



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

FIFTH SECTION

CASE OF KOROBOV v. UKRAINE

(Application no. 39598/03)

JUDGMENT

STRASBOURG

21 July 2011

FINAL

21/10/2011

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

In the case of Korobov v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 June 2011,

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

PROCEDURE

1. The case originated in an application (no. 39598/03) 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 Igor Viktorovich Korobov (“the applicant”), on 2 November 2003.

2. The applicant was represented by Mr V.I. Dovzhenko, a lawyer practising in Mariupol, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that he had been ill-treated by police officers and that the investigation into these events had not been effective. He also alleged that the principle of equality of arms had been breached during the consideration of his criminal case by the Supreme Court of Ukraine because his cassation appeal had been examined in the presence of the prosecutor but in the absence of his lawyer and himself.

4. On 15 October 2008 the President of the Fifth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Mariupol.

A. Criminal proceedings against the applicant; his arrest and alleged ill-treatment by police officers

6. According to the applicant, on 25 December 1999 he lent 3,400 United States dollars (USD) to S. The latter had repaid part of his debt and had agreed to meet the applicant on 18 April 2000 to pay back the remainder, which according to the applicant was USD 2,030.

7. On 11 April 2000 criminal proceedings were instituted against the applicant following a complaint by S. that the applicant had extorted money from him.

8. On 18 April 2000 at around 3 to 4 p.m. and during the applicant's meeting with S., the applicant was arrested by police officers of the Mariupol Department for the Prevention of Organised Crime (*співробітники Маріупольського ВБОЗ УБОЗ УМВС України*) and taken to a police station. Two passers-by, B. and Bo., provided written statements on the same day to the Head of the Mariupol Department for the Prevention of Organised Crime to the effect that the applicant had been talking to S. and F. (S.'s sister) on the street when the policemen arrived and asked him to follow them. The applicant had tried to run away and to throw something from his pocket. The policemen had tried to stop the applicant but he had resisted, sworn at and threatened the policemen. He was handcuffed, put "with difficulties" into B.'s car and taken to the police station. The sum of USD 1,500 and some personal belongings had been confiscated from the applicant. In the report drawn up in relation to the applicant's arrest, it was stated that the applicant was arrested at 9 p.m. on suspicion of committing a crime, because he could otherwise have absconded.

9. According to the applicant, from 3 to 9 p.m. on 18 April, and on 26 April 2000, he had been beaten in the police station and had been tortured with the use of an electric current.

10. On 21 April 2000 the prosecutor of Mariupol authorised the applicant's pre-trial detention because he "had committed a serious crime and was likely to abscond and pervert the course of justice". The applicant, who was questioned on the same day, submitted that he had been ill-treated by the policemen. Following these submissions, the investigating officer ordered a forensic medical examination of the applicant (see paragraph 19).

11. By August 2000 the pre-trial investigation regarding the charges against the applicant had been completed and the case was transferred to court. According to the applicant, during the examination of his case by the court, twenty-one court hearings were postponed because of the victim's failure to appear.

12. On 15 April 2002 the Prymorskiy District Court at Mariupol sentenced the applicant to three years' imprisonment for physically threatening behaviour made with the aim of securing the repayment of debt, and released him on two years' probation. In particular, it was found that the

applicant had threatened S. and that on 2 February 2000 the applicant, together with unknown accomplices, had beaten S., as confirmed by a medical examination of S.

13. The applicant submitted extracts from the records of court hearings in his criminal case. On one undated separate page, it is mentioned that police officer R. testified in court that the applicant had suffered a kidney contusion and two broken ribs. Witnesses Sh. and Shi. testified that they had witnessed the applicant's arrest and that he had been handcuffed and put into a van, but that nobody had beaten him.

14. On 23 May 2003 the Donetsk Court of Appeal upheld the applicant's conviction of 15 April 2002.

15. On 13 January 2004 the Supreme Court of Ukraine rejected the applicant's application for leave to appeal in cassation. According to the applicant, he had not been informed about the date of the hearing. Neither the applicant nor his lawyer had been present at the hearing, whilst the prosecutor had been present and had been heard by the judges. The applicant had received a copy of that decision only on 14 April 2004.

B. Investigation into the complaints about the applicant's ill-treatment

16. On 19 April 2000 the applicant was taken to the Mariupol Town Emergency Hospital (*Маріупольська міська лікарня швидкої медичної допомоги*). Upon examination it was noted that the applicant had suffered blows to his back and the left side of his chest, and also had a kidney contusion and haematuria (red blood cells in his urine).

17. On 24 April 2000 the applicant's mother requested that a prosecutor institute criminal proceedings against the policemen who had subjected her son to ill-treatment.

