



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

FIFTH SECTION

CASE OF NAYDYON v. UKRAINE

(Application no. 16474/03)

JUDGMENT

STRASBOURG

14 October 2010

FINAL

14/01/2011

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

In the case of Naydyon v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Zdravka Kalaydjieva,

Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 16474/03) 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, Mr Vladimir Nikolayevich Naydyon (“the applicant”), on 22 April 2003.

2. Between 25 March and 31 July 2008 Mr A. Bushchenko, a lawyer practising in Kharkiv, represented the applicant in the proceedings before the Court. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 26 November 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1962 and is currently serving a prison sentence at the Yenakiyeve Town Correctional Colony (Prison) No. 52, the Donetsk Region (“the Yenakiyeve Colony”).

A. The arrest and detention of the applicant

5. On 23 November 1999 the applicant was arrested by the police on suspicion of burglary. According to the applicant, during his detention from 23 to 25 November 1999 and subsequent interrogations, which took place at the police station, he was subjected to various forms of ill-treatment, the aim of which was to extract a confession for grave crimes, including murder and burglary. The applicant maintained that he had received multiple bruises and abrasions on his head and body and that several ribs and teeth had been broken. The applicant did not have access to a doctor and the alleged injuries were not recorded.

6. On 25 November 1999 the applicant was given access to an official defence lawyer, appointed by the authorities, who continued to represent him until the completion of the proceedings. On the same day the applicant was transferred to the Mariupol Town Temporary Detention Centre (“the Mariupol ITU”).

7. On 29 November 1999 the applicant was transferred to the Mariupol Pre-Trial Detention Centre No. 7 (“the Mariupol SIZO”).

8. According to the applicant, he complained to the prosecutors that he had been ill-treated. His complaint was allegedly rejected as unsubstantiated by the Deputy Prosecutor of the Donetsk Region on 12 April 2000 and he did not challenge that decision before the courts. No copy of the decision was submitted to the Court. The Government did not contest these submissions, though they provided a copy of the letter from the General Prosecutor's Office of 24 January 2008 by which the Government Agent had been informed, *inter alia*, that the applicant had not lodged any complaints with the Donetsk Regional Prosecutor's Office claiming that unlawful investigation methods had been applied in his case (see paragraph 31 below).

9. In the course of his trial the applicant maintained his complaint of ill-treatment. In particular, the applicant alleged that his confession for having committed some of the crimes with which he had been charged had been obtained under duress. In his submissions before the courts the applicant referred to the decision of 12 April 2000, indicating where it was to be found in the domestic case file. While the Donetsk Regional Court of Appeal gave no reply to the applicant's complaint, the Supreme Court, in its decision of 26 September 2002 (see below), held, in general terms, that there was no evidence that the applicant's statements had been obtained in an arbitrary manner. The relevant parts of that decision read as follows:

“... Naydyon disagrees with [his] conviction, as, in his view, it is harsh, partial and unfair. [According to him] the case was heard with the accusatory inclination; the force was used during [his] questioning; [he was] questioned in a misleading manner; [and] he did not organise a [criminal] group ...

Having heard the judge-rapporteur, the prosecutor ... having examined the case materials, and having discussed the arguments in the cassation appeals, the panel of judges concluded that the appeals shall not be allowed ...

There is no evidence that the statements of the convicted were obtained in a misleading or in any other unlawful manner.

...”

10. On 22 July 2001 the applicant was transferred to the Donetsk Pre-Trial Detention Centre No. 5 (“the Donetsk SIZO”), where he was held at least until 10 July 2004, when he was transferred to the Yenakiyeve Colony in which he is now serving his sentence. During his detention in the Donetsk SIZO the applicant requested and subsequently received dental treatment on one occasion and he also had his lungs x-rayed and examined in May 2003 and January 2004. He did not request any other medical aid.

According to the applicant, the conditions of his detention in the Donetsk SIZO were poor, he was not provided with food of adequate quality and there was a person with mental health problems detained in the same SIZO building with him.

B. The applicant's trial

11. On 31 May 2000 the pre-trial investigations in the applicant's case were completed and the case was subsequently referred to the Donetsk Regional Court of Appeal.

12. According to the applicant, in the course of the court proceedings, he asked for several witnesses to be called and examined on his behalf. He received no reply to his request.

