

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

FIFTH SECTION

CASE OF TYMCHENKO v. UKRAINE

(Application no. 47351/06)

JUDGMENT

This version was rectified on 26 January 2017
under Rule 81 of the Rules of Court

STRASBOURG

13 October 2016

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



In the case of Tymchenko v. Ukraine,

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

Khanlar Hajiyev, *President,*
Faris Vehabović,
Carlo Ranzoni, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 20 September 2016,

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

PROCEDURE

1. The case originated in an application (no. 47351/06) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Yevgen Oleksandrovych Tymchenko ("the applicant"), on 3 November 2006. The applicant, who had been granted legal aid, was represented by Mr M. Tarakhkalo, a lawyer practising in Kharkiv.

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

3. The applicant alleged, in particular, that he had been ill-treated by the police and that there had been no adequate domestic investigation into the matter. He also complained that his trial had been unfair and that the conditions of his detention in Ladyzhynska prison no. 39 were poor. Lastly, the applicant complained of a violation of his right of individual application.

4. On 9 October 2013 the 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

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1977 and is currently serving a life sentence in Ladyzhynska prison no. 39.

A. Criminal proceedings against the applicant and his alleged ill-treatment by the police

6. In the evening on 17 August 2005 the applicant arrived from Sumy, where he lived, to Kyiv. Shortly thereafter, at 21.20 p.m., while still being at the railway station, he was arrested on suspicion of two counts of murder and robbery committed earlier that month in Sumy. Some items belonging to the victims were found in his luggage.

7. The applicant stated in his application that no coercive measures had been applied to him during or after his arrest on 17 August 2005. He also noted that immediately after his arrest he had been brought to the local police station, where the officer on duty had examined him and had drawn up a report about his injuries in the presence of two attested witnesses. The report stated that the applicant had abrasions on his back and stomach.

8. The applicant spent the night at the police station, without any investigative measures undertaken.

9. On 18 August 2005 three police officers, who had arrived from Sumy, transported the applicant to that city (340 km from Kyiv) in their vehicle.

10. The applicant's account of the subsequent events is as follows. He was handcuffed and had one of his ankles shackled in a tight manner. When he protested, one of the officers hit him several times in the stomach. The police stopped their car in a forest, made him go out and subjected him to cruel ill-treatment with a view to extracting his confession to the investigated criminal offences. The applicant maintained that he had only witnessed the offences in question, whereas those were his acquaintances, A. and Se., who had committed them. The police officers severely beat him all over his body. Subsequently they undressed him, stuffed his mouth with earth and grass, and raped him with a wooden stick. The applicant urinated involuntarily. He conceded to all their requirements. After a pause, during which the officers drank alcohol, while the applicant stayed in the car with the driver, they made him "rehearse" his confessions. They insisted that he should plead guilty without mentioning the involvement of anybody else.

11. The police car arrived at the Kovpakivskyy police station in Sumy at about 6 p.m. on 18 August 2005.

12. According to the case-file materials, on 18 August 2005, at 6.20 p.m., the applicant's arrest was reported and his rights of a criminal suspect were explained to him.

13. On the same day, at 7 p.m., a forensic medical expert (a woman), acting at the investigator's instruction, examined the applicant, who was naked. She finalised the examination report on 16 September 2005, in which she documented the following injuries: a bruise measuring 2 x 1 cm in the applicant's left temple, another bruise of about the same size on the right part of his head, a 6 x 0.2 cm bruise and abrasion under his right eye, a horizontal linear abrasion on the right part of his torso measuring

3 x 0.6 cm, a bruise of 2 x 1 cm and a vertical linear abrasion measuring 18 x 3 cm on his left thigh. Furthermore, there were linear abrasions up to 1 cm wide around both wrists of the applicant. The applicant explained the origin of his injuries as follows: upon his arrival to Kyiv some unknown persons had beaten him up at about 9 p.m. at the railway station. The expert stated that the injuries in question had been inflicted "by blunt hard objects" and that the applicant could have sustained them at the time he indicated. Lastly, the injuries were evaluated as insignificant.

14. The applicant submitted that the expert had not reported all his injuries and that he had not dared to complain to her of his ill-treatment, firstly, because of the presence of the officers in question during his examination and, secondly, because he had been ashamed in front of a woman.

15. As indicated by the applicant in his application form and confirmed by the case-file materials, from 7.20 to 10.50 p.m. on 18 August 2005 he was questioned in respect of and confessed to one count of murder (of Ms Ch.), in the presence of a lawyer, Mr M., appointed for him by the investigator. More specifically, he submitted that Ms Ch. had been his acquaintance, he had met her by chance near a forest, they had had a conflict and he had killed her with a knife that had fallen out of her picnic bag. The applicant also stated that he had taken the victim's jewelleries and mobile phone and had sold them.

