



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

FIFTH SECTION

CASE OF VERGELSKYY v. UKRAINE

(Application no. 19312/06)

JUDGMENT

STRASBOURG

12 March 2009

FINAL

12/06/2009

This judgment may be subject to editorial revision.

In the case of Vergelskyy v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 19312/06) 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 Mykola Andriyovych Vergelskyy (“the applicant”), on 3 May 2006.

2. The applicant was represented by Mr D.D. Menko, a lawyer practising in Romny. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had been subjected to ill-treatment contrary to Article 3 of the Convention during his detention in the Romny Town Police Department and that the domestic authorities failed, contrary to Articles 3 and 13 of the Convention, to conduct an effective investigation into his complaint. The applicant also referred to Articles 3 and 13 of the Convention and contended that during his pre-trial detention between August 2005 and May 2006 he was not afforded relevant medical assistance and was kept together with inmates who smoked. The applicant further complained under Article 6 § 1 of the Convention that the criminal proceedings against him lasted an unreasonably long period of time and that he had no domestic remedy, as required by Article 13 of the Convention, in respect of the excessive length of these proceedings.

4. On 17 September 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was 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 1936 and lives in Romny.

A. Criminal proceedings against the applicant

6. After last being seen in the applicant's house on 7 June 2003, Mr O.S., the applicant's acquaintance, disappeared. On several occasions between June 2003 and March 2004 the applicant explained to the police that he was unaware of Mr O.S.'s whereabouts following his departure from the house.

7. On 11 June 2003 the police seized from the applicant's house a knife and several objects spotted with a brown substance. According to an expert assessment obtained in March 2004, these spots were human blood that probably belonged to Mr O.S.

8. On 27 March 2004 the applicant confessed that he had accidentally killed Mr O.S. during a drinking party. He had then dismembered the body, packed it in sacks and disposed of it in the Romenka River. On the same date criminal proceedings were instituted against him on suspicion of murder. The applicant was taken to the river bank to point out the place where he had dumped the sacks. However, no body parts were found.

9. On 30 March 2004 the applicant was detained as a criminal suspect.

10. On 6 April 2004 the investigator brought formal charges against the applicant for murder.

11. On 9 April 2004 the applicant was released after giving an undertaking not to abscond.

12. On 16 April 2004 the applicant informed the Town and the Regional Prosecutor that he had confessed to having killed Mr O.S. under torture. He further submitted that in reality Mr O.S. had apparently been killed by two masked robbers, who had broken into his house during the drinking party on 7 June 2003 and knocked the applicant unconscious. He had kept this story secret fearing reprisals by the robbers.

13. Between April and December 2004, on some four occasions, criminal proceedings against the applicant were suspended for periods ranging from several days to some three months on account of his ill-health or for unexplained reasons. At the same time, certain investigative actions, such as the examination of witnesses, were carried out during the periods when the investigation was officially suspended.

14. On 21 January 2005 the applicant was committed for trial.

15. Between February and July 2005 the prosecution withdrew the case file from the court on four occasions for the rectification of procedural

omissions. On 1 August 2005 the applicant was committed for trial for the fifth time.

16. On 8 August 2005 human bones were retrieved from the Romenka River. On the same day the prosecution withdrew the case file from the court in order to verify whether these bones belonged to Mr O.S.

17. On 12 August 2005 the Town Court authorised the applicant to be remanded in custody for ten days.

18. On 19 August 2005 the Town Court, following a hearing held in the presence of the applicant and his lawyer, authorised that pending the outcome of pre-trial investigation the applicant be detained for a maximum period of two months, on the grounds that there was a serious suspicion that he had committed the offence with which he had been charged and that during the pre-trial proceedings he had changed his place of residence and attempted to influence a witness.

19. On 2 September 2005 the Town Prosecutor refused an application for bail lodged by the applicant. On the same date the Town Court informed the applicant that it was not competent to deal with bail applications while the case was at the investigation stage.

20. On 23 September 2005 the case file and a new bill of indictment were sent to the Town Court.

21. On 3 October 2005 the prosecutor withdrew the case for the rectification of omissions. The case was referred back to the Town Court on 4 October 2005.

22. On 13 October 2005 the Town Court scheduled the case for trial proceedings, reviewed the decision to hold the applicant in custody and found no reason to release him. In November 2005 the Town Court held five hearings.

23. On 24 November 2005 the Town Court decided that further investigations were called for and remitted the case to the prosecution. On the same date the court rejected an application by the applicant for his release on bail and authorised his detention pending the above-mentioned investigations.

