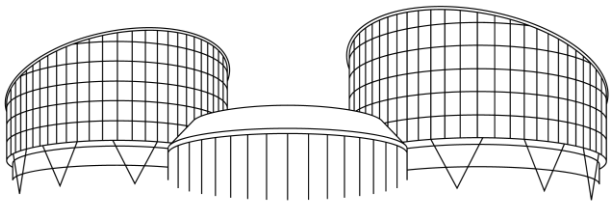

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF
OLEKSIY MYKHAYLOVYCH ZAKHARKIN v. UKRAINE

(Application no. 1727/04)

JUDGMENT

STRASBOURG

24 June 2010

FINAL

24/09/2010

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

In the case of Oleksiy Mykhaylovych Zakharkin v. Ukraine**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*
Mykhaylo Buromenskiy, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 27 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 1727/04) 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 Oleksiy Mykhaylovych Zakharkin ("the applicant"), on 21 November 2003.

2. The applicant, who had been granted legal aid, was represented by Mr A.P. Bushchenko, a lawyer practising in Kharkiv. 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 authorities and that there had been no effective investigation of these events. The applicant further alleged that his detention had been unlawful and that he had not been brought promptly before a judge after the arrest.

4. On 5 February 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979. At the material time he lived in the town of Kalush, Ivano-Frankivsk Region.

A. Applicant's detention and alleged ill-treatment

6. At about 4 p.m. on 17 May 2003, when the applicant was driving from Ivano-Frankivsk to Kalush, he was stopped by police because they had received information that the applicant, who had previously been convicted of theft, might have been involved in recent burglaries committed in the neighbourhood.

7. When searching the applicant's car, the police officers seized an adjustable wrench, gloves, two pocket torches and some other things. They further allegedly found in the car and the applicant's pocket small amounts of cannabis. According to the applicant, he had no cannabis on him and there was none in his car.

8. Following the search, the police officers decided to formalise the applicant's arrest under Articles 44 and 263 of the Administrative Offences Code for possession of illegal drugs in small amounts (administrative offence). In the meantime they sent the seized adjustable wrench to an expert for an opinion as to whether it might have been used to break down the doors of the recently burgled apartments.

9. During the questioning, the applicant informed the police officers that the cannabis did not belong to him and stated that it had been planted on him and his car by the police officers. In response the applicant was allegedly beaten up.

10. According to the applicant, he was hung over a horizontal crowbar when handcuffed and with his head pointing downwards; when held in this position, he was threatened with being killed.

11. On 20 May 2003, after the expert confirmed that the adjustable wrench had been used for a number of burglaries, the police officers took the applicant to the investigator, who at 1 a.m. on 21 May 2003 formalised the applicant's further detention in the status of criminal suspect in respect of the burglaries.

12. When questioned, the applicant rejected the accusations of burglary. In response, he was allegedly beaten up by police officers. According to the applicant, he was hung over a horizontal crowbar when handcuffed and with his head pointing downwards; when he was in that position his head was beaten with a plastic bottle filled with water and his feet with a wooden bat; a gas mask filled with liquid was placed over his head, which made it impossible to breathe. During this treatment the applicant lost consciousness several times and when he came round he was told he had to confess to the crimes. Finally, he signed a confession to one burglary. Subsequently, he signed a number of other documents given to him by police officers.

13. During the night of 24 May 2003 the applicant, still being detained at the police station, asked to use the toilet. When allowed to use it, he cut his left-hand arterial vein. When the resultant bleeding was seen he was delivered to a local public hospital. The same day, having been provided

with the requisite medical assistance, the applicant was released. The medical examinations and treatment provided to the applicant in connection with that injury were documented by medical officers.

14. On 26 May 2003 medical officers examined the applicant and issued a medical report. According to the letter of the Ivano-Frankivsk Regional Prosecutor's Office ("the Regional Prosecutor's Office") of 16 October 2003, the report attested that the applicant had suffered (in addition to the cut on the left arm) three abrasions to his right shoulder and arm, three bruises to his left shoulder, three abrasions and eight scratches to his left arm, and two abrasions to his right leg. According to the bill of indictment of 28 December 2007 (see also paragraph 32 below), the report, after describing the above injuries, ended with the conclusion that they had to be qualified as minor bodily injuries, which could have been inflicted by blunt objects (except for the cut on the left arm), about five days before the examination.

15. On 29 May 2003 the applicant was diagnosed with a severe and suicidal depressive disorder.

B. Official investigation of the events

16. Following his release the applicant and his mother lodged numerous complaints with law enforcement authorities requesting that the police officers involved be held criminally responsible.

