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La Corte EDU su violenza domestica e omissione di obblighi positivi da parte dello Stato (CEDU, sez. V, sent. 3 novembre 2022, ric. n. 4669/20)

I ricorrenti, una madre e suo figlio, hanno affermato di essere state vittime di una serie di episodi di violenza domestica e si sono lamentati del mancato intervento delle autorità nazionali, come richiesto dagli articoli 3, 8 e 13 della Convenzione.

La Corte EDU, sulla base della documentazione a disposizione, ha accertato - in effetti - che le stesse autorità non hanno fornito alcuna significativa dimostrazione in relazione alle doglianze prospettate. In particolare, nessuno dei presunti testimoni è stato interrogato né sono state intraprese attività investigative, nonostante la richiesta dei ricorrenti. In più, la Corte ha ribadito che, a causa della situazione particolarmente vulnerabile delle vittime di violenza domestica, il quadro legislativo deve consentire alle autorità di indagare sui tali violenze di propria iniziativa in quanto questioni di pubblico interesse. Ciò detto, i giudici di Strasburgo hanno condannato le autorità nazionali per non aver adeguatamente risposto alle denunce degli episodi di violenza domestica e per non aver valutato la situazione nella sua interezza, compreso ogni possibile rischio che incidenti simili si ripetessero con la conseguente violazione dell'articolo 8 della Convenzione.

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

FIFTH SECTION

CASE OF M.M. AND Z.M. v. UKRAINE

(Application no. 4669/20)

JUDGMENT

STRASBOURG

3 November 2022

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

In the case of M.M. and Z.M. v. Ukraine,

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

Arnfinn Bårdsen, *President*,

Kateřina Šimáčková,

Mykola Gnatovskyy, *judges,*
and Martina Keller, *Deputy Section Registrar,*
Having regard to:
the application (no. 4669/20) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 30 December 2019 by two Ukrainian nationals, M.M. ("the first applicant") and Z.M. ("the second applicant"), born in XXX and XXX respectively and, according to the most recent information, living in XXX, who were represented by Ms O. Domanchuk, a lawyer practising in Kyiv;
the decision to give notice of the application to the Ukrainian Government ("the Government"), represented by their Agent, most recently Mr I. Lishchyna, of the Ministry of Justice;
the decision not to have the applicants' names disclosed;
the decision to give priority to the application (Rule 41 of the Rules of Court);
the parties' observations;
Having deliberated in private on 6 October 2022,
Delivers the following judgment, which was adopted on that date:

SUBJECT MATTER OF THE CASE

1. The applicants, a mother and her son, claimed to be victims of a number of incidents of domestic violence and complained that the authorities had allegedly failed to take measures to protect them, as required by Articles 3, 8 and 13 of the Convention. They also complained under Articles 6, 8 and 13 about the manner in which the courts had dealt with the first applicant's application for an interim order in child custody proceedings.
2. The first applicant and R., her unmarried partner, separated in March 2017. After the separation, their sons, the second applicant and S., born in 2017, mostly lived with the first applicant. R. allegedly tried to force her to resume their relationship and behaved aggressively towards her and their sons. In particular, on about ten occasions between July 2017 and September 2018 he allegedly went to the first applicant's home, shouted and swore at her, grabbed her by the throat, threatened to beat or kill her and set her flat on fire, took the second applicant away without her consent, refusing to return him for around four months, and tried to "kidnap" their second son, S. The first applicant immediately reported the relevant incidents to the police and submitted to them written statements by several individuals who had allegedly witnessed some of the incidents. The police found no basis to investigate her allegations, stating, in most instances, that they had been unable to find and question R. and that she should try civil remedies in order to resolve the differences she had with him as regards raising their children.
3. On 6 and 12 February 2019 the applicant lodged two further criminal complaints with the police, asking them to start a criminal investigation into the aforementioned incidents under Article 126-1 of the Criminal Code[1]. In her complaints, she indicated the names and contact details of the purported witnesses to the relevant incidents.

