



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

FIFTH SECTION

CASE OF UKHAN v. UKRAINE

(Application no. 30628/02)

JUDGMENT

STRASBOURG

18 December 2008

FINAL

18/03/2009

This judgment may be subject to editorial revision.

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

Having deliberated in private on 25 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 30628/02) 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 Ivan Dmytrovych Ukhan (“the applicant”), on 31 July 2002.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he was ill-treated in police custody contrary to Article 3 of the Convention, that the conditions of his detention in various detention facilities were incompatible with the above provision and that he had no effective remedies in respect of these complaints.

4. On 11 December 2006 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 1961 and lives in Nekhvoroshch, in the Cherkasy Region.

1. The applicant's detention between August 1997 and June 2003

6. By decision of the Gorodyshe District Court of 21 May 1997, upheld on appeal by the Cherkasy Regional Court on 12 August 1997, the applicant was convicted of inflicting grievous bodily harm and sentenced to ten years' imprisonment.

7. Between 18 August 1997 and 3 December 2002 the applicant was detained in Vinnytsia penitentiary no. 86.

8. According to the applicant, the sanitary conditions in this prison were poor in that dishes used by inmates were not properly washed after use, thus entailing an increased risk for detainees of contracting tuberculosis. Furthermore, the detainees were woken up very early and assembled for morning exercises in the prison yard without due regard being had to weather conditions.

9. In December 2002 the applicant was moved to penitentiary no. 113, with a less strict regime, where detainees could enjoy relative freedom of movement. In that penitentiary, according to the applicant, the food and the living conditions were inadequate and the detainees were used as a source of cheap labour for the administration's benefit.

10. In neither of the penitentiaries, allegedly, did the applicant receive adequate medical treatment for unspecified medical conditions.

11. According to the Government, the conditions of the applicant's detention in these penitentiaries, including the quality of medical care, were adequate.

12. In June 2003 the applicant was released on probation and returned to his home in Nekhvoroshch.

2. Criminal proceedings concerning hooliganism

13. On 28 October 2003 the applicant was arrested on suspicion of hooliganism and theft and detained in the Korsun-Shevchenkivsky town police station.

14. On 31 October 2003 the Korsun-Shevchenkivsky District Court remanded the applicant in custody.

15. On the same date the applicant requested the Korsun-Shevchenkivsky Prosecutor's Office to institute criminal proceedings against several police officers, who had allegedly inflicted bodily injuries on him in order to force him to confess.

16. On 11 November 2003 the applicant underwent a medical examination and was found to be fit for detention, although he had a fractured rib. According to the applicant, he also suffered other injuries at the hands of the police, including a major head injury, which was not recorded. He did not, however, lodge any complaints concerning the adequacy of the medical examination at the relevant time.

17. On 30 January 2004 the prosecutor's office refused to institute criminal proceedings to investigate the applicant's ill-treatment complaint, having found it groundless. It referred to the findings of the medical commission that the applicant had been fit for detention and to the testimonies of the investigator and police officers who had participated in his arrest. All officers denied the applicant's allegations concerning ill-treatment. The four police officers who had taken part in the arrest operation, however, admitted that they could have inflicted minor injuries on the applicant when arresting him. In their opinion the application of force had, however, been proportionate, since the applicant, who had gone into hiding after his disorderly conduct on 25 October 2003, had vigorously resisted his arrest and threatened the officers with a loaded rifle. The applicant did not appeal against that decision in court.

18. On 20 December 2004 the Korsun-Shevchenkivsky District Court convicted the applicant of hooliganism, acquitted him of theft, and sentenced him to six and a half years' imprisonment. The court found, in particular, that on 25 October 2003 the applicant had killed two dogs, belonging to his neighbour, with an unregistered rifle, had sworn at and beaten two ladies and had fired the rifle in the direction of police officers.

19. The applicant appealed, alleging, in particular, that the police officers had beaten him, to force him to confess to the above offences.

20. On 29 March 2005 the Cherkasy Regional Court of Appeal dismissed the applicant's appeal. It refused to consider his ill-treatment argument, referring to the decision of the prosecutor's office of 30 January 2004 not to institute criminal proceedings and to the fact that the applicant had failed to appeal against it through the applicable appeal procedure.

21. On 4 October 2005 the Supreme Court of Ukraine rejected the applicant's request for leave to appeal on points of law.

3. The conditions of the applicant's detention after November 2003

22. Between November 2003 and May 2005 the applicant was detained in the Cherkasy Regional Investigative Isolation Unit SIZO no. 30.

23. According to the applicant, during that period he started suffering from severe headaches and pain in the left eye as a result of his purported head injury. Gradually he began losing mobility in his left side. In addition, the applicant suffered aggravation of his chronic bronchitis and digestive tract conditions. The administration of the Cherkasy SIZO did not provide him with prompt and adequate medical examination and treatment, purportedly to conceal the fact that a number of his health problems resulted from his having been ill-treated in police custody.