13. On 19 July 2001 the Donetsk Regional Court of Appeal, acting as a court of first instance, found the applicant, together with three other persons, guilty of crimes committed in 1998-99, including several counts of aggravated murder, burglary and sexual intercourse with a minor. The court sentenced the applicant to life imprisonment and confiscated all his property. The court based its judgment on the statements made before it by the defendants and their statements obtained during the pre-trial investigations in which they had confessed to having committed some of the crimes with which they had been charged; the statements of ten victims and witnesses heard by the court and the written statements of six other victims and witnesses obtained in the course of the pre-trial investigations; and the reports of fifteen experts.

14. The applicant's lawyer and the applicant himself lodged separate appeals in cassation with the same court.

15. The lawyer alleged that the first-instance court had erred in the assessment of evidence and had not applied the law correctly in the case.

16. The applicant complained that the first-instance court had failed to summon witnesses on his behalf or the expert on whose conclusions the applicant's conviction of sexual intercourse with a minor had been based. The conclusions concerned the state of sexual development of the victim. In his appeal in cassation the applicant further alleged that the court had refused to take into account his allegations of torture during his detention and subsequent interrogations in November 1999 and that it had not examined his submissions concerning various procedural violations committed by the authorities in the course of the pre-trial investigations.

17. On 26 September 2002 the Supreme Court partly amended the judgment of 19 July 2001. However, the applicant's conviction and sentence remained unchanged. The Supreme Court found that the judgment had been well-founded and that there had been no procedural irregularities during the investigation or trial. The Supreme Court's decision was communicated to the applicant on 25 October 2002.

C. The application to the Court

18. On 17 April 2003 the applicant sent his first letter to the Court and the application form was received on 30 September 2003. In support of his application the applicant submitted copies of the court decisions in his criminal case, his lawyer's appeal in cassation and several letters from the authorities which the applicant had received in reply to his complaints that his conviction had been unlawful.

19. In the letters, which the Court received from the applicant in 2003, he alleged that the staff of the Donetsk SIZO had often refused or substantially delayed the dispatch of his letters, including the application form, addressed to the Court; that they had refused to provide him with copies of the documents which he had intended to submit to the Court (the applicant's complaints and procedural requests made in the course of his trial and the courts' replies to the applicant's submissions); and that they had put psychological pressure on the applicant asking him not to complain about the SIZO authorities. The applicant maintained that, because of his application to the Court, he was placed in a cell with a person suffering from the open form of tuberculosis. As a consequence, he was at risk of being infected with this disease.

20. On 27 October 2003 the Court invited the Government to submit factual information with respect to allegations contained in the applicant's letters to the Court.

21. By letter dated 3 December 2003, the Government informed the Court that there had been no interference with the applicant's correspondence. They submitted copies of the Donetsk SIZO's register of incoming and outgoing correspondence and the applicant's written statements addressed to the State Penitentiary Department, in which he had

acknowledged that he had had no complaints against the Donetsk SIZO authorities and that his letters had been dispatched without delay.

22. In his letters of 22 November and 12 December 2003 the applicant alleged that on 5 November 2003 the deputy governor of the Donetsk SIZO had told him to write such statements.

23. In his letter of 22 May 2006 the applicant stated that in July 2004, just before his transfer to the Yenakiyev Colony, an unspecified member of staff of the Donetsk SIZO had made threats against him in order to prevent him complaining about the SIZO authorities.

24. By letter dated 7 July 2006, the Court asked the applicant to submit documentary evidence in respect of his complaints under Articles 3 and 6 of the Convention. In particular, the applicant was invited to submit copies of his complaints made to the national authorities concerning the alleged ill-treatment and copies of their replies to such complaints concerning the events of 23-25 November 1999, a copy of his appeal in cassation against the judgment of the Donetsk Regional Court of Appeal of 19 July 2001 and copies of his written requests to have witnesses examined by the latter court on his behalf.

25. By letter dated 1 August 2006, the applicant asked the Donetsk Regional Court of Appeal to send him copies of his appeal in cassation, the reports on his confrontation with four police officers who had allegedly ill-treated him, his complaint to the Donetsk Regional Prosecutor stating that he intended to submit those copies to the Court in substantiation of his application and the latter's reply.

