

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

FIFTH SECTION

CASE OF KOMAROVA v. UKRAINE

(Application no. 13371/06)

JUDGMENT

STRASBOURG

16 May 2013

FINAL

16/08/2013

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



In the case of Komarova v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
André Potocki,
Paul Lemmens, *judges,*
Myroslava Antonovych, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 9 April 2013,

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

PROCEDURE

1. The case originated in an application (no. 13371/06) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mrs Svetlana Ivanovna Komarova ("the applicant"), on 22 March 2006.

2. The Ukrainian Government ("the Government") were represented by their Agent, most recently, Mr N. Kulchytskyy, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that her pre-trial detention had been lengthy, that she had been detained in inhuman conditions and that she had not been provided with adequate medical care.

4. On 12 January 2011 the application was communicated to the Government. Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Ms Myroslava Antonovych to sit as an ad hoc judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Dnipropetrovsk, Ukraine.

A. Criminal proceedings against the applicant, her arrest and pre-trial detention

6. The applicant is a lawyer. On 1 April 2004 criminal proceedings were instituted against her for allegedly attempting to bribe a judge and for fraud. On the same day the applicant was arrested.

7. On 3 April 2004 the Dnipropetrovsk Prosecutor's Office asked the court to order the applicant's pre-trial detention arguing that the applicant might escape since she had the financial means to do so and a special passport issued for travelling abroad (закордонний паспорт) which she had already used on several occasions. There was also a possibility that she could hinder the investigation, put pressure on witnesses and destroy documentary evidence. The applicant already had a criminal record (it appears from the material in the case file that in 2000 she was charged on several counts of fraud but was pardoned in an amnesty). The applicant did not appear to have a permanent place of residence as she had provided three different home addresses and also did not have a permanent office. She did not have children of minor age and her state of health was considered to be compatible with detention.

8. Later on the same day, in a court hearing, the applicant stated that she had been put under psychological pressure by the officers who had arrested her. She further stated that there was a possibility that she was pregnant and added that she had a student son who depended on her. The Babushkinskiy District Court of Dnipropetrovsk ("the Babushkinskiy Court") ordered the applicant to remain in custody until 9 April 2004 as there was not enough evidence to make a formal decision on her pre-trial detention. The investigating authorities had to examine the case put forward by the applicant, look for further evidence of her having committed the crimes and conduct an assessment of her personality.

9. On 9 April 2004 the Babushkinskiy Court ordered the continuation of the applicant's detention. The court held that since the applicant had been accused of a serious crime, had given several different addresses and was also registered as a resident in Kyiv, there was a possibility that, if not detained, she could continue her criminal activities, hinder the investigation and abscond.

10. On 21 May 2004 the Babushkinskiy Court further extended the applicant's detention until 1 August 2004 on the same grounds as before. On 27 May 2004 the Dnipropetrovsk Regional Court of Appeal quashed that decision, extending the applicant's detention until 1 July 2004.

11. On 25 June 2004 the Babushkinskiy Court extended the applicant's detention until 1 August 2004.

12. On an unspecified date the investigation ended and the case was sent to the first-instance court for consideration. On 9 August 2004 the

applicant's criminal case was accepted by the Samarskiy District Court of Dnipropetrovsk ("the Samarskiy Court").

13. On 18 July 2006 the Samarskiy Court found the applicant guilty on thirteen counts of fraud and attempted bribery and sentenced her to seven years' imprisonment. Four accomplices of the applicant were also found guilty and sentenced to various terms of imprisonment but were then released on probation.

14. On 28 December 2006 the Dnipropetrovsk Regional Court of Appeal quashed the decision of 18 July 2006 upon appeal by both the applicant and the prosecutor and sent the case back for a fresh investigation. The court also ordered the applicant's detention to be extended, taking various factors into consideration, namely "the applicant's personality, the seriousness and number of crimes with which she had been charged and the circumstances in which they were committed."

15. On 30 March 2007 the Court of Appeal extended the applicant's detention until 10 April 2007 since "certain procedural steps needed to be taken".

16. On 10 April 2007 the same court extended the applicant's detention for one more month, finding that there were "no grounds on which the applicant could be released".

