

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

FIFTH SECTION

CASE OF BASENKO v. UKRAINE

(Application no. 24213/08)

JUDGMENT

STRASBOURG

26 November 2015

FINAL

26/02/2016

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



In the case of Basenko v. Ukraine,

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

Josep Casadevall, *President,*
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal,
Síofra O'Leary, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 20 October 2015,

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

PROCEDURE

1. The case originated in an application (no. 24213/08) 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 Aleksandr Anatolyevich Basenko ("the applicant"), on 5 May 2008.

2. The applicant was represented by Mr A.A. Kristenko, a lawyer practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr B. Babin, of the Ministry of Justice.

3. On 26 November 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1958 and lives in Kyiv.

5. On 24 February 2002 the applicant was travelling on a tram and was approached by Mr G. and Mr S., ticket inspectors employed by the Kyivpastrans municipal enterprise ("the transport company"). As subsequently established by domestic authorities in the indictment and in the judgment convicting S. (see paragraphs 31 and 34 below), there was a disagreement between the applicant and the inspectors as to whether he had a valid ticket. They insisted that the applicant pay a fine for travelling

without a ticket, while he insisted that he had broken no rules. The applicant was asked to get off the tram. It was then agreed that the applicant would accompany the inspectors to a tram depot to resolve the dispute. While they were on their way to the depot S. kicked the applicant. In response the applicant sprayed the inspectors with tear gas from a can he had on him. S. then kicked the applicant in the left knee, causing a fracture. A struggle between the applicant and S. ensued. G. and S. then left the scene. The applicant could not stand up or walk following the knee fracture, he was helped to the nearby tram stop by the bystanders who called an ambulance for him. According to the applicant, he has been receiving treatment for his injury until early 2005.

A. Criminal proceedings

6. On 26 February 2002 the applicant made a statement to the police describing the circumstances of the incident. In particular, he stated that on the day of the incident he had been approached by two ticket inspectors who questioned the validity of his ticket, suggesting that he appeared too old to be using a student ticket. While they insisted that he pay a fine he insisted his ticket was in order. He volunteered to go with them to a police station to resolve the dispute. In response they suggested that they go to the tram depot instead and he agreed. On the way to the depot he was kicked from behind. He turned round and sprayed the inspectors with tear gas, and was kicked in the knee. He stated that he did not know the names of the inspectors but could identify them by sight.

7. On 4 March 2002 a police investigator of the Svyatoshynskyy District Police Department ("the District Police Department") refused to institute criminal proceedings into the incident. The investigator noted that the ticket inspector on duty on the tram line in question at the relevant time was identified as S. He went on to note that S. could not be contacted for an interview since he was said to be on sick leave from work and was not found at his home address. The investigator also noted that the gravity of the applicant's injuries could only be evaluated after completion of the applicant's treatment.

8. On 5 March 2002 a forensic medical expert diagnosed the applicant with a knee fracture and classified this as bodily injuries of medium gravity.

9. On 18 December 2002 the Svyatoshynskyy District Prosecutor's Office ("the District Prosecutor's Office") quashed the decision of 4 March 2002 and instituted criminal proceedings on suspicion of deliberate infliction of bodily injuries of medium gravity. On the same day the District Prosecutor's Office informed the applicant about this decision, also informing him that disciplinary proceedings had been initiated against the investigator who made the decision of 4 March 2002. According to the

applicant, he first learned about the decision of 4 March 2002 from this letter from the District Prosecutor's Office.

10. On 24 December 2002 another investigator of the District Police Department commenced the investigation.

11. On 28 December 2002 the investigator recognised the applicant as an aggrieved party in the criminal proceedings. On the same day the applicant was interviewed in this capacity.

12. On 4 April 2003 the investigator sent a letter to the transport company enquiring whether S. had been working at the relevant time as a ticket inspector and asking the company to identify who S. had been working with on the day of the incident. In April 2003 the company responded that S. had indeed been working as an inspector at the relevant time, that G. had accompanied him on the day of the incident, and that S. had been dismissed on 16 June 2002 for absenteeism.

13. On 9 April 2003 the applicant, in the course of a photo identification, identified S. as the person who had assaulted him.

14. According to the Government, on 18 April 2003 the investigation was suspended for failure to identify the perpetrator.

15. On 18 September 2003 the investigation was resumed.

16. On 9 October 2003, in the course of a photo identification, the applicant identified G. as the person who, together with S., participated in the incident.