4. On 12 March 2019 the police decided not to open a case regarding the criminal complaint of 12 February 2019. On 26 April 2019 the Pecherskyi District Court dismissed an appeal by the first applicant against that decision as out of time.

5. Regarding the first applicant's complaint of 6 February 2019, the police opened a criminal case on 14 June 2019 pursuant to a decision of the Dniprovskyi District Court of Kyiv of 12 April 2019 taken following a complaint by her of the police inaction. On 18 July 2019 the police questioned her and on 27 December 2019 closed the case, stating that R. had not been "found administratively liable" for domestic violence and that there was therefore no evidence of "systematic" acts, prohibited by Article 126-1 of the Criminal Code. The decision of 27 December 2019 also indicated that the first applicant had not responded to a police summons inviting her to undergo a medical examination and that no information regarding her psychological condition could therefore be obtained. According to the first applicant, she received no summons from the police.

6. On 18 February 2020 the Kyiv prosecutor's office set aside the police's decision of 27 December 2019 mainly for their failure to find and question R. and any witnesses and to order a comprehensive psychological and psychiatric examination of the first applicant. The police were instructed to further investigate the case.

7. On 6 August 2020 the police again closed the case, stating that the alleged offender could not be found and the twelve-month statutory period during which he had to be officially notified that he was suspected of committing an offence had expired. They also relied on the same reasons as in their decision of 27 December 2019 (see paragraph 5 above).

8. Between June and October 2019, before the case was closed, the first applicant sent several letters to the police asking them to intensify the investigation and inform her of any developments but received no reply.

9. In the meantime, in May 2018 the first applicant brought a civil action before the Pecherskyi District Court of Kyiv against R. seeking to obtain physical custody of the second applicant and S., which was granted by a judgment of 30 July 2020, against which no appeal was lodged.

10. In the course of those proceedings, on 13 July 2018 that court decided, by way of an interim order, that the second applicant, who was at the time with R., should be returned to the first applicant pending the outcome of the dispute. On 5 September 2018 the order was enforced, and on 19 June 2019 it was quashed by the Kyiv Court of Appeal, although the second applicant continued living with the first applicant.

11. Relying initially on Article 13 of the Convention, the applicants complained that the domestic authorities had failed to act upon the first applicant's complaints regarding R.'s aggressive behaviour towards her and her children. Subsequently, the first applicant also relied on Articles 3 and 8 in that regard.

12. Relying on Articles 6, 8 and 13 of the Convention, the applicants also complained about the quashing of the Pecherskyi District Court's order of 13 July 2018 (see paragraph 10 above).

THE COURT'S ASSESSMENT

I. COMPLAINTS REGARDING THE ALLEGED INCIDENTS OF DOMESTIC VIOLENCE

13. The material available to the Court contains no medical evidence demonstrating that the applicants suffered physical violence. Nor is there sufficient material enabling the Court to determine whether the psychological impact the alleged incidents of R.'s aggressive behaviour had on them reached the required level of severity under Article 3 of the Convention. In these circumstances and given that a positive obligation to protect the applicants from a private person's violent behaviour might arise under different provisions of the Convention, including Articles 3 and 8 relied upon, the Court considers it more appropriate to examine the applicants' complaints regarding the authorities' failure to adequately respond to the alleged incidents solely under Article 8 (see, for instance, *A. v. Croatia*, no. 55164/08, §§ 57-60, 14 October 2010, and *Remetin v. Croatia (no. 2)*, no. 7446/12, §§ 55-63, 24 July 2014, and contrast *Volodina v. Russia*, no. 41261/17, § 74, 9 July 2019).

14. The Government argued that the first applicant had failed to exhaust domestic remedies since she had not challenged most of the decisions regarding her complaints of domestic violence before the courts.

15. The Court considers that the Government's objection is closely linked to the substance of the applicants' present complaints and, accordingly, joins it to the merits.

16. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

17. The relevant general principles under Article 8 regarding the State's positive obligation to put in place and apply an adequate legal framework affording effective protection against acts of domestic violence are summarised in several cases (see, among other authorities, *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 65, 12 June 2008; *A. v. Croatia*, cited above, § 60; *Hajduová v. Slovakia*, no. 2660/03, § 46, 30 November 2010; and *Levchuk v. Ukraine*, no. 17496/19, § 80, 3 September 2020).

