



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

FIFTH SECTION

CASE OF BOCHAROV v. UKRAINE

(Application no. 21037/05)

JUDGMENT

*This version was rectified on 14 June 2011
under Rule 81 of the Rules of Court*

STRASBOURG

17 March 2011

FINAL

17/06/2011

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

In the case of Bocharov v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 22 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 21037/05) 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 Yevgeniy Yuryevich Bocharov (“the applicant”), on 18 April 2005.

2. The applicant, who had been granted legal aid, was represented by Mr A.P. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. On 14 December 2009 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1970 and lives in Kharkiv.

A. The applicant's version of the events of 11 and 12 April 2002

5. On 11 April 2002 soon after 8 a.m. the applicant was arrested at his home by officers from the Kharkiv City Police Department (*Харківське міське управління Головного Управління Міністерства внутрішніх справ в Харківській області*)¹. He was then taken to the forest, where the police officers beat him severely, forcing him to confess that he was storing weapons and ammunition. Later the police took him to the Kharkiv City² Police Station, where they beat him again and put a gas mask on him to induce suffocation. The applicant then confessed to storing and trading weapons.

6. The applicant was taken home after 2 p.m. and the police conducted a search and seizure of weapons and ammunition at his house and in his garage.

7. The same day he was taken to the Moskovskiy District Police Station, where he was asked to sign several documents including a paper that said he had no complaints about the police officers.

8. On 12 April 2002 the applicant was released around 6 p.m.

B. The Government's version of the events of 11 and 12 April 2002

9. On 11 April 2002, officers of the Criminal Investigation Unit of the Kharkiv City³ Police Department summoned the applicant for questioning. The applicant arrived at the Kharkiv City⁴ Police Station and was questioned. On the same date, the police officers carried out a seizure of ammunition at the applicant's place of residence and in his garage. After the seizure, the police officers took the applicant to the Kharkiv Moskovskiy District Police Station. On the same date, the applicant was released. In the evening of the same day, the applicant was arrested on suspicion of storing drugs and taken to the district police station. A report of an administrative offence was drafted in respect of the applicant.

10. On 12 April 2002, the officers of the Moskovskiy District Police Department (*Московський районний відділ Харківського міського управління Головного Управління Міністерства внутрішніх справ в Харківській області*)⁵ took the applicant outside the city and, there, the applicant indicated the place where the rest of the ammunition had been stored. On the same date, the applicant was released at 5 p.m. Criminal

1. Rectified on 14 June 2011: the Ukrainian equivalent of “Kharkiv City Police Department” has been given in brackets.

2. Rectified on 14 June 2011: “Regional” has been replaced with “City”.

3. Rectified on 14 June 2011: “Regional” has been replaced with “City”.

4. Rectified on 14 June 2011: “Regional” has been replaced with “City”.

5. Rectified on 14 June 2011: the Ukrainian equivalent of “Moskovskiy District Police Department” has been given in brackets.

proceedings against the applicant were instituted on charges of ammunition storage.

C. Further events

11. Following his release, the applicant went home and felt unwell. An ambulance brought him to hospital the same day at about 8 p.m. The applicant told the doctors that he had been ill-treated by the police. The diagnosis on admission contained the following: closed head trauma, chest injuries, rib fractures, bruises on the back of the head, concussion, kidney trauma and post-traumatic pneumonia. According to the applicant, the doctors did not report all of his injuries, but only the most serious ones.

12. On 18 April 2002 the applicant lodged a formal complaint about his ill-treatment by three officers of the Kharkiv City¹ Police Department – Messrs O.V.S., D.M.S. and D.N.S. – with the Kharkiv Regional Prosecutor's Office (“the KRPO”).

13. On 23 April 2002 the applicant's complaint was readdressed to the Moskovskiy District Prosecutor's Office (“the MDPO”).

14. On 4 May 2002 the applicant was discharged from the hospital. Afterwards, he requested an examination by a forensic expert and received a letter of referral from the prosecutor handling the matter.

15. On 7 May 2002, following a query by the applicant, the MDPO informed him that they had been reviewing the lawfulness of his detention at the Moskovskiy District Police Station and that they were sending his complaint to the Kharkiv City Prosecutor's Office (“the KCPO”)² to investigate the actions of the Kharkiv City³ Police Department.

16. On 17 June 2002 the KCPO⁴ refused to institute criminal proceedings against the police officers of the Kharkiv City⁵ Police Department, basing such refusal on the lack of proof that a crime had been committed.

17. On 15 August 2002, the forensic expert gave his opinion that the applicant had sustained light and medium bodily injuries, including concussion and injuries to the chest and kidneys.

