

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

FIFTH SECTION

CASE OF KULIK v. UKRAINE

(Application no. 10397/10)

JUDGMENT

STRASBOURG

19 March 2015

FINAL

19/06/2015

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



In the case of Kulik v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 17 February 2015,

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

PROCEDURE

1. The case originated in an application (no. 10397/10) 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 Vitaliy Vladimirovich Kulik ("the applicant"), on 8 February 2010.

2. The applicant, who had been granted legal aid, was represented by Mr A. Bushchenko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent at the time, Mr. N. Kulchytskyy.

3. The applicant alleged under Article 3 of the Convention that he had been ill-treated by police officers and that there had been no effective investigation of the incident. He further complained under Article 13 of the Convention that he had had no civil remedy in respect of his allegations of ill-treatment.

4. On 19 March 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1977 and lives in the village of Budy, Kharkiv Region.

6. On 4 May 2003 the applicant was arrested on suspicion of stealing cucumbers from a greenhouse on a vegetable farm. On the same day the applicant was also arrested for an administrative offence (disobeying and resisting police officers). The report concerning the applicant's arrest for the administrative offence indicated that the applicant had no bodily injuries.

7. According to the Government, the applicant was released on 4 May 2003.

8. According to the applicant, on that day police officers beat him up in the Chervonozavodskyy District Police Department of Kharkiv ("the Police Department"), forcing him to confess to the theft. The applicant made self-incriminating statements. He was released on 5 May 2003 after the court had imposed a fine on him for the administrative offence.

9. On 5 May 2003 the investigator of the Police Department instituted criminal proceedings against the applicant and another person (P.) in connection with the theft of the cucumbers. As a preventive measure the applicant signed a written undertaking not to abscond.

10. On 5 May 2003 the applicant sought medical treatment at a hospital. A doctor at the trauma unit of the hospital noted that the applicant had numerous bruises on his body, and diagnosed him with concussion and a possible fracture of the nose.

11. On 8 May 2003 the applicant was examined by a surgeon, who noted that he had bruises on his nose, on the right side of the waist and on the suprapubic area.

12. On 12 May 2003 the applicant was admitted to the hospital for inpatient treatment on account of the injuries he had sustained.

13. On 20 May 2003, in the course of questioning, P., another suspect in the criminal case, complained of ill-treatment to the police investigator and noted that on 4 May 2003 he had also been in the Police Department and had heard noises and the applicant shouting.

14. On 13 June 2003 the applicant was discharged from the hospital.

15. On 25 June 2003 the applicant denied any involvement in the theft and argued that his earlier self-incriminating statements had been made as a result of ill-treatment on the part of police officers.

16. On 26 June 2003 a medical expert completed the medical examination (which started on 8 May 2003) and issued a report stating that the applicant was recovering from concussion accompanied by asthenic syndrome, he had bruises on the right leg and the trunk, swollen fingers on the left and right hands, and a swollen nose. The expert opined that the injuries had been inflicted by blunt solid objects and could have been sustained on 4 May 2003. The expert also cited the applicant's statement that the injuries had been caused on 4 May 2003 by unknown persons in the street.

17. On 27 June 2003, in the course of questioning, P. once again stated that on 4 May 2003 he had also been in the Police Department and had heard noises and the applicant shouting.

18. On 8 July 2003 the applicant was examined by a psychiatrist and diagnosed with postcontusional syndrome accompanied by occasional anxious depression.

19. On 10 July 2003 the applicant applied to the Chervonozavodskyy District Prosecutor's Office of Kharkiv ("the District Prosecutor's Office") seeking criminal prosecution of police officers for ill-treatment.

20. On 19 July 2003 the prosecutor, having conducted a pre-investigation enquires, refused to open criminal proceedings in connection with the applicant's allegations of ill-treatment, for lack of *corpus delicti*.

21. On 31 July 2003 the applicant was examined by a psychiatrist, who considered that the concussion had had a negative psychological effect on him and that he was showing signs of psychoorganic anxious depression syndrome with amnestic disorder.

22. On 12 August 2003 the medical expert issued another report, noting that the applicant had sustained concussion which had caused psychoorganic anxious depression syndrome accompanied by amnestic disorder; that he had bruises on his right arm and trunk, and swellings of the right and left hands and face; the injuries were of medium severity and had been caused by blunt solid objects. The expert considered that the injuries could have been sustained on 4 May 2003. The expert again cited the applicant's statement that the injuries had been caused on 4 May 2003 by unknown persons in the street.

23. On 7 October 2003 the Kharkiv Regional Prosecutor's Office quashed the decision of 19 July 2003 as unfounded and ordered further pre-investigation enquiries.

