



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF OKHRIMENKO v. UKRAINE

(Application no. 53896/07)

JUDGMENT

STRASBOURG

15 October 2009

FINAL

15/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Okhrimenko v. Ukraine,

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

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Zdravka Kalaydjieva, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 22 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 53896/07) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Sergey Nikolayevich Okhrimenko (“the applicant”), on 10 December 2007.

2. The applicant, who had been granted legal aid, was represented by Mr A. Kristenko, a lawyer practising in Kharkiv, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that he had not received adequate medical treatment in the pre-trial detention centre, that he had been handcuffed in the hospital and that the conditions in which he was transported to the court hearings amounted to torture. He further alleged that his detention had not been lawful and that he had been unable to challenge it.

4. On 30 April 2008 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 case was given priority under Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and is currently detained in Kharkiv pre-trial detention centre No. 27 (*Слідчий ізолятор № 27 м. Харкова* – “the SIZO”), Ukraine.

6. On 14 March 2007 the applicant was arrested on suspicion of theft and inflicting grievous bodily harm causing the death of Mrs S.

7. On 16 March 2007 the Zmiyivskyy District Court authorised the applicant's pre-trial detention. The court indicated that the applicant was suspected of committing a serious crime, had been previously convicted on many occasions, had had negative character assessments, drank excessively and did not work. Therefore, the court was of the opinion that the applicant might abscond, commit other crimes or hinder the investigation. The applicant did not appeal against this decision.

8. On 10 May 2007, on completion of the preliminary investigation, the applicant's criminal case was sent to the court.

9. On 25 June 2007 the Zmiyivskyy District Court rejected the applicant's request for release. The parties did not submit a copy of this decision.

A. Facts concerning the applicant's medical treatment in the SIZO as presented by the applicant

10. On 28 March 2007 (in some submissions the applicant refers to 23 March 2007) the applicant was placed in the SIZO. The applicant stated that he had requested his release as he was suffering from cancer.

11. Immediately on his arrival, the applicant complained about his health problems but was examined and diagnosed only a month later.

12. In April 2007 the applicant was diagnosed with liver cirrhosis and advanced cancer of the left kidney with metastasis in the lungs. The applicant received symptomatic treatment including the use of narcotic analgesics but, according to him, the quantity of analgesics was not sufficient given the advanced stage of his cancer.

13. On 26 July 2007 the Zmiyivskyy District Court ordered a medical examination of the applicant in order to establish the severity of his condition. The applicant was not provided with any medical treatment.

14. From 9 to 17 August 2007 the medical examination of the applicant took place, confirming the previous diagnosis.

15. The applicant's representative in the criminal proceedings, allegedly Mr Kh., lodged numerous requests with the court for the applicant to be released in view of his serious state of health, but to no avail. No copies of these requests or the court's refusals were submitted by the applicant.

16. On several occasions – at least four times – the applicant was escorted to court hearings which took place about 50 kilometres away from the SIZO. The applicant stated that the conditions in which he was transported, given his serious state of health, had caused him extensive suffering. In particular, he had to wait in a room measuring one square metre for the arrival of the prison van. The trip lasted approximately two hours and the applicant was not fed or provided with any medical assistance. The applicant stated that any movement had been painful for him and that being transported to the courthouse had caused him severe distress; on the last two occasions his health had seriously deteriorated as a result.

B. Facts concerning the applicant's medical treatment in the SIZO as presented by the Government

17. From 15 to 28 March 2007 the applicant stayed in Zmiyivska Central Hospital, where he received treatment for an injury to the left hand, lymphangitis (an inflammation of the lymphatic channels) of his left arm and pneumonia.

18. On 28 March 2007 the applicant was placed in the SIZO.

19. On arrival at the SIZO the applicant complained about headaches and pain in the right part of his chest. On the next day he was diagnosed with pneumonia and placed in the hospital wing of the SIZO. However, on 2 April 2007 he was transferred to Kharkiv City Clinic (*Міська клінічна лікарня № 1 м. Харкова*) where he stayed until 20 April 2007. During his stay in the clinic, the applicant was diagnosed with cancer.