24. The applicant appealed against the decision to extend his detention. On 7 December 2005 the Sumy Regional Court of Appeal (*Апеляційний суд Сумської області*, hereafter “the Court of Appeal”) found that it was not competent under the law to deal with this appeal.

25. On 18 January 2006 the case was referred back to the Town Court for trial.

26. Between March and June 2006 the Town Court scheduled ten hearings. Three of them were adjourned on account of the prosecutor’s failure to appear. One was adjourned on account of the failure to appear by the prosecutor and the applicant’s lawyer.

27. On 17 May 2006 the Town Court ordered the applicant’s release on bail.

28. On 5 June 2006 the Town Court ordered an additional assessment to be carried out by a genetics expert.

29. On 31 October 2006 the Town Court requested the expert to expedite the assessment.

30. On 16 November 2006 the expert assessment was carried out and on 12 December 2006 the report was delivered to the Town Court.

31. On 29 December 2006 the hearing was adjourned until 25 January 2006 to summon experts. The experts failed to appear on this date.

32. On 26 January 2007 the Town Court reminded the experts of their obligation to appear at hearings.

33. On 19 February 2007 the Town Court examined two experts and a witness and ordered a further assessment by a commission of experts.

34. On 22 February 2007 the Town Court addressed the prosecutor by letter demanding the submission of material evidence for expert assessment. On 5 March 2007 the Town Court sent a reminder.

35. On 17 April 2007 the Town Court made enquires of the expert as to the status of the assessment.

36. On 5 May 2007 the assessment was carried out.

37. Between June and October 2007 the Town Court scheduled six hearings. Two of them were adjourned on account of the prosecutor's failure to appear. By letters of 28 August and 4 October 2007 the Town Court reminded the prosecutor of his duty to appear for hearings.

38. On 12 October 2007 the Town Court remitted the case for additional investigation. The Town Court referred, in particular, to the failure of the prosecution to carry out a comprehensive inquiry into the applicant's allegation that he had confessed to the killing of Mr O.S. under duress.

39. On 20 December 2007 the Court of Appeal quashed this decision, having found that the shortcomings of the investigation of the murder were such that they could be addressed at the trial stage by examination of witnesses and other evidence in court.

40. On 10 June 2008 the Town Court remitted the case for additional investigation, referring to numerous procedural shortcomings in the carrying out of the investigation, the handling of evidence and the drafting of procedural documents. The court noted, in particular, that the investigation had been suspended on several occasions for no reason or in connection with the applicant's ill-health, despite the fact that there was no relevant medical documentation attached. Furthermore, during these periods the authorities continued with their investigations.

41. According to the case file materials, the proceedings are currently pending.

B. Alleged ill-treatment

1. The applicant's account of events of 19-27 March 2004 and medical evidence concerning his injuries

42. According to the applicant, on 19 March 2004 he visited public baths with Messrs V.B. and V.S., his relatives.

43. Shortly after 10 a.m., immediately after he had returned home, the applicant was seized by two police officers and taken to the Romny Police Department (*Роменський міськрайонний відділ УМВС України в Сумській області*, hereafter “the Police Department”). There the police officers beat him with their fists and truncheons and stamped on his feet, demanding that he confess to the killing of Mr O.S. At about 3 a.m. on 20 March 2004 the applicant, completely exhausted, fell unconscious and was placed in a police cell for temporary detainees.

44. Shortly after 3 a.m. an ambulance arrived. The applicant complained about pain in the heart and a headache and was administered treatment for low blood pressure. The applicant was further detained.

45. On 22 March 2004 investigator I.S. proposed that the applicant sign an acknowledgement that he had been properly arrested on 20 March 2004 for swearing in public and that he had no claims against the police. The applicant agreed, allegedly hoping that his suffering would end.

46. On 22 March 2004 the applicant was brought before the Town Court, which sentenced him to seven days' administrative arrest (*адміністративний арешт*) in the Centre for Temporary Detention (*Ізолятор тимчасового тримання*, hereafter “the ITT”) for petty hooliganism on 20 March 2004.

47. According to the applicant, each day he was taken to the Police Department, beaten, threatened and urged to confess to the killing. On 24 March 2004 the applicant told the police that Mr O.S. had apparently been killed by two masked robbers. However, the officers continued to demand that the applicant confess that Mr O.S. had been killed by him. As the last day of the applicant's detention approached, the pressure was intensified. On 27 March 2004 the applicant pleaded guilty to the murder of Mr O.S.

