

European Court of Human Rights
Council of Europe
Strasbourg, France

Ref. no. 387/03

Fedorchenko and Lozenko v. Ukraine

Application

Under Article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of the Court

THE PARTIES

THE APPLICANTS

Family name: Fedorchenko

First name: Jurij

Sex: male

Nationality: Ukrainian

Occupation: unemployed

Date and place of birth: 1951

Permanent address: Str Molodzhina, Novi Sanzhary, Novosanzharskij area, Poltava County, Ukraine

Telephone: -

Present address: Same as permanent address

Family name: Lozenka

First name: Zoja

Sex: female/

Nationality: Ukrainian

Occupation: unemployed

Date and place of birth: 1954

Permanent address: Str Blagovishchenska 21, Zolotonosha, Cherkaska County, Ukraine

Telephone: -

Present address: Same as permanent address

Information concerning the authorised representatives of the applicants:

- a). European Roma Rights Center (ERRC), tel: +361 413 22 00, fax: +361 413 22 01, P.O. Box 906/93, 1386 Budapest 62, Hungary
- b). Vasyl Dydychin, Attorney at Law, 8/20 Onokivska Street. Uzhgorod, Ukraine
- c). Aladar Adam, 43 Glinsky Street, Uzhgorod, Ukraine.zX

This application is being submitted jointly by the ERRC, Vasily Didychin and Aladar Adam as the appointed representatives of the applicants.

THE HIGH CONTRACTING PARTY

Ukraine

II. STATEMENT OF THE FACTS

II.1. The European Roma Rights Center (ERRC), Vasily Didychin and Aladar Adam are hereby filing an application on behalf of Jurij Fedorchenko and Zoja Lozenko (“the applicants”), Ukrainian citizens of Roma ethnicity.

II.2. This application is with respect to the violent death of applicants’ relatives, Vladimir Fedorchenko (27 years old; the son of Jurij Fedorchenko), Zukhra Fedorchenko (21 years old; the daughter of Zoja Lozenko and daughter-in-law of Jurij Fedorchenko), Snezhana Fedorchenko (their 6-year-old granddaughter), Misha Fedorchenko (their 3-year-old grandson), and Jura Fedorchenko (their 6-year-old grandson) (all ethnic Roma) (“the victims”).

II.3. According to Mr. Jurij Fedorchenko’s testimony, on the morning of October 28, 2001, he was leaving his house while the rest of the family was sleeping. When he opened the entrance door, he came upon three men, one of whom he immediately recognized as Police Major Ivanov of the Kryukov area Police Department, one tall-unknown man with red hair and another unknown man.¹

II.4. One of the two unknown men was holding a 5-litre polythene bottle. The men pushed Mr. Fedorchenko inside the house, and one of them hit him on the head with a hard object. When he pleaded with Police Major Ivanov not to harm his family, Police Major Ivanov responded, “I will turn you all into black roses.” The tall man with red hair then started sprinkling what was apparently flammable liquid from the 5-litre bottle throughout the house, including on members of the Fedorchenko family.²

II.5. The three men set the house on fire and fled, barring the entrance door of the house from the outside, apparently to prevent people from escaping. Shortly afterwards, there was a large explosion, the force of which threw Fedorchenko from the house, together with the door.³

II.6. Five members of the Fedorchenko family were later admitted to hospital from the Malaya Kahnivka village of the Kremenchuk region, central Ukraine, with extensive burns and suffering from smoke inhalation. Zukhra Fedorchenko (21), mother of 3 children, suffered burns to her respiratory tract as well as to 40 percent of her body; her two children, 6-year-old Snezhana Fedorchenko suffered burns to 100 percent of her body, and 3-year-old Misha Fedorchenko suffered 80 percent burns; 15-year-old Lozenko Takhir,

¹ See Exhibit 5

² See Exhibits 5, 7, 16 and 18.

³ Ibid.

Zukhra's brother, suffered 70 percent burns, and 50-year-old Jurij Fedorchenko (the applicant himself) suffered second-degree burns to 18 % percent his body, primarily the back, neck, arms and feet, which caused temporary health disorder. Two members of the Fedorchenko family were found dead in the burnt house – Ms Fedorchenko's husband, 25-year-old Vladimir Fedorchenko, and their 6-year old son Jura. Snezhana Fedorchenko died 40 minutes following her arrival at the hospital, Misha Fedorchenko died on the next day and Ms. Zukhra Fedorchenko died two days later.⁴

II.7. According to the Kremenchuk-based weekly newspaper *Kremin'* of November 2, 2001, witnesses stated that the windows and doors of the house were blown out during the explosion, and everything inside the house was burnt. Witnesses also reported seeing three men running from the vicinity of the fire immediately after the explosion.⁵

II.8. Mr. Jurij Fedorchenko informed the police that he believed the fire was caused by arson, organized by Major Ivanov of the Kryukov police department, a small village south of Kremenchuk, as a punishment because the Fedorchenko family could not pay a monthly bribe of 200 hryvnya. According to Mr. J. Fedorchenko, prior to the incident, Major Ivanov made a verbal threat to the family saying "I will set all of you on fire."⁶

II.9. According to the weekly newspaper *Kremin'*, authorities investigating the case, in the first days following the event, claimed that they knew the names of the perpetrators, and area prosecutor Mr. Aleksandr Jarmonik was quoted by the newspaper as saying that the possibility of involvement of "drug kings in police uniforms" was being considered as probable. The County Prosecutor Mr. V. Tsvigun said in public that should this supposition in the course of investigation be found to be true, he would contact the General Prosecutor of Ukraine and seek to involve high-ranking independent law-enforcement officials in the investigation.