17. On 14 October 2003 the investigation was suspended for failure to identify the perpetrator.

18. On 31 August 2004 the District Police Department informed the applicant that the investigation in his case was pending.

19. On 2 February 2005 the District Prosecutor's Office quashed the decision of 14 October 2003 to suspend the investigation, finding that possible perpetrators had in fact been identified.

20. On 20 February 2005 the investigation was suspended for failure to identify the perpetrator.

21. On 5 April 2005 the investigator resumed the investigation, initiated criminal proceedings against S. and G., and joined the newly initiated proceedings with the existing case file.

22. On 14 April 2005 the investigator charged S. with infliction of bodily injuries of medium gravity, committed in conspiracy with G. The investigator placed S. and G. on the list of wanted persons, and suspended the investigation as the whereabouts of the accused were unknown.

23. On 20 February and 4 May 2006 the investigator decided to resume the investigation, and on 22 February and 4 May 2006 respectively to suspend it again.

24. On 10 June 2006 the investigation was resumed.

25. On 12 June 2006 a face-to-face confrontation was conducted between G. and the applicant, and the applicant was interviewed separately.

The applicant stated that S. had kicked him on the knee. While he was not certain that G. had assaulted him, he was assuming that it was G. who had kicked him in the back on 24 February 2002.

26. On 14 June 2006 the investigator discontinued the criminal proceedings against G. for lack of *corpus delicti* in his actions. He relied on the testimony of G., who denied assaulting the applicant, and the testimony of the applicant to the effect that it was S. and not G. who had assaulted him. On the same day he suspended the remaining part of the investigation for failure to identify the perpetrator.

27. According to the Government, on 24 September 2007 S. was arrested. On the same day the investigation was resumed and the charges were announced to S.

28. On 25 September 2007 a face-to-face confrontation was conducted between S. as the accused and the applicant as the aggrieved party.

29. On 20 October 2007 the investigator charged S. with infliction of bodily injuries of medium gravity.

30. According to the Government, on an unspecified date, upon completion of the pre-trial investigation in S.'s case, the applicant was offered an opportunity to study the case file but refused it. According to the applicant, he was not informed about the completion of the investigation or any of the subsequent developments in the criminal proceedings.

31. On 29 October 2007 the District Prosecutor's Office approved the bill of indictment indicting S. for infliction of bodily injuries of medium gravity.

32. On 9 November 2007 the Svyatoshynskyy District Court of Kyiv ("the trial court") held a preliminary hearing in S.'s case, in which S., his lawyer and a prosecutor participated. The record of the hearing states that the applicant was not present at the hearing.

33. On 20 November 2007 the trial court examined the case on the merits in the presence of S., his lawyer and the prosecutor and in the absence of the applicant. The trial court, after obtaining favourable opinions from all parties present, ruled that the hearing should proceed in the absence of the applicant and witness G. who, the court stated, "had been duly notified about the hearing". The court further ruled that, should their presence prove necessary, measures would be taken to ensure the applicant's and G.'s appearance**.** In the course of the hearing the court heard a statement from S.. S. did not contest the charges and admitted his guilt. The court ruled that in view of S.'s confession and admission of guilt there was no call to examine any other evidence.

34. On the same day the trial court convicted S. as charged and sentenced him to two years' imprisonment, suspended for two years with probation. In sentencing S. the court took into account that S. had admitted his guilt and expressed remorse, the fact that he had no prior convictions,

was employed and had positive references from his then-current place of employment.

35. According to the information submitted by the Government, the domestic case file in S.'s case does not contain any copies of summonses or notices sent to the applicant in the course of examination of the case by the trial court or any documents indicating that such summonses or notices were sent.

B. Civil proceedings

36. On 7 February 2005 the applicant lodged a civil claim with the Holosiyivskyy District Court of Kyiv, against the transport company, seeking damages for the unlawful actions of its employees.

37. On 15 November 2005 the court rejected his claim on the ground that he had not proved that he had been injured by the employees of the defendant in the performance of their duties. The court noted that the applicant had failed to explain why the individuals identified by him had not yet been charged or convicted, and that the criminal case in connection with the incident was still under investigation.

38. On 24 January 2006 the Kyiv City Court of Appeal upheld the judgment of the first-instance court.

39. On 30 November 2007 the Donetsk Regional Court of Appeal, acting as a court of cassation, upheld the decisions of 15 November 2005 and 24 January 2006.

II. RELEVANT DOMESTIC LAW

A. Code of Administrative Offences of 1984

40. Under Article 135 of the Code, travelling on municipal transport without a ticket shall be punishable with a fine equal to twenty times the fare.