26. In its reply of 14 August 2006, the court refused to provide copies of the requested documents because the applicant's request had no basis in domestic law.

27. By letter dated 8 December 2006, the applicant requested the same court to send him copies of his complaints to that court about the allegedly unlawful investigations in his case.

28. The applicant received no reply to his latter request.

29. On 13 June 2007 the applicant sent a third letter to the court of appeal, requesting copies of the same documents from his case file. On 3 July 2007 he received a reply from the deputy president of the Donetsk Regional Court of Appeal. In that letter, he was informed that his request had been refused on the ground that, because his conviction had become final, he was entitled to receive copies only of the courts' decisions in his criminal case. According to the deputy president of that court, no copies of other documents from the case file were allowed to be sent to the applicant.

30. On 26 November 2007 the Court invited the Government to submit written observations on the admissibility and merits of the case (see paragraph 3 above). They were also requested to submit a copy of the applicant's appeal in cassation and relevant documents concerning his complaints about the alleged ill-treatment to the national authorities, copies

of their replies to such complaints, and copies of his written motions to have witnesses on his behalf examined by the Donetsk Regional Court of Appeal.

31. On 29 February 2008 the Government sent to the Court their observations on the case and copies of the applicant's appeal in cassation of 31 August 2001 together with written amendments to his appeal dated 29 July 2002, copies of the applicant's letters to the president of the Donetsk Court of 9 and 20 February 2001 requesting copies of documents from his case file, and a copy of the letter from the General Prosecutor's Office of 24 January 2008 by which the Government Agent had been informed, *inter alia*, that the applicant had not lodged any complaints with the Donetsk Regional Prosecutor's Office claiming that unlawful investigation methods had been applied in his case. The Government's observations were subsequently forwarded to the applicant.

32. On 25 March 2008 the applicant informed the Court that he had found a lawyer to represent him in the proceedings before the Court and asked for legal aid. On 27 May 2008 the President of the Chamber decided that legal aid should be granted to the applicant for his representation before the Court. The lawyer prepared and submitted observations to the Court on behalf of the applicant. By a letter of 31 July 2008, the applicant informed that he did not wish the lawyer to continue representing him before the Court.

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. Punishment for particularly serious crimes

33. The Criminal Code of 1960 (repealed on 1 September 2001) provided for the death penalty as an exceptional type of punishment for particularly serious crimes, including aggravated murder.

34. By a judgment of 29 December 1999, the Constitutional Court held that the provisions of the Criminal Code concerning the death penalty were contrary to the Constitution of Ukraine. On 22 February 2000 those provisions were changed by the Verkhovna Rada, the Parliament, to the effect that the death penalty was replaced by life imprisonment. Before the changes of 22 February 2000, the maximum term of imprisonment under the Code had been twenty years.

2. Access to documents in criminal case files

35. Under the Code of Criminal Procedure of 1960, an accused, a defendant, their defence lawyers or non-legal representatives may

familiarise themselves with materials in the criminal case file at various stages of the proceedings until their completion (Articles 43, 48, 218, 219, 222, 255, 349, 362, 384 of the Code). When studying the case file they are allowed to take notes.

36. According to section 32 of the Information Act of 1992, citizens have the right to ask the authorities to provide them with any official document, whether or not it concerns them, except in cases in which the law limits access to documents. Copies of the requested documents may be given against the payment of a fee (section 35 of the Act).

37. Regulations on case processing in courts of appeal and local courts of general jurisdiction, issued by the State Judicial Administration on 6 January and 27 June 2006 (Order nos. 1 and 68), respectively, provide for a procedure through which persons taking part in court proceedings may familiarise themselves with case files. In particular, case files should be studied at a court's premises in the presence of a member of the registry. Copies of documents included in a file, court decisions which have entered into force and written information notes are issued by registry staff upon a written request and against the payment of a court fee. Upon approval by the president or deputy president of a court, a complete case file may be sent by post to those State bodies which are entitled by the law to request it.

