

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

FIFTH SECTION

CASE OF SADKOV v. UKRAINE

(Application no. 21987/05)

JUDGMENT

STRASBOURG

6 July 2017

FINAL

11/12/2017

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



In the case of Sadkov v. Ukraine,

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

Angelika Nußberger, *President,*
Erik Møse,
Ganna Yudkivska,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 16 May 2017,

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

PROCEDURE

1. The case originated in an application (no. 21987/05) 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 Anatolyevich Sadkov ("the applicant"), on 2 June 2005.

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

3. The applicant complained, in the main, under Article 3 of the Convention of ill-treatment by the authorities, under Article 5 of the unlawfulness of his pre-trial detention and a lack of review of the lawfulness of his detention, under Article 6 of the unfairness of the criminal proceedings against him, and under Article 34 of the hindrance of his right of individual application.

4. On 3 June 2013 the applicant's above complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

5. The applicant was born in 1972 and currently lives in Ukraine. Prior to the events at issue, notably during an unspecified period before 1998, the applicant used to serve in the police. He provided no further details in that regard.

I. THE APPLICANT'S ARREST AND ADMINISTRATIVE DETENTION

6. On 11 June 2004 the police were informed that the applicant and one of his suspected accomplices, who at the time were on a wanted list for having committed multiple robberies, were on a train travelling to Moldova. The police were also informed that they could be in possession of a gun. At about 11 p.m. on that day a group of four police officers boarded the train and arrested the applicant and his accomplice, using, as noted in the relevant official documents, "hand-to-hand combat techniques" and handcuffs to subdue them. According to the Government, during the arrest the applicant tried to escape. Subsequently, the applicant was taken to Kotovsk police station.

7. On 12 June 2004 the police drew up a report on the applicant's arrest in which it was noted that he had been arrested for "having resisted lawful demands of the police", which was an administrative offence, on 12 June 2004 in Kotovsk. The police report on the offence, joined to the above arrest report of 12 June 2004, specified that the applicant "had behaved aggressively, had refused to present his identity documents, had tried to run away [and] had grabbed the police officers' clothes". According to the parties, the information concerning the time and place of the arrest contained in the reports was false.

8. Later that day the Kotovsk Town Court found the applicant guilty of the abovementioned administrative offence and ordered his administrative detention for twelve days. The applicant remained in police custody.

9. On 17 August 2004 the regional police department examined the circumstances of the applicant's arrest and issued a report, finding that the police officers concerned had lawfully used "hand-to-hand combat techniques" and handcuffs against the applicant. No further details were given in that connection. In the report, it was also noted that the applicant had had bruises on his body after the arrest.

II. ALLEGED ILL-TREATMENT OF THE APPLICANT

10. According to the applicant, while in police custody during the night of 11 to 12 June 2004, he was ill-treated by several police officers with the aim of extracting his confession to the crimes of which he was suspected (see paragraph 6 above). In particular, police officers allegedly beat him up, administered electric shocks to him, suffocated him using a gas mask, inserted needles under his nails, hung him over a metal bar, and attempted to sexually abuse him. Unable to withstand the ill-treatment, the applicant made self-incriminating statements and also statements incriminating several other persons, who later became his co-defendants in the proceedings. The applicant stated that had he not done so, the police officers

would have killed him as they had killed a certain M., whom the police had suspected of being the applicant's accomplice, during his questioning in the same police station on 18 March 2004. As was later found by the trial court, M. had died in the course of a robbery he had committed together with the applicant (see paragraph 54 below).

11. Allegedly, the police officers also forced the applicant to sign a written statement that he had no complaints about them and that he had received his injuries elsewhere.

12. On 12 June 2004 the applicant complained to a prosecutor's office that he had been tortured by the police. On the same day, on the prosecutor's office's instructions, the applicant was examined by a medical expert who noted multiple bruises on the applicant's body and face, which the expert classified as minor. During his medical examination the applicant stated that he had been beaten up by the police officers at the police station during the night of 11 to 12 June 2004. The expert noted that the applicant could have been punched and kicked in the head and body during that time.

13. According to the applicant, the police officers continued torturing him for the next three days. The applicant stated that two people had witnessed him being ill-treated by the police. He did not give their details.

14. On 29 June 2004 the applicant handed the investigators a written statement informing them of his wish to withdraw his complaints of ill-treatment. Notably, he stated that he had no grievances against the police and that he had been injured due to his own fault in a different location. He did not provide any details of how he had been injured.

15. On 30 June 2004 an investigator from the Kotovsk police station, having questioned the applicant in the presence of his lawyer (see paragraph 38 below), decided not to launch a criminal investigation in respect of the applicant's injuries, noting, mainly, that the applicant had withdrawn his complaints.

16. Subsequently, the applicant lodged new complaints of alleged ill-treatment by the police on 11-12 June 2004 with a prosecutor's office.

17. In particular, in August 2004 the applicant complained to the prosecutor overseeing the investigation that he had been beaten up by the police. On 30 August 2004 the prosecutor met with the applicant and allegedly tried to force him to confess to having committed other crimes. As the applicant refused, the prosecutor allegedly beat him up. As a result, the applicant decided to stop making complaints to that prosecutor.

18. The applicant's complaints of ill-treatment by the police on 11-12 June 2004 made to other prosecutors were re-examined on several occasions. In particular, the prosecutors' decisions refusing to prosecute the police officers issued on 6 July and 31 August 2004, 25 January, 28 July and 25 November 2005 were annulled by senior prosecutors for failure to investigate the matter in full.

19. By a decision of 11 February 2006, the prosecutor's office again rejected the complaints as unsubstantiated, finding that it had not been demonstrated that the police officers had committed a crime and that there was no evidence that the police had forced the applicant to give self-incriminating statements after his arrest. Statements of a number of police officers were relied upon in that regard. It was also noted that at some point in time the applicant and his lawyer had made statements that the applicant had not been ill-treated by the police after his arrest, and that he had refused to give details as to how he had received the injuries noted in the medical examination of 12 June 2004 (see paragraphs 14 and 15 above). The prosecutor's office further found no issue in the way the police had arrested the applicant, relying on the report of 17 August 2004 (see paragraph 9 above).

20. The applicant did not challenge that decision in a separate appeal to a higher prosecutor or the courts, though he raised the complaints of ill-treatment by the police raised during his trial (see paragraph 49 below).

21. According to the applicant, during further stages of the criminal proceedings against him, he was subjected to beatings by the police on several occasions.

22. The applicant also stated that during his trial he had been subjected to various forms of ill-treatment by the guards, who had been escorting him to court hearings. In particular, the guards had twisted his hands and tried to break his vertebral column; they had not provided him with food during the lunch breaks; and they had threatened the applicant with physical punishment. They had also placed him temporarily in cells together with inmates whom the applicant claims he had arrested when he had worked for the police (see paragraph 5 above). The guards had informed the inmates that they would go unpunished had they killed or raped the applicant. Allegedly, the prosecutors to whom the applicant had brought his complaints of ill-treatment did not examine those complaints on the merits.

23. After his trial, in particular between February 2009 and November 2012, the applicant was detained in "ordinary" prisons, where he was allegedly subjected to abuse and threats by inmates on account of his previous service in the police. Eventually he was transferred to a specialised prison in Mena in which inmates with law-enforcement backgrounds were detained.

24. On 15 February 2016 the applicant was released from prison.

III. ALLEGEDLY INADEQUATE MEDICAL ASSISTANCE TO THE APPLICANT WHILE IN DETENTION

25. The applicant stated that during his detention he had suffered from different health issues, including a gastric ulcer, kidney disease and an eye issue, for which he had not been provided adequate medical assistance.