II.10. Chief of Department of the Ministry of Internal Affairs of the Poltava County Police General A. Prisyazhnyuk stated at a press conference on October 29, 2001, that one of the alleged arsonists was being hidden by his parents, although the person had stated the following: "I myself set those Gypsies on fire." This person, whom officer Prisyazhnyuk did not identify, allegedly had set another two houses on fire on the same morning with two accomplices. Officer Prisyazhnyuk also confirmed the likelihood of involvement of a police officer from the Department of the Fight Against the Illegal Use of Drugs in the

4 See Exhibit 7

5 See Exhibit 20

6 See Exhibit 5

arson and denied any possibility of covering up the truth. He was quoted as saying: "I have never illegally protected anyone and never will."⁷

II.11. In the weeks following the incident, both prosecutorial officials and the media reportedly denied any police involvement in the arson.

II.12. On 2 November 2001, Lt. Col. Ilyashenko from Poltava County issued a resolution on the alleged participation of Major Ivanov in the arson attack.⁸ According to him, the fact that Fedorchenko himself witnessed the attack on his home and identified Major Ivanov as one of the perpetrators, did not warrant further verifications because of the alibi provided by Major Ivanov, who allegedly spent the morning of 28 October with his family and shopping with his wife.⁹ On the contrary, Lt. Col. Ilyashenko went on stating that "the traumas suffered [by Fedorchenko] during the fire and explosion,[...] could promote the slandering of Ivanov from the relatives of the victims".¹⁰

II.13. Major Ivanov was reportedly temporarily suspended from his duties. Mr. V. Shapoval, chief of the Kryukiv area police department, denied any involvement of Major Ivanov in the arson, and explained allegations made by Roma from Mala Kahnivka as revenge for major Ivanov's enthusiasm in performing his work.

II.14. On May 22, 2002, the local counsel submitted a complaint with the prosecutor's office on behalf of Mr. Jurij Fedorchenko, Ms. Zoja Lozenko and 15-year-old Viktor Lozenko. In his submission, the local counsel pointed at severe deficiencies in the investigation, and asked that additional investigation be carried out, in particular that:

- the neighbor who witnessed the arson be interrogated. According to Mr. Fedorchenko, his neighbor was taken to the police station after the event and a "prophylactic" conversation was carried out with her about the necessity of not spreading the facts of the crime that are known to her;
- another neighbor, Ms Valja Fedorchenko, who recognized the car in which Major Ivanov allegedly arrived on the scene of the crime, be interrogated; and
- a confrontation between Mr. Fedorchenko, the main witness of the crime, and Major Ivanov be carried out.¹¹

7 See Exhibit 20

8 See Exhibit 4

9 Ibid.

10 Ibid.

11 See Exhibit 6

II.15. On the same date, the applicants and local counsel met with the senior investigator of the city prosecutor's office of Kremenchuk, Mr. S.V. Barashkov, who was in charge of this case. The applicants were officially acknowledged as “victims” and were interrogated as to the events of the case.

II.16. During the meeting with Mr. Barashkov, the applicants learned that on April 29, 2002, an indictment was issued by the Prosecutor’s Office against Nazarenko Oleksiy Borisovich for manslaughter and destruction of property, pursuant to Articles 115 § 2 i.i.1, 2, 4, 5, 7, 12, 194 § 2 and 393 § 1 Ukrainian Criminal Code.¹² No mentioning was made as to the alleged involvement and/or participation of Major Ivanov in the arson attack. In addition, the indictment specified the material damages caused which amount to 36560 Hryvna (approximately 6 000 Euro).

II.17. Following this, the local counsel submitted another written request to the Prosecutor’s Office in Kremenchuk, urging the authorities to carry out a series of forensic examinations and to bring charges against Major Ivanov.¹³ In his submission, the local counsel, pointed out the inefficiency of the investigation and failure of the authorities to question witnesses, in particular the neighbors of Fedorchenko family as well as the lack of forensic examinations.¹⁴ In addition, the local counsel submitted that the investigation process as conducted so far, was in clear violation of Article 22 of the Ukrainian Criminal Procedure Code, which requires a thorough and effective investigation and moreover, such action violated the Articles 2, 3, 8, 13 and 14 of the European Convention on Human Rights.¹⁵

II.18. On June 1, 2002, a line-up identification took place where Fedorchenko identified and confirmed Major Ivanov's involvement in the arson attack.¹⁶ During the confrontation, Fedorchenko gave once more a clear account of the events, describing in details the attack. However, Major Ivanov flatly denied any involvement. To the question asked by the local counsel why was he operating in a territory outside his usual assignment, he answered that he has done that before and saw nothing strange in that.

II.19. On June 1, 2002, the local counsel, together with the applicants, finally were permitted to examine the investigation file.¹⁷ He discovered that Police Major Ivanov’s involvement in the arson attack was not being investigated at all by the authorities and no formal charges were being considered against him. On the

12 See Exhibit 7

13 See Exhibit 8

14 See supra, Para. 11

15 Ibid

16 See Exhibit 11

17 Pursuant to Article 49 of Criminal Procedure Code, the victim or his relative can review the file only after the preliminary investigation is completed.

same date, the local counsel submitted a written request in which he urged Mr Barashkov, the investigator, to bring charges against Major Ivanov.¹⁸

II.20. On June 28, 2002, he received a decision by Mr Barashkov whereby he rejected the request to bring charges against Major Ivanov. Overlooking all the previous requests filed by the local counsel, the decision concluded that “[In] the course of investigation, [...] Major Ivanov’s involvement was not proved, [thus] the complaint of the victims cannot be complied with.”¹⁹

II.21. On July 15, 2002, the local counsel sent a letter to the General Prosecutor of Ukraine in which he urged him to annul the decision made by Barashkov rejecting the appeal of June 1st to bring charges against Major Ivanov.²⁰ The response from the General Prosecutor's office arrived on August 12, 2002, stating that the appeal was forwarded to Mr Savchenko, the deputy of the prosecutor of the Poltava Province for further examination.²¹

