicants' allegations about the State's responsibility in the death of their relatives. That failure also deprived the applicants of an opportunity to obtain compensation. The Court deems it more appropriate to deal with the applicants' inability to obtain compensation for the death of their relative in examining their claims for just satisfaction under Article 41 of the Convention (see paragraphs 53-55). In the light of that finding the Court considers that it is not necessary to examine the facts of the case separately under Article 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

49. The applicants further complained that the judgment of 14 November 2000 remained unenforced and that the length of the proceedings against the Dnipropetrovsk Regional Police Office and the local department of the State Treasury of Ukraine had been excessive.

50. The Court, having examined these complaints, considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

51. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The first, third, fourth and fifth applicants claimed 100,000 euros (EUR) each in respect of non-pecuniary damage. The first applicant further claimed EUR 15,839 and the third, fourth and fifth applicants EUR 15,000 each in respect of pecuniary damage.

54. The Government found these claims excessive.

55. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, deciding on an equitable basis, it awards the first, third, fourth and fifth applicants EUR 12,000 each in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicants also claimed EUR 1,000 (the first applicant) and EUR 2,099 (the third applicant) for the costs and expenses incurred before the Court.

57. The Government did not comment on these claims.

58. 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, the above criteria and to the fact that the first applicant was awarded legal aid, the Court considers it reasonable to award the sums of EUR 150 (first applicant) and EUR 2,099 (third applicant) to cover the costs of the proceedings before the Court.

C. Default interest

59. The Court considers it appropriate that the default interest 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. *Decides* to join the applications;

2. *Declares* the complaints under Articles 2 and 13 of the Convention admissible and the remainder of the applications inadmissible;

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

4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the first, third, fourth and fifth applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnas at the rate applicable on the date of settlement;
   (b) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 150 (one hundred and fifty euros) to the first applicant and EUR 2,099 (two thousand and ninety-nine euros) to the third applicant, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be converted into Ukrainian hryvnas at the rate applicable on the date of settlement;

(c) 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;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 12 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President