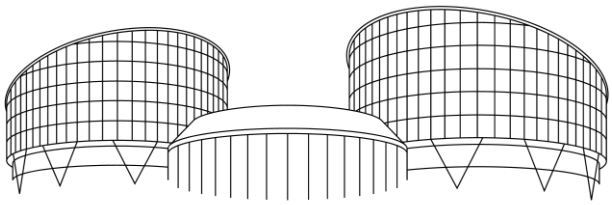

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FEDORCHENKO AND LOZENKO v. UKRAINE

(Application no. 387/03)

JUDGMENT

STRASBOURG

20 September 2012

FINAL

20/12/2012

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

In the case of Fedorchenko and Lozenko v. Ukraine,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 10 July2012,

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

PROCEDURE

1. The case originated in an application (no. 387/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Ukrainian nationals, Mr Yuriy Fedorchenko and Ms Zoya Lozenko ("the applicants"), on 28 November 2002.

2. The applicants were represented by the European Roma Rights Center, Budapest, Hungary. The Ukrainian Government ("the Government") were represented by their former Agent, Mr Y. Zaytsev, from the Ministry of Justice of Ukraine.

3. On 22 September 2008 the President of the Fifth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1951 and 1954 and live in the towns of Novi Sanzghary and Zolotnosha, Ukraine.

5. According to the first applicant, between 8 and 8:30 a.m. on 28 October 2001, as he was leaving his house, he came face to face with Police Major I. and two strangers. They threatened him and then hit him and pushed him inside the house. The attackers then set the house on fire and left, barring the door.

6. The house exploded and the first applicant was projected outside, while other members of his family, who were asleep, remained inside.

7. Later the same day the first applicant and four other members of the applicants' family, 21-year-old Z.F. (the second applicant's daughter), 6-year-old S.F. (the applicants' granddaughter), 3-year-old M.F. (the applicants' grandson) and 15-year-old T.L., were admitted to hospital with burns and gas intoxication. Z.F., S.F. and M. F. died in hospital.

8. Two other members of the applicants' family were found dead in the house: 25-year-old V.F. (the first applicant's son) and 6-year-old Y.F. (the applicants' grandson).

9. The first applicant informed the police that the fire had been caused by an arson attack carried out by Major I. from the Kryukov police department. He believed that it was a punishment attack for failure to pay a monthly bribe of 200 Ukrainian hryvnias (UAH) claimed by the police. Major I. had allegedly visited the first applicant's house before and allegedly extorted money from the applicants' relative, Z.F., in payment for not instituting criminal proceedings against her for drug trafficking. In that connection Major I. had allegedly already been bribed with UAH 800. The first applicant also maintained that Major I. had previously threatened to set his house on fire.

10. According to an article in the local newspaper, "police officers burned alive a Gypsy family since they had refused to pay a usual share from selling drugs". A local prosecutor said that in one of the burned houses they used to sell drugs. He also said that the version of "police drug lords' complicity" in the crime was being checked. A neighbour testified that the applicants' family was a poor one and that Z.F. had been selling heroin (*шшрку*) for a couple of months but then she had been beaten by police officers "for she was inexperienced". The first applicant said that Major I. had threatened to burn them alive since they had failed to pay UAH 200 in monthly bribes.

The newspaper article also contained the following passages:

> "Several dozens Gypsies, who came to the victims' funeral, told the journalists: "Yes, there exists fascism in respect of Gypsies in Ukraine, their ethnic minority rights are being breached"
>
> [...]
>
> "Very often it is mentioned in the police reports that drugs are sold by "persons of Gypsy ethnicity", while Ukrainians also sell drugs"

11. On 28 October 2001 the Kremenchug District Prosecutor instituted criminal proceedings for the murder of V.F. and Y.F. On 6 November 2001 the Poltava Regional Prosecutor's Office instituted criminal proceedings for the arson attack on the first applicant's house. These two cases were later joined.