48. On the evening of 27 March 2004 the applicant was formally released. However, the police in fact continued to keep him in some vacant offices in the Police Department, until on 30 March 2004 he was officially detained as a criminal suspect.

49. On 6 April 2004 the applicant underwent an assessment by a medical expert of the Romny Bureau of Forensic Medical Examinations (*Роменське бюро судово-медичних експертиз*). The examination revealed some eight large bruises (about 15x10 cm each) in the applicant's groin area, on his thighs and shoulders. The expert concluded that these bruises could have

resulted from a beating as well as from a fall. He further found it impossible to determine the probable date on which the bruises had been sustained, as they could remain on the body for up to one and a half months.

50. On 9 April 2004 the applicant was admitted to hospital on account of stress-associated asthenia (a personality disorder, characterised, in particular, by insomnia, anxiety, headache and bodily weakness). On 19 April 2004 the applicant returned home.

51. On 31 January 2008 a commission of experts analysed the medical documents relating to the applicant's injuries. It confirmed the earlier findings by the single expert and noted that, regard being had to the number of bruises and their diverse localisation; they were unlikely to result from a single fall.

2. Investigation of the alleged ill-treatment

52. On 16 April 2004 the applicant lodged a criminal complaint against police officers for ill-treatment. The complaint was addressed to the Romny Town and Sumy Regional Prosecutors.

53. On 13 July 2004, on the basis of the statements of four police officers denying subjecting the applicant to any ill-treatment and the fact that during his questioning as a suspect on 1 April 2004 the applicant had not complained of any police violence, no *prima facie* case of ill-treatment was found and the inquiry into the applicant's complaint was discontinued.

54. On 14 December 2004 the applicant was given access to the above decision. On 20 December 2004 he challenged it before the Town Court.

55. On 24 January 2005 the Town Court quashed the decision of 13 July 2004, finding that further inquiries were called for. It noted, in particular, that the police officers had been questioned before the formal commencement of the inquiry. Moreover, the investigator had failed to question persons listed in the applicant's complaint who could allegedly confirm the applicant's ill-treatment; to examine the circumstances of the applicant's stay at the Police Department before his official arrest; or to determine how the applicant had sustained his injuries.

56. On 14 February 2005 the investigator decided that there was no *prima facie* case of ill-treatment.

57. On 26 April 2005 the Town Court quashed this decision on the ground that the investigating authorities had failed to follow the instructions set out in its decision of 24 January 2005.

58. In the course of the additional inquiry, the Prosecutors' Office questioned the officers who had called the ambulance for the applicant on 20 March 2004, who could not recall any details; the members of the voluntary citizens' guard, who confirmed having arrested the applicant at 4 p.m.; the ambulance doctor, who stated that she had not examined the applicant's body on account of injuries; and the medical expert, who confirmed the findings of his assessment of 6 April 2004. On 15 May 2005

on the basis of this evidence and on the grounds set out in the decision of 13 July 2004, a fresh decision was taken not to initiate any criminal proceedings.

59. On 8 August 2005 this decision was quashed by the Town Court. The court found that the inquiries had been conducted in a perfunctory manner. It instructed the investigating authorities, in particular, to question the persons who had seen the applicant on 19 March 2004 at the public baths; the persons who had shared the cell with the applicant in ITT; and the applicant's neighbours.

60. On 9 September 2005 it was decided not to institute criminal proceedings with reference to essentially the same grounds as before.

61. On 28 October 2005 the Town Court found that the prosecution had failed to comply with its earlier instructions. Referring to the case of *Kmetty v. Hungary* (no. 57967/00, 16 December 2003), the court noted that the prosecution had a duty to determine whether the applicant had sustained injuries resulting from his treatment by the police.

62. The Town Prosecutor's Office appealed against the court's decision.

63. On 27 December 2005 the Court of Appeal rejected the prosecution's appeal and upheld the decision of 28 October 2005.

64. On 16 January, 12 March, 15 May, 13 August and 19 December 2006 the Prosecutors' Office again refused to institute criminal proceedings.

65. On 24 February, 20 April, 31 July, 24 November 2006 and 16 January 2007 respectively the Town Court quashed these decisions referring to the cursory analysis of various sources of evidence and the failure of the investigation to establish a probable cause of the applicant's injuries.

