



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

FIFTH SECTION
PARTIAL DECISION
AS TO THE ADMISSIBILITY OF

Application no. 74768/10
by Denis Vadimovich CHERNEGA and Others
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 5 April 2011 as a Chamber composed of:

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 17 December 2010,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Denis Vadimovich Chernega, born in 1982; Mr Andrey Andreyevich Yevarnitskiy, born in 1983; Mr Gennadiy Leonidovich Kovshyk, born in 1963; Mr Boris Yevgenyevich Zakharov, born in 1977; Mr Andrey Vladislavovich Yevarnitskiy, born in 1959; Mr Igor Fyodorovich Yasinskiy, born in 1957; Mrs Lyubov Vladimirovna Melnik, born in 1959; Mr Sergey Sergeyevich Melnik, born in 1983; Mr Andrey Viktorovich Tsukanov, born in 1969; Mr Valeriy Yuryevich

Bortnik, born in 1967 and Mr Sergey Anatolyevich Kirilin, born in 1962, are Ukrainian nationals who live in Kharkiv. They are represented before the Court by Messrs A.P. Bushchenko and M.A. Tarakhkalo, lawyers practising in Kharkiv.

A. The circumstances of the case

1. General background on the Gorky Park protests

On 19 May 2010 the Executive Committee of the Kharkiv City Council allowed the felling of 503 trees in Gorky Park (*Парк ім. Горького*) for the construction of a road, in accordance with the General Urban Development Plan adopted in 2004.

On the same day the Municipal Architecture Department (*Департамент будівництва та шляхового господарства Харківської міської ради*) entered into a contract with the private company P. for the construction works, to be completed before December 2010. P., in its turn, subcontracted the municipal company Kharkivzelenbud to do the tree-felling.

Also on that day the Kharkiv City Department of the Ministry of the Interior developed an action plan for ensuring public safety during the works. According to the plan, thirty-seven officers (including ten reservists) were assigned for ensuring public order and safety at the tree-felling site. It was mentioned in the plan that the tree-felling could potentially generate picketing, manifestations of protest, and other sudden actions by opponents of the construction project.

On 20 May 2010 the works commenced, attracting a number of individuals (including the applicants) who protested against the works. The protesters, *inter alia*, alleged that the felling was unjustified and not duly authorised and demanded proof of its legality. Some protesters actively attempted to interfere with the works. In particular, they climbed the trees with the help of climbing equipment and attached themselves to the trees to be felled; interfered with work of the machinery by placing their bodies in front of it; or attempted to pull the workers away from the trees.

Notwithstanding the protests, the loggers proceeded with their work. On some occasions the loggers and a large group of men dressed in black camouflage with Municipal Guard badges attempted to drive away the protesters, including by force. In some instances clashes took place, which resulted in injuries to the protesters. On at least fifteen occasions ambulances were called to the site and eventually at least nine people were hospitalised with various injuries.

The police officers deployed at the site allegedly paid little if any attention to the clashes and never interfered with the workers' or the guards' actions.

By 2 June 2010 the tree-felling works had been completed. However, some of the protesters continued to picket the site until about mid-August 2010.

2. Alleged assaults on some of the applicants

On 27 May 2010 the ninth applicant was allegedly assaulted and beaten by unidentified men in orange (road workers') jackets. An ambulance was called, he was hospitalised and certified as suffering from injuries to the soft tissues of the head and face.

On 31 May 2010 the seventh applicant was taken to hospital by ambulance, having allegedly been beaten up by the black-clothed men with Municipal Guard badges in response to her protests about the beating of another protester. According to her, the police officers situated nearby observed the beatings without reacting to her cries for help. In the hospital the seventh applicant was diagnosed as suffering from situational hypertension and soft tissue contusions in the lumbar area.

On 2 June 2010 the third applicant was allegedly closely approached by two workers, threatening a group of protesters with chainsaws, which were switched on. One of them nearly injured the third applicant, who had to flee for his life and limb.

On the same date the black-clothed men allegedly attempted to dissolve by force the protesters' tent camp located near the tree-felling site. During this operation they kicked the ninth applicant, who was therein, with their legs.

