



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

FIFTH SECTION

CASE OF ISMAILOV v. UKRAINE

(Application no. 17323/04)

JUDGMENT

STRASBOURG

27 November 2008

FINAL

27/02/2009

This judgment may be subject to editorial revision.

In the case of Ismailov v. Ukraine,

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

Rait Maruste, *President*,

Karel Jungwiert,

Volodymyr Butkevych,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 4 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 17323/04) 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 Alim Ayderovich Ismailov (“the applicant”), on 31 March 2004.

2. The applicant, who had been granted legal aid, was represented by Mr A.L. Lesovoy, a lawyer practising in Simferopol. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged that he had been subjected to ill-treatment in police custody and that the authorities had failed to carry out an effective investigation in that regard. He relied on Articles 3 and 13 of the Convention.

4. On 18 September 2007 the Court declared the application partly inadmissible and decided to communicate the above complaints to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and lives in Simferopol.

6. On the night of 14 to 15 March 2001 the applicant and three co-suspects were arrested on suspicion of armed robbery. After the arrest the applicant was taken into police custody at the Simferopol District Police Station (“the Police Station”).

7. According to the applicant, during the time he was held in the Police Station, from 15 to 18 March 2001, he was repeatedly punched and kicked by several police officers for the purpose of extracting from him a confession that he had committed the crime.

8. On 18 March 2001 the applicant was brought before the prosecutor, to whom he complained about the ill-treatment.

9. On the same day the applicant was taken to Simferopol City Hospital No. 6 and to the Semashko Central Hospital, where the doctors established that the applicant had suffered injuries to the soft tissue of his head and sustained bruises on his face. The same day the applicant was admitted to the Simferopol City Temporary Detention Centre.

10. On 19 March 2001 the applicant was examined by an expert of the Crimean Bureau of Forensic Medical Examinations. During the examination the applicant stated that the injuries had been inflicted on him by police officers. The expert who examined him established that the applicant had sustained bruises on the lower eyelids of both eyes and on the left ear, with abrasions on the right temple and lower lip. Those injuries cumulatively qualified as minor bodily injuries. The expert assumed that the injuries could have been caused to the applicant in the period between four and seven days before the examination; however, the abrasion of the lower lip could have been sustained two days before the examination. The expert further opined that the injuries were caused by blunt objects with limited impact surface, in this case possibly fists or booted legs.

11. On 29 March 2001 another expert of the Crimean Bureau of Forensic Medical Examinations examined the applicant and did not find any injuries on him.

12. In letters of 29 and 31 May 2001 the Crimean Police Department, upon the request of the applicant’s mother, informed her that the internal inquiry had not revealed any wrongdoing by the police officers with respect to the applicant. Following these replies the applicant and his relatives lodged a number of other complaints with various police officials and prosecutors claiming that the applicant had been ill-treated. Their complaints were dismissed as unsubstantiated.

13. On 5 November 2002, after the conviction of the applicant and his three co-defendants, the Zheleznodorozhnyy District Court of Simferopol (the “Zheleznodorozhnyy Court”) issued a separate ruling, noting that during the trial proceedings it had been established that the defendants had not had any injuries when arrested and that the applicant, Mr S. and Mr Sh. had sustained injuries while in police custody. The court “brought to the attention” of the Prosecutor of the Crimea that the three defendants had

sustained injuries during pre-trial proceedings and suggested that the offenders be identified and punished.

14. On 22 November 2002 an investigator of the Prosecutor's Office of the Crimea ("the POC") found no evidence of any wrongdoing on the part of the police officers and decided not to institute criminal proceedings against them.

15. On 25 February 2003 the Tsentralnyy District Court of Simferopol ("the Tsentralnyy Court"), upon the applicant's appeal, quashed the decision of 22 November 2002 as unfounded and ordered further investigation. The court stated, *inter alia*, that the investigator had disregarded the fact, established by the Zheleznodorozhnyy Court, that the injuries had been suffered by the applicant in the Police Station and that no attempt had been made to establish the circumstances in which those injuries had been caused.

