CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 29971/04
by Oleg Volodymyrovych KATS and Others
against Ukraine

The European Court of Human Rights (Second Section), sitting on 14 March 2006 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Ms A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 29 July 2004,

Having deliberated, decides as follows:

THE FACTS

The first two applicants, Mr Oleg Volodymyrovych Kats and Mrs Tetiana Volodymirivna Kats, are the father and mother of Ms Olga Olegivna Biliak, deceased (hereinafter Olga Biliak). They were both born in 1946. The third applicant, Mr Stanilav Igorevich Biliak, born in 1993, is the son of the late Olga Biliak. All three applicants live in Kyiv.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

Olga Biliak, a writer and journalist, had a history of mental ill health and drug addiction. At the time of her arrest, she was a registered schizophrenic and infected with HIV (Human Immunodeficiency Virus).

1. Criminal proceedings for assault

On 18 November 2002 the Solomyanski District Police Department (hereafter "the District Police Department") of Kyiv instituted criminal proceedings against Olga Biliak and Ms S. for having assaulted and robbed a certain Ms A. On 15 January 2003 the cases against Olga Biliak and S. were disjoined. (Ms S. was subsequently sentenced to seven years' imprisonment for assault and robbery committed jointly with "another person".)

On 6 February 2003 the pre-trial proceedings in Olga Biliak's case were suspended and, as she was at liberty, she was put on the "wanted" list.

On 14 April 2003 Olga Biliak was arrested. On 16 April 2003 she was charged with robbery.

On 27 August 2003 the Solomyanski District Court of Kyiv (hereafter "the District Court") sentenced Olga Biliak to eight and a half years' imprisonment for robbery. On 25 November 2003 the Kyiv City Court of Appeal (hereafter "the Court of Appeal") quashed this decision and remitted the case for reinvestigation. The Court of Appeal indicated, *inter alia*, that the first instance court had based Olga Biliak's conviction on the testimony of the victim. The latter, at the initial stages of the investigation, had first stated that there had only been one perpetrator (Ms S.), then that there had been someone else whom she did not know and, finally, that she had been assaulted by Ms S. and Olga Biliak. The testimony of a witness who had allegedly seen Olga Biliak assaulting Ms A. was not verified through a reconstruction of events. Other persons who were present at the incident, as well as the convicted Ms S., who all along denied her acquaintance with Olga Biliak, were not heard. Olga Biliak's alibi was verified by neither the investigative authorities nor the District Court.

On 1 February 2004 Olga Biliak died.

On 23 August 2004 the District Police Department closed the case, given the death of the accused. The applicants challenged this decision as this non-exonerating ground for terminating the proceedings was equivalent to a finding of Olga Biliak's guilt. On 30 December 2004 the District Court quashed the ruling and remitted the case. On 29 March 2005 the Court of Appeal rejected the prosecution's appeal against this decision.

The proceedings are still pending.

2. Olga Biliak's detention on remand

On 14 April 2003, upon her arrest, Olga Biliak was brought to the District Police Department, where she was kept until 22 April 2003. On 18 April 2003 she was examined and x-rayed in the Institute of Physiotherapy and Pulmonology (*Інститут фізіатрії і пульмонології*). She was found to be healthy.

Olga Biliak in her subsequent complaints alleged that, during her detention in the District Police Department, she was tortured to make her confess. In particular, she stated that a certain officer Z. had banged her head against the walls.

On 17 April 2003 the District Court ordered Olga Biliak's detention on remand.

On 22 April 2003 Olga Biliak was transferred to the Kyiv Centre for Detention on Remand (hereafter "the CDR"). The applicants allege that, upon her arrival, she was not examined by doctors, whereas the subsequent investigation found otherwise. She was placed in a general cell where, the applicants state, she was bullied by her cellmates on account of her weird conduct caused by her mental illness.

In early May 2003 Olga Biliak, according to her diary, had suffered from bilateral pneumonia.

On 18 May 2003 a commission of psychiatrics examined Olga Biliak in the CDR. It established that she had suffered from schizophrenia, but found that a more detailed assessment was required.