20. On 6 and 12 April 2007 the applicant was examined in Kharkiv Oncology Hospital (*Харківський обласний клінічний онкологічний диспансер*) and diagnosed with cancer of the left kidney. On his discharge from the hospital he was prescribed symptomatic treatment.

21. On 20 April 2007 the applicant was returned to the SIZO. He was diagnosed with advanced cancer with metastasis, chronic hepatitis and vasculitis (a heterogeneous group of disorders that are characterised by inflammatory destruction of blood vessels) and placed in the hospital wing, where he stayed until 18 May 2007.

22. Since April 2007 the SIZO authorities have several times requested the Ministry of Internal Affairs and the Zmiyivskyy District Court to accelerate the proceedings in the applicant's case or to order the applicant's release but, apparently, to no avail. No copies of such requests or decisions taken in respect of them have been provided to this Court.

23. The applicant also stayed in the hospital wing of the SIZO from 6 to 20 June, 13 to 20 July and 31 July to 11 December 2007.

24. Between June and August 2007 the applicant frequently complained of pains in the left side of his body. He was prescribed some painkillers, antibiotics and vitamins.

25. On 4 July 2007 the applicant lodged a written request to participate in a court hearing scheduled for 5 October 2007.

26. On 26 July 2007 the Zmiyivskyy District Court, which was considering the applicant's criminal case, ordered the medical examination of the applicant.

27. From 2 August to 11 September 2007 the applicant constantly had a high body temperature (38-39°). His medical file contains a reference to a telephone conversation of 8 August 2007 during which the head doctor of Kharkiv Oncology Hospital refused to admit the applicant since “according to the medical findings of 12 April 2007, the applicant could not undergo surgery”. The applicant's condition was described as of “medium severity” (*“середньої тяжкості”*).

28. Between September and October 2007 the applicant's condition remained serious; however, he had no fever and his body temperature was normal.

29. On 5 and 12 October 2007 the applicant participated in court hearings.

30. On 5 October 2007 the applicant was examined by a doctor from Zmiyivska Central Hospital. The applicant requested a prescription for morphine injections.

31. On 24 October 2007 the Kharkiv City health department was requested to assist the SIZO in providing pain relief since the SIZO was not entitled to buy narcotic analgesics.

32. On 25 October 2007 the applicant underwent an examination in Kharkiv Oncology Hospital.

33. Since 1 November 2007 the applicant has been receiving morphine injections.

34. On 5 November 2007 the applicant participated in a court hearing. A doctor was called into the hearing but the applicant refused to be examined. The doctor concluded that, judging from the applicant's appearance, he could participate in a court hearing, but recommended further diagnostic tests in a specialised hospital. By a separate ruling the court decided to make enquiries with the SIZO about the applicant's state of health since “he could not participate in a court hearing after the morphine injections and refused to participate without having them”.

35. On 8 November 2007 the applicant was examined by a doctor from Kharkiv City Hospital, who recommended the use of morphine twice a day.

36. On 12 November 2007 the applicant refused blood and urine tests and requested an increase in his morphine injections.

37. On an unspecified date in November 2007 the applicant requested his transfer to a civil hospital, a course of chemotherapy and an increase in his morphine injections. He was refused on the ground that “the oncologist had not prescribed such treatment”. The applicant, however, refused further diagnosis.

38. On 21 November 2007 the applicant participated in a court hearing and was assisted by a medical professional.

39. On 23 November 2007 the applicant again refused to submit to a blood test.

40. On 30 November 2007 the applicant was examined in Kharkiv Oncology Hospital. A biopsy was prescribed, as well as analgesics. According to the Government, the applicant refused to undergo a biopsy.

41. On 5 December 2007 the Governor of the SIZO hospital wing informed the court that, given the applicant's diagnosis, his state of health was serious; he could, however, participate in the court hearings.