24. According to the Government, the applicant was examined by medical professionals on a number of occasions. Although they have not provided a comprehensive medical file recording all those consultations, the

case-file contains a number of handwritten medical notes which, in so far as they are legible, prove that the applicant was frequently attended by doctors.

25. The first records of such medical care relate to the applicant's examination in the Korsun-Shevchenkivsky district hospital on 18 December 2003, during which it was established that he suffered from haemorrhoids, chronic bronchitis and a fractured rib. The next records relate to 6 and 27 April 2004, when the applicant was examined in the Korsun-Shevchenkivsky district hospital for chronic bronchitis and unspecified "neurological symptoms". At this point in time the complaint concerning neurological symptoms was considered unfounded. No details concerning treatment recommendations have been provided.

26. On 21 May 2004 the applicant was seen by a SIZO doctor on account of headaches, dizziness and an irregular heartbeat. He was diagnosed as suffering from the after-effects of a head injury sustained in 2003, in particular, hypertension and neurasthenia, and prescribed nootropic and anti-hypertensive medication (dibazolum and cerebrolisin). There is no indication as to the duration of the prescribed treatment or whether the applicant actually received it.

27. Subsequently the applicant was seen by the SIZO medical staff on a number of occasions, in particular on 27 and 28 May 2004 (complaints about headache, dizziness, noise in the ears and aggravation of chronic bronchitis); 21 and 30 June 2004 (same symptoms); 4 August 2004 (a knee injury); 21 September 2004 (headache, dizziness and chills); 12 and 13 October and 3 November 2004 (stomach-ache, bronchitis, headache); 13, 17 and 28 December 2004 (leg pain, headache, bronchitis); 11 and 14 January 2005 (headache); 18 January 2005 (headache and itching); 21 January 2005 (insomnia, headache); 3, 9 and 13 February 2005 (dizziness, insomnia, headache); 18, 25 and 27 February and 3, 7, 9 and 18 March 2005 (headache, dizziness, insomnia and itching).

28. In the course of the above visits the applicant was primarily recommended to take painkillers (analgin, tempalgin) and other conservative medication, including sedatives (valeriana and dimedrol), mild bronchial and cough medicine (aminophylline, bromgecsine and mucaltine); stomach medicine (platifillin); brain stimulators (fezam, cerebrolisin, piracetam) and over-the-counter anti-allergy medication (diasolin).

29. On 8 July 2004 the applicant was additionally consulted by a neurologist in the hospital of another (Bucha) penitentiary, who found that he was suffering from cerebral dystonia, chronic vascular insufficiency, neck osteochondrosis, chronic rhinitis and partial loss of sight in the left eye. The neurologist recorded that the applicant's ailments were associated with his head injury sustained in 2003.

30. On 21 July 2004 the applicant underwent a head scan, which revealed no skull injuries at the time of the test.

31. On 15 December 2004 and 30 March 2005 the applicant consulted a neurologist and an eye doctor, who concluded that he suffered from partial atrophy of the left eye nerve of traumatic origin, an astheno-neurotic syndrome and insomnia. According to the available materials, he received full treatment for these ailments, without any details as to the nature and duration of this treatment being recorded.

32. Between 5 April and 3 May 2005 the applicant was treated as an in-patient in the Bucha penitentiary hospital for the after-effects of the head injury, with moderate left-side hemiparesis, asthenia, “mnestic personality impairment” (*мнестичне зниження особистості*), chronic bronchitis and chronic gastro-duodenitis. The case-file contains no details concerning the nature of the treatment.

33. On an unspecified date the applicant complained to the Cherkasy prosecutor’s office that the medical treatment he was receiving was insufficient, regard being had to the seriousness of his medical conditions. On 8 April 2005 the prosecutor’s office informed the applicant that it did not find any grounds to pursue his complaint.

34. On 26 April 2005 the applicant was examined by a disability commission in Bucha penitentiary and recognised as falling into the “third category” (the mildest category) of invalidity (*третья группа инвалидности*) for one-year period on account of secondary neuritis of the left eye nerve, moderate left-side hemiparesis without movement disorders, cerebral asthenia, mnestic personality impairment, chronic bronchitis and chronic gastro-duodenitis. He was found unfit for work in the cold, activities involving high noise levels or lifting heavy objects.

35. On 11 May 2005 the applicant was transferred to Stryzhavska penitentiary no. 81 in the Vinnytsya Region.

36. In the applicant’s opinion, the conditions of detention there were unsatisfactory in that the prison authorities failed to ensure his adequate medical supervision and treatment and to provide him with facilities to attend to his progressively deteriorating mobility. In particular, the applicant was no longer able to walk to the cafeteria without assistance, and even being supported by other inmates caused him unbearable pain. Moreover, on many occasions the administration did not let the inmates assist the applicant, maintaining that he was pretending to be in pain, and he was left in his cell without food for days.

