

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

FIFTH SECTION

CASE OF GRIGORYEV v. UKRAINE

(Application no. 51671/07)

JUDGMENT

STRASBOURG

15 May 2012

FINAL

15/08/2012

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



In the case of Grigoryev v. Ukraine**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 10 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 51671/07) 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 Andrey Grigoryevich Grigoryev ("the applicant"), on 1 November 2007.

2. The applicant was represented by Ms L. Lyakhovetska, a lawyer practising in Odessa. The Ukrainian Government ("the Government") were represented by their Agent, Ms Valeria Lutkovska.

3. The applicant alleged that he had been tortured by the police and that his subsequent conviction had essentially been based on his self-incriminating statements and material evidence obtained by coercion and without legal representation. He also complained that there had been no effective domestic investigation into his allegations of torture.

4. On 22 March 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and is currently serving a prison sentence in Yenakiyeve Penitentiary no. 52.

6. In the morning of 1 March 2002 the "Berkut" special police unit apprehended the applicant, at the home of an acquaintance, in connection with an investigation into a series of armed robberies and murders.

7. The police searched the applicant and discovered a suspicious sachet in his pocket appearing to contain drugs. According to him, the police had planted it on him when he was already handcuffed. The applicant's arrest was documented as being based on a suspicion of illegal drug possession.

8. On the same day, 1 March 2002, the applicant was placed in administrative detention for three days while the contents of the sachet were analysed.

9. Between 1 and 3 March 2002 he confessed to about fifteen counts of robbery, theft and smuggling, as well as an attempted murder. The applicant also showed to the police a garage and a forest cache where firearms and other weapons and explosives were stored.

10. According to the Government's submissions, the applicant decided to confess and to cooperate with the police of his own free will. According to the applicant, however, he was coerced into self-incrimination. His account of the events following his arrest is as follows. At about 11 a.m. on 1 March 2002 the applicant was taken to an office in the Kyivskyy District Police Department in Odessa where two law-enforcement officials from Kyiv, D. and Y., who introduced themselves as the Deputy Chief of the Criminal Investigation Unit *(заступник начальника Департаменту карного розшуку МВС України)* and the Chief of the Main Criminal Investigation Department *(начальник Головного управління карного розшуку МВС України)* respectively, questioned him in respect of a number of robberies and murders. As the applicant denied any involvement in them or knowledge thereof, Y. summoned several officers and ordered them to force him to confess to about forty instances of such offences. The applicant, being handcuffed, was suspended from a metal bar between two tables, and Y., together with D., delivered numerous blows with a rubber truncheon to various parts of his body. Subsequently a mask was put on the applicant's face, and other police officers continued to beat him until about 7 p.m. The applicant signed numerous confessions. In the evening D. and Y. checked on him. As they considered that he had not been sufficiently cooperative, the applicant's ill-treatment continued until 4 March 2002. During that period he was detained in the police station, where he had no contact with his relatives or a lawyer.

11. On 4 March 2002 the applicant was arrested on suspicion of several counts of armed robbery, illegal arms handling and attempted murder. He signed a waiver of legal assistance (its copy in the case file is illegible) and confessed to six counts of robbery.

12. The applicant was then transferred to the Odessa Temporary Detention Facility ("the ITT").

13. Before that transfer, on 4 March 2002, he was examined by a doctor at the local hospital, who found that he had a chest contusion and post-traumatic neuritis. The doctor also concluded that the applicant's right hand had been subjected to prolonged constriction.

14. On 5 March 2002 an expert from the Odessa Regional Bureau for Expert Forensic Medical Examinations examined the applicant on the instructions of the investigator. Although the examination report (delivered on 1 April 2002) noted that the applicant's right wrist was swollen and restricted in movement, its general conclusions were as follows:

> "1. The forensic medical examination of [the applicant] has not discovered any external injuries (sores, bruises or wounds).
>
> 2. It is impossible to establish the nature of the pathology of the right wrist without an X-ray."

