



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

FIFTH SECTION

CASE OF KULISH v. UKRAINE

(Application no. 35093/07)

JUDGMENT

STRASBOURG

21 June 2012

FINAL

21/09/2012

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

In the case of Kulish v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Ann Power-Forde,

Ganna Yudkivska,

Angelika Nußberger,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 22 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 35093/07) 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 Sergey Nikolayevich Kulish (“the applicant”), on 18 July 2007.

2. The applicant was represented by Mr A.A. Kristenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs V. Lutkovska, from the Ministry of Justice.

3. The applicant alleged that he had been ill-treated by the police and that his allegation had not been properly investigated.

4. On 28 April 2011 the application was communicated 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 1947 and lives in Kharkiv.

A. The applicant's alleged ill-treatment by the police

1. The applicant's version of the events of 6 December 2004

6. On 6 December 2004 the applicant met with Ms Ch., who tried to bribe him. When the applicant refused to take the bribe, Ms Ch. threw a package of money into his car and retreated. Following this, strangers in plain clothes (who later turned out to be police officers) got into the applicant's car and without any introduction started wrenching his arms behind his back. One of the officers sat behind the applicant and started strangling him. Two others punched the applicant in the lower back. Then the applicant was handcuffed. One of the officers stretched the applicant out, hooked his finger in the applicant's mouth and started pulling on his cheek. In acute pain, the applicant bit the officer's finger. The officer concerned punched the applicant four times in the head, while another officer punched the applicant in the jaw. Then they pulled the applicant out of his car, threw him to the ground and started kicking him in the kidney area. This scene was witnessed by the applicant's wife.

7. The police officers placed the applicant in the car with his cuffed hands between his legs and his head on the seat of the car. The officer who had been bitten by the applicant covered the applicant's head with the hood of his jacket and sat on it. The applicant started suffocating and lost consciousness.

8. The applicant was then taken to Kharkiv Regional Police Department, where the investigator explained to him that he had been arrested for taking a bribe. The investigator suggested to the applicant that they might "come to an agreement" and ignored his complaints of violence on the part of the police officers. The applicant also complained of an acute headache and dizziness during the questioning, which lasted for five hours. Then the applicant was taken to the prosecutor's office, where the prosecutors questioned him about the events of that day. Following this, the applicant was released under a written undertaking not to abscond.

2. The Government's version of the events of 6 December 2004

9. On 6 December 2004 the applicant was apprehended by the police in the street and taken to the Kharkiv Regional Police Station for questioning on suspicion of swindling and instigation to bribery. The same day the applicant gave a written obligation not to abscond.

B. Investigation into the applicant's allegations of ill-treatment

10. At about 11.30 p.m. on the same day the applicant complained to Dzerzhinsky District Police Department of having been ill-treated by police

officers during his arrest. He received a hospital referral for a medical examination. The police also questioned two eyewitnesses and one testifying witness, who had been present at the time of the applicant's arrest.

11. On 7 December 2004 the applicant underwent a medical examination. According to the certificate of Kharkiv Emergency Hospital No. 4 of 9 December 2004, the applicant's injuries included the following: closed head trauma, bruises, brain injury, and soft tissue injuries to the chest and lower back. These injuries were classified as being of "medium severity".

12. On 8 December 2004 criminal proceedings were instituted against the applicant for swindling and instigation to bribery. These proceedings were terminated on 22 June 2006 for lack of proof.

13. On 9 December 2004 the applicant lodged a complaint with the Kharkiv Regional Prosecutor's Office against the police officers who had ill-treated him.

14. Between 9 and 31 December 2004 the applicant underwent in-patient treatment and between 1 and 10 January he also received out-patient treatment for his injuries.

15. On 10 December 2004 the Kharkiv Regional Prosecutor's Office received the applicant's above-mentioned complaint.

16. On 15 December 2004 the Kharkiv City Prosecutor's Office received the complaint.

17. On 24 December 2004 the Kharkiv City Prosecutor's Office refused to institute criminal proceedings for lack of *corpus delicti* in the actions of the police officers. The decision mentioned that three police officers, who had arrested the applicant, had been questioned and had testified that during the arrest the applicant had behaved violently, shouted at them and then fallen on the ground where he had started hitting himself against the ground in an attempt to cause himself bodily injuries. It further indicated that there were testimonies of other witnesses to the incident. It lastly mentioned that the applicant was in hospital, but that this could be considered an attempt to avoid liability for the crime he had committed.