On 26 May 2003 the District Court ordered the in-patient psychiatric examination of Olga Biliak, who was moved to a psychiatric hospital.

The psychiatric commission drew up a report on 1 July 2003. They concluded that the applicant suffered from a mental disorder but at the time of the offence could have controlled and directed her conduct. In early July 2003, following the completion of the psychiatric assessment, the applicant was transferred back to the CDR and again placed in the general cell.

Meanwhile, on 1 June 2003 the District Court extended the term of detention on remand to three months.

Olga Biliak's diary states that in early August 2003 she suffered from acute kidney failure. She was examined by a doctor, who provided her with certain out-dated drugs which helped very little.

In early September 2003 Olga Biliak again developed pneumonia.

On 25 September 2003 Olga Biliak had an exacerbation of a gastric ulcer. She first vomited undigested food and then blood. She was prescribed "activated charcoal" (*активоване вугілля*, an absorbent, used for improving digestion - a cheap medicine). The next day she had a heart attack during the exercise period. On 27 September 2003 a doctor went to her cell to treat her heart problems.

On 1 October 2003 Olga Biliak wrote in her diary: "I am a sick, exhausted person, who constantly passes out, loses consciousness and complains about searing pains" (*я больной измученный человек, который без конца падает в обморок, теряет сознание и жалуется на сильные боли*).

On 5 October 2003 Olga Biliak, several months after she had started to complain about gastric problems, was prescribed a diet.

On 28 October 2003 Olga Biliak visited a prison doctor complaining about acute kidney failure. He gave her certain medication.

On 7 November 2003 Olga Biliak wrote that she had been visited by a prison therapist, A., who had told her that she would not be able to secure her release on grounds of purported ill-health.

When on 25 November 2003 the Court of Appeal ordered a reinvestigation into Olga Biliak's case, it simultaneously decided that the preventive remand measure should remain unchanged. Henceforth, according to the applicants, no investigative action was taken and on no occasion was Olga Biliak visited by the investigator.

On 1 December 2003 Olga Biliak, according to her diary, was diagnosed with chronic bronchitis. On 4 December 2003 she had shaking chills and a rising temperature. On 9 December 2003 Olga Biliak wrote that she was rapidly losing weight. On 10 December 2003 she complained about nervous exhaustion, stating that she could hardly eat, being only able to keep down tiny pieces of food. She continued to lose weight at a frightening rate.

On 11 December 2003 Olga Biliak recorded that a high temperature had caused her fifth sleepless night. Constant weakness, drowsiness and a high temperature prevented her from going outside for walks.

On 12 December 2003 Olga Biliak started to lose herself in time.

On 13 December 2003, with her temperature being constantly around 40°C, Olga Biliak was given a couple of fever-reducing pills. Her only friend in the cell fixed her tea in the morning, coffee and biscuits during the day and milk with sugar and butter in the evening.

On 15 December 2003 Olga Biliak was given another pill and informed that she was to have her lungs x-rayed. Her body temperature that day was 39°C, subsequently receding to 35°C. She wrote that day: "if they continue to do nothing with me I can in fact die, which they have already understood for themselves" (*если они не будут ничего делать со мной я в натуре могу умереть, и они это уже сами поняли*).

On 17 December 2003 the applicant was scheduled for an x-ray and given another fever-reducing pill. The paramedics told her that it was the last one in the CDR.

Since 29 December 2003 the applicants and Olga Biliak's lawyer had repeatedly requested the authorities that she be released due, *inter alia*, to her rapidly deteriorating state of health. On 13 January 2004 the Deputy

Prosecutor of the Solomyanski District of Kyiv and, on 19 January 2004 the investigator, rejected these complaints without addressing the health issues.

On 21 January 2004 Olga Biliak was x-rayed. According to a letter of 2 April 2004 from the State Department for the Execution of Punishments, this examination did not reveal acute pneumonia.

On 22 January 2004 the Head of the CDR applied to the Head of the District Police Department, stating that Olga Biliak's poor state of health did not allow her to participate in any investigative actions and that she needed urgent treatment in a hospital. He asked that the investigative authorities consider the possibility of her release on the undertaking not to abscond.

