



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

FIFTH SECTION

CASE OF TESLENKO v. UKRAINE

(Application no. 55528/08)

JUDGMENT

STRASBOURG

20 December 2011

FINAL

20/03/2012

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

In the case of Teslenko 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 Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 29 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 55528/08) 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 Anatoliy Grigoryevich Teslenko (“the applicant”), on 31 October 2008.

2. The applicant was represented by Ms Zoya Shevchenko, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agents, Mr Yuriy Zaytsev, succeeded by Ms Valeria Lutkovska.

3. The applicant alleged, in particular, that he had been tortured by police and that the domestic authorities had failed to duly investigate his complaint in that regard.

4. On 10 March 2010 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

5. The applicant was born in 1974. His present place of residence is unknown.

A. Background events

6. On 4 August and 5 November 2003 Ms Z. and Ms G. were robbed in their flats. The first robbery took place in the building where the applicant's acquaintance Ms M. lived, while the second victim was her distant relative.

7. On 5 November 2003 the police questioned Ms M., who was suspected by one of the victims. She stated that both robberies had been committed by the applicant and his friends.

8. On 8 November 2003 Ms M. was hospitalised with a head injury and concussion. On 10 November 2003 she complained to the Ministry of the Interior that she had been coerced by the police into testifying against the applicant. After this Ms M. went into hiding from the authorities. Her complaint was later examined as part of the applicant's trial (see paragraph 14 below).

B. Criminal proceedings against the applicant

9. Late in the evening of 5 November or during the early hours of 6 November 2003 the applicant was apprehended by the police on suspicion of the robberies of Ms Z. and Ms G. His arrest was documented on 6 November 2003.

10. On 2 June 2004 the Solomyanskyy District Court of Kyiv ("the Solomyanskyy Court") severed the charge concerning the robbery of Ms Z. and remitted the case in that part for additional investigation. Its outcome is unknown.

11. While it is not known when the applicant began to be legally represented, it transpires from the aforementioned ruling of 2 June 2004, as well as from the subsequent judicial decisions, that from that point onwards one or sometimes two lawyers represented him in the course of the trial.

12. Although the applicant consistently denied guilt, both during the pre-trial investigations and the trial, on 11 November 2004 the Solomyanskyy Court found him guilty of the violent robbery of Ms G. and sentenced him to seven years and six months' imprisonment with confiscation of all his personal property. The court relied on the statements of the victim, who recognised the applicant as one of the perpetrators, as well as the statements of a witness who had seen him close to the crime scene around the time of the robbery. The court further relied on the statements given by Ms M. during the pre-trial investigation. It also heard statements from two defence witnesses, according to which the applicant had spent the whole day with them on 5 November 2003, but did not trust the statements, deeming them too general and contradictory.

13. On 24 May 2005 the Kyiv City Court of Appeal ("the Court of Appeal") quashed the judgment and remitted the case for additional investigation, having pointed out a number of procedural shortcomings.

14. On 22 May 2007 the Solomyanskyy Court delivered a new judgment, the operative part of which was identical to the previous one. The court additionally heard a number of defence witnesses who stated that they had either spent the whole day on 5 November 2003 in the applicant's company or had seen him at various times on that date. The court decided, however, that those statements were either untruthful, because the witnesses were the applicant's friends and wanted to help him avoid criminal liability, or unrelated to the precise time when the robbery had been committed. Ms M. was questioned during the trial and retracted her earlier statements incriminating the applicant as given under duress. However, the court chose to rely on those earlier statements as more plausible and concordant with the other facts. It noted, in particular, that she had not requested a medical examination until two days after her questioning by the police and that there was no evidence that the injuries discovered had been inflicted on her in police custody. While Ms M. contended that she had been hiding in fear that the police might seek revenge, the court considered it more probable that she had in fact been afraid that the applicant's accomplices who had not been detained might seek revenge.

15. On 5 February and 9 June 2008 the Court of Appeal and the Supreme Court respectively upheld the aforementioned judgment.

16. On 12 August 2009 the applicant was released on parole.

C. The applicant's alleged ill-treatment and its investigation

17. According to the applicant, the Chief and Deputy Chief of the Criminal Investigation Unit of the Solomyanskyy District Police Department (*начальник та заступник начальника відділу кримінального розшуку Солом'янського РУ ГУ МВС України в м. Києві*), officers T. and Z., tortured him in the police station at Povitroflotskyy Avenue during the night of 5-6 November 2003. They allegedly sought, but failed to obtain, a confession from him to several counts of robbery.