42. On 6 December 2007 the applicant participated in a court hearing.

C. Interim measures and subsequent events

43. On 11 December 2007, following the applicant's request for Rule 39 of the Rules of Court to be applied, the President of the Fifth Section of this Court decided that the Government of Ukraine should ensure that the applicant was transferred to a hospital or other medical institution where he could receive the appropriate treatment.

44. On the same day the applicant was transferred to Kharkiv Oncology Hospital. On admission he was diagnosed with cancer of the kidney (hypernephroma) in the advanced stage (T3-4 N1M1).

45. By a letter of 14 December 2007 the head doctor of Kharkiv Oncology Hospital informed the Governor of the SIZO that on 11 and 13 December 2007 the applicant had refused any diagnostic tests and requested that the prosecutor and a representative of the Kharkiv Human Rights Group be present during his examination. The applicant explained his refusal to give blood tests by saying that he "wanted to live". The hospital personnel also complained to the hospital management that the applicant had sworn at them and insisted that they leave his ward. The head doctor stated that in the absence of any diagnosis it was not appropriate for the applicant to stay in a specialised hospital. Later, allegedly following the intervention of the applicant's lawyer, the applicant agreed to further examination. The doctors decided that the applicant should undergo a biopsy and that in the event of confirmation of the diagnosis surgery should be performed. After several refusals the applicant finally agreed to a biopsy and surgery.

46. On 24 December 2007 the court proceedings in the applicant's case were stayed because of the applicant's illness.

47. According to the applicant, from 11 December 2007 until, at the earliest, 19 September 2008, he was handcuffed to his bed. By letter of 27 December 2007 the applicant's lawyer informed this Court that he had complained about this matter to the Governor of the SIZO.

48. By a letter of 8 January 2008 the Zmiyivskyy District Court rejected Mr Kristenko's request for information concerning the applications for the applicant's release and all court decisions taken in response to those applications, since Mr Kristenko had not submitted a proper power of attorney.

49. On 11 January 2008 the applicant underwent surgery. Afterwards he continued to receive morphine injections.

50. On 23 January 2008 the applicant was diagnosed with cancer of the kidney (hypernephroma), stage T3N0M0 2/2 clinical group.

51. By a letter of 23 January 2008 the deputy head doctor of Kharkiv Oncology Hospital requested the Governor of the SIZO to remove the applicant since there was no further need for him to stay in a specialised hospital and he was currently occupying a four-bed ward as he was being guarded by three SIZO officers.

52. On 1 February 2008 the authorities of the SIZO requested the Kharkiv health department and the Kharkiv regional prosecutor's office to admit the applicant to the radiotherapy department of the Oncology Hospital since the SIZO did not have the proper equipment and personnel for the applicant's further treatment.

53. From 4 to 17 February 2008 the applicant underwent radiotherapy. Subsequently he refused to continue it.

54. By letters of 19 and 27 February 2008 the deputy chief doctor of Kharkiv Oncology Hospital informed the Governor of the SIZO that the applicant had to be discharged from the hospital since he had refused to undergo radiotherapy, and the place in the hospital was expensive and was needed by other patients.

55. On 29 February 2008 the applicant was examined by a panel of doctors who concluded that his state of health was satisfactory and that he could be discharged from the hospital but placed under the supervision of an oncologist.

56. On 29 July 2008 the Zmiyivskyy District Court resumed proceedings in the applicant's case. The court considered the request by the applicant's lawyer (Mr Kh.) to release the applicant and rejected it. The court noted that the applicant was accused of committing a serious crime. The prosecutor and the victims, S. and Ya., objected to the applicant's release. In particular, S. stated that the applicant, while in detention, had written letters in which he had threatened her son and promised to pay him to change his testimonies and to incriminate another person, M. The applicant had never been employed, had no means of supporting himself and did not maintain any ties with his relatives.