41. Under Article 189-9 of the Code, malicious disobedience of a lawful demand or request of a transport employee exercising supervision over the transportation of passengers associated with physical resistance, insult or other unlawful acts shall be punishable by a fine or a term of correctional service.

42. Under Article 229 of the Code, cases of administrative offences associated with breaches of rules governing the use of passenger electric transport (tram, trolleybus) may be examined, in particular, by the heads of the tram and trolleybus depots and by ticket inspectors.

B. Criminal Code of 2001

43. The relevant provisions of the Code concerning the offence of deliberately inflicting bodily injuries of medium gravity can be found in the Court's judgment in the case of *Sizarev v. Ukraine* (*Sizarev v. Ukraine,* no. 17116/04, § 82, 17 January 2013). The provisions of the Code concerning the offence of abuse of authority of office and the offence of exceeding authority or official powers can be found in the Court's judgment in the case of *Lutsenko v. Ukraine* (no. 6492/11, § 41, 3 July 2012).

C. Code of Criminal Procedure of 1960 (repealed on 20 November 2012)

44. According to Article 28 of the Code a person who has sustained pecuniary damage as a result of a crime may lodge a civil claim against an accused or persons liable for the actions of the accused.

45. The relevant parts of Articles 49 and 206 of the Code provided:

Article 49. Aggrieved party

"A person who has suffered non-pecuniary, physical or property damage from a crime may be recognised as an aggrieved party. ...

A citizen who has been recognised as an aggrieved party shall be entitled to give evidence in the case. An aggrieved party, or his or her representative, shall be entitled to ... make requests; to study all the materials of the case file when the pre-trial investigation is completed ... to lodge complaints against the actions of the inquirer, investigator, prosecutor and court ..."

Article 206. Grounds and procedure for the suspension of an investigation

"Pre-trial investigation in a criminal case shall be suspended:

1) when the whereabouts of the accused are unknown;

2) when a psychiatric or other serious illness of the accused prevents completion of the proceedings in the case;

3) when the investigation has failed to identify the perpetrator.

In the cases provided in paragraphs 1 and 2 of this Article a pre-trial investigation may be suspended only after the investigation has charged a specific person as the accused and has taken all the investigative steps which can be taken in the absence of the accused, and has taken measures to preserve documents and other potential evidence in the case.

In cases provided in paragraph 3 of this Article pre-trial investigation can be suspended only after all necessary and possible investigative steps have been taken to identify the perpetrator ..."

46. Article 217 of the Code required the investigator to inform the aggrieved party about the completion of the pre-trial investigation in the case which was to be sent to court for trial, and also about the aggrieved

party's right to study the case file. The investigator was required to draw up a report of this notification or to add a copy of the notice sent to the case file.

Articles 348 and 349 of the Code provided that an aggrieved party could lodge an appeal against a first-instance court's judgment within fifteen days of its delivery, and that arguments presented in such an appeal had to be limited to the scope of claims presented by the aggrieved party during the trial.

D. Civil Codes of 1963 and 2003

47. The Civil Code of 1963 ("the 1963 Code") remained in effect until 31 December 2003. With effect from 1 January 2004 it was repealed and replaced by the Civil Code of 2003 ("the 2003 Code").

48. The relevant parts of Article 441 of the 1963 Code and Article 1172 of the 2003 Code provide that a legal entity must compensate for any damage caused by its employee in the performance of work-related (official) duties.

E. Companies Act of 1991 (repealed on 1 January 2004)

49. The relevant section of the Act provided:

Section 2
Types of companies

"Companies of the following type may operate in Ukraine ...

municipal companies [komunalne pidpryemstvo], founded on the property of a municipality ..."

F. Rules concerning municipal transport and the powers of ticket inspectors

50. Resolution no. 386 of the Cabinet of Ministers of Ukraine of 22 April 1997 approved the Rules for the Provision of Transportation Services on Municipal Electric Transport. Paragraphs 31 and 32 of the Rules provided that ticketless passengers were subject to administrative liability and their cases could be considered, in particular, by the heads of the tram and trolleybus depots and by ticket inspectors.