66. On 7 March 2007 a new decision not to institute criminal proceedings was taken. It was based on essentially the same evidence as before. Additionally, the investigator also explained why, in his opinion, further measures demanded by the court were either unavailable or irrelevant. For instance, it was no longer possible to find the objects with which the applicant could have purportedly been beaten.

67. On 12 April 2007 the Town Court quashed this decision.

68. By its subsequent decisions dated 10 May 2007 and 23 August 2007 the Prosecutors' Office further refused to institute criminal proceedings.

69. These decisions were annulled by the Town Court on 21 June 2007 (upheld on appeal on 31 July 2007) and 25 September 2007 (upheld on 16 October 2007), respectively.

70. On 18 February 2008 the Prosecutors' Office yet again refused to institute criminal proceedings. In addition to the reasons recited earlier, this decision referred, in particular, to the testimonies of Messrs V.B. and V.S. who stated that they had seen no injuries on the applicant's body in the public baths. The prosecution found this evidence unreliable, since the witnesses were related to the applicant. Moreover, according to the attendant at the baths, she did not remember ever having seen the applicant

in the public baths. As regards the testimonies by the applicant's neighbours, they clearly recalled seeing him back at home on 19 April 2004. Their recollections concerning his presence at home between 19 March and 19 April 2004 were blurred.

71. The Prosecutors' Office further stated that according to the Police Department visits journal, the applicant had entered the Police Department at 10:35 a.m. on 19 March 2004. The journal contained no record of his subsequent departure, apparently as a result of the fact that the door guard forgot to make the relevant entry. On that date the applicant was questioned by investigator I.S. about Mr O.S.'s disappearance. After the questioning, the applicant felt ill and was offered to stay in a police cell to recuperate. On 20 March 2004 at 3 a.m. an ambulance arrived to treat the applicant for blood-pressure complaints. Subsequently he felt better and left the cell by 8 a.m. on 20 March 2004. At about 4 p.m. on 20 March 2004 members of the voluntary citizens' guard (ГФ «Громадський правопорядок») spotted the applicant who, apparently under the influence of alcohol, was swearing in a public street. As the applicant refused to cease his disorderly conduct in response to their demands, the guards took him to the Police Department. A report of an administrative offence was drafted and the applicant was detained in the ITT. According to applicable regulations, the staff of the ITT should have organised a medical examination of the applicant to detect any injuries or sickness before placing him in the ITT. No injuries were recorded on his body. However, since the applicant lodged no health-related complaints, the examination could have been cursory. In this connection it was not possible to rule out that the applicant's bruises could have been sustained by a fall on 20 March 2004, shortly before he had been taken to the police, as at the time he was apparently under the influence of alcohol. At the same time, the applicant's alcohol level was not checked, as he was not charged with being drunk in a public place. Between 22 and 27 March 2004 the applicant was daily checked out from his cell by officer I.S. for several hours at a time. These check-outs were for the purposes of the applicant's engagement in community service or for discussions on public morale. On 27 March 2004 the applicant voluntarily confessed to having killed Mr O.S. The same day at 7 p.m. the applicant was released.

72. On 13 June 2008 the Town Court quashed this decision, referring to the fact that the investigation had still failed to comply with all its instructions and in order to determine whether the State was responsible for the applicant's injuries.

73. On three occasions in the course of the investigation (in October 2005, April 2006 and April 2007 the Town Court also separately addressed the Prosecutors' Office instructing it to take measures in respect of the continued non-execution of the court's instructions by the investigating authorities. Referring to the cases of *Kmetty v. Hungary* (cited above) and

Afanasyev v. Ukraine, (no. 38722/02, 5 April 2005) the court found that the criminal inquiry conducted had not been sufficiently thorough.

74. On 3 July 2008 the Sumy Regional Court of Appeal quashed the decision of 13 June 2008 and remitted the case for fresh consideration in first instance. According to the case-file materials, the proceedings are currently pending.

C. Conditions of detention

75. From 19 August 2005 to 17 May 2006 the applicant was remanded in custody. During certain periods the applicant was held in the Sumy Regional Pre-Trial Detention Centre (Сумський слідчий ізолятор, hereafter “the Sumy SIZO”). These periods were as follows: 26 September to 3 October 2005; 17 to 24 October 2005; 7 to 21 November 2005, 6 December 2005 to 5 January 2006; 14 to 20 February 2006; 6 to 13 March 2006; 15 March to 3 April 2006 and 25 April to 15 May 2006. The remainder of the time the applicant was held in the Romny ITT.