16. Furthermore, according to the applicant's account submitted in his application form, his questioning had started before and continued during his medical examination, in the presence of many police officers including those who had ill-treated him. He also alleged that he had not had the possibility to talk in private to the lawyer, who, in any event, had not shown any interest in the case and had remained passive.

17. In his reply to the Government's observations on the admissibility and merits of the application, the applicant submitted a different version of the events: that his first questioning had actually taken place on 19 August 2005 and that its report had wrongly been dated 18 August 2005.

18. The applicant was placed in the Sumy Temporary Detention Facility ("the Sumy ITT", a part of the police infrastructure), in which he was detained until his transfer to the Sumy Pre-Trial Detention Centre ("the Sumy SIZO") on 7 October 2005.

19. On an unspecified date the administration of the Sumy ITT issued an information note about the meetings the applicant had with police officers. It appears that two of the officers, who had convoyed him from Kyiv to Sumy and whom he accused of his ill-treatment, visited him in the ITT on seven occasions during the period from 18 August to 7 October 2005.

20. On 19 August 2005, during the crime reconstruction, the applicant reiterated his confession to Ms Ch.'s murder and the theft of her belongings.

21. On the same date the applicant was questioned, in the presence of his lawyer Mr M., in respect of another count of murder, of Ms S. (some household appliances from her flat and her husband's military identity card had been found in the applicant's luggage following his arrest on 17 August 2005 – see paragraph 6 above).

22. On 27 and 30 August 2005 the applicant reiterated his confessions. During his questioning on the last-mentioned date he, however, modified his account of the events as regards the murder of Ms Ch. He submitted that he had in fact used his own butterfly-type knife, which he had bought at a market in July that year.

23. On 1 September 2005 a reconstruction of the criminal offences was carried out, during which the applicant maintained his confessions, in the presence of his lawyer.

24. According to the applicant, on 28 September 2005 his lawyer and the investigator had an informal conversation with him. They requested him to tell them the truth regarding his role in the criminal offences under the investigation. By that time the applicant had written seven "pleas of guilt", but, as his interlocutors had supposedly stated, none of them appeared convincing. The applicant complained of his ill-treatment and submitted that he was remaining under the constant pressure on the part of the police officers concerned. The investigator promised him to take measures to protect him.

25. During his questioning on 30 September 2005 the applicant retracted his earlier confessions as obtained under duress. He stated that he had only been a witness of the crimes and that the murders had been committed by other persons, A. and Se., who had later forced him to sell the property belonging to the victims. The applicant indicated those persons' first names and physical description.

26. Two police officers implicated in the alleged ill-treatment of the applicant visited him in the SIZO (where he had been transferred from the ITT on 7 October 2005) on 18, 22 and 30 November 2005. They allegedly continued putting pressure on him, to which the investigator failed to react.

27. On 31 January 2006 the investigator in charge of the applicant's criminal case was replaced.

28. On an unspecified date in January 2006 Mr M. allegedly admitted in his conversation with the applicant's mother that he was under pressure and was not therefore in a position to duly defend her son's rights.

29. On 6 February 2006 the applicant started to be represented by Ms S., a lawyer contracted by his mother, instead of the appointed lawyer Mr M.

30. On 13 February 2006 the formal charges of two counts of murder for profit and aggravated robbery were brought against the applicant. During his questioning on that date the applicant stated once again that his initial confessions had been the result of his ill-treatment by the police officers

who had ensured his transfer from Kyiv to Sumy on 18 August 2005 (see paragraphs 9 and 10 above).

31. On 15 February 2006 an investigator of the Sumy Regional Prosecutor's Office refused to institute criminal proceedings in respect of the applicant's complaint of ill-treatment by the police officers for the lack of *corpus delicti* in their actions. It was noted in the decision that the applicant had raised that complaint for the first time during his questioning on 13 February 2006. The officers concerned denied the veracity of his allegations. One of them submitted that the applicant had voluntarily decided to confess to the criminal offences in question during his transfer from Kyiv to Sumy. Although the applicant had some injuries, he had himself explained that he had sustained them during a conflict with unidentified persons prior to his arrest.

32. On 21 March 2006 the above decision was sent to the applicant with a note that he could challenge it before a court within seven days of the date of its receipt. The applicant did not, however, appeal against that decision. According to him, he intended to raise the complaint of his ill-treatment during his trial as his lawyer had advised him.

