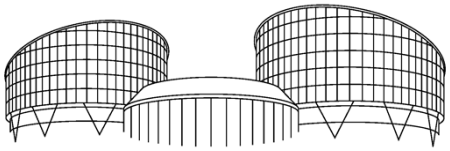

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF OKSUZOGLU v. UKRAINE

(Application no. 56669/18)

JUDGMENT

STRASBOURG

31 August 2023

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Oksuzoglu v. Ukraine,

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

Lado Chanturia*, President*,
Stéphanie Mourou-Vikström,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 56669/18) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 10 November 2018 by a Ukrainian national, Ms Anna Leonidivna Oksuzoglu ("the applicant"), who was born in 1983 and lives in London, and was represented initially by Mr M. Halabala and subsequently by Mr Y. Chekarov, Ms A. Kozmenko and Mr M. Tarakhkalo, lawyers practising in Kyiv;

the decision to give notice of the applicant's complaints under Articles 2 and 8 of the Convention concerning the kidnapping of her son to the Ukrainian Government ("the Government"), represented by their Acting Agent, most recently Ms O. Davydchuk, of the Ministry of Justice, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 6 July 2023,

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

SUBJECT MATTER OF THE CASE

1. The present case concerns the kidnapping of the applicant's son, born in 2010 in Djibouti, by two unknown individuals in the presence of the child's grandmother on 9 April 2015 in Brovary, where he had been living with his mother and separately from his father (A.) since March 2012, and the allegedly ineffective official investigation into that incident. The applicant complained of a violation of Articles 2 and 8 of the Convention.

2. Following an application lodged by the applicant, an official investigation into the kidnapping was launched by the Ukrainian authorities on 9 April 2015. On the same day the investigators inspected the scene of the incident, collected certain material evidence and questioned the applicant, her mother and their neighbours. Initially the investigators pursued three main working hypotheses: (i) that the applicant's son had been kidnapped for ransom; (ii) that the child had been abducted by A.; or (iii) that he had been abducted at A.'s request. From November 2016 the investigation apparently pursued mainly the latter hypothesis. The child's whereabouts remain unknown.

3. When questioned by the investigators the applicant asserted that A., who lived in Djibouti and had previously made a number of unsuccessful

attempts to regain custody of their child by initiating civil and criminal proceedings in Ukraine, had been responsible for the kidnapping. The applicant's mother, who had witnessed the incident, made similar statements. In that connection, the applicant also referred to a complaint she had lodged with the Vyshhorod district prosecutor on 6 November 2012 alleging in general terms that A. had ill-treated her when they had lived together in Djibouti in 2010 and that A. had threatened her with taking the child from her after they had separated in 2011. In that complaint, she expressed concern that A. might come to Ukraine to "take physical and moral revenge" on her and to kidnap the child and she had asked the prosecutor to inform her in the event that A. crossed the Ukrainian border.

4. In the course of the investigation, the applicant, represented by a lawyer, repeatedly requested the investigators to perform specific investigative actions; most of her requests were ignored or dismissed. She also challenged the investigators' actions and inactivity before the courts. On various dates between May 2016 and February 2018 the authorities officially acknowledged that the investigation had been conducted ineffectively, in violation of the relevant procedural requirements. In particular, the investigators had failed to find out whether the child or A. had crossed the Ukrainian border after the kidnapping; to warn the State border control that the child might be taken outside Ukraine; to establish A.'s whereabouts and to question him; to create facial composites of the kidnappers; to find and question the owner of the car which had been used by the kidnappers; to establish the route which the car took on the day of the incident; and to conduct a number of other specific investigative actions ordered by their superiors. In addition, there were lengthy periods of time when no investigative actions were performed at all. On an unspecified date in 2020 one of the investigators was disciplined in that connection.

THE COURT'S ASSESSMENT

5. The applicant complained under Articles 2 and 8 of the Convention that the Ukrainian authorities had failed to prevent her son's kidnapping, to establish his whereabouts following the kidnapping and to investigate that incident effectively.

6. The Government contended that the authorities had not been informed of any risk to the applicant's son's life or health prior to the kidnapping. Subsequently, the kidnapping of the applicant's son had been the subject of the ongoing official investigation, which had faced serious obstacles linked to the fact that the person whom the applicant had suspected of being implicated in the events (see paragraph 3 above) had been out of the reach of the Ukrainian authorities and that there had been no legal instruments to ensure that he was questioned – Ukraine had no relevant bilateral treaties with the Republic of Djibouti and it was not a party to the Hague Convention of

25 October 1980 on the Civil Aspects of International Child Abduction. Furthermore, the applicant and her lawyer had been given the opportunity to actively participate in the investigation, their procedural applications had been duly examined and some had been granted, including, for instance, their application to have an investigator disciplined.