37. According to the Government and as confirmed by the handwritten medical notes in so far as they are legible, the applicant was seen by medical professionals and treated as an in-patient on a number of occasions.

38. Between 1 and 22 June and 25 June and 15 July 2005 the applicant was treated in the penitentiary hospital. His diagnosis included posttraumatic osteochondrosis, chronic obstructive bronchitis, gastro-duodenitis, hyper-metropy of the left eye and chronic haemorrhoids. The prescribed treatment consisted primarily of conservative medication such as

sedatives (dimedrol) painkillers (analgin, citramon), brain-stimulators (cinarisin, piracetam), vitamins (nicotine acid), metabolism stimulators (inosine, asparcam), other stomach medicines (almagel and vikalín) and spasmolytics (no-spa, papaverin). There is no information as to the doses and duration of the medication prescribed or whether the applicant actually received the treatment. Upon his releases from the hospital, the applicant was recommended further therapeutic supervision, an unspecified diet and prophylactic in-patient treatment twice a year.

39. On 13 June 2005 the applicant was additionally examined by a neurology professor, who concluded that the “vague limitations of mobility in the applicant’s left limbs” did not meet the criteria for organic hemiparesis of traumatic or vascular origin, as indicated in the applicant’s invalidity report. It appears that apart from this finding the professor made no further comments concerning the nature of the applicant’s ailments or recommendations as to his subsequent supervision and treatment.

40. On 3 August 2005 the applicant refused to walk to the cafeteria for lunch, referring to unbearable pain in the spinal cord, and demanded that his lunch be brought to his cell or that he be carried to the cafeteria on a chair. Eventually, on the instructions of the administration, two other inmates dragged the applicant to the cafeteria by his hands. On the same day the applicant saw the governor of the penitentiary about his walking problem, and was referred to the penitentiary doctor.

41. On 4 August 2005 the doctor concluded, referring in particular to the report by the neurology professor, that the applicant was exaggerating the gravity of his state, which was stable, and that he was able to move on his own with the help of a stick or a crutch.

42. On 11 August 2005 the penitentiary administration concluded that the applicant’s refusal to walk to the cafeteria was prompted by his low moral fibre and the desire to receive undeserved privileges. Accordingly, on 19 August 2005 the applicant was reprimanded for his conduct by way of a disciplinary sanction.

43. On 31 August 2005 the applicant demanded his urgent hospitalisation on account of severe pain in the spinal cord and the general aggravation of his state of health. According to the applicant, between 25 August 2005 and 13 September 2005 he was on hunger-strike to protest against his situation and was force-fed twice a day during that period. Between 1 and 13 September 2005 the applicant was placed in a disciplinary cell which, according to him, had none of the necessary facilities, including furniture.

44. According to the Government, the applicant was held in the disciplinary cell during the period in question as punishment for offending an inmate’s dignity. However, he did not refuse food, or at least did not inform the administration about his hunger-strike and was therefore not

force-fed. The conditions in which the applicant was kept in the disciplinary cell were not incompatible with human dignity.

45. Between 14 September and 21 October 2005 the applicant was treated as an in-patient in the penitentiary hospital for the same conditions and under the same conservative treatment scheme as in June and July 2005, and was subsequently transferred to penitentiary no. 6.

46. Between 8 November and 18 December 2005 the applicant was placed in the Dnipropetrovsk penitentiary hospital suffering from organic injury of the central nervous system of complex origin (traumatic and vascular), left-side hemiparesis and psycho-organic syndrome. The treatment prescribed to the applicant during this period included glucose, aminophylline, inosine, piracetam, cinnarisin and the Pavlov mixture (a sedative). The applicant's further supervision was recommended.

47. On several occasions the applicant complained to various authorities, including the prosecutor's office and the ombudsman, that his treatment in penitentiary hospitals was far from sufficient. *Inter alia*, the medical personnel refused to examine and even record a number of his complaints, in particular about severe abdominal pain, heartache and pain in the right arm. Furthermore, he had an opportunity to go to toilet only three times a day at a designated hour, which was unbearable in his condition. Moreover, the patients were held in anti-sanitary conditions; the hospital premises smelled foul, disposable syringes were used several times, the supply of drugs was short and outdated drugs were sometimes administered. Medical personnel rarely checked on the patients, including those who were seriously ill, and administered medication irregularly. As a result, each day somebody died. On several occasions the applicant received responses from the authorities advising him that, as far as they could determine, his condition was satisfactory and did not call for any intervention on their part.

