

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

FIFTH SECTION

CASE OF TIKHONOV v. UKRAINE

(Application no. 17969/09)

JUDGMENT

STRASBOURG

10 December 2015

FINAL

10/03/2016

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



In the case of Tikhonov v. Ukraine,

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

Angelika Nußberger, *President,*
Ganna Yudkivska,
Khanlar Hajiyev,
André Potocki,
Faris Vehabović,
Yonko Grozev,
Carlo Ranzoni, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 17 November 2015,

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

PROCEDURE

1. The case originated in an application (no. 17969/09) 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 Igor Nikolayevich Tikhonov ("the applicant"), on 20 March 2009.

2. The applicant, who had been granted legal aid, was represented by Ms Y.N. Ashchenko, a lawyer practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr B. Babin, of the Ministry of Justice.

3. The applicant complained under Article 6 §§ 1 and 3 (c) of the Convention that he had had no access to a lawyer at the initial stage of proceedings against him, and that in that time he had made self-incriminating statements as a result of ill-treatment and of a violation of his privilege against self-incrimination.

4. On 5 November 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979. At the time of his application to the Court he was detained in prison in Vinnytsya.

6. On 12 February 2006 an elderly man was found killed in his house in the village of Pavlysh, in the Kirovohrad Region. A criminal investigation was opened by an investigator from the Onufriyivka District Prosecutor's Office.

7. On the same day the Onufriyivka District Police Department ("the Police Department") arrested the applicant under Article 263 of the Administrative Offences Code for minor acts of disorderly conduct, which constituted an administrative offence under Article 173 of that Code. According to the applicant, the police officers over the next two days exerted psychological pressure on him and applied physical violence against him for the purpose of extracting a confession to the murder.

8. On 14 February 2006 the investigator from the Onufriyivka District Prosecutor's Office questioned the applicant on suspicion of murder. Before questioning him, the investigator asked the applicant if he wished to have a lawyer. The applicant refused. In the course of the questioning the applicant confessed to the murder.

9. On 15 February 2006 the applicant participated in a reconstruction of the crime and showed, in the presence of witnesses, how he had committed the murder. Before that investigative measure, the applicant refused to have a lawyer.

10. On 17 February 2006 the Onufriyivka District Court ("the District Court") placed the applicant in pre-trial detention.

11. On 24 February 2006, following a request from the applicant for legal assistance, the investigator offered him a legal-aid lawyer. The applicant refused the lawyer, saying that he wished to have a different one who would be provided by his relatives. On that day the applicant denied his guilt and submitted that he had been psychologically and physically ill-treated by police officers and that this had resulted in his confession.

12. On 13 June 2006 the applicant was questioned again. He submitted that he would represent himself without a lawyer. He did not admit his guilt and refused to make any further statements.

13. On 19 June 2006 the case was referred to the District Court for the applicant to be tried.

14. On 15 August 2006 the District Court remitted the case to the Petrove District Prosecutor for additional investigation. In its reasons for that decision, the court stated that the information about the applicant's personality, including his prior criminal record, had not been assembled properly; the investigator had ignored the applicant's request for another lawyer after refusing the legal-aid lawyer; the applicant had not been told of his right to be assisted by a lawyer when examining the case file after the termination of the investigation; and the applicant had not been able to examine all the material in the case file.

15. On 3 October 2006 the Kirovohrad Regional Court of Appeal ("the Court of Appeal") upheld the District Court's decision of 15 August 2006.

16. On 5 December 2006 the Petrove District Prosecutor provided the applicant with a legal-aid lawyer and also allowed the applicant's mother to act as defence counsel in the proceedings. When questioned on 12 December 2006 in the presence of the lawyer, the applicant denied his guilt and refused to reply to any further questions.

17. On 20 February 2007 the Onufriyivka District Prosecutor's Office refused to institute criminal proceedings against the police officers in relation to the applicant's allegations of police brutality between 12 and 14 February 2006. Having conducted pre-investigation enquiries, it found no evidence suggesting the applicant had been ill-treated by the officers.

18. On 23 February 2007 the additional investigation was completed and the case was again referred to the District Court for trial.

19. During the trial the applicant, who was represented by the legal-aid lawyer, denied the charges and contended that his self-incriminating statements had been obtained by ill-treatment and in breach of his procedural rights.

