



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

FIFTH SECTION

CASE OF ALEKSAKHIN v. UKRAINE

(Application no. 31939/06)

JUDGMENT

STRASBOURG

19 July 2012

FINAL

19/10/2012

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

In the case of Aleksakhin v. Ukraine,

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

Dean Spielmann, *President*,

Mark Villiger,

Karel Jungwiert,

Ann Power-Forde,

Ganna Yudkivska,

Angelika Nußberger,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 19 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 31939/06) 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 Viktorovich Aleksakhin (“the applicant”), on 11 July 2006.

2. The applicant was represented by Ms Irina Blagaya and Mr Gennadiy Tokarev, lawyers practising in Kharkiv, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, Mr N. Kulchytsky, of the Ministry of Justice of Ukraine.

3. The applicant alleged that he had been ill-treated by the police and that there existed no effective remedy in respect of that ill-treatment. He also alleged that the proceedings in his case, mainly those against the police officer, had been too lengthy.

4. On 3 January 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Kharkiv, Ukraine.

A. Events of 14 April 1998

6. At 6 p.m. on 14 April 1998 the applicant and K. were apprehended by police officers Kh., Ko. and L. at a trolleybus stop and taken to the police station. Kh. later testified that the applicant and K. had been apprehended because they had been fighting with other young men, who had run off.

7. In the police station Kh. told the applicant to sit down. He then attached the applicant by handcuffs to a metal ring in the wall and sprayed him in the face with tear gas. Kh. then kicked the applicant in the chest and hit him several times on the head, neck and back. Kh. later produced written accounts, allegedly given by private individuals B. and Kl., stating that the applicant had behaved violently and that that was the reason for his apprehension. On the following morning the applicant was released.

8. The applicant was in hospital between 16 April and 19 May 1998. He was diagnosed with concussion, body and chest injuries and a fractured bone in his neck.

9. On 9 January 2002 the applicant was recorded as falling into the third category of disability (the mildest) on account of the injuries he had received.

B. Criminal proceedings against the police officer

10. In April 1998 the applicant requested the institution of criminal proceedings against Kh.

11. Between April and December 1998 various persons were questioned by the prosecutor's office. In the meantime, on 5 June 1998 the police officially informed the applicant that he had been arrested for being drunk and molesting passers-by. On an unidentified date he was also informed that the police officers' actions had been lawful. In August 1998 the police issued a certificate stating that no force had been used on the applicant (*«меры физического воздействия не применялись»*).

12. On 29 October 1998 a forensic medical examination concluded that the applicant had sustained traumatic oedema on his neck, chest and hands, bruises on one hand and his chest, a closed craniocerebral injury, concussion and some broken bones in the neck. The injuries were classified as grievous bodily harm endangering life at the moment of infliction. They could have been inflicted in the circumstances described by the applicant.

13. On 8 December 1998 the Dzerzhynskyy District Prosecutor's Office instituted criminal proceedings in respect of the infliction of grievous bodily harm on the applicant (*по факту заподіяння тяжких тілесних ушкоджень*).

14. On 14 December 1998 the applicant was given the status of victim.

15. A forensic medical examination carried out in January 1999 reached similar conclusions to the one of 29 October 1998.

16. On 30 March 1999 criminal proceedings were instituted against Kh. and joined to the criminal case instituted on 8 December 1998. Kh. was charged with infliction of grievous bodily harm, abuse of power with grave consequences, and forgery. According to the Government, on the same date the applicant lodged within criminal proceedings a civil claim against Kh.

17. On the same date it was decided not to institute criminal proceedings against Ko. and L. It was also decided that there was no evidence that the applicant and K. had resisted the police in any way.

18. In April 1999 the criminal case against Kh. was transferred to the Dzerzhynskyy District Court of Kharkiv.

19. Between May 1999 and September 2000 seven court hearings were scheduled but all of them were postponed for various reasons (hearing scheduled on a public holiday, judge being busy on another case, “for technical reasons”, Kh. failing to appear twice, victim and witnesses failing to appear).

20. Between September 2000 and August 2001 eleven court hearings took place and two were postponed because the judge was ill.