18. As submitted by the applicant, T. and Z. punched and kicked him, forced him to stand for a long time with his legs wide apart, attempted to insert a truncheon into his anus, and put a plastic bag over his head, stopping him from breathing. In the early hours of 6 November 2003 they allegedly took him to the police station garage, where they forced him to undress, handcuffed him to a radiator and poured cold water on him from a car-wash hose until he lost consciousness. After the applicant regained consciousness, he found himself inside the police station and was given a mug of hot water to drink and some drops.

19. On 6 November 2003 the applicant wrote an "explanatory note", stating that he had accidentally fallen in the street the night before and had received some injuries as a result. He noted that he had no complaints against the police.

20. In the afternoon of 6 November 2003 the applicant was taken to another police station in Shutov Street, Solomyansky District, TUM-4 (*Територіальне управління міліції № 4, ТУМ-4*).

21. On 11 November 2003 the applicant's mother complained to the Ombudsman that he had been ill-treated in police custody.

22. On 12 November 2003 representatives of the Ombudsman visited the applicant in TUM-4 and took photographs of his injuries. The applicant provided the Court with seven colour photographs, which, according to him, are those taken by the Ombudsman's representatives. From these photographs, the following injuries can be seen on his body: a large bruise on the inner part of his left thigh, a considerable number of bruises on the upper parts of both buttocks, several sores and bruises on the front of both ankles, and sores on the bridge of his nose. The date printed on the photographs is 12 November 2003.

23. On the same date the applicant gave an account of the 5-6 November events to the Ombudsman's representatives in writing. He submitted that on 6 November 2003 he had been forced to write that he had no complaints against the police.

24. On 13 November 2003 the Ombudsman wrote to the Ministry of the Interior that the applicant's situation called for investigation.

25. On the same date a doctor examined the applicant and discovered sixteen bruises on his face, arms, buttocks and legs (with the largest one measuring 21 x 20 centimetres), as well as sores on his wrists and feet. He concluded that the injuries were not serious, and that they had been inflicted by blunt objects, possibly on 5 or 6 November 2003.

26. On 17 November 2003 an investigator of TUM-4 and the Chief Inspector of Staff of the Kyiv Police Department (*начальник Інспекції по особовому складу РУ МВС України*) questioned the applicant about his alleged ill-treatment.

27. On 21 November 2003 another investigator of TUM-4 ordered another forensic medical examination aimed at answering the following questions: whether the applicant had any injuries on his body and, if so, how they had been inflicted; whether those injuries could have been inflicted on 5 or 6 November 2003; and how serious they were.

28. On 25 December 2003 the Solomyansky District Prosecutor's Office ("the SDPO") instituted a criminal investigation, without naming any specific individuals, into the allegation that Solomyansky District police officers had exceeded their powers by engaging in violent and degrading treatment of the applicant. The investigation was entrusted to SDPO investigator N.

29. On 26 January 2004 a new forensic medical report confirmed the results of the applicant's medical examination of 13 November 2003.

30. On 9 February 2004 the investigator ordered another medical examination to clarify: whether the applicant could have inflicted the

injuries on himself; whether he could have sustained those injuries by falling; what his body position had been during the infliction of the injuries; and whether he could have sustained them in self-defence.

31. On 12 February 2004 an expert report answered those questions as follows: the injuries were to parts of the applicant's body on which self-infliction would be possible; the possibility that they had been the result of a fall was excluded; and the remaining two questions could not be answered.

32. In the meantime, on 11 February 2004, the applicant was assigned victim status.

33. On 6 April 2004 the investigator questioned the forensic medical expert, who confirmed that the applicant could have sustained his injuries at the time and under the circumstances described by him.

34. On 20 April 2004 the SDPO opened a criminal case against police officers T. and Z. on suspicion of abuse of power associated with violence and degrading treatment (Article 365 § 2 of the Criminal Code), given that the applicant had recognised them as those who had allegedly tortured him.

35. On the same date those officers were suspended from duty.

36. On 30 April 2004 they were indicted, and the case was sent to the Golosiyivskyy District Court of Kyiv ("the Golosiyivskyy Court").

37. On 9 August 2004 the Golosiyivskyy Court directed the SDPO to find out with whom the applicant had shared cells from 6 to 12 November 2003 and to question these persons.

38. On 20 October 2004 the court referred the case back to the SDPO for additional investigation, which was to clarify the origin of the applicant's injuries given that, on the one hand, they were to parts of his body on which self-infliction would be possible and, on the other hand, his cell-mates at the time had not been identified or questioned.

39. On 22 January 2005 the forensic medical expert, repeatedly questioned by the investigator, confirmed again her earlier findings that the applicant's injuries could have been inflicted as he had described.