18. The Court considers that the first applicant's allegations that R. behaved aggressively towards her and the second applicant, which could have adversely affected their mental integrity and well-being, do not appear to be unfounded. She raised these allegations before the domestic authorities in a detailed and consistent manner and relied on written statements by several individuals who she claimed had witnessed some of the relevant incidents.

19. The material before the Court demonstrates that the authorities failed to make any meaningful effort to find and question R. in connection with the first applicant's complaints. They did not question any of the purported witnesses to the incidents either. Although some of the relevant decisions pointed to a failure on the part of the first applicant to cooperate with the police regarding her complaints, there is no evidence that the police sent her any summonses to which she did not respond. Furthermore, the parties provided a number of documents demonstrating that on several occasions the first applicant enquired about the progress of the relevant investigation and asked the police to take specific investigative steps (see paragraphs 5 and 8 above).

20. While it is true that the first applicant did not challenge all the decisions regarding her complaints before the domestic courts, she successfully challenged some of them and, consequently, the police were given clear instructions as to how to investigate the matter. However, those instructions were not followed (see paragraphs 6 and 7 above). Thus, in the

present case it has not been demonstrated that, even if the applicant had challenged all the decisions regarding her complaints of domestic violence, this would have led to a serious attempt by the police to investigate them. Moreover, the Court reiterates that because of the particularly vulnerable situation of victims of domestic violence, the legislative framework must enable the authorities to investigate domestic violence cases of their own motion as a matter of public interest. Thus, an applicant's failure to lodge, or the subsequent withdrawal of, criminal complaints should not prevent the authorities from starting or continuing criminal proceedings against the alleged offender (see *Levchuk*, cited above, § 87, and, *mutatis mutandis*, *Volodina*, cited above, § 99). Accordingly, the Government's objection of non-exhaustion previously joined to the merits (see paragraphs 14 and 15 above) must be rejected.

21. In the light of the foregoing, the Court finds that the authorities failed to adequately respond to the alleged incidents of domestic violence affecting the applicants and to assess their situation in its entirety, including any possible risk that similar incidents would happen again. Accordingly, there has been a violation of Article 8 of the Convention on that account.

II. REMAINING COMPLAINTS

22. Having regard to the facts of the case, the submissions of the parties and its findings above, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the admissibility and merits of the applicants' complaints under Articles 6, 8 and 13 of the Convention regarding the child custody proceedings decided in July 2020 (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. The applicants claimed 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,024 for costs and expenses, representing legal costs paid by the first applicant to their lawyer for seventy hours' work on the proceedings before the Court. The first applicant submitted the relevant contracts, invoices and a detailed account of the work performed.

24. The Government contended that the applicants' claims were unsubstantiated and/or excessive.

25. The Court awards the applicants EUR 4,500 jointly for non-pecuniary damage, plus any tax that may be chargeable, and the first applicant EUR 4,024 for legal costs relating to the proceedings before the Court, plus any tax that may be chargeable to her.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's objection concerning non-exhaustion of domestic remedies in respect of the applicants' complaints under Article 8 of the Convention regarding the authorities' failure to adequately respond to the alleged incidents of domestic violence;
2. *Declares* those complaints under Article 8 of the Convention admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention and *dismisses* the Government's objection concerning non-exhaustion of domestic remedies in this regard;
4. *Holds* that there is no need to examine the admissibility and merits of the applicants' complaints under Articles 6, 8 and 13 of the Convention regarding the child custody proceedings decided in July 2020;

5. *Holds*

   (a) that the respondent State is to pay, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

   (i) the applicants jointly EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

   (ii) the first applicant EUR 4,024 (four thousand and twenty-four euros), plus any tax that may be chargeable to her, in respect of costs and expenses;

   (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;

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

   Done in English, and notified in writing on 3 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

   Martina Keller Deputy Registrar
   Arnfinn Bårdsen President