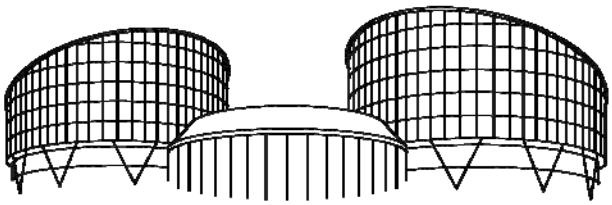

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF DUBETSKA AND OTHERS v. UKRAINE

(Application no. 30499/03)

JUDGMENT

This version was rectified on 2 May and 18 October 2011
under Rule 81 of the Rules of Court

STRASBOURG

10 February 2011

FINAL

10/05/2011

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

In the case of Dubetska and Others v. Ukraine,

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

Peer Lorenzen, *President,*
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 18 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 30499/03) against Ukraine lodged with the Court on 4 September 2003 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eleven Ukrainian nationals: Ms Ganna Pavlivna Dubetska, born in 1927; Ms Olga Grygorivna Dubetska, born in 1958; Mr Yaroslav Vasylyovych Dubetskyy, born in 1957; Mr Igor Volodymyrovych Nayda, born in 1958; Ms Myroslava Vasylivna Nayda[1], born in 1960; Mr Arkadiy Vasylyovych Gavrylyuk, born in 1932; Ms Ganna Petrivna Gavrylyuk, born in 1939; Ms Alla Arkadiyivna Vakiv, born in 1957; Ms Mariya Yaroslavivna Vakiv, born in 1982; Mr Yaroslav Yosypovych Vakiv, born in 1955; and Mr Yuriy Yaroslavovych Vakiv, born in 1979.

2. The applicants were represented by Ms Y. Ostapyk, a lawyer practising in Lviv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicants alleged that the State authorities had failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities.

4. On 15 October 2008 the President of the Fifth 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).

5. On an unspecified date after the case was communicated the applicant Mr Arkadiy Gavrylyuk died. On 18 September 2009 the applicants' representative requested that his claims be excluded from consideration.

1. Rectified on 18 October 2011: the text was "Myroslava Yaroslavivna Nayda".

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are Ukrainian nationals residing in the hamlet of Vilshyna in the Lviv region.

A. Preliminary information

7. The first to fifth applicants are members of an extended family residing in a house owned by the first applicant (the Dubetska-Nayda family house). This house was built by the family in 1933.

8. The remaining applicants are members of an extended family residing in a house constructed by the sixth applicant (the Gavrylyuk-Vakiv family house). This house was built by him in 1959. It is unclear whether a permit for construction of this house was obtained in 1959. Subsequently the house was officially registered, to which a property certificate of 1988 is witness.

9. The applicants' houses are located in Vilshyna hamlet, administratively a part of Silets village, Sokalskyy district, Lviv Region. The village is located in the Chervonograd coal-mining basin.

10. In 1955 the State began building, and in 1960 put into operation, the Velykomostivska No. 8 coal mine, whose spoil heap is located 100 metres from the Dubetska-Vakiv family house. In 2001 this mine was renamed the Vizeyska mine of the Lvivvugillya State Holding Company ("the mine"; *Шахта «Візейська» ДХК «Львіввугілля»*). In July 2005 a decision was taken to close the mine as unprofitable. The closure project is currently under way.

11. In 1979 the State opened the Chervonogradska coal processing factory ("the factory"; *Центрально-збагачувальна фабрика «Червоноградська»*) in the vicinity of the hamlet, initially managed by the Ukrzakhidvugillya State Company. In 2001 the factory was leased out to the Lvivsystemenergo Closed Joint Stock Company (*ЗАТ «Львівсистеменерго»*). Subsequently the Lvivsystemenergo CJSC was succeeded by the Lviv Coal Company Open Joint Stock Company. In 2007 a decision was taken to allow the factory to be privatised. It is not clear whether the factory has already been privatised.

12. In the course of its operation the factory has piled up a 60-metre spoil heap 430 metres from the Dubetska-Nayda family house and 420 metres from the Gavrylyuk-Vakiv family house. This spoil heap was not subject to privatisation and remained State property.

B. The environmental situation in Vilshyna hamlet

1. General data concerning pollution emitted by the factory and the mine

13. According to a number of studies by governmental and non-governmental entities, the operation of the factory and the mine has had adverse environmental effects.

14. In particular, in 1989 the Sokalskyy District Council Executive Committee ("the Sokalskyy Executive Committee"; *Виконавчий комітет Сокальської районної ради*) noted that the mine's and the factory's spoil heaps caused continuous infiltration of ground water, resulting in flooding of certain areas.

15. According to an assessment commissioned by the State Committee for Geology and Mineral Resource Utilisation, jointly with the Zakhidukrgeologiya State geological company (*Державний комітет України по геології та використанню надр; Державне геологічне підприємство «Західукргеологія»)* in 1998, the factory was a major contributor to pollution of the ground water, in particular on account of infiltration of water from its spoil heap. The authors of the assessment contended, in particular, that:

> "All the coal-mining industry operational in the region for over forty years has been negatively affecting the environment: spoil heaps from the mines and the coal-processing factory have been created, from which dust with a high concentration of toxic components spreads into the atmosphere and the soil ... systems of water drainage of the mines ... and cesspools... of the coal-processing factory are sources of pollution of surface and underground waters ...
>
> Rocks from the spoil heaps contain a variety of toxic heavy metals, leaching of which results in pollution of soils, surface and underground waters ...
>
> Very serious polluters ... are cesspools of mining waters and factory tailing ponds ..., which in the event of the slightest disturbance of the hydro-insulation cause pollution of surface and ground waters ...
>
> The general area of soil subsidence is about 70 square kilometres[2]... the deepest subsidence (up to 3.5 metres) corresponds to areas with the most mining activity...
>
> During construction of the water inlets ... deep wells were drilled which reached those [mineralised] waters. All this inevitably affected the health of people living in the area, first of all the children ...
>
> Extremely high pollution levels ... were found in the hamlet of Vilshyna, not far from the coal-processing factory and mine no. 8 spoil heaps, in the wells of Mr T. and Mr Dubetskyy. We can testify that even the appearance of this water does not give

2. Rectified on 2 May 2011: the text was "70 square meters".

grounds to consider it fit for any use. People from this community should be supplied with drinking-quality water or resettled ...”

16. In 2001 similar conclusions were proposed in a white paper published by Lviv State University.

17. On 20 April 2000 the Chervonograd Sanitary Epidemiological Service (“the Sanitary Service”; *Червоноградська міська санітарно-епідеміологічна служба*) recorded a 5.2-fold excess of dust concentration and a 1.2-fold excess of soot concentration in ambient air samples taken 500 metres from the factory's chimney.

18. On 1 August 2000 the Sanitary Service sampled water in the Vilshyna hamlet wells and found it did not meet safety standards. In particular, the concentration of nitrates exceeded the safety limits by three- to five-fold, the concentration of iron by five- to ten-fold and that of manganese by nine- to eleven-fold.

19. On 16 August 2002 the Ministry of Ecology and Natural Resources (*Міністерство екології та природних ресурсів*) acknowledged in a letter to the applicants that mining activities were of major environmental concern for the entire Chervonograd region. They caused soil subsidence and flooding. Heavy metals from mining waste penetrated the soil and ground waters. The level of pollution of the soil by heavy metals was up to ten times the permissible concentration, in particular in Silets village, especially on account of the operation of the factory and the mine.