17. On 10 May 2007 the case was sent back to the first-instance court.

18. On 18 May 2007 the case was accepted by the Samarskiy Court.

19. On 15 June 2007 it sent the case back for further investigation, holding that the applicant should remain in pre-trial detention since there were "no grounds to believe that the applicant's pre-trial detention was no longer necessary". A submission from the applicant's lawyer that the applicant was suffering from numerous illnesses and should therefore be released was not addressed. On 30 August 2007 the Dnipropetrovsk Regional Court of Appeal upheld that decision.

20. On 10 October 2007 the case was again submitted to the first-instance court.

21. On 31 October 2007 the Samarskiy Court sent the case back to the prosecutor to rectify various procedural errors. The court extended the applicant's detention holding that her state of health did not render her unfit for detention and that there were "no grounds to believe that the applicant's detention was no longer necessary".

22. On 11 January 2008 the case was sent back to the Samarskiy Court.

23. On 18 January 2008 the same court again sent the case back to the prosecutor for further investigation. It reiterated its previous grounds for the applicant's detention and stated that although, according to her medical report, the applicant was bedridden, that was not sufficient reason to release her.

24. On 11 March 2008 the case was again returned to the court.

25. On 20 June, 7 August, 30 October and 3 November 2008 and on an unspecified date in January 2009 the Samarskiy Court rejected requests for the applicant's release. It accepted that the applicant was suffering from a number of diseases but could not find this a sound reason for her release. Moreover, S., recognised as a victim in the case, submitted in his statement that the applicant had urged him to withdraw his financial claims.

26. On 28 April 2009 the same court sentenced the applicant to five years and twenty-seven days' imprisonment for fraud. Her three accomplices were sentenced to various terms of imprisonment on probation. On the same day the applicant was released.

27. On 11 February 2010 the Supreme Court of Ukraine rejected a request by the applicant for leave to appeal on points of law.

B. Medical assistance in detention

28. On 14 April 2004 the applicant was confined in the Dnipropetrovsk Pre-Trial Detention Centre ("the SIZO").

29. Between April 2004 and February 2008 she received the following medical assistance.

1. Treatment for hypertension

30. On 22 April 2005 an ambulance was called to the court because the applicant had a sudden episode of hypertension. The following day she was examined by a doctor, who confirmed that the applicant was suffering from arterial hypertension. The applicant was also given an electrocardiogram.

31. The applicant was further examined by a physician and a paramedic on 29 April, 6 and 22 June 2005 and was prescribed medication for hypertension.

32. Between 1 and 29 July 2005 the applicant was admitted to the SIZO medical ward with another episode of hypertension. According to medical records submitted by the Government, the applicant received treatment and was discharged following an improvement in her condition.

33. The applicant was further examined and treated for high blood pressure by either a doctor or a paramedic on 17, 25 and 28 August 2005, 7 and 19 September 2005, 16 November 2005, 7 and 16 December 2005, 14 August 2006 and 10 May, 13 August, 15 October and 18 December 2007.

34. On 14 October and 28 December 2005 and 27 and 30 April 2007 the applicant was given an electrocardiogram.

2. Treatment for eye problems

35. On 9 August 2005 the applicant was diagnosed with eye problems - myopic astigmatism and angiosclerosis of retina vessels - and was recommended the use of spectacles.

36. The applicant was further examined by an ophthalmologist on 6 December 2005, 28 February 2006, 3 April, 17 April 24 April, 29 May, 7 August, 4 September, 9 October, 27 November and 15 December 2007 and on 19 February 2008. She was diagnosed with hypertensive angiopathy (a disease of the blood vessels) and was advised to avoid work which involved using her eyes for long periods of time. It was also noted that she needed to consult a general practitioner and receive treatment for hypertension. On two occasions the applicant was prescribed vitamins. On 19 February 2008 it was again recommended that the applicant wear spectacles.

37. In addition, on 6 April 2006 the applicant consulted an ophthalmologist from Dnipropetrovsk City Hospital no. 8. She was diagnosed with amblyopia, retinopathy and the atrophy of the nerves to the right eye.