18. On 20 August 2002 the KCPO⁶ instituted a criminal investigation into the infliction of medium bodily harm on the applicant. The KCPO⁷ noted that despite the refusal to institute criminal proceedings against the

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2. Rectified on 14 June 2011: “the Kharkiv Regional Prosecutor’s Office (the KRPO)” has been replaced.

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4. Rectified on 14 June 2011: “the KRPO” has been replaced.

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6. Rectified on 14 June 2011: “the KRPO” has been replaced.

7. Rectified on 14 June 2011: “the KRPO” has been replaced.

police officers of the Kharkiv City¹ Police Department, the findings of the forensic examination called for an investigation into the infliction of bodily injuries to the applicant.

19. In October 2002 two police officers of the Moskovskiy District Police Department and two attesting witnesses who had been present during the ammunition seizure on 11 April 2002 were questioned. They all denied seeing any violence towards the applicant or that he had suffered any injuries.

20. On 2 December 2002 the KRPO quashed the decision of 17 June 2002 and ordered a further investigation into the applicant's complaints. The KRPO noted that the applicant had always indicated that the injuries were inflicted on him by officers O.V.S., D.M.S. and D.N.S. from the Kharkiv City² Police Department and not by the officers of the Moskovskiy District Police Department. It was also noted that information on the possible involvement of the Kharkiv City³ Police Department in the crime had been obtained and that not all of the necessary investigative actions had been carried out in the case.

21. Following the applicant's complaint, the Kharkiv City⁴ Police Department also conducted an internal inquiry and the applicant was informed in January 2003 that two police officers had been dismissed and one officer subjected to disciplinary sanctions. The dismissed police officers were later reinstated in their positions under a court decision.

22. On 4 and 10 January 2003, the investigator questioned two of the officers of the Kharkiv City⁵ Police Department – O.V.S. and D.M.S., who denied the applicant's allegations of ill-treatment.

23. On 27 January 2003, upon the applicant's request, the investigator ordered a forensic medical examination, which was conducted on 4 March 2003. According to its conclusion, the previous diagnosis had been made on the basis of the applicant's complaints and had not been supported by any evidence. Therefore, the only injury that was not questioned was a bruise on the applicant's chest which could be classified as a light bodily injury.

24. On 7, 16 and 28 May 2003 officers O.V.S., D.M.S. and D.N.S. from the Kharkiv City⁶ Police Department were questioned and on 21 and 28 May 2003 a confrontation was conducted between them and the applicant. They denied any ill-treatment of the applicant.

25. On 23, 26 and 27 May 2003 three more people present during the seizure of ammunition from the applicant on 11 April 2002 were

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questioned. They testified that they had seen no injuries being inflicted on the applicant and that they had heard no complaint from him.

26. On 2 June 2003, the investigator terminated the criminal proceedings for want of proof of a crime. On 25 June 2003 this decision was quashed by the KRPO.

27. On 4 September 2003, the investigator questioned Ms Ch., the applicant's neighbour, who had seen him together with the police officers near the entrance to his house on 11 April 2002. She had not seen evidence of any injuries to the applicant.

28. On 26 September 2003, the investigator ordered an additional forensic medical examination, which was carried out between 9 October 2003 and 20 February 2004 by a group of specialists from the Central Forensic Medical Examination Office. The experts concluded that the medical diagnoses had been based on the applicant's complaints and not supported by other medical indications and were to be excluded as unreliable. Furthermore, the symptoms taken as a manifestation of concussion might have had a different explanation. They concluded that the applicant had not sustained medium bodily harm as indicated in the first report, but rather a light bodily injury which had been a bruise on his chest.

29. On 11 May 2004, the investigator issued an order terminating the criminal proceedings for want of proof of crime and for lack of *corpus delicti*. The decision took into account both the testimonies of witnesses who had seen the applicant on 11 April 2002 and who had not noticed any injuries to the applicant, and the results of the forensic medical examinations of 4 March 2003 and 20 February 2004 which overruled the previous medical findings as to the existence of injuries to the applicant after the events of 11 April 2002.

30. On 14 July 2004 the applicant challenged the decision of 11 May 2004 before the Moskovskiy District Court of Kharkiv.

31. According to the applicant, the court received the case file from the MDPO only in February 2005. This was the first time that he had had the opportunity to study it, as all his previous requests to this end had been refused.

32. On 8 April 2005, the Moskovskiy District Court quashed the decision of 11 May 2004 and ordered the prosecutor's office to conduct a further investigation. The court found, amongst other things, that the applicant's version of events had not been examined and that the chronology of the events of 11 April 2002 had not been established, despite the discrepancies between the testimonies of the applicant and the police officers.

