CASE OF SAMARDAK v. UKRAINE

(Application no. 43109/05)

JUDGMENT

STRASBOURG

4 November 2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Samardak v. Ukraine,

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 12 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 43109/05) 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 Ivan Trofymovych Samardak ("the applicant"), on 4 November 2005.

2. The applicant, who had been granted legal aid, was represented by Mr R. Taratula, a lawyer practising in Lviv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged that he had been ill-treated by the police officers and that no effective investigation had been carried out in respect of his complaint.

4. On 10 November 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Lviv.

6. At about 1.40 p.m. on Saturday, 20 April 2002 police officers V.Z. and S.P. saw the applicant playing with a knife at a public bus stop and took him to the Lychakivsky District Police Station of Lviv for questioning. In the police station the officers seized the knife and forwarded it for an expert assessment to determine whether it qualified as an offensive weapon. After questioning the applicant was released without his detention being recorded.

7. On Monday, 22 April 2002 the applicant complained to the Lychakivsky District Prosecutors' Office of Lviv that police officers had severely beaten him during the questioning, had handcuffed him without reason and had attempted to hang him from a pipe. Following this complaint the applicant was referred for a medical expert assessment.

8. On 23 April 2002 the medical experts found that the applicant had several abrasions and numerous bruises on his head and different parts of his body, cumulatively qualifying as minor bodily injuries.

9. On the same date it was decided not to institute any proceedings against the applicant, as the knife seized from him could not qualify as an offensive weapon.

10. On 30 April 2002 the investigative unit of the Lychakivsky District Prosecutors' Office refused to institute criminal proceedings in respect of the applicant's complaint of ill-treatment. The decision referred primarily to the depositions by the two police officers, who had stated that

the applicant might have been injured when they escorted him to the police station, as he had refused to follow them and they had applied martial arts techniques to subdue him.

11. On 24 May 2002 the Lychakivsky District Prosecutor quashed this decision as "unlawful and unjustified", in particular in view of the fact that the applicant himself had not been questioned and that the circumstances of his detention in the police station had not been clarified. The prosecutor further demanded an additional medical assessment of the applicant's injuries.

12. According to the findings of a new medical assessment carried out between 3 and 7 June 2002, the applicant was additionally found to have several rib fractures, which could have been sustained on 20 April 2002. The applicant's injuries were accordingly re-qualified as "bodily injuries of moderate severity".

13. Between June and October 2002 three more decisions not to institute criminal proceedings (of 7 June, 1 August and 13 September 2002) were taken, with reference to the likelihood that the applicant had been injured as a result of the application of proportionate force while he was being escorted to the police station. These decisions were quashed on 11 July, 28 August and 29 October 2002 respectively. By this latter decision it was simultaneously decided to initiate formal criminal proceedings in respect of the incident.

14. On 31 March 2003 the criminal proceedings were discontinued for want of evidence of criminal conduct of the police officers.

15. In April 2003 the applicant appealed to the Lychakivsky District Court of Lviv against the decision to discontinue criminal proceedings.

16. On 1 August 2003 the District Court allowed the applicant's appeal and reopened the proceedings. It noted in particular that in the course of questioning the applicant had provided detailed and consistent descriptions of the circumstances leading to his injuries. The two police officers, on the other hand, had modified their initial explanations (at the outset they had claimed that the applicant might have been injured as a result of the application of martial arts techniques while he was being escorted to the police station, while they subsequently suggested that when resisting application of those techniques he had accidentally fallen to the ground and injured himself). The court further expressed doubt that the applicant's numerous injuries on different parts of his body could be explained by a single fall, as the police officers had said, and instructed the investigating authorities to question medical experts as to the likelihood of the officers' and the applicant's accounts of the incident. The court also instructed the investigative authorities to determine why the applicant's detention in the police station had not been properly registered and to identify and question other possible witnesses to the events.