51. By its Order no. 22 of 18 November 1997 the State Committee for Construction, Architecture and Housing Policy enacted Rules for Using Trams and Trolleybuses in the Cities of Ukraine. Under sub-paragraph 4.3 of the Rules fines could be imposed for breaches of transportation rules, in particular by the heads of tram and trolleybus depots and by ticket inspectors, and were to be collected on the spot. Under sub-paragraph 4.4 of

the Rules a passenger refusing to pay a fine could be directed to get off at the next stop. In the event of malicious disobedience the passenger could be escorted to the nearest police station.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

52. Referring to Article 5 the applicant complained that his right to "personal inviolability" had been breached, and that as a result he had suffered serious injuries. Under Article 6 the applicant complained that the criminal investigation against S. and G. had been delayed, and that he had not been informed about its progress and was thus deprived of the opportunity to challenge the repeated decisions to suspend the criminal investigation. Under Article 6 the applicant also complained that he had been denied access to a court to adjudicate his civil claim, because the domestic courts had rejected his claim against the transport company as criminal proceedings against S. had not yet been completed. He further referred to Article 7 § 2 of the Convention, arguing that his right of access to court had been breached.

53. Being master of the characterisation to be given in law to the facts of the case, and having regard to the substance of the applicant's complaints, the Court decides to examine them under Article 3 of the Convention (see, for example, *Dembele v. Switzerland*, no. 74010/11, § 33, 24 September 2013).

54. Article 3 of the Convention reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Concerning the procedural limb of Article 3

1. Admissibility

55. The Government did not raise any objections to the admissibility of this complaint. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

56. The applicant argued that the investigation had been ineffective. He submitted that it was unjustifiably lengthy, that there had been periods when the investigative authorities had neglected to act, and that in particular his original statement to the police and the results of the identification of S. and G. had been ignored for a long time. According to him, he had not been informed about the progress of the pre-trial investigation, its completion or S.'s trial. The applicant submitted that as a result he had been prevented from appealing against the judgment by which S. was convicted and sentenced, which, the applicant maintained, was unfair and failed to hold S. genuinely accountable.

57. The Government argued that the investigation conducted by domestic authorities had met the requirements of Article 3 of the Convention. In particular, the authorities had conducted a number of investigative actions, interviewing S., G., and the applicant, conducting photo identifications and face-to-face confrontations, ordering medical examinations, and collecting information from the transport company. The applicant was recognised as a victim and informed about the progress of the investigation.

(b) The Court's assessment

(i) Relevant principles

58. The Court reiterates that Article 3 of the Convention requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion". The minimum standards of effectiveness defined by the Court's case-law include the requirements that the investigation be independent, impartial and subject to public scrutiny. It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. When an official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirement of the prohibition of ill-treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow major attacks on physical and moral integrity to go unpunished (see, for example, *Mesut Deniz v. Turkey*, no. 36716/07, § 52, 5 November 2013, with further references).

59. According to the Court's case-law the investigation must afford a sufficient element of public scrutiny to secure accountability. Whilst the degree of public scrutiny required may vary, the complainant must be afforded effective access to the investigative procedure in all cases (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 137, ECHR 2004-IV, and *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 67, 24 June 2010).

(ii) Application of the above principles to the present case

60. The Court notes at the outset that the Government did not contest that the treatment suffered by the applicant fell within the ambit of Article 3 of the Convention. The Court observes that the assault on the applicant occurred in public, as a result of the assault he could not stand up or walk and had to resort to bystanders' help. This was bound to arouse in him the feelings of humiliation and helplessness, diminishing his dignity. The Court is also conscious of the fact that the assault resulted in a knee fracture, an injury which generally takes more than thirty days to heal. Moreover, according to the applicant's uncontested submissions, his knee fracture required some continued medical treatment for a period of about three years. In view of these considerations, the Court concludes that the violent treatment to which the applicant was subjected on 24 February 2002 constituted inhuman and degrading treatment contrary to Article 3 of the Convention (see and compare *Aleksandr Nikonenko v. Ukraine,* no. 54755/08, §§ 7 and 40, 14 November 2013, and *İbrahim Demirtaş v. Turkey*, no. 25018/10, § 31, 28 October 2014).

61. The applicant promptly brought the attack he had suffered to the attention of the authorities. It follows that the authorities had a duty to carry out an effective investigation of the attack.

(α) As regards the expeditiousness of the domestic proceedings

62. The Court notes that the authorities did not remain completely passive in the present case. The initial investigative steps were taken promptly: the applicant's statement was taken on 26 February 2002, just two days after the incident, and S. was identified as a person of interest in the investigation. Eventually, criminal proceedings were initiated and S. was charged and convicted. However, the investigation was characterised by a number of shortcomings.

