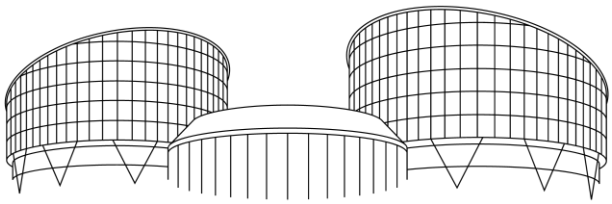

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GRIMKOVSKAYA v. UKRAINE

(Application no. 38182/03)

JUDGMENT

STRASBOURG

21 July 2011

FINAL

21/10/2011

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

In the case of Grimkovskaya v. Ukraine**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Isabelle Berro-Lefèvre,
Ann Power,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 28 June 2011,

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

PROCEDURE

1. The case originated in an application (no. 38182/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mrs Klara Vasilyevna Grishchenko. The initial application form was executed by her on 20 and posted on 21 October 2003.

2. On 22 December 2003 Mrs Grishchenko informed the Court that she did not wish to be the applicant in the present case. She wished, on the other hand, to represent the interests of Mrs Natalya Nikolayevna Grimkovskaya, her daughter ("the applicant"). She also presented a power of attorney in her name signed by the applicant.

3. On 28 June 2004 the Court received a new undated application form, signed by the applicant, indicating Mrs Grishchenko as her representative.

4. The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska.

5. In both application forms it was alleged that the applicant's home, private and family life were severely affected by the operation of a motorway and that the domestic courts had arbitrarily dismissed her claims relating to the matter without responding to her main arguments.

6. On 23 November 2004 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Subsequently the case was assigned to the newly composed Fifth Section (Rule 25 § 1 and Rule 52 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1966 and lives in Krasnodon.

A. Impact of the operation of the M04 motorway on the applicant's home, private and family life

8. The applicant is the owner of a house on K. Street in Krasnodon, where she resides with her parents and her minor son, D. G.

9. According to the Government, since 1983 K. Street had been a part of the Soviet trans-republican motorway running from Chisinau (Moldova) to Volgograd (the Russian Federation). In 1998 (after disintegration of the USSR) the Ukrainian authorities undertook a motorway stocktaking project and re-classified part of the motorway routed through the applicant's street as the "M04 Kyiv-Lugansk-Izvarine motorway".

10. According to the applicant, until the 1998 stocktaking project, the Chisinau-Volgograd motorway had never been routed through K. Street. Instead, it ran through P. Street in Krasnodon. K. Street, which is only six meters wide, is lined with private houses and gardens and is completely unsuitable for accommodating cross-town traffic. It has no drainage system, pavements or proper surfacing able to support heavy lorries and has been initially designed as an exclusively residential street. In 1998, in the course of the stocktaking project, the Department for Architecture and Urban Development of the Krasnodon City Council's Executive Committee agreed, for the first time, that the M04 motorway should pass via K. Street. In support of this allegation, the applicant provided a copy of a letter sent by the abovementioned Department on 9 October 1998 addressed to the State Roads Design Institute (*Дорпроект*), in which it notified that agency of its consent to the M04 motorway being routed via a number of streets in Krasnodon, including K. Street.

11. According to the applicant, following this change in the routing of traffic, her house eventually became practically uninhabitable. It suffered heavily from vibration and noise caused by up to several hundred lorries passing by every hour. In addition, air pollution increased substantially over the years and numerous potholes emerged in the inadequate surface of the road. As a result of driving across these potholes, the vehicles emitted additional fumes and stirred up clouds of dust. In trying to deal with the potholes, the road service department started filling them with cheap materials, such as waste from nearby coal-mines, which had a high heavy-metal content.

12. On 15 May 2002, responding to complaints from the street's residents, the Lugansk Regional Sanitary Department (*Державна санітарно-епідеміологічна служба в Луганській області*) measured the level of pollution near several K. Street houses, including the applicant's. During the test period of one hour, 129 vehicles were recorded as having passed by, 71 of which (55%) emitted pollutants (nitrogen dioxide, carbon monoxide, saturated hydrocarbons, lead, copper, etc.) in excess of applicable safety standards. It was further established that the content of copper and lead in dust stirred up exceeded the safety standards by 23 and 7.5 times respectively. The monitoring team also noted that the road surface was damaged.

13. By way of evidence concerning the damage to the applicant's house, she presented a certificate dated 31 May 2002 signed by a group of assessors consisting of a city council deputy, the head of the local residents' association and a private individual. The group attested that it had examined the house and found that it had been damaged. In particular, the basement was cracked and the walls were covered with coal dust, which had allegedly been used during ad-hoc repairs of the road aimed at filling the potholes and subsequently disturbed by passing traffic. It also noted that the road surface near the applicant's house had been badly damaged, thus amplifying vibrations from passing vehicles and causing vibration of the furniture inside the applicant's house and pieces of plaster to occasionally fall from its ceiling and walls.