20. On 28 May 2003 factory officials and the Chervonograd Coal Industry Inspectorate (*Червоноградська гірничо-технічна інспекція з нагляду у вугільній промисловості*) recorded infiltration of water from the foot of the factory's spoil heap on the side facing Vilshyna hamlet. They noted that water flowing from the heap had accumulated into one hectare of brownish salty lake.

21. In 2004 the Zakhidukrgeologiya company published a study entitled “Hydrogeological Conclusion concerning the Condition of Underground Waters in the Area of Mezhyriccha Village and Vilshyna Hamlet”, according to which in the geological composition of the area there were water-bearing layers of sand. The study also indicated that even before the beginning of the mining works the upper water-bearing layers were contaminated with sodium and compounds thereof as well as iron in the river valleys. However, exploitation of the mines added pollution to underground waters, especially their upper layers.

22. On 14 June 2004 the Lviv Chief Medical Officer for Health (*Головний державний санітарний лікар Львівської області*) noted that air samples had revealed dust and soot exceeding the maximum permissible concentrations 350 metres from the factory, and imposed administrative sanctions on the person in charge of the factory's boiler.

23. In September 2005 Dr Mark Chernaik of the Environmental Law Alliance Worldwide reported that the concentration of soot in ambient air

samples taken in Vilshyna hamlet was 1.5 times higher than the maximum permissible concentration under domestic standards. The well water was contaminated with mercury and cadmium, exceeding domestic safety standards twenty-five-fold and fourfold respectively. According to the report, the hamlet inhabitants were exposed to higher risks of cancer and respiratory and kidney diseases.

2. The applicants' accounts of damage sustained by them on account of the mine and factory operation

24. The applicants first submitted that their houses had sustained damage as a result of soil subsidence caused by mining activities and presented an acknowledgement of this signed by the mine's director on 1 January 1999. According to the applicants, the mine promised to pay for the repair of their houses but never did so.

25. Secondly, the applicants alleged that they were continuing to suffer from a lack of drinkable water. They contended that until 2009 the hamlet had no access to a mains water supply. Using the local well and stream water for washing and cooking purposes caused itching and intestinal infections. The applicants presented three photographs reportedly of the water available to them near their home. One photo entitled “water in a well in Vilshyna hamlet” pictured a bucket full of yellow-orange water near a well. The second photo entitled “a stream near the house” pictured a small stream of a bright orange colour. The third photo entitled “destruction of plant life by water from the coal-processing factory waste heap” depicted a brownish lake with many stumps and several dead bushes in the middle of it.

26. The applicants further contended that from 2003 the Lvivsystemenergo CJSC had been bringing, at its own expense, drinkable water into the hamlet by truck and tractor. However, this water was not provided in sufficient quantity. In evidence of this statement, the applicants presented a photograph picturing five large buckets of water and entitled “weekly water supply”.

27. The applicants further alleged that the water supply was not always regular. In support of this argument they produced letters from the Sokalskyy District Administration dated 9 July 2002 and 7 March 2006, acknowledging recent irregularities in supply of drinking water.

28. Thirdly, some of the applicants were alleged to have developed chronic health conditions associated with the factory operation, especially with air pollution. They presented medical certificates which stated that Olga Dubetska and Alla Vakiv were suffering from chronic bronchitis and emphysema and that Ganna Gavrylyuk had been diagnosed with carcinoma.

29. Fourthly, the applicants contended that their frustration with environmental factors affected communication between family members. In particular, lack of clean water for washing reportedly caused difficulties in

relations between spouses. Younger family members sought to break away from the older ones in search of better conditions for their growing children.

30. The applicants, however, did not relocate. They alleged that they would not be able to sell houses located in a contaminated area or to find other sources of funding for relocation to a safer community without State support. In evidence, the applicants presented a letter from a private real estate agency, S., dated September 2009, stating the following:

> "since in Vilshyna hamlet ... there has been no demand for residential housing for the past ten years because of the situation of this hamlet in technogenically polluted territory and subsidence of soil on its territory ... it is not possible to determine the market value of the house."

C. Administrative decisions addressing the harmful effects of the factory and mine operation

1. Decisions aimed at improving the environmental situation in the region

31. In November 1995 the Sanitary Service ordered the factory to develop a plan for management of the buffer zone.

32. On 5 June 1996 the Sanitary Service found that the factory had failed to comply with its order and ordered suspension of its operation. In spite of this measure, the factory reportedly continued to operate, with no further sanctions being imposed on its management.

33. On 7 April 2000 and 12 June 2002 the State Commission for Technogenic and Ecological Safety and Emergencies ("The Ecological Safety Commission"; *Державна комісія з питань техногенно-екологічної безпеки та надзвичайних ситуацій*) ordered a number of measures to improve water management and tackle soil pollution in the vicinity of the factory.

34. On 14 April 2003 the Lviv Regional Administration (*Львівська обласна державна адміністрація*) noted that the overall environmental situation had not improved since the Ecological Safety Commission's decision of 7 April 2000, as no funds had been allocated by the State Budget for implementation of the relevant measures.

35. On 27 January 2004 the Sanitary Service found that the mine had failed to comply with its instruction of 4 December 2003 as to the development of a plan for management of the buffer zone, and ordered suspension of its operation. However, the mine reportedly continued to operate.

36. On 13 July 2005 the Marzeyev State Institute for Hygiene and Medical Ecology (*Інститут гігієни та медичної екології ім. О. М. Марзеєва АМН України*) developed a management plan for the

factory buffer zone. The authors of the report acknowledged that the factory was polluting the air with nitrogen dioxide, carbon oxide, sulphuric anhydride and dust. They noted, however, that according to their studies ambient air samples taken more than 300 metres from the factory did not contain excessive pollution. The plan provided for implementation of a number of measures aimed at improvement of the hydro-insulation of the spoil heap, as well as reduction of its height to 50 metres. The authors concluded that in view of such measures it was possible to establish a general buffer zone at 300 metres for the entire factory site.

37. Later in the year the Ministry of Health (*Міністерство охорони здоров'я*) approved the Marzeyev Institute's plan, on an assumption that the height of the spoil heap would be reduced by August 2008.

38. On 29 April 2009 the Sanitary Service fined the factory director for failing to implement the measures in the factory buffer zone management plan.

2. Decisions concerning the applicants' resettlement

39. On 20 December 1994 the Sokalskyy Executive Committee noted that eighteen houses, including those of the applicants, were located within the factory spoil heap 500-metre buffer zone, in violation of applicable sanitary norms. It further allowed the Ukrzakhidvugillya company to resettle the inhabitants and to have these houses demolished. The Committee further obliged the company director to provide the applicants with housing by December 1996. This decision was not enforced.

40. In 1995 the Sokalskyy Executive Committee amended its decision and allowed the residents to keep their former houses following resettlement for recreational and gardening use.

41. On 7 April 2000 the Ecological Safety Commission noted that eighteen families lived within the limits of the factory buffer zone and commissioned the Ministry of Fuel and Energy and local executive authorities to ensure their resettlement in 2000-2001. The names of the families appear not to have been listed.

42. In December 2000 and 2001 the applicants enquired of the Ministry of Fuel and Energy when they would be resettled and received no answer.

43. In 2001 the Lviv Regional Administration included resettlement of eighteen families (names not listed) from the factory sanitary security zone in their annual activity plan, indicating the State budget as the funding source and referring to the Ecological Safety Commission's decision of 7 April 2000.

