

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

FIFTH SECTION

CASE OF ZYAKUN v. UKRAINE

(Application no. 34006/06)

JUDGMENT

STRASBOURG

25 February 2016

FINAL

25/05/2016

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



In the case of Zyakun v. Ukraine,

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

Angelika Nußberger, *President,*
Ganna Yudkivska,
Khanlar Hajiyev,
Erik Møse,
Faris Vehabović,
Síofra O'Leary,
Carlo Ranzoni, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 34006/06) 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 Vladimir Aleksandrovich Zyakun ("the applicant"), on 5 August 2006.

2. The applicant was represented by Mr P. Sushko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr B. Babin, of the Ministry of Justice.

3. The applicant alleged, in particular, that he had been ill-treated by the police and that a confession obtained from him under duress had been used to secure his conviction.

4. On 30 March 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and is currently detained.

6. On the night of 12 to 13 June 2003 a house was robbed and three individuals were murdered in the Ivanivka District of the Odessa Region. On 13 June 2003 criminal proceedings were instituted in this respect.

7. According to the applicant, on 27 June 2003 he was arrested in Sumy; the reasons for his arrest were not explained to him, no record of the arrest

was drawn up, and there was a delay in charging him. He remained in detention thereafter. On the same day, the applicant was taken to the Sumy Regional Police headquarters, where he was allegedly beaten up by police officers from the Odessa Regional Police. According to the applicant, he had been handcuffed and remained so during the night.

8. On 28 June 2003 the applicant was interviewed in Sumy by an officer of the Odessa Regional Police concerning the circumstances of his business trip to the Odessa Region from 10 to 18 June 2003. According to a written explanation signed by the applicant, he denied any involvement in the murder.

9. According to the applicant, on the same day he was transferred to the Ivanivka police station, where he was allegedly subjected to beatings and psychological pressure by police officers with a view to obtaining a confession.

10. According to the arrest report drawn up by Mr I.G., an investigator from the Odessa regional prosecutor's office, the applicant was arrested on 30 June 2003 as a suspect in the criminal case. The applicant refused to sign the report. On the same day I.G. apprised the applicant of his right to defence and his right not to incriminate himself. According to a decision issued by I.G. on the same date, the applicant wished to be represented by P., who was formally appointed as his lawyer. Thereafter, the applicant was questioned by I.G. in his lawyer's presence and confessed to the robbery and murder of three persons. According to the applicant, he was in fact questioned on 3 July 2003 and the record of his questioning was backdated to 30 June 2003. The applicant further maintained that the lawyer had left the interview in protest against the applicant's poor state of health, but the lawyer's signature was added to the record of the questioning afterwards.

11. On 2 July 2003 the applicant made a written confession in the Ivanivka police station; his lawyer was not present.

12. On 3 July 2003 another arrest report was drawn up by an officer on duty at the Ivanivka police station. It stated that the applicant had been placed under arrest on suspicion of murder. On the same day the Ivanivka District Court ordered the applicant's pre-trial detention. His lawyer was not present.

13. According to a statement from the applicant's wife, on 8 July 2003 the lawyer P. informed her by telephone that her husband, who had been arrested in Sumy on 27 June 2003, was in Ivanivka.

14. On 8 July 2003 the applicant was transferred to the Odessa temporary detention facility (*ізолятор тимчасового тримання*, "the ITT"). According to the applicant, the ITT had initially refused to admit him because of his injuries and a medical officer arranged for him to attend the local hospital for a medical examination. At the hospital a general surgeon and a neurosurgeon examined the applicant and issued a medical certificate stating that he had bruising on his shoulders and hips, and extensive

bruising on his head and face, but that there was no indication of brain damage. Subsequently, the applicant was taken back to the ITT but the medical officer sent him back to the hospital for an additional examination, as not all the injuries on his body had been recorded. However, the hospital doctors refused to issue a new certificate.

15. On an unspecified date the applicant was transferred from the ITT to the Odessa pre-trial detention centre (*слідчий ізолятор*, "the SIZO").

16. On 9 July 2003 the investigator charged the applicant and a Mr Y.G. with the robbery and murder of three persons.

17. On the same day, at the applicant's request, lawyer P. was replaced by lawyer K.

18. On 5 September 2003 the applicant complained to investigator I.G. that the police officers had beaten him and put psychological pressure on him in order to force him to confess.

19. In response to a request from the investigator I.G., on 23 October 2003 the ITT informed him about the injuries observed on the applicant on 8 July 2003 and about the disagreement as to their full extent which had occurred on that day.