12. The Poltava Regional Police Department (*Управління Міністерства внутрішніх справ України в Полтавській області*) conducted an internal inquiry into the allegations of Major I.'s involvement in the arson attack on the first applicant's house. During the inquiry, the first applicant again stated that Major I. had extorted 200 UAH from the first applicant's daughter-in-law for not prosecuting her for selling drugs. The inquiry further established that at 9 a.m. on 28 October 2001 Major I. left home with his wife. On their way they met their neighbours. However, the written explanations given by Major I. and his wife stated that they had left the house at 8.20 a.m. Later Major I. was seen with his wife at the markets in town, where they talked to furniture and clothes retailers and to a couple named Su. At 1 p.m. Major I. returned home. It was also found that on 4 October 2001 Major I. had arrested Z.F., who was later released, and on 20 October 2001 he had searched the first applicant's house.

13. In particular, in his explanations given on an unidentified date, Major I. stated that "it was likely that I knew by sight the inhabitants of the house on Shkolnaya street, but I did not know their names. I've seen there all Gypsies and know that they sell drugs there. But it is difficult to catch Gypsies..."

14. It was concluded that these circumstances, as well as "the first applicant's head injuries sustained as a result of the explosions" could have been the reason why the first applicant slandered Major I. On 10 December 2001 the conclusion reached in the inquiry, namely that Major I. had not been involved in the arson attack on the first applicant's house, was sent to the Poltava Regional Prosecutor's Office.

15. On 14 November 2001 a certain N., who was suspected of burning down the first applicant's house, was charged with murder and destruction of property.

16. On various dates further criminal proceedings were instituted against at least six individuals for three counts of arson and murder, which took place on 28 October 2001. In April 2002 the cases against these individuals were separated from the case against N., since the former were all missing.

17. In May 2002 the applicants' representative requested the prosecutor to question (i) the doctors who had been providing first aid to the victims, (ii) the applicants' neighbour, who had allegedly been told by police not to testify, and (iii) Major I.'s former wife, who had allegedly seen his car.

18. On 1 June 2002 the applicants' lawyer requested the investigator to establish criminal responsibility on the part of Major I. for the arson attack.

19. On the same day a face-to-face cross-examination was held between the first applicant and Major I. The applicant gave his account of events and described the clothes Major I. had been wearing on the morning of the arson attack. Major I. denied all the accusations.

20. The same day the prosecutor rejected the applicants' request for Major I. to be prosecuted for the arson attack, on the basis of Major

I.'s contentions, the conclusions of the internal inquiry and the existence of other accused who did not confirm the involvement of Major I. in the attack. In particular, D. testified that in the morning of 28 October 2001 he had driven three people to the first applicant's house, and that Major I. had not been among them.

21. In July 2002 the criminal case against N. was submitted to the court.

22. On 11 December 2002 the Poltava Regional Court of Appeal, acting as a court of first instance, considered the criminal case against N. and G., and remitted it for further investigation. In particular, the court noted that a certain X. "had planned to destroy and damage by way of arson three houses in which lived persons of Gypsy ethnicity". N. and G. were accused of acting on the orders of X. together with seven other people. The court indicated numerous shortcomings in the investigation. In particular, G.'s complaints that he had been ill-treated by police with the aim of extracting a confession from him had to be checked; it was not established who had taken part in the arson attack and what each person's role was; others allegedly involved in arson attacks were wanted, but nothing had been done to search for them. The court noted in particular that the investigation should check Major I.'s alibi and establish why and on what grounds, when arresting Z.F. and searching the first applicant's house, he had been working outside his area of territorial jurisdiction. The applicants also testified in a court hearing that Major I. had threatened them with reprisal. The court, however, did not specify in its decision what the reason for the alleged reprisal was. The court noted that Major I. himself admitted that he had visited the first applicant's house several times in 2001. The first applicant was also not informed about the decision not to institute criminal proceedings against Major I. The documents from the internal investigation were not joined to the criminal case file and the applicants' representative's request of May 2002 was not answered. The court noted that Major I.'s former wife, the ambulance doctors, the firemen and the first applicant's neighbours should be questioned. Finally, the court indicated a large number of various investigative actions which were to be performed by investigation authorities.