17. On 6 August 2004 an additional medical expert assessment confirmed that the applicant had suffered fractures to three ribs, which could have been sustained on 20 April 2002.

18. On 17 September 2004 and 26 January 2005 the criminal proceedings were discontinued on essentially the same grounds as before. On 15 October 2004 and 10 March 2005 respectively the Lviv Regional Prosecutors' Office quashed those decisions, finding that the court's previous instructions had not been fully complied with.

19. On 17 June 2005 the investigative unit of the District Prosecutors' Office again discontinued criminal proceedings, referring to the likelihood that the injuries had resulted from the application of proportionate force while the applicant was being escorted to the police station. By way of reasoning they referred in particular to additional questioning of the two police officers suspected of ill-treatment, several other officers, several individuals detained in the police station on the same date, and two lay witnesses, in whose presence the applicant's knife had been seized. The above individuals had stated that, although they were no longer able to remember details on account of the lapse of time, they had not witnessed any ill-treatment of the applicant. The police officer who had been responsible for registration of detainees on 20 April 2002, also

stated that the applicant had not been officially detained, as there was no relevant record in the journal.

20. On 3 August 2005 the Lviv Regional Prosecutors' Office quashed the decision to discontinue the proceedings and remitted the case for further investigations.

21. On 3 January 2006 the investigations were discontinued on essentially the same grounds as before and with reference to essentially the same sources of evidence. The applicant appealed to the District Court.

22. On 9 August 2006 the District Court quashed the decision of 3 January 2006, having found that its previous instructions remained unfulfilled. In particular, it noted that it was still unclear why the police officers had modified their initial statements concerning how the applicant had been injured while being escorted to the police station; medical experts had not been questioned concerning the credibility of the parties' descriptions of how the injuries had been caused; and the reasons for the failure by the police to register the applicant's detention had not been determined. The court also found that the investigation's omissions could be perceived as

"stubborn unwillingness ... to conduct a detailed verification of the circumstances described by the applicant ... [and take] a reasoned decision concerning his complaint ..."

23. On several subsequent occasions the proceedings were suspended, on the ground that it was not possible to identify the perpetrator in spite of the fact that all necessary measures had been taken, and reopened following the applicant's complaints. As of July 2009 (the last date on which the parties updated the Court about the case) the investigation was still pending.

II. RELEVANT DOMESTIC LAW

24. Relevant domestic law can be found in the judgment in the case of *Kozinets v. Ukraine* (no. 75520/01, §§ 39-42, 6 December 2007).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3 AND 13 OF THE CONVENTION

25. The applicant complained that he had been subjected to inhuman and degrading treatment by the police officers during his questioning on 20 April 2002, contrary to Article 3 of the Convention. He further complained under Article 13 of the Convention that there was no effective investigation into his ill-treatment complaint and he therefore lacked an effective remedy in respect of the above violation.

26. The relevant Articles of the Convention read as follows:

Article 3

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

27. The Court is of the opinion that it is appropriate to examine the applicant's complaint of an inadequate investigation into his allegations of ill-treatment under the procedural limb of Article 3 of the Convention (see *Kozinets v. Ukraine*, cited above, § 44).

A. Admissibility

28. The Government submitted that the applicant's complaint of ill-treatment was premature, as the relevant domestic investigation was still under way.

29. The applicant insisted that the investigation was ineffective and that he should therefore be excused from the requirement to await its results.

30. The Court considers that the Government's objection raises an issue which falls to be examined together with the complaint that the investigation was ineffective under Article 3 of the Convention and accordingly joins it to the merits of the applicant's complaint in that respect.

B. Merits

1. Concerning the alleged ill-treatment

31. According to the applicant, the case file contained sufficient evidence that his injuries had been inflicted by the police officers during his unregistered detention in the police station. In particular, the Government had failed to provide a coherent alternative explanation as to how the applicant had sustained the injuries in question.

32. According to the Government, it was not possible to assess the truthfulness of the applicant's allegations concerning his ill-treatment by police officers in April 2002, as the domestic investigation in this respect was still pending.