76. In August 2005 the authorities were informed that he suffered from several chronic conditions, in particular, osteochondrosis, secondary radicular syndrome, myopia, cerebral atherosclerosis, hypertension and adenoma of the prostate.

77. According to the applicant, being in detention had negative effects on his health. In particular, he began suffering from an asthmatic complaint as a consequence of being exposed to passive smoking in the cell. Furthermore, good quality medical assistance was not always readily available to him, even though he was suffering from numerous chronic conditions. Finally, medications were frequently supplied to the applicant by his sister, as the detention facility lacked them. Sometimes his sister was not informed in good time that further medications were needed.

78. In November 2005 the applicant consulted a doctor and was treated for allergic dermatitis.

79. In March 2005 the applicant consulted a doctor and was treated for cystitis.

80. On seven occasions throughout the period of his detention the applicant was tested for tuberculosis and other infections.

81. After his release and until the end of 2006 the applicant was treated in hospital twice: between 26 June and 7 July for dermatophytia and between 10 and 21 October 2006 for adenoma.

II. RELEVANT DOMESTIC LAW

82. 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).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

83. The applicant complained that conditions of his detention were contrary to Article 3, regard being had to the tolerance of smoking in the cells, shortage of medicaments and inaccessibility to him of quality medical assistance. He further complained under the same provision that in March 2004 he had been ill-treated by police officers and that the investigation of his respective complaint had been ineffective. In the latter respect he also invoked Article 13 of the Convention. The relevant provision reads as follows:

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

A. Admissibility

1. Concerning the conditions of detention

84. The Government considered that the applicant failed to exhaust the domestic remedies before lodging this complaint with the Court. They further submitted that in any event the applicant had been held in conditions which were not incompatible with Article 3. As regards the negative effects of smoking in the cells and the insufficiency of medical assistance, the applicant's submissions were of a very general nature and were not corroborated by any evidence. According to their records, the applicant was regularly monitored for tuberculosis and other infections. He consulted a doctor twice and both times received prompt and adequate treatment. The fact that the applicant's sister was allowed to supplement parcels with medicines proved only that the applicant had not been short of anything he might have needed to sustain his health.

85. The applicant contested these arguments. He submitted that there were no effective remedies to exhaust in his case. Furthermore, it was contrary to Article 3 to detain him given that he was 69 years of age, suffered from various chronic illnesses and was innocent of the murder he was accused of.

86. The Court does not find it necessary to address the Government's objection concerning non-exhaustion, as the applicant's complaints concerning the conditions of detention are in any way inadmissible for the reasons set out below.

87. The Court considers that the applicant's primary complaint is directed against the very fact of his placement in pre-trial detention. In this

respect the Court reiterates its case-law that pre-trial detention in itself does not raise an issue under Article 3 of the Convention (see as a recent authority *Trepashkin v. Russia*, no. 36898/03, § 91, 19 July 2007). What the State must do under this provision is to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (*Valašinas v. Lithuania*, no. 44558/98, § 102, ECHR 2001-VIII, § 102).

88. An allegation that the treatment complained about has been such as to fall within the scope of Article 3, usually requires 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, in cases concerning detention conditions the Court has not always required that an applicant supports each and every allegation with particular documents. Depending on the nature of a complaint, the Court may study non-documented sources, such as testimonies of other inmates (see e.g. *Gorea v. Moldova*, no. 21984/05, § 29, 17 July 2007) or draw inferences from the failure of the Government to present convincing evidence overturning the applicant’s submissions, where they have been clearly and consistently formulated (see e.g. *Trepashkin*, § 85).

89. Turning to the applicant’s complaints as they are presented in the case at issue, the Court notes that the applicant’s submissions are of very general nature. In particular, he did not name any specific instance when he sought and did not receive attention by a competent doctor. He also did not show that a particular health condition from which he suffered was aggravated as a result of his detention. According to the records, the applicant was, on the contrary, administered regular medical tests. He applied to the doctor twice and both times was promptly treated. Following his release in May 2006 and until the end of the year the applicant sought medical treatment twice. The first time was more than a month after his release and in connection with a problem (dermophytia), which was not associated in the applicant’s submissions with his detention. The second treatment (for adenoma) was administered to the applicant some six months after his release. Further, as regards the complaint about smoking in the cells, the applicant provided no evidence that he was in fact held with smokers, that he requested to be moved to another cell on this basis, or that he suffered any health problems associated with passive smoking (see, *a contrario*, *Ostrovar v. Moldova*, no. 35207/03, §§ 15-17, 13 September 2005).