3. Arrests of and penalties imposed on some applicants for participating in the Gorky Park protests

(a) The 28 May 2010 arrests

On 28 May 2010 the first to fifth, the eighth, the tenth and the eleventh applicants were arrested and taken to the police station, where charges of malicious insubordination in the face of lawful demands of a police officer were drafted. According to these reports, the above applicants repeatedly refused to abide by the officers' instructions to leave the construction works site and resisted the officers' efforts to take them away by force, in particular by dragging their feet, attempting to break free and remaining at the site.

On various dates these reports were examined by the Dzerzhinsky District Court of Kharkiv. During the hearings, the applicants pleaded not guilty. They noted, in particular, that in the morning of 28 May 2010 they had been in Gorky Park along with some fifty to seventy other protesters to express their dissatisfaction with the tree-felling activities. The construction site had no boundary markers and they believed they were lawfully in a public open space. About 100 police officers were situated nearby, and they

never requested that the protesters leave the area. At about 7.30 a.m. a number of black-clothed men with Municipal Guard badges surrounded the protesters and started pressing them into a tight circle. Then the police officers approached them, and instead of responding to the protesters' cries for help, took some of the protesters, including the applicants, out of the crowd one by one and escorted them to the police station, without any demands or explanations. The applicants went with the police officers without offering any resistance.

On 8 June 2010 the eighth applicant was acquitted. The court noted, in particular, that his explanations were consistent with a private video recording of the events, submitted by him; that the police officers' accounts of the events, on the other hand, were inconsistent with each other and lacked precision, in particular, as to what the applicant's actions were which had led to the charges at issue.

On 9 June 2010 the court, having heard the police officers, who supported the charges, the applicants, and some witnesses, convicted the first and second applicants as charged and sentenced them to fifteen days' administrative detention. The decision was enforced immediately. On 18 June 2010 the Kharkiv Regional Court of Appeal heard the above applicants' appeals in their absence and reduced their sentences to nine days' detention. On the same day this decision became final and the above applicants were released.

On 14 June 2010 the court, having heard the police officers, who supported the charges, the applicants and some witnesses, convicted the third and fourth applicants as charged and sentenced them to fines of 136 and 170 Ukrainian hryvnias (UAH) respectively. On 27 July and 11 August 2010 respectively these decisions were upheld by the Kharkiv Regional Court of Appeal and became final.

On 23 June 2010, the court, having heard the police officers, the fifth applicant, and some witnesses, convicted the fifth applicant as charged and fined him UAH 170. On 27 July 2010 the Kharkiv Regional Court of Appeal quashed the conviction by its final decision, having found, in particular, that in the absence of any allegations that the police officers had resorted to any physical restraint or special means to break the fifth applicant's resistance, the delinquent element in his conduct had been so insignificant that an oral reprimand would have sufficed and the proceedings should be terminated.

On 12 July 2010 the tenth applicant was acquitted. In its ruling, the court referred, in particular, to inconsistencies between various police reports in the case file; lack of evidence that the area which the above applicant had allegedly refused to leave had been marked as the construction site, or that the officers had duly instructed him to leave.

(b) The 28 June 2010 arrest

On or around 28 June 2010 the eleventh applicant was allegedly arrested and subsequently convicted by the Dzerzhinsky District Court on charges of malicious insubordination in the face of the police officers' requests and sentenced to an unspecified sanction. The above applicant did not appeal against this decision and did not present to the Court any documents concerning his conviction.

(c) The 6 July 2010 arrest

On 6 July 2010 the sixth applicant was arrested and charged with malicious insubordination in the face of the police officers' requests that he leave the construction site.

On 7 July 2010 his case was heard by the Dzerzhinsky District Court of Kharkiv. At the hearing the police officers supported the charges. The sixth applicant, in his turn, acknowledged that he had been sitting on the ground in the tree-felling area, protesting against the works, which he considered unlawful, and that he had refused to comply with the police officers' requests to leave the site, to the point where they had had to drag him away by the arms with his legs dragging on the ground. He had further admitted that he had told the police officers that he would return to the site as soon as he could.

On the same day the Dzerzhinsky District Court convicted the sixth applicant as charged and sentenced him to ten days' administrative detention, which he served immediately.

On 15 September 2010 the Kharkiv Regional Court of Appeal upheld this decision.