40. On 8 February 2005 formal charges were brought against T. and Z. under Article 365 § 2 of the Criminal Code.

41. On 18 February 2005 the SDPO invited the Kyiv Chief of Police to consider suspending T., who had resumed his work as a police officer at some point in the meantime, from his duties.

42. On 25 March 2005 the SDPO approved a bill of indictment against T. and Z. and sent the case to the Golosiyivskyy Court for examination.

43. On 26 April 2005 the trial began.

44. On 16 May 2005 the applicant lodged a civil claim seeking compensation for non-pecuniary damage in the amount of 200,000 Ukrainian hryvnias (UAH).

45. On 16 August 2005 the Golosiyivskyy Court found T. and Z. guilty and sentenced them to four years' imprisonment with a prohibition on working in law-enforcement bodies for two years. The prison sentence was

suspended for two years on probation. The court also awarded the applicant UAH 20,000 in compensation for non-pecuniary damage, to be paid by the defendants.

46. While both defendants admitted that they had questioned the applicant on the night of 5-6 November 2003 in the police station at Povitroflotsky Avenue, they denied any coercion. However, the court found that there was sufficient evidence to establish their guilt. It took into account statements by several witnesses, who had seen the applicant during the day before his arrest without any visible injuries. Furthermore, the court relied on the statements of the applicant's cell-mates in TUM-4 at Shutov Street (where he had been placed in the afternoon of 6 November 2003), who, on the one hand, had seen numerous bruises and sores on his body, but, on the other, denied any ill-treatment in TUM-4. Also, the police officers who had escorted the applicant from the police station at Povitroflotsky Avenue to TUM-4 on 6 November 2006 stated that at that time his face was already bruised and swollen. The court also examined the photographs of the applicant taken by the Ombudsman's representatives on 12 November 2003 and relied on the findings of the medical reports of 26 January and 12 February 2004. It noted that the applicant's description of the police station garage where he had allegedly been ill-treated, was very detailed and subsequently confirmed as accurate, which showed that he had indeed been there.

47. On 13 February 2006 the Court of Appeal quashed the judgment and remitted the case for additional investigation. It concluded that the investigation had been incomplete, mainly because it had failed to establish how exactly the injuries had been inflicted on the applicant.

48. On 22 March 2006 investigator S. of the SDPO took the case over.

49. On 21 April 2006 he ordered another forensic medical examination with a view to clarifying the number, nature, location, origin and date of each of the applicant's injuries.

50. On 15 May 2006 an expert report was produced, which confirmed the findings of the earlier reports. It further specified that the abrasions on the applicant's wrists could have been caused by handcuffs, while the bruises could have been caused by being punched, kicked or hit with a truncheon.

51. On 24 July 2006 the investigator instructed the Kyiv Chief of Police to find the truncheon with which the applicant could have been beaten. The reply given on 27 July 2006 stated that it could not be found.

52. On 25 July 2006 T. was again suspended from duty (it is not known when he resumed his duties following the earlier removal).

53. On 22 August 2006 investigator S. decided to withdraw from the case. He considered that the evidential basis was limited to the applicant's allegations and not corroborated by any other valid evidence. The

investigator grounded his withdrawal by that view and further referred to the principle of the impartiality of the investigation.

54. On the same date the SDPO reversed that withdrawal as lacking legal basis.

55. On 27 March 2007 the investigator applied to the Deputy General Prosecutor for an extension of the term of the pre-trial investigation to eight months (the six-month term was to expire on 7 April 2007) given that the accused had not yet studied the case file. In the application the investigator however indicated that T. and Z. had been protracting the investigation by taking an unjustifiably long time to familiarise themselves with the file and by unmeritorious requests for unnecessary investigation measures.

56. On 16 June 2007 the SDPO indicted T. and Z. again.

57. On 30 July 2007 the Golosiyivskyy Court started the examination of the case.

58. On 17 September 2007 the applicant brought a new civil claim against T. and Z. within the criminal proceedings.

59. During the period between September 2007 and March 2008 the court adjourned hearings eight times for a total of over three months because of the absence of a number of witnesses.

60. On 7 March 2008 the Golosiyivskyy Court again remitted the case for additional investigation on the following grounds: the defendants' lawyer had been deprived of his licence at some point during the pre-trial investigation, but had nonetheless continued to represent them. As a result, the court considered that the defence rights of T. and Z. had been violated.

61. On 29 May 2008 the Court of Appeal quashed that decision and referred the case back to the first-instance court, allowing the public prosecutor's appeal.