44. On 12 June 2002 the Ecological Safety Commission noted that its decision of 7 April 2000 remained unenforced and ordered the Sokalskyy District Administration, the Silets Village Council and the factory to work together to ensure the resettlement of families from the factory spoil heap buffer zone by the end of 2003.

45. In June 2002 the applicants, along with other village residents, complained to the President of Ukraine about the non-enforcement of the decisions concerning their resettlement. The President's Administration redirected their complaint to the Lviv Regional Administration and the Ministry of Ecology and Natural Resources for consideration.

46. On 16 August 2002 the Ministry of Ecology and Natural Resources informed the Vilshyna inhabitants in response to their complaint that it had proposed that the Cabinet of Ministers ensure prompt resettlement of the inhabitants from the factory buffer zone in accordance with the decision of the Ecological Safety Commission of 7 April 2000.

47. On 14 April 2003 the Lviv Regional Administration informed the applicants that it had repeatedly requested the Prime Minister and the Ministry of Fuel and Energy to provide funding for the enforcement of the decision of 7 April 2000.

D. Civil actions concerning the applicants' resettlement

1. Proceeding brought by the Dubetska-Nayda family

48. On 23 July 2002 the Dubetska-Nayda family instituted civil proceedings in the Chervonograd Court (*Місцевий суд м. Червонограда*) seeking to oblige the factory to resettle them from its buffer zone. Subsequently the Lvivvugillya State Company was summoned as a co-defendant.

49. The first hearing was scheduled for 28 October 2003. Subsequent hearings were scheduled for 12 November and 18 December 2003, 26 and 30 April, 18 May, 18 and 30 June, 19 July and 22 December 2004, and 25 November, 6, 20 and 26 December 2005. On some four occasions hearings were adjourned on account of a defendant's absence or following a defendant's request for an adjournment.

50. On 26 December 2005 the Chervonograd Court found that the plaintiffs resided in the mine's buffer zone and ordered the Lvivvugillya State Company holding it to resettle them. It further dismissed the applicants' claims against the factory, finding that their house was outside its 300-metre buffer zone.

51. This judgment was not appealed against and became final.

52. On 3 May 2006 the Chervonograd Bailiffs' Service initiated enforcement proceedings.

53. On 19 June 2006 the Bailiffs fined the mine's director for failing to ensure the enforcement of the judgment. The latter appealed against this decision.

54. On 26 June 2006 the director informed the Bailiffs that the mine could not comply with the judgment. It neither had available residential

housing at its disposal nor was it engaged in constructing housing, as it had received no appropriate allocations from the State budget.

55. The judgment remains unenforced to the present date.

2. Proceedings brought by the Gavrylyuk -Vakiv family

56. On 23 July 2002 the Gavrylyuk-Vakiv family, similarly to the Dubetska-Nayda family, instituted civil proceedings at Chervonograd Court seeking to be resettled outside the factory buffer zone.

57. Subsequently the factory was replaced by the Lvivsystemenergo CJSC as a defendant in the proceedings.

58. The first hearing was scheduled for 29 September 2003. Subsequent hearings were scheduled for 6, 17 and 30 October 2003, and 15 and 30 April, 18 May, 18 and 21 June 2004.

59. On 21 June 2004 Chervonograd Court dismissed the applicants' claims. The court found, in particular that, although the plan for management of the factory buffer zone was still under way, there were sufficient studies to justify the 300-metre zone. As the plaintiffs' house was located outside it, the defendant could not be obliged to resettle them. Moreover, the defendant had no funds to provide the applicants with new housing. The court found the decision of 1994 concerning the applicants' resettlement irrelevant and did not comment on subsequent decisions concerning the matter.

60. On 20 July 2004 the applicants appealed. They maintained, in particular, that the law provided that the actual concentration of pollutants on the outside boundaries of the zone should meet applicable safety standards. In their case, the actual level of pollution outside the zone exceeded such standards, as evidenced by a number of studies, referring to the factory operation as the major source of pollution. Furthermore, the decision of the Sokalskyy Executive Committee of 1994 could not have been irrelevant, as it remained formally in force.

61. On 28 March 2005 the Lviv Regional Court of Appeal (*Апеляційний суд Львівської області*) upheld the previous judgment and agreed with the trial court's reasoning. In response to the applicants' arguments concerning the actual pollution level at their place of residence, the court noted that the hamlet was supplied with imported water and that in any event, while the applicable law included penalties against polluters, it did not impose a general obligation on them to resettle individuals.

62. On 23 April 2005 the applicants appealed on points of law, relying on essentially the same arguments as in their previous appeal.

63. On 17 September 2007 the Khmelnytskyy Regional Court of Appeal (*Апеляційний суд Хмельницької області*) dismissed the applicants' request for leave to appeal on points of law.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

64. 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. Law of Ukraine "On Local Councils of People's Deputies and Local and Regional Self-Government" of 7 December 1990 (repealed with effect from 21 May 1997)

65. According to Article 57 of the Law, private and public entities and individuals could be held liable under the law for failure to comply with lawful decisions of bodies of regional self-government (which included executive committees of district councils).

66. Subsequent legislation concerning local self-government did not envisage the existence of such a body as an executive committee of a district council.

C. Law of Ukraine "On Waste" of 5 March 1998

67. Relevant provisions of the Law "On Waste" read as follows:

Section 9. Property rights to waste

"The State is the owner of waste produced on State property ... On behalf of the State the management of waste owned by the State shall be carried out by the Cabinet of Ministers."

D. Law of Ukraine "On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises" of 23 June 2005

68. The above Law introduced a new mechanism for payment and amortisation of companies' debts for energy resources. It also introduced a special register of companies involved in debt payment and amortisation under its provisions. A company's presence on that register suspends any enforcement proceedings against it; domestic courts shall also dismiss any request to initiate insolvency or liquidation proceedings against the company.

E. Order of the Ministry of Health No. 173 of 19 June 1996 "On Approval of the State Sanitary Rules concerning Planning and Construction of Populated Communities"

69. Relevant provisions of the Order of the Ministry of Health read as follows:

> "5.4. Industrial, agricultural and other objects, which are sources of environmental pollution with chemical, physical and biological factors, in the event that it is impossible to create wasteless technologies, should be separated from residential areas by sanitary security zones.
>
> ...
>
> On the exterior boundary of a sanitary security zone which faces a residential area, concentrations and levels of harmful substances should not be greater than those set down in the relevant hygiene standards (maximum permissible concentrations, maximum permissible levels) ...
>
> 5.5. ...
>
> In the event the studies do not confirm the statutory sanitary security zone or its establishment is not possible under particular circumstances, it is necessary to take a decision concerning a change of production technology, which would provide for decrease in emission of harmful substances into the atmosphere, its re-profiling or closure.
>
> ***Supplement No. 4, Sanitary classification of enterprises, production facilities and buildings and their required sanitary security zones***:
>
> .....
>
> A sanitary security zone of 500 metres [shall surround the following facilities]:
>
> ....

5. Spoil heaps of mines which are being exploited, inactive spoil heaps exceeding 30 metres in height which are susceptible to combustion; inactive spoil heaps exceeding 50 metres in height which are not susceptible to combustion.

A sanitary security zone of 300 metres [shall surround the following facilities]:

...

5. ... coal-processing factories using wet treatment technology

6. ... inactive spoil heaps of mines, less than 50 metres in height and not susceptible to combustion."