Consequently, his health condition had deteriorated. The applicant had lodged multiple complaints concerning his allegedly inadequate medical assistance with a prosecutor's office.

26. In 2006 the prosecutor's office instructed the head of the Prisons Service in Odessa to ensure that the applicant received adequate medical assistance while he was detained in Odesa Pre-Trial Detention Centre ("the SIZO"). Allegedly, the SIZO administration did not comply with that instruction and he was not given the assistance he needed. Thus, he continued to lodge complaints with the prosecutor's office. The prosecutor's office eventually rejected the complaints as unsubstantiated, having studied the applicant's medical file and noted that he had been medically examined and provided with adequate medical assistance during his detention in the SIZO. The applicant's further complaints of inadequate medical assistance while in prison were also rejected as unsubstantiated.

27. The Government submitted detailed information regarding the medical assistance which the applicant had received in detention. It demonstrates that throughout the period of his detention in the SIZO and in different prisons he had been examined by various doctors, including those from civilian medical institutions, and had been provided with treatment for the different medical issues he had had at the time.

IV. THE APPLICANT'S DETENTION PRIOR TO HIS CONVICTION ON 30 MARCH 2007

28. After his arrest on 11 June 2004, the applicant was detained on the basis of the decision of the Town Court of 12 June 2004 sentencing him to twelve days' administrative detention (see paragraph 8 above).

29. On 24 June 2004 the applicant was informed that he was being arrested in connection with his criminal prosecution. The next day the Town Court ordered his further detention for two months on the grounds that the applicant was accused of serious crimes and that he might evade investigation or commit a new crime. No further details were given in that regard.

30. The applicant did not appeal against the decision of the Town Court of 25 June 2004. Nor did he appeal against the decision of the same court of 10 August 2004 extending the maximum period of his detention to 21 October 2004.

31. Between 21 October and 24 December 2004 the applicant was detained solely on the basis of his case having been referred to the trial court.

32. Subsequently, the applicant was detained partly on the basis of the decision of the Town Court of 24 December 2004 and the decisions of the Odesa Regional Court of Appeal ("the Appeal Court") of 3 June 2005 and 10 January 2006 returning the case for additional investigation, and partly

on the basis of the decisions of the Appeal Court of 4 March, 29 July and 2 November 2005 and 10 March 2006 repeatedly extending the maximum period of his pre-trial detention. Those decisions were based mainly on the grounds that further investigative measures had to be performed, that the applicant was accused of serious crimes, and that he might evade investigation and trial and obstruct the establishment of the truth in the case. Those decisions contained no further details in that connection. No appeal against those decisions could be lodged. The applicant alleged that they were taken in violation of procedural norms, in particular without him or his lawyer taking part in the hearings on the matter.

33. Some of the periods of the applicant's detention between 4 March 2005 and 18 April 2006 – notably, from 10 May to 3 June and from 4 to 16 December 2005 – were not covered by any decision at all, the applicant having been detained on the grounds that the case was pending commencement of the trial.

34. According to the applicant, his detention between 10 and 15 May 2005 was also not covered by any decision at all.

V. THE APPLICANT'S CRIMINAL PROSECUTION

35. On 13 June 2004 the applicant was questioned as a witness concerning several cases of robbery. The applicant made self-incriminating statements, giving details of the crimes which he and several other persons had committed.

36. On 15 June 2004 the applicant was questioned on suspicion of murder, as one of his accomplices had given statements implicating him in that crime, which he had allegedly committed in the course of a robbery. The accomplice had been with the applicant when the murder had been committed, but had not seen how it had happened. In the course of the applicant's questioning on that date he confessed to having committed the murder and gave details in that regard. On the same date the applicant was officially charged with that crime. The applicant stated that he had been questioned without a lawyer being present. The Government did not address this submission. No documents regarding the applicant's questioning of 15 June 2004 were provided. Reference to that questioning was made in the judgment of 30 March 2007 (see paragraph 53 below). Notably, when assessing evidence concerning the murder charges, the Appeal Court held that:

> "... [T]he questioning of Sadkov V.A. was conducted with the participation of a lawyer [while Mr Sadkov had the procedural status of] a suspect on 15 June 2004 ([pages] 64-65, [volume] 12 [of the case file]) and an accused ([pages] 69-70, [volume] 12 [of the case file]) ... during which Sadkov explained that he had stabbed [the victim] repeatedly with a knife ... [and that] subsequently, he threw that knife into a lake. [His] statements contained information about the way the victim had been stabbed ... which was later confirmed by a forensic expert ... and which was not

present in the statements of [his accomplice] ... [O]n 15 June 2004, immediately after that information was received, the police officers searched the lake which [Mr Sadkov and his accomplice] had indicated and found a knife, which, according to the experts' report, could have been used to inflict the injuries of the victim ..."

37. Subsequently, the applicant took part in a number of investigative procedures, notably crime reconstructions and witness confrontations. According to the applicant and the information contained in the judgment of 30 March 2007 (see paragraph 53 below), he was not represented by a lawyer during those procedures.

38. According to the parties' submissions, on 24 June 2004 a lawyer was appointed by the investigator to represent the applicant in the proceedings. No copy of the relevant decision was provided. The applicant was questioned in the lawyer's presence where he confirmed his previous statements to the police.

39. During questioning at later stages of the investigation and at the trial, the applicant, with his lawyer present, repeatedly changed his version of the events pertaining to the charges against him. For instance, while initially he testified that it had been only him who had committed the murder, during subsequent questioning he stated that one of his co-defendants had also taken part in the murder. Ultimately, the applicant denied his responsibility for the murder and the majority of the counts of robbery. In particular, he stated that the crimes had been committed by his co-defendants, who had informed him of the relevant details, and that his confession during the initial questioning in June 2004 had been extracted as a result of ill-treatment by the police.

40. On 22 October 2004 the investigation was completed and the applicant was given the case file to study.

41. On 24 December 2004 the Town Court returned the case for additional investigation for failure to complete the required investigative steps in full. It also instructed the investigator to look into one of the applicant's co-defendants' complaints of ill-treatment by the police.

42. Subsequently, the case was returned to the prosecutor's office for additional investigation two more times, on 3 June and 16 December 2005, mainly for failure to complete the required investigative steps in full.

43. In the meantime, on 28 April 2005 the applicant asked the investigators to terminate the criminal proceedings against him and to release him from detention, stating that the charges against him were based on his self-incriminating statements obtained as a result of ill-treatment in June 2004.

44. On 29 April 2005 the request was refused as unsubstantiated.

45. On 30 November 2005 the investigators rejected a similar request made by the applicant's lawyer on 29 November 2005, in which he also alleged that the applicant's complaints of ill-treatment by the police had not been duly examined.

46. During the pre-trial investigation the applicant was given access to the entire case file and studied it together with his lawyer on several occasions, notably in April and September 2005 and February 2006. He was also given access to the case file during the trial.

47. According to the reports of the police, while the applicant was studying the case file on 29 September 2005 he tried to destroy several documents, in particular those concerning his statements made on 29 June 2004 (see paragraph 14 above). The applicant did not make any comments in that regard.

48. In April 2006 the case was referred to the Appeal Court for trial.

49. During the trial the applicant denied being guilty of the crimes he was charged with. The applicant's principle argument was that the charges were based on his and his co-defendants' testimony obtained as a result of ill-treatment by the police, and on false evidence.

50. On 30 March 2007 the Appeal Court found the applicant and five others guilty of a number of crimes, including murder, illegal possession of firearms and on multiple counts of robbery, sentenced the applicant to fifteen years' imprisonment and ordered the confiscation of all his property.