15. From 5 March 2002 the applicant was represented by Ms Lyakhovetska. During his questioning in her presence on that day he again confessed to six counts of robbery. At the same time, the lawyer requested the investigator to arrange for her client to have a medical examination in view of his complaints of ill-treatment.

16. On 6 March 2002 a judge of the Zhovtnevyy District Court of Odessa remanded the applicant in custody pending trial. According to that ruling, the applicant was to be detained in the Pre-Trial Detention Centre ("the SIZO"). In reality, however, he remained in the ITT.

17. On 16 March 2002 the investigator decided that the applicant was to be detained in the ITT until 19 March 2002, on account of the considerable number of investigative measures yet to be taken.

18. According to the applicant, on 17 March 2002 Y. and D. again tried to obtain confessions from him, this time to several counts of murder. As the applicant resisted, he was handcuffed and beaten by four officers for about thirty minutes. Thereafter he was placed face-down on the floor and immobilised with a chair. The officers then brought an electric generator and attached its wires to the applicant's ankles and buttocks. After several electric shocks, the applicant signed all the documents handed to him by the police.

19. On 18 March 2002 he complained to his lawyer about these events, and she further raised the complaint before the prosecution authorities.

20. On 19 March 2002 the applicant was transferred to the SIZO, where he was examined by a doctor. As a result, burn marks measuring about 2 x 1 cm were discovered on his both ankles. They were estimated to have been sustained two days earlier as the result of an electric shock.

21. On 5 April 2002 another forensic medical examination of the applicant was carried out. According to the report (delivered on 8 April 2002), eight wounds measuring 1.5 x 2 cm each were discovered on both of his ankles. While the expert noted that it was impossible to establish exactly

how and when they had been caused, he referred to the medical certificate of 19 March 2002, according to which the wounds could have been caused by electric burns.

22. On 29 April 2002 the Odessa Regional Prosecutor's Office ("the ORPO") opened a criminal case in respect of the allegations of ill-treatment by the applicant and a co-accused under Article 365 § 2 of the Criminal Code (abuse of power associated with violence and degrading treatment). The prosecutor referred, in particular, to the medical certificate of 8 April 2002 confirming that the applicant had sustained injuries possibly originating in electric shocks.

23. Yet another forensic medical expert examination, which had been assigned on 21 June and completed on 2 July 2002, reported the same injuries as before and classified them as minor. Given the ongoing cicatrisation process, it was impossible to establish their origin with precision: the wounds could have been caused either by electric burns or by blunt objects. The report further noted that, according to the medical file, it could not be ruled out that they had been caused by electric shocks. Lastly, the expert answered in the positive the investigator's question as to whether the wounds in question were in places within the applicant's reach ("accessible for self-infliction").

24. On 16 September 2002 the investigator at the Odessa City Prosecutor's Office ("the OCPO"), to whom the case had apparently been transferred, discontinued the criminal investigation into the ill-treatment allegations, concluding that no indication of a crime could be discerned in the actions of the police officers. This decision was based, on the one hand, on the submissions of the applicant and two co-accused (found to be unreliable), and, on the other, on statements by eighteen police officers, including Y. and D., who either denied any coercion or submitted that they did not know anything (found to be trustworthy). While both Y. and D. admitted that they had questioned the applicant following his arrest on 1 March 2002, they maintained that he had confessed to some of the crimes under investigation of his own free will. When asked how he could explain the electric burns on the applicant's ankles, Y. stated as follows:

> "I can explain them by the sheer inventiveness of this person, who could make explosive devices and who tortured his victims with devious methods."

25. The investigator also mentioned the medical certificate issued by the SIZO doctor in respect of the applicant's injuries, without commenting on it. The general conclusions of this decision read as follows:

> "... the investigation has established that [the applicant], after [his] arrest, confessed to armed robberies and maintained his confessions during the crime reconstruction exercise. Moreover, [the applicant] showed [the investigators] an underground cache of firearms and ammunition.