18. On the same date the applicant was placed in the Mariupol Pre-Trial Detention Centre No. 7 (*Слідчий ізолятор № 7 м. Маріуполя*, hereinafter "the SIZO"). Upon his arrival he complained of headache and difficulties in urination and breathing. He was examined by the SIZO doctor who noted that the applicant had haematuria and an extensive haematoma on his chest.

19. On 5 May 2000 a forensic medical examination found that the applicant had suffered minor bodily injuries, comprising numerous bruises on his chest, on the right side of his back and on the hips. The examiner found that these bruises could have been inflicted on 18 April 2000 by blows from fists and feet or by the applicant falling down. As for the two broken ribs, the expert noted that on an X-ray of 19 April 2000 it was visible that the applicant had a consolidated fracture of two ribs. Therefore, this injury was not taken into consideration as it had been inflicted earlier than 18 April 2000.

20. On 27 May 2000 the Head of the Mariupol Department for the Prevention of Organised Crime requested that the Mariupol Town Emergency Hospital submit certain X-ray images of the applicant's ribs to him. According to the applicant, these X-rays were subsequently lost by the police.

21. On 10 May 2000, following a complaint lodged by the applicant's mother, the Donetsk Regional Prosecutor's Office (*прокуратура Донецької області* – "the Regional Prosecutor's Office") refused to institute criminal proceedings against the policemen. It stated that during his arrest on 18 April 2000 the applicant had disobeyed police orders, had sworn and had tried to run away, and that the policemen had therefore been forced to use martial arts on the applicant. S., who was questioned during the investigation, testified that on 18 April 2000 he had had a fight with the applicant, that the policemen had then come and used force against the applicant, and that the applicant had fallen on a fence but "finally was brought to the police station".

22. On 19 and 20 May 2000 the applicant was examined by a SIZO physician. The applicant complained of pain in his back, heart pain, headache, and haematuria. His diagnosis was the same as upon his arrival at the SIZO and he was prescribed an anti-inflammatory drug.

23. On 10 October and 15 November 2000 the applicant was again examined by a SIZO physician and diagnosed with acute post-traumatic pyelonephritis on his left side.

24. On 17 November 2000 the applicant was released from the SIZO. On 24 November 2000 he was hospitalised at the Azov Central Basin Hospital (*Азовська центральна басейнова лікарня на водному транспорті м. Маріуполя*). He was diagnosed with post-traumatic kidney deformations, possible chronic nephritis and haematuria. In the extract from the applicant's medical file provided by this hospital it is also mentioned that in April 2000 the applicant had suffered two broken ribs.

25. The applicant stayed in hospital until the end of December 2000. On 21 December 2000 the applicant was transferred to the Nephrological Ward of the Donetsk Regional Clinical Territorial Medical Unit (*нефрологічне відділення Донецького обласного клінічного територіального медичного об'єднання*).

26. The applicant complained of, amongst other things, ill-treatment by the policemen and his unlawful conviction to a Member of Parliament, V. V. redirected the complaint to the General Prosecutor's Office (*Генеральна Прокуратура України*). On 11 March 2001 the General Prosecutor's Office informed the applicant that his complaint had been transferred to the Prymorsky District Court at Mariupol, which had exclusive competence to deal with such complaints.

27. On 14 March 2001 the Prymorsky District Court sent the applicant's complaints to the Regional Prosecutor's Office because the

applicant had requested that criminal proceedings be brought against certain people and the Regional Prosecutor's Office had failed to address this request. Moreover, the court found that the examination of the applicant's complaints did not fall within its competence.

28. On 6 April 2001 the Donetsk Regional Court, following a complaint lodged by the applicant, quashed the above-mentioned decision of the Regional Prosecutor's Office of 10 May 2000. The court pointed out the need to investigate the applicant's complaints of ill-treatment by the policemen in the police station, to question a number of witnesses (B., Bo., S.'s sister and a policeman, indicated by the applicant) and to conduct an additional expert medical examination of the applicant. Moreover, the court noted that it had not been established during the investigation exactly how the applicant had resisted the policemen and who in particular had used martial arts techniques against him.

29. On the same date the General Prosecutor's Office again redirected the applicant's complaints, originally received from V. and the Secretariat of the Ombudsman of Ukraine (*Секретаріат Уповноваженого Верховної Ради України з прав людини*), to the Prymorsky District Court for consideration.

30. On 27 April 2001 the Prymorsky District Court returned the applicant's complaints to the General Prosecutor's Office for the same reasons as mentioned above.

31. However, on 18 May 2001 the General Prosecutor's Office sent the applicant's complaints back to the court, indicating that their examination fell within the exclusive competence of the court.