48. On 9 December 2005 the applicant was examined by a disability commission, which placed him in the second (more advanced) category of invalidity. In the same month the applicant was transferred to Sofiyivska penitentiary no. 45, designed for inmates with disabilities.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL MATERIALS

49. The relevant provisions of the Constitution and the Code of Criminal Procedure can be found in the judgment in the case of *Kozinets v. Ukraine*, (no. 75520/01, §§ 39-42, 6 December 2007).

50. The relevant extracts from the 3rd General Report [CPT/Inf (93) 12] by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") read as follows:

“a. Access to a doctor

35. A prison’s health care service should at least be able to provide regular out-patient consultations and emergency treatment (of course, in addition there may often be a hospital-type unit with beds). ... Further, prison doctors should be able to call upon the services of specialists. ...

Out-patient treatment should be supervised, as appropriate, by health care staff; in many cases it is not sufficient for the provision of follow-up care to depend upon the initiative being taken by the prisoner.

36. The direct support of a fully-equipped hospital service should be available, in either a civil or prison hospital. ...

37. Whenever prisoners need to be hospitalised or examined by a specialist in a hospital, they should be transported with the promptness and in the manner required by their state of health.”

b. Equivalence of care

38. A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.

There should be appropriate supervision of the pharmacy and of the distribution of medicines. Further, the preparation of medicines should always be entrusted to qualified staff (pharmacist/nurse, etc.).

39. A medical file should be compiled for each patient, containing diagnostic information as well as an ongoing record of the patient’s evolution and of any special examinations he has undergone. In the event of a transfer, the file should be forwarded to the doctors in the receiving establishment.

Further, daily registers should be kept by health care teams, in which particular incidents relating to the patients should be mentioned. Such registers are useful in that they provide an overall view of the health care situation in the prison, at the same time as highlighting specific problems which may arise.

40. The smooth operation of a health care service presupposes that doctors and nursing staff are able to meet regularly and to form a working team under the authority of a senior doctor in charge of the service.”

THE LAW

I. SCOPE OF THE CASE

51. The Court notes that after the case had been communicated to the respondent Government, the applicant additionally complained on several occasions about the conditions of his detention in penitentiary no. 45.

52. In the Court's view, the new complaints are not an elaboration of the applicant's original complaints to the Court which were communicated to the respondent Government. The Court considers, therefore, that it is not appropriate to consider them now (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

53. The applicant complained under Article 3 of the Convention that he was ill-treated by police officers during his detention in Korsun-Shevchenkivsky police station in 2003. He also relied on Article 3 in complaining about the material conditions of his detention in various penitentiaries, his placement in a disciplinary cell in September 2005 and his force-feeding during that period, as well as the insufficiency of the medical assistance available to him throughout the entire period of his detention. Article 3 of the Convention reads as follows:

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

A. Admissibility

1. The submissions of the parties

54. The Government submitted that the applicant did not make out any arguable claims and that the application was inadmissible.

55. The applicant disagreed. He maintained that as a result of injuries sustained at the hands of the police in 2003 he had become a “category three” invalid and, having been deprived of quality medical assistance throughout the period of his subsequent detention, his state of health had rapidly and irreversibly deteriorated. His numerous complaints to various authorities concerning his situation had not yielded any effective results. It followed that his Convention complaints were not manifestly ill-founded or inadmissible on any other ground.

2. *Alleged ill-treatment in police custody*

56. The Court recalls that to fall under Article 3 of the Convention ill-treatment must attain a minimum level of severity. The assessment of this level 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 gender, age and state of health of the victim (see *Valašinas v. Lithuania*, no. 44558/98, §§ 100-01, ECHR 2001-VIII). The standard of proof relied upon by the Court is that “beyond reasonable doubt” (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Court must apply a particularly thorough scrutiny where the applicant raises an arguable ill-treatment complaint (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 32, and *Avşar v. Turkey*, cited above, § 283). However, it must also be sensitive to the subsidiary nature of its role and be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of the case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000).

57. Turning to the facts of the present application and absent any plea on the Government’s part concerning non-exhaustion, the Court will assume that the applicant exhausted all the remedies which, in the particular circumstances of his case, could have been effective (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006, and *Dobrev v. Bulgaria*, no. 55389/00, §§ 112-114, 10 August 2006) and will examine whether, in light of the available materials, his claim that his injuries were inflicted in police custody is arguable.

58. In this regard the Court recalls that the applicant alleged that he had suffered numerous injuries in police custody in October 2003, including one to his head. The applicant has not, however, presented any medical proof concerning the injuries sustained in that period, except for evidence of a fractured rib. Although, according to subsequent medical findings, the applicant could have suffered a head injury in 2003, in the absence of any materials shedding light on the relevant circumstances, including the period in which that injury could have been sustained, this allegation alone cannot raise a reasonable suspicion against the police officers.