33. On 12 May 2006 the Sumy Regional Court of Appeal ("the Sumy Court") sitting as a court of first instance found the applicant guilty as charged and sentenced him to life-term imprisonment with confiscation of all his property. The court relied on the applicant's confessions made during the pre-trial investigation as eventually modified by him (see paragraph 22 above). It noted certain factual inconsistencies in his statements, but considered them insignificant. The court also took into account the forensic and material evidence in the case. Namely, it could not be ruled out that the blood discovered under Ms Ch.'s fingernails could have originated from the applicant. Nor could it be excluded that the applicant had smoked the cigarettes found at the crime scene in Ms S.'s flat. Furthermore, certain items belonging to the victims had been discovered on him or sold by him to other persons, which he did not contest.

34. The applicant had requested the court to summon a number of witnesses, who might have seen him in a local bar together with A. and Se. or who might have been able to identify those persons. The court called numerous witnesses indicated by the applicant, but not all of them. Those heard by the court could not identify the persons described by the applicant.

35. The trial court examined and dismissed as unfounded the applicant's allegation of his ill-treatment by the police. It noted that although some injuries had been detected on him following his arrest, he had himself explained their origin as resulting from his beating by unknown persons. Furthermore, he had stated in writing that he had no complaints against the police. Lastly, the court noted that the applicant had complained for the first time about his ill-treatment only on 13 February 2006. It relied on the prosecutor's decision of 15 February 2006 not to initiate criminal

proceedings against the police, which the applicant could but had not challenged.

36. On the same date the Sumy Court also issued a separate ruling criticising the applicant's delayed transfer from the Sumy ITT to the SIZO (see paragraph 18 above). It noted that instead of the legally established maximum of three days the applicant had been detained in the ITT for three weeks.

37. Both the applicant and the lawyer acting on his behalf appealed against the conviction, arguing principally that the applicant's guilt had not been proven (there had been no sufficient material evidence and the statements of the applicant and of the witnesses had been inconsistent) and that the conviction was based on the applicant's statements obtained under duress. They also argued that the court had not allowed the applicant's requests to summon a witness who had been acquainted with the supposed murderers and that the statements of several witnesses who had allegedly seen those persons had not been attached sufficient weight.

38. On 17 August 2006 the Supreme Court partly changed the reasoning of the verdict, having upheld, on the whole, the findings of the first-instance court and the applicant's sentence. The Supreme Court noted that the applicant's complaints of ill-treatment were unsubstantiated and that they had been rejected by the prosecutor's decision against which the applicant had failed to lodge an appeal. The Supreme Court also noted that the applicant's allegation about other persons' responsibility for the crimes had been duly examined at the pre-trial stage and during the trial and that it was unsubstantiated.

39. On 9 April 2007 the applicant was transferred from the SIZO to Ladyzhynska prison no. 39 to serve his sentence.

B. Other relevant facts

40. On 31 January 2007 the Registry of the Court acknowledged receipt of the completed application form from the applicant. By the same letter it requested him to specify whether he had appealed against the prosecutor's decision of 15 February 2006 and to provide a copy of his cassation appeal, as well as any other documents in substantiation of his complaints under Article 6 § 3 (c) and (d) of the Convention.

41. On 31 May 2007 the applicant informed the Court that he had not challenged the decision in question. He also sent a copy of the cassation appeals against his conviction lodged by him personally and by his lawyer.

42. On 6 July 2007 the Registry wrote to the applicant that his case was ready for examination by the Court and that he would be informed about the subsequent procedures in due time.

43. The applicant submitted numerous supplements to his application. He provided, in particular, extensive details as regards the conditions of his

detention in the pre-trial detention facilities in Sumy (the ITT and the SIZO). Subsequently the Court declared those complaints inadmissible (see paragraph 4 above). As regards the applicant's conditions of detention in Ladyzhynska prison no. 39, the submissions before the Court are confined to the following two letters from the applicant's mother.

44. On 24 November 2009 the Registry received a letter from the applicant's mother (who represented him at the time) of an unspecified date, in which she submitted that her son was in a desperate situation in prison being subjected to constant beatings and humiliations. She noted that he had been "placed in a cell without light for seven days" and that he "had been wearing a winter hat whereas the temperature was about 30ºC".

45. On 10 October 2011 another letter from the applicant's mother was received, in which she submitted that the conditions of his detention in the prison amounted to his "constant torture". In substantiation, she enclosed an incomplete photocopy of the applicant's letter to her dated 9 August 2011. The applicant had complained to his mother about poor conditions in the prison, about his harassment by the guards and about having had to share his cell with an inmate, with whom he had a conflict. He had also written that he had cut his left wrist as a protest and that no adequate medical care had been provided to him in that regard.