II.22. On August 19, 2002, the counsel received a response from the prosecutor’s office of the Poltava Province flatly stating that the office examined the allegation and based on its findings and “thorough control” rejected the appeal.²²

II. 23. The first court hearing on the case against the civilians who participated in the arson attacks, Nazarenko Oleksiy Borisovich and Gusev Igor Volodimirovich, took place on October 21, 2002 before the Court of Appeal of Poltava County. During the proceedings, the local counsel filed a petition whereby he asked the court to add the civil claims for damages of the applicants to the materials of the case. In total the applicants asked for 150,000 (one hundred fifty thousand) hryvnas each for the material and moral damages suffered as a consequence of the attack.²³ The court held its hearings on the case on 21st, 22nd, 25th, 26th, 27th of November 2002 and 2nd, 3rd, 4th of December 2002.²⁴

II.24. The court heard testimonies from witnesses and accused persons, and considered the evidence put forward. The applicants Fedorchenko and Lozenko stated that on 28 October, 2001, Major Ivanov directly participated in the arson [attack] of the house No. 101 in Sadova St. in the village Mala Kakhnivka, Kremenchuk region, Poltava County, and that before he had been at that house for several times and

18 See Exhibit 12

19 See Exhibit 13

20 See Exhibit 14

21 Ibid

22 See Exhibit 15

23 See Exhibit 3

24 See Exhibit 18

threatened its residents with violence.²⁵ Witness E.V.Saprykina testified that Y.I.Fedorchenko was shouting that Ivanov had set his house on fire. She informed the court of the fact that Zuhra Lozenko (one of the victims) complained with police officers of Kryukiv area Police Department who had arrested her and she bore signs of injuries on her arms. Witness T.V.Lukashenko gave similar testimony at the preliminary investigation.²⁶

II.25. During the proceedings, Ivanov himself did not deny the fact that in 2001 he had been in the village of Mala Kahnivka several times, and had visited the house of Fedorchenko four to five times, looking for Fedorchenko's daughter-in-law Lozenko Zuhra.²⁷ The court also examined the taped interrogation of Nazarenko, who in the course of questioning was asked why he committed such a heinous crime. The answer was: "We had to put those fucking Gypsies in their place."

II.26. At the end of the court hearings, the presiding judge invited the parties to submit their final petitions. The local counsel filed a petition where he raised once again the issue of Major Ivanov's involvement in the arson attack and the absence of a thorough and impartial investigation that preceded the decision not to pursue the alleged participation of Ivanov.²⁸

II.27. On 11 December 2002, the court issued a decision whereby it sent the case back to the Prosecutor of Poltava County for additional investigation.²⁹

The Judges' Panel concluded the following:

"To partially comply with the mentioned requests of the counsels and representative of the victims, [...] the case has to be sent for additional investigation during which [further investigative steps] and verifications they [counsels] requested for should be performed."

II.28. Furthermore, the court pointed to a series of deficiencies and shortcomings that seriously hampered the ability of the court to reach a decision. The criminal file contains a conclusive decree on the involvement of Major Ivanov in the arson attack, issued by the assistant Head of the Department of Internal Security in Poltava County of the Department of Internal Affairs of the General Department of Prevention of Organized Crime of the Ministry of Internal Affairs of Ukraine M.T.Ilyashenko.³⁰ However, the documents which supported such decision were not in the file

25 Ibid

26 Ibid

27 Ibid

28 See Exhibit 16

29 See Exhibit 18

30 See supra Para II.9

II.29. Among other problems, the court drew attention to the fact that no request filed by the lawyer for the victims has been complied with. The court went on stating that: “[In order to] verify the alleged involvement of Ivanov in the arson [attack] it is necessary to prove what he was doing in the morning of 28 October 2001, whom did he meet and under what circumstances. Also, it is necessary to find out why Ivanov, working at Kryukiv area Police Department in Kremenchuk since 1 June 2001, performed operative and investigatory acts in the Kremenchuk region, whether he was commanded to do so and if so who gave him that task”.³¹

II.30. The court, in its decision stated that “[T]he court cannot remove all the [problems] of preliminary investigation at the court hearing without sending the case for additional investigation, for many additional investigatory actions concerning the case are to be carried out. According to the Ukrainian Criminal Procedure Code, the court has no possibility to obtain documents on demand, to conduct searches, reconstruction of the events, to search for witnesses and exhibits. The court also cannot make up for this deficiency of the investigation even according to Article 315 of the CPC, for this article establishes that only certain but not all investigatory actions can be carried out by court. [In addition] a great amount of operative investigative actions concerning the case are to be carried out and the abovementioned article does not [foresee] them be carried out at the court’s order.”

II.31. It is clear that throughout the investigation and before the court proceedings in this case, the applicants repeatedly attempted to raise the issue of police involvement and the Ukrainian Prosecution authorities continuously ignored their plea. To date, they are not aware of any step taken to investigate the alleged participation of Major Ivanov, thus being deprived of a comprehensive redress in their case.

III. RELEVANT DOMESTIC LEGISLATION

The applicants have attached the relevant domestic legislation as exhibit 19.

1. Excerpts from the Ukraine Criminal Procedure Code
2. Excerpts from the Ukraine Criminal Code
3. Excerpts from the Ukraine Civil Procedure Code

³¹ See exhibit 18

IV. STATEMENT OF THE ALLEGED VIOLATIONS OF THE CONVENTION AND OF THE RELEVANT ARGUMENTS

In the instant case the applicants allege that the Ukrainian authorities have violated a number of rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular, Article 2, Article 3, Article 8 paragraph 1, Article 1 of Protocol 1, Article 13 in conjunction with Article 2, 3 and Article 1 of Protocol 1; Article 14, in conjunction with Articles 2, 3, Article 1 of Protocol 1 and 13.