62. On 10 July 2009 the Golosiyivskyy Court issued a special ruling (*окрему ухвали*) bringing to the attention of the Kyiv Chief of Police the latter's failure to comply with the court orders of 14 April, 20 May and 19 June 2009, that the obligatory attendance of numerous witnesses should be ensured. The orders were that the police were to take appropriate measures and report to the court.

63. On 21 July 2009 the applicant wrote the following statement addressed to the President of the Golosiyivskyy Court:

"I, Teslenko Anatoliy Grigoryevich, would like to make the following statement. The Golosiyivskyy District Court of Kyiv is currently examining a case against the Chief of the Criminal Investigation Department [T.] and [Z.], in which I am a victim. I retract the statements which I gave in the prosecutor's office under pressure from the investigator and in court, namely that it was precisely [T. and Z.] who had beaten and humiliated me. The investigator [N.] demanded that I identify [T. and Z.]. In exchange, he promised I would be acquitted and that criminal department officials would be held liable. I remembered [T.] because he had been the Chief, and [Z.] because he had been wearing glasses. I could recognise only those two, as I could not, and do not now, remember any other officers. I was beaten up at Shutov Street, no. 3,

as they really needed my confession to the robbery. But I did not remember any officers from Shutov [street], and I was advised to incriminate those I remembered. When the investigator [N.] came to see me, I was at a loss and did not know what to tell him. But he reassured me and told me that I did not have to worry and that I was to testify against those I remembered. As to what exactly I had to tell and to show, he told that he would help me. At the same time, he promised that if I followed his advice I would be at liberty shortly. It is very difficult for me now to testify before the court, for I have got confused in my statements because it was the investigator [N.] who gave them to me. I therefore request you not to disturb me any longer regarding the case of [T. and Z.] and not to bring me to the court”.

64. On 18 September 2009 the Golosiyivskyy Court directed the SDPO investigator to establish the actual places of residence of twenty-two witnesses whose obligatory presence had been ordered, but who had failed to attend and whom the police had failed to bring to the courtroom. Ten of the witnesses in question were police officers, nine were detained (at the time) in the police stations where the applicant had been placed on 6 November 2003, two were acquaintances of the applicant, and one was the forensic expert.

65. On 6 October 2009 the Golosiyivskyy Court also ordered obligatory attendance by the applicant, who had been released from prison in the meantime in July 2009 and had not been appearing for hearings.

66. On 19 October 2009 the police informed the court that the applicant’s actual place of residence could not be established.

67. On 24 March and 18 May 2010 the court ordered mandatory attendance by the applicant, to be ensured by the police.

68. On 24 June 2010 the Golosiyivskyy Court referred the case for additional investigation, given the need to question the applicant regarding his statement of 21 July 2009.

69. On 20 September 2010 the Kyiv Court of Appeal quashed the aforementioned decision and remitted the case to the first-instance court for examination. The parties did not provide the Court with a copy of this ruling.

70. According to the most recent information submitted by the Government in February 2011, the case remains pending before the Golosiyivskyy Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code

71. Article 365 § 2, as worded in November 2003, provided for three to eight years’ imprisonment with a prohibition on holding certain offices or carrying out certain activities for a period of up to three years as punishment

for exceeding one's power by engaging in the violent or degrading treatment of a victim.

B. Report of the Commissioner for Human Rights of the Parliament of Ukraine (Ombudsman) for 2003

72. The relevant extracts from Chapter 3.3 provide as follows:

“... On 11 November 2003 the mother of detained A. Teslenko complained [to the Ombudsman] that her son had been tortured in the Solomyanskyy Police Department (*у Солом'янському РУ ГУ МВС України в м. Києві*). Staff members of the Ombudsman's Secretariat verified this allegation on site and found numerous traces of beatings on the body of A. Teslenko (photos were taken).

A. Teslenko gave the following explanations to the staff of the Ombudsman's Secretariat: “I was tortured for thirteen hours in the district police station. Trying to extract a confession to a crime from me, they beat me, forced me to stand with my legs wide apart (*садили на «шагати»*), prevented me from breathing by putting a plastic bag over my head, hanged me naked from handcuffs and poured cold water on me for forty minutes, threatening to make a General Karbyshev¹ out of me. To conceal the torture, they forced me to write a statement that I had injured myself by an accidental fall on my way home the previous evening and that I had no complaints against the police.”

By the way, this is a typical example: police officers often force the victims of torture to write a no-complaint statement under threats that the torture will continue or in exchange for release. Later on [such statement] is used by the police as a key proof of their innocence as regards any injuries sustained by the person.