32. On 23 May 2001 the Regional Prosecutor's Office refused to institute criminal proceedings against the policemen owing to the lack of evidence that a crime had been committed. Police officers R., M., P. and Va. testified that during his arrest the applicant had behaved very aggressively and had insulted F. The applicant had been struck on the face three times by S. and had fallen to the ground. In order to arrest the applicant, the policemen had used martial arts techniques, as the applicant had been struggling and kicking and did not want to get into the car. S. and F. also confirmed the above findings. No force had been used against the applicant in the police station. The prosecutor also noted that, according to the forensic medical examination of 5 May 2000, the applicant had broken his ribs before 18 April 2000 and had been suffering from kidney disease since 1994.

33. On 29 October 2001 the Voroshylovsky District Court at Donetsk quashed the decision of 23 May 2001 and remitted the case materials to the Regional Prosecutor's Office for additional investigation. The court indicated that the Regional Prosecutor's Office had failed to comply with the instructions given by the Donetsk Regional Court on 6 April 2001. In

particular, witnesses B. and Bo. had not been questioned and an additional forensic medical examination had not been conducted.

34. From 7 to 26 December 2001 the applicant underwent further treatment at the Azov Central Basin Hospital. He was diagnosed with a recurrent and persistent haematuria.

35. On 12 July 2002 a forensic medical examination found that at the material time the applicant presented with light bodily injuries: bruises all over the right side of his chest and back, on the right hip and on the left shoulder, small scratches on his wrists and puffiness in the area of the sixth and seventh ribs. The report stated that such injuries could have been inflicted during the applicant's arrest in the circumstances indicated by the policemen or in the circumstances described by the applicant. It was also stated that the laboratory findings had failed to confirm the kidney contusion. However, the back contusion could have caused temporary (five to seven days) haematuria. In particular, the applicant had suffered a contusion on the lower part of his back, which could have led to a short-term (five to seven days) kidney concussion. In the absence of the X-ray images of the applicant's ribs, it was also impossible to establish whether the applicant had suffered broken ribs.

36. On 2 August 2002 the Regional Prosecutor's Office rejected the applicant's criminal complaint against the policemen on account of a lack of *corpus delicti*. The prosecutor referred to the findings of the forensic medical examinations of 5 May 2000 and 12 July 2002. As to the two broken ribs, it was mentioned that on an unidentified date the applicant had been X-rayed at Mariupol Town Emergency Hospital and diagnosed with an old fracture of two ribs. Since the applicant had refused to explain the origin of this fracture, it was concluded that it had occurred before 18 April 2000. During the pre-trial investigation, S. had testified that he had hit the applicant three times on his head and body because the applicant had insulted his sister. The applicant had fallen on a metal fence. Later, the applicant had resisted the policemen, who had then used martial arts techniques and had handcuffed him. The applicant had broken free from the police but had fallen down. He had then been put into the car. The policemen, M., R. and P. confirmed these submissions. R. also testified that S. had hit the applicant whilst the policemen had been holding the applicant by the hands. While being put in the car, the applicant had also hit the car door.

37. On 29 January 2003 the Voroshylovskyy District Court quashed the above decision and remitted the case materials to the Regional Prosecutor's Office for further investigation. The court referred to the previous court findings of 6 April 2001 and 29 October 2001 and underlined the investigator's repeated failure to question witnesses B. and Bo. The court also pointed out the contradictions in the policemen's statements as regards the circumstances of the use of force against the applicant and the blows

inflicted by S. In particular, the court indicated the absence of any injuries on the applicant's head, whereas S. had submitted that he had hit the applicant on the head three times.

38. On 24 March 2003 the Regional Prosecutor's Office again refused to institute criminal proceedings against the policemen and S., repeating the same arguments as in its previous decisions. In addition, S. and F. submitted that when police officer R. had showed the applicant his police card, the applicant had knocked it out of his hands, rushed to S. and gripped his throat, whereupon S. had hit the applicant several times. Therefore, the use of force by the police and S. had been justified.

39. On 23 June 2003 the Voroshylovskyy District Court quashed the above decision and remitted the case materials to the Regional Prosecutor's Office for further investigation. The court reiterated its findings from the decision of 29 January 2003 and indicated that the prosecutor had failed to verify whether the applicant's injuries could have been inflicted on him in the circumstances indicated by the applicant – that is to say, in the police station.

40. Between 20 May 2004 and 27 July 2005 the Regional Prosecutor's Office refused to institute criminal proceedings against the policemen on three further occasions, until on the last-mentioned date criminal proceedings for abuse of authority were finally instituted against the policemen of the Mariupol Department for the Prevention of Organised Crime.

41. However, on 20 December 2005 the proceedings against the officers were terminated on account of the lack of evidence of a crime.

42. On 15 March 2006 the above decision was quashed by the Regional Prosecutor's Office. The Regional Prosecutor's Office determined that the applicant should be given victim status, should be questioned and that it should be decided whether a further forensic medical examination was necessary.

43. On 10 July 2006 the applicant was given victim status and questioned on the next day.

44. On 19 July 2006 the senior investigation officer of the Mariupol Prosecutor's Office terminated the proceedings in the case for the absence of evidence of a crime.