63. Firstly, there was a delay in opening criminal proceedings in connection with the attack on the applicant. On 4 March 2002 the investigator refused to institute criminal proceedings in this connection on the ground that the degree of gravity of the applicant's injuries could not be determined even though the very next day a medical expert did determine the gravity of the injuries, classifying them as bodily injuries of medium gravity. Despite this, it was only on 18 December 2002 that the prosecutor

quashed the decision of 4 March 2002 and instituted criminal proceedings. The authorities thus remained largely passive in the initial months after the attack.

64. Secondly, for a considerable period of time the authorities took no active steps to find S. and make him available for questioning (see and compare, in relation to Article 2, *Yuri Illarionovitch Shchokin v. Ukraine,* no. 4299/03, § 43, 3 October 2013, and *Trapeznikova v. Russia*, no. 21539/02, § 85, 11 December 2008). It is to be noted that the police had identified S. as a person of possible interest in the investigation at least as early as 4 March 2002 (see paragraph 7 above). However, there is no indication in the case file that the authorities took any active steps to find S. and to question him until more than three years later, on 14 April 2005, when S. was placed on the list of wanted persons.

65. Thirdly, the pre-trial investigation was repeatedly suspended (see and compare *Dudnyk v. Ukraine*, no. 17985/04, § 36, 10 December 2009, and *Koval and Others v. Ukraine,* no. 22429/05, § 82, 15 November 2012). The case file shows that S. was identified as the possible perpetrator at least as early as 9 April 2003, when the applicant picked him out in the course of the photo identification. Despite this, the investigation was inexplicably suspended just a few days later, on 18 April 2003, on account of a purported failure to identify the perpetrator, and then again on the same ground on 14 October 2003. The Court notes that on 2 February 2005 the supervising prosecutor quashed the decision of 14 October 2003 to suspend the investigation, pointing out that possible perpetrators had in fact been identified. Despite this decision, the proceedings were suspended yet again, on the same ground of purported failure to identify the perpetrator, on 20 February 2005.

66. In view of these findings, the Court concludes that for a considerable period of time the investigating authorities made no genuine or serious attempt to carry out a thorough investigation of the assault on the applicant.

(β) As regards the applicant's access to the investigative procedure

67. Turning to the question of the applicant's access to the investigative procedure, the Court notes the Government's submission that the applicant was officially recognised as an aggrieved party in the criminal proceedings and that this conferred a number of procedural rights on him, in particular the right to study the materials in the case file once the pre-trial investigation had been completed (see paragraph 45 above).

68. However, the Court finds that these rights available to the applicant under domestic law were not consistently available in practice. Thus, according to the applicant's uncontested submissions, he was not informed about the initial decision not to initiate criminal proceedings, taken on 4 March 2002, until 18 December 2002. The Court further notes that on 31 August 2004 the investigating authorities informed the applicant that the

investigation in his case was continuing. This information appears to have been misleading, since the investigation had in fact been suspended on 14 October 2003 and was not resumed until 2 February 2005 following the prosecutor's intervention.

69. The applicant also alleged that the authorities had failed to inform him about the completion of the pre-trial investigation in S.'s case and about his trial and conviction. In assessing this allegation the Court notes that it was apparent from the applicant's initial submissions to the Court that when he introduced his application on 5 May 2008 he was unaware of the completion of the investigation in S.'s case, his trial and conviction. In their observations in response the Government insisted, to the contrary, that the applicant had been informed about the completion of the investigation and had refused to study the case file as he had been invited to do.

70. The Court observes that the Government did not identify the dates of the supposed invitation to study the case file and the applicant's refusal, and did not provide any documents to support their assertion in this regard. Indeed, the Government stated that S.'s case file contained no copies of any summonses or notices which would have been sent to the applicant in the course of examination of the case against S. by the trial court. It is true that the record of the hearing held on 20 November 2007, at which S. was convicted, contains a statement, worded in general terms and without any specific facts, that the applicant had been duly notified of the hearing. However, in several cases concerning Article 6 § 1 of the Convention where it was in dispute whether the applicant had been notified, the Court held, in circumstances similar to the present case, that normally such statements in the hearing records cannot, without more, be viewed as sufficient evidence of notice (see, for example, *Pirali Orujov v. Azerbaijan*, no. 8460/07, §§ 19 and 41, 3 February 2011; *Fyodorov and Fyodorova v. Ukraine*, no. 39229/03, § 100, 7 July 2011; and *Kolegovy v. Russia*, no. 15226/05, § 41, 1 March 2012). In view of the Government's above-mentioned submissions concerning the absence of the relevant documents in the case file, the Court considers it appropriate to adopt the same approach in the present case.