7. The Court notes that it has not been demonstrated that either prior to or after the applicant's son's kidnapping there existed a real and immediate risk to his life. In particular, the applicant's complaints at the domestic level concerned alleged threats of physical harm directed solely towards her. As regards her child, she alleged that there was a risk that his father might take him from her. While in her domestic complaints she pointed to unspecified instances of domestic violence committed by the child's father against her while they had lived in Djibouti, no allegation that the child was the subject of any aggression or abuse was raised (see paragraph 3 above). Although at the initial stage of the investigation at issue the investigators did not exclude that the child might have been kidnapped for ransom, no relevant demands or threats were ever received by the applicant or the authorities (contrast *Olewnik-Cieplińska and Olewnik v. Poland*, no. 20147/15, §§ 122-24, 5 September 2019). In their submissions to the domestic authorities, the applicant and her mother asserted that the child had been kidnapped in order to be taken to his father, A. (see paragraph 3 above). Thus, even though the kidnapping of the applicant's five-year-old son by two unknown individuals may in itself be regarded as potentially life-threatening, in the present case there is no sufficient basis to hold that Article 2 of the Convention is applicable (contrast, for instance, *Olewnik-Cieplińska and Olewnik*, cited above, and *Medova v. Russia*, no. 25385/04, §§ 89-90, 15 January 2009). Accordingly, the applicant's complaints concerning Article 2 must be rejected as incompatible *ratione materiae* pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

8. The applicant's complaint concerning Article 8 is essentially two-fold: she complained that the authorities had allegedly failed both to prevent and to adequately respond to the kidnapping.

9. Even assuming that Article 8 may be construed as imposing a positive obligation on the State to take preventive measures to protect the child and the parent from unlawful disruption of their contact by third parties in certain exceptional circumstances (compare the Court's interpretation of that provision in the context of protection of an individual's physical integrity in *İbrahim Keskin v. Turkey*, no. 10491/12, §§ 61-63, 27 March 2018), the Court notes that, although on 6 November 2012 the applicant informed the authorities of a risk that the child's father might take him from her, her submissions did not indicate that the alleged risk was real and/or imminent so as to potentially require them to take certain measures to avoid it (see paragraph 3 above). Accordingly, her complaint in that connection must be

rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

10. As to the applicant's complaints under Article 8 regarding the adequacy of the measures taken by the authorities after the kidnapping of her child, the Court considers that they are not manifestly ill-founded within the meaning of Article 35 § 3 (a) or inadmissible on any other grounds. They must therefore be declared admissible.

11. The Court has already held that Article 8 requires the authorities to take all the measures that could reasonably be expected of them to enable the parent and the child to maintain and develop family ties and contact with each other and that this obligation includes establishing the whereabouts of the child if the parent loses contact with him or her (see *Hromadka and Hromadkova v. Russia*, no. 22909/10, §§ 165-68, 11 December 2014).

12. In the present case, the serious shortcomings in the official investigation, which the authorities acknowledged on a number of occasions (see paragraph 4 above), clearly show that the measures taken to find the applicant's son and to investigate the circumstances of his kidnapping were insufficient. Moreover, there is no indication that the criticism at the domestic level of the investigators' failures and inactivity has led to any improvement in the investigation that has been ongoing with no identifiable progress for over seven years.

13. The Court can, to a certain extent, agree with the Government that the investigation was complicated by the absence of an international legal framework for Ukraine's cooperation with Djibouti, where A. might have been living. However, it has not been demonstrated that the Ukrainian authorities were precluded from contacting their counterparts in Djibouti in order to obtain their assistance in clarifying whether the child might have been taken to that country and whether his father was implicated in the events in issue. International judicial cooperation should have been used to try to localize A., the alleged kidnaper, or any of his relatives, friends or acquaintances, living in Djibouti or elsewhere, who might have been able to give information about the child's whereabouts. The opening of the criminal proceedings in Ukraine should have given rise to a possibility of sending an international warrant to the judicial authorities of Djibouti in order, at least, to obtain statements from A. The Court cannot but acknowledge the nearly complete inaction and indifference as regards the applicant's requests for specific investigative actions and the anguish and unbearable uncertainty which the mother consequently suffered and continues to suffer (see paragraph 4 above). On the whole, the authorities have made no serious effort to establish the child's whereabouts and still remain under the obligation to take effective measures to find the child.

14. The foregoing considerations are sufficient to enable the Court to find in the present case that the authorities failed to take all the measures that could reasonably be expected of them in order to fulfil their positive obligation

under Article 8 to enable the applicant and her child to maintain and develop their family ties and contact.

15. There has accordingly been a violation of that Article.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

16. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage. She also claimed 68,600 Ukrainian hryvnias (UAH – the equivalent of around EUR 2,200 at the time when the payments for legal services were made and when the claim was lodged with the Court) for legal costs incurred in the domestic proceedings and when lodging her application with the Court and EUR 5,500 for legal costs incurred when preparing her observations in reply to those of the Government, in respect of which she submitted copies of the relevant contracts, invoices, receipts and a detailed account of the work performed by her representatives (forty hours at an hourly rate of UAH 1,000 (the equivalent of around EUR 35), nineteen hours at an hourly rate of UAH 1,500 (the equivalent of around EUR 50) and thirty-seven hours at an hourly rate of EUR 150).

17. The Government contended that the claim in respect of non-pecuniary damage was unsubstantiated.

18. The Court awards the applicant EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable, and dismisses the remainder of the claim under this head. As concerns the applicant's claim in respect of legal costs, the Court awards her EUR 2,000 in respect of the legal costs incurred in the domestic proceedings and when lodging her application with the Court and EUR 1,000 in respect of the legal costs incurred when preparing her observations in the proceedings before the Court.

19. The default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the applicant's complaints under Article 8 regarding the adequacy of the measures which the Ukrainian authorities took after the kidnapping of her child admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts:
  (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
  (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of legal costs incurred in the domestic proceedings and when lodging her application with the Court, to be paid directly into the bank account indicated by the applicant;
  (iii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of legal costs incurred when preparing her observations in the proceedings before the Court, to be paid directly into the bank account indicated by Mr M. Tarakhkalo;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 31 August 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Lado Chanturia President