33. On 13 September 2007, the prosecutor's office decided to forward the case for further investigation to the police authorities, considering that infliction of bodily harm fell within their jurisdiction.

34. On 30 November 2007, the investigator of the Moskovskiy District Police Department took the decision to terminate the criminal proceedings for lack of *corpus delicti*. He noted that none of the witnesses had confirmed the existence of injuries to the applicant on 11 and 12 April 2002 and that the forensic medical examination of 20 February 2004 had not confirmed the earlier findings as to the applicant's injuries, save for a bruise on his chest which could only qualify as a light bodily injury.

35. According to the Government, the decision of 30 November 2007 was sent to the applicant on the same day and the applicant did not appeal against it. The applicant denied that he had received a copy of the aforementioned decision.

II. RELEVANT DOMESTIC LAW

36. Relevant domestic law is summarised in the judgment of *Oleksiy Mykhaylovych Zakharkin v. Ukraine* (no. 1727/04, §§ 38-41 and 45-46, 24 June 2010).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

37. The applicant complained that he had been ill-treated by the police and that such ill-treatment had not been investigated properly. He referred to Articles 3 and 13 of the Convention. The Court, which is master of the characterisation to be given in law to the facts of the case, decided to examine these complaints under Article 3 of the Convention, which is the relevant provision and which provides as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

38. The Government submitted that the applicant had failed to exhaust domestic remedies. They contended that the applicant could have challenged the decision of the Police Department of 30 November 2007 under Article 236 (5) of the Code of Criminal Procedure but had failed to do so.

39. The applicant maintained that he had not been informed about the decision of 30 November 2007 and therefore had not been able to challenge it.

40. The Court notes that the Government's objection is closely linked to the merits of the applicant's complaint under Article 3 of the Convention. Therefore, it joins it to the merits.

41. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Alleged ill-treatment by the police

42. The applicant maintained that after being under the control of the police, he had been hospitalised with bodily injuries that were serious enough to necessitate his in-patient treatment for a significant period of time. He further maintained that his allegation of ill-treatment was corroborated by other evidence, in particular: (i) the unexplainable interval of six hours between his having been taken into custody by the police and the search of his property; and (ii) his suspicious administrative arrest on the same day for possession of illegal drugs.

43. The Government noted that there was no evidence that the applicant had been ill-treated at all, let alone in the hands of the police. They noted that the forensic medical examinations ordered by the investigation had not confirmed the initial findings as to the gravity and extent of the applicant's injuries. Moreover, the private individuals who had either participated in the investigative actions or had witnessed them had not confirmed that the applicant had suffered any injuries on 11 and 12 April 2002.

44. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports of Judgments and Decisions* 1998-VIII).

45. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

46. Turning to the circumstances of the present case, the Court notes that the applicant was hospitalised within hours after his release from the police station and underwent in-patient treatment for more than twenty days. The degree of bodily harm established by the medical examination carried out on the applicant shortly after his release (see paragraph 11 above) indicates that the applicant's injuries were sufficiently serious to amount to inhuman and degrading treatment within the scope of Article 3.

47. As to the Government's argument that none of the witnesses confirmed the injuries to the applicant, the Court does not see the reason for attaching so much weight to this evidence, given that it would be difficult for non-specialists, being there for a different purpose, to see injuries whose nature and location made them either not visible externally or covered by the clothes of a person dressed for the weather in mid-April. As to the additional forensic examinations that questioned most of the findings of the initial medical examinations (see paragraph 23 and 28 above), it should be noted that some injuries remained unchallenged. Furthermore, the additional examination was conducted much later and did not overturn the previous findings but rather questioned their reliability given the possible alternative explanations to be given for the applicant's health complaints made immediately after his release. Nonetheless, the initial findings apart from being based on direct examination of the applicant, as opposed to later examination based on documents, were corroborated by the applicant's consistent allegations of ill-treatment and suspicious circumstances of his apprehension and detention by police on 11 and 12 April 2002. Furthermore, it does not appear from the parties' submissions and the documents provided that any of the medical staff who examined the applicant on 12 April 2002 were ever questioned by the investigator.

48. The Court reiterates that a State is responsible for the welfare of people in detention and that the authorities have a duty to protect such people. Bearing in mind the authorities' obligation to account for injuries caused to people under their control, the Court considers that failure to find and prosecute individuals guilty of a crime of violence against a detainee, as in the instant case, cannot absolve the State of its responsibility under the Convention (see, *mutatis mutandis*, *Esen v. Turkey*, no. 29484/95, § 28, 22 July 2003; *Yaz v. Turkey*, no. 29485/95, § 30, 22 July 2003; and *Ayşe Tepe v. Turkey*, no. 29422/95, 22 July 2003).