51. The court based its judgment regarding most of the charges mainly on the testimony of the applicant's co-defendants obtained in the course of the investigation and during the trial. The court also relied on the testimony of a number of witnesses and victims of the crimes and on the conclusions of several forensic, ballistic and other expert examinations.

52. The court noted that the applicant's and his co-defendants' arrest and administrative detention at the initial stage of the investigation (in the applicant's case between 11 and 24 June 2004) had been contrary to Articles 106 and 115 of the Code of Criminal Procedure (setting-out rules on pre-trial detention), as they had actually been arrested on suspicion of having committed crimes. The court also noted that during that period they had been questioned as witnesses concerning the relevant events and had taken part in other investigative procedures, notably crime reconstructions and witness confrontations. According to the court, that situation had entailed a violation of their right to mount a defence. The court decided not to accept as evidence all the verbatim records of the investigative actions in which the applicant and his co-defendants had taken part as witnesses during the relevant periods (see paragraph 35 above).

53. As regards the charge of murder, the court relied principally on the statements of one of the applicant's accomplices and the applicant's self-incriminating statements made at the pre-trial stage, in particular during his interview on 15 June 2004 and during subsequent questioning, having noted that the applicant had been assisted by a lawyer when he had made those statements (see paragraphs 36 and 38 above). The court found that the statements were reliable and noted that during the trial the applicant had

made conflicting submissions concerning the relevant events, which could not be accepted.

54. Relying on the prosecutor's office's decision of 11 February 2006 (see paragraph 19 above), the court found that the applicant's complaints of ill-treatment by the police had been unsubstantiated. The court also found that, contrary to the applicant's submissions, one of his accomplices, M., had died of blood loss after he had been injured by the applicant's other accomplice in the course of one of the robberies they had committed.

55. The applicant and the prosecution challenged the judgment of 30 March 2007 on appeal. While the prosecution disagreed with the first-instance court's legal qualification of some of the crimes, the applicant argued that he had not been guilty, that he had made self-incriminating statements as a result of ill-treatment by the police and that his co-defendants had made untruthful statements concerning his involvement in the crimes.

56. On 4 December 2007 the Supreme Court heard the case and delivered its decision in the applicant's presence. It upheld the judgment of 30 March 2007 in so far as it concerned the majority of the convictions, including murder. The Supreme Court found that the applicant's guilt had been duly established. In its decision, it referred to the statements of the applicant's co-defendants, witnesses and victims, and also to different forensic evidence.

57. By the same decision, the Supreme Court ordered a retrial of several of the convictions of robbery, holding that the first-instance court had erred in the legal qualification of the crimes. In particular, it ordered the examination of whether those crimes could be considered as having been committed by an "organised group".

58. The applicant stated that a copy of the decision of the Supreme Court of 4 December 2007 had been given to him, after a substantial delay, on 19 June 2008.

59. During the retrial the applicant argued that he was not guilty and that he had been ill-treated by the police on 11-12 June 2004.

60. On 11 August 2008 the Appeal Court convicted the applicant and his co-defendants on the remaining counts of robbery. It did not change the applicant's sentence. The conviction was based mainly on the testimony of the applicant's co-defendants obtained in the course of the investigation and trial. To a certain extent, the court also relied on the testimony of several witnesses and victims and the results of various expert examinations.

61. Relying on the prosecutor's office's decision of 11 February 2006, the court found that the applicant's complaints of ill-treatment by the police were unsubstantiated.

62. The applicant appealed in cassation.

63. On 16 December 2008 the Supreme Court upheld the judgment of 11 August 2008, noting, *inter alia*, that there had been no evidence that the

applicant's co-defendants had perjured themselves. It also noted that the applicant had acknowledged his guilt and had given details of the relevant events on several occasions during the investigation. The Supreme Court did not specify the period of the investigation to which it referred.

64. The Supreme Court generally noted that the applicant's complaints of a violation of his right to mount a defence did not have any basis in the case file. It further found no violation of the Code of Criminal Procedure of 1960 ("the CCrP") in that the applicant had taken part in the investigative actions during his administrative detention. The applicant's complaints of ill-treatment were considered to be unsubstantiated.

65. On 13 February 2009 the Appeal Court sent the applicant a copy of the decision of the Supreme Court of 16 December 2008, noting that after that date the applicant would not be entitled to study the case file.

VI. THE APPLICATION TO THE COURT

66. In June and July 2005 the applicant made submissions to the Court, complaining principally of ill-treatment by the police and of the unlawfulness of his arrest and detention.

67. By a letter of 22 August 2005, the Court invited the applicant to provide copies of documents pertinent to his complaints.

68. In his letter of 29 September 2005, the applicant stated that his requests for copies of the necessary documents had been refused by the domestic authorities. In particular, in September 2005 the prosecutor's office informed the applicant that the CCrP did not provide for the issuing of copies of documents from criminal case files and that once the investigation had been completed the applicant and his lawyer would be given a possibility to study the case file and to make copies of documents by hand.

69. By a letter of 5 December 2005, the Court invited the Government to provide factual information concerning the applicant's complaints regarding his inability to obtain copies of the documents needed for his application.

70. In January 2006 the applicant and the Government submitted copies of a number of documents relating to the applicant's complaints of ill-treatment and unlawful detention.

71. In their reply to the Court's letter of 5 December 2005, the Government also stated that pursuant to the CCrP the applicant had the right to study the case file and to make copies of documents after the completion of the investigation against him.

72. Subsequently, the applicant allegedly also had difficulties obtaining copies of other documents from the case file. He stated that his requests to the prosecutor's office and the courts for such copies had been to no avail. According to the documents provided by the parties, it was noted that the applicant had been given access to his case file during the criminal

proceedings against him and that the courts had not been required to issue him copies of documents other than judgments in his criminal case.

73. The applicant alleged that the administration of a prison in which he had been detained in August 2009 had destroyed a letter which he had asked them to send to the Court on 3 August 2009.

74. The prosecutor's office examined the alleged destruction of the letter and found that it had been duly dispatched.

75. The Court did not receive a letter from the applicant dated 3 August 2009.

THE LAW

I. SCOPE OF THE CASE

76. The Court notes that, after the communication of the case to the respondent Government, the applicant lodged new complaints. In particular, in his submissions dated 10 July 2014 the applicant complained under Article 6 § 1 of the Convention about the length of the criminal proceedings against him, under Article 8 of the unlawfulness of the search of his home in the course of those proceedings, and under Article 9 that he had not been allowed to keep religious texts or to meet with a priest during his pre-trial detention.

77. In the Court's view, the applicant's new complaints are not an elaboration of his original complaints to the Court on which the parties have commented. The Court considers, therefore, that it is not appropriate to take these matters up in the context of the present case (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

78. The applicant complained that he had been ill-treated by the police in June and December 2004, by a prosecutor on 30 August 2004 and by the guards escorting the applicant to court hearings during his trial. The applicant alleged that his complaints at the domestic level had not been duly examined.

79. The applicant further complained of inadequate medical assistance in detention and the prosecutor's office's inaction in that regard.