33. Applying the general principles determined in its case-law (see, for example, *Kozinets,* cited above, §§ 51-54 and *Spinov v. Ukraine*, no. 34331/03, §§ 44-45 and 49, 27 November 2008) to the facts of the present case, the Court notes that it is common ground between the parties that on 20 April 2002 the applicant had sustained several abrasions, numerous bruises all over his body and three rib fractures.

34. Although there is no record of the applicant's state of health prior and following his encounter with the police on the date at issue, in light of the testimonies by police officers (see paragraphs 10 and 16 above) and in absence of any alternative suggestions by the Government, the Court considers it established that the injuries complained of had been sustained during the applicant's encounter with the police.

35. The question which remains to be answered is whether, as suggested by the applicant, the injuries were inflicted while he was in custody and the State authorities should be accountable for them under Article 3 of the Convention, or, as argued by the Government, they resulted from application of proportionate force to effect the applicant's arrest.

36. In assessing the applicant's version of the events – that he was beaten up while being questioned in detention - the Court finds that a number of facts add credibility to his position. It is noteworthy that the applicant's questioning, which could potentially have led to his criminal prosecution for possession of offensive weapon, took place in the absence of basic procedural guarantees. In particular, the applicant was questioned without a lawyer. His detention was not registered for unclear reasons. It is also notable that the police officers, who attempted to explain the applicant's injuries by his resistance to the arrest during the ensuing investigation, never pressed the insubordination charges against him following his arrest and released him following the questioning about the knife.

37. In addition, as noted by the domestic judicial authorities, the applicant's account of events was detailed and consistent throughout the course of the investigation. The officers' accounts, on the other hand, were modified following re-qualification of the applicant's injuries from "minor" to those of "moderate severity". In particular, while initially the officers claimed that the applicant had been bruised as a result of application of martial arts techniques to restrain him, subsequently they added that in his attempts to resist the police he had fallen to the ground and injured himself. The Court also notes that the instructions of the domestic judicial authorities to question medical experts as to the likelihood of the applicant's and the police's versions had not been complied with (see paragraph 16 above).

38. In sum, the Court, like the domestic judicial authorities, cannot accept that the numerous bruises on different parts of the applicant's body could have resulted from the application of restraining force while he was being escorted to the police station without further substantiation

of this latter version. It notes that while no conclusive evidence has been provided by the parties concerning the exact nature and degree of force resulting in the applicant's injuries, viewed cumulatively, the medical evidence, the nature and disseminated location of the injuries, the applicant's consistent statements, the lack of evidence that the applicant's questioning had been attended by proper procedural guarantees and lack of consistency in the alternative explanation by the Government as to the origin of the applicant's injuries, give rise to a strong suspicion that these injuries may have been caused by the police officers during the applicant's questioning.

39. Bearing in mind the authorities' obligation to account for injuries caused to persons under their control, the Court considers that failure to find that particular State agents were guilty of a crime of violence against the applicant in the present case cannot absolve the State of its responsibility under the Convention (see, *e.g. Afanasyev v. Ukraine*, no. 38722/02, § 66, 5 April 2005; *Vergelskyy v. Ukraine*, no. 19312/06, §§ 108-110, 12 March 2009 and, by contrast, *Spinov*, cited above, §§ 48-54, 27 November 2008 and *Drozd v. Ukraine*, no. 12174/03, §§ 60-62, 30 July 2009).

40. The Court concludes that the applicant had been subjected to inhuman and degrading treatment in breach of Article 3 of the Convention.

2. Concerning the effectiveness of the investigation of the applicant's allegation of ill-treatment

41. The applicant alleged that the investigation of his complaint was perfunctory, as the authorities were reluctant to penalise the police officers for the act of violence.

42. According to the Government, the authorities were doing everything in their power to investigate the applicant's complaint of ill-treatment.