3. Other medical treatment

38. On 3 April 2004 the applicant underwent an ultrasound scan, which revealed that she was not pregnant.

39. On 21 May 2004, 13 December 2005 and 30 March 2006 the applicant was treated for a skin disease on her face (streptodermia).

40. On 23 September and 18 November 2005, 8 June, 21 September, 19 October, 14 December and 21 December 2007 the applicant was examined by a neurologist and diagnosed with a neurological condition induced by chronic hypertension (hypertensive encephalopathy), for which she was prescribed medication.

41. On 14 November 2006 the applicant was diagnosed with left-sided pneumonia but she refused to be admitted to the SIZO medical ward.

42. Between 18 April and 21 May 2007 the applicant was confined in the medical ward of the SIZO, where she was diagnosed with complications arising from high blood pressure (stage II hypertension), hypertensive angiopathy, stage II encephalopathy, ventricular arrhythmia, chronic gall-bladder disease and chronic pancreatitis.

43. On 16 August 2007 the SIZO authorities informed the applicant's lawyer about the medical treatment the applicant had received between April and August 2007. It was noted that she had been treated by a general practitioner, an ophthalmologist and a neurologist on eight different occasions and that, "given the course of the main disease and its development, the patient needed diagnosis and treatment in cardiology and ophthalmology departments".

44. On 11 December 2008 the administration of the SIZO informed the Samarskiy Court that the applicant had been admitted to its medical ward suffering from a urine infection, cystitis and hypertension as well as other illnesses and needed supervision and treatment by a doctor, a cardiologist and an ophthalmologist.

45. During her stay in detention the applicant received ultrasound scans and X-ray examinations as well as blood and urine tests and was recommended to undergo a gastric endoscopy, which she refused.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

46. The applicant complained that she had been subjected to torture as she had been seriously ill while in detention, had had a miscarriage in April 2004 and was losing her sight. She had also been forced to participate in court hearings while suffering from high blood pressure and heart pain. The applicant complained further that she had had to share a cell with detainees who smoked constantly, and that she had not been able to obtain spectacles or receive adequate medical treatment.

47. The applicant invoked 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

48. The Government noted that the applicant had not complained at the national level of inadequate medical assistance. In their view, she could have raised her complaints before a prosecutor or court.

49. In reply the applicant submitted that, while in detention, she had lacked the means to lodge complaints before a court, and that she had, in any case, been afraid of the repercussions.

50. The Court notes that it has already dismissed similar objections by the Government on a number of occasions, as the problems arising from the conditions of detention and the lack of proper medical treatment in Ukrainian places of detention were of a structural nature and no effective remedy was available in this respect (see, among other authorities, *Petukhov v. Ukraine*, no. 43374/02, §§ 76-78, 21 October 2010). The Court sees no reason to depart from that finding in the present case and therefore considers

that this complaint cannot be rejected for failure to exhaust domestic remedies.

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

B. Merits

1. The parties' submissions

(a.) The applicant

52. The applicant stated that she had complained to the SIZO administration about sharing a cell with inmates who smoked but her complaints had been ignored.

53. She had also requested to have a gastric endoscopy performed in a specialised hospital since she had had doubts as to whether the SIZO medical staff knew how to use the relevant equipment which she claimed had not been properly disinfected. She had not been diagnosed quickly enough with a disease of the thyroid gland which had later led to numerous other health problems. The applicant also submitted that it had been impossible to choose the correct spectacles in the detention centre since it lacked the necessary equipment and as a result she had not been able to read or write. Lastly, she submitted that, after 1 April 2004, she had suffered a miscarriage due to stress. In summary, the applicant concluded that she had not been provided with adequate medical assistance while in detention.

(b.) The Government

54. The Government submitted that the applicant had not been pregnant and that this had been confirmed by an ultrasound scan on 3 April 2004.

55. The Government further submitted that while in detention, the applicant had been regularly examined by an ophthalmologist and that spectacles had been selected for her on 6 April 2006.