23. According to the applicants, in a court hearing N. said: "We had to put those [...] Gypsies in their place. The police should do this!"

24. On 6 March 2003 the Supreme Court of Ukraine upheld the decision of 11 December 2002. It has, however, decided that it was not necessary to carry out the reconstruction of events as indicated by the Court of Appeal.

25. On 16 June 2003 the Kremenchug Prosecutor's Office refused to institute criminal proceedings against Major I. It was held, without any particular specifications, that further checks had been performed and it had been established that Major I. had not been involved in the arson attack.

26. On 10 July 2004 the criminal proceedings were stayed, because other perpetrators could not be found.

27. On 23 September 2004 the criminal proceedings in respect of N. were resumed.

28. On 21 January 2005 the Kremenchug Court found N. guilty of wilful destruction of property which caused significant pecuniary damage and sentenced him to five years' imprisonment, suspended, with two years' probation. The court found that N., No. and S. had arrived at the first applicant's house in order to "destroy the houses of persons of Gypsy ethnicity who sell drugs". N. chased people out of the house while No. and S. did not wait until everybody was out before setting the house on fire. N. testified in a court hearing that his aim had been to destroy the house of drug traffickers. His task was to evict the people from the house, but his accomplices did not wait for him, and had set the house on fire with people inside, including him. The court found that N. had been "in some way" dependent on No. and S., and had acted as their accomplice. His story was confirmed by various evidence, in particular, he had received burns and spent some time in hospital afterwards. The court awarded the first applicant UAH 13,820 for destruction of property and entirely rejected the applicants' civil claim for damages caused by the death of their relatives and by the injuries sustained by the first applicant, on the ground that these had not been caused as a result of the actions or intentions of N.

29. The prosecutor and the applicants appealed, claiming that N.'s sentence was too lenient. In their appeal the applicants noted that the first-instance court had not assessed the evidence of the first applicant and one other survivor of the arson attack, who had witnessed the involvement of Police Major I. in the attack. They also noted that according to N. and G.'s testimonies the arsons had been planned and organised well ahead since the inflammable mixture had been bought and several cars had been sent to set on fire houses of persons of Romani ethnicity.

30. On 20 May 2005 the Poltava Regional Court of Appeal quashed the judgment of 21 January 2005 due to procedural defects of the trial in the first-instance court.

31. On 22 June 2005 the criminal proceedings against N. were terminated because of his death.

32. On 4 December 2008 the decision of 10 July 2004 to stay the proceedings was quashed by a prosecutor. No further information about the proceedings in the case is available.

II. RELEVANT INTERNATIONAL DOCUMENTATION

Second report on Ukraine by the European Commission against Racism and Intolerance (ECRI) adopted on 14 December 2001

33. The relevant extracts from the report read as follows:

"56. As is the case in some European countries, the Roma/Gypsy population of Ukraine is faced with situations of severe socio-economic disadvantage, but also with manifestations of prejudice, discrimination and violence on the part of the majority population and sometimes on the part of the authorities, particularly law enforcement officials. ECRI expresses concern at this situation and considers that policies are urgently needed to address the position of the Roma/Gypsy communities in Ukraine in order to ensure that the members of these communities enjoy in practice the same rights as the rest of the population of Ukraine. ECRI believes that the first necessary step towards developing an appropriate response to the problems faced by the Roma/Gypsy population of Ukraine is the recognition on the part of the authorities that such problems exist and that they need to be addressed [...].