38. The Internal Regulations of Penitentiary Institutions, approved by the State Department for the Execution of Sentences on 25 December 2003 (Order no. 275), do not allow prisoners to keep any documents, other than copies of judgments in their criminal cases and correspondence concerning their application to the European Court of Human Rights (Annexes 6, 7 and 9 to the Regulations). Further to amendments made to the Regulations on 14 March 2007, a prison administration is required to assist prisoners who wish to obtain copies of documents concerning their applications from the State bodies. When copies of such documents are received, prisoners should be allowed to keep them and, if appropriate, to join them to their applications to the Court (Regulation 43). Under amended Regulation 92, prisoners are to be provided with photocopying services against the payment of a fee.

B. Law and practice in the Council of Europe member States

39. A comparative survey of national legislation in eighteen of the member States of the Council of Europe demonstrates that while there are no specific regulations on prisoners' access to their case files, other domestic legal provisions can be relied upon by prisoners to make a request for access to such documents. The most common provisions can be found in Codes of Criminal Procedure. This is the case in seven of the surveyed member States, namely, France, Greece, Italy, Latvia, Malta, Poland and the United Kingdom. In five member States, the relevant provisions can be

found in Acts on the Administration of Justice or the Courts, as is the case for Bulgaria, Denmark, Estonia, Ireland and Turkey. In another four member States, namely, Georgia, Moldova, the Netherlands and Romania, Access to Public Information provisions provide the best way for a prisoner to request such documents. Finally, in one member State, Georgia, the relevant provisions can also be found in the Administrative Code of Procedure.

40. Using one or more of these legal provisions, a prisoner, who does not have a person to represent him or her outside the penitentiary institution, may have access to documents in a criminal case file once domestic proceedings have ended, usually by way of a written request to the court for photocopies of the relevant documents to be sent by post, or, as, for instance, in Poland, consultation of the file under supervision in prison. In the majority of the surveyed member States, the photocopies of the relevant documents would have to be paid for, although in some member States there is provision for an exemption for charges depending on the means of the prisoner (such as in Estonia).

C. European Prison Rules

41. The relevant extract from the Appendix to the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted on 11 January 2006, reads as follows:

“...Legal advice

...

23.6 Prisoners shall have access to, or be allowed to keep in their possession, documents relating to their legal proceedings...”

42. According to legal commentary contained in the Council of Europe publication of the European Prison Rules (2006, p. 52), Rule 23.6 is designed to assist prisoners by giving them access to legal documents which concern them. Where for reasons of security and good order it is not acceptable to allow them to keep those documents in their cells, steps should be taken to ensure that they are able to access them during normal working hours.

THE LAW

I. SCOPE OF THE CASE

43. The Court notes that, after the communication of the case to the respondent Government, the applicant complained about the poor conditions of his detention in the Yenakiyeve Colony and the lack of medical treatment and assistance for his diseases in the Colony. The applicant did not invoke any provision of the Convention.

44. In the Court's view, the applicant's allegations are not an elaboration of his original complaints to the Court which were lodged approximately six and a half years earlier and concerned other facts. The Court considers, therefore, that it is not appropriate to take these matters in the context of the present case (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATION OF ARTICLES 3, 6, 7, 13 AND 15 OF THE CONVENTION

45. The applicant complained that he had been tortured by the police between 23 and 25 November 1999. He also complained, in general terms, that in the Donetsk SIZO he had not received adequate medical aid; that the food there had been of a poor quality; and that there had been a person with mental health problems detained in the same SIZO building with him. The applicant invoked Article 3 of the Convention.

He next complained that there had been a violation of Article 6 §§ 1 and 3 (d) of the Convention, stating that his conviction had been based on evidence obtained unlawfully, in particular, by threats and torture, that the courts had refused to call and examine witnesses on his behalf, and that, in his case, they had assessed the evidence and applied the law inaccurately.

Invoking Article 7 of the Convention, the applicant complained that the courts had sentenced him to life imprisonment, although in 1999, when he had committed the criminal offences, such punishment had not existed.

He further submitted that he had been denied an effective remedy in respect of his complaints that the police had tortured him and that, in the course of the investigations and trial, there had been certain procedural shortcomings. He invoked Article 13 of the Convention.

The applicant alleged a violation of Article 15 of the Convention without any further specification.