> However, later these persons [the applicant and his co-accused], who have previous convictions and are bound by joint responsibility, retracted their earlier statements. In an attempt to escape criminal liability for particularly serious crimes, they, personally and with the assistance of their lawyers, sent complaints to various authorities attempting to cast doubt on their own depositions by allegations that they had been beaten by the police and that they had confessed under duress.
>
> The allegations of [the applicant] and the other co-accused are refuted by the ... statements of the police officers."

26. On 5 November 2002 the ORPO quashed the above decision, concluding that it was not based on a comprehensive and objective investigation.

27. On 16 December 2002 one of the applicant's cellmates in the ITT at the material time, L., when questioned by the investigator, confirmed that the applicant, on returning to the cell after his questioning, had had injuries and had hardly been able to stand on his feet. The other cellmates, who were also questioned, did not remember anything of that kind.

28. On 28 December 2002 the OCPO investigator again discontinued the criminal investigation, finding nothing criminal in the police officers' actions. The decision was identical to that of 16 September 2002.

29. On 8 May 2003 the ORPO quashed this second decision also, for non-compliance with instructions.

30. On 14 May 2003 the OCPO investigator in charge of the ill-treatment investigation wrote to the Odessa City Prosecutor (his superior) that it would be more appropriate to transfer the case to the ORPO dealing with the criminal case against the applicant. He noted that the ORPO had criticised his decisions and made the following comment in that regard:

> "... compliance or non-compliance with those instructions would not have had any influence whatsoever on the conclusions reached in this case. This case has no prospect of judicial examination."

31. In July 2003 the pre-trial investigation in the criminal proceedings against the applicant (and the co-accused) was completed and the case was sent for trial to the Odessa Regional Court of Appeal ("the Regional Court"), acting as a court of first instance.

32. On 8 August 2003 the OCPO investigator, who was still in charge of the ill-treatment investigation, discontinued the proceedings by a decision worded identically to his earlier decisions of 16 September and 28 December 2002. The only new part was a remark that the applicant's cellmates had been questioned and had not confirmed his allegations.

33. On 31 March 2004 the Regional Court examined the applicant's criminal case and decided that it was necessary to undertake an official investigation *(призначити по справі службове розслідування)* into the defendants' allegations about their ill-treatment by the police. This investigation was entrusted to the General Prosecutor's Office ("the GPO"). It was noted in the court's ruling that the official investigation in question

was required "to take into account not only the explanations of the persons who took part in the investigative measures involving the defendants, but also the medical documents and expert reports on their injuries available in the case file".

34. On 21 May 2004 the ORPO quashed the OCPO's decision (see paragraph 32 above). The case file does not contain a copy of this ruling.

35. On 22 November 2004 the OCPO investigator once again discontinued the investigation for lack of *corpus delicti* in the police officers' actions. In addition to the earlier reasoning it was noted that, despite all possible efforts, it had been impossible to establish the origin of the applicant's injuries.

36. On 25 February 2005 the ORPO quashed the above-mentioned decision as based on an incomplete investigation.

37. On 12 April 2005 the OCPO investigator again discontinued the case with a decision identical to that of 22 November 2004.

38. On 11 May 2005 the Regional Court sent a letter to the GPO which stated as follows:

> "During the judicial proceedings all the defendants changed their original statements and alleged that they had been subjected to ill-treatment (sometimes amounting to torture) during the pre-trial investigation, as a result of which they were forced to incriminate themselves and plead guilty to criminal offences which they had not committed.
>
> The statements of the defendants are indirectly confirmed by some of the materials in the case-file.
>
> The court requested the [GPO] as early as 31 March 2004 to undertake an official investigation into the defendants' allegations.
>
> This judicial request was addressed to the GPO because the earlier investigation by the [local prosecuting authorities] had been superficial and failed to take into account all the arguments and the medical documents.
>
> All the materials in the case-file were forwarded to the [GPO] on 1 April 2004.
>
> However, in spite of numerous reminders, the judicial request has not been complied with.
>
> The examination of the evidence was completed on 24 January 2005, and the proceedings were stayed pending the [GPO's] conclusion."