THE LAW

I. SCOPE OF THE CASE

70. On 18 September 2009 the applicants' representative informed the Court that applicant Mr Arkadiy Gavrylyuk had died. She further requested that his claims be excluded from consideration.

71. The Court considers that, in the absence of any heir expressing the wish to take over and continue the application on behalf of Mr Arkadiy Gavrylyuk, there are no special circumstances in the case affecting respect for human rights as defined in the Convention and requiring further examination of the application under Article 37 § 1 *in fine* of the Convention (see, for example, *Pukhigova v. Russia*, no. 15440/05, §§ 106-107, 2 July 2009 and *Goranda v. Romania* (dec.), no. 38090/03, 25 May 2010).

72. In view of the above, it is appropriate to strike the complaints lodged by Mr Arkadiy Gavrylyuk out of the list.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

73. The applicants complained that the State authorities had failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities. They relied on 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

1. Submissions by the parties

(a) The Government

74. The Government submitted that the application was inadmissible *ratione temporis* in so far as it related to the facts predating 11 September 1997, the date of entry of the Convention into force with respect to Ukraine.

75. They further submitted that the Gavrylyuk-Vakiv family could not claim to be victims of any violations of Article 8 as in 1959 they had unlawfully constructed their house on the land, which was formally allocated to them only a year later. Moreover, in breach of the law in force at the material time, this family had never requested authorisation of the mining authorities to construct their house on the land above the mine. As the Gavrylyuk-Vakiv family had deliberately constructed their house on land under industrial development and in so doing acted in violation of applicable law, they could not claim that the State had any obligations relating to respect for their Article 8 rights while they lived in this house. Their complaints were therefore inadmissible *ratione personae*.

76. The Government also submitted as an alternative that the Gavrylyuk-Vakiv family's complaints were manifestly ill-founded, as their family lived outside the statutory buffer zones of both the mine and the factory, and their resettlement claim was rejected by a competent court at the close of adversary proceedings. These applicants had therefore not made out an arguable Convention claim.

77. Finally, the Government contended that none of the applicants had exhausted available domestic remedies. In particular, they had never claimed compensation from either the mine or the factory for any damage allegedly sustained on account of their industrial activity.

(b) The applicants

78. The applicants disagreed. They noted that while the situation complained about had started before the entry of the Convention into force with respect to Ukraine, it continued afterwards and up to the present day. In particular, the Sokalskyy Executive Committee's decision to resettle them had not been formally quashed and was in force by the date of the Convention's entry into effect. So the competent authorities were responsible for its non-enforcement, as well as for the non-enforcement of the subsequent decision of the Ecological Safety Commission concerning

the applicants' resettlement and the Chervonograd Court's judgment in the Dubetska-Nayda family's favour. Likewise, the State bore responsibility for failure to enforce the buffer zone management plans for the mine and the factory leading to environmental deterioration in the area, where the applicants lived.

79. The applicants further submitted that the Gavrylyuk-Vakiv family had constructed their house lawfully, on land duly allocated for this purpose, while in 1960 they had been given extra land for gardening. The Government's submission that they had to seek the mining authorities' permission to build a house was not based on law. Also, by the time the Convention entered into force in respect of Ukraine, their house had been properly registered with the authorities, as evidenced by the property certificate provided by them to the Court.

80. The applicants further contended that the fact that the Chervonograd Court had dismissed the Gavrylyuk-Vakiv family's resettlement claim did not render their application manifestly ill-founded, regard being had to the actual excessive levels of pollution in the vicinity of their home. In rejecting their claim for resettlement the courts had relied on the prospective improvements anticipated following implementation of the buffer zone management plan for the factory. As the plan remained unimplemented, this group of applicants continued to suffer from excessive pollution and their claim was therefore not manifestly ill-founded.

81. Finally, the applicants alleged that they had properly exhausted domestic remedies, as they aired their complaints through domestic courts and referred to environmental pollution as the reason to claim resettlement.

2. The Court's assessment

82. In so far as the Government alleged partial inadmissibility of the application as falling outside the scope of the Court's temporal jurisdiction, the Court considers itself not competent *ratione temporis* to examine the State actions or omissions in addressing the applicants' situation prior to the date of the entry of the Convention into force with respect to Ukraine (11 September 1997). It is however competent to examine the applicants' complaints, which relate to the period after this date (see, *mutatis mutandis, Fadeyeva v. Russia*, no. 55723/00, § 82, ECHR 2005-IV).

83. As regards the Government's allegation that the complaints lodged by the Gavrylyuk-Vakiv family are incompatible with the Convention *ratione personae*, the Court notes, firstly, that Article 8 of the Convention applies regardless of whether an applicant's home has been built or occupied lawfully (see, among other authorities, *Prokopovich v. Russia*, no. 58255/00, § 36, ECHR 2004-XI (extracts)). Moreover, it notes that irrespective of whether the house at issue was lawfully constructed or regularised after the family had settled in it, by 11 September 1997, when the Convention entered into force with respect to Ukraine, the

Gavrylyuk-Vakiv family was occupying it lawfully. This fact is not disputed between the parties. In light of the above the Government's objection should be dismissed.

84. As regards the Government's allegation that the Gavrylyuk-Vakiv family's claims were manifestly ill-founded as their resettlement claim had been rejected in domestic proceedings, the Court agrees that it is not in a position to substitute its own judgment for that of the national courts and its power to review compliance with domestic law is limited (see, among other authorities, *Slivenko v. Latvia* [GC], no. 48321/99, § 105, ECHR 2003-X and *Paulić v. Croatia*, no. 3572/06, § 39, 22 October 2009). It is the Court's function, however, to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention (see *Slivenko*, cited above, ibid.). Furthermore, the Court notes that the Gavrylyuk-Vakiv family's complaint is not limited to the alleged unfairness of the judgments dismissing their resettlement claim. It concerns a general failure of the State to remedy their suffering from adverse environmental effect of pollution in their area. The Government's objection must therefore be dismissed.

85. Finally, as regards the non-exhaustion objection, the Court notes that the Government have not presented any examples of domestic court practice whereby an individual's claim for compensation against an industrial pollutant would be allowed in a situation similar to that of the applicants. Furthermore, both applicant families in the present case chose to exhaust domestic remedies with respect to their claim to be resettled from the area, permanently affected by pollution. One family obtained a resettlement order, which however remains unenforced as the debtor mine lacks budgetary allocations for it, and the other's claim was dismissed on the grounds that it lived outside the pollutants' statutory buffer zone. In view of all the above the Court has doubts concerning the applicants' prospects of success in compensation proceedings.

86. Even assuming, however, that such compensation could be awarded to them for past pollution and paid in good time, the Court notes that the applicants complain about continuing pollution, curtailing which for the future appears to necessitate some structural solutions. It is not obvious how the compensatory measure proposed by the Government would address this matter. In light of the above, the Court dismisses the non-exhaustion objection.

87. In conclusion, the Court notes that the application raises serious issues of fact and law under the Convention, the determination of which must be reserved to an examination of the merits. The application cannot therefore be declared manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. The Court, therefore, declares the application admissible.

B. Merits

1. Applicability of Article 8 of the Convention

(a) Submissions by the parties

(i) The applicants

88. The applicants submitted that they were suffering from serious State interference with their rights guaranteed by Article 8 of the Convention, on account of environmental pollution emanating from the State-owned mine and factory (in particular their spoil heaps), as well as from the State's failure to cope with its positive obligation to regulate hazardous industrial activity.