16. On 27 March 2003 the POC's investigator refused to institute criminal proceedings in respect of the applicant's complaints, finding, in particular, that the injuries sustained by the applicant in the Police Station could have been self-inflicted and caused by impacts against the wall.

17. On 7 May 2003 the Tsentralnyy Court quashed the investigator's decision of 27 March 2003, holding that the inquiry had been insufficient. The court pointed out the following discrepancies in the inquiry:

- the investigator had failed to establish the exact place in the Police Station where the applicant had sustained the injuries; he did not clarify whether the applicant had hit the wall himself or had been made to hit the wall by others; he did not inspect the wall;
- the investigator had closed the case against the police officers, whereas the offence as such, committed by unknown persons, was still open for investigation;
- the investigator had failed to explain the inconsistency of his conclusion with the medical expert's report of 19 March 2001, which described a number of injuries to the applicant's head and which stated that the injuries had been caused by blunt objects with a limited impact surface, whereas the wall, having a flat surface, could not qualify as such an object.

18. On 19 May 2003 the POC instituted criminal proceedings in respect of the applicant's complaints and transmitted the case to the Zheleznodorozhnyy District Prosecutor's Office for investigation.

19. On 20 November 2003 the investigator of the Zheleznodorozhnyy District Prosecutor's Office terminated the investigation into the applicant's alleged ill-treatment, finding that there was no evidence of any crime having been committed. The investigator stated, in particular, that the difference between the medical conclusions of 19 and 29 March 2001 could be explained by the fact that the applicant had recovered by the latter date. The investigator did not provide any explanation of how the applicant could have sustained the injuries recorded by the expert on 19 March 2001 and

established by the ruling of the Zheleznodorozhnyy Court of 5 November 2002.

20. On 3 December 2003 the applicant challenged the decision of 20 November 2003 before the court stating, in particular, that the investigator had failed to establish how the injuries had been inflicted on the applicant.

21. On 23 March 2004 the Zheleznodorozhnyy Court upheld the decision of 20 November 2003, finding that the investigation had been sufficient.

22. On 27 April 2004 the Court of Appeal of the Crimea (the “Court of Appeal”), following a hearing held in the absence of the applicant and his representative, upheld the Zheleznodorozhnyy Court’s decision of 23 March 2004.

23. The applicant lodged an appeal in cassation, stating, *inter alia*, that neither he nor his representative had been notified of the hearing before the Court of Appeal.

24. On 20 January 2005 the Supreme Court quashed the decision of the Court of Appeal and remitted the case for a new appeal hearing, finding that the applicant’s representative had not been properly served with the summons.

25. On 26 April 2005 the Court of Appeal re-examined the applicant’s appeal in the presence of his representative and rejected it as unsubstantiated.

26. On 17 November 2005 the applicant’s appeal in cassation was dismissed by the Supreme Court as unfounded.

II. RELEVANT DOMESTIC LAW

27. The relevant provision of the Constitution reads as follows:

Article 28

“Everyone has the right to respect for his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. ...”

28. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 4

The obligation to institute criminal proceedings and investigate a crime

“The court, prosecutor or investigator must, to the extent that it is within their power to do so, institute criminal proceedings in every case where evidence of a crime has been discovered, take all necessary measures provided by law to establish whether a crime has been committed and the identity of the perpetrators and punish them.”

Article 94
Grounds for instituting criminal proceedings

“Criminal proceedings shall be instituted on the following grounds:

(1) applications or communications from ... individuals;

...

(5) direct detection of signs of a crime by a body of inquiry or investigation, a prosecutor or a court.

A case may be instituted only when there is sufficient evidence that a crime has been committed.”

Article 215
Challenging of the decision about termination of the criminal proceedings

“The investigator’s decision about termination of the criminal proceedings can be appealed against to the prosecutor...”