39. On 2 August 2005 the ORPO wrote to the President of the Regional Court that, on the instructions of the GPO, it had thoroughly investigated the defendants' allegations of ill-treatment and dismissed them as unfounded.

40. On 10 October 2005 the Regional Court found the applicant, along with five other persons, guilty of premeditated murder committed with particular cruelty, for profit, repeatedly and following conspiracy by a group

of persons, as well as banditry, illegal firearms handling, carjacking, deliberate destruction of the property of others, and multiple counts of theft and armed robbery. The applicant was additionally found guilty of illegal drug possession. He was sentenced to a total of nineteen years' imprisonment, with confiscation of all his personal property. The court relied on, among other things, the applicant's confessions made during the pre-trial investigation – in particular, on 1 and 2 March 2002 – even though he had retracted them in the judicial proceedings. It also relied on the material evidence (firearms and ammunition) shown by the applicant to the police on 1 and 2 March 2002. The court found that the applicant's allegation of ill-treatment in police custody had been thoroughly examined by the official investigation and had been rightly dismissed as unsubstantiated. The term of the applicant's sentence was to be calculated from 1 March 2002.

41. The applicant, both personally and through his lawyer, appealed in cassation. He submitted that the first-instance court had distorted the facts of the case and that his conviction had been based mainly on confessions obtained from him by coercion and in breach of his right to legal assistance. He emphasised in this connection that the Regional Court had relied on the investigation of his ill-treatment allegations, which had earlier been recognised as superficial and otherwise flawed. It was for that reason that the trial court had decided to entrust the official investigation of his allegations to the General Prosecutor's Office, since the earlier investigation undertaken by the local prosecution authorities had not taken into account all his arguments or the medical documents.

42. The applicant further emphasised that he (as well as the other defendants) had never been assigned victim status in the criminal investigation regarding the ill-treatment allegations. He noted that on 12 April 2005 the OCPO had discontinued the investigation, finding that there was no case to be examined, and the Regional Court's assignment of the official investigation to the GPO had never been implemented. The applicant pointed out that the fact that he had sustained injuries had not even been mentioned in the final decision. Lastly, he criticised the first-instance court for not having given any consideration to his continued detention in the ITT (for eighteen days instead of the legal maximum of three days).

43. On 4 September 2007 the Supreme Court rejected the applicant's appeal in cassation. It concluded that his guilt was sufficiently proved by the evidence, including his own confessions. As to the applicant's complaint of a violation of his right to legal assistance, the Supreme Court noted that he had had his rights in that respect explained to him following his arrest on 4 March 2002 and that he had been legally represented thereafter. In so far as his allegation of ill-treatment was concerned, the Supreme Court referred to the investigation into the matter by the prosecution authorities undertaken at the request of the first-instance court.

44. On 19 December 2008 the GPO returned the case file on the ill-treatment allegations to the ORPO as "no longer required". It noted in its letter: "the General Prosecutor's Office has not established any grounds for setting aside the decision made".

II. RELEVANT DOMESTIC LAW AND PRACTICE

45. Articles 59 and 63 of the Constitution concerning the right to legal assistance and the right not to incriminate oneself can be found in the judgment of 19 February 2009 in the case of *Shabelnik v. Ukraine* (no. 16404/03, § 25).

46. The provisions concerning the obligation to institute criminal proceedings and investigate a crime can be found in the judgment of 27 November 2008 in the case of *Spinov v. Ukraine* (no. 34331/03, § 33).

47. According to Article 263 of the Code of Administrative Offences, a person suspected of a drug offence may be detained for up to three days if the suspected drug needs to be analysed.