89. The applicants further noted that they had set up their present homes lawfully, before they could possibly have known that the area would fall within the legislative industrial buffer zone and would be environmentally unsafe.

90. The applicants next alleged that the Government's plan approving the 300-metre buffer zone around the factory was controversial, as operation of the spoil heap required a 500-metre buffer zone. The plan at issue had not been approved by the State Medical Officer for Health until it had previewed the measures for decreasing the height of the waste heap to 50 metres and hydro-insulating it, which has not been done so far. They considered, therefore, that they continued to live within the scientifically justifiable buffer zone of the waste heap.

91. The applicants further contended that not only their houses were located within the zone formally designated by the law as inappropriate for habitation, but there was considerable evidence that the actual air, water and soil pollution levels in the vicinity of their homes were unsafe and were such as could increase the applicants' vulnerability to pollution-associated diseases. In this regard they referred to various Governmental and non-governmental reports and surveys discussed in paragraphs 13-23 above.

92. The applicants additionally noted that other hazards included flooding of the nearby areas and soil subsidence caused by mining activities. They alleged that regard being had to the existence of numerous underground caverns dug out in the course of mining operations these hazards would exist even if no new mining activities took place.

93. In the meantime, the applicants were unable to relocate without the State's assistance, as on account of industrial pollution there was no demand for real estate in their hamlet and they were not capable of finding other sources of funding for relocation.

94. Finally, the applicants noted that the State being the owner of the factory for numerous years and remaining at present the owner of its spoil

heap as well as the owner of the mine, was fully aware of and responsible for the damage caused by their everyday operations, which had been going on for a long time. It therefore had responsibility under Article 8 of the Convention to take appropriate measures to alleviate the applicants' burden.

(ii) The Government

95. The Government did not dispute that they had Convention responsibility for addressing environmental concerns associated with the mine and the factory operation.

96. On the other hand, they contested the applicants' submissions as regards the damage suffered by them on account of alleged pollution. In particular, the Government submitted that, as regards the pollution emitted by the factory, its levels were generally safe outside the 300-metre zone around it, as confirmed by numerous studies. It is in view of these studies that the 300-metre buffer zone around the factory was approved by the relevant authorities in 2005. The applicants' houses, located 430 and 420 metres from the factory, should accordingly have been safe, regardless of whether the buffer zone plans had formally been put in place. Although occasional incidents of increased emissions might have taken place, they were promptly monitored and appropriate measures to decrease them were applied in good time, as evidenced, for instance, by the sanctions imposed on the factory management (see paragraphs 32 and 35 above).

97. The Government further submitted that although the Dubetska-Nayda family lived within the boundaries of the mine spoil heap's buffer zone, they, like the Gavrylyuk-Vakiv family, which lived outside the buffer zones of either the mine or the factory, had failed to substantiate any actual damage sustained on account of their proximity to both industrial facilities.

98. As regards the applicants' reference to several chronic diseases suffered by some of them, these could well be associated with their occupational activities and other factors.

99. As regards soil subsidence and flooding, the Government referred to geological studies which determined that the mountainous area in which the applicants lived had layers of water-bearing sands underneath the surface, susceptible to flotation. Based on these studies, the Government alleged that it could not be proved beyond reasonable doubt that the soil had subsided as a result of mining activities, rather than of a natural geological process.

100. The Government next alleged that in so far as the applicants complained about the water quality, various studies, including the one done by the Zakhidukrgeologiya (see paragraph 15 above) scientifically proved that the chemical composition and purity of the underground water in the area was naturally unfavourable for household consumption, except when drilled for at a much deeper level than was done for the applicants' households. In addition, the applicants' wells were not equipped with the

necessary filters and pipes. Moreover, the applicants were supplied with imported water. Finally, it was not in 2009, as suggested by the applicants (see paragraph 25 above), but in 2007 that a centralised aqueduct for the hamlet was put into operation.

101. As regards the authorities' decisions on the applicants' resettlement, they were based on preventive rather than remedial considerations. The decision taken by the Sokalskyy Executive Committee had expired by 1997 in view of the change in economic circumstances. The decision at issue had been taken when enlargement of the factory was being contemplated, which called for the establishment of a 500-metre buffer zone around it. If such a zone had been approved the applicants' houses would have been located within its boundaries, setting in motion the legal provisions calling for their resettlement regardless of the actual level of pollution. However, by 1997 it had become clear that the enlarged zone would not be necessary and the 1994 decision automatically became invalid.

102. Moreover, in 1995 the Sokalskyy Executive Committee had made amendments to its resettlement decision. Following requests from residents subject to resettlement, the Committee decided that there was no need to demolish their former houses, which could be used by them for recreational and gardening purposes. Several families who had been provided with alternative housing in 2000-03 as they lived within the 300-metre buffer zone, did in fact continue to use their previous houses, including for long periods, and refused to give them up.

103. In the Government's view, this fact was evidence that the applicants' resettlement claims were in fact not based on the actual levels of pollution. The conclusion that the Gavrylyuk-Vakiv family's[3] resettlement was not necessary was likewise reasonably made by the national judicial authorities. As regards the Dubetska-Nayda family, their resettlement was ordered on the basis of formal statutory provisions and did not involve any assessment of the actual or potential damage involved. In any event, both families were free to apply to the authorities for placement on a waiting list for social housing, which they had never done.

104. In sum, the applicants did not show that the operation of either the mine or the factory had infringed on their rights to an extent which would attract State responsibility under Article 8 of the Convention.

(b) The Court's assessment

(i) The Court's jurisprudence

105. The Court refers to its well-established case-law that neither Article 8 nor any other provision of the Convention guarantees the right to preservation of the natural environment as such (see *Kyrtatos v. Greece*,

3. Rectified on 2 May 2011: the text was “Gavrylyuk-Nayda family's”.

no. 41666/98, § 52, ECHR 2003-VI). Likewise, no issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his 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 (see, among other authorities, *Fadeyeva*, cited above, §§ 68-69).

106. While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. "Quality of life" in its turn is a subjective characteristic which hardly lends itself to a precise definition (see *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, § 90, 26 October 2006).

107. Taking into consideration the evidentiary difficulties involved, the Court will primarily give regard to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case (see *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1291-93, §§ 74-77). As a basis for the analysis it may use, for instance, domestic legal provisions determining unsafe levels of pollution (see *Fadeyeva,* cited above, § 87) and environmental studies commissioned by the authorities (see *Taşkın and Others v. Turkey*, no. 46117/99, §§113 and 120, ECHR 2004-X). Special attention will be paid by the Court to individual decisions taken by the authorities with respect to an applicant's particular situation, such as an undertaking to revoke a polluter's operating licence (see *Taşkın and Others,* cited above, § 112) or to resettle a resident away from a polluted area (see *Fadeyeva,* cited above, § 86). However, the Court cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such a situation it has to assess the evidence in its entirety (see *Ledyayeva and Others,* cited above, § 90). Further sources of evidence for consideration in addition to the applicant's personal accounts of events, will include, for instance, his medical certificates (see *Lars and Astrid Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008) as well as relevant reports, statements or studies made by private entities (see *Fadeyeva,* cited above, § 85).