14. By way of evidence of health damage, the applicant presented medical certificates attesting that her father, mother and minor son were suffering from numerous diseases. The applicant's father, born in 1939, was diagnosed, in particular, with chronic erosive gastroduodenitis, chronic bronchitis, pneumatic fibrosis, atherosclerosis, hypertension, cardiosclerosis and other diseases, cumulatively resulting in his being assessed in April 2001 as a "second (intermediate) degree" disabled person.

15. The applicant's mother (Mrs Grishchenko), born in 1946, was found to be suffering, *inter alia*, from ulcers, chronic bronchitis, respiratory insufficiency, ischemic heart disease, deforming osteoarthritis, osteochondrosis and other diseases.

16. The applicant's minor son D. G., born in 1994, started suffering from frequent respiratory tract diseases from 1997 onwards. In 1998 he was diagnosed as suffering from secondary immunodeficiency, non-rheumatic carditis and biliary dyskinesia. In 2000 D. G. was further diagnosed with hyperexcitability and hyperactivity disorder. During in-patient treatment of D. G. in November 2002, he was found to have excessive levels of copper and lead in his blood and urine and was diagnosed as suffering from chronic poisoning from heavy-metal salts, chronic toxic hepatitis and toxic encephalopathy.

17. On 12 July 2003 the Krasnodon Children's Hospital recommended that the applicant's son be resettled. The certificate noted, in particular:

> "Regard being had [to the fact] that the child has been living in an environmentally-saturated area since his birth (considerable pollution of air and soil with salts of heavy metals, sulphur dioxide, saturated and unsaturated carbohydrates), it is necessary to change his place of residence".

B. Administrative decisions addressing damage caused by the operation of the M04 motorway

18. On numerous occasions Mrs Grishchenko complained on the family's behalf to various authorities (including the President of Ukraine, the State Sanitary Department, the municipal authorities and the prosecutor's office) about intolerable levels of nuisance and pollution from the M04 motorway. According to the case file, the first complaints were lodged by her no later than 2000. On various occasions analogous complaints were also lodged individually and collectively by other K. Street residents. It is unclear from the case file what actions, if any, were taken by the authorities in response to these complaints prior to May 2002.

19. On 28 May 2002, following the assessment of pollution levels undertaken on 15 May 2002 (mentioned in paragraph 12 above), the Lugansk Regional Chief Sanitary Officer (*головний санітарний лікар Луганської області*) ordered the Krasnodon Mayor to consider stopping through traffic using K. Street and repairing K. Street's road surface. In his decision, that official mentioned that K. Street was designated as a temporary transit thoroughfare and that heavy traffic had ruined the surface of the road. He further noted that the level of air pollution on K. Street was in breach of the Law of Ukraine "On the Protection of the Air" ("the Clean Air Act") and that such pollution could have adverse effects on the residents' health.

20. On an unspecified date Mrs Grishchenko complained to the Krasnodon Prosecutors' Office about the level of pollution and demanded the initiation of a criminal investigation into the situation.

21. On 13 June 2002 the Krasnodon Prosecutors' Office rejected her demand, having found that while the fact of excessive pollution was not in dispute, there was no basis for linking this situation to any criminal wrong-doing on any authority's behalf. There was no appearance that the decision to use K. Street as a transit road had been in and of itself unlawful. As regards repairing the road, the Prosecutors' Office had ordered the Krasnodon City Council's Executive Committee (hereafter "the Executive Committee") to redress violations of environmental law. It further notified Mrs Grishchenko that according to its information, repairs were planned for June 2002.

22. On 16 June 2002 K. Street was blocked to prevent the further passage of automobile traffic.

23. On 2 July 2002 the Lugansk Regional Prosecutors' Office further informed Mrs Grishchenko that on 18 June 2002 the Executive Committee had decided to order repairs to K. Street.

24. On 24 October 2002 the Chief of the Krasnodon Department of the Interior recommended that the municipality find funding for the repair of the surface of K. and L. Streets.

25. On 1 July 2003 the Lugansk Regional Department of the State Highways Agency (*Укравтодор* – "the Highways Agency") wrote to the Mayor of Krasnodon, acknowledging that the section of the M04 road in the region was not sufficiently equipped to accommodate the increased traffic and that there was an urgent need to build transit routes bypassing populated communities, including Krasnodon. However, regard being had to the lack of available funding, these works had not been carried out and the Lugansk Department had asked its central headquarters to deal with the situation. It further suggested that the Krasnodon municipality should renovate the in-town part of the road using funds garnered from automobile tax retained by the city treasury.

26. On 6 June 2006 the Municipal Housing and Municipal Maintenance Department informed the Executive Committee that repairing the surface of K. Street had been entered into the Urban Development Plan for 2006. However, no funding for the works had ever been received. It further noted that Krasnodon lacked any alternative roads meeting the standards of a transit thoroughfare and that the use of K. Street for this purpose – which it was unequipped for – had resulted in heavy deterioration of its surface.