24. On 17 October 2003 the District Prosecutor's Office instituted criminal proceedings on account of the alleged ill-treatment of the applicant.

25. On 31 March 2004 a medical expert issued an additional report which stated that the applicant's craniocerebral injury accompanied by psychoorganic effects should be classified as an injury of medium severity; the other injuries (bruises and swellings) should be classified as minor injuries. It was noted in the report that the applicant stated that he had been beaten up by police officers on 4 May 2003. The expert opined that his injuries had been caused by blunt solid objects and could have been sustained on 4 May 2003 in the circumstances described by the applicant. The expert did not however exclude the possibility that those injuries had been caused by the applicant's falling down.

26. On 7 April 2004 the Kharkiv Regional Prosecutor's Office informed the applicant's father that the criminal case concerning the applicant's ill-treatment had not been comprehensively investigated and that the

investigator in charge had been given instructions as to what further steps must be taken.

27. On 8 June 2004 a doctor diagnosed the applicant with anxious depression syndrome.

28. On 17 November 2004 the investigation in that case was suspended as the perpetrators of the crime against the applicant could not be identified.

29. On 30 March 2005 the investigation was resumed.

30. On 11 April 2005 the investigation was suspended again because the perpetrators of the crime against the applicant could not be identified.

31. On 1 August 2005 the criminal proceedings against the applicant concerning the theft of the cucumbers were terminated for lack of *corpus delicti*.

32. On 27 January 2006 the Kharkiv Regional Prosecutor's Office informed the applicant that the decision of 11 April 2005 had been quashed as unfounded and that instructions had been given for a proper investigation of the alleged ill-treatment.

33. On 13 March 2006 the investigator of the District Prosecutor's Office refused to institute criminal proceedings against specific officers of the Police Department in connection with the applicant's alleged ill-treatment. The investigator noted that the police officers denied the applicant's allegations and the applicant himself had not claimed at the beginning that he had been ill-treated; the available evidence did not suggest that the injuries had been caused to the applicant by police officers.

34. On 14 March 2006 the District Prosecutor's Office decided to refer the case to the investigation unit of the Police Department for further proceedings.

35. On 20 August 2008 the investigation was suspended as the perpetrators of the crime against the applicant could not be identified.

36. On 31 October 2008 the supervising prosecutor's office quashed that decision as unfounded and gave instructions for a further investigation. By letter of the same date the prosecutor informed the applicant of the decision taken. In that letter the prosecutor also informed the applicant about the earlier decision of 13 March 2006, by which the investigator had refused to institute criminal proceedings against specific police officers.

37. On 3 August 2009 the local prosecutor's office informed the applicant that disciplinary proceedings had been instituted against the investigators for inadequate investigation of the case concerning the applicant's ill-treatment.

38. On 20 September 2012 the investigation was pending.

II. RELEVANT DOMESTIC LAW

39. The relevant provisions of the Code of Criminal Procedure of 1960 (in force at the relevant time) can be found in the judgment in the case of *Kaverzin v. Ukraine* (no. 23893/03, § 45, 15 May 2012).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

40. The applicant complained under Article 3 of the Convention that he had been ill-treated by police officers and that there had been no effective investigation of the incident.

41. Article 3 of the Convention reads as follows:

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

A. Admissibility

42. The Government submitted that the complaint was inadmissible for non-exhaustion of domestic remedies. They argued that the applicant had failed to appeal against the decision of 13 March 2006 by which the investigator had refused to open criminal proceedings against specific police officers. As an alternative, the Government maintained that the complaint should be rejected for the applicant's failure to comply with the six-month period, which should be calculated from the date the applicant became aware of the decision of 13 March 2006. In that regard the Government argued that the applicant must have become aware of the decision at least by the date of the prosecutor's letter, 31 October 2008, while the application was introduced in 2010.

43. The Government further contended that the applicant's complaint was manifestly ill-founded. With reference to the medical reports, they emphasised that the applicant had given to the medical experts different descriptions of the circumstances of his ill-treatment. Furthermore, the Government noted that in the last medical report of 31 March 2004 the expert considered that the injuries could have been sustained on 4 May 2003 in the Police Department, although the possibility was not excluded that those injuries had been caused by the applicant's falling down. The medical evidence was not therefore conclusive to support the allegations of ill-treatment. As to the statements of the co-suspect P., they were vague and did not indicate that the applicant had any injuries at that time. With regard to the procedural aspect of Article 3, the Government submitted that the

applicant made a complaint against the police officers only belatedly; nevertheless, the investigation was effective and there had been no shortcomings on the part of the domestic authorities.