71. In view of the foregoing, the Court finds it established that the applicant was not informed about the completion of the pre-trial investigation in S.'s case, and about his trial or conviction. The applicant was thus effectively precluded from participating in the domestic proceedings at the trial and sentencing stage and was therefore prevented from challenging S.'s sentence which he found inadequate.

(γ) Conclusions

72. The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to carry out an effective investigation into the ill-treatment suffered by the applicant in view of the domestic

authorities' failure to ensure the requisite expediency of the proceedings and their failure to ensure effective access of the complainant to the investigation procedure.

73. There has therefore been a violation of Article 3 of the Convention under its procedural limb.

B. Concerning the substantive limb of Article 3

1. Admissibility

(a) The parties' submissions

74. The Government submitted that the State was not responsible for S.'s actions. They argued that the jurisdiction of the Court extended only to cases of ill-treatment inflicted by representatives of the State. The Government did not dispute that municipal companies could be considered to be under State control as far as they performed obligations entrusted to them by the State. They argued, however, that the State could be held responsible for the actions of the employees of such companies only to the extent they were acting in performance of their official duties at the material time. Interpreting the scope of State responsibility otherwise would place an excessive burden on the State. The Government stressed that S.'s actions could not have been directed at discharging his duties. S. was convicted of an offence against the person, namely infliction of bodily harm, in his private capacity, rather than of offences of abuse or of exceeding authority, which would have been applicable if S. had committed official misconduct related to his duties. Accordingly, they argued that the applicant's complaint was incompatible *ratione materiae* with the Convention.

75. The Government also submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint under Article 3, since he had failed to bring a civil claim against S. after the domestic court had convicted him.

76. The applicant submitted that S. had inflicted injuries on the applicant while performing his duties as an employee of a municipal company, which was under State control. In the capacity of ticket inspector S. possessed certain powers vested in him by the State, namely to impose fines, to direct persons travelling without a ticket to get off trams, and to escort persons behaving disobediently to a police station. For the applicant, this meant that S. had powers normally conferred on law-enforcement officers. The applicant argued that the State was responsible for the treatment inflicted by S. on the applicant.

77. The applicant also disagreed with the Government's argument that he had failed to exhaust domestic remedies. He submitted that he had lodged his civil claim for damages against the transport company in 2005 in view of the ineffectiveness of the criminal investigation against S., and

fearing that the time-limit for lodging his claim would soon expire. However, because the criminal investigation had still not been completed by that time, his civil claim had also failed. Both the criminal investigation and the civil claim had proved to be ineffective. He stated that he had not been informed about the completion of the pre-trial investigation in S.'s case and about his trial, and that he had first learned about the judgment against S. from the Government's observations. According to him, since S. was convicted as far back as 2007 an attempt to lodge a civil claim now would be unsuccessful.

(b) The Court's assessment

(i) Whether the impugned acts can be imputed to the respondent State

(α) Relevant principles

78. A Contracting State will be responsible under the Convention for violations of human rights caused by acts of its agents carried out in the performance of their duties (see, for example, *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004). However, a State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions (see *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 94, ECHR 2005-VII (extracts), and *Ireland v. the United Kingdom*, 18 January 1978, § 159, Series A no. 25). In order to establish whether a State can be held responsible for the unlawful actions of its agents taken outside their official duties, the Court needs to assess the totality of the circumstances and consider the nature and circumstances of the conduct in question (see, in relation to Article 2, *Sašo Gorgiev v. "the former Yugoslav Republic of Macedonia"*, no. 49382/06, § 48, ECHR 2012 (extracts)).

79. According to the Court's case-law, the fact that a State chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of State responsibility *ratione personae*. In the Court's view, the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law (see *Woś v. Poland* (dec.), no. 22860/02, § 72, 1 March 2005).

(β) Application of the above principles to the present case

80. The Court notes that the Government did not contest that the treatment suffered by the applicant was sufficiently serious to fall within the ambit of Article 3 of the Convention. However, they did argue that Article 3 was inapplicable because the applicant was ill-treated by S. acting outside of his official duties.

81. The Court is therefore called upon to determine whether S. could be considered a State agent, and if so whether his conduct, recognised as unlawful at the domestic level, could be imputed to the respondent State under the substantive limb of Article 3.