57. By letter of 12 September 2008 the hospital informed the Governor of the SIZO that the applicant was suffering from cancer of the left kidney (medium stage) but did not need hospital treatment and could be held in the SIZO.

58. On 7 October 2008 the applicant was returned to the SIZO.

59. On 20 November 2008 the President of the Fifth Section reconsidered the present application and decided to lift the interim measure previously indicated on 11 December 2007 under Rule 39 of the Rules of Court.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

60. The relevant extracts from the Constitution read as follows:

Article 28

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

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

Article 55

“Human and citizens' rights and freedoms shall be protected by the courts.

Everyone is guaranteed the right to challenge in a court the decisions, actions or omissions of bodies exercising State power, local self-governing bodies, officials or officers.

...After exhausting all domestic legal remedies, everyone has a right of appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.”

B. Code of Criminal Procedure, 1960

Article 280

“If a defendant ... is suffering from a mental or other serious long-term illness which makes further consideration of the case impossible, the court shall stay proceedings in the case until the defendant's recovery...”

C. 1993 Pre-trial Detention Act

61. Section 18 of the Act sets out rules governing the use of security measures including the use of handcuffs. Prison officers are entitled to use force and special equipment, including unarmed combat, handcuffs, truncheons, etc., with a view to putting an end to physical resistance, violence, outrage (*безчинства*) and opposition to the lawful directions of the authorities of the detention facility, when other means of achieving a

legitimate objective prove ineffective. The type of security measure and the time and manner of its use depend on the particular circumstances of the case and the personality of the detainee. The use of force should be preceded by a warning if the circumstances so allow. If the use of force cannot be avoided, it should not exceed the level necessary for fulfilment by the officers of their duties and should be carried out so as to inflict as little injury as possible. Those persons against whom security measures have been used should undergo a medical examination.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

62. The applicant complained that from 23 March to 10 December 2007 he had not been provided with adequate medical treatment in the SIZO and that, given his state of health, the conditions in which he was transported to the court hearings had amounted to torture. The applicant further complained that the morphine injections administered to him had favoured his relapse into drug addiction, since from 1997 until his arrest and detention he had been addicted to drugs. Finally, the applicant complained of his handcuffing in the hospital.

Article 3 of the Convention reads as follows:

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

A. Adequate medical treatment

1. Admissibility

63. 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.

2. Merits

64. The applicant argued that since 14 March 2007 he had been deprived of his liberty and, therefore, the authorities of Ukraine had been obliged to provide him with the appropriate medical treatment and assistance. However, it was not until 6 April 2007 that he had been diagnosed with cancer; his treatment had commenced on 12 April 2007, six days after the diagnosis was made. The applicant was of the opinion that he should have undergone a puncture biopsy to confirm the diagnosis, which could only

have been performed in a specialised hospital. He believed that his treatment was aimed at relieving his pain and not at recovery. As a result his health had deteriorated significantly. Accordingly, the applicant submitted that his symptomatic treatment, including the morphine injections, had not been adequate, in breach of Article 3 of the Convention.

65. The Government stated that the applicant had been provided with the necessary medical assistance. During the applicant's stay in the SIZO, his state of health had not deteriorated and his condition remained stable.

66. The Government observed that on numerous occasions the applicant had been offered examinations and, in particular, blood and urine tests; however, even after his admission to Kharkiv Oncology Hospital in accordance with Rule 39 applied by the Court, the applicant had refused to be examined. Furthermore, a biopsy, which was necessary to confirm his diagnosis, was prescribed for the applicant on several occasions, but it was only in late December 2007 that he had agreed to it and to subsequent surgery. Instead, the applicant had constantly requested an increase in the number of morphine injections. After having undergone surgery, the applicant had been prescribed further treatment, which he had also refused. Therefore, the applicant's negative conduct had prevented the doctors from confirming his diagnosis and prescribing appropriate treatment.