58. Another priority area for action identified by ECRI is the behaviour of the law enforcement officials vis-à-vis members of the Roma/Gypsy communities. In this respect, ECRI notes with concern frequent reports of excessive use of force, ill-treatment, verbal abuse and destruction of property by law enforcement personnel. Discriminatory practices are also reported to be widespread and include arbitrary checks, unwarranted searches, confiscation of documents and, as noted in ECRI's first report, discriminatory enforcement of crime prevention policies targeting persons with criminal records. ECRI urges that action be taken to address manifestations of unlawful behaviour on the part of law enforcement officials generally, including through a more effective institutional response to such manifestations and through training and awareness raising measures. In addition, noting reports that the response of the police to crimes committed by the general population against Roma/Gypsies is often inadequate, ECRI recommends that the Ukrainian authorities take measures to ensure that the police react promptly and effectively to all crimes, including those committed against Roma/Gypsies and, in line with its recommendations formulated above, to ensure that the racist element of such offences is duly taken into account."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

34. The applicants complained that their relatives had died as a result of an arson attack with the direct involvement of a State agent, Police Major I.

They further complained that the State authorities had failed to conduct a thorough and effective investigation into the circumstances of the death of their relatives and of Major I.'s involvement in the arson attack. They relied on Article 2, which provides, in so far as relevant, as follows:

"1. Everyone's right to life shall be protected by law. ... "

A. Admissibility

35. The Government argued that the applicants had failed to challenge the refusal of 16 June 2003 of the prosecutor to institute criminal proceedings against Major I. with the higher prosecutor or the court.

Therefore, they did not exhaust effective domestic remedies in respect to their complaints under Article 2 of the Convention.

36. The applicants disagreed, pointing out that there was no evidence that the State authorities, having twice rejected the applicants' claims, would reach a different conclusion if faced with another complaint. The applicants noted that Article 35 of the Convention must be applied with some degree of flexibility and without excessive formalism (see *Kucheruk v. Ukraine*, no. 2570/04, § 109, 6 September 2007). They indicated that they had done everything possible in the circumstances, had provided evidence to the police, and had lodged complaints and appeals, although, according to the applicants, all they had to do was bring the case to the attention of the competent authorities. The applicant noted that in the case of *Assenov and Others v. Bulgaria* (28 October 1998, § 86, *Reports of Judgments and Decisions* 1998-VIII) the Court had found that "the applicants made numerous appeals to the prosecuting authorities at all levels, requesting that a full criminal investigation of Mr Assenov's allegations of ill-treatment by the police be carried out" and considered that, "having exhausted all the possibilities available to him... the applicant was not required... to embark on another attempt to obtain redress". Thus, the applicants concluded that they had exhausted all available domestic remedies.

37. The Court notes that the Government's objection is closely linked to the applicants' complaint under the procedural limb of Article 2 of the Convention. In these circumstances, it joins the objection to the merits of the applicants' complaint (see, *mutatis mutandis*, *Lotarev v. Ukraine*, no. 29447/04, § 74, 8 April 2010).

38. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Procedural obligations under Article 2 of the Convention

(a) The parties' submissions

39. The applicants noted that the investigation following the arson attack on the first applicant's house suffered from a number of crucial omissions which made it ineffective. The conclusion that Major I. was not involved in the arson attack was reached without interviewing key eyewitnesses. According to the applicants, the first applicant was questioned by investigating officers only a month after the events in question and because he went to the investigator on his own initiative, without being summoned. The applicants also underlined that the national authorities, and in particular the Poltava Regional Court of Appeal in its decision of 11 December 2002,

pointed out numerous shortcomings in the investigation and remitted the case for additional investigation. The applicants concluded that the authorities had not complied with their procedural obligation under Article 2 of the Convention.