Article 236-5
Challenging of the decision about termination of the criminal proceedings before the court

“The decision of the ... investigator about termination of the criminal proceedings can be appealed against to the district court...”

THE LAW

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

29. The applicant complained that he had been subjected to ill-treatment in police custody and that the authorities had failed to carry out an effective investigation into his allegations in that regard. He relied on Article 3 and 13 of the Convention which read as follows:

Article 3 (prohibition of torture)

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

Article 13 (right to an effective remedy)

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

A. Admissibility

30. The Government submitted that the applicant had failed to exhaust domestic remedies with respect to those complaints in so far as he had not challenged before the prosecutor the decision of 20 November 2003 by which the criminal proceedings had been terminated. They further contended that the applicant had submitted these complaints to the Court when the proceedings before the domestic courts as to the lawfulness of the decision of 20 November 2003 were still pending.

31. The applicant insisted that there were no effective remedies to be exhausted in his situation given that the investigation into his allegations had been carried out superficially and inadequately.

32. The Court notes that the Government’s objection is closely linked to the applicant’s complaints under Articles 3 and 13 of the Convention. In these circumstances, it joins the objection to the merits of the applicant’s complaints.

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

B. Merits*1. The parties’ submissions*

34. The Government maintained that the applicant had not been subjected to any ill-treatment, since the results of the domestic investigation had proved that the applicant’s injuries had been self-inflicted. They further insisted that the investigation into the alleged ill-treatment had been carried out thoroughly and comprehensively. Accordingly, there had been no violation of Article 3 of the Convention in its substantive or procedural limb and the applicant had had at his disposal an effective domestic remedy as required by Article 13 of the Convention.

35. The applicant disagreed, alleging that the material in the case file unequivocally indicated that he had been ill-treated in the Police Station. He referred, in particular, to the medical documents describing when and how the injuries had been inflicted on him as well as to the court ruling of 5 November 2002 establishing that the injuries had appeared during his

detention in police custody. He further insisted that the investigation into the alleged ill-treatment had not been prompt and thorough. In particular, the criminal proceedings had been instituted more than two years after the events complained of. At that time, however, much of the evidence had been lost. The applicant emphasized that the domestic authorities had in fact failed to provide a plausible explanation as to the cause of his injuries and to identify and punish the persons guilty of the crime as required by Articles 3 and 13 of the Convention.

2. The Court's assessment

(a) Alleged ill-treatment

(i) General principles established by the Court's case-law

36. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Labita v. Italy* [GC], no. 26772/95, 6 April 2000, §§ 119-20, ECHR 2000-IV).

37. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. 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. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 34, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

(ii) Application in the present case

38. Turning to the facts of the case, the Court considers that there is sufficient evidence in the case file (see paragraphs 9 and 10 above) to show that the applicant sustained injuries which were serious enough to amount to

ill-treatment falling within the scope of Article 3 of the Convention. It remains to be established whether the State authorities should be held responsible under Article 3 for having inflicted these injuries.

39. In this connection the Court considers that the material before it shows that the injuries were inflicted on the applicant when he was detained in the Police Station. In particular, the Court has regard to the expert's report of 19 March 2001 describing the time and manner in which the injuries were inflicted (see paragraph 10 above) which is consistent with the applicant's allegations, as well as to the court ruling of 5 November 2002 establishing that the injuries occurred when the applicant was detained in police custody (see paragraph 13 above). The Court lastly notes that the Government did not contest the fact that the injuries appeared on the applicant when he was under the control of the State authorities. It therefore has to be examined whether the authorities offered a satisfactory and convincing explanation in respect of those injuries.

40. The Court notes, however, that the decision of 20 November 2003 by which the investigation into the ill-treatment was terminated did not address the issue of how the injuries appeared on the applicant. The previous decision of 27 March 2003, by which the investigator refused to institute criminal proceedings, had relied on the version that the injuries had been self-inflicted. This decision was, however, quashed by the court for being unsubstantiated and having manifest inconsistencies in that regard (see paragraphs 16 and 17 above).