43. The Court considers that where an individual raises an arguable claim that he has been seriously ill-treated by the State authorities in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3290, § 102).

44. As regards the circumstances of the present case, the Court observes that the applicant sustained several rib fractures and numerous bruises and lodged his ill-treatment complaint against the police officers on the first working day after the purported incident. The resulting investigation, which has lasted more than eight years, has not established the circumstances in which he sustained the injuries and has not held accountable those (if any) responsible for them.

45. The Court further notes that the investigation was discontinued or suspended on a number of occasions, as the prosecution was not able to detect evidence of police misconduct or identify an alternative perpetrator. These decisions were subsequently quashed by the supervising prosecutorial and judicial authorities, which referred to failures on the part of the investigating authorities to employ all the means at their disposal. In their decisions the prosecutorial and judicial authorities expressly pointed to a number of measures which could have been taken, as well as noting that previous instructions had not been fully complied with (see paragraphs 11, 16, 18 and 22 above). In spite of this, on various occasions the inquiries were still discontinued on essentially the same grounds as before without further substantive measures being taken. This situation resulted in the finding by the Lychakivsky Court that the investigating authorities were manifesting "*stubborn unwillingness*" to determine the real circumstances of the case (see paragraph 22 above).

46. It appears from the materials in the case file (see paragraph 19 above) that further collection of evidence was impeded on account of the lapse of time. In particular, the witnesses could no longer recall details of the events. In these circumstances the Court does not have reason to believe that yet another round of inquiries would redress the earlier shortcomings and render the investigation effective.

47. The Court finds that the factual circumstances surrounding the investigation of the applicant's ill-treatment complaint in the present case are similar to the situations, in which it has found violations in a number of recent cases (see, for example, *Mikheyev v. Russia*, no. 77617/01, §§ 112-113 and 120-121, 26 January 2006; *Kobets v. Ukraine*, no. 16437/04, §§ 53-56, 14 February 2008; and *Vergelskyy*, cited above, § 102).

48. In light of the circumstances of the present case and its settled case-law, the Court concludes that in the present case there has been a violation of Article 3 of the Convention on account of the ineffective investigation of the applicant's complaint about ill-treatment in police custody. It follows that the Government's preliminary objection (see paragraph 28 above) must be dismissed.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed 150,000 euros (EUR) in respect of non-pecuniary damage.

51. The Government contended that this claim was exorbitant and unsubstantiated.

52. The Court considers that the applicant must have suffered anguish and distress from the circumstances leading to the finding of the above violations of the Convention. Ruling on an equitable basis, the Court awards the applicant EUR 10,000 for non-pecuniary damage.

B. Costs and expenses

53. The applicant also claimed EUR 1,500 in legal fees incurred before the domestic authorities and the Court. In support of this claim the applicant provided a bill issued by Mr R. Taratula in May 2009 for 150 hours of legal assistance provided between 2005 and 2009 in connection with "criminal proceedings in which he was a victim" and his "representation before the European Court of Human Rights".

54. The Government noted that this claim was unsubstantiated. In particular, the applicant failed to submit a specific account of which services had been rendered to him by Mr Taratula in the course of domestic and Convention proceedings.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the above criteria and the documents in its possession, the Court considers the amount claimed reasonable. Regard being had to the fact that the applicant was granted legal aid in the amount of 850 euros from the Court, the Court awards the applicant EUR 650 under this head.

C. Default interest

56. The Court considers it appropriate that the default interest 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. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies in respect of the applicant's complaint under Article 3 of the Convention concerning his alleged ill-treatment by the police officers and dismisses it after having examined the merits of that complaint;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the inhuman and degrading treatment;

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

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 650 (six hundred fifty euros) in respect of legal fees plus any tax that may be chargeable to the applicant on the above amounts, to be converted into the national currency of Ukraine at the rate applicable on 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;

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

Done in English, and notified in writing on 4 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Peer Lorenzen
Registrar President

SAMARDAK v. UKRAINE JUDGMENT