59. The applicant raised a complaint about ill-treatment before the prosecutor’s office and before the criminal courts in the context of criminal proceedings against him. On 30 January 2004 the prosecutor’s office rejected his allegations and proposed, as an alternative, that the applicant might have been injured during his arrest. The criminal courts subsequently rejected his ill-treatment argument with reference to the findings of the prosecutor’s office, which the applicant had failed to challenge using the

proper procedure. Based on the available materials, therefore, there is no evidence that the applicant was ill-treated in police custody.

60. Even assuming that the applicant's rib was fractured in the course of his arrest, the Court recalls that, according to the unchallenged findings of the prosecutor's office, the applicant was apprehended by four police officers when he was in hiding after having beaten two individuals, shot two dogs and fired shots from an unregistered rifle in the direction of police officers who had ordered him to cease his disorderly conduct. He refused to surrender and threatened the officers with his loaded rifle. In the light of the available materials there is therefore no *prima facie* evidence that the officers' recourse to physical force in restraining the applicant was not made necessary by his own conduct, or that, regard being had to the nature of his injury, it was excessive and raised an arguable issue under the Convention (see, *mutatis mutandis*, *Berliński v. Poland*, nos. 27715/95 and 30209/96, §§ 62-64, 20 June 2002, and, by contrast, *Rehbock v. Slovenia*, no. 29462/95, §§ 65-78, ECHR 200-XII).

61. Accordingly, this part of the application must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Conditions of detention

62. The Court considers that the applicant's complaints concerning the conditions of his detention can be separated into three distinct groups: (a) the complaints relating to the first period of his detention, starting in August 1997 and ending in June 2003 (penitentiaries nos. 86 and 113); (b) the force-feeding in September 2005 and (c) general complaints about conditions of detention, including health care, during the second period, which started in November 2003 and ended in December 2005 (SIZO no. 30 and penitentiary no. 81).

a. Conditions of detention during the first period

63. The Court recalls that the applicant's complaints relating to this period concerned anti-sanitary dishwashing practices purportedly entailing a risk of contamination of inmates with tuberculosis, the assembly of the cellmates for morning exercises irrespective of the weather conditions, abuse of the detainees' labour and the insufficiency of medical assistance for the applicant's chronic illnesses (see paragraphs 8-10 above). The applicant submitted no details of the facts giving rise to the above allegations and presented no documentary evidence enabling the Court to establish their truthfulness.

64. Although in cases concerning complaints about detention conditions the Court has not always required that an applicant support each and every allegation with particular documents, recognising that relevant information and possibilities to investigate the facts in such cases lie primarily in the hands of the authorities, in order for the Court to reverse the burden of proof

and examine the merits of the complaints, they must at least have been clearly and consistently formulated (see, for example, *Trepashkin v. Russia*, no. 36898/03, § 85, 19 July 2007).

65. In the Court's opinion, this requirement has not been met in the present case, as the applicant's complaints have been limited to vague and general statements. The applicant did not provide a detailed account of events to make it apparent what was the nature and extent of his sufferings and whether the ill-treatment complained about had reached the threshold of severity bringing the matter within the ambit of Article 3 of the Convention. Moreover, the applicant did not use an opportunity to elaborate on his original submissions in response to the observations, submitted by the Government, in which his statements were denied.

66. The Court finds therefore that the applicant has not made out an arguable claim concerning the conditions of his detention in penitentiaries nos. 86 and 113. This part of the application must therefore be rejected as inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

b. Force-feeding in September 2005

67. Similarly to its findings in paragraph 65 above, the Court notes that the case-file contains neither documentary proof of the applicant's force-feeding in September 2005, nor even a detailed description of the force-feeding procedure (see, for example, by contrast, *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 78, ECHR 2005-II (extracts)). Moreover, no such description is to be found in the copies of the applicant's numerous complaints to different domestic authorities relating to various aspects of conditions of his detention during the period in question. Finally, the applicant did not comment on the Government's observations denying that he had been force-fed.

68. In the light of the above, the Court finds that this aspect of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

c. Conditions of detention during the second period

69. The Court recalls that during the period in question the applicant was held first in SIZO no. 30 and subsequently in penitentiary no. 81. However, his complaints concerning the conditions of detention in both facilities are interrelated and broadly similar, relating primarily to the failure of the authorities to properly address the rapid deterioration of his health. The Court notes that according to the case-file materials the applicant's health substantially deteriorated during this period. It finds that this part of the application raises issues of fact and law under the Convention, the determination of which requires an examination on the merits. The Court finds no ground for declaring the respective complaints inadmissible. The Court must therefore declare them admissible.