27. On 27 June 2006 the Lugansk Regional Chief Sanitary Officer confirmed in his correspondence that the passage of vehicles through K. Street had been impossible, the street having been blocked by concrete blocks and other barriers.

28. On 24 November 2010 the applicant informed the Court, without providing any supporting materials, that the use of K. Street as a motorway had been recently restarted without any in-depth repairs having been carried out.

C. Civil proceedings against the Krasnodon City Council's Executive Committee

29. In 2001 Mrs Grishchenko lodged a civil claim on the applicant's behalf, seeking to oblige the Krasnodon City Council's Executive Committee to resettle the family and to pay 5,000 hryvnias (UAH) in compensation for damage caused to their house and health by the operation of the M04 motorway.

30. In the course of the trial, the court examined written evidence presented by the applicant and questioned officials of the municipal Architecture, Housing and Road Maintenance Departments, and officers from the traffic police. The Architecture Department official stated that K. Street was seven metres wide; it had no drainage or pavements because there was no funding available for constructing these amenities. The Housing Maintenance Department official acknowledged that his department was partly responsible for K. Street's maintenance, which was to be funded by the Highways Agency and from automobile taxes. As the funding had not been forthcoming, the street had not been maintained properly. He also opined that the damage to the applicant's house had more likely been caused by construction flaws than by the operation of the motorway. The official from the Road Maintenance Department submitted that K. Street, being part of a motorway, was to be managed by it jointly with the Highways Agency. Finally, a traffic police officer submitted that for several preceding years there had been no complaints of traffic accidents on K. Street and that twice a year the traffic police examined the state of the road.

31. On 18 January 2002 the Krasnodon Court rejected Mrs Grishchenko's claim. The full text of its reasoning reads as follows:

> "It has been established in court that K. Street in Krasnodon hosts the M04 Kyiv-Lugansk-Izvarine motorway.
>
> The plaintiff did not provide the court with evidence that on account of the Executive Committee's fault the road is operated in breach of technical requirements existing for this category of roads. The plaintiff did not specify which particular provisions have been breached.
>
> In addition, the plaintiff did not provide evidence that it is the [Executive Committee's] fault that her lawful rights have been infringed, namely, [that] her house has been destroyed, [and that] herself and her family suffer from various illnesses, resulting in mental distress.
>
> Based on the above, the court considers it necessary to reject the claim as ill-founded ..."

32. Mrs Grishchenko appealed. Referring primarily to Article 50 of the Constitution of Ukraine and the Clean Air Act, she noted, in particular, that by focusing on the issue of the road's maintenance, the first-instance court had deviated from the object of her claim. In fact, instead of seeking to oblige the plaintiff to repair the street, she had demanded resettlement, as in her opinion the street was completely unsuitable for hosting a motorway in the first place. The defendant had been at fault, not only for allowing through traffic, but also for failure to organise its regular supervision by traffic police, environmental and sanitary services to ensure safety, and anti-pollution measures. The claimant asserted that the witnesses had presented inaccurate data. In particular, there had been numerous traffic accidents on

K. Street, and a recent police response to one of the residents' complaints about that issue had been included in the case file. Mrs Grishchenko further complained that the court had failed to summon officials from the environmental and sanitary services to present comprehensive information about the environmental situation around the road and so had failed to ensure her and her family's right of access to environmental information.

33. On 10 June 2002 the Lugansk Regional Court of Appeal dismissed this appeal. The full text of the court's reasoning was as follows:

> "Rejecting the claim of Grimkovskaya N. N., the court lawfully concluded that the M04 Kyiv-Lugansk-Izvarine motorway has been assigned on the basis of full managerial maintenance to the [Highways Agency]... and not to the Krasnodon City Council's Executive Committee.
>
> The plaintiff did not provide the court with any evidence that the defendant had wrongly caused her non-pecuniary damage and did not specify the legal basis for compensation of the [alleged] non-pecuniary damage and [for] resettlement ..."

34. On 8 July 2002 Mrs Grishchenko appealed in cassation. She submitted that in her view the Krasnodon City Council's Executive Committee had been the proper defendant. In support of this argument, she provided a letter from the Highways Agency dated 6 June 2002 informing her that K. Street was not on its books and that it was to be managed by the municipality. She further alleged that the court had never examined whether the decision of the Krasnodon City Department for Architecture and Urban Development taken in October 1998 to route through traffic via K. Street had been lawful and reasonable. She considered that it had been unlawful to turn a six-metre-wide street into a motorway, especially in light of the subsequent failure of the municipality to organise proper environmental monitoring and management of the road. Mrs Grishchenko additionally mentioned that the first measurement of pollution levels had been carried out only in May 2002, following numerous complaints by the street's residents.

35. On 21 July 2003 the Supreme Court of Ukraine rejected Mrs Grishchenko's request for leave to appeal in cassation.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine of 28 June 1996

36. Relevant provisions of the Constitution read as follows:

Article 16

"To ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chernobyl catastrophe — a catastrophe of global scale, and to preserve the gene pool of the Ukrainian people, is the duty of the State."