48. Under Article 315-1 of the Code of Criminal Procedure, if a court requires verification or clarification of the factual information obtained during a pre-trial investigation, it may request the investigating authority, by a judicial request *(судове доручення)*, to undertake certain investigative activities within an established time-limit.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

49. The applicant complained that he had been tortured by the police and that there had been no effective investigation into the matter. He relied on Article 3 of the Convention, which reads as follows:

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

A. Admissibility

50. The Government submitted that the applicant could not be regarded as having exhausted domestic remedies under Article 35 § 1 of the Convention because he had failed to challenge the decision of the Odessa City Prosecutor's Office of 12 April 2005 before the higher-level prosecution authorities or before the domestic courts.

51. Alternatively, the Government argued that, had the applicant believed he had no effective domestic remedies to exhaust following the aforementioned prosecutor's decision discontinuing the criminal investigation into his ill-treatment allegation, he should have introduced his application before the Court within the six-month time-limit to be calculated from that date. Accordingly, they maintained that it should be rejected as belated.

52. The applicant disagreed. He noted that, indeed, under the domestic legislation, he could have challenged the decision of 12 April 2005 either before the Odessa Regional Prosecutor's Office or before a local court. He contended, however, that none of those remedies could be considered effective for the following reasons in particular. The Odessa Regional Court of Appeal, which had acted as a first-instance trial court in his own criminal case, had already considered the ill-treatment allegation and assigned its investigation to the General Prosecutor's Office on account of the deficiencies in the investigation undertaken by the local prosecution authorities (at the city and the regional level). Accordingly, the applicant had considered it pointless to bring the issue before a lower-level court (a local court as compared to the aforementioned Regional Court) or before the Regional Prosecutor's Office, which had been criticised by the Regional Court for the inadequacy of its investigation.

53. He also pointed out that the aforementioned judicial request of the Regional Court to the GPO had revived the latter's obligation to investigate his allegation of ill-treatment after the prosecutor's decision of 12 April 2005 discontinuing the investigation.

54. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *Akdivar and Others v. Turkey* [GC], 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV, and *Aksoy v. Turkey*, 18 December 1996, §§ 53-54, *Reports* 1996-VI).

55. Regard being had to the above, the Court considers that the questions of exhaustion of domestic remedies and compliance with the six-month rule are closely linked to the substance of the applicant's complaint regarding the effectiveness of the investigation, and accordingly joins them to the merits of that complaint (see, for example, *Oleg Nikitin v. Russia*, no. 36410/02, § 28, 9 October 2008, and *Bocharov v. Ukraine,* no. 21037/05, § 40, 17 March 2011).

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

B. Merits

1. Alleged ill-treatment

(a) The parties' submissions

57. Relying on the medical documents in the case-file and referring to his lengthy detention under the full control of the police (in an ITT instead of a SIZO), the applicant submitted that police officials Y. and D., with the assistance of some other officers, had tortured him following his arrest on 1 March, as well as on 17 March 2002, with a view to extracting his confession to numerous crimes.

58. The Government considered the applicant's allegation to lack any basis. They contended that, despite the fact that all possible efforts had been undertaken by the domestic authorities, its veracity had never been established. The Government relied, in particular, on the medical report of 1 April 2002, with the emphasis on its finding that there had been no external injuries discovered on the applicant. As to the other medical evidence confirming that he had sustained eight wounds to his ankles, the Government noted that they were minor injuries and that it could not be ruled out that the applicant had inflicted them on himself.

(b) The Court's assessment

59. As the Court has stated on many occasions, Article 3 of the Convention enshrines one of the core values of democratic societies (see, among many other references, *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V). Where allegations are made under this provision, the Court must conduct a particularly thorough scrutiny and will do so on the basis of all the material submitted by the parties (see *Matyar v. Turkey*, no. 23423/94, § 109, 21 February 2002, and *Ülkü Ekinci v. Turkey*, no. 27602/95, § 136, 16 July 2002).

60. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, as a classic authority, *Ireland v. the United Kingdom*, cited above, § 161). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

61. Turning to the present case, the Court notes that three days after the applicant's arrest, on 4 March 2002, a doctor discovered that he had a chest contusion and post-traumatic neuritis and that his right hand had been subjected to prolonged constriction (see paragraph 13 above). The medical examination a day later made contradictory findings: on the one hand, it stated that "there were no external injuries discovered" on the applicant, while, on the other, it noted that his right wrist was swollen and he could not move it (see paragraph 14 above). The Court therefore does not regard it as having rebutted the earlier medical evidence of the applicant's injuries.

62. The Court further notes that the SIZO doctor who examined the applicant on 19 March 2002 following his transfer there from the ITT discovered several burns on his both ankles and found that they fully corroborated the applicant's account as to their date and origin. Although the two later forensic medical examinations, of 5 April and 21 June 2002, were less conclusive as to the origin of these injuries, they did not challenge that finding (see paragraphs 20, 21 and 23 above).

63. Thus the applicant's allegation of ill-treatment at the hands of the police – including the administration of electric shocks to him – has a solid evidential basis. The fact that the injuries were to parts of his body within his reach and the alternative view that they had not necessarily resulted from electric shocks, on which the Government relied in their observations, do not undermine its credibility. The Court notes in this connection that the Government did not provide any explanation as to how the applicant could have possibly inflicted such injuries on himself.

64. As to the Government's submission about the supposedly minor nature of the applicant's injuries, the Court has already held in its case-law that subjecting a person to electric shocks is a particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering, and therefore falling to be treated as torture, even if it does not result in any long-term damage to health (see *Polonskiy v. Russia*, no. 30033/05, § 124, 19 March 2009; and *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 157, 21 April 2011). Moreover, it appears that the use of force against the

applicant in the present case was aimed at debasing him, driving him into submission and making him confess to criminal offences.

65. The Court therefore concludes that the applicant suffered ill-treatment serious enough to be considered as torture.

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

2. Effectiveness of the investigation

(a) The parties' submissions

67. The applicant maintained that the domestic authorities had failed to duly investigate his complaint of torture and to hold those responsible liable. He contended that the prosecuting authorities in charge had not taken an objective stand on the matter and had sought to dismiss his complaint rather than to verify it. The applicant also pointed out that he had never been assigned victim status even though it had been established that he had sustained injuries in police custody. Lastly, he submitted that, while the deficiencies in the investigation undertaken by the prosecuting authorities at the city and regional levels had been acknowledged and criticised on many occasions, both the General Prosecutor's Office and the courts eventually chose to ignore them and to take the investigation's findings at face value.

68. The Government contested that view. They submitted that the domestic authorities had investigated the applicant's allegation of ill-treatment with due diligence and the fact that they had not discerned anything criminal in the police officers' actions did not undermine the effectiveness of the investigation as such.

(b) The Court's assessment

69. The Court emphasises that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII, and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). The minimum standards of effectiveness defined by the Court's case-law include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary

diligence and promptness (see, for example, *Menesheva v. Russia*, no. 59261/00, § 67, ECHR 2006-III).

70. In the present case the Court has found that the respondent State is responsible under Article 3 for the applicant's torture (see paragraphs 57-66 above). The authorities therefore had an obligation to investigate it in compliance with the aforementioned effectiveness standards.

71. The Court notes that the applicant complained to the prosecuting authorities about his ill-treatment on 18 March 2002. His allegations were confirmed by two medical reports. As a result, on 29 April 2002 the Odessa Regional Prosecutor's Office opened a criminal case in respect of abuse of power, associated with violence and degrading treatment, by the police.