B. Merits

1. Submissions of the parties

70. The applicant submitted that he had become an invalid of the “third” and subsequently of the “second” category as a result of inadequate treatment in SIZO no. 30 and penitentiary no. 81. His untreated head injury had resulted in his left-side paralysis, which was progressing and spreading to new parts of his body, and added to a number of other chronic conditions either contracted or aggravated during the second period of his detention. In the meantime, the medical supervision and treatment available to him had been insufficient: in particular, he had not been properly and timely diagnosed, his complaints had been treated on a symptomatic rather than a systematic basis, even the conservative treatment prescribed had not always been adequately followed through, in particular on account of the lack of medication or the use of outdated drugs; many of his complaints had not been recorded, and even fewer of them had been properly examined and addressed. In addition, general conditions in both detention facilities as well as in the hospitals had been very poor, in particular on account of unpleasant smells, the lack of regular checks by medical personnel on the state of the patients and the fact that he had not been allowed to go to the toilet when he needed to. Against this background, no steps had been made by the penitentiary administration to attend to his basic needs, such as providing him with adequate food, toilet paper, razors and other necessities, in view of his inability to work and earn money to buy them, not to mention making special arrangements for his reduced mobility.

71. The Government submitted that the applicant’s Convention rights had not been breached during his detention in the above facilities. In particular, the applicant’s health care needs had been promptly and sufficiently addressed by qualified medical staff, including on an in-patient basis, and the material conditions of his detention had not been such as to debase his dignity.

2. The Court’s assessment

a. General principles

72. The Court notes that Article 3 imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance (see *Kudła v. Poland* [GC],

no. 30210/96, § 94, ECHR 2000-XI; see also *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, and *Kalashnikov v. Russia*, no. 47095/99, §§ 95 and 100, ECHR 2002-VI).

73. In assessing whether the authorities discharged their health-care obligations vis-à-vis a detainee in their charge, the Court may also analyse to what extent his state of health deteriorated in the course of his detention. Although such deterioration does not in itself imply a violation of Article 3, it may, however, be considered to be a characteristic element of the overall conditions of detention (see, for example, *Valašinas v. Lithuania*, no. 44558/98, § 54, ECHR 2001-VIII, and *Farbtuhs v. Latvia*, no. 4672/02, § 57, 2 December 2004). Where the authorities decide to place and maintain in detention a person who is seriously ill, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability (see *Price v. the United Kingdom*, no. 33394/96, § 30, ECHR 2001-VII, and *Farbtuhs v. Latvia*, cited above, § 56).

74. The mere fact that a detainee was seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and the treatment he underwent while in detention (see, for example, *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-... (extracts)), that the diagnoses and care are prompt and accurate (see *Hummatov v. Azerbaijan*, cited above, § 115; *Melnik v. Ukraine*, no. 72286/01, §§ 104-106, 28 March 2006; and *mutatis mutandis Holomiov v. Moldova*, no. 30649/05, § 121, 7 November 2006), and that where necessitated by the nature of a medical condition, supervision is regular, systematic and involving a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Hummatov*, cited above, §§ 109, 114; *Sarban v. Moldova*, no. 3456/05, § 79, 4 October 2005; and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006). The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Hummatov*, cited above, § 116 and *Holomiov*, cited above, § 117).

b. Application of the principles in the present case

75. The Court recalls that in December 2003, shortly after the applicant's placement in detention in SIZO No. 30, he was diagnosed with haemorrhoids, chronic bronchitis and a rib fracture. In April 2005, just before his transfer to penitentiary no. 81, he was found to be suffering from secondary neuritis of the left eye nerve, moderate left-side hemiparesis; cerebral asthenia, mnestic personality impairment, chronic bronchitis and

chronic gastro-duodenitis, and assigned a “third category” of invalidity. In December 2005, by the end of his stay in penitentiary no. 81, the applicant was assigned the “second category” of invalidity on account of aggravations of the above conditions. In these circumstances the Court cannot but mark that the applicant’s state of health appears to have substantially deteriorated during the period of his detention.

76. On the other hand, the Court finds it difficult to establish to what extent this deterioration was prompted by the conditions of detention, including insufficient health care, as opposed to the applicant’s aging and the natural course of the diseases from which he was suffering. It notes, first of all, that the applicant was frequently examined by various medical professionals and prescribed treatment for various complaints. Although, as appears from the handwritten medical notes, this treatment was largely symptomatic and based on the administration of painkillers, sedatives and mild conservative medication, without any alternative submissions the Court is not in a position to decide whether the choice of treatment methods appropriately reflected the applicant’s needs and whether he could have obtained better treatment in civil hospitals. Moreover, the Court notes that on several occasions the applicant was in fact examined by medical professionals practising outside the penitentiary system (see paragraphs 25 and 39 above).

77. Notwithstanding the frequency with which the applicant consulted medical professionals during his detention, the Court notes that, starting from 21 May 2004 his medical records repeatedly associate numerous and progressing neurological symptoms with a head injury purportedly sustained in 2003, which remained unreported and unsupervised until spring 2004. It was not until 21 July 2004 that the applicant underwent a head scan.