46. As regards the applicant's complaint of torture during the pre-trial stage of the proceedings, the Court notes that, having regard to the parties' submissions, it is not clear if the applicant raised it before the prosecutors (see paragraphs 8 and 31 above). Even assuming that the applicant had complained to the prosecutors and that the latter rejected the complaint as

unsubstantiated on 12 April 2000, the Court observes that he failed to challenge the prosecutors' decision through the relevant court procedure envisaged by the Ukrainian legislation (see *Yakovenko v. Ukraine*, no. 15825/06, §§ 71-73, 25 October 2007). Instead, the applicant decided to raise his complaint of torture before the trial court. The Supreme Court dealing with the applicant's appeal against his conviction dismissed the applicant's complaint of torture as unsubstantiated.

Given the Court's findings in *Yakovenko* (cited above), the Court considers that he cannot be regarded as having exhausted domestic remedies in respect of his complaint of torture, as required by Article 35 § 1 of the Convention. Similarly to *Yakovenko*, the criminal proceedings against the applicant in the present case were aimed at finding him innocent or guilty of the criminal charges levelled against him, rather than attributing responsibility or affording redress for the alleged ill-treatment.

47. In so far as the applicant complained about the conditions of his detention in the Donetsk SIZO, the Court observes that he was treated by a dentist and also had his lungs x-rayed and examined after he had asked for medical aid and there is no evidence that he had required or asked for any other or additional medical examination or treatment in the Donetsk SIZO. The applicant's allegation of poor nutrition is made in general terms and lacks specification. His complaint about the presence of a person with mental health problems in the same building of the Donetsk SIZO is unsubstantiated. In any event, the applicant did not demonstrate that his alleged moral suffering in such situation had attained the minimum level of severity to fall within the scope of Article 3 of the Convention. Accordingly, the Court finds that this part of the application is manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention.

48. The Court further observes that the applicant's complaints under Article 6 §§ 1 and 3 (d) of the Convention are equally unsubstantiated. In particular, the applicant failed to prove, either before the national authorities or before this Court, that his confessions, on which his conviction had been partially based, had been obtained under duress. The applicant also failed to demonstrate that he or his lawyer had used all the procedural means provided for in Ukrainian law in order to have the witnesses, whom he had mentioned in his appeal, heard at a public hearing or to show that it had been necessary for those witnesses to be questioned at the trial (see *Khivrenko v. Ukraine* (dec.), no. 65743/01, 25 September 2007). On the whole, the Court notes that the domestic courts of both judicial instances duly considered and answered the arguments in the applicant's defence, based their decisions on a substantial amount of oral and documentary evidence and provided sufficient reasoning for their decisions.

49. As regards the applicant's complaint that there had been a violation of Article 7 of the Convention, the Court observes that the domestic criminal law in force at the time of some of the applicant's crimes carried a maximum penalty of capital punishment for aggravated murder. By the time that the applicant was convicted in July 2001, the death penalty had been abolished and replaced by a more lenient penalty, life imprisonment (see paragraphs 33-34 above). Accordingly, the Court cannot conclude that a heavier penalty, within the meaning of Article 7 of the Convention, was imposed on the applicant than the one that had been applicable at the time the criminal offences were committed by him (see *Hummatov v. Azerbaijan* (dec.), nos. 9852/03 and 13413/04, 18 May 2006). It follows that this complaint is manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention.

50. Finally, the Court observes that the applicant's complaints under Articles 13 and 15 of the Convention do not disclose any appearance of a violation of the rights and freedoms set out in these provisions of the Convention.

51. In the light of the foregoing, the Court finds that the applicant's above complaints must be rejected as manifestly ill-founded pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF THE RIGHT OF INDIVIDUAL PETITION

A. Alleged interference with the applicant's correspondence with the Court and his alleged intimidation by officials of the Donetsk SIZO in connection with his application to the Court

52. The applicant complained that the Donetsk SIZO authorities had obstructed his correspondence with the Court by refusing to send or by delaying the postage of his letters. He invoked Article 10 of the Convention.

53. However, the Court notes that, given its case-law on the matter (see, for instance, *Klyakhin v. Russia*, no. 46082/99, §§ 108-110 and 118-123, 20 November 2004), the applicant's complaint falls to be examined under Articles 8 and 34 of the Convention. These provisions read, in so far as relevant, as follows:

Article 8

“1. Everyone has the right to respect for ... 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.”