Violation of Article 2

IV. 1. The applicants raises two separate and independent claims under Article 2 of the ECHR, each one of which taken alone constitutes a breach of Article 2:

The victims died as a result of fatal injuries sustained during the arson attack.

The state authorities failed adequately to protect the victims' right to life by undertaking a thorough and effective investigation into the circumstances surrounding their death.

IV. 2. The applicant Jurij Fedorchenko, father of Vladimir Fedorchenko, father-in-law of Zukhra Fedorchenko, grandfather of Snezhana Fedorchenko, Misha Fedorchenko and Jura Fedorchenko ("the victims") respectfully submits that he should be considered a victim within the meaning of Article 34 with respects to all claims raised in this application.

IV.3. By its very nature Article 2 requires that relatives of those who have died must be regarded as 'victims' within the meaning of Article 34 of the Convention.³² An individual whose life is put at serious risk may also claim to be a victim. Thus, in *Osman v. United Kingdom* (2000) 29 E.H.R.R. 245, the Court accepted that the second applicant, who was severely wounded, and his deceased father were both victims for the purposes of Article 34 of the Convention.³³ However the claimant must be able to establish some detriment.

IV.4. In the case at issue, the applicant suffered serious injuries to his health (See supra para. II.6), the burning of 18% of his body which required long hospitalization and will have consequences for the rest of his life. With respect to the other applicant, Ms. Lozenko, mother of Zukhra Fedorchenko, mother-in-law of

³² See also: *Yasa v Turkey* (1999) 28 E.H.R.R. 408, (nephew of deceased as 'victim'); *H v. United Kingdom*, App. No. 9833/82; 42 D.R. 53; (mother of murdered person regarded as 'victim'); *Wolfgram v. Germany*, App. No. 11257/84; 49 D.R. 213 (parents of deceased as 'victims').

³³ With regard to use of non-fatal force falling within the caveat of Art. 2 see *Makratzis v. Greece*, Decision of October 18, 2001

Vladimir Fedorchenko, grandmother of Snezhana Fedorchenko, Misha Fedorchenko and Jura Fedorchenko, we respectfully submit that, although indirectly, she also suffered from the violations of the victim's rights under the Convention. The victim requirement implies that the violation of the Convention must have caused the applicant a personal injury. Such injury need not be physical but may include emotional damage arising from injustices done to loved ones. Thus, a spouse was considered a victim in view of the fact that she had suffered financial and moral injury in consequence of a violation of the Convention committed against her husband.³⁴ Moreover, in *Kurt v. Turkey*³⁵, a mother sued on behalf of herself and her son for damages arising out of her son's disappearance after having last been seen surrounded by members of Government security forces. The Court held that the applicant mother "*herself was the victim of the authorities' complacency in the face of her anguish and distress*".³⁶

IV.5. The Strasbourg organs have frequently accepted applications by relatives of the deceased in cases of alleged unlawful killing. Quite obviously, the need to allow direct victims to complain is nowhere more apparent than in cases of violation of the right to life.

The victims died as a result of fatal injuries sustained during the arson attack (substantial violation)

Principles on which the applicants rely in the interpretation of the facts:

IV.6. In their claim of a violation of Article 2, the applicants rely on a number of principles developed by the Convention organs. It has been repeatedly affirmed that Article 2 protects one of the most fundamental rights in the Convention, the right to life. (*McCann and others v UK*, A 324 (1995), par. 147 ("Article 2 ranks as one of the most fundamental provisions in the Convention"). The object and the purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective. (*Id.* pp. 45-46, S146-147).

In the instant case the applicants alleges the following:

IV.7. It is not disputed that victims died as result of injuries sustained in the arson attack, orchestrated and committed with the direct participation of government agent, i.e. Major Ivanov. Zukhra. (See supra Para. 5).

The state authorities failed adequately to protect the victims' right to life by undertaking a thorough and effective investigation into the circumstances surrounding their death. (Procedural violation)

34 Appl. 1478/62, *Y v. Belgium*.

35 Judgement of May 25, 1998.

36 *Ibid.*, Para. 134; see also Para. 142.

Principles on which the applicants rely in assessing the facts:

IV.8. Article 1 ECHR read together with the articles guaranteeing substantive rights requires governments not only to refrain from violating rights guaranteed under the Convention, but also to undertake appropriate measures and provide effective remedies for such violations.

Effective protection of the right to life includes a procedural element,³⁷ amounting to an obligation on the authorities to investigate any death of which they are aware, irrespective of how they found out about the death³⁸, whether state agents were involved³⁹ or the circumstances surrounding the deaths.⁴⁰

IV.9. In *McCann and others v. UK*, supra, the Court clarified the scope of this obligation in the context of a violation of Article 2: “[A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.” *Id.*, par. 161.

IV.10. The Court has held that “ [i]n the light of the importance of the protection afforded by Article 2 [it] must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. “The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, for example, *Salman v. Turkey*, § 106; concerning witnesses, for example, *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence, for example, *Gül v. Turkey*, no. 22676/93, (Sect. 4), § 89, judgment of 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling afoul of this standard.