Article 50

"Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right ..."

B. Clean Air Act (Law of Ukraine no. 2707-XII "On the Protection of the Air") of 16 October 1992

37. The relevant provisions of the above law as worded at the material time read as follows:

Article 12. Restriction, suspension or discontinuation of emissions of pollutants into the air and [of levels of pollution] by physical and biological factors

"Carrying out a business or other type of activity connected to a breach of conditions and requirements concerning the emission of pollutants into the air and levels of [pollution] by physical and biological factors envisaged by permits may be restricted, suspended or discontinued according to the law."

Article 13. Regulation of levels of [pollution of the] air by physical and biological factors

"...

Local bodies of executive power, bodies of local self-governance, enterprises, establishments, organisations and citizens [involved in] entrepreneurial activity shall be obliged to take necessary measures to prevent and preclude [an increase in] established levels of air [pollution] by physical and biological factors and [its effects on] human health."

Article 17. Measures concerning the prevention and mitigation of air pollution [caused] by emissions from methods of transport and by [associated] physical factors and facilities

"In order to prevent and mitigate air pollution by methods of transport and by physical factors and facilities connected to them, there shall be:

Developed and implemented a system of measures concerning reductions in emissions, detoxification of pollutants and mitigation of physical impacts in the course of the development, production, exploitation and repair of methods of transport and in [associated] facilities;

A shift of methods of transport and [associated] facilities to less toxic types of fuel;

Rational planning and development of populated communities in conformity with the distances to main roads set out by law or regulation;

The movement of transport enterprises, cargo transit, and automobile transport [so that they take place] outside of densely populated residential areas;

Restrictions on the entrance of automotive traffic and other methods of transport and on [associated] facilities in areas zoned for residential, resort, health, recreational and nature-reserve uses, and in places of mass recreation and tourism;

Improvement in the state of maintenance of main roads and street surfaces;

Implementation of automated systems of traffic regulation in the cities;

Improvement in technologies for the transportation and storage of fuel at petrol refineries and petrol stations;

Implementation of and improvement in monitoring activities, regulatory facilities, diagnostics facilities and comprehensive systems of control over compliance with environmental safety laws and regulations governing methods of transport and [associated] facilities;

A prohibition on the development, production and exploitation of methods of transport and [associated] facilities or physical factors [giving rise to] a level of pollutants in exhaust fumes which exceeds [applicable] standards."

Article 21. Preclusion and decrease of noise

"In order to preclude and decrease [excessive] levels of production and other noise and [in order to] achieve safe [levels of noise], there shall be:

...

Improvement in the design of methods of transport and [associated] facilities, and in the conditions for their exploitation, as well as due maintenance of train and tram tracks, roads, [and] street surfaces;

The situation, during the planning and development of populated communities, of enterprises, transport thoroughfares, aerodromes and other objects containing sources of noise in accordance with sanitary requirements and construction guidelines established by law and [in accordance with] noise maps;

...

Administrative measures concerning the preclusion and decrease of ... noise, including the implementation of regulations and schedules [governing] transport and vehicle movement, and [the operation of associated] facilities, within the boundaries of populated communities.

..."

C. The State Committee for Construction, Architecture and Housing Policy of Ukraine, State Construction Guidelines of Ukraine DBN B.2.3 – 4 – 2000 of 2000

38. The relevant paragraph of the Guidelines as worded at the material time reads as follows:

> "In the course of developing new or reconstructing existing motorways of national importance, their routes shall be channelled, as a rule, [so as to] bypass existing populated communities."

III. RELEVANT INTERNATIONAL MATERIALS

39. The Aarhus Convention ("Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", ECE/CEP/43) was adopted on 25 June 1998 by the United Nations Economic Commission for Europe and came into force on 30 October 2001. Ukraine ratified the Convention on 6 July 1999.

The Aarhus Convention may be broken down into the following areas:

- Developing public access to information held by the public authorities, in particular by providing for transparent and accessible dissemination of basic information.

- Promoting public participation in decision-making concerning issues with an environmental impact. In particular, provision is made for encouraging public participation from the beginning of the procedure for a proposed development, "when all options are open and effective public participation can take place". Due account is to be taken of the outcome of the public participation in reaching the final decision, which must also be made public.

- Extending conditions for access to the courts in connection with environmental legislation and access to information.

40. On 27 June 2003 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on environment and human rights. The relevant part of this recommendation states:

> "9. The Assembly recommends that the Governments of member States:
>
> i. ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;
>
> ii. recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;

iii. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention;

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant complained that by routing the M04 motorway via her street, which had been unequipped for such a purpose, and by failing to organise the road's proper environmental monitoring and management, the Krasnodon municipal authorities had breached her right to enjoyment of her home and her private and family life. She referred in this respect to Article 8 of the Convention, which reads as follows:

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

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

A. Admissibility

42. The Government submitted that they were confused as to the applicant's identity: namely, whether Mrs Klara Grishchenko or Mrs Natalya Grimkovskaya should be considered the applicant in the present case.