Article 34

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

54. The applicant further alleged, without relying on any specific provision of the Convention, that he had been intimidated by the Donetsk SIZO authorities in connection with his application to the Court.

55. The Court considers that this complaint likewise falls to be examined under Article 34 of the Convention.

56. The Court notes that there is no evidence that the authorities delayed or stopped the applicant's letters. Furthermore, there is no evidence of threats or other concrete attempts to dissuade the applicant from applying to the Court. He was able to lodge his application and he continued corresponding with the Court without any obstacles, except for those with which the Court will deal below.

57. In the light of the foregoing, the Court finds that this part of the application is unsubstantiated. Accordingly, it rejects the complaints in the context of Article 8 of the Convention as manifestly ill-founded pursuant to Article 35 §§ 1, 3 and 4 of the Convention and holds that there is no appearance of hindrance of the exercise of the applicant's right of individual petition, within the meaning of Article 34 of the Convention.

B. Refusal to provide the applicant with copies of documents for his application to the Court

58. The applicant complained that the refusal of the domestic authorities to provide him with copies of documents necessary for substantiating his application to the Court constituted a violation of his right of individual petition as provided in Article 34 of the Convention.

1. Submissions of the parties

59. The Government submitted that it was the applicant's fault that he had not obtained documents from his criminal case file. In particular, the Government maintained that the applicant and the lawyer, who had represented him in the domestic proceedings, had had full access to the case file in the course of those proceedings and that they could have made copies of the relevant documents for the applicant's subsequent application to the Court. According to the Government, from the early stages of the proceedings against him, the applicant had known that he would lodge an

application with the European Court and thus he could have started collecting the necessary documents before the completion of those proceedings.

60. They further submitted that, following the completion of the domestic proceedings, the applicant could have asked his close relatives or a hired lawyer to obtain copies of documents for the present application and could have hired a lawyer to represent him before the national authorities.

61. The applicant disagreed that he was responsible for not collecting documents for an application to the Court before the completion of the domestic proceedings. He further submitted that, following his conviction, his relatives had refused to have contact with him; that the lawyer who had been appointed to defend him in the domestic proceedings was under no obligation to assist him in bringing his case before the European Court; that he had had no money to hire a new lawyer; and that it was not possible to obtain legal aid for such purposes under the domestic legislation.

2. The Court's assessment

(a) General principles emerging from the Court's case law

62. The Court notes that Article 34 of the Convention imposes an obligation on a Contracting State not to hinder the right of individual petition. In particular, this provision requires that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see, for instance, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, §§ 115-116, 15 January 2007).

63. Although the object of Article 34 is essentially that of protecting an individual against any arbitrary interference by the authorities, it does not merely compel States to abstain from such interference. In addition to this primarily negative undertaking, there are positive obligations inherent in Article 34 requiring authorities to furnish all necessary facilities to make possible a proper and effective examination of applications. For instance, under certain circumstances authorities may be under obligation to provide applicants with copies of documents necessary for examination of their applications. Such an obligation will arise in the situations of particular vulnerability and dependence of applicants who are unable to obtain documents needed for their files (see *Iambor v. Romania (no. 1)*, no. 64536/01, § 216, 24 June 2008; *Novinskiy v. Russia*, no. 11982/02, § 120, 10 February 2009; *Gagiu v. Romania*, no. 63258/00, §§ 93-99, 24 February 2009; and, *a contrario*, *Kornakovs v. Latvia*, no. 61005/00, §§ 172-173, 15 June 2006; *Chaykovskiy v. Ukraine*, no. 2295/06, § 96, 15 October 2009).

(b) Application of these principles to the present case

64. The Court takes note of the applicant's specific situation at the time he lodged and pursued his present application. In particular, that the criminal proceedings against the applicant had been completed and his criminal case file was being kept at the trial court. Having been imprisoned, the applicant could not consult the file himself. He had no contact with his family and had only limited contact with the outside world. The applicant's property had been confiscated following his conviction and he had no source of income. No legal aid was available to him. Therefore, to complete his present application, the applicant was dependent on the authorities.