II. RELEVANT DOMESTIC LAW

46. Relevant provisions of the Constitution of Ukraine, the Criminal Code and the Code of Criminal Procedure can be found, in particular, in the Court's judgment in the case of *Nechiporuk and Yonkalo v. Ukraine* (no. 42310/04, §§ 121-123, 131, 134 and 138, with further references, 21 April 2011).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

47. The applicant complained under Article 3 of the Convention that he had been subjected to physical ill-treatment and psychological pressure by the police on 18 August 2005 and thereafter, and that the authorities had failed to carry out an effective investigation into the matter. He also complained under the same provision about the conditions of his detention in Ladyzhynska prison no. 39. Article 3 of the Convention relied on by the applicant reads as follows:

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

A. Admissibility

1. Alleged ill-treatment of the applicant and effectiveness of the investigation

48. The Government submitted that the applicant had not exhausted available domestic remedies given his failure to challenge the prosecutor's refusal of 15 February 2006 before a higher prosecutor or a court.

49. The Government contended that the present case was different from that of *Kaverzin v. Ukraine* (no. 23893/03, §§ 173-180, 15 May 2012), in which the Court had found that the reluctance of the authorities to ensure a prompt and thorough investigation of ill-treatment complaints by criminal suspects constituted a systemic problem in Ukraine. In the Government's view, the fact that the prosecutor issued his decision two days after the applicant had raised his complaint indicated the willingness of the authorities to investigate the matter, unlike in the *Kaverzin* case cited above.

50. The applicant disagreed. Relying on the extensive case-law of the Court, he contended that the remedies referred to by the Government could not be considered effective in his case. He also submitted that the mere fact that his complaint had been dismissed within two days did not indicate that the domestic investigation was effective, but rather showed a hasty attempt of the authorities to close that issue.

51. The Court notes that it has previously rejected similar objections by the Government as to non-exhaustion of domestic remedies in the context of allegations of ill-treatment, for example in the case of *Kaverzin* (cited above, §§ 84 to 99). The Court does not accept the Government's argument that the cited case was different from the present one. In that case, in similar factual circumstances the Court concluded that the applicant had taken sufficient steps at the domestic level to bring his complaints of police ill-treatment to the attention of the national authorities, noting that the fact that the complaints had been rejected by the prosecutor had not prevented the domestic courts from examining them on the merits in the course of the applicant's trial.

52. The Court therefore considers that this complaint cannot be rejected for failure to exhaust domestic remedies.

53. The Court further finds that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

2. Conditions of the applicant's detention in Ladyzhynska prison no. 39

54. The Government provided detailed information about the conditions of the applicant's detention in the prison and claimed that there had been no violation of his rights under Article 3 of the Convention.

55. The applicant replied that those conditions were not acceptable.

56. The Court does not find it necessary to analyse the exchange of the parties' observations on the merits of this complaint as it considers it to be inadmissible in any event.

57. The Court notes that the applicant failed to duly raise this grievance in the proceedings before the Court. Thus, unlike his numerous other complaints, this was the only one submitted not by him personally, but by his mother albeit acting as his representative (see paragraphs 43-45 above). It is clear from the case-file materials that the applicant complained of the conditions of his detention in the prison to his mother. It is less clear though that he intended to bring the matter before the Court.

58. However, even assuming that it was him rather than his mother who raised the complaint in question, the Court notes that the allegations with respect to the physical conditions of his detention in Ladyzhynska prison no. 39 were limited to brief, general and fragmental statements, in contrast to his complaints about the Sumy ITT and SIZO, which were very detailed and specific (but which had been declared inadmissible for other reasons – see paragraph 4 above).

59. The Court acknowledges that in cases concerning complaints about detention conditions it has not always required that an applicant support each and every allegation with particular documents, recognising that relevant information and opportunities to investigate the facts in such cases lie primarily in the hands of the authorities. At the same time, the Court notes that an applicant must provide an elaborate and consistent account of the conditions of his or her detention mentioning the specific elements, which would enable the Court to determine that the complaint is not manifestly ill-founded or inadmissible on any other grounds. Only a credible and reasonably detailed description of the allegedly inhuman or degrading conditions of detention constitutes a prima facie case of ill-treatment and serves as a basis for giving notice of the complaint to the respondent Government (see *Ananyev and Others v. Russia,* nos. 42525/07 and 60800/08, § 122, 10 January 2012, and *Ukhan v. Ukraine,* no. 30628/02, § 64, 18 December 2008).

60. In the Court's opinion, this requirement has not been met in the present case. Thus, the applicant did not provide an account of the events that was sufficiently coherent, detailed, comprehensive and reasonably supported by evidence to raise a reasonable suspicion that the extent of his suffering on account of the physical conditions of detention in Ladyzhynska prison no. 39 reached a threshold of severity that brought the matter within the ambit of Article 3 of the Convention or that he might have otherwise been ill-treated by the prison staff within the meaning of the aforementioned provision (see and compare with *Rodzevillo v. Ukraine,* no. 38771/05, §§ 45-47, 14 January 2016).