67. The Government emphasised that the applicant's state of health had been constantly monitored by the doctors of the SIZO hospital wing and when it deteriorated the applicant had been sent to civil hospitals, where he had undergone medical treatment or had been examined in order to be diagnosed. The Government further noted that the doctors of the SIZO hospital wing had always carefully followed the instructions of their civil hospital colleagues.

68. The Government, therefore, were of the opinion that the medical treatment available to the applicant in the SIZO complied with the requirements of Article 3 of the Convention.

69. The Court has emphasised on a number of occasions that the health of prisoners has to be adequately secured (see *Kudla v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI). However, the Court has also held that Article 3 of the Convention cannot be interpreted as securing to every detained person medical assistance of the same level as “in the best civilian clinics” (see *Mirilashvili v. Russia* (dec.), no. 6293/04, 10 July 2007). It further held that it was “prepared to accept that in principle the resources of medical facilities within the penitentiary system are limited compared to those of civil[ian] clinics” (see *Grishin v. Russia*, no. 30983/02, § 76, 15 November 2007). On the whole, the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be “compatible with the human dignity” of a detainee, but should also take into account “the practical demands of

imprisonment” (see *Aleksanyan v. Russia*, no. 46468/06, § 140, 22 December 2008).

70. In the present case the applicant was arrested on 14 March 2007. On the next day he was admitted to Kharkiv City Clinic, where he stayed until 28 March 2007, a fact which is confirmed by the medical records. On the applicant's subsequent arrival at the SIZO it was revealed that he had various health problems, some of which necessitated his placement in the hospital wing and later in a civil hospital. Contrary to the applicant's allegations that he had objected to his detention in March 2007 in view of his cancer, the medical records show that it was only during the applicant's stay in Kharkiv City Clinic in April 2007 that he was diagnosed with cancer, this diagnosis being confirmed later during his examination in Kharkiv Oncology Hospital. The applicant was returned to the SIZO on 20 April 2007 and the SIZO authorities cannot therefore be held liable for the applicant's treatment from 15 to 28 March and from 2 to 20 April 2007, when he was in civil hospitals.

71. After being returned to the SIZO the applicant stayed mainly in the hospital wing and was given the symptomatic treatment prescribed to him on his discharge from the civil hospitals. The Court notes that the applicant complained about the inadequacy of that treatment, which for the most part consisted of painkillers, the dosage of which was also considered by the applicant to be insufficient. In this respect the Court notes that there is no indication that the SIZO medical staff did not follow the prescriptions issued by their colleagues in the civil hospital, and the Court is not in a position to speculate on the adequacy of the medical treatment prescribed to the applicant in the civil hospitals, especially given the nature of his disease.

72. The Court further notes that, according to the doctor's findings of 12 April 2007, at that time the applicant could not be subjected to surgery (see paragraph 27). Even assuming that with time the applicant's condition had changed, he refused further diagnosis, instead requesting an increase in the dosage of narcotic painkillers. It is clear from the documents submitted by the Government that the applicant constantly resisted diagnosis and treatment in the SIZO and later in Kharkiv Oncology Hospital; this fact is not disputed by the applicant.

73. The Court is of the opinion that in the circumstances of the present case the SIZO authorities undertook sufficient measures to secure the applicant's health and that his treatment while in detention complied with the requirements of Article 3 of the Convention.

74. Therefore, the Courts finds that there is no violation of Article 3 of the Convention in respect to the applicant's medical treatment in detention.

B. Conditions of transport

1. Admissibility

75. Referring to Article 55 of the Constitution of Ukraine, the Government argued that the applicant had failed to lodge with any national court a relevant complaint against the SIZO staff.

76. The applicant submitted that he and his lawyer had repeatedly lodged complaints about the applicant's being convoyed to the court hearings. Although no copies of such complaints have been submitted, the applicant argued that they were confirmed by the fact that the first-instance court had repeatedly inquired about the applicant's state of health. The applicant further stressed that the Government had not shown how recourse to the proceedings indicated could have brought about any improvement in the conditions in which the applicant was transported.