After its own investigation and the Ombudsman's application to the General Prosecutor's Office concerning the verification of A. Teslenko's allegations, the Solomyanskyy District Prosecutor's Office opened a criminal case concerning the police officers, which is now being examined by the Golosiyivsky District Court of Kyiv. ...”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

73. The applicant complained that on 5-6 November 2003 he had been tortured by police and that there had been no effective domestic

1. A Soviet general whom the Nazis dosed with cold water in February 1945 and left to die in the frost.

investigation into that matter. He relied on Article 3 of the Convention, which reads as follows:

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

A. Admissibility

74. The Government submitted that the domestic investigation into the applicant's allegation of ill-treatment was still ongoing. In their view, the applicant could not therefore be regarded as having exhausted the remedies available to him under domestic law, as required by Article 35 § 1 of the Convention. The Government referred in this connection to the judgment in the case of *Misiak v. Poland* (no. 43837/06, 3 June 2008), in which the Court dismissed the applicant's complaint of ill-treatment as premature, given that the investigation into the matter was still pending (§ 32).

75. The applicant disagreed. He insisted that the domestic investigation in his case was ineffective, having lasted for over seven years without any meaningful result, and that he could not be reproached for not waiting for a final outcome. In any event, the applicant considered that the issue of the exhaustion of domestic remedies was to be joined to the merits of his complaint about the alleged ineffectiveness of the investigation.

76. The Court notes that, according to its case-law, an applicant is dispensed from the obligation to avail himself of an ineffective domestic remedy. As regards complaints under Article 3 of the Convention, the Court has held, in particular, that an applicant cannot be reproached for not pursuing an investigation which is found to be ineffective (see *Lotarev v. Ukraine*, no. 29447/04, § 93, 8 April 2010).

77. The Court observes that, unlike in the present case, the applicant in the case of *Misiak v. Poland*, cited by the Government, did not allege before the Court that the domestic investigation into his allegation of ill-treatment had proved ineffective. Accordingly, he was to wait for its completion before bringing that complaint to this Court.

78. In the present case however it is impossible to establish whether or not the applicant was under such an obligation before examination of the merits of his complaint about the alleged ineffectiveness of the domestic investigation in question.

79. The Court therefore joins this objection of the Government to the merits of the applicant's complaint under the procedural limb of Article 3 of the Convention (see, for example, *Lotarev v. Ukraine*, cited above, § 74, and *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 50, 24 June 2010).

80. The Court further notes that this complaint is not otherwise manifestly ill-founded within the meaning of Article 35 § 3 (a) of the

Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Alleged ill-treatment

81. The applicant insisted that he had been subjected to ill-treatment amounting to torture. He considered this allegation to be corroborated by sufficient documentary evidence.

82. The Government emphasised that the domestic investigation had yet to conclude whether the applicant's allegation had any basis. Accordingly, they abstained from expressing a view on the merits of this complaint, considering that it would prejudice the outcome of the ongoing investigation.

83. 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). Where allegations are made under this provision, the Court must conduct a particularly thorough scrutiny, and will do so on the basis of all the material submitted by the parties (see *Matyar v. Turkey*, no. 23423/94, § 109, 21 February 2002, and *Ülkü Ekinci v. Turkey*, no. 27602/95, § 136, 16 July 2002).

84. In the present case, the applicant alleged that police officers T. and Z. had subjected him to various kinds of ill-treatment and humiliation during the night of 5-6 November 2003, seeking to obtain a confession to a crime. He alleged, in particular, that they had been punching and kicking him, had forced him to stand with his legs wide apart, had attempted to insert a truncheon into his anus, and had stopped his breathing by putting a plastic bag on his head. The applicant also alleged that they had stripped him naked, had handcuffed him to a radiator in the police station garage and had dosed him with cold water.

85. According to the Court's case-law, allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see, as a classic authority, *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and

convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). It should be borne in mind that this obligation stems from the State's international responsibility under the Convention which implies different methods and standards of proof than those applicable in national legal systems regarding criminal prosecution of individuals with due respect of their right to the presumption of innocence (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336, and *Alboreo v. France*, no. 51019/08, § 153, 20 October 2011).

86. The Court notes that, as established by three medical reports – of 13 November 2003, 26 January 2004 and 15 May 2006 – and confirmed by the photographs taken by the Ombudsman's representative on 12 November 2003, the applicant had numerous bruises and sores on his face, arms, buttocks and legs, with the largest bruise on the inner part of his left thigh and measuring 21 x 20 cm (see paragraphs 22, 25, 29 and 50 above).