44. The applicant disagreed and contended that his complaint was admissible.

45. The Court considers that the Government's objections raised on the grounds of non-exhaustion of domestic remedies and non-compliance with the six-month rule are closely linked to the substance of the applicant's complaint. In these circumstances, it joins these objections to the merits of the case. The Court further considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it is not inadmissible on any other ground. The complaint should therefore be declared admissible.

B. Merits

1. The parties' submissions

46. The Government did not provide specific comments as to the merits of the case.

47. As regards the procedural aspect of Article 3, the applicant explained that he had complained to the domestic authorities of ill-treatment with a certain delay because following his release he had been having inpatient treatment in hospital, and for a long time after the release he had continued to be affected by the negative physical and psychological consequences of the ill-treatment. The applicant then contended that the criminal proceedings were not compatible with the requirements of effective investigation. As to the remedy suggested by the Government, he argued that he had become aware of the decision of 13 March 2006 only belatedly, and that a copy of that decision was made available to him only with the Government's observations in the present case. The domestic authorities had never provided him with such a copy. Furthermore, the domestic proceedings as such had not terminated with that decision, and the authorities were supposed to continue with the investigation which was pending at the time the application was made to the Court.

48. As regards the substantive aspect of Article 3, he argued that at the initial stage of domestic proceedings he did not make correct statements as to the circumstances of his ill-treatment because of the negative psychological effects of the police brutality. The applicant insisted that his complaint was properly substantiated by the available evidence and that the Government had failed to provide a plausible explanation for the injuries.

2. The Court's assessment

(a) The procedural aspect of Article 3

49. The Court reiterates that where an individual raises an arguable claim that he has been ill-treated by State authorities in breach of Article 3, that provision requires by implication that there should be an effective official investigation. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia,* eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context (see, among many other authorities, *Mikheyev v. Russia*, no. 77617/01, § 107 et seq., 26 January 2006, and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, §§ 102 et seq.). For an investigation to be effective, those responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence (see *Kolevi v. Bulgaria*, no. 1108/02, § 193, 5 November 2009).

50. The Court finds that the applicant's injuries were serious enough (see paragraphs 10, 11, 16, 22, 25 above) and that his complaint of ill-treatment, even though submitted with a certain delay, was arguable for the purpose of Article 3, requiring therefore that the domestic authorities carry out an effective investigation.

51. The Court further notes that it was more than three months after the applicant's complaint to the prosecutor's office that a full-scale investigation was opened. Before that date the case was investigated by way of pre-investigation enquiries. In this regard the Court has previously found that such pre-investigation enquiries do not comply with the principles of an effective remedy, for the following reasons: the enquiring officer can take only a limited number of procedural steps within that procedure; the victims have no formal status, with the result that they are precluded from effective participation in the procedure (see *Davydov and Others,* cited above, §§ 310-312 and *Savitskyy v. Ukraine,* no. 38773/05, § 105, 26 July 2012).

52. As to the criminal proceedings instituted on 17 October 2003, it does not appear that the investigating authorities made a serious attempt to scrutinise the applicant's version of the events, even though it was supported by the medical expert reports and other evidence. In this regard it has not been shown that the decisions to suspend the investigation in 2004

and 2005 were justified. Similarly, it cannot be concluded that the decision of 13 March 2006 by which the investigator refused to open criminal proceedings against specific police officers was based on a thorough examination of the applicant's allegations. It is notable that in 2004 and 2009 the supervising prosecutor's offices admitted that the investigation was not comprehensive or adequate (see paragraphs 26 and 37 above).

53. The Court further notes that following the decision of 14 March 2006 the investigation was entrusted to the police department which employed the police officers who had allegedly ill-treated the applicant. The Court does not consider that that investigation was accompanied by guarantees of independence and impartiality (see *Savitskyy*, cited above, § 103). As to the Government's objection concerning the failure of the applicant to appeal against the decision of 13 March 2006, the Court takes note of the applicant's contention that the domestic authorities informed him of that decision only belatedly. It also appears that the applicant was not provided with a copy of that decision by the domestic authorities and could examine it only with the Government's observations in 2012. This means that before that date he did not know the precise reasons for it, and thus was not in a position to appeal effectively against it (see *Akulinin and Babich v. Russia*, no. 5742/02, § 29, 2 October 2008, and *Savitskyy*, cited above, § 120). Meanwhile, following the decision of 13 March 2006 the criminal proceedings were not terminated at the domestic level, and the authorities remained under an obligation to investigate the alleged ill-treatment. That decision did not therefore exclude the prosecution of police officers in the light of additional material which might be obtained in the course of further investigation.

54. The Court lastly notes that the domestic investigation remained pending when the parties exchanged their observations, and the Court does not consider that the overall length of the investigation of almost nine years was justified.