77. The Court reiterates that the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see, for example, *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

78. The Court notes that, except for a general reference to the provisions of the Constitution of Ukraine, the Government did not provide any further details concerning the alleged effectiveness of the proposed remedy in the circumstances of the present case and did not show how this remedy could have afforded redress to the applicant. The Court therefore rejects the Government's objection.

79. 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.

2. Merits

80. The applicant challenged the Government's statement that he had been accompanied by medical staff when being transported to the court hearings. The applicant submitted that since there had been no oncologist in the SIZO, its doctors were not competent to draw conclusions as to the applicant's ability to participate in court hearings. The applicant further submitted that because of the deterioration of his health almost every time after he had been transported to the court, an ambulance had been called and

the doctors had indicated the applicant's poor state of health and the need for urgent specialised treatment.

81. The Government noted that from May to December 2007 the applicant had participated in nine court hearings. When scheduling the hearings the court had periodically verified whether the applicant was fit to participate in the hearing. When being transported to the court hearings the applicant was accompanied by a medical professional. The Government further noted that the applicant had insisted on participating in the hearing of 5 October 2007. Moreover, he had refused to be examined by a doctor at the court hearing of 5 November 2007. Therefore, the Government were of the opinion that the conditions in which the applicant was transported to the court hearings did not attain the minimum threshold of severity necessary for Article 3 of the Convention to apply.

82. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

83. The Court points out that in the present case the applicant alleged that the conditions in which he had been transported to the court hearings, in combination with his poor state of health, had amounted to torture. In this respect the Court notes that the only account of the conditions of transport from the detention facility to the court is that furnished by the applicant and it has not been corroborated by any further evidence. The Court reiterates that Convention proceedings such as the present application do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in certain instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004).

84. However, in the present case the transport conditions described by the applicant cannot on their own be sufficient to conclude that they amounted to inhuman or degrading treatment. The Court therefore has to decide whether those conditions, in combination with the applicant's state of health, can be considered to exceed the minimum level of severity required to constitute a violation of Article 3 of the Convention.

85. In this connection the Court notes that the applicant was regularly checked by the SIZO doctors and by the doctors in the civil hospitals and found to be fit to be transported. The Court believes that although the SIZO

did not have its own oncologist, the finding as to whether an applicant can take part in court hearings does not require any specialist knowledge. Moreover, as noted above, on some occasions it was difficult to establish the applicant's precise condition, given his refusal to be diagnosed. In particular, the applicant refused to be examined by a doctor called into the court hearing on 5 November 2007. In addition, the applicant failed to submit any evidence in support of his statement that each time he was transported to a hearing his state of health deteriorated significantly afterwards.

86. Therefore, the Court finds that the treatment to which the applicant was subjected during his transport to and from the court did not exceed the minimum level of severity required under the Convention. Accordingly, there has been no violation of Article 3 of the Convention in this respect.

C. Use of narcotic drugs

87. The applicant complained that the use of morphine had not been an appropriate medical treatment but instead had resulted in his becoming addicted to drugs again, since he had been a drug addict since 1997 but had stopped shortly after his arrest and detention. The applicant was of the opinion that the medical treatment in question had amounted to torture.

88. The Court notes that the morphine injections were prescribed to the applicant by the doctors of the civil hospitals at his own request. The Court is not in a position to decide on the necessity and appropriateness of the medical treatment prescribed for the applicant by the civil doctors. Moreover, there is no indication that the morphine injections caused the applicant suffering which reached the minimum threshold of severity within the meaning of Article 3 of the Convention. Therefore, it follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Handcuffing in hospital

1. Admissibility

89. The Government repeated their argument concerning the applicant's failure to lodge with any national court a relevant complaint against the SIZO staff under Article 55 of the Constitution of Ukraine.