20. On 21 June 2007 the District Court found the applicant guilty of murder and sentenced him to nine years' imprisonment. The court based its findings on the real, oral, documentary and expert evidence. The court relied in particular on the applicant's initial self-incriminating statements, noting that they were consistent with other evidence available in the file. The court considered that the applicant's subsequent retraction of these statements and denial of guilt were an attempt on his part to avoid punishment.

21. The District Court also dismissed the applicant's allegations of ill-treatment as unfounded. It had regard to pre-investigation enquiries conducted by the Onufriyivka Prosecutor's Office, which did not disclose evidence of any criminal acts by the police officers. The court also questioned the investigator and the witnesses who had taken part in the reconstruction of the crime, who also denied the allegations. It reviewed the videotapes of the applicant's self-incriminating statements and found no signs of ill-treatment.

22. On the same day, the District Court issued a separate ruling bringing the procedural violations committed by the law-enforcement officers during the pre-trial investigation in the applicant's case to the attention of the Kirovohrad Regional Prosecutor. The court stated in particular that the applicant's arrest and detention between 12 and 14 February 2006 for the alleged administrative offence had not been lawful, noting that the administrative case had never been examined by a competent authority. No appeal was lodged against that ruling.

23. The applicant appealed against his conviction. He claimed, *inter alia*, that his defence rights had not been respected at the initial stage of the investigation and that his self-incriminating statements had been obtained as a result of ill-treatment.

24. On 15 January 2008 the Kirovohrad Regional Court of Appeal upheld the judgment of 21 June 2007, noting that the applicant's guilt was well established by various items of evidence in the case file, including the applicant's initial self-incriminating statements. It dismissed as groundless the applicant's allegations of ill-treatment and violations of his procedural rights. The court further held that the procedural shortcomings identified by the first-instance court did not affect its findings on the substance of the criminal case.

25. The applicant appealed on points of law, repeating the arguments he made before the Court of Appeal.

26. On 7 October 2008 the Supreme Court dismissed the applicant's appeal on points of law as unfounded and upheld the decisions of the lower courts.

II. RELEVANT DOMESTIC LAW

27. Article 173 of the Administrative Offences Code of Ukraine of 7 December 1984 provides that minor disorderly conduct is an administrative offence which consists of the utterance of obscenities in public places, offensive behaviour towards others or similar acts that breach public order and peace.

28. Article 263 of that Code, as worded at the material time, provided, *inter alia*, that a person committing an act of minor disorderly conduct could be arrested until the case had been considered by a competent authority.

29. The other relevant provisions of domestic law can be found in the judgment in the case of *Orlovskiy v. Ukraine* (no. 12222/09, §§ 48-50, 2 April 2015).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant complained that between 12 and 14 February 2006 he had been ill-treated by police officers. He relied on Article 3 of the Convention, which reads as follows:

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

Admissibility

31. The Government submitted that the applicant's complaint was vague and unsubstantiated. There had been no evidence suggesting that the applicant had sustained any injuries between 12 and 14 February 2006. The allegations had been examined by the domestic authorities and no indication of ill-treatment had been found.

32. The applicant insisted that the police officers had beaten him up and tortured him in the period specified. While there had been no medical evidence in support of that allegation, his statements should be sufficient to establish a violation.

33. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment. In assessing evidence, the Court has generally applied 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 (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 87 and 92, ECHR 2010 with further references).

34. In the present case the applicant's allegations of ill-treatment are not supported by any medical or other evidence. Apart from the applicant's general statement, the Court has no material at hand suggesting that he was subjected to any psychological attacks or physical ill-treatment by police officers. In that regard the Court observes that the applicant's allegation was examined by the domestic authorities, namely the District Prosecutor's Office and the courts dealing with the applicant's criminal case, and they did not find any evidence of ill-treatment. In particular, in examining the applicant's complaint, the District Court had regard to the pre-investigation enquiries conducted by the Prosecutor's Office, heard evidence from the investigator and several witnesses and reviewed the videotapes of the applicant's statements. It follows that this part of the application should be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

35. The applicant complained that his arrest and initial detention between 12 and 14 February 2006 had been unlawful. He relied on Article 5 § 1 which provides, in so far as relevant, 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; ...”