65. However, the authorities did not take into account the applicant's specific situation. Despite the fact that, in his requests to the authorities, he clearly mentioned that he needed copies of certain documents from his case file for his application before the Court, his requests were refused. As a result, he could not comply with the Court's request of 7 July 2006 and the Court had to ask the Government to provide documents concerning the applicant's allegations of a violation of substantive provisions of the Convention (see paragraphs 25-30 above and, *a contrario*, *Chaykovskiy*, cited above).

66. The Court notes that the reason that the authorities refused the applicant's requests was that according to Ukrainian law they were under no obligation to send to interested persons copies of documents from case files, except for court decisions, following the completion of the proceedings. In this context, the Court observes that there are a number of provisions in the domestic law providing for public access to documents being kept by the authorities, including court case files (see paragraphs 35-38 above). However, given the position of the national judicial authorities and the parties' submissions in this case, the Court cannot decide if in the applicant's specific situation these provisions could have formed a basis for a request for the documents from his case file.

67. Moreover, the Court cannot speculate as to whether in the course of the domestic proceedings the applicant had known that he would lodge an application with the European Court and that he could have collected the necessary documents at that time.

68. In view of the foregoing, the Court considers that in the present circumstances the authorities' failure to ensure that the applicant was provided with a possibility of obtaining copies of documents which he needed to substantiate his application amounted to an unjustified interference with his right of individual petition. The Court notes that his application has reached the Court and that the Government have submitted copies of the documents enabling it to examine the applicant's complaints under Articles 3 and 6 of the Convention. However, this does not preclude the Court from ruling on the issue arising under Article 34 (see, *mutatis mutandis*, *Orhan v. Turkey*, no. 25656/94, § 406, 18 June 2002).

69. Accordingly, it concludes that Ukraine has failed to comply with its obligations under Article 34 of the Convention with respect of the refusal to provide the applicant with copies of documents for his application to the Court.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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.”

71. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares* by a majority the complaints under Articles 3, 6, 7, 8, 13 and 15 of the Convention inadmissible;
2. *Holds* unanimously that Ukraine has not failed to comply with its obligations under Article 34 of the Convention with respect of the alleged interference with the applicant's correspondence with the Court and his alleged intimidation by officials of the Donetsk SIZO in connection with his application to the Court.
3. *Holds* unanimously that Ukraine has failed to comply with its obligations under Article 34 of the Convention with respect of the refusal of the authorities to provide the applicant with copies of documents for his application to the Court.

Done in English, and notified in writing on 14 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Yudkivska is annexed to this judgment.

P.L.
C.W.

CONCURRING OPINION OF JUDGE YUDKIVSKA

I fully subscribe to the Court's reasoning and conclusion as to the core issue of the present judgment – violation of Article 34 of the Convention.

I also agree that the complaint under Article 3 is inadmissible, though for a different reason. I shall attempt to explain why I am unable to accept that the applicant did not exhaust domestic remedies for this grievance, as suggested in paragraph 46.

Firstly, I find it established that the applicant had complained to the prosecution authorities and that the latter had rejected his complaint as unsubstantiated on 12 April 2000. Although he was unable to provide the Court with this decision, he clearly referred to it in his submissions, which the Government did not contest. Moreover, in his pleas before the domestic courts he specified the page number in the case file where this decision could be found. It remains unclear whether the applicant received a copy of this decision or whether he found out about it only when he was given access to the case materials. Given the Court's findings under Article 34 we cannot conclude that the applicant had a copy of the decision of 12 April 2000 or even that he was timely informed about it and thus could challenge it before the courts as suggested in paragraph 46.

Furthermore, the remedy suggested in paragraph 46 remains questionable. In the recent judgment *Davydov and Others v. Ukraine*, which concerned ill-treatment in prison, the Court rejected the Government's plea of non-exhaustion and concluded that the applicants were not required to challenge the prosecution authorities' refusal to institute criminal proceedings before the courts as “[s]uch an application would have required the applicants to produce relevant medical evidence to the courts, which they were not in a position to do because no medical records were available... Moreover, a court review would only have considered compliance with the substantive and procedural grounds for instituting proceedings, and in the absence of medical evidence (i.e. substantive grounds)... would have been limited to whether the prosecutor had respected the time-limits and taken a decision which was open to him...”¹. I believe that similar reasoning is applicable in the instant case, since “the applicant did not have access to a doctor and the alleged injuries were not recorded” (paragraph 5).