37 *McCann v. United Kingdom*, See further para. IV. 17. below

38 *Ergi v. Turkey*, Judgement of July 28, 1998

39 *Yasa v. Turkey* (1998) 28 E.H.R.R. 408; *Kaya v. Turkey* (1998) 28 E.H.R.R. 1; *Cakici v. Turkey*, Judgement of July 8, 1999 (para.87)

40 *Gulec v. Turkey* (1998) 28 E.H.R.R. 121

IV.11. The applicants contend that the investigation in the instant case has been plagued by a number of omissions and inconsistencies which left unanswered some very important questions surrounding the victims' death and alleged participation of Major Ivanov. Among these are the following:

IV.12. Immediately after the incident occurred, the applicant Fedorchenko identified Major Ivanov as one of the participants in the attack. (See supra Paras 7, 8, 9 and Exhibits 4 and 5). In spite of the foregoing, the Ukrainian investigation authorities did not fulfill their obligation to provide a "plausible explanation" of the victims' death and the role of the Major Ivanov. Indeed, the prosecutors and investigators involved in the proceedings, considered the applicant's account of facts as 'clouded' by 'the traumas suffered [by Fedorchenko] during the fire and explosion,[that] could [provoke] the slandering of Ivanov from the relatives of the victims''⁴¹.

IV.13. The Court has found that to comply with Article 2, the investigation must comply with the following procedural safeguards:

- (a) it must be carried out by an independent body in public;
- (b) it must be thorough and rigorous;
- (c) it must be capable of imputing responsibility for the death;
- (d) if agents of the state are responsible, it must be capable of determining whether the killing was or was not justified under Article 2;
- (e) if initiated on the basis of a criminal complaint, the complainant must be able to take part in the proceedings.
- (f) it must enable effective involvement of the next of kin.

IV.14 Many of the above principles were given detailed recognition in *Jordan v. United Kingdom*, where a violation of Article 2 was found on the basis that the inquest did not amount to an adequate investigation). The Court held that although the nature and degree of minimum scrutiny depends on the circumstances of each case, investigations into deprivations of life must be *inter alia*, independent, effective, reasonably prompt, subject to sufficient public scrutiny and must involve the next of kin to an appropriate extent. [*Jordan v. United Kingdom, Judgment of May 4, 2001(paras 102-109).*] The language of the Court's judgment indicates these criteria are essential requirements of any effective investigation where an arguable violation of Article 2 had been made out. In *Jordan v. United Kingdom* violations were found because of a failure to disclose witness statements and call various members of the security forces to give live evidence.

IV.15. In the instant case, eyewitness evidence incriminates Major Ivanov, who was present and actively

⁴¹ Ibid.

participated at the time when all the victims were burned alive and their house was destroyed. Therefore, the Ukrainian authorities, who have continuously failed to conduct a comprehensive investigation which would lead to the prosecution and punishment of Major Ivanov, should be held accountable for a violation of Article 2.

Violation of Article 3

IV.16. The Applicants raises two independent complaints under Article 3:

a) The applicants allege that during and after the attack of 28 October 2001, the victims suffered ill treatment contrary to Article 3 of the ECHR. Besides the fatal injury which caused their death, the victims and applicant Fedorchenko suffered a number of other injuries during the arson attack, which although it did not cause his death, caused severe pain and suffering (substantive violation), and

b) The Ukrainian investigative authorities failed to satisfy their obligation under Article 3 to carry out an effective and impartial investigation with respect to the applicants' allegations that the victims were subjected to ill treatment during and after the attack. (procedural violation).

IV.17. The Court has recognized that, like Article 2, Article 3 imposes on States procedural obligations to conduct investigations in certain cases. In the Judgement of *Assenov and Others v. Bulgaria*, the European Court stated that "... where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in the breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention', requires by implication that there should be an effective official investigation. This obligation ... should be capable of leading to the identification and punishment of those responsible (...). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (...), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."⁴²

a) Substantive violation

IV.18. Concerning the violation of Article 3, the applicants submit the following facts:

(i) the incident at issue, i.e. the death of Vladimir Fedorchenko (27 years old; the son of Jurij Fedorchenko), Zuhra Fedorchenko (21 years old; the daughter of Zoja Lozenko and daughter-in-law of Jurij Fedorchenko), Snezhana Fedorchenko (their 6-year-old granddaughter), Misha Fedorchenko (their 3-year-

⁴² *Assenov and Others v. Bulgaria*, (90/1997/874/1086), Judgement of 28 October 1998, para. 102.

old grandson), and Jura Fedorchenko (their 6-year-old grandson) and the destruction of their property and belongings, goes well beyond the minimum threshold required by the case law pertaining to Article 3 and thus amounts to inhuman and/or degrading treatment. In Ireland v. United Kingdom [(1978) 2 E.H.R.R. 25.] the Court stated that: [i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is in the nature of things relative: it depends on all the circumstances of the case such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc;

(ii) in accordance with international human rights standards, the Ukrainian authorities were under a positive obligation to prevent and suppress such act of violence involving the deaths of 5 individuals;

(iii) following the incident, in spite of the existence of abundant evidence against Major Ivanov, the authorities have failed to carry out a prompt, impartial, and effective investigation and to provide comprehensive redress to the applicants for the community violence that the applicants had been subjected to – i.e. having their home destroyed and themselves having faced a real risk of dying.

IV.19. In addition to the murder of their relatives, the deliberate destruction of applicants' home with official complicity is a clear violation of Article 3. In Mentes and Others v. Turkey⁴³, the Commission concluded that the burning of applicants' homes constituted "*an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants and their children who were left without shelter and assistance and in circumstances that cause them anguish and suffering.*"⁴⁴ In particular, the Commission noted the "traumatic circumstances in which the applicants were prevented from saving their personal belongings and the dire personal situation in which they subsequently found themselves, being deprived of their own homes in their village and the livelihood which they had been able to derive from their gardens and fields."⁴⁵ It thus concluded that the applicants had been subjected to inhuman and degrading treatment within the meaning of Article 3.