Admissibility

36. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint under Article 5 § 1 of the Convention. In particular, he should have brought a civil claim for damages following the court ruling of 21 June 2007, which acknowledged that he had been unlawfully deprived of his liberty in the period at issue.

37. As an alternative, the Government asserted that the complaint was outside the six-month period, which should have been counted from 6 July 2007, when the court ruling of 21 June 2007 had come into force.

38. The applicant submitted that the remedy suggested by the Government was not effective and that he had not been obliged to have recourse to it. He further argued that he had raised the complaint in the course of criminal proceedings in which the final decision had been adopted on 7 October 2009. He argued that in these circumstances he had not failed to comply with the six-month time-limit.

39. The Court notes that it upheld the Government’s objection on the grounds of non-exhaustion of domestic remedies in similar circumstances in the case of *Orlovskiy v. Ukraine* (cited above, §§ 55-61). In the present case the deprivation of liberty complained of was also found to be unlawful by the domestic court. The relevant ruling was issued on 21 June 2007, no appeal was lodged against it and the courts carried out no further examination of the issue. Accordingly, the applicant was expected to make use of the remedy referred to by the Government. As there were no specific circumstances exempting the applicant from this requirement, the Court upholds the Government’s objection and dismisses the complaint for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention. In view of that conclusion, the Court does not need to examine the Government’s second objection.

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

40. The applicant complained that he had had no access to a lawyer at the initial stage of the proceedings and that in that time he had made his self-incriminating statements as a result of ill-treatment and a violation of his privilege against self-incrimination. He relied on Article 6 §§ 1 and 3 (c) of the Convention which provides, 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

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

B. Merits

1. The parties' submissions

42. The Government submitted that the applicant had expressly waived his right to a lawyer and the waiver had been compatible with Article 6 of the Convention. The domestic courts had lawfully relied on the self-incriminating statements made by the applicant and the absence of the lawyer at that time had not affected the overall fairness of the proceedings. They argued that the applicant had voluntarily confessed to the murder and that his privilege against self-incrimination had not been affected.

43. The applicant insisted that he had been unlawfully restricted from having legal assistance, that his defence rights and his privilege against self-incrimination had not been respected, and that the evidence unlawfully obtained in that period had been the basis for his conviction.

2. The Court's assessment

44. In its case-law the Court has emphasised the importance of the investigation stage for the preparation of criminal proceedings, as the evidence obtained at that stage provides the framework for consideration of the offence at the trial. At the same time, an accused person often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure has tended to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular situation of vulnerability can only properly be compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure that the right of an accused not to incriminate himself is respected. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In this connection, the Court has noted that the right of a detainee to have

access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly important in the case of serious charges (see *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008, with further references).

45. Having regard to such considerations, the Court has held that access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this 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 questioning by police without access to a lawyer are used for a conviction (ibid., § 55).

46. The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings (see *Jalloh v. Germany* [GC], no. 54810/00, § 105, ECHR 2006-IX). As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination in circumstances which do not give rise to a violation of Article 3 of the Convention, the Court reiterates that these standards of a fair trial presuppose that the prosecution in a criminal case should seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh*, cited above, § 100, and *Gäfgen,* cited above, § 168).

47. In the present case it is not disputed by the parties that on 14 February 2006 the applicant was questioned as a suspect in the murder case and that he was therefore entitled to a lawyer at that time. The Government submitted, however, that the applicant had waived that right and that this waiver had been compatible with the Convention.

48. The Court reiterates that Article 6 of the Convention does not prevent a person from waiving of his own free will the right to legal assistance. However, to comply with the Convention a waiver of this right must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to its importance (see *Dvorski v. Croatia* [GC], no. 25703/11, § 100, 20 October 2015, with further references).

49. The Court has not accepted waivers which have been signed by a detainee in dubious circumstances (see *Balitskiy v. Ukraine,* no. 12793/03, § 39, 3 November 2011), including arbitrary detention in police custody (see *Omelchenko v. Ukraine,* no. 34592/06, §§ 47-49, 17 July 2014). It has repeatedly condemned the practice of placing a person under administrative arrest with an ulterior motive, namely, to ensure his availability for

questioning as a suspect in a criminal case (ibid., § 49, with further references). In that regard it is appropriate to emphasise that an extension on artificial grounds of the initial period of detention by means of an administrative arrest deprives the person of prompt judicial scrutiny of such detention and runs counter to the principles of legal certainty and protection from arbitrary deprivation of liberty (see *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, §§ 84-91, 24 June 2010). Additionally, the right to prompt judicial review of a detention order is an important safeguard against ill-treatment of an individual who has been taken into custody (see *Aksoy v. Turkey*, 18 December 1996, § 76, *Reports of Judgments and Decisions* 1996-VI, and *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III).