49. In the light of the above, it must be considered that the applicant sustained the injuries as a result of inhuman and degrading treatment for which the Government must bear Convention responsibility.

50. The Court concludes that there has been a breach of Article 3 of the Convention in this regard.

2. Alleged failure to carry out an effective investigation

51. The applicant maintained that the investigation was not independent. He further complained that no immediate actions had been taken to investigate his allegations, although he had informed the medical staff about the origins of his injuries immediately upon his admission to the hospital on 12 April 2002 and though he had lodged a formal complaint with the Kharkiv Regional Prosecutor's Office about ill-treatment by the police on 18 April 2002. However, no meaningful investigative measures had been taken until at least 10 May 2002, when he had been questioned by the investigator for the first time. Most importantly, the investigator had not taken the initiative by failing to conduct a forensic examination of the applicant. The authorities had limited themselves to providing him with a letter of referral for a forensic medical examination and the applicant, being hospitalised, had not been able to undergo such an examination prior to 14 May 2002 when he left the hospital.

52. The applicant also noted that until 2 December 2002, the investigator had examined his possible ill-treatment by officers of the Moskovskiy District Police Department, although in his complaint of 12 April 2002 he had clearly indicated that he had been ill-treated by officers of the Kharkiv City¹ Police Department. Only on 2 December, more than seven months later, had the investigator accepted that the involvement of the officers of the City Police Department must be investigated.

53. He further noted that he had not been duly informed about the course of the investigation and that its shortcomings had been acknowledged at the domestic level, given that further investigation had been ordered on several occasions.

54. The Government maintained that it had not been established that the applicant had sustained the injuries he claimed and that his allegations of ill-treatment had been duly investigated by the relevant domestic authorities.

55. The Court reiterates that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such an investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those

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within their control with virtual impunity (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

56. The investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see *Assenov and Others v. Bulgaria*, judgment cited above, §§ 103 et seq.). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 104 et seq., ECHR 1999-IV, and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of those responsible will risk falling foul of this standard.

57. In the circumstances of the present case, the Court notes that the delays in securing medical evidence and furthering the course of the investigation, as indicated by the applicant, affected the effectiveness of the investigation. In particular, despite the applicant's clear complaints, the investigation was directed against the wrong police department, the officers indicated by the applicant as the perpetrators had been questioned almost nine months after the alleged beatings and the confrontation between them and the applicant had been conducted more than a year after the alleged beatings took place. The Court further notes that despite the accuracy of the applicant's diagnosis, which ought to have played a key role in the investigative process, it does not appear from the case file that any of the medical staff who examined the applicant shortly after his release were ever questioned. Moreover, some of the shortcomings in the investigation were acknowledged by the domestic authorities, who remitted the case for further investigation (see paragraph 20 and 32 above).

58. The Court also notes that the criminal case was ultimately transferred for further investigation to the District Police Department, which in the Court's opinion could not have conducted an independent investigation into the actions of their direct superiors from the City Police Department.

59. As to the Government's objection, the Court considers that it should be rejected because the applicant took sufficient steps at the domestic level to bring his complaints to the attention of the national authorities.

60. In the light of the serious deficiencies referred to above, the Court considers that the domestic authorities did not fulfil their obligation to investigate the applicant's complaints of ill-treatment. Accordingly, there has also been a violation of Article 3 of the Convention under this head.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

63. The Government considered the claimed amount to be unsubstantiated and excessive.

64. The Court, ruling on an equitable basis as required by Article 41, awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

65. The applicant also claimed EUR 7,952 for costs and expenses incurred before the domestic courts and before the Court.

66. The Government observed that the applicant had received legal aid from the Court and submitted that the request for costs and expenses must therefore be rejected.

67. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads.

C. Default interest

68. The Court considers it appropriate that 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. *Joins to the merits* the Government's preliminary objection, and rejects it after an examination on the merits;

2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 3 of the Convention as regards the applicant's ill-treatment;
4. *Holds* that there has been a violation of Article 3 of the Convention as regards the absence of an effective investigation into the applicant's allegations of ill-treatment;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable¹, in respect of non-pecuniary damage and EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant², in respect of costs and expenses, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President

1. Rectified on 14 June 2011: “to the applicant” has been deleted.

2. Rectified on 14 June 2011: “plus any tax that may be chargeable to the applicant” has been added.