55. In the light of the above considerations, the Court finds that the domestic proceedings did not comply with the basic requirements of "effectiveness" implied in Article 3 of the Convention. The Court notes that in the case of *Kaverzin v. Ukraine* (cited above, §§ 173-180) it found that reluctance on the part of the authorities to ensure that a prompt and thorough investigation of the ill-treatment complaints by the criminal suspects was carried out constituted a systemic problem within the meaning of Article 46 of the Convention.

56. Accordingly, the Court dismisses the Government's objection based on the rule of exhaustion of domestic remedies. As the investigation was pending on the date of application to the Court, no issue arises under the six-month rule either, and the relevant objection of the Government should likewise be dismissed. The Court further holds that there has been a violation of the procedural aspect of Article 3 of the Convention.

(b) The substantive aspect of Article 3

57. It is the Court's well established principle under Article 3 of the Convention that in assessing evidence it generally applies the standard of proof "beyond reasonable doubt". However, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of those under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 34, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

58. The Court considers that the medical evidence available in the file is sufficient to conclude that on 4 May 2003, the day the applicant was arrested and held in the police station, he sustained concussion and numerous bodily injuries. The medical evidence also shows that following that day he experienced psychological problems (see paragraphs 18, 21 and 27 above). At the same time, when documenting the applicant's detention on 4 May 2003 the authorities noted that the applicant was not injured. This statement therefore suggests that the applicant had not sustained injuries before being placed under the control of the authorities. As to the time of release, there is nothing in support of the Government's contention that the applicant was released on 4 May 2003 and not on 5 May 2003 following the court hearing in the administrative case, as argued by the applicant. Accordingly, the Court finds that it was for the State to provide a satisfactory and convincing explanation of the circumstances in which the applicant sustained injuries. The State's failure to discharge this burden of proof may prompt the Court to accept the applicant's account of the events.

59. The above analysis under the procedural limb of Article 3 of the Convention has shown that owing to the shortcomings of the domestic proceedings the facts of the ill-treatment had not been effectively investigated and the evidence in support of the applicant's version had not been properly assembled. The Government maintained that according to the last medical expert report the possibility could not be excluded that the injuries had been sustained as a result of the applicant's falling down. However, similarly to the applicant's version, this version was not properly examined by the domestic authorities either. It is furthermore notable that by that same report the expert also considered that the injuries could have been sustained in the circumstances as described by the applicant. The Court therefore does not accept the Government's suggestion as a plausible explanation. Meanwhile, no other explanation for the applicant's injuries has been provided. In these circumstances the Court holds that the State

must be held responsible for the ill-treatment, which should be classified as inhuman and degrading.

60. It follows that there has been a substantive violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

61. The applicant complained under Article 13 of the Convention that he had no civil remedy in respect of his allegations of ill-treatment.

62. Article 13 provides as follows:

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

A. Admissibility

63. The Government contended that the complaint was inadmissible since the applicant had no arguable claim for the purpose of Article 13.

64. The Court considers 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.

B. Merits

65. The Court notes that the criminal proceedings concerning the applicant's ill-treatment were crucial for the exercise of the applicant's civil right to claim compensation for injuries resulting from a criminal act: in the absence of an identified perpetrator a civil action would be futile (see *Afanasyev v. Ukraine*, no. 38722/02, § 77, 5 April 2005). The Court finds that the shortcomings of the criminal proceedings at issue have effectively prevented the applicant from lodging a civil claim and obtaining compensation.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 35,000 euros (EUR) in respect of non-pecuniary damage.

69. The Government contended that the claim was groundless.

70. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of violations in the present case. Ruling on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicant also claimed EUR 3,584 for costs and expenses incurred before the Court.

72. The Government submitted that this claim was unfounded and excessive.

73. 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, in addition to the legal aid granted, the sum of EUR 1,500 for costs and expenses for the proceedings before the Court. The amount is to be paid directly into the bank account of the applicant's lawyer, Mr Arkadiy Bushchenko (see, for example, *Hristovi v. Bulgaria*, no. 42697/05, § 109, 11 October 2011, and *Singartiyski and Others v. Bulgaria*, no. 48284/07, § 54, 18 October 2011).

C. Default interest

74. 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. *Joins to the merits* the Government's objections as to the admissibility of the applicant's complaint of ill-treatment by the police (on the grounds

of non-exhaustion of domestic remedies and non-compliance with the six-month rule) and dismisses these objections after an examination on the merits;

2. *Declares* the application admissible;

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

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

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

6. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of the applicant's lawyer, Mr A. Bushchenko;
(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;

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

Done in English, and notified in writing on 19 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President