45. On 19 October 2006 the Zhovtnevyi District Court quashed the above decision and remitted the case for additional investigation. The court expressly noted that police officer P. should be questioned, that the applicant's lawyer should be allowed to participate in the case and that the inconsistencies in the witnesses' testimonies should be clarified.

46. On 6 December 2006 the Mariupol Prosecutor's Office (*прокуратура м. Маріуполя*) again terminated the proceedings in the case for the absence of evidence of a crime.

47. On 15 January 2007 the prosecutor of Mariupol quashed the above decision and remitted the case for additional investigation.

48. Following the prosecutor's remittal, some additional investigatory actions were held. Officer P. was questioned again. He testified that he had seen the applicant lying on the floor in police officer R.'s office. R. had not allowed P. to enter the office, so he had not seen exactly what was happening in there. Face-to-face confrontations had taken place between Sh. and V. and the police officers (Sh. and V. are the applicant's alleged acquaintances who had testified during the investigation of the criminal case against the applicant that they had witnessed the applicant's apprehension by the police but that they had not seen that any force had been used on him). As a result it was concluded that "V.'s testimonies had been rebutted". It had been impossible to check similar testimonies made by Shi., another witness of the applicant's arrest, because her whereabouts were unknown. The applicant's mother and the applicant's neighbour Zh., who had allegedly been questioned earlier in the investigation, stated that the applicant had had no injuries before 17 April 2000.

49. On 9 April 2007 the Mariupol Prosecutor's Office terminated the proceedings in the case for the absence of evidence of a crime. The prosecutor referred to previous decisions in the case, the testimonies of the applicant, police officers and witnesses, and to the conclusions of the forensic medical examinations of 5 May 2000 and 12 July 2002. It was determined that during his arrest the applicant had resisted the police officers. The police officers testified that the applicant had hit them and had tried to escape so they had used force on him and had "literally dragged him to a minibus". Since the applicant had also offended F., her brother S. had several times hit the applicant, causing him to fall on the metal fence.

50. On 6 May 2008 the Zhovtnevyi District Court at Mariupol upheld the above decision. The court noted the contradictory evidence given by those who had been involved or witnessed the events in question, but concluded that the applicant's injuries had been inflicted on him by S. and by the police officers when he had resisted his arrest.

51. On 2 June 2008 the Donetsk Regional Court of Appeal referred to the findings of the Zhovtnevyi District Court and upheld its decision.

52. On 17 December 2008 the Supreme Court of Ukraine rejected the applicant's request for leave to appeal in cassation.

C. Other proceedings

53. On 30 August 2004 the Zhovtnevyi District Court found in part for the applicant and awarded him 8,170.80 hryvnias (UAH) in respect of pecuniary damage, UAH 1,000 for non-pecuniary damage and UAH 1,260 in costs and expenses to be paid by the State. The above damage had

resulted from the seizure of his personal belongings such as keys and money during his arrest on 18 April 2000.

54. On 2 November 2005 the Zhovtnevy District Court again found in part for the applicant and awarded him UAH 2,676.03 in respect of pecuniary and non-pecuniary damage, together with costs and expenses, in connection with the unlawful seizure of two cameras in the course of the criminal proceedings against the applicant.

55. According to the applicant, these decisions were enforced in full.

II. RELEVANT DOMESTIC LAW

Code of Criminal Procedure 1960

56. In accordance with the relevant provisions of the Code in force at the material time (Articles 383 and 394), cassation appeals against decisions of a court of appeal taken in appeal proceedings were to be examined by the court of cassation composed of three judges with the participation of a prosecutor. The court was empowered to either assign the case for examination or dismiss the cassation appeal.

57. In accordance with amendments of 12 January 2006 the provision relating to the obligatory attendance of the prosecutor at preliminary hearings in the court of cassation was revoked.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

58. The applicant complained under Articles 3 and 13 of the Convention of ill-treatment by the police officers, of the failure of the domestic authorities to investigate his complaints, and of the absence of effective domestic remedies in this connection.

59. The applicant relied upon Articles 3 and 13 of the Convention, which read as follows:

Article 3

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

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

60. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. *Alleged ill-treatment by the police*

61. The Government indicated that the applicant’s allegations of ill-treatment on 18 and 26 April 2000 had been carefully checked, both during the pre-trial investigation and in separate proceedings instituted upon the applicant’s complaints. Following forensic medical examinations it had been established that the applicant had received light bodily injuries because he had resisted the police officers, with the result that they had had to use some force in order to arrest him. Moreover, before the applicant’s arrest he had been hit by S. and had fallen on the metal fence. These conclusions had been verified and upheld by the national courts. Therefore, the Government stated that the applicant had not been ill-treated in the police station.