56. With regard to the applicant's heart disease, the Government noted that the applicant had complained of heart problems for the first time on 23 April 2005 and had thereafter been diagnosed with arterial hypertension. While in the SIZO the applicant had been regularly examined by the facility's physician and paramedic. She had received treatment in the SIZO medical ward between 1 and 29 July 2005 and between 18 April and 21 May 2007. She had been given an electrocardiogram on five occasions and had been prescribed treatment which she had refused to undergo, on

17 August and 17 December 2005 in particular, instead requesting her release.

57. On several occasions the applicant had also been examined by a neurologist and had received treatment for her other medical conditions.

58. Therefore the Government concluded that, taking into consideration the fact that the applicant had received medical attention from both the SIZO doctors and specialists from outside the facility, the applicant had received adequate medical treatment while she was in detention.

59. The Government further submitted that the applicant had never complained about being detained with smokers.

60. As for the applicant's complaints that she had participated in court hearings despite suffering from hypertension and heart pains, the Government maintained that the applicant had been under constant supervision by doctors and it had never, at any time, been suggested that she had been unable to participate in the investigation and in court hearings. An ambulance had been called for the applicant on only one occasion, on 23 April 2005.

61. Therefore, the Government concluded that the applicant's rights under Article 3 of the Convention had not been breached.

2. The Court's assessment

62. The Court reiterates that in accordance with Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

63. However, the Court has held that Article 3 of the Convention cannot be interpreted as ensuring that every detainee should receive medical care at the same level as "in the best civil clinics" (see *Mirilashivili v. Russia* (dec.), no. 6293/04, 10 July 2007). It has further held that it is "prepared to accept that, in principle, the resources of medical facilities within the penitentiary system are limited compared to those of civil clinics" (see *Grishin v. Russia,* no. 30983/02, § 76, 15 November 2007). On the whole, the Court takes a flexible approach in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment" (see *Aleksanyan v. Russia*, no. 46468/06, § 140, 22 December 2008).

64. The Court further notes that the "adequacy" of medical care in this respect remains the most difficult element to determine. The mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment

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

65. Turning to the circumstances of the present case, the Court notes that while in detention the applicant was diagnosed with a number of illnesses which warranted medical supervision and care. In particular, the applicant was suffering from hypertension which caused problems with her eyes.

66. The Court notes that, according to the applicant's detailed medical record, submitted by the Government, the applicant's health, while in detention, had been continuously supervised. On numerous occasions the applicant was seen by various specialists and underwent various medical examinations and procedures. The applicant did not contest these submissions other than to state that she had not been diagnosed in time with a disease of the thyroid gland. The Court observes, in this respect, that there is no evidence that the applicant's ailments were incorrectly or belatedly diagnosed, and furthermore the applicant did not in any way substantiate her allegations of a failure to diagnose her thyroid gland problems.

67. The Court further notes that the applicant was prescribed treatment for her illnesses and there is no evidence to suggest that such treatment was inadequate or was not properly administered and that the applicant's health problems were not properly addressed. In particular, although the applicant was prescribed spectacles as early as August 2005, it is unclear from the parties' submissions to what extent the applicant's eyesight deteriorated, whether she finally received spectacles and if so, when. Even assuming that the applicant was not provided with spectacles in detention, there is no evidence that their absence affected the applicant's everyday life to the extent that it was causing her considerable suffering (see, by way of comparison, *Slyusarev v. Russia*, no. 60333/00, 20 April 2010).

68. The Court also notes that the SIZO administration expressly recognised the applicant's need for specialised treatment (see paragraphs

43-44 above) but it did not indicate that it was impossible to provide her with the appropriate treatment in detention. During both occasions on which she stayed in the SIZO medical wing, the applicant was examined several times by an ophthalmologist, including one brought from a civil hospital and by a general practitioner, who treated her for hypertension, and the necessary examinations and medical procedures were performed on her.

69. Overall, the Court notes that none of the applicant's health problems in respect of her heart, nervous system, eye and skin conditions appear to have remained untreated. Bearing this in mind and having regard to the material in the case file and the parties' submissions, the Court concludes that the authorities did everything that could have reasonably been expected of them in the circumstances to safeguard the applicant's health and well-being during her detention (see *Breslavskaya v. Ukraine* (dec.), no. 29964/10, 31 January 2012).

70. The Court lastly notes that there is no evidence in support of the applicant's statements that her state of health had deteriorated because she had been sharing the cell with detainees who smoked or that she was forced to take part in court hearings while suffering serious health problems.