On 29 January 2004 the investigator ordered Olga Biliak's release on health grounds. However, according to the letter of the CDR, no such order was received by its administration that day.

The death certificate states that on 1 February 2004 Olga Biliak died from bilateral pleurisy.

The autopsy of Olga Biliak's body established that she had died from the HIV infection complicated by purulent pneumonia. It also revealed a number of bruises on her hands, legs, left cheekbone and chin. Some of them were already fading, the others were fresh.

Private forensic pathologists who, on the applicants' request, carried out a post-mortem examination of Olga Biliak, agreed in general with this conclusion, but further found that her death had been caused by inadequate medical treatment at the CDR.

The applicants provided two colour photographs of Olga Biliak's body, showing a corpse in an advanced state of exhaustion.

In a letter dated 21 April 2004, the State Department for the Execution of Punishments informed the applicants that the release order had only been received by the CDR's administration on 2 February 2004.

3. The investigation into the alleged ill-treatment and death

The applicants complained on many occasions that the real reason behind Olga Biliak's prosecution was revenge for her refusal to cooperate with officers T. and N. from the Anti-Narcotics Police Department, who allegedly proposed that she sell drugs seized by the police from street dealers.

On 30 November 2003 the assistant prosecutor of the Solomyanski District refused to bring any charges against the said officers for lack of any *corpus delicti*. This ruling was apparently set aside as, on 15 December 2004, the senior assistant prosecutor of the Solomyanski District again refused to institute criminal proceedings against T. and N. On the same date another senior assistant prosecutor decided not to bring any charges against officer Z. who had allegedly beaten Olga Biliak upon her arrest on 14 April 2003.

Immediately after Olga Biliak's death, the applicants lodged a criminal complaint against the officials of the CDR for negligence.

The investigator with the Shevchenkovsky District Prosecutor's Office questioned the prison doctor who had treated Olga Biliak, the Head of the CDR Medical Unit and the cellmates. The doctor submitted that the deceased had been examined on 18 June 2003, 11 July 2003, 1 October 2003, 20 and 21 November 2003, and 6, 12, 20, 21, 22 and 28 January 2004. She was found to be suffering from bronchitis, narcotic addiction, anaemia and cachexy. Taking into account her state of health, he recommended her release.

The Head of the Medical Unit testified that upon her arrival at the CDR Olga Biliak was examined and found to be suffering from narcotic addiction and certain psychiatric problems (such as hysteria), but in general her state of health was considered satisfactory. During her stay in the prison, she was under the supervision of doctor S. (in the applicant's diary A., after his first name). His instructions were fully complied with and there was no reason for her placement in the medical ward.

Olga Biliak's cellmates stated that during her detention she was frequently attended by doctors and paramedics, and that until her sudden death her health was satisfactory.

The investigator concluded that Olga Biliak's death resulted from a sudden deterioration in her health, caused by the HIV infection. On 30 April 2004 he decided not to bring any charges.

On 14 June 2004 the Kyiv City Prosecutor's Office rejected the applicants' request to set aside this ruling, stating that the investigation was thorough and complete. During her detention the deceased had had appropriate medical treatment, and had received food and medication from her relatives. Until 20 January 2004 the authorities had had no information about her HIV condition. However, disciplinary proceedings were instituted as regards the delay in dispatching the investigator's release order.

The applicant challenged the ruling of 30 April 2004 before the Shevchenkovsky District Court of Kyiv. On 16 December 2004 the court quashed this ruling and ordered further inquiries, finding that the initial investigation was inadequate and incomplete. It ordered an official post-mortem examination of the body and sought answers to the following questions:

- whether Olga Biliak, given her state of health, should have been held in the CDR;
- whether she received proper medical treatment in custody;
- whether she would have survived if she had been taken quickly to a hospital;
- when prison doctors had started to treat her health problems; and
- the time and cause of death.