62. The applicant stated that the Government’s conclusions that he had been injured while resisting the police officers and because S. had hit him had been based on inconsistent evidence. He also stated his belief that the bodily injuries received by him had been much more severe than the ones recorded by the experts, because the experts had not examined him but rather had studied medical documents as a consequence of some evidence – such as the X-rays of the applicant’s ribs – having been lost by the police officers.

63. As the Court has stated on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim’s behaviour (see, among other authorities, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV).

64. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances

of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, when allegations are made under Article 3 of the Convention, the Court must apply a particularly thorough scrutiny – even if certain domestic proceedings and investigations have already taken place (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, § 32, Series A no. 336, and *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001-VII (extracts)).

65. The Court further reiterates that in assessing evidence, it 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.

66. Turning to the facts of the present case, the Court notes that the applicant alleges having been beaten and tortured with the use of an electric current on 18 and 26 April 2000. Although there is no medical evidence in support of the applicant’s initial statements about the use of electric current, and that two of his ribs were broken on 18 April 2000, the parties agree, and it is confirmed by available evidence (see paragraphs 16-19 and 35), that the applicant sustained a number of injuries. The Court considers that these injuries were sufficiently serious as to fall within the ambit of Article 3 of the Convention. It remains to be considered whether the State authorities should be held responsible under Article 3 for having inflicted those injuries.

67. The Court notes that the parties’ explanations as to the origin of the applicant’s injuries differ. Their versions of events are exclusively based on the contradictory statements of those involved in the incident (the police officers, S. and F.) and of witnesses (passers-by B. and Bo., and the applicant’s alleged acquaintances Sh., V. and Shi.). In addition, according to the forensic medical expert report of 12 July 2002, the applicant’s injuries could have been received in the circumstances indicated by the policemen, and could also have come about in the circumstances described by the applicant. The medical evidence about the applicant’s kidney problems is also contradictory (see paragraphs 34-35). The national court on 6 May 2008 noted the inconsistencies in the available evidence and that the investigation had failed to clarify the situation.

68. The Court reiterates that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of the cause of the injury, failing which a clear issue arises under Article 3 of the Convention (see *Tomasi v. France*, judgment of 27 August 1992, §§ 108-111, Series A no. 241-A, p. 4-41, and *Ribitsch*, cited above, § 34, p. 26). Moreover, when the national authorities failed to conduct a medical examination before placing the applicant in detention, the Government cannot rely on that

failure in their defence and claim that the injuries in question pre-dated the applicant's detention in police custody (see *Türkan v. Turkey*, no. 33086/04, § 43, 18 September 2008).

69. In this regard, the Court notes that evidence obtained during forensic examinations plays a crucial role during investigations conducted against detainees and in cases where the latter raise allegations of ill-treatment. Against this background, one of the Court's tasks is to determine whether the national authorities ensured the effective functioning of the system of medical examination of persons in police custody (see, *mutatis mutandis*, *Salmanoğlu and Polattaş v. Turkey*, no. 15828/03, § 79, 17 March 2009).

70. In the present case no medical check was done immediately after the applicant's arrest, which could have confirmed that all of the applicant's injuries had been inflicted at the moment of his arrest (see, *Türkan v. Turkey*, cited above, §§ 41-42). A medical examination, together with the right of access to a lawyer and the right to inform a third party of the detention, constitute fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.) (see the 2nd General Report of the European Committee for Prevention of Torture, CPT/Inf/E (2002) 1 - Rev. 2006, § 36). This would not only ensure the applicant's rights but would also enable the respondent Government to discharge their burden of providing a plausible explanation for those injuries.

71. The Court further notes that the applicant had numerous bruises on his chest, back and hips. He further suffered from various post-traumatic effects such as headache, difficulties in urination and breathing. Although the forensic medical examination of 12 July 2002 noted that the laboratory findings had failed to confirm the kidney contusion, other medical conclusions indicate that the applicant had a recurrent haematuria at least until the end of 2000 (see paragraphs 22-25, 34) and not for 5-7 days as indicated in the medical report of 12 July 2002.

72. In the Court's view the Government did not give a convincing explanation about the particular circumstances of the applicant's arrest which necessitated the use of the "martial art techniques" with such consequences for the applicant. Finally, officer P. testified that he had seen the applicant lying on the floor in the police office. This raises a question as to whether the applicant had been beaten there as he claims or whether he was in a bad condition as a consequence of his arrest, which would have required a medical check and assistance which were not provided.

73. All of the above is sufficient for the Court to assume that the applicant's injuries were not inflicted exclusively at the moment of his arrest. Moreover, the character of the inflicted injuries in the Court's view is serious enough to conclude that they cannot be characterised as an inhuman treatment. In particular, the Court reiterates that certain acts which were

classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V). The Court considers that the injuries suffered by the applicant were sufficiently serious to amount to torture within the meaning of Article 3 of the Convention.