80. He relied on Article 3 of the Convention, which reads as follows:

Article 3

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

A. Admissibility

1. Alleged ill-treatment during the criminal proceedings

81. The Court notes that parts of the applicant's complaints under Article 3 of the Convention, specifically those of him being subjected to electric shocks, suffocation using a gas mask, insertion of needles under his nails, hanging him over a metal bar and sexual abuse between 11 and 12 June 2004 (see paragraph 10 above), are not supported by any evidence. Nor is there any evidence for the applicant's complaints of ill-treatment by the police after 12 June 2004, by a prosecutor on 30 August 2004 and by the guards escorting him to court hearings (see paragraphs 13, 17, 21 and 22 above). Also, it should be noted that the applicant did not demonstrate that he had raised those complaints in a meaningful way before the domestic authorities. Thus, the Court considers that they are not "arguable" for the purposes of Article 3 of the Convention and that the domestic authorities were not required to carry out an effective investigation into the alleged events. Accordingly, the Court finds that this part of the applicant's complaints of ill-treatment, under both the substantive and the procedural limbs of Article 3, should be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

82. In so far as the applicant can be understood as having complained of his alleged ill-treatment by inmates on account of his past service in the police (see paragraph 23 above), the Court finds that that complaint is entirely unsubstantiated and rejects it as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

83. In contrast, the Court notes that the applicant's allegation that he was beaten up by the police between 11 and 12 June 2004 is supported by a medical report (see paragraph 12 above). Accordingly, that complaint was prima facie arguable and, given the Court's settled case-law on the matter, the authorities were required to conduct an effective official investigation (see, for instance, *Kaverzin v. Ukraine,* no. 23893/03, § 106, 15 May 2012).

84. In the light of the foregoing, the Court finds that the applicant's complaints under Article 3 of the Convention of having been beaten by the police between 11 and 12 June 2004 and the authorities' failure to conduct an effective investigation in that regard are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Allegedly inadequate medical assistance

85. The Court observes that, while in detention, the applicant suffered from various medical issues (see paragraph 25 above). According to the detailed information submitted by the Government, the applicant's

complaints of specific health problems were dealt with by the authorities (see paragraph 27 above). On the whole, it cannot be argued that they addressed them inadequately. The applicant was examined by a number of doctors, including some from civilian medical institutions. He remained under their supervision throughout the entire period of his detention. They were best placed to determine the applicant's treatment and he was provided with the prescribed therapies. There is no evidence and it was not persuasively argued that the doctors had acted in bad faith or that the treatment provided had been ineffective. Nor did the applicant demonstrate that the domestic examination of his complaints of inadequate medical treatment had been deficient (see paragraph 26 above). Moreover, the shortcomings in the medical assistance provided to the applicant in the SIZO, identified by the prosecutor's office, were eventually adequately addressed and resolved (ibid.).

86. In the light of the foregoing, the Court finds that the applicant's complaints of inadequate medical assistance and the authorities' failure to conduct an effective investigation in that regard should be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Merits

1. The parties' submissions

87. The applicant complained that he had been beaten up by the police between 11 and 12 June 2004 and that there had been no effective investigation into that incident.

88. The Government contended that the applicant had failed to demonstrate that he had been ill-treated by the police after his arrest on 11 June 2004. According to them, the applicant had received the injuries, which had been discovered during a medical examination on 12 June 2004, during his arrest as the police had had to use force to subdue him. The Government argued that the use of force by the police had been lawful and that the authorities' examination of the incident had been prompt and accurate.

2. The Court's assessment

89. The Court observes that the applicant's complaints under consideration concern both the substantive and the procedural aspects of Article 3 of the Convention. As regards the former aspect, the Court notes that it is now common ground between the parties that the police had been responsible for the applicant's injuries. The medical report of 12 June 2004 also confirmed that the applicant had been injured during the time he had been at the hands of the police (see paragraph 12 above). The parties

however disagreed as to whether those injuries had been inflicted during or after the applicant's arrest on 11 June 2004 and whether they were the result of the use of proportionate force.

90. The Court is sensitive to the subsidiary nature of its task and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case. Therefore, the Court considers it appropriate to examine first whether the applicant's complaint of ill-treatment between 11 and 12 June 2004 was adequately investigated by the authorities (see, for example, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 155 and 181, ECHR 2012; *Kaverzin*, cited above, § 107; *Baklanov v. Ukraine*, no. 44425/08, §§ 70, 71 and 91, 24 October 2013; *Dzhulay v. Ukraine*, no. 24439/06, § 69, 3 April 2014; *Chinez v. Romania*, no. 2040/12, § 57, 17 March 2015; and *Yaroshovets and Others v. Ukraine*, nos. 74820/10, 71/11, 76/11, 83/11, and 332/11, § 77, 3 December 2015). It will then turn to the question of whether the alleged ill-treatment took place, bearing in mind the relevant domestic findings.

(a) Alleged failure to investigate the applicant's complaint of ill-treatment by the police

91. The Court reiterates that where an individual makes a credible assertion that he or she has suffered treatment infringing Article 3 at the hands of the police or other agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such an investigation should be 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, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

92. The investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see, for example, *El-Masri*, cited above, § 183). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 104 et seq., ECHR 1999-IV, and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the

cause of injuries or the identity of those responsible will risk falling foul of this standard.

93. Turning to the present case, the Court notes that a pre-investigation inquiry into the applicant's complaints of ill-treatment between 11 and 12 June 2004 was launched and relevant medical evidence was secured shortly after the alleged events. Although the matter was reconsidered on a number of occasions, the prosecutor's office maintained its finding that the applicant had been injured during his arrest on 11 June 2004. That finding was based, principally, on the police report of 17 August 2004 into the applicant's arrest (see paragraphs 9 and 19 above).

94. Although it is in the first place for the national authorities, in this case for the public prosecutor, to assess the relevant evidence and to draw conclusions on the basis of such assessment, the Court cannot disregard the fact that the prosecutor's office's findings lacked important details and relevant substantiation.

95. First, neither the police report of 17 August 2004 nor the prosecutor's office's decision of 11 February 2006 contained any details as to how the injuries had been inflicted on the applicant. Both documents referred to vague and unspecified "hand-to-hand combat techniques" which the police had used to subdue him, whereas the medical report of 12 June 2004 suggested that the applicant might have been punched and kicked in the head and on the body (see paragraph 12 above).

96. Secondly, even assuming that the applicant was injured because the police had tried to subdue him in order to arrest him and because, as the Government submitted, he had tried to escape (ibid.), no attempt was made to look into the questions of the lawfulness and proportionality of the force used against the applicant.

97. Thirdly, it remains unclear why the prosecutor's office relied, in its decision of 11 February 2006, on the applicant's statements of 29 and 30 June 2004 denying any ill-treatment (see paragraph 19 above), in spite of his more recent submissions to the contrary (see paragraphs 16 and 17 above).

98. Although the domestic courts dealing with the applicant's criminal case eventually addressed his repeated complaints of ill-treatment by the police between 11 and 12 June 2004, the shortcomings in the pre-investigation inquiry noted above were not remedied. Ultimately, the courts rejected the complaints as unsubstantiated, fully relying on the prosecutor's office's decision of 11 February 2006 (see paragraphs 54, 61 and 64 above).

99. In the light of the foregoing, the Court considers that the domestic authorities did not fulfil their obligation to investigate the applicant's complaints of ill-treatment by the police between 11 and 12 June 2004. Accordingly, there has been a procedural violation of Article 3 of the Convention in that regard.