The court further ordered the authorities to find out in what circumstances and who had inflicted the bruises on Olga Biliak recorded by the forensic pathologists. The investigation appears to be still pending.

COMPLAINTS

The applicants complain under Article 2 of the Convention that Olga Biliak died due to the negligence of the authorities. They also complain of a lack of an effective and independent investigation into her death.

They next complain under Article 3 of the Convention about the ill-treatment to which Olga Biliak had allegedly been subjected upon her arrest, and about her inadequate conditions of detention.

The applicants contend that Olga Biliak's arrest and initial detention in the police cells was contrary to Article 5 of the Convention, and that her subsequent detention on remand was arbitrary.

The applicants further complain under Article 6 of the Convention of the unfairness of the criminal proceedings against Olga Biliak.

The applicants finally complain that they were denied an effective remedy, within the meaning of Article 13 of the Convention, because the authorities failed to carry out an effective investigation into their complaints concerning Olga Biliak's death in detention.

THE LAW

1. Article 2 of the Convention

The applicants complain that the authorities failed to provide Olga Biliak with appropriate medical care when in detention and thus were responsible for her death. They also complain that the investigation into her death was neither adequate nor effective. The applicants invoke Article 2 of the Convention, which, insofar as relevant, reads as follows:

> "1. Everyone's right to life shall be protected by law. ..."

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. Article 3 of the Convention

The applicants allege that upon her arrest Olga Biliak was beaten by officer Z., who had allegedly bounced her head against the walls. They also

complain about the conditions of her detention, referring to Article 3 of the Convention, which provides:

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

As regards the alleged ill-treatment in police custody, the Court observes that the applicants have failed to support their allegations by any evidence (medical certificates, etc.) which could lay the basis of an arguable claim for such ill-treatment. Accordingly, this part of the application should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention as being manifestly ill-founded

However, as regards the conditions of detention, the Court cannot, on the basis of the case file, determine the admissibility of this complaint. It is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

3. Article 5 of the Convention

The applicants contend that the reason for Ms Biliak's initial apprehension, namely the search for her, was trumped up by the authorities as she had never attempted to flee but had simply moved to another apartment. This being the only reason for her arrest, the deprivation of liberty was contrary to domestic legislation, as was her detention in police cells, which they considered excessive. They also allege that Olga Biliak's detention on remand was arbitrary. The applicants rely on Article 5 § 1 of the Convention, which reads insofar as relevant as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ..."

As to the applicants' complaints about the alleged irregularities of the initial arrest, the Court recalls that, according to its established case-law, where no domestic remedy is available, the six month period runs from the act purportedly constituting a violation of the Convention (*Al Akidi v. Bulgaria* (dec.), no. 35825/97, 19 September 2000). The Court notes that the grounds for Olga Biliak's detention on remand were given by a local court on 17 April 2003 and that she ceased to be in police custody on 22 April 2003, i.e. more than six months before the application was submitted to the Court. It follows that this part of the application was lodged out of time for the purposes of Article 35 § 1 of the Convention and should be dismissed pursuant to Article 35 § 4.

The Court cannot, however, on the basis of the case file, determine the admissibility of the complaint regarding the alleged arbitrariness of Olga Biliak's detention on remand (notably the period between 29 January and 1 February 2004) and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

4. Article 6 of the Convention

The applicants complain under Article 6 § 1 of the Convention that the criminal proceedings against Olga Biliak were unfair.

The Court notes that the proceedings in Olga Biliak's criminal case are still pending. This complaint should therefore be rejected as being premature in accordance with Article 35 §§ 1 and 4 of the Convention.

5. Article 13 of the Convention

The applicants submit that there was no effective remedy as regards their complaints under Article 2 of the Convention. They invoke Article 13 of the Convention, which provides:

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

The Court considers that it cannot, on the basis of the case file, determine the admissibility of the complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

For these reasons, the Court by a majority

Decides to communicate the complaints concerning Articles 2, 3 (conditions of detention), 5 § 1 (arbitrariness of detention on remand) and 13 of the Convention and to invite the respondent Government to submit, within eight weeks, written observations on the admissibility and merits of the case;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President