21. On 23 August 2001 the court sentenced Kh. to five years’ conditional imprisonment, with three years’ probation, for infliction of grievous bodily harm, abuse of power, and forgery. Kh. was also prohibited from occupying “particular positions” in the police for five years and had to pay a fine of 300 Ukrainian hryvnias (UAH). The applicant was awarded UAH 12,261.43 (at the material time around 2,526 euros (EUR)) in compensation for pecuniary and non-pecuniary damage.

22. On the same date the court adopted a separate ruling by which it informed the Dzerzhynskyy District Prosecutor that the Kharkiv Regional Department of the Ministry of the Interior had not properly examined the applicant’s complaints and that witnesses Kho., Ko. and Ch. (police officers) had made false statements in court. In particular, these witnesses had testified that the applicant had himself hit the wall with his head and that the gas and handcuffs had been used in order to restrain him. The court found these statements to be untrue as they contradicted other evidence in the case.

23. On 3 December 2001 the Kharkiv Regional Court of Appeal quashed the decision of 23 August 2001, finding that the sentence was too lenient, and remitted the case for fresh consideration to the first-instance court.

24. On 25 December 2001 the case was received by the Dzerzhynskyy District Court and a court hearing was scheduled for 16 April 2002.

25. On 16 April 2002 the hearing did not take place since “a lawyer had failed to appear”.

26. Between April 2002 and October 2003 six more hearings were postponed, the judge being busy in another case, on vacation or ill. On one occasion the hearing was postponed because Kh.’s lawyer had failed to appear.

27. On 15 October 2003 the conclusion of the previous forensic medical examination was confirmed.

28. Between October 2003 and May 2005 seven court hearings took place, four hearings were postponed as witnesses had failed to appear or the judge was ill or on vacation, and four hearings were postponed at the applicant's request or because of the applicant's failure to appear.

29. On 10 May 2005 the Dzerzhynskiy District Court found Kh. guilty of abuse of power and forgery, and sentenced him to three years' imprisonment, but dispensed him from serving the sentence.

30. On 18 October 2005 the Kharkiv Regional Court of Appeal quashed that decision and remitted the case to the Kyivskiy District Court of Kharkiv for fresh consideration. The court also adopted three separate rulings. It informed the Kharkiv Regional Council of Judges that the judges at the Dzerzhynskiy District Court had delayed the consideration of the case and failed to take into account that Kh. had also been accused of the infliction of grievous bodily harm. In particular, the court stated that since 14 April 1999 six judges had been replaced and for a total of four years no action had been taken in the case. The court also noted that the prosecutor had failed to respond to the court's separate ruling of 23 August 2001.

31. On 3 July 2006 the Kyivskyy District Court sentenced Kh. to five years' conditional imprisonment, with three years' probation, for infliction of grievous bodily harm endangering life at the moment of infliction, and abuse of power. Kh. was also prohibited for three years from occupying positions which involved exercising State power. The charges concerning forgery were dismissed as time-barred. The court noted that Kh. had partially compensated the damage inflicted by him and had committed no further crimes. As additional mitigating circumstances, the court noted that Kh. was a carer for his partner's minor son and had an aged mother. The applicant's claim for damages was left unexamined since "the applicant would amend it". The applicant did not appeal against the decision.

C. Civil proceedings

32. In March 2007 the applicant instituted civil proceedings against the Kharkiv Main Regional Department of the Ministry of the Interior and the State Treasury of Ukraine, claiming UAH 121,599 in respect of non-pecuniary damage and UAH 1,052.87 in respect of pecuniary damage.

33. On 2 April 2008 the Kyivskyy District Court found against the applicant.

34. On 24 June 2008 the Kharkiv Regional Court of Appeal quashed that decision and remitted the case for fresh consideration.

35. On 25 March 2009 the Supreme Court of Ukraine quashed the decision of 24 June 2008 and remitted the case for fresh consideration to the Court of Appeal.

36. On 11 June 2009 the Kharkiv Regional Court of Appeal quashed the decision of 2 April 2008 and awarded the applicant UAH 80,000 (at the material time approximately EUR 7,600) in respect of non-pecuniary damage and UAH 1,052.87 in respect of pecuniary damage.