IV.20. In Selcuk and Asker v. Turkey,⁴⁶ the applicants also claimed a breach of Article 3 based on the destruction of their homes and their eviction from their village. The Court in this case noted that the destruction of the applicants' homes and their property was "*premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes...*"⁴⁷. Both the Court and Commission found the destruction of the

43 Mentes and Others v. Turkey, 58/1996/677/867.

44 Ibid., para. 76.

45 Ibid.

46 Selcuk and Asker v. Turkey, 12/1997/796/998-999.

47 Ibid., para. 77.

applicants' home to have caused suffering of sufficient severity for the acts to be categorized as inhuman treatment within the meaning of Article 3.

IV.21. In view of the facts of the instant case and indeed of the above cited jurisprudence, we respectfully submit that the victims were subjected to acts of torture inflicting on them great physical and mental suffering amounting to torture, inhuman and/or degrading treatment or punishment. (paras II.4, 5, 6, 7, 18)

b) Procedural violation

IV.22. With respect to the facts of this case, we respectfully submit that the Ukrainian authorities have failed to properly investigate the participation of Major Ivanov, in the arson attack against the victims whose home and property were destroyed. (See Exhibits 3, 7, and 18). Notwithstanding the existence of evidence, the authorities have failed to carry out a prompt, impartial and effective investigation and to provide comprehensive redress to the applicants for the terrible crime they had been subjected to – i.e. their relatives burned alive, home having been destroyed and he [Fedorchenko] having faced a real risk of dying. (See para. II. 5.)

IV.23. In order to comply with the requirements of Article 3 of the Convention, the prosecuting and law enforcement authorities of the respondent state must conduct not just any investigation but an investigation capable of leading to the identification and punishment of those responsible and to also comprehensively determine the nature and circumstances of the incident at issue. To interpret these article differently would render them ineffective in practice and make it possible and easy for the police and other investigating authorities to comply with the Convention requirements by simply conducting a pro forma investigation.

IV.24. With regard to the facts of the case, and the applicable legal standards discussed above, the applicants respectfully submit that, de facto in violation of Article 3 of the Convention, the Ukrainian authorities have failed to carry out an adequate or relevant investigation into the incident, as well as to provide redress for the violation of the applicants' Article 3 rights. To date, no police officer has been charged with a crime in relation to the arson attack at issue even though there is ample evidence that suggests his explicit involvement. (See paras. II.2. – II.4.)

Violation of Article 8

IV.25. Article 8 of the Convention sets forth the following guarantees:

"Everyone has the right to respect for his private and family life, his home and his correspondence....

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

IV.26. In view of the facts of the case, the applicants respectfully submit that the violent arson attack at issue discloses an unequivocal violation of their rights to respect for their home, and their private and family lives. The attack was incited by a member of the police force, and as such, agent of the State. Therefore, the Ukrainian authorities themselves have breached the letter and the spirit of Article 8 by failing to adequately conduct a thorough and comprehensive investigation or provide adequate and comprehensive legal redress for the violation alleged.

IV.27. The Convention organs have in a number of cases held that the concept of "private life" for the purposes of Article 8 (1) includes the physical and moral integrity of a person.⁴⁸ Furthermore, the notion of private life is one which tends to overlap with other interests protected under Article 8 – family life, home and correspondence. In *Mentes and Others v. Turkey*,⁴⁹ the Commission found that the deliberate destruction of the applicants' homes and possessions by the State security forces cut across the entire personal sphere protected by Article 8, family life, private life and home and it was not necessary to distinguish them.

IV.28. The applicants respectfully submit that they have been living in Malaya Kahnivka and Their home, in addition to other possessions, were deliberately and violently destroyed during the arson attack that occurred on October 28, 2001.⁵⁰ There can be no doubt that this act constituted grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes - and indeed, in the most flagrant way possible.

IV.29. Thus, the State was under a duty to adequately respond to the incident by conducting a comprehensive and thorough investigation and providing comprehensive redress for the violations alleged. The State has clearly failed in this respect, and must therefore be held responsible.

Violations of Article 1 of Protocol I

IV.30. Article 1 of Protocol I reads:

⁴⁸ See, e.g., *X and Y v. Netherlands*, A-91 (1985), para. 22.

⁴⁹ See *Mentes and Others v. Turkey*, 58/1996/677/867.

⁵⁰ See Exhibit 7 and 18

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

IV.31. The applicants respectfully submit that the facts of the case disclose an overwhelming interference and violation of their right to peaceful enjoyment of their possessions. In so doing they wish to point out the following:

their home, furniture and other household and personal possessions/belongings were completely destroyed;⁵¹ following the incident to date the respondent State has continuously failed to provide the applicants with comprehensive and adequate legal redress and for this, it must be held responsible.

Violations of Article 13

IV.32. Article 13 provides:

“Everyone whose rights and freedoms as set forth in this 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.”

The applicants respectfully submit that following the incident at issue, they have been denied an effective and comprehensive remedy for the killing of their relatives, ill-treatment and the destruction of their home and possessions in that even though there was strong evidence that suggested Major Ivanov’s involvement, there was never a comprehensive investigation or a formal criminal indictment issued against him.

IV.33. The Court has held that Article 13 "guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this article is thus to require the provisions of a domestic remedy to allow the competent national authorities both to deal with the substance of the relevant complaint and to grant appropriate relief.”(Assenov and Others v. Bulgaria (90/1997/874/1086), Judgment of 28

⁵¹ See See Exhibit 7.

October 1998, para. 117; *Kaya v. Turkey*, (158/1996/777/978), Judgment of 19 February 1998; *Aksoy v. Turkey* (100/1995/606/694), Judgment of 18 December 1996, para. 95).