71. There has accordingly been no violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

72. The applicant complained about the length of her pre-trial detention. She relied on Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

73. The Government did not submit any observations on the admissibility of this complaint.

74. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

75. The applicant stated that there had been no reasons for her pre-trial detention. There was no evidence that she had intended to leave Ukraine. She had not been in possession of visas for foreign travel, nor had she

bought any travel tickets. She had not sold her property or opened new bank accounts. Moreover, her passport for travelling abroad had expired in 2006. There had also been no grounds to assume that she would hinder the investigation. In the applicant's view, her confinement in pre-trial detention was aimed at putting pressure on her to confess to crimes she had not committed.

76. The Government submitted that the applicant had been in pre-trial detention between 1 April 2004 and 18 July 2006, and between 6 October 2006 and 28 April 2009 - a total of four years, ten months and nine days. The Government reiterated the reasons for the applicant's pre-trial detention as indicated by the national courts (the possibility of her absconding and the risk that she might put pressure on witnesses, in particular). They maintained that such reasons had been sufficient for the applicant's detention and that the national authorities had acted with special diligence when conducting proceedings in the applicant's case.

77. The Court notes that the applicant's pre-trial detention to be taken into account amounted to four years, seven months and seventeen days in total, and consisted of two separate periods (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI): the first lasting from her arrest on 1 April 2004 until her initial conviction on 18 July 2006; and the second, lasting from the quashing of her first conviction on 28 December 2006 until her second conviction, on 28 April 2009. This aggregate period is considerable.

78. Examining the present case in the light of the general principles established in its case-law (see *I.A. v. France*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 102; *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV; and *Iłowiecki v. Poland*, no. 27504/95, § 61, 4 October 2001), the Court observes that the applicant's initial detention was based on the gravity of the charges laid against her, as well as additional reasons such as the possibility that she might have absconded, hindered the investigation, and continued with her criminal activities. Although the applicant's detention may have initially been justified on these grounds, after a certain amount of time had elapsed the courts were obliged to give specific reasons for continuing her detention. Instead, they repeatedly relied on the same grounds for nearly five years throughout the applicant's time in detention, advancing such grounds for its continuation as the necessity to investigate the case further without analysing whether the applicant's situation had changed.

79. The Court particularly notes that in the present case the domestic court repeatedly justified the applicant's further detention by the absence of reasons to release her, while Article 5 § 3 of the Convention implies an opposite approach and requires national authorities to indicate grounds for the person's continuing detention (see *Neumeister v. Austria*, 27 June 1968,

§ 4, Series A no. 8). Besides, at no stage did it appear that the courts considered applying any alternative preventive measures.

80. The Court has frequently found violations of Article 5 § 3 of the Convention in similar circumstances (see, among many other authorities, *Yeloyev v. Ukraine*, no. 17283/02, §§ 60-61, 6 November 2008; *Doronin v. Ukraine*, no. 16505/02, §§ 63-64, 19 February 2009; and *Kharchenko v. Ukraine*, no. 40107/02, §§ 79-81, 99 and 101, 10 February 2011). It considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

81. There has accordingly been a breach of Article 5 § 3 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

82. Lastly, the applicant complained of an unfair trial, without invoking any Article of the Convention.

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

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. 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."

86. The applicant submitted that she did not insist on compensation for pecuniary and non-pecuniary damage. Accordingly, the Court considers that there is no call to award her any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints under Article 3 and Article 5 § 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 16 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Ann Power-Forde is annexed to this judgment.

M.V.
C.W.

PARTLY DISSENTING OPINION OF JUDGE POWER-FORDE

I do not share the majority's view that there has been no violation of Article 3 of the Convention in this case. To my mind, the judgment fails to address, sufficiently and convincingly, the question of the adequacy of the medical treatment which the applicant received whilst detained. In addition, I consider that it departs from previous case law wherein the Court has found it degrading to deprive a prisoner suffering from eye problems of his glasses in circumstances where these have been medically prescribed and are, clearly, necessary for his general well being.