37. On 16 August 2010 the Supreme Court of Ukraine rejected cassation appeals by the parties.

38. By 28 January 2011 the decision of 11 June 2009 was enforced in full.

II. RELEVANT DOMESTIC LAW

39. Article 101 of the Criminal Code of Ukraine, in force at the material time provided as follows:

Article 101. Intentional grievous bodily injury

1. Intentional grievous bodily injury, that is, willful bodily injury which endangers life at the time of infliction, or results in the loss of any organ or its functions, or causes mental illness or any other health disorder together with a persisting loss of not less than one-third of working capability, or the interruption of a pregnancy, or permanent facial disfigurement, shall be punishable by imprisonment for a term of two to eight years.

2. Intentional grievous bodily injury committed in a heinous manner (*мучення або мордування*) ... shall be punishable by imprisonment for a term of seven to ten years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

40. The applicant complained that he had been subjected to an unjustified use of force which amounted to torture, and had been further subjected to degrading treatment contrary to Article 3 of the Convention since the police officer had insulted him and demanded that he plead guilty. He further invoked Article 13 of the Convention, stating that for more than seven years the State authorities had failed to protect his rights.

41. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the above complaints fall to be examined solely under Article 3 of the Convention under its substantive and procedural limbs (see, *mutatis mutandis*, *Polonskiy v. Russia*, no. 30033/05, §§ 126-127, 19 March 2009, and contrast *İlhan v. Turkey* [GC], no. 22277/93, §§ 89-93, ECHR 2000-VII), which reads as follows:

Article 3

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

A. Admissibility

42. The Government stated that the applicant could no longer claim to be the victim of a violation of Article 3 of the Convention since the police officer who had ill-treated him had been punished and the applicant had not appealed against the sentence of 3 July 2006. The applicant had also received appropriate compensation.

43. The applicant contended that Kh.’s lenient sentence and the low amount of compensation awarded had not been an adequate response to the negative effects he had suffered as a result of sustained ill-treatment.

44. The relevant principles concerning whether an applicant can continue to claim to be the victim of an alleged violation of Article 3 of the Convention are summarised in the judgment of *Gäfgen v. Germany* [GC] (no. 22978/05, §§ 115-119, ECHR 2010).

45. The Court considers that the Government’s objection is closely linked to the applicant’s complaint about the inadequacy of the redress he received for a breach of his Convention rights. In these circumstances, it joins the objection to the merits of the applicant’s complaints (see *Vladimir Romanov v. Russia*, no. 41461/02, § 53, 24 July 2008).

46. The Court further notes that the 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. The parties’ submissions

47. The applicant noted that the Government had accepted the fact of his ill-treatment. He stated that he had not lost the victim status and reiterated his submissions that there had been no effective investigation into his complaints.

48. The Government stated that the fact of the applicant’s beatings had been recognised on the national level and that the applicant had received appropriate compensation.

2. *Legal qualification of the treatment*

49. As the Court has held 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. 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. 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; *Aksoy v. Turkey*, 18 December 1996, § 63, *Reports of Judgments and Decisions* 1996-VI; and *Selmouni v. France* [GC], no. 25803/94, § 96, ECHR 1999-V).

50. 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 of which 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 *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 115, ECHR 2000-X).

51. The Court notes that in the present case the national courts found that the applicant had sustained grievous bodily harm endangering life at the moment of infliction, at the hands of a police officer. The ill-treatment consisted of application of tear-gas, a kick and a small number of blows. As a result of it the applicant suffered intense pain and became disabled.

52. The Court further notes that there is no evidence that the applicant's behaviour necessitated any use of force, let alone such violent actions. In such circumstances this severe ill-treatment was necessarily aimed at intimidating and humiliating the applicant, and possibly facilitating the further extraction of a confession, since according to Kh.'s explanations, he believed that the applicant had participated in a fight and thus could possibly have committed a criminal offence.

53. These elements are sufficient for the Court to conclude that the applicant was subjected to torture, in violation of Article 3 of the Convention (see *Savin v. Ukraine*, no. 34725/08, §§ 59-63, 16 February 2012).

3. *Effectiveness of the investigation*

54. According to the Court's established case-law, when an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of agents of the State, it is the duty of the national authorities to carry out "an effective official investigation" capable of establishing the

facts and identifying and punishing 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* 1998-VIII, and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

55. 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).