90. The applicant stated that after being placed in Kharkiv Oncology Hospital he had no possibility of seeing his representative, Mr Kristenko, or of filing a claim with the court, while Mr Kristenko did not have a proper power of attorney to file such a claim on the applicant's behalf. Moreover, the criminal proceedings in the applicant's case were stayed.

91. The Court has noted above (see paragraphs 77-78) that the Government did not show how the proposed remedy would have changed the applicant's situation. It therefore rejects the Government's objection.

92. 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.

2. Merits

93. The applicant submitted that from 11 December 2007 and, at least, until 19 September 2008 he had been constantly handcuffed to his bed while in the hospital – with one hand during the day and with both hands during the night. He further noted that he had been constantly guarded by three SIZO officers and had been in a ward with a barred window, which significantly reduced the likelihood of his escaping. Moreover, neither in the SIZO nor in the hospital had the applicant attempted to escape or behaved aggressively. Therefore, in the applicant's opinion his handcuffing to the bed had not been justified and constituted inhuman treatment in breach of Article 3 of the Convention.

94. The Government indicated that the applicant had been handcuffed in the hospital in order to ensure staff safety and to prevent the applicant escaping. The Government further noted that the applicant had been able to move freely and to have meals without difficulties. Therefore, the Government stated that there had been no ill-treatment of the applicant.

95. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. 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 sex, age and state of health of the victim (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI, and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III).

96. Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see *Peers*, cited above, § 74).

97. Handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary. In this regard, it is important to consider, for instance, the danger of the person's absconding or causing injury or damage (see *Raninen v. Finland*, 16 December 1997, § 56, *Reports of Judgments and Decisions* 1997-VIII, and *Henaf v. France*, no. 65436/01, §§ 50-53, ECHR 2003-XI).

98. In the present case, the Court notes that although the applicant had refused examination and treatment and sworn at the hospital personnel, there is no indication that he ever behaved violently or attempted to escape. Furthermore, it is not disputed by the parties that the applicant was constantly guarded by three SIZO officers. Moreover, when taken to the hospital the applicant had been suffering from an advanced stage of cancer and after undergoing surgery and subsequent radiotherapy was in a weak condition. Therefore, the Court considers that the applicant's handcuffing could not be justified by security reasons and, given his poor state of health, is to be considered as inhuman and degrading treatment.

There has therefore been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

99. The applicant complained under Article 5 § 3 of the Convention that, given his state of health, his detention from 23 March until 11 December 2007 had been unlawful.

100. The Court notes that it is more appropriate to consider the applicant's complaint under Article 5 § 1 (c) of the Convention, which is the relevant provision.

101. The applicant further complained under Article 5 § 4 of the Convention that he had not been able to challenge his detention because as of 24 December 2007 the proceedings in his case had been stayed.

102. The relevant parts of Article 5 read as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

Admissibility

103. The Government submitted that the applicant could have appealed against the decision to place him in pre-trial detention and thus he had not exhausted effective domestic remedies in respect of his complaint under Article 5 § 1 (c) of the Convention.

104. The applicant indicated that he was not complaining about the court's decision on his pre-trial detention but about the lawfulness of his subsequent detention in spite of his health problems.

105. The Court notes that the decision on the applicant's pre-trial detention was taken on 16 March 2007, before the applicant was diagnosed with cancer, and that it is therefore irrelevant in the present case. The Court therefore rejects the Government's objection.

106. The Court further notes that the applicant did not submit copies of the requests for his release or copies of any decisions taken in response to these requests. Furthermore, the applicant did not demonstrate that there had been insuperable difficulties which prevented him from obtaining such copies. Although the national court rejected the request by the applicant's representative to provide him with the necessary documents, no copy of this request has been submitted to the Court and there is no evidence that the applicant's representative possessed and presented to the court a proper power of attorney or referred to the present application before this Court in order to receive the necessary copies. Therefore, the Court considers that the applicant's complaints under Article 5 § 1 (c) are unsubstantiated.