72. The city and regional prosecuting authorities, however, discontinued the proceedings five times, finding that there was nothing criminal in the actions of the officers in question. The Court also observes that the applicant was never assigned victim status. Although each of the decisions to discontinue the proceedings (apart from the last one of 12 April 2005) was quashed as not being based on proper investigation and taken in disregard of the higher-level prosecutor's instructions, another such decision followed which merely repeated the earlier reasoning. Its key point was, in substance, that the applicant had himself confessed to a number of criminal offences, but later sought to escape criminal liability, and therefore his words could not be trusted. By such perverted logic the investigator used the applicant's confessions, the result of his alleged torture, as a reason to dismiss his allegations in that regard.

73. Furthermore, the Court notes that the investigator in charge of the ill-treatment investigation explicitly admitted that he did not find it necessary to improve the investigation in line with the received instructions, because its conclusions appeared clear to him from the outset (see paragraph 30 above). For the Court, this is not only another confirmation of the investigation's deficiencies, but also an indication of its lack of impartiality, as reasonably feared by the applicant.

74. The Court also observes that the superficial nature of the investigation and, in particular, its failure to take into account all the medical documents was acknowledged by the Regional Court in the context of the applicant's trial. Moreover, the court instructed the General Prosecutor's Office to take over the investigation.

75. The Court considers that after the Regional Court requested the GPO, the highest prosecution authority in Ukraine, to investigate the applicant's complaint of ill-treatment (on 31 March 2004 and again on 11 May 2005), it must indeed have appeared pointless to him to challenge, on his own, the local prosecutor's decision of 12 April 2005 dismissing that complaint, especially given that the earlier remittals had not in fact led to any improvements in the investigation.

76. The Court notes that the aforementioned instruction regarding the investigation by the GPO remained unimplemented, and the Regional Court eventually contented itself with the findings of the local prosecution authorities which it had itself previously criticised (see paragraphs 33, 38 and 40 above). The applicant's appeal in cassation within his trial was also without effect: the Supreme Court too relied on the findings of the investigation by the prosecution authorities, erroneously noting that it had been undertaken at the instruction of the first-instance court.

77. It therefore appears that appeals both to higher-level prosecutors and to courts have proved not capable of ensuring effective investigation of the applicant's complaint of ill-treatment by police. At the same time, the Court does not reproach the applicant for having reasonably waited the completion of his trial within which this complaint was examined on the merits. Accordingly, the Court dismisses the Government's objections as regards exhaustion of domestic remedies and compliance with the six-month time-limit previously joined to the merits (see paragraph 55 above).

78. In the light of the above considerations, the Court concludes that the applicant was denied a thorough and effective investigation into his arguable claim that he had been subjected to torture at the hands of police. As the Court has held in its judgment concerning the case of *Kaverzin v. Ukraine*, this situation stems from systematic problems at the national level allowing for agents of the State responsible for such ill-treatment go unpunished (no. 23893/03, 15 May 2012, §§ 169-182, not yet final).

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

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

80. The applicant further complained that he had not had a fair trial on account of his self-incrimination under duress and in the absence of legal assistance. He relied on under Article 6 §§ 1 and 3 (c), which read as follows in their relevant parts:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

A. Admissibility

81. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

(a) The parties' submissions

82. The applicant maintained that he had been coerced into confessing to a series of serious crimes, while being deprived of any procedural rights, including the right to legal assistance. He noted that the courts had relied on his confessions in securing his conviction, in disregard of the documents in the file indicating that he had not given the confessions of his own free will and with the assistance of a lawyer.

83. The Government submitted that courts at two levels of jurisdiction had examined the applicant's case with due diligence and that there was no reason to question their findings. According to them, had there been any serious breaches of the criminal procedural legislation by the first-instance court, the Supreme Court would have identified and remedied them.

(b) The Court's assessment

84. The Court notes that although the admissibility of evidence is, as a matter of principle, a prerogative of domestic courts, with the role of this Court being limited to assessing the overall fairness of the proceedings, particular considerations apply to evidence obtained by a measure found to violate Article 3 of the Convention. Thus, according to the Court's case-law, the admission of statements obtained as a result of torture as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair, irrespective of their probative value and of whether their use was decisive in securing the defendant's conviction (see *Gäfgen v. Germany* [GC], no. 22978/05, § 166, ECHR 2010, with further references).