(b) Alleged ill-treatment by the police

100. Turning to the substantive aspect of the applicant's complaints of ill-treatment by the police, the Court notes that in assessing evidence in a claim of a violation of Article 3 of the Convention, the standard of proof "beyond reasonable doubt" must be applied (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25, and *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita*, cited above, § 121). Where the events at 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. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

101. In the present case, having regard to the parties' submissions and the relevant medical evidence, it is uncontested that the applicant's injuries were sustained when under the control of the police, either during his arrest or thereafter when he was being questioned at the police station (see paragraphs 12, 87 and 88 above). Although no conclusive evidence is available concerning the time and other circumstances in which the applicant was injured, the exact nature and degree of force used against him and whether, in the circumstances, that force was proportionate, mainly because of the shortcomings in the domestic investigation (see paragraphs 95-99 above), the applicant's version of events, which he changed on several occasions during the proceedings (see paragraphs 12, 14, 15 and 17 above), cannot be accepted as presented. However, given the burden on the State to provide a plausible explanation for injuries sustained by a person under control of the police, the Court concludes that the Government have not satisfactorily established that the use of force against the applicant was lawful and absolutely necessary and that the applicant's injuries were wholly caused otherwise than by ill-treatment by the police (see *Sylenok and Tekhnoservis-Plus v. Ukraine*, no. 20988/02, §§ 69-70, 9 December 2010). Accordingly, there has been a violation of Article 3 of the Convention in that the applicant was subjected to inhuman and degrading treatment by the police between 11 and 12 June 2004.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

102. The applicant complained that he had been arrested on 11 June 2004 for the purpose of prosecuting him, although there had been no decision warranting his arrest.

103. He further complained of the unlawfulness of his detention between 4 March 2005 and 18 April 2006, stating in particular that the decisions of the Court of Appeal authorising his detention during part of that period had been taken in violation of procedural norms and had contained no justification for his continued detention. He also contended that his detention between 10 and 15 May 2005 had not been covered by any decision.

104. The applicant complained that the courts had failed to consider thoroughly and without delay his complaints concerning the unlawfulness of his detention during the abovementioned periods.

105. The applicant relied on Article 5 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> ..."

A. Admissibility

106. The Government argued that the applicant's complaint under Article 5 § 1 of the Convention of the unlawfulness of his arrest on 11 June 2004 and his detention between 11 and 24 June 2004 should be rejected for non-exhaustion of domestic remedies. In particular, he should have brought a compensation claim on the basis of the judgment of 30 March 2007, by which the Appeal Court found that he had been unlawfully deprived of his liberty during the period at issue (see paragraph 52 above).

107. The Court notes that it accepted the Government's objection of non-exhaustion of domestic remedies in similar circumstances in a number of cases against Ukraine (see, for a recent authority, *Tikhonov v. Ukraine,* no. 17969/09, § 39, 10 December 2015). It finds no grounds to decide otherwise in the present case. Accordingly, the applicant's complaint of the unlawfulness of his arrest on 11 June 2004 and his detention between 11 and 24 June 2004 should be rejected for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

108. The Court further finds that part of the applicant's complaint under Article 5 § 4 of the Convention, in so far as it concerns the period between 11 and 24 June 2004 which had ended more than six months before the date on which the present application was lodged (2 June 2005), must accordingly be rejected as lodged out of time pursuant to Article 35 §§ 1 and 4 of the Convention.

109. In so far as the applicant's complaints under Article 5 §§ 1 and 4 of the Convention concern his detention between 4 March 2005 and 18 April 2006, the Court notes that they are not manifestly ill-founded within the meaning of Article 35 § 3 (a). The Court further notes that those complaints are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

110. The Government argued that the applicant's pre-trial detention had been in compliance with Article 5 § 1 (c) of the Convention and that there had been no violation of Article 5 § 4, as the applicant had failed to appeal against the decisions authorising his detention and had not requested that the courts release him.

111. The applicant maintained his complaints under Article 5 §§ 1 and 4 of the Convention.

112. The Court notes that this part of the application concerns the applicant's detention between 4 March 2005 and 18 April 2006. During that period he was detained on the basis of court decisions which could not be appealed further. The impugned decisions relied essentially on the seriousness of the charges against the applicant and used stereotyped formulae without addressing specific facts or considering alternative preventive measures (see paragraph 32 above). In particular, the courts did not give any further details as regards their findings that, if released, the applicant might evade investigation and trial and obstruct the establishment of the truth in the case. Nor did they make reference to any facts in that regard. This left the applicant in a state of uncertainty as to the grounds for his detention during that period. The Court further notes that the applicant's detention from 10 May to 3 June and from 4 to 16 December 2005 was not covered by any decision at all (see paragraph 33 above).

113. The Court has frequently found violations of Article 5 §§ 1 and 4 of the Convention in similar situations (see, for recent authorities, *Yaroshovets and Others v. Ukraine*, nos. 74820/10, 71/11, 76/11, 83/11, and 332/11, §§ 122-28, 3 December 2015, and *Zakshevskiy v. Ukraine,* no. 7193/04, §§ 94-96, 17 March 2016, with further references).

114. Assessing the applicant's situation in the present case in the light of the principles developed in its case-law, the Court considers that there is no reason to depart from its previous approach. The Government did not put

forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

115. The Court therefore concludes that there has been a violation of Article 5 §§ 1 and 4 of the Convention as regards the applicant's detention between 4 March 2005 and 18 April 2006.

IV. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

116. The applicant complained that the proceedings against him had been unfair mainly for the reasons that during the initial stage of the investigation, notably between 12 and 24 June 2004, he had not been given access to a lawyer and had been forced to make self-incriminating statements. He relied on Article 6 §§ 1 and 3 (c), which read, in so far as relevant, as follows:

> "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

117. The Government stated that the applicant's complaints were to be rejected as manifestly ill-founded. In particular, the Government argued that there was no evidence of duress; that the applicant had been informed of his procedural rights, including the right not to incriminate himself; that he had been assisted by a lawyer for almost the entire duration of the proceedings; that the applicant had not complained of the inadequacy of the legal assistance with which he had been provided; that he had not sought to have the lawyer replaced; that the applicant had voluntarily participated in some investigative procedures without being assisted by a lawyer; that the Appeal Court had expressly found that the verbatim records of the investigative procedures carried out between 12 and 24 June 2004 could not be used as evidence in the case and accordingly had excluded them from the body of evidence; and that the applicant's conviction had been based on other evidence.

118. The applicant maintained his complaints.

119. The Court, having regard to the material before it, considers that the applicant's complaints under Article 6 §§ 1 and 3 (c) 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.

120. When examining the merits of this part of the application, the Court will take into consideration the Government's specific submissions as to those complaints (see paragraph 117 above).

B. Merits

1. General principles

121. The Court has consistently viewed early access to a lawyer as a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting the particular vulnerability of an accused in the early stages of proceedings when he or she is confronted with both the stress of the situation and the increasingly complex criminal legislation involved. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008).

122. Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction. (see *Salduz*, cited above, § 55).

123. The above test in *Salduz* (cited above) for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial is composed of two stages. In the first stage, the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 257, 13 September 2016).

124. As to the first stage of the test, the criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular when a suspect is first questioned, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. It is of relevance, when assessing whether compelling reasons have been demonstrated, whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them (ibid., § 258).

125. Where compelling reasons are established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were "fair" for the purposes of Article 6 § 1 (ibid., § 264).

126. Where compelling reasons are not established, the Court must apply a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). The onus is on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (ibid., § 265).

127. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:

(a) Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.

(b) The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair.

(c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.

(d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion.

(e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found.

(f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.

(g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case.

(h) Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.

(i) The weight of the public interest in the investigation and punishment of the particular offence in issue.

(j) Other relevant procedural safeguards afforded by domestic law and practice (ibid., 274).

128. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. Furthermore, it must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II). For a waiver to be effective it must be shown that the applicant could reasonably have foreseen the consequences of his conduct (see, *mutatis mutandis*, *Idalov v. Russia* [GC], no. 5826/03, § 173, 22 May 2012). The right to counsel, being a fundamental right among those which constitute the notion of a fair trial and ensuring the effectiveness of the rest of the guarantees set forth in Article 6 of the Convention, is a prime example of those rights which require the special protection of the "knowing and intelligent waiver" standard established in the Court's case-law (see *Dvorski v. Croatia* [GC], no. 25703/11, § 101, ECHR 2015).