78. Further, after the detection of neurological symptoms, the medical professionals seem not to have been able to formulate a clear approach to their qualification. In particular, the Court notes that on 26 April 2005 the disability commission recognised that the applicant was suffering from left-side hemiparesis. On 13 June 2005 a neurology professor disagreed with that diagnosis and found that “vague limitations of mobility” in the applicant’s left limbs did not meet the criteria of hemiparesis, without, however, indicating her final diagnosis and further recommendations. No attempts to reconcile the two approaches ensued, and, based on the professor’s report, medical staff at penitentiary no. 81 concluded that the applicant’s neurological state was stable and he was exaggerating the extent to which he was in pain. At the same time, in November 2005 the applicant was again diagnosed with hemiparesis and in December 2005 assigned a second (more advanced) category of invalidity on account of aggravations in that and other conditions. In the light of the available materials, the Court

is prepared to accept the applicant's contention that the authorities failed to provide the conditions for his prompt and proper diagnosis.

79. As regards the comprehensiveness of the authorities' approach to the applicant's treatment, rehabilitation and prophylactic supervision, the Court notes that the medical notes submitted to it, notwithstanding their abundance, are not only hardly legible, but also non-systematic, and contain only partial information concerning the treatment recommended and administered to the applicant. In particular, although the applicant suffered from a broken rib upon his placement in SIZO no. 30, the case-file contains no information whatsoever concerning his supervision and treatment on that account. Likewise, notwithstanding the fact that on 18 December 2003 the applicant was officially recognised as suffering from haemorrhoids and chronic bronchitis, the Court has not been provided with any documents concerning treatment recommendations and supervision on account of bronchitis predating April 2004 or on account of haemorrhoids predating June 2005 (see paragraphs 25 and 38 above).

80. Subsequent handwritten records, although more numerous, also contain only partial, *ad hoc* information. Many of the notes simply recite the applicant's complaints about recurrent aggravations of his chronic conditions and do not reflect any specifics concerning the treatment which was recommended or administered. Even where such information can be found in these notes, it is largely limited to names of medication, without reference to doses, frequency and duration of treatment, information as to whether the treatment was actually administered as prescribed or any evaluation of its effectiveness. Although the majority of the applicant's conditions were assessed as chronic, follow-up recommendations for preventive treatment, even where present, are also mostly generic (for example, recommendation of an unspecified diet, see paragraph 38 above). Whether this lack of information is due to insufficient recording or insufficient treatment, in the light of the available materials the Court is unable to conclude that the applicant's health care needs were comprehensively and thoroughly addressed and that the aggravation of his conditions was not attributable to the lack of care.

81. The Court also gives regard to the applicant's description of the material conditions of his detention and treatment in his complaints before both the domestic authorities and the Court. It recalls that the applicant consistently complained about the unpleasant smell in the hospital premises, the insufficient supply of drugs and the use of outdated drugs, the re-utilisation of disposable syringes, the irregular attention given to the patients and the possibility to go to the toilet only at the appointed times. The Court is particularly stricken by the applicant's account of catering arrangements in penitentiary no. 81, according to which he might be left without food for days in response to his complaints about his inability to walk to the cafeteria.

82. The Court is mindful that the applicant's allegations concerning the material conditions of his detention summarised in the preceding paragraph are not supported by documents and cannot be proved "beyond reasonable doubt". However, it notes that the Government did not submit any valid counter-arguments refuting them, whereas they had been clearly formulated before the domestic authorities and later before the Court. Moreover, in so far as the applicant complained about the failure of the authorities to address properly his concerns about the pain in his back when walking to the cafeteria, the Court notes that according to official records the only arrangement made in this regard was an order to other inmates to drag the applicant to the cafeteria, which cannot be regarded as a means to provide him with qualified assistance addressing his mobility problems or to find a structural solution to the issue (see, among other authorities, *Farbtuhs*, cited above, § 60). In the light of all the above, the Court is prepared to conclude that the material conditions of the applicant's detention added to his sufferings associated with health problems.

83. Overall, in the light of the findings concerning delays and inconsistencies in the diagnosis of the applicant's illnesses, the lack of a comprehensive approach to his medical supervision and treatment, and failure to ensure conditions reasonably adapted to the applicant's health-care needs, the Court considers that the State authorities have not acted duly in discharging their Convention duty vis-à-vis the applicant under Article 3 but have subjected him to inhuman and degrading treatment. There has therefore been a violation of this provision.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

84. The applicant also alleged that he did not have at his disposal an effective domestic remedy for his complaints under Article 3, as required by Article 13 of the Convention. This provision reads as follows:

"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

85. The Government contended, without indicating any reasons, that this complaint was inadmissible.

86. The applicant disagreed.

87. The Court refers to its findings in paragraphs 61, 66, 68 and 69 above and recalls that the applicant has made out an arguable claim under Article 3 only in so far as his allegations relate to the conditions of detention in SIZO no. 30 and penitentiary no. 81. It finds, therefore, that his complaint

under Article 13 about the lack of effective remedies for conditions of detention in those facilities must be declared admissible.