20. On 19 December 2003 investigator I.G. refused to institute criminal proceedings into the above complaint for want of proof against the police officers. According to the investigator's decision, it was impossible to establish the circumstances in which the applicant had sustained his injuries. The investigator relied on a certificate from the SIZO, according to which at the time of the applicant's admission to the SIZO he had had no injuries, and on the ITT records of 8 July 2003 describing the applicant's injuries. The investigator stated that despite this information from the ITT, the applicant had not raised any complaints during his questioning at the ITT. The decision was included in the applicant's criminal case file.

21. On 30 December 2003 the applicant and his representative studied the criminal case file in its entirety.

22. On 16 February 2004 the applicant refused to continue to be represented by lawyer K. and was given time to find a new lawyer.

23. On 18 February 2004 the applicant wrote to the deputy prosecutor of the Odessa Region arguing that the decision of 19 December 2003 had been based on an error and asking that his case be examined impartially and carefully. The applicant alleged that the ITT had originally refused to admit him because of his injuries and had agreed to admit him only after he had presented a written explanation of his injuries to the ITT medical officer.

24. On 4 May 2004 the applicant concluded a contract with Mr P. Sushko, who represented him in the proceedings thereafter.

25. Following remittal of the applicant's criminal case for an additional investigation, on 2 October 2004 it was transferred to the Odessa Regional Court of Appeal for trial. According to the applicant, he had been allowed to study only part of the case file material.

26. In the course of the trial the applicant and Mr Y.G. retracted all their confessions, which they claimed had been given under duress, and asserted their innocence. The applicant raised the complaint that he had been ill-treated. The Court of Appeal questioned the investigator I.G., who stated that the injuries recorded at the ITT could have been inflicted on the applicant in the course of arrest.

27. On 1 August 2005 the Court of Appeal found the applicant and his co-defendant Y.G. guilty of murder and sentenced them to life imprisonment with confiscation of their property. The court based their conviction, among other things, on the testimony of Ms V., who had seen the applicant and Y.G. before and after the murder, on fingerprints from Y.G. found at the scene of crime, on the confessions made by the applicant and Y.G. in the presence of their lawyers, and on the applicant's written confession of 2 July 2003 made in the absence of his lawyer. Commenting on the applicant's complaint of ill-treatment, the court also took into account the investigator's decision of 19 December 2003. It thus found that there was no evidence that the applicant's confession had been obtained under duress and rejected his complaint as unsubstantiated.

28. The applicant and his lawyer appealed in cassation, complaining, *inter alia*, of the applicant's alleged ill-treatment in police custody, as a result of which he had confessed.

29. On 11 April 2006 the Supreme Court upheld the applicant's conviction. It noted that his complaint of ill-treatment had been thoroughly examined by the Court of Appeal and had been lawfully rejected as unsubstantiated. It also mentioned that the applicant's guilt had been proved by his confession, among other things.

II. RELEVANT DOMESTIC LAW

30. The relevant domestic law is summarised in the cases of *Yaremenko v. Ukraine* (no. 32092/02, §§ 45-47, 12 June 2008) and *Kaverzin v. Ukraine* (no. 23893/03, § 45, 15 May 2012).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

31. The applicant complained that the police officers had ill-treated him to extract his confession. 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."

A. Admissibility

32. The Government noted that the applicant had complained to the prosecutor of the Odessa Region about ill-treatment by the police on 5 September 2003, and that the investigator had refused to institute criminal proceedings for lack of *corpus delicti*. The refusal decision had been made on 19 December 2003 and attached to the applicant's criminal case file, thus the applicant must have become aware of it the same month, given that on 30 December 2003 he and his lawyer had studied the said case file in its entirety. The Government further noted that the applicant and his representatives had never challenged the prosecutor's refusal of 19 December 2003 before a higher prosecutor or a court. The Government considered therefore that the applicant had not exhausted available domestic remedies. They further noted that the applicant's complaints of ill-treatment during the trial and in his appeal to the Supreme Court did not mean that he had exhausted domestic remedies.

33. In the alternative, the Government submitted that if the applicant had considered that there were no effective remedies available under which to challenge the decision of the prosecutor of 19 December 2003, he should have raised that issue before the Court within a period of six months after the decision was taken or, at the latest, after the date when he ought to have become aware of that decision, namely 30 December 2003. However, the applicant had lodged his application much later – on 6 August 2006.

34. The applicant disagreed. He stated that he had been ill-treated and that his lawyers had seen the resulting injuries, but had not reacted. He considered the Government's contentions unsubstantiated.