82. In this connection the Court first observes that S. was employed by a municipal transport company as a ticket inspector. The applicant argued, and the Government did not contest, that domestic law authorised S. to exercise certain powers. In his capacity as a ticket inspector S. had the power to impose administrative fines. He also had the authority to use a certain degree of compulsion, namely to direct passengers refusing to pay a fine to get off the tram and to escort them to the police station in certain cases of disobedience (see paragraph 51 above). These powers were conferred on S. by domestic public law and backed up by lawful sanctions, with the Code of Administrative Offences prescribing administrative sanctions for disobeying a ticket inspector's lawful demands (see paragraph 41 above). This leads to the conclusion that in the capacity of ticket inspector S. exercised certain State powers.

83. In this context the Court reiterates that according to its case-law, the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised (see *Woś*, cited above, § 72).

84. Accordingly, the Court concludes that in the circumstances of this case S. can be considered to have been a State agent to the extent that he exercised, in the capacity of ticket inspector, the above-mentioned powers granted to him by domestic law.

85. Having established that S. is to be considered a State agent, the Court must now determine whether the respondent State can be held responsible for the ill-treatment he inflicted on the applicant in spite of the unlawful nature of S.'s conduct.

86. The disagreement between the parties in this respect centres on whether or not S.'s conduct in attacking the applicant occurred outside his official duties. According to the Government, S.'s conduct in attacking the applicant lay outside his official duties; the State could not therefore be held responsible. According to the applicant, S. attacked the applicant while performing his duties as a ticket inspector and exercising powers vested in him by domestic law; therefore the respondent State was responsible.

87. The Court must first examine the Government's argument that S. was convicted domestically of an offence against a person committed in his private capacity rather than of an offence proscribing official misconduct. For the Government, this meant that S.'s acts were judged by the domestic court to be private acts not leading to any responsibility of his employer and, by extension, of the State. In this context the Court reiterates that its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention (see, for example, *Hassan v. the*

United Kingdom [GC], no. 29750/09, § 48, ECHR 2014). For this reason, even if the Government's interpretation of the domestic court's judgment is accepted, the domestic criminal classification of S.'s action cannot in itself be decisive for resolving the question now before the Court.

88. The Court observes that the applicant came into contact with S. on account of S.'s functions as a ticket inspector. All events in issue in this case occurred during S.'s working hours while he was on duty at his place of work. Moreover, the disagreement between S. and the applicant which led to the attack on the applicant focused on whether the applicant had a valid travel document, an issue which directly concerned S.'s duties as a ticket inspector. It is because of this disagreement that the ticket inspectors exercised their power, granted by domestic law, to direct the applicant to get off the tram. If the applicant's ticket had been proven invalid the applicant would have been liable to an administrative fine. S. assaulted the applicant on the way to the depot, during his working hours and in the process of settling a disagreement directly related to the exercise of S.'s powers and duties as a ticket inspector.

89. While S.'s attack on the applicant was in violation of domestic criminal law and was unauthorised, the Court finds that S. committed it in the capacity of ticket inspector rather than as a private individual. S.'s conduct was not so far removed from the perpetrator's status that it could not engage the State's substantive international responsibility (see and compare *Reilly v. Ireland* (dec.), no. 51083/09, § 54, 23 September 2014; *Gorovenky and Bugara v. Ukraine,* nos. 36146/05 and 42418/05, § 31, 12 January 2012; *Enukidze and Girgvliani v. Georgia*, no. 25091/07, §§ 289 and 290, 26 April 2011).

90. The Court concludes, therefore, that S.'s impugned acts can be imputed to the respondent State.

(ii) The question of exhaustion of domestic remedies

91. According to the Court's case-law the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 87, ECHR 2010).

92. The Government submitted that the applicant could lodge a civil claim against S. after his conviction. However, the applicant was unaware of S.'s conviction on the date on which his application was lodged with the Court (see paragraph 71 above) and thus could not be required to follow up on this conviction with a separate civil claim.

93. In any case the Court notes that the applicant pursued the criminal investigation for a period of five years and eight months and was then kept unaware of the completion of the proceedings. The Court reiterates that it

was precisely the delay in the criminal proceedings and the applicant's exclusion from the final stage of the investigation which led the Court to find a violation of Article 3 under its procedural limb (see paragraph 72 above). Accordingly, the Court considers that it would be too onerous, and indeed unreasonable, to expect the applicant to institute separate civil proceedings after he finally became aware of the completion of criminal proceedings against S. (see, *mutatis mutandis*, *Valeriy Fuklev v. Ukraine,* no. 6318/03, § 82, 16 January 2014, and *Arskaya v. Ukraine,* no. 45076/05, § 80, 5 December 2013). The Court observes, moreover, that the remedy identified by the Government concerned S.'s personal liability, while what is at stake is the applicant's complaint before this Court is the question of the States' responsibility for the applicant's ill-treatment.