87. As to the time those injuries were inflicted, the aforementioned medical reports concluded that they could have been inflicted on the applicant on 5 or 6 November 2003. The Court notes in this connection the statements of several witnesses who submitted having seen the applicant throughout the day on 5 November 2003 uninjured and whose statements remained unchallenged (see paragraph 46 above). At the same time, the Court observes that the applicant's arrest was not followed by any immediate medical examination which could have documented any injuries sustained by him by the time of or during his arrest. All these considerations lead the Court to conclude that the applicant sustained the injuries in question while in police hands on 5 and/or 6 November 2003.

88. The Court is not convinced by the applicant's written statement of 6 November 2003 that he had injured himself the previous evening, having accidentally fallen down, because, firstly, given the circumstances, he could have been forced to write in this way, and, secondly, the accuracy of that statement was put into question by a medical report (see paragraphs 18, 19, 23 and 31 above).

89. 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, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). Moreover, when the national authorities failed to conduct a medical examination before placing the applicant in detention, as in the present case, 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). In this respect the Court recalls that 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. 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 the injuries (see *Korobov v. Ukraine*, § 70, 21 July 2011).

90. Given that the domestic authorities in the present case neither proved that the applicant had been injured before his detention nor explained the origin of his injuries, they are to bear the responsibility for those injuries.

91. This finding alone is sufficient for the Court to find a breach of Article 3 of the Convention, without getting into the classification of the ill-treatment in question. However, given the applicant's insistence that the ill-treatment complained of amounted to torture, all further aspects of his allegation as to the nature of the ill-treatment suffered and the underlying circumstances are to be scrutinised with great care.

92. As regards the manner in which the applicant could have been injured, the Court notes that the domestic medical findings are as follows: firstly, the doctor examining the applicant on 13 November 2003 concluded that his injuries might have been caused by blows with blunt objects; secondly, the report of 12 February 2004 established, on the one hand, that the injuries were to parts of the body on which wounds could be self-inflicted, while, on the other hand, they could not have resulted from the applicant's falling; and, lastly, the forensic medical report of 15 May 2006 specified that the abrasions on the applicant's wrists could have been caused by handcuffs, while the bruises could have resulted from punches, kicks or blows with a truncheon (see paragraphs 25, 31 and 50 above). Moreover, the forensic medical expert confirmed twice while being questioned by the investigating authorities that the applicant might have sustained the aforementioned injuries in circumstances described by him (see paragraphs 29 and 33 above).

93. Accordingly, the Court considers it established that the applicant had been subjected to handcuffing, punches, kicks and blows from a truncheon. It considers the reported failure of the police to find the truncheon in question almost three years after the events to be of no relevance in this regard (see paragraph 51 above).

94. At the same time, the Court notes that the applicant alleged more than that (see paragraphs 18 and 84 above). The remaining part of his allegations is neither confirmed nor refuted by any documents. The Court does not however draw inferences from the absence of such evidence itself, for the applicant might have indeed been subjected to an attempted rape with a truncheon, temporary stopping of his breathing with a plastic bag, as well as being stripped naked and doused with cold water, without any traces being left. There is nothing in the case file to undermine the plausibility of these allegations, and the applicant's account appears concordant with the other facts of the case. Thus, police officers T. and Z. admitted that they

remained with the applicant during the night of 5-6 November 2003. The officers who convoyed the applicant to another police station during the afternoon of 6 November 2003 stated that he already had visible injuries by that time. Lastly, the applicant gave a detailed and accurate description of the interior of the police garage where he had allegedly been ill-treated during the night of 5-6 November 2003 (see paragraph 46 above).

95. The Court does not lose sight of the delayed and inexplicable change by the applicant of the account of events he gave the domestic investigating authorities. It notes that almost six years after his alleged ill-treatment the applicant submitted to the Golosiyivskyy Court, which was trying officers T. and Z., that he had incriminated them under pressure from the investigator and that he had in fact been ill-treated in a different police station, where he had been taken on the afternoon of 6 November 2003, by some officers whom he did not remember (see paragraph 63 above).

96. Whatever led the applicant to change his statements, the Court is not convinced by this new account which, by the way, was never submitted to this Court. Firstly, there had been several investigators dealing with the case (see paragraphs 26-28 and 48 above) and the applicant's allegation that he was put under pressure by one of them does not stand up under scrutiny. Secondly, his initial account had been detailed and consistent, while the new version was couched in vague terms. Lastly, the applicant apparently appeared reluctant to pursue that new version, having ceased to cooperate with the investigation after making the statement in question in July 2009 (see paragraphs 63 and 65-67 above).

97. In the light of all the foregoing, the Court finds the applicant's allegation of ill-treatment, as raised in his application to this Court, to be plausible overall, being either corroborated by the documentary evidence or supported by factual inferences.