56. The procedural requirements of Article 3 go beyond the preliminary investigation stage when, as in this case, the investigation leads to legal action being taken before the national courts: the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3. This means that the domestic judicial authorities must on no account be prepared to let physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts (see, *Okkali v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts)).

57. The Court observes that in the present case the criminal proceedings against the police officer were instituted one year after the events in question. These proceedings lasted for more than seven years and were significantly protracted, as was particularly noted by the national courts (see paragraph 30). Although they ended with the police officer's conviction, the Court notes that the sentence of 3 July 2006 is nearly identical to the one of 23 August 2001 which was quashed by the higher court as being too lenient. In such circumstances the Court is not convinced that, after more than seven years of court proceedings and two remittals, the applicant should again have been expected to appeal against the decision of 3 July 2006, as contended by the Government.

58. The Court further reiterates that when an agent of the State is accused of crimes involving torture or ill-treatment, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permitted (see *Abdişamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004). Although in the present case the police officer was convicted, the Court again notes that the final sentence of 3 July 2006 is nearly identical to the one of 23 August 2001 (Kh. being sentenced to five years' imprisonment and released on probation) quashed by the higher court as too lenient. By punishing the officer with a lenient non-custodial sentence more than eight years after his wrongful conduct, the State in effect fostered the law-enforcement officer's

“sense of impunity” instead of showing, as it should have done, that such acts could in no way be tolerated (see, for similar reasoning, *Gäfgen*, cited above, §§ 123 and 124, and *Okkali*, cited above, §§ 73 to 75). In such circumstances, the Court is not convinced that the police officer’s punishment was adequate.

59. Regard being had to the foregoing, the Court finds that the authorities failed to carry out an effective criminal investigation into the applicant’s complaints of ill-treatment.

4. *Adequacy of the compensation*

60. The Court reiterates that in the case of a breach of Articles 2 or 3 of the Convention, compensation for the pecuniary and non-pecuniary damage flowing from the breach should in principle be available as part of the range of remedies (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 109, ECHR 2001-V), although in cases of wilful ill-treatment a violation of Articles 2 or 3 cannot be remedied exclusively through an award of compensation to the victim. In the present case the applicant was awarded approximately EUR 7,600 in compensation for non-pecuniary damage, to be paid by the State. The Court notes that this amount is significantly lower than the amount it generally awards in comparable cases lodged against Ukraine (see *Korobov v. Ukraine*, no. 39598/03, § 99, 21 July 2011, and *Savin v. Ukraine*, cited above, § 90).

5. *Conclusions*

61. The foregoing considerations are sufficient to enable the Court to conclude that the applicant can still claim to be a victim of the violation of Article 3. It therefore dismisses the Government’s preliminary objection in this regard.

62. In view of the foregoing, the Court finds that there has been a violation of Article 3 of the Convention under its substantive and procedural heads.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

63. The applicant complained about length of proceedings in his case. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”.

64. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

65. Having regard to the finding relating to Article 3 (see paragraphs 57 and 62 above), the Court considers that it is not necessary to examine

whether, in this case, there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed EUR 40,000 in respect of non-pecuniary damage.

68. The Government considered this sum to be extremely excessive.

69. The Court, taking into account the domestic courts' award to the applicant and deciding on an equitable basis, awards the applicant EUR 20,000 in respect of non-pecuniary damage.

B. Costs and expenses

70. The applicant also claimed EUR 4,144 for the costs and expenses incurred before the Court. This amount included EUR 3,850 for the applicant's lawyer's fees, EUR 206 for “administrative expenses”, and EUR 88 for postal expenses, all incurred during the period 2006-11.

71. The Government indicated that the present case was not complex and did not necessitate the amount of legal work claimed by the applicant. Moreover, the Government considered that the “administrative expenses” and postal expenses claimed by the applicant were excessive.

72. 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 considers it reasonable to award the sum of EUR 4,144 to cover the costs for the proceedings before the Court.

C. Default interest

73. 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. *Decides* to join to the merits the issue of the applicant's victim status in respect of the alleged violation of Article 3 of the Convention and holds that he may still claim to be a victim for the purpose of Article 34 of the Convention;
2. *Declares* the application admissible;
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 under Article 6 § 1 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, the following amounts, to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement:
 - (i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 4,144 (four thousand one hundred and forty-four 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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President