

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

FIFTH SECTION

DECISION

Application no. 65567/13
Viktoriya Pavlivna YIZHACHENKO
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 18 October 2016 as a Chamber composed of:

Angelika Nußberger, *President,*
Ganna Yudkivska,
Erik Møse,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 17 October 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Viktoriya Pavlivna Yizhachenko, is a Ukrainian national who was born in 1968 and lives in Poltava. She was represented before the Court by Mr O.V. Levytskyy, a lawyer practising in Kyiv.

2. The Ukrainian Government ("the Government") were represented, most recently, by their Agent, Mr I. Lishchyna.

The circumstances of the case

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

4. On an unspecified date criminal proceedings were instituted against the applicant on several counts of fraud and incitement to bribery. The applicant remained at liberty, having paid a bail.

5. On 31 July 2012, during the trial, the Oktyabrskyy District Court of Poltava ("the District Court") ordered that the applicant be placed in custody.

6. On 3 September 2012 the applicant was put on the list of wanted persons.

7. On 1 February 2013 she was arrested.

8. On 7 February 2013 she was placed in the Poltava Pre-Trial Detention Centre ("the SIZO"). On admission to the SIZO the applicant had a medical examination.

9. On 27 March 2013 she was admitted to a medical unit at the SIZO with a diagnosis of ischemic heart disease, stenocardia, atherosclerotic cardio sclerosis, impaired cardiac function and hypertensive disease. The applicant had an electrocardiogram and was provided with treatment. The next day she had a consultation with a cardiologist.

10. On 5 April 2013 the applicant was examined by a neuropathologist.

11. On 17 April 2013 the applicant had a stenocardia attack accompanied by a sharp drop in her arterial blood pressure. She was provided with urgent medical care by an ambulance team which had arrived at the request of the SIZO. The applicant was given further treatment in a city hospital.

12. On 8 May 2013 the applicant was taken to the gynaecological ward of a city hospital where she was treated for uterine fibroids and haemorrhagic syndrome. Further examinations showed that the applicant suffered from endometrial cancer (*adenocarcinoma corporis uteri*). On 10 May 2013 the applicant was returned to the SIZO and placed in the medical unit for further treatment and observation.

13. On 21 May 2013 the applicant was examined and prescribed further drug therapy.

14. On 6 June 2013 the applicant was examined by an oncologist who recommended she have surgery. She was registered with the Poltava regional oncologic clinic as a cancer patient with T1N0M0-stage cancer.

15. On 7 August 2013 the applicant wrote a statement refusing to consent to surgical treatment, chemotherapy or any other complex treatment until she had been seen by the oncology panel at the Kyiv oncologic centre.

16. In a letter of 10 August 2013, the governor of the SIZO and the head of the SIZO's medical unit informed the applicant's lawyer that the applicant had refused to have the necessary treatment because she wanted to be examined by doctors from the Kyiv oncology institution.

17. On 14 August 2013 the applicant had her lungs X-rayed. No tuberculosis was found.

18. On 12 September 2013 the applicant was diagnosed with cervical osteochondrosis and prescribed medical treatment and further observation.

19. On 8 October 2013 the applicant was taken by ambulance to the gynaecological ward of the city hospital because of a uterine haemorrhage. The doctor who treated her confirmed her diagnosis and the need for surgery. The applicant returned to the SIZO the next day.

20. On 16 October 2013 the applicant was examined by an oncologist from the Poltava regional oncologic clinic who also recommended surgery.

21. On 17 October 2013 the Court indicated to the Government under Rule 39 of the Rules of Court that they should secure immediately, by appropriate means, inpatient treatment for the applicant for her health condition.

22. On 21 October 2013 the applicant was admitted to the Poltava regional oncologic clinic for further examination and treatment.

23. On 1 November 2013 a panel of doctors at the clinic made a plan for the applicant to have surgery and scheduled it for 5 November 2013. The applicant refused to give her consent to the proposed treatment.

24. On 13 November 2013 the applicant again refused to consent to the medical intervention and treatment proposed by the doctors at the Poltava regional oncologic clinic. The refusal was witnessed by six witnesses, including the doctor in charge of her treatment. The applicant was returned to the SIZO's medical unit for further supervision and non-surgical treatment, which included taking prescription pills.

25. On 25 November 2013 the applicant was taken to the Poltava regional psychiatric hospital for observation in connection with signs of a possible mental disorder. On 2 December 2013 she was returned to the SIZO after she was found to be of sound mind and that she had attempted to simulate a mental disorder. The applicant continued to accept the treatment provided to her in the SIZO.

26. On 14 March 2014 the District Court found the applicant guilty of financial frauds and of incitement to bribery. It sentenced her to five years' imprisonment but released her from serving that sentence pending three year probation period. The District Court further changed the preventive measure against her from pre-trial detention to a written undertaking not to abscond. The applicant was released on the same day.

27. On 10 June 2014 the Government informed the Court of the applicant's release, following which the Court lifted the interim measure.

COMPLAINT

28. The applicant complained under Article 3 of the Convention that she had not been provided with adequate medical treatment during her pre-trial detention.

THE LAW

29. The applicant complained that the authorities had failed to provide her with adequate medical treatment in custody and that that failure had amounted to torture within the meaning of Article 3 of the Convention.

30. Article 3 of the Convention reads as follows:

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

A. The parties' submissions

31. The applicant argued that the medical treatment had not been sufficient. She initially contended that her refusal to undergo surgical treatment had been made involuntarily, but she subsequently stated that she had refused to consent to surgery because of her fear of such a serious interference with her body. In any event, the authorities had been under an obligation to provide her with other forms of treatment which, in her opinion, had not been available in the SIZO.