40. The Government noted that both the police internal investigation and the prosecutor's office had established that Major I. had not been involved in the arson attack. The Government further stated that the circumstances of the incident had been clarified and those responsible for the arson attack had been identified. Numerous and various procedural actions had been taken, including four reconstructions of the incident, four searches, eleven identification parades, sixty-three interviews, one confrontation (between the first applicant and Major I.), and seventeen forensic examinations. The applicants' complaints that Major I. had been involved in the incident were properly checked and the national authorities did all which is necessary to find those responsible for the arson attack.

(b) The Court's assessment

i. General principles

41. The Court reiterates that Article 2 of the Convention imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also requires by implication that there should be an effective official investigation when individuals have been killed. The duty to conduct such an investigation arises in all cases of killing and other suspicious death, whether the perpetrators are private persons or State agents, or are unknown (see *Angelova and Iliev v. Bulgaria*, no. 55523/00, § 94, 26 July 2007, and *Rantsev v. Cyprus and Russia*, no. 25965/04, § 232, ECHR 2010 (extracts)).

42. The investigation must be effective in the sense that it is capable of leading to the establishment of the relevant facts and the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure all the evidence concerning the incident. The investigation's conclusions must be based on thorough, objective and impartial analysis of all the relevant elements. Furthermore, the requirements of Article 2 of the Convention go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of

the required measure of effectiveness. The national courts should not under any circumstances be prepared to allow life-threatening offences to go unpunished (see, *mutatis mutandis*, *Mojsiejew v. Poland*, no. 11818/02, § 53, 24 March 2009, and *Esat Bayram v. Turkey*, no. 75535/01, § 47, 26 May 2009).

43. For an investigation to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also independence in practice. The effective investigation required under Article 2 serves to maintain public confidence in the authorities' maintenance of the rule of law, to prevent any appearance of collusion in or tolerance of unlawful acts and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see, for example, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 321-322, ECHR 2007-II; *Khaindrava and Dzamashvili v. Georgia*, no. 18183/05, §§ 59-61, 8 June 2010; *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 222-225, ECHR 2004-III; and *Güleç v. Turkey*, 27 July 1998, § 82, *Reports of Judgments and Decisions* 1998-IV).

ii. Application of these principles in the present case

44. The Court notes that in the present case, despite the heinous nature of the incident, in which small children were burned alive, it appears that State authorities limited the investigation to some basic procedural steps.

45. In particular, despite the Government's reference to a number of procedural actions performed during the investigation of the criminal case, in the absence of the case-file materials it is unclear what exactly was examined, who was questioned during the investigation and when these actions were taken. In its decision of 11 December 2002 the Poltava Regional Court of Appeal indicated numerous shortcomings of the investigation, and noted numerous procedural actions which had to be performed. That was confirmed by the Supreme Court of Ukraine. From the materials submitted by the Government it is unclear whether these recommendations had been taken into consideration and complied with by the investigation authorities.

46. The Court also notes that since 2004 none of the at least six suspects of involvement in the arson attack on the first applicant's house and other houses on 28 October 2001 have been found, and notes that there is no evidence that anything was done to find them.

47. As for the investigation of Major I.'s possible involvement in the arson attack, the Court also notes that it appears from the available materials that the prosecutor's office simply referred to the conclusion of the police

internal investigation. Although it was stated in the decision of 16 June 2003 that "further checks had been performed" there is no evidence what exactly had been done.

48. The Court accepts that not every investigation is necessarily successful or comes to a conclusion coinciding with the claimant's account of events. However, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

49. The foregoing considerations are sufficient to enable the Court to conclude that the investigation of the applicants' relatives' deaths had not been effective. It accordingly dismisses the Government's objection (see paragraph 37).

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

2. The alleged violation of the right to life of the applicants' relatives

50. The applicants stated that the deaths of their relatives had been caused by a violent arson attack, organised and carried out with the participation of a State agent.

51. The Government stated that it had been established by an internal police investigation and by the prosecutor on 16 June 2003 that Major I. had not been involved in the arson attack.

