

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

FIFTH SECTION

CASE OF TSMOKALOV v. UKRAINE

(Application no. 15524/13)

JUDGMENT

STRASBOURG

3 November 2022

This judgment is final but it may be subject to editorial revision.



In the case of Tsmokalov v. Ukraine,

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

Arnfinn Bårdsen*, President,*
Kateřina Šimáčková*,*
Mykola Gnatovskyy*, judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 15524/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 19 February 2013 by a Ukrainian national, Mr Oleg Oleksandrovych Tsmokalov ("the applicant"), who was born in 1975 and lives in Mukachevo, and was represented before the Court by Mr M.O. Tarakhkalo, a lawyer practising in Kyiv;

the decision to give notice of the complaints under Articles 6 and 8 of the Convention to the Ukrainian Government ("the Government"), represented by their Agent, Mr I. Lishchyna, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 6 October 2022,

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

SUBJECT MATTER OF THE CASE

1. This case essentially concerns the authorities' failure to provide the applicant with appropriate redress for medical malpractice in State hospitals. It raises issues under Article 6 § 1 and Article 8 of the Convention.

2. The applicant has been registered as a disabled person since childhood and has suffered from a number of chronic diseases. In 2001 he was treated in three State hospitals after he had complained of poor health. He was misdiagnosed with Behçet's syndrome, whereas he had actually been suffering from tuberculosis, and for about three months he received inappropriate medical treatment, including unregistered medicines, which caused his health to deteriorate considerably and intensified the progression of the tuberculosis. During his medical treatment in one of the hospitals, the applicant was exposed while undressed (against his will, according to him) to medical students and clinical interns as "a patient with a rare disease".

I. CRIMINAL COMPLAINT AGAINST THE HOSPITALS' STAFF

3. In October 2003 the applicant lodged a criminal complaint against the hospitals' staff in view of the above facts, but to no avail. On at least four occasions between 2006 and 2011, the Zakarpattya regional prosecutor's

office refused to initiate criminal proceedings following complaints by the applicant, having found no evidence of the doctors' misconduct. Those decisions were subsequently quashed by higher prosecutors, who found that the inquiry conducted in respect of the applicant's complaint had not been comprehensive.

4. On 3 February 2012 the prosecutor's office instituted criminal proceedings against the hospitals' officials for medical negligence and forgery of documents. It relied, in particular, on the results of a forensic medical examination conducted in civil proceedings instituted by the applicant against the hospitals' officials (see paragraph 5 below). According to the applicant, those proceedings are still pending, while the criminal offences he had complained of have become time-barred. The applicant complained of a lack of activity on the part of the investigator, but was unsuccessful.

II. CIVIL PROCEEDINGS INSTITUTED BY THE APPLICANT

5. In August 2004 the applicant instituted civil proceedings against the hospitals, claiming 300,000 Ukrainian hryvnias (UAH – approximately 45,500 euros (EUR) at the time) in respect of non-pecuniary damage and certain amounts in respect of pecuniary damage. The proceedings ended with a final decision given by the Higher Specialised Civil and Criminal Court on 5 September 2012. In those proceedings the domestic courts, relying on a forensic medical report prepared by the main forensic medical examination bureau in Kyiv (report no. 109/109 A11), held that there had been medical negligence in respect of the applicant's treatment in all three hospitals, which could have led to the worsening of the applicant's health and protracted his recovery from tuberculosis, and awarded him the sum of UAH 10,000 (about EUR 965 at the time) in respect of non-pecuniary damage, as well as an additional amount of UAH 12,199 (about EUR 1,172 at the time) in respect of costs and expenses. The applicant's claim in respect of pecuniary damage was dismissed because he had failed to support it with relevant evidence.

6. In January 2016 the applicant applied to the court for a writ of execution in respect of the judgment delivered in his favour, and by January 2017 he had been paid the full amount of the compensation awarded to him in that judgment.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

7. The applicant alleged that the compensation proceedings had been ineffective, as the domestic courts had not taken into account all the instances of interference with his private life which had occurred in the hospitals and

had awarded him a very low amount of compensation, which had been paid to him more than four years after the completion of the proceedings.

8. The Government argued that the applicant could no longer claim to be a victim of a violation of his rights under Article 8, as the domestic courts had expressly acknowledged the infringement of his rights and had afforded him adequate and sufficient redress. They further submitted that the applicant's complaint concerning his exposure to medical students and interns was manifestly ill-founded, as the participation of such persons in medical examinations had been a routine procedure not aimed at interfering with the applicant's private life or diminishing his dignity, but had been carried out in the context of the education of future medical practitioners.

9. The Court considers, quite apart from (i) the question whether the domestic courts' finding could be regarded as a proper acknowledgment of the alleged violation of the Convention and (ii) the amount awarded, that the length of the proceedings the applicant had to pursue in order to obtain an award of compensation and then its payment was in any event excessive (see, *mutatis mutandis*, *Süleyman Ege v. Turkey*, no. 45721/09, § 59, 25 June 2013).

10. Accordingly, the applicant can still claim to be a "victim" of a violation of Article 8 of the Convention within the meaning of Article 34. The Government's objection in this regard must therefore be dismissed.

11. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

12. The general principles applicable to allegations of medical negligence can be found in *Mehmet Ulusoy and Others v. Turkey* (no. 54969/09, §§ 82-86, 25 June 2019).

13. Turning to the present case, the Court observes that the applicant held the hospitals' staff responsible for the deterioration of his health and mental condition caused by medical negligence and misconduct and argued that the judicial authorities had been ineffective in establishing the responsibility of the medical practitioners concerned.

14. Accordingly, the Court's task in the present case is to review the effectiveness of the remedies used by the applicant and thus to determine whether the judicial system ensured the proper implementation of the legislative and regulatory framework designed to protect patients' right to physical integrity .That task involves verifying that those actions actually enabled the applicant to have his allegations examined and to have any breach of the rules by the medical profession punished (see *İbrahim Keskin v. Turkey*, no. 10491/12, § 68, 27 March 2018).

15. The Court notes that the applicant made use of two remedies available to him in the domestic judicial system, one of a civil nature and the other of a criminal nature.

16. As regards the criminal proceedings, apart from the repeated remittals of the case for additional inquiries, which– as the Court has noted on a number of occasions– discloses a serious deficiency in the operation of the criminal justice machinery (see, for instance, *Kiryakov v. Ukraine*, no. 26124/03, § 64, 12 January 2012, with further references), there is nothing in the case file to justify the length of the proceedings, which have been pending for more than eighteen years without any results.

17. As for the civil proceedings, they were, in principle, the most appropriate remedy for the applicant's complaints, as they were capable of not only establishing the possible liabilityof the medical staff but also enabling the applicant to obtain compensation .However ,the manner in which the civil-law mechanism was implemented in the particular circumstances of the present case likewise did not provide adequate protection of the applicant's right to physical integrity.

18. In that regard, it took the domestic courts more than eight years to deliver a final judgment in respect of the applicant's compensation claims against the hospitals. The Court cannot accept that proceedings in respect of accusations of medical negligence should last this long (see, for instance, *İbrahim Keskin*, cited above, §§ 69 and 70). It is apparent from the case file that no significant delays in the proceedings were attributable to the applicant. In this connection, it is for the State to organise its judicial system in such a way as to enable its courts to meet the requirements of the Convention.

19. Moreover, it took another four years for the judgment to be executed by the authorities. The fact that it was only in 2016 that the applicant applied on his own initiative for the enforcement of the judgment does not mean that, in the meantime, the defendants – all of which were State medical institutions – were exempted from their obligation to comply voluntarily with the judgment and to pay him the compensation ordered by the court, of which they were well aware (see, *mutatis mutandis*, *Burdov v. Russia (no. 2)*, no. 33509/04, § 68, ECHR 2009).

20. Lastly, while the domestic courts acknowledged the violation of the applicant's rights on account of the error in his diagnosis and his inappropriate medical treatment, including the use of unregistered medicines, there is nothing to suggest that any assessment was made by the courts of the applicant's allegation that he had been exposed while unclothed during his treatment, even though the applicant explicitly raised this issue in his claim against the hospitals (see paragraph 3 above). The arguments put forward by the Government in this connection (see paragraph 8 above) were not relied on by the domestic courts.

21. The above elements are sufficient for the Court to find that the applicant did not receive an adequate judicial response which complied with the requirements inherent in the protection of the right to physical integrity. There has, accordingly, been a violation of Article 8 of the Convention.

22. In view of these findings, the Court does not consider it necessary to address separately the remaining aspects of the applicant's complaint under the abovementioned provision of the Convention.

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

23. The applicant also alleged, under Article 6 of the Convention, that the length of the compensation proceedings, which had lasted for more than twelve years including the enforcement phase, had been excessive.

24. The Court considers that it is not necessary to examine separately the admissibility or merits of this complaint, in view of its above conclusion under Article 8 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. The applicant claimed 10,809 euros (EUR) in respect of pecuniary damage, corresponding to the estimated future expenses he would be obliged to bear over the next ten years in connection with his condition, such as treatment in a sanatorium and a special diet, and also the medication which he had allegedly been required to pay for during his medical treatment at the hospitals. He also claimed EUR 27,726 in respect of non-pecuniary damage.

26. The Government contested those claims.

27. The Court observes that the applicant's claim for pecuniary damage appears to be based on the same materials he put before the domestic courts. The domestic courts rejected the applicant's claim for lack of evidence, and the Court does not find that conclusion arbitrary or ill-founded. Nine years after the final judgment in the compensation proceedings was given, the applicant has not provided the Court with new arguments or evidence capable of enabling it to reach a different conclusion from the one reached by the domestic courts or to show that during those years he actually incurred expenses due to the inappropriate medical treatment he had received in 2001. Consequently, the Court rejects the applicant's claim for just satisfaction in respect of pecuniary damage.

28. On the other hand, it awards the applicant EUR 5,900 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

29. The Court further 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 application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the length of the compensation proceedings;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 5,900 (five thousand nine 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;

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

Done in English, and notified in writing on 3 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Arnfinn Bårdsen President