98. It will assess now whether the ill-treatment in question amounted to torture as alleged by the applicant.

99. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom*, cited above, § 167).

100. In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (see *Selmouni v. France* [GC], cited above, § 97, and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 115,

ECHR 2000-X). In the *Selmouni* judgment, cited above, the Court took the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies (§ 101). In the light of this approach, the Court held that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future (ibid.).

101. Turning back to the instant case, the Court notes that the multiple bruises (sixteen in total, with the largest measuring 21 x 20 cm) and numerous abrasions sustained by the applicant, even though classified as “light injuries” in the domestic proceedings, attest to the severity of the ill-treatment he suffered (see and compare with *Nikiforov v. Russia*, no. 42837/04, § 46, 1 July 2010). The applicant’s physical pain from his beatings, and possibly from other forms of ill-treatment (see paragraphs 93-94 above), must without doubt have been exacerbated by feelings of helplessness, stress and anxiety, given that he was ill-treated during the night, in a police station, by trained officers whose violence he had no means of resisting. It is also relevant for the assessment of the seriousness of the ill-treatment suffered by the applicant that it was intentional and aimed at extracting from him a confession that he had committed the offence of which he was suspected.

102. In these circumstances, the Court concludes that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention.

103. The Court therefore finds that there has been a violation of Article 3 of the Convention under its substantive limb.

2. Effectiveness of the investigation

104. The applicant maintained that the domestic investigation had been slow and ineffective. He considered that its duration for over seven years was an indication of the authorities’ lack of will to establish the truth and to hold the police officers who had tortured him criminally liable.

105. The Government contended that there had been a prompt and effective response to the complaints of the applicant’s relatives about his alleged ill-treatment raised for the first time on 11 November 2003. In the Government’s view, the fact that the investigation remained pending was not an indication of its ineffectiveness, but rather proved that the applicant’s allegations were receiving due attention. Lastly, they argued that the applicant himself did not appear interested in the prompt completion of the investigation, because, after he was released from prison in August 2009 he did not inform the authorities about his place of residence.

106. The Court emphasises that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of

Article 3, that provision requires by implication that there should be an effective official investigation 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, and *Labita*, cited above, § 131). The minimum standards of effectiveness defined by the Court's case-law include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, *Menesheva v. Russia*, no. 59261/00, § 67, ECHR 2006-III).

107. In the present case, the Court has found that the respondent State is responsible under Article 3 for the applicant's torture (see paragraphs 102-103 above). The applicant's complaint in this regard is therefore "arguable", which means that the authorities had an obligation to investigate it in compliance with the aforementioned effectiveness standards.

108. The Court notes that the allegation about the applicant's ill-treatment was raised for the first time on 11 November 2003 by his mother in her complaint to the Ombudsman, and maintained by the applicant himself thereafter before the domestic investigation authorities.

109. The fact that the applicant remained silent about his alleged ill-treatment for six days might be explained by his written statement of 6 November 2003 that he had no complaints against the police. In any event, this delay was insignificant and did not hinder the investigation by any means (see and compare with *Aleksandr Smirnov v. Ukraine*, no. 38683/06, § 59, 15 July 2010).

110. The Court observes that the Ombudsman's representatives were able to meet the applicant without delay, question him and take photographs of his injuries (see paragraphs 21-22 above). Immediately after their visit the applicant was examined by a doctor, and several days later he was questioned by the investigating authorities about his allegations of ill-treatment (see paragraphs 25-27 above). About a month later, a criminal investigation was launched into the matter (see paragraph 28 above). Accordingly, the Court considers that the domestic authorities responded to the applicant's complaint with the requisite promptness.

111. The development and duration of the subsequent investigation however disclose deficiencies which cast doubts on the diligence of the authorities in their efforts to establish the truth and to bring those guilty to justice.

112. The Court observes that the investigation has lasted for more than seven and a half years, and has advanced no further than to the examination of the case by the first-instance court (see paragraphs 28, 34 and 70 above).

113. The Court does not lose sight of the criticism expressed by the trial court as regards the quality of the pre-trial investigation, which necessitated the remittal of the case for additional investigation on two occasions (see paragraphs 38 and 47 above).

114. At the same time, the Court notes that, while the medical evidence corroborated the applicant's allegation as early as 13 November 2003 (when he was examined by a doctor for the first time), numerous further medical examinations were ordered, and the forensic medical expert was repeatedly questioned by the investigator. Although the results of those additional medical reports and interviews were consistent with that early conclusion, the investigating authorities kept questioning their completeness and accuracy, as if seeking to undermine the applicant's allegation rather than objectively establish its veracity (see paragraphs 25, 27, 29-31, 33, 39, 49 and 50 above).