41. In these circumstances the Court finds that the domestic authorities failed to provide any plausible explanation as to how the applicant sustained the injuries while in police custody. It follows that there has been a violation of Article 3 of the Convention in its substantive limb.

(b) Procedural obligation under Article 3 of the Convention

(i) General principles established by the Court's case-law

42. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the State authorities in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation. As with an investigation 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 *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of*

Judgments and Decisions 1998-VIII, p. 3290, § 102, and *Labita*, cited above, § 131).

43. The investigation into arguable allegations of ill-treatment must also be thorough. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions in order to close their investigation or as the basis of their decisions (see *Assenov and Others*, cited above, §§ 103 et seq.). They must take all reasonable steps available to them to obtain evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, §§ 104 et seq., and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000).

(ii) *Application in the present case*

44. The Court observes that a decision not to institute criminal proceedings against the police officers was taken on two occasions. These decisions, however, were quashed by the court, following which the case was remitted for further inquiries. As a result, it took about two years and two months from the time of the alleged ill-treatment before the authorities eventually commenced the criminal proceedings. This protraction, however, significantly diminished the prospect of success of these proceedings. The Court reiterates that, since remittal is usually ordered because of errors committed by the authorities whose decisions are appealed against, the repetition of such orders within one set of proceedings discloses a serious deficiency (see, *mutatis mutandis*, *Kozinets v. Ukraine*, no. 75520/01, § 61, 6 December 2007).

45. The Court further notes that on two occasions the domestic court found serious omissions in the inquiries into the applicant's allegations (see paragraphs 15 and 17 above). In particular, when remitting the case for the second time, the domestic court indicated, *inter alia*, that the investigator's version as to the origin of the applicant's injuries had been evidently inconsistent with the medical conclusions in that regard. Those inconsistencies, however, were not subsequently removed by the investigation. Furthermore, the Court is struck by the fact that the decision of 20 November 2003, by which the criminal proceedings were terminated, did not provide any explanation of the origin of the injuries. This decision was, however, eventually upheld by the domestic courts. It appears therefore that the domestic authorities, though faced with hard evidence that the applicant had been the victim of violence in police custody, did not make any serious attempt to investigate the applicant's allegations.

46. In these circumstances the Court has strong doubts that any further procedural steps taken by the applicant within the domestic procedure, including those indicated by the Government, would have rendered the investigation effective. Accordingly, the Court dismisses the Government's

objection as to the non-exhaustion of domestic remedies, finding that the applicant, given his particular situation, was absolved from pursuing any further channels.

47. The Court further holds that the domestic authorities failed to carry out a prompt and thorough investigation into the applicant's allegations about his alleged ill-treatment at the Police Station. Therefore there has been a violation of procedural limb of Article 3 of the Convention.

(c) Alleged violation of Article 13 of the Convention

48. The Court, having regard to its finding under Article 3 of the Convention, considers that it is not necessary to examine whether in this case there has also been a violation of Article 13 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

51. The Government submitted that this claim was excessive and that there was no causal link between the alleged violations and the non-pecuniary loss allegedly sustained, since the applicant had failed to submit documents supporting such a claim.

52. The Court considers that the applicant clearly suffered some non-pecuniary damage as a result of the violations found. Having regard to its case-law in comparable cases and making its assessment on an equitable basis, it awards the applicant EUR 6,500 in respect of non-pecuniary damage.

B. Costs and expenses

53. The applicant did not submit any claim under this head; the Court therefore makes no award in this respect.

C. Default interest

54. 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 preliminary objection as to the exhaustion of domestic remedies in respect of Articles 3 and 13 of the Convention; and dismisses it after an examination on the merits;
2. *Declares* the complaints under Article 3 and 13 of the Convention admissible;
3. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;
4. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;
5. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of Ukraine at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 27 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Rait Maruste
President