74. The Court concludes that there has been a violation of the substantive limb of Article 3 of the Convention.

2. Adequacy of the investigation

75. The Government submitted that the authorities conducting the investigation had used all possible means to establish the truth in the applicant’s case. The Government contended that the investigation into the applicant’s complaints had been effective and that the fact that the applicant had not succeeded in having recourse to a particular remedy did not mean that the overall investigation had been ineffective.

76. The applicant reiterated his previous submissions to the effect that the investigation following his complaints had been lengthy and ineffective.

77. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by State authorities in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation. As with an investigation subject to Article 2 of the Convention, 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 within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII, p. 3290, and *Labita*, cited above, § 131).

78. The investigation into arguable allegations of ill-treatment must also be thorough. This 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 in order to close their investigation or as the basis of their decisions (see *Assenov and Others*, cited above, §§ 103 et seq.). They must take all reasonable steps available to them to obtain evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrikulu v. Turkey* [GC], no. 23763/94, §§ 104 et

seq., ECHR 1999-IV, and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000).

79. The Court notes that the investigation into the applicant's complaints lasted for more than eight years. During this period, the national authorities refused on seven occasions to institute criminal proceedings into the applicant's complaints. All of these refusals were quashed by higher prosecutors or courts which remitted the case back, pointing out the discrepancies in the investigation until in 2005, more than five years after the incident, the criminal proceedings against the police officers were finally instituted.

80. The Court further notes that after being instituted, the criminal proceedings were subsequently terminated on three occasions. Those decisions were subsequently quashed, but still in 2008 the national courts upheld the last decision to terminate the criminal proceedings without clarifying the persistent inconsistencies in the available evidence.

81. The Court observes that the impossibility to clarify the existing inconsistencies (the applicant and some witnesses insisted on one version of events, while the police officers and other witnesses gave different testimonies) was caused by the failure of the investigation authorities to question all witnesses and all those involved in the incident at the earliest available opportunity after the complaint about the applicant's ill-treatment had been lodged. In particular, it does not appear from the first decision of 10 May 2000 not to institute criminal proceedings against the policemen that anybody other than the applicant and S. was questioned. The police officers involved in the incident were questioned only one year after the events in question. Some key witnesses were questioned much later and the confrontations between them and the police officers were held even later or not at all. Similarly, the applicant's allegations that he had been ill-treated in the police office were not checked for a long time. In the early period of investigation the authorities focused only on the evidence in support of the policemen's version of events i.e. that the applicant had received his injuries at the moment of his arrest.

82. The Court notes that, throughout the investigation, these flaws were indicated by the national authorities, in particular, by the courts. However, it does not appear that such flaws were adequately corrected. Moreover, it could be concluded from the available materials that with the passage of time it became more difficult to collect the necessary evidence in order to rectify the shortcomings of the investigation, as, for example, some witnesses moved out of town. There is also a danger that eight years after the events in question it would be quite difficult for the witnesses to recall these events correctly.

83. In such circumstances, given the length of the investigation into the applicant's complaints, the failure to conduct important investigatory steps during the early stages of investigation and the persistent inability of the

national authorities to correct the revealed flaws, the Court concludes that in the present case there is a violation of the procedural limb of Article 3 of the Convention.

84. The Court further considers that no separate issue arises under Article 13 of the Convention (see *Timur v. Turkey*, no. 29100/03, §§ 35-40, 26 June 2007).

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

85. The applicant complained that the Supreme Court of Ukraine had examined his case in his and his lawyer's absence. He relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

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

B. Merits

87. The Government indicated that the law in force at the material time had not provided for the participation of the convicted person and his lawyer in the relevant court hearing. The Government were of the opinion that the leave to appeal proceedings in the present case had been similar to those of the civil case of *Stepenska v. Ukraine* (dec.), no. 24079/02, 12 June 2006, where the Court had found that the absence of an oral hearing before the panel had been justified. The Government further noted that proceedings involving only questions of law, as opposed to questions of fact, might comply with the requirements of Article 6 even though the appellant had not been given the opportunity to be heard in person by the appeal or cassation court, provided that he had been heard by a first-instance court. In the present case the applicant had been present at court hearings in both the first-instance and appeal courts. Therefore, the examination of the applicant's appeal by the Supreme Court had complied with the requirements of Article 6 § 1 of the Convention.

88. The applicant reiterated his previous allegations that the principle of equality of arms had been breached in his case.

89. The Court reiterates that the proceedings concerning leave to appeal and proceedings solely involving questions of law, as opposed to questions

of fact, may comply with the requirements of Article 6, even though the appellant was not given an opportunity of being heard in person by the appeal court or court of cassation, provided that a public hearing was held at first instance and that the higher courts did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see, for example, *Hermi v. Italy* [GC], no. 18114/02, § 61, ECHR 2006-XII with further references).