2. Application of the above principles to the present case

(a) Conviction for robbery and related crimes

129. Turning to the present case, the Court notes that at the initial stage of investigation, notably between 11 and 24 June 2004, the applicant, who was formally serving his twelve-day administrative arrest, took part in different investigative actions. In particular he was questioned as a witness, without a lawyer present, concerning most charges against him and gave self-incriminating statements in that regard (see paragraphs 35 and 37 above). Eventually, those statements were excluded as evidence by the Appeal Court, which found that they had been obtained in violation of the applicant's defence rights, and the applicant's conviction was based on other evidence (see paragraphs 51, 52 and 60 above). Even though the Supreme Court in its decision of 16 December 2008 on the applicant's cassation appeal against his conviction noted that the applicant had

confessed to some of the crimes at a particular stage of the investigation (see paragraph 63 above), it did not refer to the applicant's statements made before 24 June 2004 and generally carried out no reassessment of the evidence or facts relied upon by the Appeal Court in its decision of 11 August 2008.

130. Further, the Court sees no evidence that the impugned statements played a role in the domestic courts' assessment of the relevant facts and the finding of guilt. It notes that the domestic courts substantiated the applicant's conviction for robbery and related crimes by the testimony of the applicant's co-defendants and that of a number of witnesses and victims of the crimes and also by the conclusions of several forensic examinations (see paragraphs 51 and 60 above). There is no basis to conclude that the applicant, who took part in the trial personally and was also represented by a legal counsel, was in any way restricted in adopting a defence strategy at variance with his statements made between 11 and 24 June 2004, which indeed he did (see paragraph 49 above). Nor was he restricted in his rights to state his case, question witnesses or challenge the evidence concerning this part of the case during the trial.

131. In the light of the forgoing, the Court finds that, although there were no compelling reasons to restrict the applicant's right of access to a lawyer during his questioning between 11 and 24 June 2004, which had implications for his privilege against self-incrimination, the overall fairness of the applicant's trial on charges of multiple counts of robbery and related crimes of unlawful possession of firearms was not irretrievably prejudiced. In this case, the courts' decisions concerning the above charges convincingly demonstrate that the applicant's conviction on those charges was not contrary to the guarantees of a fair hearing. Accordingly, there has been no violation of Article 6 of the Convention in that regard.

(b) Conviction for murder

132. The situation is different in so far as the applicant's conviction for murder is concerned. In particular, during the aforementioned period between 11 and 24 June 2004 the applicant was questioned as a suspect concerning the murder charge and confessed to having committed that crime (see paragraph 36 above). The applicant's self-incriminating statements in that regard, notably those of 15 June 2004, were eventually relied upon by the Appeal Court in its judgment of 30 March 2007. That judgment was upheld by the Supreme Court on 4 December 2007, which in its turn did not refer to the applicant's self-incriminating statements, but mentioned other pieces of evidence (see paragraphs 53 and 56 above).

133. The Court notes that in the judgment of 30 March 2007 it was held that the applicant had been assisted by a lawyer during his questioning on 15 June 2004. However, the applicant denied this and stated that he had not been given access to a lawyer before 24 June 2004.

134. Although the Government did not address the applicant's specific submissions in this regard, the Court finds that there is no sufficient basis to put into doubt the domestic court's finding that the applicant had been questioned with the assistance of a lawyer, which was ultimately upheld by the Supreme Court.

135. In the circumstances, it is not for the Court to take the role of a first-instance court and to establish the facts of the case itself, in particular where it was not demonstrated that the finding in question can be regarded as arbitrary or manifestly unreasonable.

136. Furthermore, the Court recalls that, while it has found that the applicant had been subjected to inhuman and degrading treatment while at the hands of the police between 11 and 12 June 2004 (see paragraph 101 above), there is no conclusive evidence that he was subjected to the ill-treatment with a view to obtaining self-incriminating statements during that period (ibid.) and there is no evidence in support of his complaints of ill-treatment by the police after 12 June 2004 (see paragraph 81 above).

137. The Court also notes that the applicant did not retract the statements of 15 June 2004 when questioned later undisputedly in the presence of a lawyer and maintained them for some time during the proceedings (see paragraphs 38-39 above). The statements in question were not the sole basis for the applicant's conviction for murder in the judgment of 30 March 2007 and it does not transpire from that judgment that the Appeal Court gave them decisive weight. Moreover, the Supreme Court, while upholding the judgment of the Appeal Court, made no reference to the applicant's self-incriminating statements and relied on other pieces of evidence regarding the murder charges (see paragraphs 56 and 132 above).

138. In making its overall fairness assessment of this part of the case and taking into account all the above circumstances and arguments, the Court finds that it was not demonstrated convincingly that the applicant's right of access to a lawyer or his privilege against self-incrimination were restricted during his questioning on 15 June 2004 and that the use of his self-incriminating statements of that date as a basis for convicting him of murder prejudiced the overall fairness of the trial. The above considerations are sufficient for the Court to conclude that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention in that regard.

V. ALLEGED INTERFERENCE WITH THE APPLICANT'S RIGHT OF INDIVIDUAL APPLICATION

139. The applicant complained that the authorities had failed to provide him with copies of the documents from his case file which he had wished to submit to the Court in substantiation of his application. The applicant also complained that the authorities had blocked his correspondence with the

Court. He relied on Article 34 of the Convention, which provides as follows:

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

140. The Court notes that the applicant's complaints under Article 34 of the Convention essentially concern two distinct issues, namely, the alleged refusal to provide the applicant with copies of documents for his application to the Court and the alleged blocking of his letters to the Court. The Court will deal with these issues separately.

A. Refusal to provide the applicant with copies of documents for his application to the Court

141. The Government argued that the applicant and the lawyer who had represented him in the domestic proceedings had had full access to the case file in the course of those proceedings and that they could have made copies of the relevant documents for the applicant's application to the Court.

142. The applicant did not make further submissions in that regard.

The Court notes that, although the applicant did not have access to the domestic case file at the time when the Court requested him to submit copies of certain documents in August 2005, less than a month later, that is in September 2005, the applicant was given full access to the case file and was eventually provided copies of some documents from it (see paragraphs 40 and 70 above).

143. The applicant did not demonstrate that he had been prevented from making copies of any other documents from the case file which he had deemed necessary to substantiate his application before the Court during the times he had had access to the case file on several subsequent occasions during the investigation and at the trial stage (see paragraph 46 above). Nor did he argue that he had been prevented from keeping copies of his own complaints and appeals, which he had made in the domestic proceedings after 2 June 2005 (the date on which he had lodged the present application with the Court), in order to send them to the Strasbourg Court (see paragraph 55 and 62 above).

144. In the light of the foregoing, the Court does not consider that the applicant was effectively prevented from substantiating his application, even though there were periods during which the applicant's access to the domestic case file was restricted (see paragraphs 68 and 71 above). It does not escape the Court's attention that there were delays in the applicant's receiving copies of certain documents from his case file and that after his trial had been completed he could no longer avail himself of the procedural

right to study the case file (see paragraphs 58 and 65 above). However, the Court finds the situation at issue was not of a kind where the applicant had no practical opportunity to obtain copies of the necessary documents for his case (compare and contrast with, for instance, *Vasiliy Ivashchenko v. Ukraine,* no. 760/03, §§ 107-10, 26 July 2012).