43. The Government further contended that, assuming that the application had been lodged by Natalya Grimkovskaya, it should be dismissed as incompatible *ratione personae* with the provisions of the Convention. Namely, they contended that Natalya Grimkovskaya could not be considered a victim of a violation of Article 8, as she had not been a party to the relevant domestic civil proceedings. In the alternative, her complaint should be rejected for non-exhaustion grounds for the same reason. Finally, it was in any event lodged outside the six-month period provided for by the Convention, because the application form signed by Natalya Grimkovskaya had been undated and had only been received by the

Court on 28 June 2004, while the final domestic decision in Mrs Grishchenko's civil proceedings had been taken on 21 July 2003.

44. The Government further submitted that, assuming that Mrs Grishchenko was the proper applicant, the complaint should be rejected for non-exhaustion. She had lodged her civil claim against the Executive Committee, which had been an improper defendant. Mrs Grishchenko had never lodged a claim against the Highways Agency, which, according to the domestic courts' findings, had been responsible for maintenance of the M04 motorway.

45. The applicant disagreed. She noted that the application concerned the interests of her entire family. However, she had wished to be considered the applicant, since she was the owner of the house. In addition, it had been expressly on her behalf that Mrs Grishchenko had instituted the domestic civil proceedings claiming compensation and resettlement. The applicant further alleged that she had not been obliged to lodge a claim against the Highways Agency, as in her opinion the Executive Committee had been responsible for K. Street's maintenance. Moreover, it had been the Executive Committee who had allowed through traffic on K. Street in the first place. Further, it had not organised regular monitoring of this part of the road by traffic police, or by environmental and sanitary authorities, to ensure the enforcement of anti-pollution and safety measures. The substance of her complaint under Article 8 of the Convention had therefore been duly stated before the domestic courts.

46. The Court notes that the applicant lives on K. Street and has provided considerable information concerning her personal suffering on account of the street's designation as part of a motorway. Her complaint may therefore not be considered incompatible *ratione personae* with the provisions of the Convention. The Government's objection concerning the applicant's victim status must therefore be dismissed.

47. The Court further observes that the judicial authorities, and, in particular, the Lugansk Regional Court of Appeal clearly considered Mrs Grishchenko's civil claim as having been lodged on the applicant's behalf (see paragraph 33 above). The Government's first objection concerning non-exhaustion must therefore also be dismissed.

48. As regards the Government's argument that the complaint was lodged after the expiry of the six-month period, the Court notes that Mrs Grishchenko first informed the Court that she wanted to act on her daughter's behalf in the Convention proceedings and submitted the respective power of attorney from the applicant on 22 December 2003. This date falls within the six-month period following the taking of the final decision in the civil proceedings ending on 21 July 2003. The Court considers that, in these circumstances, the fact that the initial application form (executed on 20 and posted on 21 October 2003) was signed by Mrs Grishchenko and that subsequently the applicant herself signed a new

application form raising the same complaints, which was received by the Court on 28 June 2004, cannot be construed against her. The Court therefore dismisses the Government's objection concerning the six-month period.

49. Finally, as regards the Government's second objection concerning non-exhaustion, namely, that a civil claim should have been lodged against the Highways Agency, in light of the materials in the case file (see paragraphs 21, 24-26 and 30 above) the Court considers that the applicant's arguments concerning the Executive Committee's responsibility for the maintenance of K. Street were not without some basis. It is more important, however, that the object of the applicant's claim before the Court concerns, primarily, not repairs to K. Street, but rather the compatibility with the Convention of: (i) the municipality's consent to designate that street as a part of a motorway; and (ii) its alleged omissions in putting in place a sound environmental management policy to ensure that the operation of the motorway complied with applicable law. The Government have not shown how these issues could be resolved in proceedings against the Highways Agency. This objection must therefore also be dismissed.

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

B. Merits

1. Submissions by the parties

(a) The applicant

51. The applicant submitted that the decision taken in 1998 to designate K. Street as part of a motorway had been unlawful and arbitrary, as national transit roads should be constructed outside of populated communities. Given that as of October 1998, when the authorities had been carrying out the motorway stocktaking project, there had been no proper transit road in place, they should have routed the M04 motorway via P. Street, which had previously served as a portion of the Chisinau-Volgograd motorway. The decision to re-route traffic via a six-metre-wide residential street with private houses situated four to five metres from the road had been arbitrary.

52. Furthermore, having taken this decision, the municipal authorities had never taken measures to ensure regular monitoring of the street by the traffic police, as well as its environmental management to curtail pollution resulting from the heavy lorry traffic. Pollution and other nuisances had remained unchecked for several years in a row, and it had only been following multiple complaints from the street's residents that in May 2002

the level of pollution had been checked and the decision to suspend the traffic had been taken. Moreover, the street's residents had had to engage in mass protests in order to have this decision eventually enforced. In any event, although the traffic had been stopped, no measures to repair the deteriorated road surface or clean up the soil had ever been implemented.