61. The Court therefore rejects this part of the application as manifestly ill-founded under Article 35 §§ 3 (a) and 4 of the Convention.

B. Merits

1. Alleged ill-treatment of the applicant

(a) The parties' submissions

62. The applicant maintained his account of the events (see paragraph 10 above). He observed that, as established by the medical evidence, he had sustained a number of injuries while being under the control of the police between 17 and 18 August 2005. The authorities had not, however, accounted for the origin of those injuries. The applicant also submitted that the police officers in question had continued to put psychological pressure on him during his pre-trial detention.

63. The Government argued that the applicant's allegations lacked convincing evidence. They noted that his first questioning had taken place in the presence of his lawyer and that it had been the applicant's choice to confess to the criminal offences incriminated to him. The Government further submitted that the applicant had raised his allegation of ill-treatment with an inexplicable delay, which should be interpreted as undermining its plausibility.

(b) The Court's assessment

64. As the Court has stated on many occasions, Article 3 of the Convention enshrines one of the core values of democratic societies (see, among many other references, *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V). Where allegations are made under this provision, the Court must conduct a particularly thorough scrutiny and will do so on the basis of all the evidential material submitted by the parties (see *Matyar v. Turkey*, no. 23423/94, § 109, 21 February 2002, and *Ülkü Ekinci v. Turkey*, no. 27602/95, § 136, 16 July 2002).

65. In assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt". According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. Where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 151 and 152, ECHR 2012, with further case-law references).

66. Turning to the present case, the Court notes that, according to the medical evidence in the case file, the applicant had certain injuries at the moment of his arrest on 17 August 2005. More specifically, he had some abrasions on his back and stomach (see paragraph 7 above). While he did not explain the origin of those injuries in his submissions before the Court, he has never attributed them to the authorities. The Court further observes that a day later the applicant underwent a forensic medical examination, which documented many more injuries on him. Thus, at the time of that examination he had numerous bruises and abrasions on his head, torso and on the left thigh. Furthermore, there were linear abrasions on his both wrists. The origin of those additional injuries, which the applicant had sustained while being under the authorities' control, has never been explained.

67. That being the case, the Court considers it sufficiently established that the applicant sustained the injuries as a result of ill-treatment for which the Government must bear Convention responsibility and which must be classified as inhuman and degrading.

68. The Court is mindful of the particular cruelness of the ill-treatment suffered by the applicant according to his version of the events (see paragraph 10 above). Undoubtedly, if sufficiently established, it would be classified as torture. However, the Court has no evidential basis before it enabling it to establish to the required standard, "beyond reasonable doubt", that the treatment the applicant suffered reached the level of "torture".

69. There has, accordingly, been a violation of Article 3 of the Convention.

2. Effectiveness of the domestic investigation

70. The applicant argued that there had been no genuine effort to investigate his allegation of ill-treatment. He submitted that he had tried to raise that complaint as soon as possible, but he had been scared given that the police officers in question had had an unhindered access to him during his detention in the ITT and even later. He further submitted that he had not trusted the lawyer appointed for him and had not been able to confide to him. In any event, the applicant noted that he had brought the issue to the attention of the authorities on 30 September 2005 and that there had been no follow up to it. As regards his complaint raised on 13 February 2006, the applicant admitted that the authorities had reacted to it in a prompt manner. However, in the applicant's opinion, the prosecutor's refusal to institute criminal proceedings into the matter, which had been issued only two days later, was rather an indication of ineffectiveness of the investigation.

71. The Government noted that the applicant had raised this complaint for the first time only on 13 February 2006, that is with a delay of about six months. They observed that the investigation had been launched immediately thereafter and that all the essential investigative steps had been

taken to verify the applicant's allegations. The fact that those allegations had proved unsubstantiated could not be held against the authorities. The Government also observed that the applicant had not challenged the decision taken following the results of the investigation.

72. The Court notes, however, that in their observations concerning the applicant's complaint about the violation of his right to legal defence (see paragraph 82 below) the Government admitted that the applicant had complained to the investigator of his ill-treatment and of the continued psychological pressure by the police as early as on 30 September 2005.

73. The Court reiterates that any investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what has happened and should not rely on hasty or ill-founded conclusions to close their investigation or to provide a basis for their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see, for example, *Serikov v. Ukraine*, no. 42164/09, § 78, 23 July 2015).

74. Turning to the circumstances of the present case, the Court considers it sufficiently established that the applicant complained to the authorities for the first time about his alleged ill-treatment on 30 September 2005. No investigation in the matter followed. Moreover, it appears that the applicant was not duly protected against the continued psychological pressure by the police officers whom he had accused of his ill-treatment. Thus, as indicated by the case-file materials, they continued visiting him in the ITT and later in the SIZO, in spite of the investigator's assurances to the contrary (see paragraphs 19, 24 and 26 above).