115. The Court also considers questionable the independence of investigator S., who was in charge of the investigation from March 2006 till the referral of the case to the trial court in June 2007. While he expressed the view that the applicant's allegation of torture was groundless, this investigator did not terminate the proceedings with a conclusion that there was no case to answer, but admitted his lack of impartiality and sought, unsuccessfully, to withdraw from the investigation (see paragraphs 53-54 above).

116. The Court next observes that, as it appears from the facts of the case, starting from September 2007, the trial of the accused officers T. and Z. came to a stalemate due to the failure of numerous witnesses to attend. The Court notes in this connection that almost half the witnesses in question (ten out of twenty-two) were police officers, and therefore their attendance could have easily been ensured if the authorities had had the will to do so (see paragraph 64 above). Moreover, the near halt of the proceedings by the Golosiyivskyy Court, solely because of the absence of witnesses, appears unjustified, given that the passage of about four years – as of September 2007 and even more thereafter – must inevitably have taken a toll on the witnesses' capacity to recall events in detail and with accuracy.

117. Lastly, the Court does not lose sight of the applicant's change of his account of the events complained of and his termination of any cooperation with the domestic investigation from July 2009 (see paragraphs 63 and 65-67 above). While the Court has doubts regarding the applicant's motives and the veracity of his new version (see paragraph 96 above), it notes that until then the domestic investigation had already lasted for almost six years. Its lack of progress cannot therefore be explained or excused solely by this change of the applicant's account at such a late stage. In any event, the

obligation on the part of the domestic authorities to investigate a credible allegation of ill-treatment by police does not derive from the purported victim's attitude, but is to be undertaken by virtue of Article 3 of the Convention (see *Arat v. Turkey*, no. 10309/03, § 43, 10 November 2009).

118. The foregoing considerations provide a sufficient basis for the Court to conclude that the State fell short of its obligation to conduct an effective investigation into the applicant's allegation of torture by the police.

119. The Court therefore dismisses the Government's objection as to the exhaustion of domestic remedies previously joined to the merits (see paragraph 79 above) and finds that there has been a violation of Article 3 of the Convention under its procedural limb as well.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

120. The applicant complained that the investigation into his allegation of torture was ineffective and thus contrary to Article 13 of the Convention, which provides:

"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."

121. The Court observes that this complaint concerns the same issues as those examined in paragraphs 104 to 118 above under the procedural limb of Article 3 of the Convention. Therefore, the complaint should be declared admissible. However, having regard to its conclusion above under Article 3 of the Convention, the Court considers it unnecessary to examine those issues separately under Article 13 of the Convention (see *Polonskiy v. Russia*, no. 30033/05, §§ 126-127, 19 March 2009).

III. REMAINDER OF THE APPLICATION

122. The applicant complained under Article 5 §§ 1 (c) and 2 of the Convention that his arrest was unlawful and that the reasons for it had not been explained to him. Furthermore, relying on Article 6 §§ 1 and 3 (b), (c) and (d), he complained that his trial had been unfair and that his conviction lacked a solid evidential basis. He submitted in that regard that the courts had wrongly relied on the statements of Ms M. given during the pre-trial investigation, had arbitrarily disregarded the statements of several witnesses confirming his alibi, and had failed to summon some other witnesses for the defence. Lastly, the applicant complained, relying on Article 13, that there had been no investigation into the lawfulness of the institution of the criminal proceedings against him on the charge of robbery of Ms Z.

123. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. 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

125. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

126. The Government contested this claim as unsubstantiated and, in any event, excessive.

127. The Court finds that the applicant must have suffered pain and distress which cannot be compensated solely by the finding of a violation. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards him the claimed amount in full, plus any tax that may be chargeable.

B. Costs and expenses

128. The applicant did not submit any claims for legal costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

129. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies in respect of the applicant's complaint under Article 3 of the Convention concerning his alleged torture by the police, and dismisses it after having examined the merits of that complaint;
2. *Declares* the complaints about the applicant's alleged torture in police custody and the lack of an effective investigation into that allegation admissible and the remainder of the application inadmissible;
3. *Holds* that the applicant has been subjected to torture in violation of Article 3 of the Convention;
4. *Holds* that there has been a violation of Article 3 of the Convention on account of the lack of an effective investigation into the applicant's allegation of torture by the police;
5. *Holds* that there is no need to examine the complaint in that regard under Article 13 of the Convention;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of 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, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable on the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President