94. Accordingly, the applicant cannot be reproached for failing to use the remedy suggested by the Government.

(iii) Otherwise as to admissibility

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

2. Merits

(a) The parties' submissions

96. The applicant submitted that S.'s conviction confirmed that he had been subjected to inhuman and degrading treatment by S., an employee of a municipal company. He stated that, not having been informed about S.'s trial, he had been denied the opportunity to recover damages from S. and his employer. He considered that S. had not been genuinely held accountable for inflicting bodily harm on the applicant.

97. The Government did not submit observations on the merits of this complaint.

(b) The Court's assessment

98. The Court notes that according to the findings of the domestic authorities the applicant was assaulted on 24 February 2002 by S. The Court reiterates its findings that S. suffered inhuman and degrading treatment at the hands of S. and that S.'s actions were imputable to the respondent State (see paragraphs 60 and 90 above respectively).

99. Accordingly, there has been a violation of Article 3 of the Convention under its substantive limb.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

100. The applicant complained that he had no effective remedy in respect of the treatment he suffered. He relied on Article 13 of the Convention, which provides:

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

A. The parties' submissions

101. The applicant referred to his submissions regarding the ineffectiveness of the investigation under Article 3, and argued that the delays in the criminal investigation led to his civil claim also being ineffective as a remedy.

102. The Government argued that the authorities had conducted an investigation into the applicant's allegations of ill-treatment and he, accordingly, had effective remedies at his disposal.

B. The Court's assessment

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

104. The Court refers to its finding that because of the delay in the criminal proceedings against S. and the applicant's exclusion from their final stages, the applicant could not be expected to seek compensation from S. after completion of criminal proceedings against the latter (see paragraph 93 above). As to the possibility of bringing a civil claim for damages against S. prior to the conclusion of criminal proceedings, the Court observes that it previously found that a civil claim for damages lodged in the course of pending criminal proceedings could constitute an appropriate compensatory remedy in the context of Article 3 of the Convention where a particular offender has been identified and prosecuted (see, for example, *Afanasyev v. Ukraine*, no. 38722/02, § 77, 5 April 2005). However, the Court notes that, because of the unjustified delay in the criminal proceedings, by the time when the applicant may have first become aware that S. had been charged and could, conceivably, bring a claim for damages against him, that is 25 September 2007 (see paragraphs 28 and 44 above), five years and seven months had passed after the assault on the applicant. Therefore, such a claim could not be regarded as capable of providing appropriate and sufficient redress for a violation of Article 3 in the

particular circumstances of this case (see, *mutatis mutandis*, *Sizarev v. Ukraine*, no. 17116/04, § 97, 17 January 2013).

105. In view of these findings the Court concludes that the shortcomings of the criminal proceedings at issue have prevented the applicant from obtaining compensation in a timely manner. This meant that the compensatory remedies available to the applicant in theory under domestic law were ineffective in practice in the particular circumstances of the present case.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. 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

108. The applicant claimed 6,955.37 Ukrainian hryvnias (UAH) in respect of pecuniary damage, and 50,000 euros (EUR) in respect of non-pecuniary damage.

109. The Government submitted that the claims were excessive and unsubstantiated. They also considered that there was no causal link between the pecuniary damage claim and the alleged violations of the Convention.

110. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, deciding on an equitable basis, it awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

111. The applicant also claimed UAH 74,173 for legal fees incurred in the proceedings before the Court and UAH 70.4 for postal expenses, to be transferred to the bank account of his representative's law firm.

112. The Government contested the applicant's claim in respect of legal fees as excessive. As regards the claim for postal expenses, they left it to the discretion of the Court.

113. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award him EUR 3,684 in respect of costs and expenses, plus any tax that may be chargeable to the applicant. This award is to be paid into the bank account of the applicant's representative's law firm, as indicated by the applicant.

C. Default interest

114. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a procedural violation of Article 3 of the Convention;

3. *Holds* that there has been a substantive violation of Article 3 of the Convention;

4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,684 (three thousand six hundred and eighty-four euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be transferred directly to the bank account of the applicant's representative's law firm;
   (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;

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

Done in English, and notified in writing on 26 November 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Josep Casadevall
Deputy Registrar	President