85. The Court has found in the present case that the applicant's initial confessions were extracted and the material evidence was obtained from him by ill-treatment amounting to torture within the meaning of Article 3 of the Convention (see paragraphs 57-66 above). It also notes that the domestic courts admitted those confessions as evidence in his trial (see paragraph 40 above). In the light of the principles of its case-law as outlined above, the Court considers that this extinguished the very essence of the first applicant's privilege against self-incrimination, irrespective of the weight of the impugned confessions in the evidential basis for his conviction, and

regardless of the fact that he confessed again several times during the investigation.

86. Furthermore, as confirmed by the domestic courts (the judgment of the Regional Court of 10 October 2005 and the ruling of the Supreme Court of 4 September 2007 upholding it), the applicant met with a lawyer for the first time on 4 March 2002, whereas he had been arrested on 1 March 2002. Although his detention from 1 to 4 March 2002 was documented by the police as being based on a suspicion that he had committed an administrative offence, the Court notes that during that period the applicant was treated as a suspect in criminal investigations into such serious crimes as banditry, murder, robbery and theft. It was during that period that he confessed to these crimes and showed weapons storage places to the police. Looking beyond the appearances and the language used and concentrating on the realities of the situation, the Court considers that the applicant's administrative detention in reality formed part of his detention as a criminal suspect, but without the requisite safeguards for his procedural rights, notably the right to defence (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008, and, *mutatis, mutandis*, *Doronin v. Ukraine*, no. 16505/02, § 55-56, 19 February 2009). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008). The Court observes that, in the course of the applicant's trial, the courts failed to give an adequate response to his complaints about the early restrictions on his right to defence. Moreover, they relied on the applicant's self-incriminating statements made in the absence of legal assistance.

87. The Court has on many occasions condemned the practice of placing a person under administrative arrest to ensure his availability for questioning as a criminal suspect while not respecting his procedural rights (see, for example, *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 54, 28 October 2010, and *Nechiporuk and Yonkalo*, cited above, § 264). Moreover, the Court has held that this problem is of a structural nature in Ukraine (see *Balitskiy v. Ukraine,* no. 12793/03, § 54, 3 November 2011). The present case discloses another example of it.

88. Accordingly, the Court concludes that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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

90. The applicant claimed nothing for pecuniary or non-pecuniary damage. He noted that the fair examination of his case by the Court would be sufficient just satisfaction for him.

91. The Government submitted that no award should be made to the applicant given the aforementioned statements.

92. Having regard to the applicant's position on the issue, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for him. At the same time, given the Court's findings regarding the unfairness of the domestic proceedings resulting in the applicant's conviction and having regard to the grave circumstances of this case, including the fact that confessions obtained in violation of the absolute prohibition on torture were admitted into evidence, the Court considers it indispensable for the proper protection of human rights that a retrial (a possibility of which is envisaged in the Ukrainian legislation) be provided forthwith should the applicant so request. Any such trial must observe, strictly, the substantive and procedural safeguards enshrined in Article 6 of the Convention (see *Nechiporuk and Yonkalo*, cited above, § 297).

B. Costs and expenses

93. The applicant did not make any claim under this head. The Court therefore makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objections as to the exhaustion of domestic remedies and compliance with the six-month time-limit in respect of the applicant's complaint under Article 3 of the Convention and dismisses them after having examined the merits of that complaint;

2. *Declares* the application admissible;

3. *Holds* that the applicant has been subjected to torture in violation of Article 3 of the Convention;

4. *Holds* that there has been a violation of Article 3 of the Convention on account of the lack of an effective investigation into the applicant's allegation of torture by the police;

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's privilege against self-incrimination;

6. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention;

7. *Holds* that, as suggested by the applicant, the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by him.

Done in English, and notified in writing on 15 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President