In addition, the Court recently cast doubt on the effectiveness of the proposed remedy, having communicated to the Ukrainian government the case of *Kaverzin v. Ukraine* with the question on the effect of a court's ruling to quash a decision of the prosecution authorities to refuse the institution of criminal proceedings². Without any intention to prejudge the

1. *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, § 252, 1 July 2010.

outcome, I find it inconsistent to question the same remedy in one case and insist on its exhaustion in the other.

The applicant, however, raised the complaint of ill-treatment in the course of the criminal proceedings against him, which were rejected for being unsubstantiated.

In the case of *Vladimir Fedorov v. Russia*³ the Court found that “by raising, before the trial and appeal courts, a complaint about ill-treatment and the authorities' failure to investigate, the applicant provided the domestic authorities with the opportunity to put right the alleged violation”. The same conclusion was reached in several other cases in which the trial courts examined the defendants' complaints of ill-treatment and rejected them⁴. The Court was left “unconvinced that having additional recourse [to challenge a refusal to institute criminal proceedings before the courts] would have made any difference and yielded a different result from the one obtained by the applicant in this respect in the main set of criminal proceedings against him”⁵.

Yet in the present case the Court departed from the above-described approach and found that the manner in which the applicant raised the issue in the domestic courts was insufficient to exhaust domestic remedies on the ground that “the criminal proceedings against the applicant... were aimed at finding him innocent or guilty of the criminal charges levelled against him, rather than attributing responsibility or affording redress for the alleged ill-treatment”.

In my view, this is an excessively formalistic application of the rule of exhaustion of domestic remedies, atypical for this Court. It is true, *stricto sensu*, that the criminal proceedings in which the applicant was a defendant could not provide the required redress – to bring those responsible for the ill-treatment to account. But the same applies to the remedy proposed in paragraph 46 – a court can only quash the prosecutor's decision not to institute criminal proceedings against alleged perpetrators and remit the matter for additional investigation. Such “ping-pong” can last for years (see, for example, *Vergelskyy v. Ukraine*, in which the prosecutors' decision not to institute criminal proceedings was quashed 13 (!) times⁶). On the other hand, in the trial proceedings the courts do examine the defendants' complaints of ill-treatment in the context of alleged self-incrimination, and are empowered either to send a case for additional investigation⁷ or to issue

2. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kaverzin&sessionid=5729972&skin=hudoc-cc-en>.

3. *Vladimir Fedorov v. Russia*, no. 19223/04, § 50, 30 July 2009.

4. *Akulinin and Babich v. Russia*, no. 5742/02, 2 October 2008; *Lopata v. Russia*, no. 72250/01, 13 July 2010.

5. *Dmitrachkov v. Russia*, no. 18825/02, 16 September 2010.

6. *Vergelskyy v. Ukraine*, no. 19312/06, §§ 48-70, 12 March 2009.

7. See, for example, *Suptel v. Ukraine*, no. 39188/04, § 20, 19 February 2009.

a separate ruling drawing the attention of the prosecution authorities to the allegations of ill-treatment⁸.

Thus, in the absence of the court's power to institute criminal proceedings - whether an applicant appeals against a decision not to institute criminal case into his complaints of abuse or raises this issue during his trial - the role of the judicial authorities is limited in both situations. Following the line adopted in the above-mentioned cases, I find that the applicant made the domestic courts sufficiently aware of his grievances in respect of the alleged ill-treatment and thus had exhausted the available domestic remedies.

Nevertheless, the applicant's inability to substantiate his claims creates obvious difficulties in determining whether they are well-grounded. There is no evidence before the Court that he was ill-treated, and for this reason I would conclude that this complaint is inadmissible as being manifestly ill-founded. However, to the extent that the absence of such evidence is attributable to the authorities' failure to provide him with the requested documents, this failure is addressed by the finding of a violation of Article 34.

8. See, *Lopatin and Medvedskiy v. Ukraine*, nos. 2278/03 and 6222/03, §18, 20 May 2010; *Ismailov v. Ukraine*, no. 7323/04, § 13, 27 November 2008; and, *mutatis mutandis*, *Shalimov v. Ukraine*, no. 20808/02, § 29, 4 March 2010.