B. Alleged interference with the applicant's correspondence with the Court

145. The Government denied any interference with the applicant's correspondence with the Court.

146. The applicant did not make further submissions in that regard.

147. The Court notes that it may not be excluded that the letter which the applicant sent to the Court in August 2009 (see paragraph 73 above) was lost due to a technical error at some stage of dispatch or delivery. In any event, the Court finds that there is an insufficient factual basis to conclude that the Ukrainian authorities deliberately stopped the applicant's letter or failed to ensure that it was duly dispatched (see *Vasiliy Ivashchenko*, cited above, § 115).

C. Conclusion

148. Accordingly, the Court finds that the respondent State has not failed to comply with its obligations under Article 34 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

149. 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

150. The applicant claimed 6,000,000 euros (EUR) in respect of pecuniary damage, principally relating to his alleged loss of earnings and deteriorating health during the time he had been imprisoned, and non-pecuniary damage.

151. The Government contested that claim.

152. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects the claim in so far as it concerns the alleged pecuniary damage. Deciding in equity, it awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

153. The applicant submitted no claim for costs and expenses.

C. Default interest

154. 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,

1. *Declares* admissible:
   (a) by a majority, the applicant's complaints under Article 3 of the Convention of ill-treatment by the police between 11 and 12 June 2004; and
   (b) unanimously, the applicant's complaints under Article 5 §§ 1 and 4 of unlawfulness of his detention between 4 March 2005 and 18 April 2006 and of a lack of review of the lawfulness of that detention, and under Article 6 §§ 1 and 3 (c) of unfairness of the criminal proceedings against him;

2. *Declares*, unanimously, the remainder of the complaints inadmissible;

3. *Holds*, by four votes to three, that there has been a violation of Article 3 of the Convention in that the authorities failed to carry out an effective investigation into the applicant's complaints of ill-treatment by the police between 11 and 12 June 2004;

4. *Holds*, by four votes to three, that there has been a violation of Article 3 of the Convention in that the applicant was subjected to inhuman and degrading treatment by the police between 11 and 12 June 2004;

5. *Holds*, unanimously, that there has been a violation of Article 5 §§ 1 and 4 of the Convention as regards the applicant's detention between 4 March 2005 and 18 April 2006;

6. *Holds*, unanimously, that there has been no violation of Article 6 of the Convention as regards the applicant's conviction on multiple counts of robbery and related crimes of unlawful possession of firearms;

7. *Holds*, by five votes to two, that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the applicant's conviction for murder;

8. *Holds*, unanimously, that Ukraine has not failed to comply with its obligations under Article 34 of the Convention;

9. *Holds*, by four votes to three,
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 July 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint partly dissenting opinion of Judges Nußberger, Møse and O'Leary;
(b) joint partly dissenting opinion of Judges Yudkivska and Grozev.

M.B.
A.N.

JOINT PARTLY DISSENTING OPINION OF JUDGES NUSSBERGER, MØSE AND O'LEARY

The judgment is unanimous that there has been a violation of Article 5 §§ 1 and 4 of the Convention; that there has been no violation of Article 6 as regards the applicant's conviction on multiple counts of robbery and possession of firearms; and the respondent State has not failed to comply with its obligations under Article 34. We also agree with the majority which found that there has been no violation of Article 6 §§ 1 and 3 (c) as regards the applicant's conviction for murder.

However, we disagree with the majority's findings concerning the applicant's complaint that he was ill-treated by the police between 11 and 12 June 2004. In our view this complaint is not supported by sufficient evidence and is therefore inadmissible as unsubstantiated (operative paragraphs 1 (i) of the judgment). Consequently, there is no basis for finding violations of Article 3 under its procedural or substantive limb (operative paragraphs 3 and 4).

Before focusing on the allegation concerning 11 and 12 June 2004 it should be recalled that the applicant also invoked Article 3 in respect of other events (paragraph 78 of the majority judgment). The Chamber, again unanimously, has declared these complaints inadmissible as manifestly ill-founded (paragraphs 81 and 82). It considers, in particular:

- that the applicant's complaints that he was subjected to electric shocks, suffocated using a gas mask, had needles inserted under his nails, was hung over a metal bar and subjected to sexual abuse between 11 and 12 June 2004 (paragraph 10) are not supported by any evidence;

- nor is there any evidence for his complaints of ill-treatment by the police after 12 June 2004 (paragraphs 13 and 21), by a prosecutor on 30 August 2004 (paragraph 17) or by the guards escorting him to court hearings (paragraph 22). As the applicant did not demonstrate that he had raised those complaints in a meaningful way before the domestic authorities, they are not considered "arguable" for the purposes of Article 3 of the Convention;

- that the applicant's complaints concerning alleged ill-treatment by inmates on account of his past service in the police (paragraph 23) are entirely unsubstantiated.

Turning to the events between 11 and 12 June 2004 (paragraphs 6, 7 and 9 of the judgment), it is common ground that on 11 June 2004, at about 11 p.m., a group of four police officers boarded the train to Moldova and arrested the applicant and his suspected accomplice, who were both on a wanted list, accused of having committed multiple robberies. The police had been informed that they could have been in possession of a gun. It emerges from the police report of 12 June that the police resorted to "hand-to-hand combat techniques" and used handcuffs to restrain them. The same report

stated that the applicant had "resisted lawful demands of the police ... had behaved aggressively, had refused to present his identity documents, had tried to run away [and] had grabbed the police officers' clothes". The subsequent police report of 17 August 1004 also noted that the applicant had bruises on his body after his arrest.

Following the applicant's complaint on 12 June 2004 that he had been beaten up by the police at the police station, a medical expert found multiple bruises on the applicant's body and face. The expert classified them as "minor" but also noted, in view of the applicant's allegations, that he could have been punched and kicked in the head and body (see paragraph 12).

Subsequently, the applicant withdrew his complaints on 29 and 30 June 2004, the last time in the presence of his lawyer (see paragraphs 14 and 15), and then resubmitted his complaints with respect to 11 and 12 June. These complaints were considered several times. On 29 September 2005, when studying the case file, the applicant tried to destroy several documents, in particular those concerning his statements made on 29 June 2004 (paragraph 47). On 11 February 2006 the prosecutor's office maintained their conclusion that the allegations about ill-treatment were unsubstantiated. The applicant did not lodge any complaint against that decision.

The applicant's complaints about ill-treatment were also examined by the courts during the trial and on appeal. In its judgment of 30 March 2007, the Appeal Court rejected them as unsubstantiated, and at the same time noted that, contrary to the applicant's submissions, a certain M. had not been killed by the police, but that he had died because he had been injured by the applicant's other accomplice during one of their robberies (paragraph 54). Following a retrial ordered by the Supreme Court in respect of some of the convictions, the Appeal Court on 11 August 2008 maintained its view that the complaints about ill-treatment were unsubstantiated (paragraph 61). On 16 December 2008 the Supreme Court reached the same conclusion (paragraph 64).

As stated in the majority judgment (paragraph 90), the Court is sensitive to the subsidiary nature of its task and must be cautious in taking the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances. In the present case, the applicant's complaints about ill-treatment between 11 and 12 June 2004 were not only repeatedly considered unsubstantiated by the prosecutor's office and by the Appeal Court and the Supreme Court but even the Chamber held that the description of events given by the applicant (insertion of needles under his nails etc.) could not be true according to the findings of the medical expert (see paragraphs 81 and 82).