4. Investigations into the Gorky Park events**(a) The Prosecutors' Office's investigation**

On various dates the protesters, including the applicants, complained to the law-enforcement authorities that they had been assaulted by unidentified loggers and black-clothed men with Municipal Guard badges and that the police officers stationed nearby had done nothing to protect them.

On 4 June 2010 the Kharkiv Regional Prosecutors' Office instructed the Kharkiv City Prosecutors' Office to investigate the situation.

On 11 June 2010, having conducted some inquiries, the Kharkiv City Prosecutors' Office found no grounds for institution of formal criminal proceedings.

On 14 June 2010 this decision was quashed by the City Prosecutor, who ordered a further inquiry.

Following a further inquiry, on 24 June 2010 the Kharkiv City Prosecutors' Office took a fresh decision not to institute any criminal proceedings. According to the relevant findings, P. and Kharkivzelenbud

had been duly qualified and had received all necessary permits for deployment of the tree-felling works before starting them. The road construction site had been delimited by a red and white tape and signs saying “No Entry: tree-felling works in progress”.

With respect to the complaints about the actions of the “black-clothed men”, the Prosecutors’ Office established that the municipal company Municipal Guard (*КП «Муниципальна охорона»*) and the private company O. had been subcontracted to guard the road construction site. The Municipal Guard company assigned six employees to the task, who wore badges. The employees of both companies wore civilian clothes. There was no evidence that any of the employees of either company had attacked, beaten or injured any of the protesters.

With respect to the complaints that the workers had threatened the protesters (including the third applicant) with chainsaws, the Prosecutors’ Office noted that these were Y.K. and Y.A., subcontracted by Kharkivzelenbud to clear the area after the tree felling. The protesters repeatedly interfered with Y.K.’s attempts to finish sawing through a tree trunk which had already been cut, and so could fall at any moment, hitting the people nearby. Consequently, he attempted to scare the protesters away by holding his saw out in front of him, but he did not hit or injure anyone. The Prosecutors’ Office further noted that, regard being had to the public safety motivation of Y.K. and his colleague Y.A., they could not be prosecuted for any offence.

In July 2010 the seventh applicant, represented by M.K., her lawyer, appealed against this decision to the Kharkiv Regional Prosecutor. She noted, in particular, that the inquiry had failed to identify or prosecute the black-clothed men responsible for assaulting, beating and injuring the protesters, including herself. It had also failed to make a comprehensive assessment of Y.K.’s and Y.A.’s actions, and, in particular, the fact that they had no proper permits to participate in the tree-felling on the date at issue. In addition, the Prosecutors’ Office had failed to investigate the complaints about unlawful tree-felling. In particular, one of the permits necessary for the works had been obtained by Kharkivzelenbud only on 26 May 2010, after the works had commenced. Moreover, seventy-three more trees had been felled than authorised by the decision of the Kharkiv City Council. Finally, the Prosecutors’ Office had not investigated the possible offence of infringement of safety rules in the course of hazardous activities. Referring to a video recording of the events, the seventh applicant alleged that there were no signs indicating restricted access in view, while there was boundary tape only in some places. Moreover, demarcation of the construction site with tape was in any event not in compliance with the applicable law, which required the placement of a solid fence.

On 4 August 2010 the Kharkiv Regional Prosecutors’ Office annulled the decision of 24 June 2010 and ordered a further inquiry.

On 9 August 2010 a further decision not to institute any criminal proceedings was taken. According to the applicants, notwithstanding their persistent efforts, they have not been able to gain access to the decision at issue to appeal against it.

(b) The ombudsman's investigation

On an unspecified date the Ukrainian Ombudsman Nina Karpachova initiated an inquiry into the Gorky Park protests and the events surrounding the construction of the road.

On 5 January 2011 her press service announced that the investigation of complaints about infringement of rights of access to environmental information and other human rights was still under way. It also noted that certain infringements of budgetary, construction, and public purchase provisions had already been uncovered.

5. Administrative proceedings concerning the police's failure to protect the applicants

In November 2010 a number of protesters, including all the applicants, lodged an action with the Kharkiv District Administrative Court, complaining that the police had failed to protect them against assaults by the loggers and Municipal Guard during their peaceful protest against the tree-felling, and in particular on 28 and 31 May and 1 and 2 June 2010.

These proceedings are currently pending before the first-instance court.

B. Relevant domestic law and other materials

1. Constitution of Ukraine

Article 39 of the Constitution of Ukraine, which is the relevant provision, reads as follows:

Article 39

Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government.

Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons.

2. *Code of Administrative Offences of Ukraine*

The relevant provision of the Code of Administrative Offences, as worded at the material time, reads as follows:

Article 185. Malicious insubordination in the face of a lawful order or demand by a police officer, a member of a public body for the protection of public order or the State border, or a military officer

“Malicious insubordination in the face of a lawful order or demand by a police officer who is carrying out his official duties...

Shall be punished by a fine of from eight to fifteen citizens’ minimum incomes below the income tax threshold, or correctional activity of from one to two months with a deduction of 20% of earnings; or, in the event that in the particular circumstances of the case and with regard to the offender’s character these measures are found to be insufficient, administrative detention of up to fifteen days.”

3. *A comment by Thomas Hammarberg, the Council of Europe Commissioner for Human Rights*

An excerpt from the Thomas Hammarberg comment “The Public has the right to know what those they elected are doing” (posted on 27 September 2010 in his blog)¹ referring to the Gorky Park protests, reads as follows:

“... The transparency of international, national and local administrations is a basis for their legitimacy and public trust. This was illustrated recently by the reports about human rights violations of people who protested against the destruction of a part of the old Gorky Park in the city of Kharkiv in Ukraine.

In that case the authorities had reportedly decided to cut down trees without properly consulting and informing the community, as required by law. This provoked incidents with protesters, resulting in injuries and the detention of activists. This situation could have been avoided if the local people had been properly informed about the plans of the authorities and involved in the decision-making process ...”

COMPLAINTS

1. The applicants complain under Article 3 of the Convention that they were subjected to ill-treatment by the loggers and the black-clothed men wearing Municipal Guard badges and that the police failed to protect them. They further complain that the investigation of their respective complaints was ineffective.

2. The first and the second applicants further complain under Article 6 § 1 of the Convention that they were unable to participate in the appeal hearings in the administrative cases against them, as they were serving their detention sentences at the material time;

1. http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=82

3. The first to sixth, eighth, tenth and eleventh applicants further allege under Articles 6 § 1 and 13 of the Convention that the courts hearing administrative cases against them lacked impartiality, because, since there was no requirement under the applicable law for a prosecutor to take part in this type of proceedings; the courts were *de facto* obliged to support the charges against these applicants;

4. The first to sixth, eighth, tenth and eleventh applicants further complain under Articles 7, 11 and 18 of the Convention that Article 185 of the Code of Administrative Offences lacked foreseeability;

5. The first to sixth, eighth, tenth and eleventh applicants next complain under Article 11 of the Convention that their arrests, convictions and sentences were not necessary in a democratic society;

6. Finally, all the applicants complain under Article 11 of the Convention about numerous assaults by loggers and individuals wearing Municipal Guard badges and failure of the police to protect them.

THE LAW

1. The third, the seventh and the ninth applicants complain that they were subjected to ill-treatment by the loggers and the black-clothed men wearing Municipal Guard badges and that the police failed to protect them. They further complain that the investigation of their respective complaints was ineffective. They rely on Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this part of the application to the respondent Government.

2. The first and the second applicants complain that they were unable to participate in the appeal hearings in the administrative cases against them, as they were serving their detention sentences at the material time. They refer to Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this part of the application to the respondent Government.

3. The first to sixth applicants complain that their arrests, convictions and sentences were not necessary in a democratic society within the meaning of Article 11 of the Convention. All applicants also complain under the same provision about having been assaulted by loggers and individuals wearing Municipal Guard badges and failure of the police to protect them. The relevant provision of the Convention reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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 ...”

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this part of the application to the respondent Government.

4. The Court has examined the remainder of the applicants’ complaints under Articles 3, 6 § 1, 7, 11, 13 and 18 and considers that, in the light of all the materials 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.

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

For these reasons, the Court unanimously

Decides to adjourn the examination of the third, seventh and ninth applicants’ complaints under Article 3 of the Convention; the first and second applicants’ complaints under Article 6 § 1 of the Convention concerning their absence at an appeal hearing, the first to the sixth applicants’ complaints under Article 11 of the Convention about having been prosecuted for their participation in the protests and the applicants complaint under Article 11 of the Convention concerning assaults and police’s inaction;

Declares the remainder of the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President