108. In addition, in order to determine whether or not the State could be held responsible under Article 8 of the Convention, the Court must examine whether a situation was a result of a sudden and unexpected turn of events

or, on the contrary, was long-standing and well known to the State authorities *(see Fadeyeva*, cited above, §§ 90-91); whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life (see *López Ostra v. Spain*, 9 December 1994, §§ 52-53, Series A no. 303-C) and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay (see *Ledyayeva*, cited above, § 97).

(ii) Assessment of the facts in the present case

109. The Court reiterates that the present case concerns an allegation of adverse effects on the applicants' Article 8 rights on account of industrial pollution emanating from two State-owned facilities – the Vizeyska coal mine and the Chervonogradska coal-processing factory (in particular, its waste heap, which is 60 metres high).

110. The applicants' submissions relate firstly to deterioration of their health on account of water, air and soil pollution by toxic substances in excess of permissible concentrations. In addition, these submissions likewise concern the worsening of the quality of life in view of the damage to the houses by soil subsidence and persistent difficulties in accessing non-contaminated water, which have adversely affected the applicants' daily routine and interactions between family members.

111. In assessing to what extent the applicants' health was affected by the pollution complained about, the Court agrees with the Government that there is no evidence making it possible to establish quantifiable harm in the present case. It considers, however, that living in the area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health.

112. As regards the quality of the applicants' life, the Court notes the applicants' photographs of water and their accounts of their daily routine and communications (see paragraphs 24-30 above), which appear to be palpably affected by environmental considerations.

113. It notes that, as suggested by the Government, there may be different natural factors affecting the quality of water and causing soil subsidence in the applicants' case (see, for instance, paragraph 21 above). Moreover, at the present time the issue of accessing fresh water appears to have been resolved by the recent opening of a centralised aqueduct. At the same time, the case file contains sufficient evidence that the operation of the mine and the factory (in particular their spoil heaps) have contributed to the above problems for a number of years, at least to a certain extent.

114. This extent appears to be not at all negligible, in particular as according to domestic legislation residential houses may not be located within the buffer zones of the mines and the spoil heaps are designated as *a priori* environmentally hazardous. It appears that according to the State Sanitary Rules, a “safe distance” from a house to a spoil heap exceeding

50 metres in height is estimated at 500 metres (see paragraph 69 above). The Dubetska-Nayda family's house is situated 100 metres from the mine spoil heap and 430 metres from the factory one. The Gavrylyuk-Vakiv family's house in its turn is situated 420 metres from the factory spoil heap.

115. While agreeing with the Government that the statutory definitions do not necessarily reflect the actual levels of pollution to which the applicants were exposed, the Court notes that the applicants in the present case have presented a substantial amount of data in evidence that the actual excess of polluting substances within these distances from the facilities at issue has been recorded on a number of occasions (see paragraphs 17-18 and 22-23 above).

116. In deciding on whether the damage (or risk of damage) suffered by the applicants in the present case was such as to attract guarantees of Article 8, the Court also has regard to the fact that at various times the authorities considered resettling the applicants. The need to resettle the Dubetska-Nayda family was ultimately confirmed in a final judgment given by the Chervonograd Court on 26 December 2005.

117. As regards the Gavrylyuk-Vakiv family, on 21 June 2004 the same court found their resettlement unnecessary. However, in its findings the judicial authorities relied on anticipation that the factory would promptly enforce the measures envisioned in its prospective buffer zone management plan. These measures included hydro-insulation of the spoil heap and decreasing its height to 50 metres (in which case, as noted by the applicants, a 300-metre buffer zone around the spoil heap would become permissible under domestic law). According to the case file materials, these measures have not yet been carried out.

118. Consequently, it appears that for a period exceeding twelve years since the entry of the Convention into force in respect of Ukraine, the applicants were living permanently in an area which, according to both the legislative framework and empirical studies, was unsafe for residential use on account of air and water pollution and soil subsidence resulting from the operation of two State-owned industrial facilities.

119. In these circumstances the Court considers that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of Article 8 of the Convention.

120. In examining to what extent the State owed a duty to the applicants under this provision, the Court reiterates that the present case concerns pollution emanating from the daily operation of the State-owned Vizeyska coal mine and the Chervonogradska coal-processing factory, which was State-owned at least until 2007; its spoil heap has remained in State ownership to the present day. The State should have been, and in fact was, well aware of the environmental effects of the operation of these facilities, as these were the only large industries in the vicinity of the applicant families' households.

121. The Court further notes that the applicants set up their present homes before the facilities were in operation and long before the actual effect of their operation on the environment could be determined.

122. The Court also observes that, as the Government suggests, in principle the applicants remain free to move elsewhere. However, regard being had to the applicants' substantiated arguments concerning lack of demand for their houses located in the close proximity to major industrial pollutants, the Court is prepared to conclude that remedying their situation without State support may be a difficult task. Moreover, the Court considers that the applicants were not unreasonable in relying on the State, which owned both the polluters, to support their resettlement, especially since a promise to that effect was given to them as early as in 1994. As regards the Government's argument that the applicants could have applied for social housing, in the Court's view they presented no valid evidence that a general request of this sort would have been more effective than other efforts made by the applicants to obtain State housing, especially in view of the fact that the only formal reason for them to seek relocation was environmental pollution.

123. In the Court's opinion the combination of all these factors shows a strong enough link between the pollutant emissions and the State to raise an issue of the State's responsibility under Article 8 of the Convention.

124. It remains to be determined whether the State, in securing the applicants' rights, has struck a fair balance between the competing interests of the applicants and the community as a whole, as required by paragraph 2 of Article 8.

2. Justification under Article 8 § 2 of the Convention

(a) Submissions by the parties

(i) The applicants

125. The applicants asserted that in addressing their environmental concerns the State had failed to strike a fair balance between their interests and those of the community.

126. In particular, for the period of more than twelve years since the entry of the Convention into force with respect to Ukraine, the State authorities have failed either to bring the pollution levels under control or to resettle the applicants into a safer area.

127. While some measures in respect of mitigating the applicants' hardship were taken at various times, they were inconsistent and insufficient to change the applicants' overall situation as well as marked by prohibitive delays.

128. In particular, it was only in 2009 that the hamlet was provided with a centralised aqueduct. Until then drinking water, which was not available at all before 2003, was brought in small quantities by trucks and tractors at irregular intervals, sometimes as long as several months in winter. On several occasions the State authorities attempted to penalise the mine and the factory management for their failures to ensure safer pollution levels, but these punishments were negligible or remained unenforced (such as the decision to suspend operation of the mine) and did not bring about any subsequent improvements.

129. The applicants further submitted that, as regards their resettlement, the 1994 decision to this end was never officially revoked, remained in force and was confirmed in 2000 by the Ecological Safety Commission. The subsequent court decisions disregarding it were therefore unlawful. Moreover, in deciding that the applicants no longer lived in the factory buffer zone, the judicial authorities relied on its prospective plan for buffer zone management, envisioning a number of measures to ensure that living outside the 300-metre zone actually would become safe, including downsizing of the spoil heap to 50 metres and hydro-insulating it. However, as the zone management measures had remained unenforced, the applicants continued to live in an environmentally unsafe area.

130. Moreover, the Dubetska-Nayda family's house was also located within the mine's buffer zone, which was confirmed by the judicial authorities in a final and binding decision of 26 December 2005 ordering this family's resettlement.

131. Further, significant delays marked consideration of the applicants' claims by domestic judicial authorities. On many occasions the trial court failed to inform the applicants of hearing dates or unreasonably postponed hearings on account of defendants' absences.