75. Accordingly, the Court considers that the delay with the beginning of the investigation is to be attributed to the authorities, but not to the applicant as the Government tried to convince it.

76. The Court next observes that, when the investigation was eventually launched, it was mainly confined to the questioning of the police officers concerned who denied the veracity of the applicant's allegations. Furthermore, although there was unequivocal medical evidence that the applicant had sustained some of his injuries while being under the control of the police, the prosecutor chose not to analyse that matter, having contented himself with a general observation that the applicant had already had injuries at the moment of his arrest.

77. Overall, the case file material discloses no meaningful effort to verify or disprove the applicant's account of events, including by thoroughly questioning him, organising confrontations or posing specific questions to the Kyiv police officer and the forensic medical expert who had

examined the applicant on 17 and 18 August 2005 respectively (see *Danilov v. Ukraine*, no. 2585/06, § 70, 13 March 2014).

78. The Court notes that in a number of other cases against Ukraine it has already condemned patterns of investigation similar to the one in the present case (see, *inter alia*, *Drozd v. Ukraine*, no. 12174/03, §§ 68-71, 30 July 2009; *Savitskyy v. Ukraine*, no. 38773/05, §§ 121-22, 26 July 2012; and *Grinenko v. Ukraine*, no. 33627/06, § 62, 15 November 2012). In the case of *Kaverzin* (cited above, §§ 173-80) the Court found that the reluctance of the authorities to ensure that a prompt and thorough investigation of the ill-treatment complaints by the criminal suspects was carried out constituted a systemic problem within the meaning of Article 46 of the Convention. In view of the circumstances of the present case and its earlier case-law, the Court concludes that in the present case, too, no serious effort was made to investigate the applicant's allegations of ill-treatment.

79. It follows that there has been a violation of Article 3 of the Convention under its procedural limb in this regard.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

80. The applicant complained under Article 6 § 1 of the Convention that his right not to incriminate himself had been violated. He also complained under Article 6 § 3 (c) that he had been denied access to a lawyer during the first two days after his arrest and that his lawyers had not defended his rights properly. Lastly, he complained under Article 6 § 3 (d) that he had not had the possibility to get summoned and question all the important defence witnesses. The relevant provisions of Article 6 of the Convention read 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;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. Admissibility

1. Self-incrimination under duress

81. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that

it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Right to legal defence

82. The Government observed that the applicant had not raised this complaint in his appeal on points of law. They therefore contended that he had not exhausted the domestic remedies as required by Article 35 § 1 of the Convention. In the alternative, the Government submitted that this complaint was manifestly ill-founded, in particular, because the applicant had been represented by a lawyer from his first questioning as a suspect. They observed in this connection that on 30 September 2005 the applicant, while still represented by the appointed lawyer, retracted his earlier confessions as obtained under duress. In the Government's view, that could be regarded as an indication of the applicant's trust towards that lawyer and of the due performance of his duties by the latter.

83. The applicant submitted that he had complained before the Supreme Court, among other issues, "about the unfairness of the proceedings". Accordingly, he invited the Court to dismiss the Government's argument.

84. The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). Thus, the complaint submitted to the Court must first have been lodged with the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, and *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, §§ 604 and 605, 13 November 2003). Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

85. The Court has held that an appeal on points of law to the Supreme Court in Ukraine is considered an effective remedy for complaints concerning various aspects of the fairness of criminal proceedings guaranteed by Article 6 §§ 1 and 3 of the Convention (see, for example, *Arkhipov v. Ukraine* (dec.), no. 25660/02, 18 May 2004, *Oleg Kolesnik v. Ukraine*, no. 17551/02, § 28, 19 November 2009, and *Zhyzitskyy v. Ukraine*, no. 57980/11, §§ 58-60, 19 February 2015).

86. The Court further notes that in its judgment on the case of *Buglov v. Ukraine* it held that the applicant had not exhausted the domestic remedies in respect of his complaint about the early restriction of his right

of access to a lawyer because his complaint concerning the violation of his right to defence before the domestic courts had been based on arguments that were different from those advanced before this Court (no. 28825/02, § 110, 10 July 2014).

87. Turning to the present case, the Court observes that the applicant did not mention in his appeal on points of law the issues of the alleged early restriction on his right to be legally represented or the performance of the lawyer appointed for him by the investigator. The Court therefore considers that this part of the application should be rejected under Article 35 §§ 1 and 4 of the Convention for the applicant's failure to exhaust the domestic remedies.