35. 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). 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. The Court further concluded that in such circumstances it had been reasonable for the applicant to wait for the completion of the trial before raising the complaints before the Court and he had accordingly complied with the six-month rule provided in Article 35 § 1 of the Convention (ibid., § 99). The Court sees no reason to depart from those findings in the present case and therefore considers that this complaint cannot be rejected for failure to exhaust domestic remedies or for non-compliance with the six-month time-limit.

36. The Court thus finds 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

37. The applicant maintained that the fact of his ill-treatment in police custody was supported by documents and that the State had failed to ensure his physical integrity. Even though the lawyers P. and K. had seen his injuries, they had failed to request a medical examination and to lodge formal complaints. For this reason, the applicant had subsequently engaged Mr Sushko as his counsel.

38. The Government made no observations on the merits, considering this complaint inadmissible.

2. The Court's assessment

(a) General principles

39. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports of Judgments and Decisions* 1998-VIII).

40. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

41. Furthermore, according to the Court's established case-law, when an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation should be capable of leading to the identification and punishment of those responsible (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

42. 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 use as the basis for their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. 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, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 183, ECHR 2012).

(b) Application of the above principles to the present case

43. The Court notes at the outset that it is uncontested that the applicant sustained a number of injuries, including bruises on his shoulders, hips, head and face. These recorded injuries were serious enough to fall within the ambit of Article 3. The applicant complained to the investigator in charge of his case that he had been ill-treated. In such circumstances the domestic authorities were under an obligation to carry out an effective investigation of the applicant's allegations.

44. However, the investigation of the applicant's complaint was conducted by I.G., the very official who was investigating the applicant's criminal case. In fact, it was I.G. who had placed the applicant under arrest and had collected the testimony the applicant alleged had been extracted by ill-treatment (compare *Boicenco v. Moldova*, no. 41088/05, § 124, 11 July 2006).

45. Moreover, it appears that I.G. limited his investigation of the applicant's complaint to requesting records from the ITT and SIZO. Even though the ITT's records showed that the applicant had had rather extensive injuries at the time of his arrival at the ITT and indicated that some of them might not have been recorded (see paragraph 19 above), I.G. appears to have made no effort to establish the full extent or the origin of the injuries. The ITT's records showed that the ITT medical officer had gone to great lengths to record the extent and origin of the applicant's injuries, sending the applicant twice to a civilian hospital. Moreover, the applicant insisted that he had given the medical expert a written explanation of his injuries. However, it appears that neither the applicant, the ITT medical officer, nor the civilian doctors were questioned about any of these circumstances.

46. Despite concluding on 19 December 2003 that it was impossible to establish the circumstances under which the applicant had sustained his injuries, in the course of the subsequent trial I.G. expressed an opinion that the injuries could have been inflicted at the time of arrest. It is unclear on what material I.G. based this opinion and why he had omitted to explore this possibility in more detail, especially given that, as the official who had recorded the applicant's arrest, he had been in a unique position to observe any injuries inflicted in the course of the arrest.

47. In view of these circumstances, the Court concludes that the domestic authorities did not fulfil their obligation to conduct an effective investigation into the applicant's complaint of ill-treatment.

48. As to the substance of the applicant's allegations, it is uncontested that a number of injuries were observed on the applicant on 8 July 2003. Prior to that date he had remained in the custody of the authorities for a substantial uninterrupted period of time. His arrest was recorded on 30 June 2003. However, the authorities did not explain why the applicant, who denied any involvement in the crime on 28 June 2003 in Sumy (see paragraph 8 above), would have travelled of his own free will to Ivanivka, a distance of more than 700 kilometres, only to be arrested there two days later (compare with *Dzhulay v. Ukraine*, no. 24439/06, § 58, 3 April 2014). In the absence of any alternative coherent account of the events, the Court finds it established that the applicant had been in *de facto* police custody from at least 28 June 2003 until 30 June 2003, when his arrest was recorded and he confessed to the crime.

49. The Court observes that there is nothing in the case file to indicate that the applicant had any injuries prior to his contact with the police. The Court further notes that no medical examination of the applicant was performed immediately upon his arrest.

50. In such circumstances, the Court finds it established that the applicant sustained injuries while under the control of the authorities.

51. The Court reiterates that it is for the State to provide a plausible explanation for injuries sustained by a person under its control. The origin of the applicant's injuries has never been established by the authorities. The Court notes that in his decision of 19 December 2003 the investigator admitted that it was not possible to establish the circumstances in which the applicant's injuries had been inflicted (see paragraph 20 above).