The applicant's injuries were minor and could be explained by the need to use force during his arrest, as he, armed with a gun, resisted the police officers and tried to escape. Aside from the applicant's claims, there was no

other evidence suggesting ill-treatment between 11 and 12 June 2004. His credibility is highly doubtful, however, as demonstrated above. In particular, he made numerous complaints about ill-treatment which the Chamber found totally unsubstantiated.

The fact that the applicant withdrew his complaint about ill-treatment is not in itself decisive. The Court's case-law illustrates that this does not occur infrequently in cases concerning Article 3, often as a result of pressure or force from law-enforcement personnel. This said, it should be noted that that the applicant even did so in the presence of his lawyer. In addition, at no point did the applicant complain that he had been subjected, when arrested on 11 June 2004, to disproportionate force itself amounting to ill-treatment within the meaning of Article 3. When examining the substantive limb of Article 3 the majority judgment partly transforms the applicant's complaint to this Court (described in paragraphs 12 and 83 but subsequently enlarged in paragraph 101 of the majority judgment) in order to permit the finding of a substantive violation.

In a large number of judgments involving Ukraine, the Court has found substantive and procedural violations of Article 3 of the Convention (see, for instance, *Kaverzin v. Ukraine,* no. 23893/03, 15 May 2012, with further references). However, needless to say, each case must be considered in view of the particular circumstances. The present case presents particular evidentiary challenges in view of the limited credibility of the applicant.

We therefore conclude that the applicant's complaint under Article 3 about ill-treatment by the police between 11 and 12 June 2004 is unsubstantiated and should be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA AND GROZEV

We voted for finding a violation of Article 6 §§ 1 and 3 (c) with respect to the murder charges against the applicant for the following reasons.

The applicant complained, both in the domestic courts and in this Court, that the proceedings against him had been unfair mainly for the reason that during the initial stage of the investigation, namely on 15 June 2004, he was not given access to a lawyer and had been forced to make a self-incriminating statement, during the time when he was unlawfully kept under administrative arrest between 12 and 24 June 2004. This confession was later used by the domestic courts as key evidence for his conviction on the murder charge. In rejecting the applicant's complaint, the majority accepted that contrary to his allegations, he had indeed been represented by a lawyer during his interrogation on 15 June 2004, relying on the finding of the domestic court. It is precisely on this point that we found ourselves unable to follow the majority and their holding that "there is no sufficient basis to put into doubt the domestic court's finding that the applicant had been questioned with the assistance of a lawyer" (see paragraph 134).

The Court has held on numerous occasions that the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see *Salduz v Turkey* [GC], no. 36391/02, § 51, ECHR 2008, and *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015). Further, in order to implement that principle, a respondent Government has the evidentiary burden of proving that this right could effectively be exercised, particularly where the suspect was under arrest. On this second point, the Court has held recently in *Simeonovi v. Bulgaria* ([GC], no. 21980/04, ECHR 2017) that it falls on the respondent Government to prove that the applicant was duly informed of his right to a lawyer. As in that particular case the respondent Government had failed to present to the Court any document demonstrating that the applicant had been duly informed of his right to a lawyer, the Court could not conclude that the applicant had indeed been informed of his right to a lawyer, and consequently that he had validly waived this right (ibid., §§ 125-28). We find this evidentiary requirement for the respondent Government in the proceedings before this Court, and respectively *vis-à-vis* the prosecution in the domestic proceedings, to be a particularly important guarantee for the effective exercise of the right to a lawyer. Placing the evidentiary burden upon the Government is justified by various considerations and primarily because persons in custody are in a vulnerable position, as this Court has repeatedly acknowledged, and the authorities are under a duty to protect them (see, among other authorities, *Salman v Turkey* [GC], no. 21986/93, § 99, ECHR 2000).

Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54, and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 255, ECHR 2016). This Court has repeatedly insisted on the right of access to a lawyer being "triggered" as from the first police interrogation of a suspect, since this initial stage may be particularly decisive as regards the course to be taken by the ensuing criminal proceedings, and the evidence obtained at this stage determines the framework in which the offence charged will be considered at the trial (see *Salduz*, cited above, § 54, and *Martin v. Estonia*, no. 35985/09, § 79, 30 May 2013).

Turning to the present case, we cannot help but note that the finding of the domestic court, on which the majority relied, is of particular brevity and fails to address a number of factual issues that clearly conflict with such a finding. The domestic court simply stated that the applicant had a lawyer on 15 June 2004, without however referring to any evidence on the basis of which this factual finding was made. No mention of the time of appointment or identity of the lawyer was made either. Further, no explanation was provided with respect to the obvious discrepancy between the finding that a lawyer represented the applicant on 15 June and the fact that a lawyer was appointed to represent the applicant on 24 June 2004 (see paragraph 38). Finally, the domestic court did not address another clearly pertinent issue, namely the fact that at the time of the applicant's interrogation on 15 June 2004 he was detained unlawfully. The applicant's administrative detention at the initial stage of the investigation (between 11 and 24 June 2004) was later found to be contrary to Articles 106 and 115 of the Code of Criminal Procedure, as he had actually been arrested on suspicion of having committed crimes (see paragraph 52). The fact that the authorities had detained the applicant on a false pretext in order to avoid arresting him on the basis of the criminal procedure and the applicable guarantees for a fair trial, necessitated a closer examination of the applicant's complaint that he had no lawyer on 15 June 2004. The domestic courts failed to do that.

We are fully aware that, with respect to findings of fact, this Court has a limited role, as domestic courts are better positioned to assess all the relevant evidence. However, in the light of the particular importance which the Convention and the Court's case-law attach to the presence of a lawyer from the very start of the criminal proceedings, and in the light of the deficiencies of the findings of the domestic court described above, it is our view that the issue deserved strict scrutiny by this Court.

Taking such a closer look, we are not convinced that the respondent Government proved that the applicant did indeed benefit from legal representation during his confession on 15 June 2004. Despite the fact that the applicant consistently reiterated throughout the domestic proceedings and before this Court that he had had no lawyer during the murder charges questioning of 15 June 2004, the respondent Government simply ignored the applicant's specific arguments and presented no additional evidence to support the holding of the domestic courts. Most importantly, in our view, the respondent Government failed to submit the documents related to the 15 June 2004 charges against the applicant and his interrogation. Not only did they fail to present these documents to the Court, without any explanations, they have also refused the applicant's requests for copies of the relevant documents in the criminal file. The applicant apparently had access to the case file only at the point of the conclusion of the preliminary investigation, however, without the right to make copies of documents. In view of the refusal of the domestic authorities to provide the applicant with copies of those documents, and in view of the failure of the respondent Government to present this Court with those documents, we find ourselves unable to conclude that it was established that the applicant was legally represented on 15 June 2004. Thus, in our view, the analysis of the applicant's complaint should have proceeded on a finding that the applicant was denied access to a lawyer on 15 June 2004, without there being "compelling reasons" for that denial.

Following the approach recently outlined by the Court in *Ibrahim*, where compelling reasons for limiting access to a lawyer were not established, the Court must apply very strict scrutiny to its assessment of the fairness of the proceedings. In such a case, the onus is on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (see *Ibrahim and Others,* cited above, § 265).

Applying this standard to the proceedings on the murder charge against the applicant, we come to the conclusion that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention. While the applicant's confession of 15 June 2004 was not the sole basis for his conviction, it appears to have had an impact on his conviction in both establishing the fact of the murder and in undermining the credibility of his subsequent statements during the trial (see paragraphs 49 and 53 of the judgment). In any event, the applicant's self-incriminating statements of 15 June 2004 formed an integral part of the body of evidence on which his conviction was based, and the Government did not demonstrate convincingly that the overall fairness of the trial was not irretrievably prejudiced by restricting his access to legal assistance.