52. The Court reiterates that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention. In the light of the importance of the protection afforded by Article 2, the Court must subject complaints about deprivation of life to the most careful scrutiny, taking into consideration all relevant circumstances.

53. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny, even if certain domestic proceedings and investigations have already taken place (see *Aktaş v. Turkey*, no. 24351/94, § 271, ECHR 2003-V (extracts), with further references).

54. The Court notes that in the present case it is undisputed that Major I. knew the applicants, had been to the first applicant's house and had been

involved in some police operations against one of the applicants' relatives, though it appears that in doing that he had been acting outside his jurisdiction. The question to be answered is whether the applicants slandered Major I. in accusing him of involvement in the police operations, or whether Major I. had indeed been involved in the arson attack.

55. The Court first notes that there is no convincing evidence that Major I. had an alibi for the morning of 28 October 2001. For example, the time Major I. allegedly left for the markets in the morning has not been precisely established and is not corroborated by other witnesses (such as Major I.'s neighbours).

56. Further on, the first applicant stated that he had recognised Major I. among the arsonists. The applicants further suggested that several witnesses (a neighbour, Major I.'s former wife) could have seen Major I. on the morning of the tragic event near the first applicant's house. However, the Court does not have any other evidence, except for the applicants' statements, that Major I. had indeed participated in the events in question, as it appears that these witnesses were not questioned. Although the first applicant described the clothes which Major I. had been allegedly wearing in the morning of 28 October 2001, the investigation authorities did not check this with other possible witnesses.

57. Therefore, in the absence of other evidence, and given the above conclusion that there was no effective investigation in the present case, the Court cannot draw a conclusion beyond reasonable doubt as to whether Major I. was or was not involved in the arson attack which caused the deaths of the applicants' relatives, and if he was, in what capacity that was.

It is not, therefore, possible to conclude that there has been a violation of the substantive limb of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 2 OF THE CONVENTION UNDER ITS PROCEDURAL LIMB

58. The applicants further invoked Article 14 taken in conjunction with Article 2 of the Convention under its procedural limb. Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] 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."

A. Admissibility

59. The Court notes that this complaint is linked to the one examined above (see paragraphs 35-38) and must therefore likewise be declared admissible.

B. Merits

60. The applicants noted that they had offered evidence of racist motive in the crime. In this case there exists an explicit obligation to investigate possible racist overtones in the events in question (see *Šečić v. Croatia*, no. 40116/02, §§ 66-70, 31 May 2007). Despite the information available to the authorities that several houses, in which the Romani lived, had been set on fire during the same day, and the express racist statement of one of the accused, there was no evidence that the authorities had carried out any examination into allegations that there had been a crime motivated by ethnic hatred.

61. The Government submitted that Article 14 of the Convention applied only when the alleged violation had been committed by the State agents. However, in the present case there were private persons charged with a crime. The Government therefore contended that there has been no violation of Article 14 of the Convention in the present case.

62. The Court recalls firstly that, according to its established case-law, discrimination means treating differently, without any objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-....).

63. The Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those texts. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter (see *Koppi v. Austria*, no. 33001/03, § 25, 10 December 2009).

64. The Court further reiterates that in respect of cases of deprivation of life, States have a general obligation under Article 2 of the Convention to conduct an effective investigation including cases which involve acts of private individuals (see *Muravskaya v. Ukraine*, no. 249/03, §§ 41-50, 13 November 2008), and that obligation must be discharged without discrimination, as required by Article 14 of the Convention.

65. In particular, when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII; *mutatis mutandis*, *Šečić v. Croatia*, cited above, § 67).

66. Admittedly, proving racist motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and is not absolute; the authorities must do what is reasonable in the circumstances of the case (see *Nachova and Others*, cited above, § 160, ECHR 2005-...).