52. However, the fact that the applicant confessed after remaining in unrecorded detention for at least two days, combined with the medical evidence of unexplained injuries, creates an appearance that his confession may not have been given freely (compare *Belousov v. Ukraine*, no. 4494/07, § 63, 7 November 2013).

53. In the circumstances of the case, the presence of a lawyer at the actual time of the applicant's original confession on 30 June 2003 does not of itself rule out the possibility that the applicant could have been ill-treated prior to his contact with the lawyer and remained fearful of the police, given that he remained under their control (compare *Ushakov and Ushakova v. Ukraine*, no. 10705/12, § 107, 18 June 2015). This is particularly so given that P.'s contact with the applicant and his involvement in the applicant's case appear to have been quite limited. For instance, the lawyer was absent when the applicant made his written confession on 2 July 2003 and at the pre-trial detention hearing on 3 July 2003.

54. 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.

55. However, neither the description of ill-treatment provided by the applicant, which is couched in rather general terms, nor any other element in the case file enable the Court to establish to the required standard, "beyond reasonable doubt", that the treatment the applicant suffered reached the level of "torture".

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

57. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had been unfair in that his conviction had been based on a confession obtained under duress. The relevant parts of that provision read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

58. 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

59. The applicant maintained that the proceedings had been unfair.

60. The Government noted that the applicant had been provided with a lawyer of his choosing on the day of his arrest and had been questioned in the presence of that lawyer. Before the questioning he had been apprised of his rights, including the right not to testify against himself. The applicant had confessed to the robbery and murder. The Government further noted that on 2 July 2003 the applicant had made a written statement confessing to those crimes, and although there was no indication that that confession had been written in the presence of a lawyer, the applicant had been represented at the time and his written confession of 2 July was identical to his oral confession made on 30 June 2003 in the presence of his lawyer. Thus, in the Government's opinion, the applicant had confessed to the crimes while he

was represented by a lawyer, which excluded any possibility of the alleged physical or psychological pressure. His later claims of innocence and retraction of his previous confessions were to be considered merely a change of defence strategy.

61. The Government further noted that the applicant's confessions had not been crucial for his conviction, as his guilt had been confirmed by the testimony of the witnesses and the results of the forensic medical examinations. The Government maintained that the applicant's allegations of ill-treatment and of police pressure had been examined by the domestic authorities and found to be unsubstantiated.

2. The Court's assessment

62. The Court reiterates that 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 was decisive in securing the defendant's conviction (see *Gäfgen v. Germany* [GC], no. 22978/05, § 166, ECHR 2010, with further references).

63. In the present case, the applicant made confessions officially dated 30 June and 2 July 2003 while in custody. The trial court referred to those confessions, along with other extensive evidence, as proof of his guilt. In the light of the above findings concerning the applicant's ill-treatment the Court considers that the failure of the domestic courts to exclude the applicant's confessions dated 30 June and 2 July 2003 from the body of evidence in the present case rendered the proceedings as a whole unfair.

64. In the view of the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

65. The applicant also complained under Article 5 §§ 1 (c), 2 and 3 of the Convention that he had been unlawfully arrested, that no record of his arrest had been drawn up, that there had been a delay in charging him, and that his pre-trial detention had been unreasonably long. Under Article 6 §§ 1 and 3 (b) and (d) and Article 13 of the Convention he further complained about the length of the proceedings and maintained that the investigator had not allowed him to study all the case-file material, that the courts had been biased, and that they had refused to admit the statements of certain defence witnesses as evidence. The applicant further complained under Article 2 of Protocol No. 7 that his case had been examined by the courts at only two levels of jurisdiction, that the hearing before the Supreme Court had been brief, and that he and his lawyer had not been allowed to make oral

pleadings. Lastly, he complained of violations of Articles 1, 5 § 1 (a), 6 § 3 (a), 8 and 17 of the Convention, without providing any further details.

66. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, 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. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

68. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

69. The Government considered that claim unsubstantiated and excessive.

70. Ruling on equitable basis, the Court awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicant also claimed 4,328 Ukrainian hryvnias (UAH) (approximately EUR 400) for the services of the lawyer K. during the domestic proceedings.

72. The Government observed that the applicant had failed to support his claim by documentary evidence.

73. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 3 and the complaint under Article 6 § 1 that his confessions obtained as a result of ill-treatment were not excluded from the body of evidence in his case admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *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 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 25 February 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President