IV.34. In the Case of *Mentes and Others v. Turkey*⁵², the Court again reiterated that Article 13 guarantees the availability at a national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The Court stated that the remedy must be "effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State."⁵³ In *Mentes*, the applicants claimed they had been denied an effective remedy by which to challenge the destruction of their home and possessions purposely destroyed by agents of the State. The Court held that the provision of Article 13 imposes "without prejudice to any other remedy available under the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals."⁵⁴ The Court stated that where an individual has an arguable claim that his/her home and possessions were purposely destroyed, the notion of effective remedy calls for a thorough and effective investigative mechanism which leads to the prosecution and punishment of all those responsible. The Court in *Mentes* found that since the respondent State in that case failed to provide an effective and thorough mechanism, such facts indeed disclosed a violation of Article 13.

IV.35. In *Selcuk and Asker v. Turkey*,⁵⁵ the Court stated that "where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, the notion of an effective remedy entails, in addition to the payment of compensation where appropriate and without prejudice to any other remedy available in the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."⁵⁶

IV.36. Furthermore, in the case of *Selcuk*⁵⁷, the Court found it particularly striking that even though the applicants had clearly identified and named the officer who was involved in burning and destroying their homes, there was never an independent, effective and thorough investigative mechanism that lead to the prosecution and punishment of all those responsible for what had occurred. Apart from applicant

52 See Case of *Mentes and Others v. Turkey*, 58/1996/677/867

53 *Ibid*, para.89.

54 *Ibid*.

55 *Selcuk and Asker v. Turkey*, 12/1997/796/998-999.

56 *Ibid*, para. 96; See also *Mentes and Others v. Turkey*, 58/1996/677/867, p. 2715, § 89.

57 See *Selcuk and Asker v. Turkey*, 12/1997/796/998-999.

statements, the Court found that no attempt was made to establish the truth through questioning of other villagers who might have witnessed the events under consideration.

IV.37. For the purpose of demonstrating that the Ukrainian authorities have failed to carry out a "thorough and effective" investigation of the incident giving rise to this application the applicants refer to paragraphs II.7. – II. 31, supra.

IV.38. In the instant case, the applicants respectfully submit that they have been denied their right to an "effective remedy" under Article 13 for murder, ill-treatment, and the destruction of their home in that despite overwhelming evidence to suggest police involvement in the above violations, there has never been a comprehensive investigation or formal indictment of police official.

Violations of Article 14

IV.39. Article 14 enshrines the fundamental principle of non-discrimination as follows:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

IV.40. The applicants respectfully allege that the violations they suffered as a result of the brutal incident at issue, including the inadequate investigation and the absence of adequate and comprehensive redress, were predominantly due to their Romani ethnicity, and therefore inconsistent with the requirement of non-discrimination set forth in Article 14 taken together with Articles 3, 8, 1 Protocol I and 13 read in conjunction with Articles 3, 8, and Article 1 of Protocol I.

IV.41. In light of the facts of this case, it is evident that the harms the applicants suffered at the hands of attackers and Major Ivanov in this case were due primarily to their ethnicity. (See paras. II.2. – 2.4.)

IV.42. In numerous cases of alleged physical violence against Roma on the part of the police or private parties, the Ukrainian justice system has simply failed to respond. Roma complaints to investigative bodies often encounter indifference, neglect or hostility. Widespread allegations of discrimination against Roma in the criminal justice system have yet to be answered, let alone convincingly rebutted. In recent years international humanitarian agencies have documented a pattern of discriminatory treatment of Roma by Ukrainian criminal justice authorities.

IV.43. The applicants respectfully submit that their claim of discrimination should be evaluated within this context of well-documented and repeated failure by the Ukrainian authorities to remedy instances of anti-Roma violence and to provide redress for discrimination. (See Exhibit 21)

V STATEMENT RELATIVE TO ARTICLE 35 (1) OF THE CONVENTION

V.1. On 22 May 2002 the local counsel submitted a complaint with the prosecutor's office on behalf of Mr. Jurij Fedorchenko, Ms. Zoja Lozenko and 15-year-old Viktor Lozenko. In his submission, the local counsel pointed at severe deficiencies in the investigation, and asked that additional investigation be carried out.

V.2. On the same date, they met with Mr. Barashkov, Senior Investigator on the case, and applicants learned that on April 29, 2002, an indictment was issued by the Prosecutor's Office against Nazarenko Oleksiy Borisovich for manslaughter and destruction of property, pursuant to Articles 115 § 2 i.i.1, 2, 4, 5, 7, 12, 194 § 2 and 393 § 1 Ukrainian Criminal Code.⁵⁸ No mentioning was made as to the alleged involvement and/or participation of Major Ivanov in the arson attack. In addition, the indictment specified the material damages caused which amount to 18820 Hryvna (in USD?) and non-material damages equivalent to 600 times the minimal salary in Ukraine at the given time.

V.3. Following this, the local counsel submitted another written request to the Prosecutor's Office in Kremenchuk, urging the authorities to carry out a series of forensic examinations and to bring charges against Major Ivanov.⁵⁹ In his submission, the local counsel pointed out the inefficiency of the investigation and failure of the authorities to question witnesses, in particular the neighbors of the Fedorchenko family as well as the lack of forensic examinations.⁶⁰ In addition, the local counsel submitted that the investigation process as conducted so far, was in clear violation of Article 22 of the Ukrainian Criminal Procedure Code, which requires a thorough and effective investigation and moreover, such action violated the Articles 2, 3, 8, 13 and 14 of the European Convention on Human Rights.⁶¹

V.4. On June 1, 2002, the local counsel, together with the applicants, finally were permitted to examine the investigation file.⁶² He discovered that Police Major Ivanov's involvement in the arson attack was not at all being investigated by the authorities and no formal charges were being considered against him.

58 See Exhibit 7

59 See Exhibit 8

60 See supra, Para. 11

61 Ibid

62 Pursuant to Article 49 of Criminal Procedure Code, the victim or his relative can review the file only after the preliminary investigation is completed.