53. As a result, the applicant's house had been damaged and her family members had suffered irreparable damage to their health. They should have obtained compensation from the Executive Committee for their grievances. However, the domestic courts had arbitrarily dismissed her claim concerning the matter, having refused to properly consider her main arguments.

(b) The Government

54. The Government objected to this view.

55. They alleged, firstly, that there had been insufficient evidence that the applicant's suffering had reached the threshold necessary for bringing Article 8 of the Convention into play. The damage to the house from vibration had been confirmed by a group of assessors who had not been qualified to come to such conclusions. On the other hand, a qualified representative of the Housing Maintenance department had opined during the court hearings that the house had more likely been flawed upon its initial construction. There had likewise been no conclusive evidence concerning a correlation between the motorway's operation and the health problems suffered by the members of the applicant's family. The Government also contested, without providing evidence, the accuracy of the medical certificates issued by the City Hospital, alleging that they were prepared by the applicant's sister. Moreover, there had been other sources of pollution in the area, such as burning spoil heaps from coal-mining activity. Overall, a considerable part of Ukraine suffers from various environmental problems and there is no indication that the environmental burden suffered by the applicant's family had been any heavier than that borne by the rest of the community.

56. The Government further contended that, even assuming that they had owed any duty vis-à-vis the applicant under Article 8 of the Convention, they had taken all reasonable actions to ensure a fair balance between her interests and those of the community. Firstly, K. Street had served as a through road since 1983. In 1998 the street's status as part of the motorway had merely been confirmed during the stocktaking project. The Government should therefore not be held responsible for the decision to route the traffic via K. Street. Secondly, following the entry of the Convention into force, the authorities had been contemplating the construction of a new through road, bypassing residential streets. However, they had had no choice but to use the existing road until the necessary funding could be found, as closing it off would have caused considerable detriment to the economic well-being

of the country. Contrary to the applicant's argument, the use of the road had not been at odds with applicable law, because paragraph 1.9 of the State Construction Guidelines had recommended, but had not required, that major motorways be constructed outside populated communities.

57. The Government next argued that the pollution complained of had not been emitted by the State authorities' operation of the road, but rather by vehicles belonging to various owners. This pollution therefore could not qualify as State interference with the applicant's Article 8 rights. Assuming the State had had a positive obligation to react to this pollution, it had done so by setting up a legislative scheme establishing safe pollution levels and a system to monitor compliance with that scheme. Once the State authorities had become aware that the road was not operating as intended, they had reacted quickly by closing it off to through traffic on 16 June 2002, more than a year before the applicant had applied to the Court.

2. The Court's assessment

58. Referring to its well-established case-law (see, among other authorities, *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C; *Dubetska and Others v. Ukraine*, no. 30499/03, §§ 105-108, 10 February 2011) the Court reiterates that, where, as in the present case, the case concerns an environmental hazard, an arguable claim under Article 8 may arise only where the hazard at issue attains a level of severity resulting in significant impairment of the applicant's ability to enjoy her home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.

59. In line with these principles, the Court must first consider whether the detriment suffered by the applicant on account of the operation of the M04 motorway starting from October 1998 was sufficiently serious to raise an issue under Article 8 of the Convention. The Court observes that the applicant's complaints concern, primarily, the level of noise, damage to her house from vibration and her sufferings on account of the deterioration of her parents' and her minor son's health resulting from air and soil pollution.

60. The Court considers that there is insufficient evidence to prove all the applicant's allegations 'beyond reasonable doubt'. In particular, the noise levels and their impact on the applicant's private and family life have never been measured (see *a contrario Deés v. Hungary*, no. 2345/06, § 23, 9 November 2010). The allegation that the damage to the house had been caused by vibration was disputed by the Government with reference to a competent authority's opinion and has never been confirmed by an independent expert. Insofar as the applicant's parents' health can fall within the scope of her family life under Article 8, the case file contains medical evidence that they suffer from numerous illnesses. However, based on this

evidence, it is not possible to determine to what extent these illnesses have been caused or aggravated by the operation of the motorway. As regards the health of the applicant's minor son, it appears that he already suffered from immunodeficiency before October 1998 and that in his doctors' opinion he had resided in an 'environmentally saturated area' from his birth in 1994 (see paragraph 17 above).

61. At the same time, the Court notes that according to the official investigation of 15 May 2002 (see paragraph 12 above), the surface of the road near the applicant's house was severely damaged and more than one hundred vehicles drove over it during one hour. It is not implausible in these circumstances that the applicant was regularly disturbed by noise and vibration, at least to some extent. Further, more than half of the examined vehicles were found to be emitting pollutants in excess of applicable safety standards. The level of air and soil pollution was assessed by the domestic environmental health authorities as necessitating the suspension of the use of the road, on pain of risk of adverse impact on the residents' health (see paragraph 19 above). The polluting substances emitted by the vehicles included copper and lead, an excessive level of which was also found in the soil near the applicant's house. In light of these findings, the Court considers it particularly notable that the applicant's son was diagnosed in 2002 with chronic lead and copper salts poisoning. The Court notes that the Government have not provided any evidence disproving the authenticity and accuracy of this diagnosis and have not proposed any plausible alternative explanation concerning the origin of this poisoning to counter the applicant's allegation that it was directly connected to the motorway's operation.