17. On 21 July 2003 the Ivano-Frankivsk Town Prosecutor's Office refused to institute criminal proceedings following the applicant's allegations, stating that there was no evidence of crime. The fact that the applicant sustained numerous injuries was noted but disregarded without explanation.

18. The applicant challenged that refusal before the Regional Prosecutor's Office which, in the course of reviewing the impugned decision, also requested the Ivano-Frankivsk Regional Police Department, supervising the relevant local police offices, to carry out an additional internal inquiry concerning the facts complained of.

19. On 27 October 2003 the Regional Prosecutor's Office quashed the decision of 21 July 2003 on the basis that the circumstances in which the applicant had sustained the injuries had not been examined.

20. On 3 November 2003 the Regional Prosecutor's Office instituted an investigation of the allegedly unlawful detention and ill-treatment of the applicant.

21. On 15 December 2003 the applicant applied to the General Prosecutor's Office asserting that the Regional Prosecutor's Office could not carry out an impartial investigation in respect of police officers working in the same region. He requested therefore that the case be referred to a prosecutor's office of another region.

22. On 16 June 2004 the applicant repeated that request as there had been no reply to the first one. He stated that he could still remember the events in detail and identify the policemen involved but the relevant investigatory steps had not been taken.

23. On 24 June 2004 the Kalush Town Prosecutor's Office refused to institute criminal proceedings against Yu. and B., two of the police officers who, it was alleged by the applicant, had been involved in the crimes.

24. On 26 July 2004 the Regional Prosecutor's Office itself considered the applicant's requests for referral of the investigation to another prosecutor's office and rejected them as unsubstantiated.

25. On 25 September 2004 the Regional Prosecutor's Office refused to institute criminal proceedings against police officers Zh., K., and H. for lack of evidence of their involvement in the alleged crimes. On several occasions the applicant requested a copy of that decision in order to challenge it before a court, but to no avail.

26. The Regional Prosecutor's Office then charged two police officers, A. (who was the operative officer of the local police office) and M. (who was the head of the division of the local police office dealing with crimes against individuals and crimes committed by group of persons), with abuse and exceeding their powers, forgery of documents, and unlawful arrest in respect of the applicant.

27. On 22 October 2004, having completed its investigation, the Regional Prosecutor's Office referred the case file to the Ivano-Frankivsk Town Court ("the Town Court") for trial.

28. Between 3 November 2004 and 15 November 2006 the hearings in the case were adjourned by the Town Court five times because of the prosecutor's failure to appear, seven times at the request of the prosecutor, and once because the prosecutor was on holiday.

29. On 18 July 2007 the Town Court held a hearing in the case, in the course of which it established that the investigation had been carried out superficially and inadequately. The Town Court noted that the decisions to refuse to institute criminal proceedings against the other police officers had not been substantiated. It therefore remitted the case for further investigation and ordered that the other police officers be brought before the applicant for identification; that they be questioned; that a confrontation be held between them and the applicant; that the alibi of the accused M. be verified; that the staff of the hospital where the applicant was provided with medical assistance be questioned; and that a detailed reconstruction of the events be held with the participation of the applicant, given that the latter had made contradictory statements about how he had allegedly been hung over the crowbar.

30. On 24 September 2007 the Ivano-Frankivsk Court of Appeal upheld the decision of 18 July 2007 noting, *inter alia*, that the applicant's inconsistent statements should have been properly verified.

31. On 15 November 2007 the Regional Prosecutor's Office commenced additional investigations ordering that they should be terminated within one month.

32. On 28 December 2007 the Regional Prosecutor's Office, having completed the additional investigation, referred the case file to the Town Court. It charged A. with abuse of powers, excess of powers, forgery of documents, deliberately unlawful arrest. It further charged M. with excess of powers and deliberately unlawful arrest. All of the charges referred to the qualified *corpi delicti* of the relevant crimes. The bill of indictment stated, among other things, that M. requested the other police officers to handcuff the applicant and to hang him over the crowbar which was placed between two chairs; to place a gas mask over the applicant's head and block the air flow. It was specified that "the torture lasted from 1 a.m. on 21 May to 9.50 a.m. on 22 May 2003".

33. According to the bill of indictment, the other police officers were not prosecuted as the applicant's mother submitted that, given the lapse of time, the applicant would not be in position to identify any other police officer except for A. and M.; moreover, all the other police officers denied their involvement in the crimes.