V.5. On the same date, the local counsel submitted a written request in which he urged Mr Barashkov, the investigator, to bring charges against Major Ivanov.⁶³

V.6. On June 28, 2002, he received a decision by Mr Barashkov in which he rejected the request to bring charges against Major Ivanov. Overlooking all the previous requests filed by the local counsel, the decision concluded that “[In] the course of investigation, [...] Major Ivanov’s involvement was not proved, [thus] the complaint of the victims can not be complied with.”⁶⁴

V.7. On July 15, 2002, the local counsel sent a letter to the General Prosecutor of Ukraine in which he urged him to annul the decision made by Barashkov rejecting the appeal of June 1st to bring charges against Major Ivanov.⁶⁵ The response from the General Prosecutor's office arrived on August 12, 2002, stating that the appeal was forwarded to Mr Savchenko, the deputy of the prosecutor of the Poltava Province for further examination.⁶⁶

V.8. On August 19, 2002, the counsel received a response from the prosecutor’s office of the Poltava Province flatly stating that the office examined the allegation and based on its findings and “thorough control” rejected the appeal.⁶⁷

V.9. In view of the above, the Ukrainian prosecuting authorities have failed to undertake any concrete steps with a view to identifying the police officer concerned. Under these circumstances, we respectfully submit that the applicant did everything possible to institute and expedite the criminal proceedings. At the same time, however, Ukrainian prosecuting authorities, have yet to provide the applicant with a remedy for the violations in question - even though they were/are still in possession of all relevant information regarding the instant case and under a strict legal obligation to do so. (See Exhibit 18)

V.10. The applicants have thus exhausted all available domestic legal remedies in the instant case.

V.11. As regards the six-month time limit, the applicant submits that the pre-application letter was filed with the Court on 26 November 2002 - within six months as of 1 June 2002, when he learned about the indictment decision which omitted Major Ivanov’s involvement. He subsequently filed several complaints with the Prosecutor’s Office to no avail. Despite the proceedings before the Court of Appeal of Poltava in

63 See Exhibit 12

64 See Exhibit 13

65 See Exhibit 14

66 Ibid

67 See Exhibit 15

October, November and December 2002, and their decision to send the case back for a thorough and effective investigation, the applicants hereby submit that so far they have no knowledge of any such investigation proceedings. Nevertheless, we shall keep the Court informed as information becomes available to us.

Finally, we respectfully submit that the applicant has complied with the six-month rule as set forth under Article 35 (1) of the Convention.

VI. STATEMENT OF THE OBJECT OF THE APPLICATION

The object of the application is to find the Ukrainian Government in breach of Article 2, Article 3, Article 8, Article 1 of Protocol 1, Article 13 read in conjunction with Articles 2,3, 8 and Article 1 of Protocol 1, Article 14 read together with Articles 2,3, 8, 1 of Protocol 1 and 13 of the European Convention on Human Rights, and for the applicants to obtain just compensation.

VII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

No complaint has been submitted under any other international procedure of investigation or settlement.

VII. LIST OF DOCUMENTS

Exhibit 1 – Letter from the applicants' attorney Vasily Didyichin to S.G. Mikhalylyk, Prosecutor of Kremenchuk, Poltava County.

Exhibit 2 – Record of interrogation of Major Ivanov.

Exhibit 3 – Statement of claim by Z.P. Lozenko and Y.I. Fedorchenko.

Exhibit 4 - Letter from Colonel V.V. Knish to Mrs N.D. Kashytsyna, Senior Investigator of Prosecutor's Office, 10 December 2001 on the Record of investigation by Lieutenant-Colonel M.G. Ilyashenko, 2 November 2001

Exhibit 5 – Transcript of statement given by Y.I. Fedorchenko on 4 March 2002

Exhibit 6 – Request to question witnesses by V.Didychn, 25 April 2002

Exhibit 7 – Decree of criminal charge against O.B. Nazarenko, 29 April 2002

Exhibit 8 – Request from Counsel V.P. Didychn to O.G. Myhajlyk, Prosecutor of Kremenchuk, 26 April 2002

Exhibit 9 – Request to bring charges against V.V. Ivanov by Counsel V.P. Didychn to S.V. Barashkov, 1 June 2002

Exhibit 9 – Request to bring charges against V.V. Ivanov, 1 June 2002

Exhibit 10 – Request to use audio recording between Y.I Fedorchenko and V.V. Ivanov, 1 June 2002

- Exhibit 11 – Record of confrontation between Y.I. Fedorchenko and V.V. Ivanov, 1 June 2002
- Exhibit 12 – Request to bring charges against V.V. Ivanov, filed after the confrontation. 1 June 2002
- Exhibit 13 – Covering letter with Decree of rejection of request to arrest V.V. Ivanov, 28 June 2002
- Exhibit 14 – Request of Didychin filed against the Decree of Rejection before the General Prosecutor’s office. 15 July 2002
- Exhibit 15 – Letter from O.O Gorbenko, Poltava County Prosecutor’s Office, rejecting the request to bring charges against Ivanov. 19 August 2002
- Exhibit 16 – Request to the Poltava County Court of Appeal, 2 December 2002
- Exhibit 17 – Note of court proceedings, 3 December 2002
- Exhibit 18 – Decree of Poltava County Court of Appeal, 11 December 2002
- Exhibit 19 – Relevant Domestic Legislation
- Exhibit 20 – Article from weekly newspaper Kremin’
- Exhibit 21 - ERRC findings concerning Roma rights abuse by the Ukrainian authorities. (In English)

VIII. PREFERRED LANGUAGE

English

DECLARATION AND SIGNATURE

The applicants hereby declare that, to the best of their knowledge and belief, the information given in the present application is true and correct.

Budapest, 29 June, 2003

European Roma Rights Center

By
Gloria Jean Garland
Legal Director

Vasily Didychin
Attorney at Law

Aladar Adam