3. Right to summon witnesses

88. In the applicant's submission, when convicting and sentencing him the domestic courts had refused to hear witnesses who could have proved his innocence. The applicant argued in the domestic proceedings that the criminal offences imputed to him had in fact been committed by A. and Se. and requested the trial court to summon witnesses who might have known those persons or who might have seen him in their company in a local bar. Furthermore, the applicant submitted that the trial court had not summoned all the witnesses heard during the pre-trial investigation.

89. The Government argued that the applicant had not proved that the testimonies of the witnesses, whom the trial court had refused to summon, had been necessary to prove his innocence or to establish the truth in the case. The Government further submitted that the applicant, who was legally represented by a lawyer of his choice, had had the benefit of adversarial proceedings, in which he had been able to raise all his arguments and had enjoyed ample opportunity to challenge the evidence against him.

90. The Court reiterates that the right to call witnesses is not absolute and can be limited in the interests of the proper administration of justice. Article 6 § 3 (d) does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as indicated by the words "under the same conditions", is full equality of arms in the matter. The task of the Court is to ascertain whether the proceedings in issue, considered as a whole, were fair (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). An applicant claiming a violation of his right to obtain the attendance and examination of a defence witness should show that the examination of that person was necessary for the establishment of the truth and that the refusal to call that witness was prejudicial to his defence rights (see *Guilloury v. France*, no. 62236/00, § 55, 22 June 2006). Although it is normally for the national courts to assess the evidence before them, as well as the relevance of the evidence which defendants seek to adduce, there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with

Article 6 (see *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158, and *Destrehem v. France*, no. 56651/00, § 41, 18 May 2004).

91. The Court also notes that the use in evidence of statements obtained at the police inquiry and judicial investigation stages is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her – either when that witness is making a statement or at a later stage of the proceedings (see *Lüdi v. Switzerland*, 15 June 1992, § 49, Series A no. 238, and *Buglov*, cited above, § 115).

92. Turning to the facts of the present case, the Court notes that the trial court heard many witnesses who, according to the applicant, might have helped with identifying A. and Se. (see paragraph 34 above). At the same time, some witnesses were not examined by the court and the applicant had no opportunity to confront them. It does not, however, appear from the circumstances of the case that the witnesses in question could have proved the applicant's innocence in any way: the only thing the applicant had been expecting from them was a confirmation that A. and Se. existed and that the applicant had been seen in their company at a time and at places having no relevance for the criminal offences incriminated to the applicant. The Court is therefore not persuaded that the failure of the domestic courts to hear the witnesses to whom the applicant referred was significant enough to compromise the outcome of the criminal proceedings (see and compare with *Balitskiy v. Ukraine*, no. 12793/03, § 45, 3 November 2011). Nor has the applicant shown that he could not duly challenge the statements of some witnesses, which had been made at the pre-trial stage or that that evidence was sole or decisive for his conviction.

93. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Merits

94. The applicant maintained that his confessions, which had been extracted from him by coercion, had played a crucial role in securing his conviction. He noted that, even though he had ceased to be subjected to the physical ill-treatment by the beginning of his first questioning as a suspect, its psychological and physiological effects had lasted beyond its actual application, particularly given that he had been under the constant threat of being subjected to ill-treatment again if he acted contrary to the police's interests. He considered that the after-effects of the ill-treatment and the threats of further ill-treatment had to be taken into account in assessing the nature and degree of compulsion used to obtain the confessions. He also noted that he had not had a proper opportunity to challenge the admissibility

of the evidence obtained through coercion, and his complaints of ill-treatment and forced confession had never been properly examined.

95. The Government submitted that the criminal proceedings against the applicant had been fair. They noted that the applicant had only been questioned in the presence of his lawyer and that he had been advised of the right not to incriminate himself. As regards his allegations of ill-treatment, they were not substantiated.

96. The Government further contended that the applicant's confessions had not been the sole evidence justifying his conviction.

97. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of a fair trial under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case 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 *Shabelnik v. Ukraine*, no. 16404/03, § 55, 19 February 2009, with further references).

98. Furthermore, the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings render the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use is decisive in securing the defendant's conviction (see *Gäfgen v. Germany* [GC], no. 22978/05, § 166, ECHR 2010, with further references, and *Zyakun v. Ukraine,* no. 34006/06, §§ 62-64, 25 February 2016).

99. The Court has found in the present case that the State authorities bore responsibility for the applicant's injuries sustained by him in unexplained circumstances, while he had been under the control of the police shortly before his first questioning (see paragraphs 66-69 above). The applicant brought this issue to the attention of the trial court and requested it to discard those confessions. He also complained during his trial about the psychological pressure continuously put on him by the police officers in question. However, the trial court took no efforts to verify the applicant's allegations and dismissed his complaint on the sole ground that the issue had already been investigated by the prosecution authorities. Such a formalistic approach is even more surprising given the fact that the trial court did find a problem as regards the excessively long detention of the applicant in the ITT (a detention facility of the police), where he had been exposed to any pressure by the police officers implicated in his alleged ill-treatment.