67. In the instant case the Court has already found that the Ukrainian authorities violated Article 2 of the Convention in that they failed to conduct an effective investigation into the incident. It considers that it must examine separately under Article 14 of the Convention taken in conjunction with Article 2 of the Convention under its procedural limb the complaint that there was also a failure to investigate a possible causal link between alleged racist attitudes and the attack on the applicants' relatives.

68. In this respect the Court observes that on 28 October 2001 three houses, in which lived people of Romani origin, were set on fire. The alleged motive of the arsonists was destruction of houses of drug dealers. However, any information as for whether the inhabitants of two other houses were involved in drug trafficking is absent. Moreover, given the widespread discrimination and violence against Roma in Ukraine as noted, in particular, by the report of the ECRI, it cannot be excluded that the decision to burn the houses of the alleged drug traffickers had been additionally nourished by ethnic hatred and thus it necessitated verification.

69. The Court, however, notes that there is no evidence that the authorities have conducted any investigation into the possible racist motives of this crime.

70. The Court considers it unacceptable that in such circumstances an investigation, lasting over eleven years, did not give rise to any serious action with a view to identifying or prosecuting the perpetrators.

71. Consequently, the Court considers that there has been a violation of Article 14 taken in conjunction with the procedural aspect of Article 2 of the Convention.

III. REMAINING COMPLAINTS

72. The applicants complained that they and their deceased relatives had been subjected to inhuman and degrading treatment, and that there had been no effective investigation of their complaints, in breach of Article 3 of the Convention. They further cited Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1. The applicants further alleged that the violations they had suffered as a result of the brutal incident at issue had been predominately due to their Romani ethnicity. They therefore considered that there had been a violation of Article 14 taken in conjunction with the above Articles and with Article 2 of the Convention under its substantive limb.

73. The Court notes that these complaints are linked to the ones examined above and must therefore likewise be declared admissible.

74. Having regard to the findings relating to Articles 2 and 14 (see paragraphs 44-49, 54-57 and 67-71 above), the Court considers that it is not necessary to examine separately whether, in this case, there has been a violation of these other provisions of the Convention (see *Koky and Others v. Slovakia*, no. 13624/03, §§ 241-244, 12 June 2012; among other authorities in respect of Article 13 of the Convention, *Timur v. Turkey*, no. 29100/03, §§ 35-40, 26 June 2007).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The second applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage inflicted on her by the deaths of her relatives, damage caused to the health of her son, and improper investigation of these events. The first applicant made no claims in this respect.

77. The Government stated that "the questions put to the Government in this case as regards the applicants' complaints of a violation of Article 3 of the Convention had no connection with those complaints by the second applicant". The Government therefore considered that the second applicant's claims should be rejected.

78. The Court considers that the second applicant must have sustained non-pecuniary damage and, deciding on an equitable basis, awards her EUR 20,000 in this respect.

B. Costs and expenses

79. The applicants also claimed EUR 9,075 for costs and expenses incurred before the Court. The applicants' representative submitted the time-sheet that between 2002 and 2009 the lawyers of the European Roma Rights Centre had spent 121 hours on the case at a rate EUR 75 per hour.

80. The Government submitted that these claims were unsubstantiated.

81. 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 information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,000 for the proceedings before the Court. This amount is to be paid into the bank account of the European Roma Rights Centre.

C. Default interest

82. 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. *Declares* the application admissible;

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

3. *Holds* that there has been no violation of the substantive limb of Article 2 of the Convention;

4. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 in respect of its procedural limb;

5. *Holds* that there is no need to examine separately the remainder of the complaints;

6. *Holds*

   (a) that the respondent State is to pay the second applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary

damage, to be converted into Ukrainian hryvnas at the rate applicable at the date of settlement;

(b) that the respondent State is to pay to the bank account of the European Roma Rights Centre, the applicants' representative in the proceedings before the Court, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in costs and expenses plus any tax that may be chargeable to the applicants;

(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;

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

Done in English, and notified in writing on 20 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Dean Spielmann
Deputy Registrar	President