132. Finally, even though the Dubetska-Nayda family succeeded in obtaining a resettlement judgment, its effect was set at naught, as for some five years now it has remained unenforced. The prospects for its enforcement within foreseeable future were unpromising, regard being had, in particular, to the entry into force of the Law of Ukraine “On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises”, which stalled the possibility of recovering debt from the Vizeyska mine.

133. In sum, the applicants submitted that the State authorities had failed to act diligently and in good time in addressing their problems caused by pollution from the mine and the factory.

(ii) The Government

134. The Government disagreed. They submitted that they had done everything in their power to ensure that people living near the mine and the factory, whose operation was admittedly connected with some environmental risks, were least affected by them.

135. In particular, the State put in place a legislative framework to regulate the operation of industrial polluters, including the establishment of safe emission levels and buffer zones. It has kept a constant watch on compliance with pollution safety standards by the mine and the factory and, in the event of occasional failures, the management was promptly penalised and the problems addressed. As a result, within 300 metres of the factory the levels of pollution were actually usually within the limits statutorily recognised as safe. This fact, confirmed by rigorous empirical monitoring, enabled scientific substantiation of the 300-metre buffer zone plan around the factory. A plan for the mine was likewise developed, however, in view of the mine's eventual closure there was no need to approve it or put it in place.

136. The Government further submitted that, as regards the applicants' resettlement claims, neither family had actually suffered damage or risk of damage from pollution such as to warrant their resettlement. As the 1994 decision, which had expired by 1997 in view of the economic challenges downsizing the factory's production levels instead of their anticipated increase, at no point in time from the entry of the Convention into force with respect to Ukraine to the present was the State responsible for the Gavrylyuk-Vakiv family's resettlement, as that family lived outside both buffer zones.

137. As regards the Dubetska-Nayda family, the State was obliged to resettle them on statutory grounds by the Chervonograd Court's decision of 26 December 2005. While the State's obligation to enforce this judgment was not in dispute, delays were caused by the severe financial problems of the debtor mine as well as the mining sector nationwide. The mine was unprofitable and owed substantial amounts to various creditors, including salary arrears to its employees. It was therefore unable to pay its debts and was subject to liquidation. Attempting to tackle the nationwide critical situation in the fuel and energy sector, the State was forced to enact the Law "On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises", suspending or restructuring debts of the enterprises in the industry. Although it was not clear when the judgment would be enforced, funds were being sought and provision of the family with housing had been included in the list of measures previewed in the course of the liquidation.

138. In any event, both applicant families were given a judicial forum to handle their resettlement complaints. In so far as they complained that their court proceedings were lengthy, the delays were caused by the complexity of the subject and the search for the comprehensive evidence necessary to substantiate a reasoned and fair decision. In addition, some adjournments were on account of the applicants' failures to appear.

139. Overall, the State, which was facing a complex task of balancing between environmental and economic concerns relating to the mine and the

factory operation, had duly considered the applicants' interests against those of the community in addressing them.

(b) The Court's assessment

(i) The Court's jurisprudence

140. The Court reiterates that the principles applicable to an assessment of the State's responsibility under Article 8 of the Convention in environmental cases are broadly similar regardless of whether the case is analysed in terms of a direct interference or a positive duty to regulate private activities (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII, and *Fadeyeva*, cited above, §§ 89 and 94).

141. In cases involving environmental issues, the State must be allowed a wide margin of appreciation and be left a choice between different ways and means of meeting its obligations. The ultimate question before the Court is, however, whether a State has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole (see *Hatton and Others, cited above,* §§ 100, 119 and 123). In making such an assessment all the factors, including domestic legality, must be analysed in the context of a particular case (see ibid., § 120, and *Fadeyeva*, cited above, §§ 96-97).

142. Where the complaints relate to State policy with respect to industrial polluters, as in the present case, it remains open to the Court to review the merits of the respective decisions and conclude that there has been a manifest error. However, the complexity of the issues involved with regard to environmental policymaking renders the Court's role primarily a subsidiary one. It must first examine whether the decision-making process was fair, and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities (see *Fadeyeva*, cited above, § 105).

143. In scrutinising the procedures at issue, the Court will examine whether the authorities conducted sufficient studies to evaluate the risks of a potentially hazardous activity (see *Hatton and Others*, cited above, § 128, and *Giacomelli v. Italy*, no. 59909/00, § 86, ECHR 2006-XII), whether, on the basis of the information available, they have developed an adequate policy *vis-à-vis* polluters and whether all necessary measures have been taken to enforce this policy in good time (see *Ledyayeva and Others,* cited above*,* § 104, and *Giacomelli,* cited above, §§ 92-93, ECHR 2006-...). The Court will likewise examine to what extent the individuals affected by the policy at issue were able to contribute to the decision-making, including access to the relevant information and ability to challenge the authorities' decisions in an effective way (see, *mutatis mutandis*, *Guerra and Others*

v. Italy, judgment of 19 February 1998, *Reports* 1998-I, p. 228, § 60; *Hatton and Others*, cited above, § 127; and *Taşkın and Others, cited above,* §119).

144. As the Convention is intended to protect effective rights, not illusory ones, a fair balance between the various interests at stake may be upset not only where the regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with (see *Moreno Gómez v. Spain*, no. 4143/02, §§ 56 and 61, ECHR 2004-X). The procedural safeguards available to the applicant may be rendered inoperative and the State may be found liable under the Convention where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced (see *Taşkın and Others,* cited above, §§ 124-25).

145. Overall, the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community (see Fadeyeva, cited above, § 128).

(ii) Assessment of the facts in the present case

146. The Court remarks that the authorities contemplated and conceived a number of measures aimed at minimising the harmful effects of the mine and the factory operation on the applicants' households. It should be noted, for instance, that the quality of the legislative framework concerning industrial pollution is not in dispute between the parties in the present case. Further, as suggested by the Government, the authorities regularly monitored the levels of actual pollution and designed various measures to minimise them, including imposing penalties on the mine and factory management for breaches and eventual development of a plan for maintenance of the factory buffer zone. In addition, the applicants were promised compensation for damage caused by soil subsidence and water was brought in at State expense. No later than 2009 a centralised aqueduct was built, which should relieve the applicants of the burdens associated with accessing drinking-quality water, a major issue raised in their application. Finally, as mentioned above, on numerous occasions the authorities considered resettling the applicants as a way of providing an effective solution to their environmental hardship.

147. Notwithstanding the effort, for more than twelve years the State authorities have not been able to put in place an effective solution for the applicants' personal situation, which throughout this period has remained virtually the same.

148. It is noted that on the date of the Convention's entry into force (11 September 1997) the applicants were living in close proximity to two major industrial polluters, which adversely and substantially affected their daily life. It appears that in order to fulfil their Convention obligations, the State authorities, who owned these polluters, contemplated two major policy

choices *vis-à-vis* the applicants' situation – either to facilitate their relocation to a safer area or to mitigate the pollution effects in some way.