The applicant's numerous medical problems were confirmed and diagnosed by the medical personnel of the SIZO Unit wherein she was detained (§ 42). She suffered from hypertension (stage 2), hypertensive angiopathy, second stage encephalopathy, ventricular arrhythmia, chronic gall-bladder disease and chronic pancreatitis. She was also diagnosed with amblyopia, retinopathy and atrophy of the nerves to the right eye (§ 37).

The Court's jurisprudence on the right of prisoners to medical treatment whilst in detention is well established. The right to health in prison was developed at the same time as the right to humane conditions of detention. The State is under an obligation not only to provide some form of medical assistance to an ill prisoner, but to provide, the 'requisite medical assistance.[1] In *Kudla v. Poland* the Court summarised the obligations incumbent upon the State:

'Article 3 compels the State to ensure that a person is detained in conditions that are compatible with respect for his human dignity, that is the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding an unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well being are adequately secured, by among other things, providing him with the requisite medical assistance.'[2]

Thus, whilst the applicant in the instant case was not entitled to "state of the art" medical assistance she was entitled to and ought to have received requisite medical assistance for the numerous and relatively serious conditions from which she suffered in order to have her health and well

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1. *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 46, ECHR 2003-V; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; *Aerts v. Belgium*, 30 July 1998, § 64, Reports of Judgments and Decisions 1998-V.
2. *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI.

being secured. Visits by or consultations with a prison doctor are not, in themselves, sufficient to discharge the State's obligations under Article 3.

My difficulty with the majority's finding under Article 3 is two fold. Firstly, the judgment contains many general references to the fact that the applicant was seen by 'various specialists' and underwent 'various medical examinations and procedures' (§ 66). It also refers, in very general terms, to the fact that the applicant 'was prescribed treatment for her illnesses'. However, such broad and general references are made without any attempt to identify the actual treatment prescribed for each of the illnesses diagnosed thus making it impossible to determine whether such treatment, if administered, was either requisite or adequate. The judgment notes, for example, that the applicant was diagnosed with, *inter alia*, chronic gall-bladder disease and chronic pancreatitis whilst in prison. However, it contains no consideration of whether she received any treatment, specifically, for these conditions and, if so, whether that treatment was adequate. This level of generality and vagueness when dealing with such a fundamentally important right under the Convention is not sufficient to enable me to conclude that the State's obligation to provide 'requisite medical treatment' to the applicant has been discharged.

Secondly, I find it difficult to reconcile the majority's approach in this case with earlier case law on similar complaints. The applicant claimed that her eyesight deteriorated while she was in detention and that she was unable to read. She further claimed that, being without glasses, she required the assistance of her cell-mates to help her to write her complaints and to read aloud to her any correspondence she received, including, correspondence in relation to the charges against her. These specific claims are not denied by the respondent State. Indeed, it confirms that the applicant was diagnosed with, *inter alia*, severe myopic astigmatism and retinal angiosclerosis and was advised to wear glasses as of August 2005, a fact noted by the majority (§ 67). Notwithstanding this uncontested medical diagnosis and advice, on the Government's own submission, it took the authorities some *eight* months (April 2006) to conduct a 'selection' of spectacles for the applicant. It is not known whether any glasses were actually selected and, if so, whether they were adequate or, indeed, whether they were ever even supplied to the applicant (§ 67). Nevertheless, the majority finds no violation of the obligation to provide requisite medical care to the applicant in this regard.

The majority's position in this regard stands in marked contrast to the Court's judgment in *Slyusarev v. Russia* – a case which also concerned a

detainee who needed glasses.[1] In that case, the Court considered that even if being deprived of his glasses had no permanent effect on that applicant's health, he must have suffered because of it (§ 36). Being diagnosed with myopia of medium severity, the applicant, without glasses, was able to attend to himself and move around but, clearly, could not read or write normally. The Court accepted that being without his own glasses for two and a half months and being deprived of new glasses which had been prescribed for him for a further two and half months, must have created a lot of distress in the applicant's everyday life and must have given rise to a feeling of insecurity and helplessness. It found that the degree and duration of suffering involved had been degrading and that there had, therefore, been a violation of Article 3.

I find, likewise, in the instant case.

1. *Slyusarev v. Russia*, no. 60333/00, 20 April 2010.