18. On 5 January 2005 the Kharkiv Regional Office for Forensic and Medical Examination drew up an expert opinion on the applicant's injuries. The opinion noted that the injuries had been caused by hard objects and could have been caused in the circumstances described by the applicant.

19. On 31 January 2005, upon a complaint by the applicant, the Kharkiv Regional Prosecutor's Office quashed the decision of 24 December 2004 on the ground that the applicant's allegations had not been verified in full. It referred the case to the Kharkiv City Prosecutor's Office for further inquiries.

20. On 3 February 2005 the Kharkiv City Prosecutor's Office received the applicant's criminal complaint, together with a copy of the expert opinion of 5 January 2005.

21. On 26 April 2005 the Kharkiv City Prosecutor's Office refused to institute criminal proceedings against the police officers for lack of corpus delicti in their actions. The reasoning of the decision was similar to that of 24 December 2004.

22. On 6 May 2005 the Kharkiv City Prosecutor's Office instituted criminal proceedings in connection with the infliction of bodily harm of medium severity on the applicant.

23. On 4 June 2005 the criminal proceedings were transferred to the Kharkiv Dzerzhinsky District Police Department, which had territorial jurisdiction. The police investigator questioned the applicant, his wife and son and the police officers who had arrested the applicant. According to the Government, the investigator held confrontations between the applicant and the police officers. According to the applicant, the confrontations were ordered but not conducted.

24. On 5 June 2005 the Kharkiv Regional Office for Forensic and Medical Examination drew up an expert opinion classifying the applicant's injuries as being of medium severity.

25. According to the Government, on 18 January 2006 the investigator conducted an on-site reconstruction of events with the applicant's participation. According to the applicant, he did not participate in the reconstruction.

26. On 19 August 2006 the criminal proceedings were suspended due to the failure to establish a perpetrator.

27. On 26 September 2006, upon a complaint by the applicant, the Kharkiv Regional Prosecutor's Office quashed the decision of 19 August 2006 and remitted the case to the District Police Department for further investigation.

28. On 8 October 2006 the criminal proceedings were resumed. The investigator conducted an on-site reconstruction of events with all those involved in the incident. The investigator also seized all the medical documentation concerning the applicant's treatment after the accident.

29. On 4 November 2006 the investigator ordered a comprehensive medical report to be drawn up by the Kharkiv Regional Office for Forensic and Medical Examination.

30. On 19 December 2006 the case was referred to the Central Office for Forensic and Medical Examination, as the Kharkiv Regional Office could not provide comprehensive answers to the investigator's questions and the applicant had expressed a lack of confidence in the specialists of the Kharkiv Regional Office.

31. On 10 July 2007, at the applicant's request, the case was transferred to the Poltava Regional Office for Forensic and Medical Examination, as the waiting time for an expert examination in the Central Office exceeded two years.

32. On 1 April 2011 the Central Office for Forensic and Medical Examination issued its opinion, in which it concluded that the applicant had only sustained some of the injuries indicated in the previous report and that those injuries should be classified as minor bodily injuries, which could have been inflicted under the circumstances described by the applicant or by himself. As to the other injuries, the experts questioned them as having been diagnosed on the basis of subjective factors not confirmed by objective information.

33. On 29 August 2011 the investigator terminated the criminal proceedings for lack of proof of a crime. The decision mentioned for the first time the testimonies of the applicant's wife and son, who had confirmed his version of events. The investigator further mentioned that, in the light of the forensic expert opinion of 1 April 2011, the applicant's injuries should be classified as minor and therefore the criminal proceedings concerning infliction of injuries of medium severity on the applicant should be terminated.

34. The applicant challenged that decision before the prosecutor and the court.

35. On 30 August 2011 the Kharkiv Dzerzhinsky District Prosecutor's Office quashed the decision of 29 August 2011 on the ground that it had been premature and the investigator had not taken all the actions necessary for a comprehensive investigation of the circumstances of the case. It also gave a number of instructions to the police investigator.