100. Furthermore, in the circumstances of the present case the Court considers that the self-incriminatory statements made by the applicant played an important role for his conviction, even though he had eventually retracted them as obtained under duress.

101. The above considerations are sufficient for the Court to find a violation of Article 6 § 1 of the Convention on account of the breach of the applicant's right to the privilege against self-incrimination.

III. ALLEGED VIOLATION OF THE RIGHT OF INDIVIDUAL APPLICATION

102. The applicant complained that the domestic authorities had hindered the effective exercise of his right of application to the Court, because they refused him access to the documents he needed to support his complaints before the Court. He relied on Article 34 of the Convention, which reads, in so far as relevant, as follows:

> "The Court may receive applications from any person ... 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."

103. The Government contested that argument and contended that Ukraine had complied with Article 34 of the Convention.

104. The Court has established that Article 34 of the Convention may impose on the State authorities an obligation to provide copies of documents to applicants who find themselves in situations of particular vulnerability and dependence and are unable to obtain the documents needed for their files without State support (see, as a recent authority, *Naydyon v. Ukraine*, no. 16474/03, § 63, 14 October 2010). At the same time, the obligation of the State not to hinder the right of individual application does not automatically mean that it has a duty to provide applicants with copies of all or any desired documents or to furnish them with the technical facilities of their choice to make their own copies (see *Kornakovs v. Latvia*, no. 61005/00, §§ 171-174, 15 June 2006).

105. Turning to the present case, the Court observes that the applicant encountered no difficulties with collecting copies of documents requested from him by the Court (see paragraphs 40 and 41 above). Even assuming that some of his requests for copies of unspecified documents, which he considered necessary for substantiation of his application, had been rejected, in view of all the information before the Court this fact alone does not raise any issue under Article 34 of the Convention.

106. In sum, the Court considers that the State has not failed to comply with its obligations under Article 34 of the Convention in the present case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. 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

108. The applicant claimed a retrial and 100,000 euros (EUR) in respect of non-pecuniary damage.

109. The Government contested this claim as unsubstantiated and in any event exorbitant.

110. Having regard to all the circumstances of the present case, the Court accepts that the applicant suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

111. Furthermore, the Court notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see, for example, *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 65, 28 October 2010).

B. Costs and expenses

112. The applicant also claimed EUR 2,975 for the costs and expenses incurred before the Court, to be paid into his lawyer's account directly. In substantiation, he submitted a legal assistance contract signed by him and Mr Tarakhkalo on 22 October 2013. It stipulated an hourly charge-out rate of EUR 95. According to the contract, that payment would be made after completion of the proceedings in Strasbourg and within the limits of the sum awarded by the Court in costs and expenses. The applicant also submitted a report of 18 June 2014 on the work completed under the aforementioned contract. It specified that Mr Tarakhkalo had worked on the case for twenty-eight hours (EUR 2,660) and that he had incurred administrative and postal costs in the amounts of EUR 213 and EUR 106 respectively.

113. The Government contested the claim as exorbitant and unsubstantiated.

114. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that only the applicant is contractually bound to pay fees *vis-à-vis* Mr Tarakhkalo. Having regard to the documents submitted, the Court considers those fees to have been "actually incurred" (see *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, § 106, ECHR 2009).

115. However, the Court notes that the applicant has not submitted any documents in substantiation of the administrative and postal costs. Accordingly, having regard to all the documents before it, the Court awards the applicant EUR 1,810 (which is equal to EUR 2,660 less EUR 850, the sum received by way of legal aid), plus any value-added tax that may be chargeable to the applicant. The net award is to be paid into the bank account of the applicant's lawyer, Mr Tarakhkalo, as indicated by the applicant (see, for example, *Belousov v. Ukraine,* no. 4494/07, §§ 116-117, 7 November 2013).

C. Default interest

116. 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 complaints under Article 3 (concerning the alleged ill-treatment of the applicant and effectiveness of the ensuing domestic investigation) and Article 6 § 1 (concerning the privilege against self-incrimination) of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention on account of the applicant's ill-treatment by the police;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the ineffective domestic investigation into the applicant's complaint of ill-treatment;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the violation of the applicant's right to the privilege against self-incrimination;

5. *Holds* that the State has not failed to comply with its obligations under Article 34 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,810 (one thousand eight hundred and ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, (the net award to be paid into the bank account of the applicant's lawyer, Mr Tarakhkalo);[1]
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Khanlar Hajiyev
President

1. Rectified on 26 January 2017: "(the net award to be paid into the bank account of the applicant's lawyer, Mr Tarakhkalo);" has been added.