90. As regards the applicant’s submission concerning the unavailability of medication, the Court notes, as before, that this complaint is vague. In particular, he did not specify which medicines necessitated by his state of

health and normally accessible to him outside the detention facility were unavailable to him in custody; which medicines he received from his sister; when it was that his sister did not know about the need for additional medicines; or what negative effects he suffered in connection with the fact that these medicines were unavailable (see by contrast, *Ostrovar*, cited above, § 16). Consequently, the fact that the applicant's sister included unnamed drugs in her parcels to the applicant does not in the circumstances of the case suffice to establish that the applicant would otherwise have been deprived of indispensable medication.

91. In light of all the above, the Court finds that the applicant has not made out an arguable claim about the incompatibility of his detention conditions with Article 3 of the Convention. This part of the application should, therefore, be dismissed in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Concerning the ill-treatment by the police and ineffectiveness of the investigation

92. The Government submitted that this part of the application was premature, as the relevant domestic investigation was still under way.

93. The applicant insisted that the investigation was ineffective and he was, therefore, excused from the requirement to await its results.

94. The Court considers that the Government's objection raises issues which fall to be examined together with the substantive provisions of the Convention relied on by the applicant. This issue will be accordingly dealt with below.

B. Merits

1. Concerning the effectiveness of the investigation of the applicant's allegation of ill-treatment

95. According to the Government, the authorities were doing everything in their power to investigate the applicant's complaint about ill-treatment.

96. The applicant objected to this view.

97. 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 (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3290, § 102, and *Labita v. Italy* [GC], cited above, § 131).

98. As regards the circumstances of the present case, the Court notes at the outset that, while the applicant lodged his complaint about ill-treatment

within ten days of his release from custody, the investigation, which has lasted nearly five years, has not led to finding those responsible for his injuries. Neither has it resulted in rebutting the applicant's account of events with another plausible explanation as to how these injuries could have been sustained.

99. The Court further notes that the investigation was discontinued on a number of occasions, as the prosecution was not able to detect evidence of ill-treatment. All of the decisions to discontinue the investigation were subsequently annulled by the judicial authorities, as the prosecution had fallen short of employing all the means available to them to establish the cause of the applicant's injuries. In its decisions as well as in several separate rulings, the Town Court expressly pointed to a number of measures which could have been taken, as well as noting that its previous instructions had not been fully complied with. In spite of this, on numerous occasions the inquiries were still discontinued on essentially the same grounds as before without further substantive measures being taken.

100. As transpires from the later decisions of 7 March 2007 and 18 February 2008 to discontinue the inquiry, certain measures referred to by the court were no longer available on account of the lapse of time. In particular, the witnesses could no longer recall details of the events; the search for material evidence, such as the objects with which the applicant could have been injured, could no longer be effective. In these circumstances the Court does not have a reason to believe that yet another round of inquiries would redress the earlier shortcomings and render the investigation effective.

101. The Court finds that the factual circumstances surrounding the investigation of the applicant's ill-treatment complaint in the present case are similar to the situations, in which it has found violations in a number of recent cases (see e.g. *Mikheyev v. Russia*, no. 77617/01, §§ 112-113 and 120-121, 26 January 2006; *Kozinets*, cited above, §§ 61-62 and 65; and *Kobets v. Ukraine*, no. 16437/04, §§ 53-56, 14 February 2008).

102. In light of the circumstances of the present case and its settled case-law, the Court concludes that in the present case there has been a violation of Article 3 of the Convention on account of the ineffective investigation of the applicant's complaint about ill-treatment in custody. It follows that the Government's preliminary objection (see paragraph 92 above) must be dismissed.

103. Having regard to its finding under Article 3, the Court considers that it is not necessary to examine whether, there has also been a violation of Article 13 of the Convention in respect of effectiveness of the investigation.

2. Concerning the alleged ill-treatment

104. According to the Government, it was not possible to assess the truthfulness of the applicant's allegations concerning his ill-treatment by police officers in March 2004, as the domestic investigation in this respect was still pending.

105. According to the applicant, the case file contained sufficient evidence that his injuries had been inflicted by the police. In particular, the Government had failed to provide any alternative explanation as to how the applicant had sustained the injuries in question.