62. Regard being had to the above data, the Court considers that the cumulative effect of noise, vibration and air and soil pollution generated by the M04 motorway significantly deterred the applicant from enjoying her rights guaranteed by Article 8 of the Convention. Article 8 is therefore applicable in the present case.

63. In view of the above, the Court will next examine, in the light of the principles developed in its jurisprudence (see, among other authorities, *Dubetska*, cited above, §§ 140-145) whether the Government have provided sufficient evidence to justify a situation in which the applicant bore a heavy burden on behalf of the rest of the community.

64. The Court firstly notes that, as submitted by the Government, on 16 June 2002, within one month of the investigation by the environmental health authorities, K. Street was closed off to through traffic. Lacking concrete data, and, in particular, texts of relevant domestic decisions (if any) in evidence of the applicant's allegations that this decision was in fact enforced at an unspecified later date or that the traffic was eventually restarted, the Court will proceed from the assumption that through traffic was stopped on the date suggested by the Government (see, *mutatis*

mutandis, *Vinokurov v. Russia and Ukraine* (dec.), no. 2937/04, 16 October 2007). Consequently, it must be noted that the issues of noise, vibration, air and soil pollution connected to its functioning were redressed. It, however, remains to be examined whether the State authorities should still be liable for the adverse effects of the motorway's operation between October 1998 and June 2002.

65. In assessing this matter, the Court recognises the complexity of the State's tasks in handling infrastructural issues, such as the present one, where measures requiring considerable time and resources may be necessary. Being mindful of its subsidiary role under the Convention, on many occasions the Court has emphasized that the States should enjoy a considerable margin of appreciation in the complex sphere of environmental policymaking (see, for example, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 100, ECHR 2003-VIII). While the authorities of the Member States are increasingly taking on responsibility for minimising or controlling pollution, Article 8 cannot be construed as requiring them to ensure that every individual enjoys housing that meets particular environmental standards (see *Ward v. the United Kingdom* (dec.), no. 31888/03, 9 November 2004). In line with these considerations, the Court considers that it would be going too far to render the Government responsible for the very fact of allowing cross-town through traffic to pass through a populated street or establish the applicant's general right to free, new housing at the State's expense. All the more so, given that the applicant in the present case has not argued that her house has decreased in value since October 1998 or that she has otherwise been unable to sell it and relocate without the State's support (see, *a contrario*, *Fadeyeva v. Russia*, no. 55723/00, § 121, ECHR 2005-IV).

66. While the Court finds no reason to reassess the substance of the Government's decision to allow the use of K. Street as a through road, in examining the procedural aspect of relevant policymaking, the Court is not convinced that minimal safeguards to ensure a fair balance between the applicant's and the community's interests were put in place.

67. It notes, firstly, that the Government have not shown that the 1998 decision to route motorway M04 via K. Street was preceded by an adequate feasibility study, assessing the probability of compliance with applicable environmental standards and enabling interested parties, including K. Street's residents, to contribute their views (see, *a contrario*, *Hatton*, cited above, § 128). On the contrary, the nature of this decision and the adequacy of attenuating procedures appear quite ambiguous, particularly in light of the Government's disagreement with the applicant as to whether the 1998 decision re-routed the traffic from P. Street to K. Street or merely confirmed K. Street's earlier status as a through road. The Court considers, however, that even if K. Street had been used by through traffic before the 1998 stocktaking project, the State authorities were responsible for ensuring

minimal procedural safeguards in this project's course. Neither the domestic court decisions, nor the Government's observations contain evidence that these safeguards, and particularly public access to relevant environmental information and decision-taking in the period of contemplating the stocktaking project, existed.

68. Secondly, the Court considers that no later than the time of the 1998 stocktaking project, the authorities likewise became responsible for putting in place a reasonable policy for mitigating the motorway's harmful effects on the Article 8 rights of K. Street's residents (see, *mutatis mutandis*, Fadeyeva, cited above, §§ 127-131). It appears that the municipal authorities did take some measures aimed at the street's environmental management (see paragraph 30 above). However, neither the assessment made by domestic courts in their judgments, nor the Government's observations contain sufficient detail enabling the Court to conclude that this management was effective and meaningful before the measurement of critical pollution levels on 15 May 2002. As transpires from the available materials, this measurement session was carried out only in response to repeated complaints by K. Street's residents, which, according to the case file, were initially lodged no later than in 2000.