50. Turning to the questioning of 14 February 2006, the Court notes that the applicant waived his right to a lawyer when he spent two days in police custody for the alleged administrative offence. Later, the domestic courts found that that detention had been unlawful, specifying that the case concerning the alleged administrative offence had never been examined by any competent authority (see paragraph 22 above). Indeed, no evidence has been presented to the Court to show that the applicant's detention in that period had any legal basis. No facts have been alleged, nor any details provided, as to the circumstances in which the applicant had allegedly committed an act of minor disorderly conduct such as to necessitate his being placed under administrative arrest in the period between the murder and the time of his arrest as a suspect in the murder case. Having regard to its case-law on this matter in respect of Ukraine, the Court considers that the present case is another example of the recurrent problem of using administrative detention in an arbitrary fashion to ensure the availability of a suspect for questioning without respecting the due process of law. The Court recalls that it has already urged Ukraine to implement specific reforms in order to put an end to this practice (see *Balitskiy,* cited above, §§ 51, 53 and 54, 3 November 2011).

51. In the cases of *Balitskiy* and *Omelchenko* (both cited above) the Court has had to deal with similar complaints in circumstances where the investigators had improperly placed the cases in less serious category of crime, with the result that the suspects were not aware of all the consequences of waiving their right to legal assistance. Those additional considerations do not apply in the present case. Nevertheless, the Court takes into account the fact that the waiver at issue was made by the applicant at a time when he was arbitrarily detained by the authorities, thus effectively depriving him of prompt judicial review of his detention and exposing him to a risk of unlawful pressure and coercion. In fact no details have been provided to the Court to show what happened to the applicant during the two-day period of his arbitrary detention in police custody. Furthermore, there is nothing to suggest that during that period the applicant

was in a position to communicate with a lawyer who could explain to him the peculiarities of his procedural status. It appears that the authorities deliberately kept the applicant in a continued state of uncertainty before they decided to clarify his wishes regarding the question of his legal representation. Having regard to such dubious circumstances and to the applicant's vulnerable position at that time, the Court cannot conclude that the applicant waived his right to a lawyer in circumstances which were attended by minimum safeguards commensurate to the importance of such a waiver. It therefore rejects the Government's contention that there was a valid waiver for the purpose of the Convention.

52. The question remains as to whether the absence of a lawyer could be justified by any exceptional circumstances in the case. However, the Court does not discern any compelling reason which would have justified the absence of the lawyer during the period in question. The lack of legal assistance at that time was therefore not compatible with the Convention.

53. Furthermore, while there is no evidence that the applicant was subjected to ill-treatment, the circumstances of the case suggest that the absence of legal assistance at the initial stage of the investigation prejudiced his right to remain silent and not to incriminate himself. In particular, the applicant several days later retracted his initial self-incriminating statements and claimed to be not guilty throughout all subsequent proceedings. However, the domestic courts gave credence to the applicant's initial self-incriminating statements, which had been made in dubious circumstances without a lawyer. Relying on those statements, the courts convicted the applicant without properly addressing his allegations of a violation of his procedural rights at the relevant time.

54. The above considerations are sufficient for the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

55. The applicant further complained of other violations of his rights under the Convention.

56. The Court has examined these complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

59. The Government contended that the claim was groundless.

60. The Court considers that the applicant must have suffered anguish and distress on account of the facts giving rise to the finding of a violation in the present case. Ruling on an equitable basis, the Court awards the applicant EUR 2,400 in respect of non-pecuniary damage.

B. Costs and expenses

61. The applicant did not submit any claims under this head. The Court therefore makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 §§ 1 and 3 (c) concerning access to a lawyer at the initial stage of the criminal proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

3. *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, EUR 2,400 (two thousand four hundred 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;

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

Done in English, and notified in writing on 10 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President