

Challenges persist for multiple legal actions regarding MH17

Written by Amy Maguire, Senior Lecturer in International Law and Human Rights, University of Newcastle



Reuters/Michael Kooren

Multiple parallel actions are ongoing with the aim of achieving truth and justice for the 298 passengers and crew of Malaysian Airlines flight MH17. The flight was [shot down](#) over Ukraine on July 17, 2014.

An investigative team, led by the Dutch aviation authority and endorsed by the Australian government, [concluded](#) that the aircraft was shot down by a BUK missile. More than 100 individuals were identified in the 2016 report as linked to the incident. The investigation is ongoing.

Australia's foreign minister, Julie Bishop, [advocated](#) for a war crimes tribunal to apportion blame for the incident. However, this proposal [was vetoed](#) by Russia in the UN Security Council.

This week, focus has [turned to an action](#) lodged in the European Court of Human Rights by lawyer Jerry Skinner on behalf of 33 relatives of MH17 victims. Skinner claims that the application has reached the stage of "ready for judicial determination".

As [reported](#) last year, each applicant is seeking A\$10 million in compensation from Russia. The claim is that Russia is responsible for violating the right to life of those killed due to its alleged supply of the missile that was launched from Ukraine, bringing down the aircraft.

However, the case lodged by Skinner is not yet listed [in the court's database](#). It is unclear how far the application has progressed but it certainly faces a range of major obstacles. The status of "ready for judicial determination" does not appear to be an official stage of proceedings in the court.

The European Court of Human Rights

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The [European Court of Human Rights](#) was established in 1959 and sits in Strasbourg. It has jurisdiction to hear complaints from individuals and countries, alleging violations by countries that are party to the European Convention on Human Rights.

The court has delivered more than 10,000 judgments, which are formally binding on the countries subject to them. It receives [more than 50,000 applications](#) each year.

The application from Ayler and others is not the first to be lodged in the court in relation to Flight MH17. The case of [Ioppa v Ukraine](#) was lodged with the court in 2016.

The four applicants in that case are family members of three of the passengers killed on board Flight MH17. They have complained against Ukraine, rather than Russia. Specifically, they argue Ukraine violated their relatives' right to life by failing to close the airspace above the military conflict zone that was active in eastern Ukraine in 2014.

The applicants allege that Ukrainian authorities intentionally failed to close the airspace despite their knowledge of the dangers posed to civilians travelling over Ukraine in passenger aircraft.

The application is currently noted as a “[communicated case](#)”, meaning it is awaiting judgment. The court has asked the applicants to identify what they have done to exhaust any available domestic legal remedies before applying to the court – particularly any legal avenues available in Ukraine.

The court has not yet published a preliminary finding on the admissibility of the case. This is the necessary first step before notice will be given to Ukraine to respond to the application. The case is certainly a long way from any potential judgment by a chamber of the court.

The Council of Europe

The European Court of Human Rights is not a creature of the European Union, but rather of the [Council of Europe](#)

. The Council of Europe is a human rights organisation of 47 members, 28 of which are also EU

members. All Council of Europe members have signed the European Convention on Human Rights.

The Council of Europe seeks to [promote goals](#) central to the international human rights framework, including freedom of expression and of the press, minority rights, and the abolition of the death penalty.

As a [Council of Europe member](#), Ukraine is subject to judgement by the European Court of Human Rights. The applicants in *Ukraine v Loppa* are all nationals of Germany, another member. Other Council of Europe members central to the MH17 situation are the Netherlands – because the flight originated at Amsterdam's Schiphol airport – and Russia.

Should the European Court of Human Rights find Ukraine liable for a breach of the convention, Ukraine will be bound by that judgment. The committee of ministers of the Council of Europe monitor the execution of judgments by countries subject to them, including compliance with any orders to pay damages to complainants.

However, the European Court of Human Rights and the Council of Europe both lack enforcement capacity within the domestic jurisdiction of members, and would rely on diplomatic pressure to compel compliance with a judgment. Such pressure may be more or less effective depending on the status, power and political stance of a given member.

Prospects of success

Skinner has called on Australia to support the Ayler application. Bishop has responded that such litigation is a private matter for the families involved and those they are taking action against.

Bishop's [position](#) is that Australia's role is to support the ongoing investigation into the causes of the incident and then to pursue a justice mechanism with other countries.

It is important to note that Australia has no standing to join any action before the European

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Court of Human Rights, as it is not a member of the Council of Europe. However, Skinner argues Australia could exert diplomatic and political pressure to support the action.

Unfortunately for the families engaged in the European Court of Human Rights applications, litigation before that court appears to be a very indirect and unreliable route to gain compensation for the loss of their loved ones.

In the case against Ukraine, beyond the as-yet-uncrossed jurisdictional barriers, it may be necessary to prove that Ukrainian authorities knew of a [direct threat](#) to those on board MH17. This is a much more difficult standard to prove than a general awareness of threat to any civilian aircraft.

In action against Russia, setting aside the considerable jurisdictional issues and matters of proof, there is a major added barrier to satisfaction for the applicants. Russia has passed a law [permitting it to overrule](#) the decisions of international courts.

The Russian Constitutional Court [subsequently ruled](#) that Russia is permitted to overrule international judicial decisions where these would conflict with the Russian Constitution.

Russia disputes the preliminary findings of the ongoing MH17 investigation and [rejects](#) suggestions of its responsibility for the atrocity. This suggests that Russia would not accept responsibility for any finding of human rights violations by the European Court of Human Rights.

Beyond the human rights context, yet another action has been launched in the [International Court of Justice](#)

. In that application, Ukraine asks the International Court of Justice to [find Russia responsible](#) for the MH17 disaster and order reparations.

From an international law perspective, the stakes of such an action are higher for Russia than

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human rights litigation launched by victims' families. However, Russia's response is likely to be the same. While the International Court of Justice [has progressed](#) the case beyond the initial stage, a finding against Russia may well be disputed and any orders ignored.

Disclosure

Amy Maguire is a member of the National Committee of Australian Lawyers for Human Rights and a member of Amnesty International.

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