149. Yet in 1994, before the Convention's entry into force, the Sokalskyy Executive Committee made the choice in favour of relocation. In the following period, however, the Government did not act promptly and consistently and did not back up this decision with the necessary resources to have it enforced. While according to the Government's observations the 1994 decision automatically lost its legal power by 1997 in view of the factory downsizing, the applicants were never officially informed of this, much less given a reference to the legal provision on the basis of which the decision at issue could have automatically lost its effect, in particular, in the absence of a new factory buffer zone management plan. Moreover, it appears that in April 2000 the 1994 decision was backed up by that of the Ecological Safety Commission, resolving to solicit State funding for the resettlement of eighteen families from the factory buffer zone. While the names of the families apparently remained unlisted, their number – eighteen - was the same as that mentioned in the 1994 decision. The Court therefore finds that the applicants could have reasonably expected to be among them. It was not until 21 June 2004 for the Gavrylyuk-Vakiv family and 26 December 2005 for the Dubetska-Nayda family that the applicants were formally declared to be living outside the prospective factory buffer zone and not entitled to relocation at State expense. It was also only on 26 December 2005 that the State authorities acknowledged their obligation under domestic law to resettle the Dubetska-Nayda family from the mine spoil heap buffer zone. The judicial proceedings, which lasted some three and a half years at one level of jurisdiction for the Dubetska-Nayda family and a little over five years at three levels of jurisdiction for the Gavrylyuk-Vakiv family, were marked by certain delays, in particular, on account of some significant intervals between hearings. Next, the decision given in the Dubetska-Nayda family's favour did not change the family's situation, as throughout the next five years and until now it has not been funded. Consequently, the Court remarks that for more than twelve years from the Convention's entry into force and up to now little or nothing has been done to help the applicants to move to a safer area.

150. The Court considers that when it comes to the wide margin of appreciation available to the States in context of their environmental obligations under Article 8 of the Convention, it would be going too far to establish an applicant's general right to free new housing at the State's expense (see *Fadeyeva*, cited above, § 133). The applicants' Article 8 complaints could also be remedied by duly addressing the environmental hazards.

151. In the meantime, the Government's approach to tackling pollution in the present case has also been marked by numerous delays and inconsistent enforcement. A major measure contemplated by the

Government in this regard during the period in question concerned the development of scientifically justified buffer zone management plans for the mine and the factory. This measure appears to have been mandatory under the applicable law, as at various times the public health authorities imposed sanctions on the facilities' management for failures to implement it, going as far as the suspension of their operating licences (see paragraphs 32 and 35 above). However, these suspensions apparently remained unenforced and neither the mine nor the factory has put in place a valid functioning buffer zone management plan as yet.

152. Eight years since the entry of the Convention into force, in 2005, the factory had such plan developed. When dismissing the applicants' claims against the factory for resettlement, the judicial authorities pointed out that the applicants' rights should be duly protected by this plan, in particular, in view of the anticipated downsizing of the spoil heap and its hydro-insulation. However, these measures, envisioned by the plan as necessary in order to render the factory's operation harmless to the area outside the buffer zone, have still not been enforced more than five years later (see paragraph 38 above). There also appear to have been, at least until the launch of the aqueduct no later than in 2009, delays in supplying potable water to the hamlet, which resulted in considerable difficulties for the applicants. The applicants cannot therefore be said to have been duly protected from the environmental risks emanating from the factory operation.

153. As regards the mine, in 2005 it went into liquidation without the zone management plan ever being finalised. It is unclear whether the mine has in fact ceased to operate at the present time. It appears, however, that the applicants in any event continue to be affected by its presence, in particular as they have not been compensated for damage caused by soil subsidence. In addition, the Dubetska-Nayda family lives within 100 metres of the mine's spoil heap, which needs environmental management regardless of whether it is still in use.

154. In sum, it appears that during the entire period taken into consideration both the mine and the factory have functioned not in compliance with the applicable domestic environmental regulations and the Government have failed either to facilitate the applicants' relocation or to put in place a functioning policy to protect them from environmental risks associated with continuing to live within their immediate proximity.

155. The Court appreciates that tackling environmental concerns associated with the operation of two major industrial polluters, which had apparently been malfunctioning from the start and piling up waste for over fifty years, was a complex task which required time and considerable resources, the more so in the context of these facilities' low profitability and nationwide economic difficulties, to which the Government have referred. At the same time, the Court notes that these industrial facilities were located

in a rural area and the applicants belonged to a very small group of people (apparently not more than two dozen families) who lived nearby and were most seriously affected by pollution. In these circumstances the Government has failed to adduce sufficient explanation for their failure to either resettle the applicants or find some other kind of effective solution for their individual burden for more than twelve years.

156. There has therefore been a breach of Article 8 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. 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

1. Pecuniary damage

158. The applicants claimed 28,000 euros (EUR) in respect of pecuniary damage. They alleged that this sum represented the purchase price of two comparable houses (one for each of the two applicant families) in the neighbouring area, not affected by pollution. They argued that they were entitled to this amount in damages, as their houses had lost market value and could not be sold on account of their unfavourable location.

159. The Government submitted that these claims were exorbitant and unsubstantiated.

160. In considering the applicants' claim for pecuniary damage, the Court would state that the violation complained of by the applicants is of a continuing nature. Throughout the period under consideration the applicants have been living in their houses and have never been deprived of them. Although during this time their private life was adversely affected by operation of two industrial facilities, nothing indicates that they incurred any expenses in this connection. Therefore, the applicants failed to substantiate any material loss.

161. In so far as they allege that their houses have lost market value, the Court reiterates that the present application was lodged and examined under Article 8 of the Convention and not under Article 1 of Protocol no. 1, which protects property rights. There is therefore no causal link between the violation found and the loss of market value alleged.

162. As regards future measures to be adopted by the Government in order to comply with the Court's finding of a violation of Article 8 of the Convention in the present case, the Court reiterates that the State obligation to enforce the final judgment in respect of the Dubetska-Nayda family is not in dispute. As regards the Gavrylyuk-Vakiv family, their resettlement to an ecologically safe area would be only one of many possible solutions. In any event, according to Article 41 of the Convention, by finding a violation of Article 8 in the present case the Court has established the Government's obligation to take appropriate measures to remedy the applicants' individual situation.

2. Non-pecuniary damage

163. In addition, the Dubetska-Nayda family claimed EUR 32,000 in non-pecuniary damage and the Gavrylyuk-Vakiv family claimed EUR 33,000 in this respect. The applicants alleged that these amounts represented compensation for their physical suffering in connection with living in an unsafe environment, as well as psychological distress on account of disruption of their daily routine, complications in interpersonal communication and frustration with making prolonged unsuccessful efforts to obtain redress from the public authorities.

164. The Government submitted that the applicants should not be awarded any compensation.

165. The Court is prepared to accept that the applicants' prolonged exposure to industrial pollution caused them much inconvenience, psychological distress and even a degree of physical suffering, and that they might well feel frustration on account of the authorities' response to their hardship – this is clear from the grounds on which the Court found a violation of Article 8. Taking into account various relevant factors, including the duration of the situation complained of, and making an assessment on an equitable basis, the Court awards the applicants the amounts claimed in respect of non-pecuniary damage in full.

B. Costs and expenses

166. The applicants did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

167. 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. *Decides* to strike the application out of its list of cases, in so far as Mr Arkadiy Gavrylyuk's complaint is concerned;

2. *Declares* the application admissible in respect of all other applicants;

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

4. *Holds*
   (a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
      (i) the first, the second, the third, the fourth and the fifth applicant jointly EUR 32,000 (thirty-two thousand euros);
      (ii) the seventh, the eighth, the ninth, the tenth and the eleventh applicant jointly EUR 33,000 (thirty-three thousand euros)
   plus any tax that may be chargeable in respect of the above amounts, to be converted into the national currency of Ukraine at the rate applicable on 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President