69. Thirdly, emphasising the importance of public participation in environmental decision-making as a procedural safeguard for ensuring rights protected by Article 8 of the Convention, the Court underlines that an essential element of this safeguard is an individual's ability to challenge an official act or omission affecting her rights in this sphere before an independent authority (see *Dubetska*, cited above, § 143). It also notes that as of 30 October 2001 the Aarhus Convention, which concerns access to information, participation of the public in decision-making and access to justice in environmental matters has entered into force in respect of Ukraine (see paragraph 39 above). In the meantime, it has not been shown in the present case that the applicant was afforded a meaningful opportunity to contest the State authorities' policymaking regarding the M04 motorway during the period of October 1998 – June 2002 before the domestic courts.

70. The Court notes that the applicant formally attempted to do so by lodging through Mrs Grishchenko a civil claim against the Executive Committee. As appears from the brief reasoning adduced by the Lugansk Regional Court of Appeal for dismissing her claim (see paragraph 33 above), its analysis was mostly limited to concluding that the defendant was not at all responsible for K. Street's maintenance and repair. The Court notes that a variety of documents in the case file appear to pinpoint that such responsibility did – at least to some extent – in fact exist (see paragraphs 24-26, 30 and 34 above), while the court's reasoning does not contain any reference to the evidence which served as a basis for its contrary conclusion.

71. Regardless, however, of which authority was responsible for the maintenance of K. Street's road surface and other amenities, the Court finds it more important that the courts' reasoning does not contain a direct response to the applicant's main arguments, on the basis of which she had sought to establish the Executive Committee's liability. In particular, while the first-instance court questioned some witnesses as to some points of the municipality's environmental policy, neither its, nor the higher courts' judgments contain any express assessment as to why they considered that this policy adequately protected the applicant's rights. Likewise, no reasoning was provided for dismissing an allegation that the defendant's decision taken in October 1998 was in and of itself unlawful and arbitrary, and it is unclear from the case file whether this aspect of the applicant's complaint was at all studied during the proceedings at issue. The Court considers that the applicant's arguments concerning the unlawfulness and arbitrariness of the above decision and the adequacy of the municipality's environmental policy concerning K. Street were of paramount importance for resolving whether or not the defendant's conduct struck a fair balance between the applicant's rights guaranteed by Article 8 and the interests of the community. Lacking reasoning for the dismissal of these arguments in the texts of the domestic judgments, the Court is unable to conclude that the applicant had a meaningful opportunity to adduce her viewpoints before an independent authority.

72. Overall, the Court attaches importance to the following factors. First, the Government's failure to show that the decision to designate K. Street as part of the M04 motorway was preceded by an adequate environmental feasibility study and followed by the enactment of a reasonable environmental management policy. Second, the Government did not show that the applicant had a meaningful opportunity to contribute to the related decision-making processes, including by challenging the municipal policies before an independent authority. Bearing those two factors and the Aarhus Convention (see paragraph 39) in mind, the Court cannot conclude that a fair balance was struck in the present case.

73. There has therefore been a breach of Article 8 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

74. The applicant additionally complained under Articles 6 § 1 and 13 of the Convention that the civil proceedings in her case had been unfair. In particular, she complained that the courts had not stated sufficient reasons for dismissing her claims. The Court considers that this complaint falls to be examined under Article 6 § 1 of the Convention only (see *Kudła v. Poland* [GC], no. 30210/96, § 146, ECHR 2000-XI). This provision, insofar as relevant, reads as follows:

> "... In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

75. The Government contested this allegation.

76. The Court notes that this complaint is linked to the applicant's complaint under Article 8 and must therefore likewise be declared admissible.

77. It further reiterates that, notwithstanding the difference in the nature of the interests protected by Articles 6 and 8 of the Convention, which may require separate examination of claims lodged under these provisions, in the instant case, regard being had to the Court's findings under Article 8 (see paragraphs 69-71 above) concerning the lack of reasoning in the domestic court judgments, the Court considers that it is not necessary to also examine the same facts under Article 6 (see, *mutatis mutandis*, *Hunt v. Ukraine*, no. 31111/04, § 66, 7 December 2006).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The applicant claimed 10,000 euros (EUR) in just satisfaction for damage allegedly caused to her current house and EUR 20,000 for buying a new house. She further claimed EUR 100,000 in compensation for health damage and mental distress.

80. The Government submitted that these claims were unsubstantiated.

81. Regard being had to the reasons for which the Court has found a violation of Article 8 of the Convention in the present case, it considers that the applicant must have suffered non-pecuniary damage which cannot be redressed by the mere finding of the violation. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage and dismisses the remainder of her claim as unsubstantiated.

B. Costs and expenses

82. The applicant also claimed EUR 500 for costs and expenses incurred before the domestic courts. She did not provide any supporting documents.

83. The Government alleged that this claim was unsubstantiated.

84. 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, lacking any supporting documents, as well as giving no explanation as to the nature of the expenses comprising the amount claimed, the Court makes no award.

C. Default interest

85. The Court considers it appropriate that 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 application admissible;

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

3. *Holds* that there is no need to examine the complaints under Articles 6 § 1 and 13 of the Convention separately;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into the national currency of Ukraine at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 21 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President