106. The Court reiterates that "[w]here an individual, when taken in police custody, is in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention" (see *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-11, and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within 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 resting on the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 34, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

107. Turning to the facts of the case, the Court notes that it is common ground between the parties that on 6 April 2004 the applicant, who was held in custody at the material time, had numerous bruises all over his body, which could have resulted either from a fall or from a beating. The applicant's account that these bruises were inflicted after his arrest is corroborated by the written statements of two individuals, who had allegedly seen him uninjured at the public baths just before he was arrested. Although the investigation decided that these statements were not trustworthy (see paragraph 70 above), the only alternative account, proposed by it after some four years of inquiries, was that the applicant could have fallen on the ground on 20 March 2004, shortly before his arrest. The Court, however, notes that this version is not corroborated by any evidence. Although the authorities purportedly were obliged to organise the applicant's medical examination before his placement in custody on 20 March 2004 (see paragraph 71 above), no such report attesting to the injuries has been produced to the Court. In sum, in the absence of any evidence to the contrary, the Court accepts the applicant's contention that his injuries were sustained while he was held in police custody.

108. As regards the State's responsibility for the applicant's injuries, the Court finds that the case-file materials provide no conclusive evidence as to how they were sustained. However, viewed cumulatively, the medical

evidence, the applicant's testimony, the failure of the authorities to provide a clear and consistent account of the applicant's whereabouts between 19 and 20 March 2004, the fact that the applicant was checked out from his cell for conversations with the investigator, which were not attended by any witnesses or procedural guarantees, the fact that he confessed at the close of his detention to having committed murder, and the lack of any plausible alternative explanation as to the origin of the applicant's injuries, give rise to a reasonable suspicion that these injuries may have been caused by the police.

109. The Court recalls that a State is responsible for the welfare of persons in detention and that the authorities have a duty to protect such persons. Bearing in mind the authorities' obligation to account for injuries caused to persons under their control, the Court considers that failure to find State agents guilty of a crime of violence against a detainee, as in the instant case, cannot absolve the State of its responsibility under the Convention (see, *mutatis mutandis*, *Esen v. Turkey*, no. 29484/95, § 28; *Yaz v. Turkey*, no. 29485/95, § 30; *Ayşe Tepe v. Turkey*, no. 29422/95, 22 July 2003).

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

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

111. The applicant complained that the length of the criminal proceedings against him had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

112. The Government contested that argument.

A. Admissibility

113. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The period to be taken into account*

114. The Court notes that in criminal matters, the "reasonable time" referred to in Article 6 § 1 of the Convention begins to run as soon as a

person is “charged”, in other words, given the official notification by the competent authority of an allegation that he has committed a criminal offence. This definition also corresponds to the test whether “the situation of the [suspect] has been substantially affected”. As regards the end of the “time”, in criminal matters the period governed by Article 6 § 1 of the Convention covers the whole of the proceedings in issue, including appeal proceedings (see *Merit v. Ukraine*, no. 66561/01, § 70, 30 March 2004).

115. As regards the facts of the present case, the Court notes that although the applicant was first questioned about the disappearance of Mr O.S. and certain objects were seized from his house in June 2003, it was not until March 2004 that the applicant was notified that he was suspected of having murdered Mr O.S. and criminal proceedings were instituted against him. As of June 2008 these proceedings were still pending in the stage of preliminary investigation. The proceedings have thus lasted by that date four years and three months without any judgment being given.

2. Reasonableness of the length of the proceedings

116. The Court observes that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II). It further notes that an accused in criminal proceedings should be entitled to have his case conducted with special diligence and Article 6 is, in criminal matters, designed to avoid that a person charged should remain too long in a state of uncertainty about his fate (see, *Nakhmanovich v. Russia*, no. 55669/00, § 89, 2 March 2006 and *Ivanov v. Ukraine*, no. 15007/02, § 71, 7 December 2006).

117. The Court further recalls that for the period of nine months the applicant in the present case was held in custody – a fact which required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously (see e.g. *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 83, ECHR 2003-IX and *Yurtayev v. Ukraine*, no. 11336/02, § 37, 31 January 2006).

118. The Court appreciates that the criminal proceedings, at issue, which concerned a person’s disappearance, were of a certain complexity, in particular, as regards the establishment of the facts and the collection of evidence. It also notes the exemplary efforts of the trial court to expedite the proceedings, in particular, by fixing a tight hearing schedule and sending reminders to the prosecution and the experts concerning their procedural duties.