107. Furthermore, the applicant failed to substantiate his complaints under Article 5 § 4 of the Convention. In particular, there is no evidence that the applicant ever requested his release after the proceedings in his case had been stayed. The applicant's reference to Article 280 of the Criminal Procedure Code is not sufficient basis on which to conclude that he lodged such a request.

108. In these circumstances the Court considers that the applicant's complaints under Article 5 of the Convention are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

109. On 14 October 2008 the applicant complained that the Government had failed to comply with the interim measures indicated by the Court under Rule 39 of the Rules of Court on 11 December 2007, since he had been transferred from the hospital back to the SIZO.

110. The Government submitted that the applicant's state of health had improved and that his return to the SIZO was required to enable the consideration of his criminal case to continue.

111. The Court notes that this complaint should be considered under Article 34 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 128, ECHR 2005-I, and *Paladi v. Moldova* [GC], no. 39806/05, §§ 87-88, 10 March 2009).

Article 34 of the Convention provides:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Rule 39 of the Rules of Court provides:

“1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

2. Notice of these measures shall be given to the Committee of Ministers.

3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.”

112. The Court notes that on 11 December 2007 the President of the Fifth Section of this Court decided under Rule 39 of the Rules of Court that the Government of Ukraine should ensure that the applicant was transferred to a hospital or other medical institution where he could receive appropriate treatment. On the same day the applicant was admitted to Kharkiv Oncology Hospital, where he underwent surgery and post-surgery radiotherapy. After having refused further treatment, in February 2008 the applicant was examined by a panel of doctors who concluded that his state of health was satisfactory and that he could be discharged from the hospital. Although the applicant was not completely cured, his state of health had improved a fact which was further confirmed by the doctors' findings made in September 2008.

113. The Court notes that the interim measure indicated was limited to the applicant's admission to the appropriate hospital and could be understood as implying that the applicant could be returned to the SIZO once his state of health permitted. The Court would nevertheless like to point out that it would have been more appropriate for the respondent Government to request the lifting of the interim measure under Rule 39 before transferring the applicant to the SIZO. However, given the nature of the interim measure applied in the present case and the improvement of the applicant's health, the Court concludes that the domestic authorities fulfilled their obligation to comply with the interim measure at issue. Accordingly, there has been no violation of Article 34 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

114. Lastly, the applicant complained that the relevant legislation which provided for the release of persons suffering from serious diseases did not concern persons in pre-trial detention but only those serving sentences. In this connection the applicant invoked Article 14 of the Convention taken in conjunction with Article 5 and Protocol No. 12.

115. In this regard the Court notes that the absence of specific legislation referred to by the applicant did not prevent him in any way from requesting release pending trial. Therefore, it follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

116. 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

117. The applicant claimed 150,000 euros (EUR) in respect of non-pecuniary damage.

118. The Government considered that the applicant's claims for non-pecuniary damage were excessive.

119. The Court considers that the applicant suffered non-pecuniary damage on account of his handcuffing in the hospital which cannot be compensated for by the mere finding of a violation of his Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards him EUR 1,000 under this head.

B. Costs and expenses

120. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court.

121. The Government indicated that the applicant had failed to present any contract signed with Mr Kristenko or any relevant invoices. Therefore, the Government argued that the applicant's claims should be rejected as unsubstantiated.

122. 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, the applicant failed to submit any documents justifying the claimed expenses. The Court therefore makes no award in this respect.

C. Default interest

123. 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 of the Convention concerning the adequacy of the applicant's medical treatment in the pre-trial detention centre, the conditions in which he was transported to the court hearings and his handcuffing in the hospital admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 3 of the Convention in respect of the adequacy of the applicant's medical treatment in the pre-trial detention centre;
3. *Holds* that there has been no violation of Article 3 of the Convention in respect of the conditions in which the applicant was transported to the court hearings;
4. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicant's handcuffing in the hospital;
5. *Holds* that the respondent State has not failed to comply with its obligations under Article 34 *in fine* of the Convention;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President