90. The Court, however, notes that although in the present case the proceedings in question concerned leave to appeal in cassation and were limited to the points of law, the prosecutor's presence during the preliminary hearing in the Supreme Court was required by law and he had made oral submissions before the panel, taking thus an active role in the proceedings, while the applicant was deprived of this possibility.

91. In such circumstances, the Court considers that the principle of equality of arms has been breached.

92. The Court has previously found a violation in a similar case against Ukraine (see *Zhuk v. Ukraine*, no. 45783/05, §§ 29-35, 21 October 2010) and does not see any reason to depart from its findings in the present case. Accordingly, there has also been a violation of Article 6 § 1 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

93. The applicant also lodged complaints under Articles 5 and 6 of the Convention related to his arrest and detention and to the criminal proceedings against him. He further complained under Article 1 of Protocol No. 1 to the Convention that his personal belongings (three guns) had been taken away from him by the police and had not been returned.

94. The Court, having carefully considered the applicant's submissions in the light of all the material in its possession, finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

95. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

96. 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

97. The applicant claimed 250,000 euros (EUR) in respect of pecuniary damage, comprised of an alleged loss of salary caused by the applicant's claimed inability to continue working as a sailor because of the injuries inflicted on him, and EUR 150,000 in respect of non-pecuniary damage.

98. The Government noted that the applicant's salary claims were of a hypothetical nature and his claims in respect of non-pecuniary damage were exorbitant.

99. The Court does not discern any causal link between the violation found and the pecuniary damage alleged: it therefore rejects this claim. On the other hand, it awards the applicant EUR 20,000 in respect of non-pecuniary damage.

B. Costs and expenses

100. The applicant also claimed EUR 1,386 for costs and expenses incurred at the national level and before the Court, including: UAH 5,600¹ paid to his lawyer for legal services in relation to the proceedings concerning the applicant's complaints of ill-treatment; UAH 7,200² for legal representation before the Court; and EUR 130 of postal expenses.

101. The Government submitted that the applicant's claim for costs and expenses incurred in the domestic proceedings should be rejected. The Government also noted that the applicant had submitted only a summary of legal services performed by his lawyer, signed by the lawyer and by the applicant, but had not submitted a copy of the contract he had entered into with his lawyer and copies of relevant invoices. The applicant had also not submitted all of the bills to substantiate his postal expenses.

102. 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

¹ Around 544 euros

² Around 700 euros

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 covering costs under all heads.

C. Default interest

103. 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. *Declares* the complaints under Articles 3 and 13 of the Convention and the complaint under Article 6 § 1 of the Convention concerning the hearing of the applicant's criminal case in the Supreme Court of Ukraine admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;
3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;
4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
6. *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 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 1,000 (one thousand euros) in costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into Ukrainian hryvnas 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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Claudia Westerdiek
Registrar

Dean Spielmann
President

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

D.S.
C.W.

JOINT CONCURRING OPINION OF JUDGES ZUPANČIČ,
BERRO-LEFÈVRE AND YUDKIVSKA

1. We agree with the outcome in this case but would beg to differ on one question, which concerns the distinction between torture *stricto sensu* on the one hand and the concept of inhuman and degrading treatment on the other. We shall also explain why it is uncertain, in this particular case, whether the *sequelae* suffered by the applicant, including his recurrent haematuria, were or were not the consequences of the respondent State's actions.

2. It is to be noted from the outset that the present case differs from the situation “where an individual, when taken into police custody, is in good health, but is found to be injured at the time of release”, which makes it “incumbent on the State to provide a plausible explanation of how those injuries were caused”¹. The Court used to make a distinction between cases where an applicant was brought to the police in good health and cases where it was not so clear because applicants were apprehended, for instance, after fights with victims or third persons².

3. The applicant in the present case was arrested on the street immediately after he had had a fight with a certain Mr S. It is of particular importance that the applicant never contested the fact that he had been beaten by S., had fallen on a metal fence and had thus received injuries. These circumstances count seriously against him, as well as his attempt to escape. Therefore we cannot state indubitably that the applicant was still in good health when taken into police custody.

4. However, we share the majority's view that having failed to conduct a medical examination of the applicant before placing him in detention, and thus to confirm that he received injuries at the time of arrest and not after it, the authorities failed “to discharge their burden of providing a plausible explanation for those injuries” (paragraph 70). Indeed, as stressed by the CPT, a medical examination immediately after the arrest constitutes one of the fundamental safeguards against ill-treatment which is of crucial importance particularly for countries like Ukraine, where ill-treatment in custody remains an endemic problem.

5. Nevertheless, we cannot subscribe to the conclusion in paragraph 73 of the judgment that the treatment at issue went beyond *inhuman treatment* and amounted to *torture* for the purposes of Article 3 of the Convention.