88. As regards the remainder of the claims, they must be dismissed in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Merits

89. The Government contended that the applicant could have raised his complaints with the prosecutor's office or the courts.

90. The applicant contended that the remedies suggested by the Government were ineffective.

91. The Court points out that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. With reference to its earlier case-law (see, among other authorities, *Melnik v. Ukraine*, cited above, §§ 113-116 and *Dvoynikh v. Ukraine*, no. 72277/01, § 72, 12 October 2006), the Court finds that the Government have not shown that in the present case it was possible under Ukrainian law for the applicant to complain about the conditions of his detention or that the remedies available to him were effective, that is to say that they could have prevented violations from occurring or continuing, or that they could have afforded the applicant appropriate redress.

92. The Court concludes, therefore, that there has been a violation of Article 13 of the Convention on account of the lack of an effective and accessible remedy under domestic law for the applicant's complaints in respect of his treatment in and conditions of detention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. 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

94. The applicant claimed 6,000,000 hryvnias in respect of non-pecuniary damage.

95. The Government contested this claim.

96. The Court finds that the applicant must have suffered non-pecuniary damage on account of the violations found; however, the requested amount

is excessive. Making its decision on an equitable basis, the Court awards the applicant 6,000 euros (EUR) in respect of non-pecuniary damage plus any tax that may be chargeable.

B. Costs and expenses

97. The applicant did not lodge any claim under this head. The Court therefore gives no award.

C. Default interest

98. 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. *Declares* the complaints under Article 3 concerning the conditions of detention in SIZO no. 30 and penitentiary no. 81 and under Article 13 concerning lack of remedies in respect thereof admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of detention in SIZO no. 30 and penitentiary no. 81;
3. *Holds* that there has been a violation of Article 13 of the Convention on account of lack of remedies in respect of the applicant's complaints about the conditions of his detention in SIZO no. 30 and penitentiary no. 81;
4. *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 6,000 (six thousand 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring opinion of Judge Maruste is annexed to this judgment.

R.M.
C.W.

PARTLY CONCURRING OPINION OF JUDGE MARUSTE

While being in agreement with the majority in finding a violation of Article 3 in respect of the conditions of detention I would like to put forward my view that the case also raises serious concerns about excessive use of force by the authorities as well as the burden of proof under these circumstances.

It is not disputed by the parties that the applicant was suffering from several and severe health problems – a broken rib and head injury in particular - which under the circumstances can be *prima facie* regarded as possible ill-treatment by the authorities as alleged by the applicant. As the facts show, the head injury in particular became a serious source of pain and suffering for the applicant. The majority seems to accept the explanation provided by the domestic authorities (police and prosecutor) and the Government that recourse to physical force was necessary in restraining the applicant and was made necessary by the applicant's own conduct, or rather that it was not possible to establish that the applicant was ill-treated while in police custody and therefore the applicant has failed to make his case as required. Accordingly the majority dismisses these allegations (see § 61).

On the basis of the Court's case-law (*Rehbock v. Slovenia*, no. 29462/95, ECHR 2000-XII) and Convention doctrine I would argue that the reasoning in end part of § 58 of the judgment which reads as follows "*Although, according to subsequent medical findings, the applicant could have suffered a head injury in 2003, in the absence of any materials shedding light on the relevant circumstances, including the period in which that injury could have been sustained, this allegation alone cannot raise a reasonable suspicion against the police officers*", runs counter to our well established doctrinal principle. Namely that when a person is under the control of authorities (as in the case at hand) there is a strong presumption that the injuries alleged and established are attributable to the authorities and the burden of proof in that case shifts and it is for the authorities to show convincingly that they are not responsible for the alleged injuries. As it has been determined in the *Ribitsch* and *Salman* cases, in situations, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of person 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*, 4 December 1995, § 34, Series A no. 336 and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

Consequently, the reasonable suspicion still stays. The applicant asked for assistance in connection with his injuries, made the relevant allegations against the police, and asked for criminal proceedings to be instituted

against those who inflicted the bodily injuries. He did what could reasonably be expected under the circumstances.

It has to be noted that the prosecutor refused to initiate criminal proceedings, finding the allegations groundless on the basis of testimonies of the investigator and the police officers who had participated in the arrest of the applicant and the finding of the medical commission that the applicant had been fit for detention. Neither the police nor the investigator could be considered impartial in that situation and the medical commission apparently was asked about his fitness for detention and did not consider his injuries. The mere fact that applicant was considered fit for detention does not necessarily imply that he was not injured.