36. On 9 September 2011 the Kharkiv Regional Prosecutor's Office decided to change the jurisdiction in the case and transfer it for further investigation from the police to the prosecution service. The case was accordingly handed over to the Kharkiv City Prosecutor's Office. The proceedings are pending.

37. By letter of 19 September 2011, the Kharkiv Dzerzhinskiy District Court informed the applicant that the examination of his appeal against the investigator's decision of 29 August 2011 was scheduled for 5 October 2011.

II. RELEVANT DOMESTIC LAW

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

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

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

A. Admissibility

1. *Non-exhaustion of domestic remedies*

40. The Government noted that the investigation into the applicant's allegations of ill-treatment was pending and that the effectiveness of that investigation had never been examined by the domestic judicial authorities. They referred to the case of *Misiak v. Poland*, in which the Court had rejected the applicant's complaint about degrading treatment by the police as being premature, since the relevant domestic proceedings had been pending (*Misiak v. Poland*, no. 43837/06, § 32, 3 June 2008). They further referred to two admissibility decisions concerning Ukraine, in which the applicants' complaints under Article 3 had been rejected for non-exhaustion of domestic remedies (*Aliev v. Ukraine* (dec.), no. 33617/02, 14 October 2008, and *Vinokurov v. Ukraine and Russian* (dec.), 16 October 2007).

41. The applicant disagreed. He considered that there were two remedies available to him under domestic law: a complaint to the prosecutor and an appeal to the court. He had applied to the prosecutor's office, which had quashed the decision to terminate the criminal proceedings of 29 August 2011 on 30 August 2011. Nevertheless, the applicant had also challenged the impugned decision before the court; however, this did not serve any purpose given that the contested decision had been already quashed by the prosecutor.

42. The Court observes that in the cases of *Aliev* and *Vinokurov*, referred to by the Government, the applicants failed to raise their complaints before any domestic authority, and in the case of *Misiak*, the applicant did not allege before the Court that the domestic investigation into his allegation of ill-treatment had proved ineffective. In the present case, however, the applicant successfully challenged the termination of the criminal

proceedings on several occasions and, therefore, can be said to have taken sufficient steps at the domestic level prior to raising his complaint about the ongoing criminal proceedings in connection with his allegations of ill-treatment before this Court (see, *mutatis mutandis*, *Bocharov v. Ukraine*, no. 21037/05, § 59, 17 March 2011).

43. The Court therefore rejects the Government's objection concerning non-exhaustion of domestic remedies.

2. Otherwise as to admissibility

44. The Court notes that the application 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

1. Alleged ill-treatment by the police

45. The applicant maintained that he had been ill-treated by the police during his arrest and that the police had used excessive force against him without any reason and had continued beating him even when he was already handcuffed. He submitted that his ill-treatment was confirmed by numerous medical documents and by the fact of his arrest, as well as a lack of any plausible alternative explanation for his injuries.

46. The Government made no observations on the merits.

47. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports of Judgments and Decisions* 1998-VIII). 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*, 18 January 1978, § 167, Series A no. 25). 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:

Article 1

“1. For the purposes of this Convention, the term ‘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. ...”

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).

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

49. Turning to the circumstances of the present case, the Court notes that the parties do not dispute the fact of the applicant’s arrest by the police on 6 December 2004. It was not suggested at any point that prior to his arrest the applicant had been involved in any conflict or had demonstrated any violent behaviour that could have resulted in injuries. It is also observed that no plausible alternative version as to the cause of the applicant’s injuries was advanced by the domestic authorities at any stage. Therefore, it can be assumed that the injuries sustained by the applicant were caused during his arrest by the police.

50. The Court further notes that the applicant was examined the day after the incident and underwent in-patient treatment for more than twenty days. The degree of bodily harm established by the medical examination carried out on the applicant shortly after his release (see paragraph 11 above) suggests strongly that the applicant’s injuries were sufficiently serious to amount to ill-treatment contrary to Article 3.

51. As to the additional forensic examination that questioned some of the findings of the initial medical examinations (see paragraph 18 and 32 above), it should be noted that the existence of some of the applicant’s injuries was not called into question. Furthermore, the additional examination was conducted much later and did not overturn the previous findings but rather questioned their reliability given possible alternative explanations for the applicant’s health complaints. Nonetheless, the initial findings, apart from being based on a direct examination of the applicant, as opposed to the later examination which was based on documents, were

corroborated by the applicant's consistent allegations of ill-treatment and the circumstances of his arrest by the police on 6 December 2004. Furthermore, it does not appear from the parties' submissions and the documents provided that any of the medical staff who examined the applicant on 7 December 2004 were ever questioned by the investigator.