119. On the other hand, the Court notes that the delays in resolution of the matter have been primarily due to the numerous remittals of the case for re-investigations and the rectification of procedural omissions. Moreover,

on several occasions the pre-trial investigation was suspended for no reason or on account of the applicant's alleged ill-health in the absence of appropriate medical documentation. By July 2008, after four years of inquiries, the case had still been pending in pre-trial stage.

120. Having examined all the material submitted to it, the Court considers that the Government have not provided a plausible explanation for the delay. The Court considers that in the instant case the length of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement.

121. There has accordingly been a breach of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

122. The applicant further complained under Article 13 of the Convention about lack of effective remedies for his complaints under Articles 3 about the conditions of detention and 6 of the Convention. The relevant 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."

123. The Government contested this argument.

A. Lack of remedies for a complaint concerning the conditions of detention

124. The Court recalls that it has found that the applicant has not made out an arguable claim under Article 3 of the Convention about his detention conditions. The guarantees of Article 13 do not, therefore, apply to this complaint. This part of the application is therefore inadmissible and must be rejected in accordance with the requirements of Article 35 §§ 3 and 4 of the Convention.

B. Lack of remedies for a complaint concerning the length of the criminal proceedings

125. The Court finds that this complaint is linked to the complaint about the length of the proceedings. It considers that it is not manifestly ill-founded or indeed inadmissible on any other ground cited in Article 35 of the Convention. It must therefore be declared admissible.

126. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudla v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). The Court further refers to its

finding in the *Merit* case about the lack of an effective and accessible remedy under domestic law for complaints in respect of the length of criminal proceedings (see *Merit v. Ukraine*, no. 66561/01, §§ 78-79, 30 March 2004).

127. The Court does not find any reasons to depart from this case-law in the present case.

128. There has, therefore, been a violation of Article 13 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

129. Lastly, the applicant alleged under Article 5 § 1 that his placement in detention in March 2004 and in August 2005 had been unlawful; under Article 5 § 4 that the Town Court had unlawfully refused on 2 September 2005 to hear his request for release, under Article 5 § 5 about inability to obtain compensation for his unlawful detention and under Article 2 of Protocol No. 7 that the Court of Appeal had unlawfully refused on 7 December 2005 to accept for adjudication his appeal against the decision of the first-instance court to extend his detention.

130. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

131. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

132. 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

133. The applicant claimed 70,000 euros (EUR) in respect of non-pecuniary damage.

134. The Government contested this claim.

135. The Court observes that it has found violations of Articles 3, 6 § 1 and 13 of the Convention in the present case. The applicant must have

suffered anguish and distress from the circumstances leading to the finding of these violations. Having regard to these considerations and to the comparable case-law (see, for example, *Afanasyev v. Ukraine*, no. 38722/02, § 84, 5 April 2005; *Kozinets*, cited above, § 73; *Kobets*, cited above, § 64 and *Lugovoy v. Ukraine*, no. 25821/02, § 46, 12 June 2008), the Court awards the applicant, on an equitable basis, EUR 10,000 for non-pecuniary damage.

B. Costs and expenses

136. The applicant also claimed UAH 28,100¹ in legal fees incurred before the domestic courts and UAH 5,750² for those incurred before the Court. He presented receipts from his lawyer for the above amounts, containing detailed account of the services for which they were paid.

137. The Government maintained that this claim was exaggerated. Moreover, there was insufficient proof that those costs were actually and necessarily incurred in connection with the alleged violations of the Convention.

138. 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering costs under all heads.

C. Default interest

139. 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 complaint under Articles 3 of the Convention concerning ill-treatment in police custody, the complaints under Articles 3 and 13 about ineffective investigation of this complaint and the complaints under Articles 6 § 1 and 13 about the unreasonable length of criminal proceedings against the applicant admissible and the remainder of the application inadmissible;

¹ Around EUR 4,000 as of the date on which the claim was formulated.

² Around EUR 800 as of the date on which the claim was formulated.

2. *Holds* that there has been a violation of Article 3 of the Convention on account of the ineffective investigation of the applicant's complaint about ill-treatment in police custody;
3. *Holds* that there is no need to examine the complaint under Article 13 concerning the ineffectiveness of investigation;
4. *Holds* that there has been a violation of Article 3 of the Convention on account of the ill-treatment inflicted on the applicant while in police custody;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
6. *Holds* that there has been a violation of Article 13 of the Convention on account of the lack of effective remedies in respect of the length of the criminal proceedings;
7. *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 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on the above amounts, to be converted into the National currency 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President