32. The Government submitted that the applicant had been under constant and comprehensive supervision during her detention. When necessary she had been transferred to specialist medical institutions for specific examinations and treatment. Her refusal to undergo the proposed operations had been binding on the medical staff and non-surgical treatment had been provided to her in the proper way.

B. The Court's assessment

33. According to the Court's case-law, Article 3 of the Convention imposes an obligation on States to protect the physical well-being of persons deprived of their liberty (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI). At the same time, it cannot be construed as laying down a general obligation to release detainees on health grounds. Rather, the compatibility of a detainee's state of health with his or her continued detention, even if he or she is seriously ill, is contingent on the State's ability to provide appropriate treatment of the requisite quality in prison (see *Goginashvili v. Georgia*, no. 47729/08, § 79, 4 October 2011).

34. The "adequacy" of medical assistance remains the most difficult element to determine. On the whole, the Court retains sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment" (see *Aleksanyan v. Russia*, no. 46468/06, §§ 139-140, 22 December 2008 and *Blokhin v. Russia* [GC], no. 47152/06, § 138, ECHR 2016). The Court has also held that Article 3 cannot be interpreted as requiring a prisoner's every wish and preference regarding medical treatment to be accommodated (see *Mathew v. the Netherlands*, no. 24919/03, § 186, 29 September 2005).

35. The mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention (see, e.g., *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII (extracts)), that diagnosis and care are prompt and accurate (see *Hummatov*, cited above, § 115 and *Melnik v. Ukraine*, no. 72286/01, §§ 104-106, 28 March 2006), and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Hummatov*, cited above, §§ 109 and 114 and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006). The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Hummatov,* cited above, § 116, and *Holomiov v. Moldova*, no. 30649/05, § 117, 7 November 2006).

36. Turning to the present case, it appears that considerable attention was paid to the applicant's health by the domestic authorities, who made efforts to address her health issues, including the endometrial cancer. The applicant was under the constant supervision of the SIZO's medical staff and was provided with regular and timely medical examinations and treatment in that facility. In addition, she was examined and treated by external doctors specialising in specific areas. Furthermore, on several occasions she was transferred to hospital for examinations and treatment.

37. It further appears that the authorities made arrangements for surgical treatment of the applicant's endometrial cancer, however, the applicant repeatedly refused to consent to that treatment. In that regard the Court observes that a refusal to accept medical treatment may be considered valid and binding upon compliance with certain conditions. Firstly, one of the central issues in determining the validity of a refusal to undergo medical treatment by a patient is the issue of his decision-making capacity

(see *Arskaya v. Ukraine*, no. 45076/05, § 69, 5 December 2013). Secondly, such a decision should be based on the patient being provided with sufficient information and any medical intervention should have the patient's informed consent (see *V.C. v. Slovakia*, no. 18968/07, § 108, ECHR 2011 (extracts), with further references to the international texts). Thirdly, the patient's decision should reflect his free will, failing which the decision to consent or to refuse to consent to treatment will not be valid. Furthermore, in the context of detention, a patient's specific motives for refusing to accept medical assistance should be examined to establish if there are any special circumstances which may engage the State's responsibility for not providing medical assistance (see *Holomiov*, cited above, § 119, where the applicant's refusal to accept medical treatment was part of a protest against the inadequate conditions of his treatment in prison, and *Yunusova and Yunusov v. Azerbaijan*, no. 59620/14, § 148, 2 June 2016, where the Court did not attach great importance to the detainee's refusals to be seen by doctors, taking into account the considerable amount of time that she had not been provided with adequate medical assistance in detention and the fact that the refusal was a protest against that lack of medical assistance).

38. Nothing in the present case suggests that the applicant was unable to take rational decisions about her treatment. Her examination at the mental hospital proved that she was mentally sound (see paragraph 25 above) and there is no evidence to the effect that the applicant might have lacked the ability to discern the matters at hand (contrast *Arskaya*, cited above, §§ 70 and 87, and *M. v. Ukraine*, no. 2452/04, § 78, 19 April 2012). Similarly, the facts do not suggest that the applicant might have been given insufficient information about the scope of the proposed medical treatment and its consequences (contrast *Arskaya*, cited above, § 89). As to the principle of free will, the applicant did not maintain her initial allegation that her refusal to undergo surgery had been involuntary and she argued eventually that she had refused consent because she had been afraid of such a serious medical intervention. The Court does not find any indication that her refusal to have the proposed surgical treatment was involuntary. It should be emphasised that States may not be held responsible for delays caused by an applicant's own refusal to undergo medical examinations or accept treatment in cases where the material available to the Court shows that qualified medical assistance was made available to the applicant but that he or she voluntarily refused it (see *Knyazev v. Russia*, no. 25948/05, § 103, 8 November 2007, and *Tymoshenko v. Ukraine*, no. 49872/11, § 213, 30 April 2013). Lastly, the Court does not discern any special circumstances as regards the motives for the applicant's refusal to have the proposed treatment while in detention and which might have still engaged the State's responsibility under Article 3. It follows that there are no grounds to

question the validity of the applicant's refusal to give her consent to surgery.

39. To sum up, the Court considers that the Government have provided sufficient evidence to enable it to conclude that the domestic authorities afforded the applicant adequate medical assistance, thus complying with their obligation to protect her physical well-being during her deprivation of liberty. It follows that the application must be rejected as being manifestly ill-founded, pursuant to Article 35 § 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 10 November 2016.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President