52. In those circumstances, and given the burden on the State to provide a plausible explanation for injuries sustained by a person under the control of the police, the Court concludes that the Government have not satisfactorily established that the use of force against the applicant was lawful and absolutely necessary.

53. In the light of the above, it must be considered that the applicant sustained the injuries as a result of treatment for which the Government must bear Convention responsibility. Having regard to the severity of the ill-treatment suffered by the applicant and the surrounding circumstances, in particular the facts that the beating took place in front of his wife and continued even after the applicant was handcuffed, the Court finds that he was a victim of very serious and cruel suffering that amounts to torture.

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

2. Alleged failure to carry out an effective investigation

55. The applicant maintained that despite the fact that he had lodged his criminal complaint on the very same day his ill-treatment had taken place, the investigation had gone on for more than six years. He further submitted that the criminal proceedings were only instituted five months after the incident. He complained that the investigation lacked independence, as most of the time his criminal complaints against the police officers had been investigated by the police themselves. He noted that the investigator ordered several forensic medical examinations, one of which took more than four years to draw up. He also pointed out that on several occasions the domestic authorities had discontinued the criminal proceedings, but every time they had been resumed after his appeals.

56. The Government made no observations on the merits.

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

be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

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

59. In the circumstances of the present case, the Court notes that the delays in furthering the course of the investigation, as indicated by the applicant, compromised the effectiveness of the investigation. The Court further notes that despite the clarity of the applicant's diagnosis, which ought to have played a key role in the investigative process, it does not appear from the case file that any of the medical staff who examined the applicant on 7 December 2004 were ever questioned. Moreover, some of the shortcomings in the investigation were acknowledged by the domestic authorities, who remitted the case for further investigation (see paragraphs 19 and 34 above).

60. The Court also notes that for almost five years (September 2006 – September 2011) the criminal case was investigated by the District Police Department, which in the Court's opinion could not have conducted an independent investigation into the actions of their superiors from the Regional Police Department.

61. In the light of the serious deficiencies referred to above, the Court considers that the domestic authorities did not fulfil their obligation to investigate the applicant's complaints of ill-treatment. As the Court has held in its judgment concerning the case of *Kaverzin v. Ukraine*, this situation stems from systematic problems at the national level allowing for agents of the State responsible for such ill-treatment go unpunished (no. 23893/03, 15 May 2012, §§ 169-182, not yet final). Accordingly, there has also been a violation of Article 3 of the Convention under this head.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage and 4,000 Ukrainian hryvnias (UAH), which is the equivalent of EUR 363, in respect of pecuniary damage.

64. The Government considered these claims premature given that the investigation was still pending.

65. In the light of the documents in its possession the Court awards the applicant EUR 17 in respect of pecuniary damage and, ruling on an equitable basis, EUR 30,000 in respect of non-pecuniary damage.

B. Costs and expenses

66. The applicant also claimed UAH 2,000 (equivalent to EUR 184.21) for the costs and expenses incurred before the domestic courts and UAH 37,375.80 (equivalent to EUR 3,442.45) for those incurred before the Court, as well as UAH 700 (equivalent to EUR 64.47) for postal and travel expenses.

67. The Government contested these claims. They noted that the travel expenses and costs incurred in the domestic proceedings were unsubstantiated and irrelevant to the circumstances of the case. They further contested the reasonableness of some of the legal services provided to the applicant and some receipts which could not be identified as pertinent to the present application.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and travel expenses and considers it reasonable to award the sum of EUR 3,460 for the proceedings before the Court and for postal expenses.

C. Default interest

69. The Court considers it appropriate that the default interest rate 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. *Rejects* the Government's objection concerning non-exhaustion of domestic remedies;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 3 of the Convention as regards the applicant's torture;
4. *Holds* that there has been a violation of Article 3 of the Convention as regards the absence of an effective investigation into the applicant's allegations of ill-treatment;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement:
 - (i) EUR 17 (seventeen euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 3,460 (three thousand four hundred and sixty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President