6. As can be seen from the judgment, the injuries sustained by the applicant included haematuria, an extensive haematoma on the chest, numerous bruises all over the right side of the chest and back and on the

1. See, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V

2. See *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, or *Kobets v. Ukraine*, no. 16437/04, 14 February 2008

right hip and left shoulder, and small scratches on his wrists. Without any attempt to underestimate or downsize the applicant's sufferings, we nonetheless oppose an *inflation* of the category "torture" which is reserved, following *Ireland v. the United Kingdom*, for "deliberate inhuman treatment causing very serious and cruel suffering", to which "a special stigma" is attached¹.

7. It must be understood that in *Selmouni v. France* the Court adopted a very concise and sophisticated definition of torture, using the very wording of Article 1 of the United Nations Convention Against Torture (hereinafter the "UN Convention").² Until *Selmouni v. France* the European Court of Human Rights did not have its own definition of torture, neither did it distinguish strictly between torture for the purposes of Article 3 of the Convention and other forms of inhuman or degrading treatment or punishment.

8. Article 3 of the European Convention on Human Rights with its marginal heading "*Prohibition of torture*" spells it out as follows: "*No one shall be subjected to torture or inhuman or degrading treatment or punishment*". The text of the European Convention on Human Rights, therefore, does not distinguish between torture and inhuman or degrading treatment or punishment. As pointed out above, the distinction between the two concepts was established in *Selmouni* by reference to Article 1 of the UN Convention. Article 1 requires that the *suffering* or *pain*, whether *physical* or *mental*, in order to be torture must be *severe*.

9. The UN Convention definition also requires that the infliction of such severe pain or suffering be perpetrated with direct intent and moreover with a special intent (*dolus specialis*) in order to obtain from the victim or a third person information or a confession or to punish him or her for an act that he or she or a third person has committed or is suspected of having committed or with intent to intimidate or coerce him or her or a third person or for any reason whatsoever based on discrimination of any kind. In addition, such

1. *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25

2. UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> Part I, Article 1:

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

acts of torture must be inflicted by or at the instigation of or with the connivance of a public official or any other person acting in such an official capacity. In this respect, we speak of *delictum proprium*, that is to say torture can only be committed, to put it simply, by an agent of the State.

10. On the other hand, Article 1 of the UN Convention *in fine* provides that pain or suffering arising only from or inherent in or incidental to normal lawful sanctions, does not qualify as torture. If the person is resisting arrest and thereby makes the use of physical force inevitable for the purposes of that arrest, injuries sustained during this altercation will not qualify as torture, even though they would in every other respect, except in so far as *dolus specialis* is concerned, correspond to the above definition. The issue in *Rehbock v. Slovenia*,¹ for example, was whether the physical resistance of a body-builder did or did not necessitate the use of physical force, i.e., whether or not it was incidental to the lawful sanction constituted by his arrest.

11. The issue in the present case, where we differ with the majority, concerns, as we have pointed out above, the distinction between torture as here defined and explained, on the one hand, and inhuman or degrading treatment or punishment, on the other. Given the reception of the definition of the UN Convention's Article 1 in *Selmouni v. France*, it must be taken into consideration that the European Court of Human Rights not only chose to be bound by the definition of torture but is *eo ipso* bound by the distinction between torture *stricto sensu* on the one hand and inhuman or degrading treatment or punishment on the other.

12. It is in this respect, therefore, interesting to note that the UN Convention practically does not refer, in the body of its text, to “*other cruel, inhuman or degrading treatment or punishment*”.

13. The term “*cruel, inhuman or degrading treatment or punishment*” appears only in Article 16 of the UN Convention, i.e., in its second paragraph, where the international instrument refers to the proviso according to which the UN Convention should be without prejudice to the provisions of any other international instrument or national law which prohibit “*cruel, inhuman or degrading treatment or punishment*” or which relate to extradition or expulsion.

14. In the logic of the UN Convention, therefore, “*cruel, inhuman or degrading treatment or punishment*” is everything which is less than torture *stricto sensu*.

15. Here we observe that the criteria in Article 1 of the UN Convention referring to *dolus specialis* and *delictum proprium* are discrete (yes or no, *aut-aut*), which means that the preconditions for characterising the conduct of the State agent are either present or not.

1. *Rehbock v. Slovenia*, no. 29462/95, ECHR 2000-XII

16. The only non-discrete element of the crime of torture, which lends itself to continuity, is the *pain* or *suffering*, which must be *severe*. It would logically follow, therefore, that “*cruel, inhuman or degrading treatment or punishment*” is everything that does not qualify as torture by virtue of the required *severity of pain and suffering*, be it *physical or mental*. If the pain or suffering, physical or mental, is less than severe, in other words, we speak – all other preconditions being equal – of inhuman or degrading treatment.

17. In the present case, not only is it doubtful that the *sequelae* actually derived from ill-treatment by public officials, but also the *severity* of the pain and suffering has, in our opinion, not been properly established.