34. On 25 March 2009 the Town Court found that the Regional Prosecutor's Office had failed to comply with the investigatory instructions contained in the decision of 18 July 2007. The Town Court further decided to disjoin from the case the charges against M. and remitted this part of the case for additional investigation. As to the charges against A., the Town Court proceeded with their consideration.

35. On 26 March 2009 the Town Court found that in the course of the applicant's arrest A. planted drugs on the applicant, ill-treated him by punching and kicking him, falsified the administrative case in his respect, and illegally detained him. The Town Court found A. guilty of exceeding his powers, forgery of documents and unlawful arrest, and sentenced him to three years' imprisonment with a prohibition on occupying posts in law enforcement bodies for the same period. It also allowed the applicant's civil claim for damages in part.

36. On 15 September 2009 the Ivano-Frankivsk Court of Appeal upheld the decision of 25 March 2009. It further quashed the judgment of 26 March 2009 as unsubstantiated and remitted the whole case for additional investigation. It noted that A.'s guilt had not been properly established either, because of the serious shortcomings of the investigation. It also held that, given the circumstances of the case, the Town Court had been wrong in its decision to examine the charges against A. separately from the charges against M.

37. The investigation against A. and M. is pending.

II. RELEVANT DOMESTIC LAW

A. Constitution of 28 June 1996

38. The relevant provisions of the Constitution read as follows:

Article 28

"Everyone has the right to respect for his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. ..."

Article 29

"... In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately if he or she has not been provided, within seventy-two hours of the moment of detention, with a reasoned court decision in respect of the holding in custody. ..."

B. Criminal Code of Ukraine of 5 April 2001 (in the wording relevant at the material time)

39. Chapter II of the Code deals with crimes against the life and health of an individual. Article 127 of the Code which is included in that chapter provides as follows:

"1. Torture, that is intentional causing of strong physical pain or physical or moral suffering by way of beating, tormenting or committing other violent acts with the purpose of compelling the victim or any other person to commit an act against his or her will

shall be punished by imprisonment for a period of from three to five years.

2. The same acts, if committed repeatedly or premeditatedly by a group of persons

shall be punished by imprisonment for a period of from five to ten years."

40. Chapter XVII of the Code deals with crimes committed by public servants and other persons performing official functions. These offences include abuse of powers (Article 364); excess of powers (Article 365); forgery of documents (Article 366). The qualified *corpi delicti* are envisaged in the event of grave consequences and other circumstances. In particular, if the abuse of powers is committed by a law-enforcement officer, punishment for such a crime shall be imprisonment for a period of from five to twelve years with the prohibition to occupy certain posts (or to carry out certain activities) for a period of up to three years and with the

confiscation of property (Article 364 § 3). Chapter XVIII of the Code deals with the crimes against the justice and provides, *inter alia*, the crime of deliberately unlawful arrest (Article 371).

C. Code of Criminal Procedure of 28 December 1960 (as worded at the material time)

41. Article 4 of the Code provides that the court, the prosecutor or the investigator must, to the extent that it is within their power to do so, institute criminal proceedings in every case where signs of a crime have been discovered, take all necessary measures provided by law to establish whether a crime has been committed and the identity of the perpetrators and punish them.

42. Article 99 of the Code provides that if there are no grounds to institute criminal proceedings, the prosecutor, the investigator, the body of inquiry, or the court shall take a decision refusing to institute criminal proceedings and give relevant notices to the interested persons, companies, institutions and organisations.

43. The relevant parts of Article 106 of the Code read as follows:

> "The body of inquiry shall be entitled to arrest a person suspected of a criminal offence for which a penalty in the form of deprivation of liberty may be imposed only on one of the following grounds:
>
> 1. if the person is discovered whilst or immediately after committing an offence;
>
> 2. if eyewitnesses, including victims, directly identify this person as the one who committed the offence;
>
> 3. if clear traces of the offence are found either on the body of the suspect, or on his clothing, or with him, or in his home.
>
> If there is other information giving grounds to suspect a person of a criminal offence, a body of inquiry may arrest such a person if the latter attempts to flee, or does not have a permanent place of residence, or the identity of that person has not been established.
>
> For each case of detention of a criminal suspect, the body of inquiry shall be required to draw up a minutes outlining the grounds, the motives, the day, time, year and month, the place of detention, the explanations of the person detained and the time when it was recorded that the suspect had been informed of his right to have a meeting with defence counsel as from the moment of his arrest, in accordance with the procedure provided for in paragraph 2 of Article 21 of the present Code. The minutes of detention shall be signed by the person who drew it up and by the detainee.
>
> A copy of the minutes with a list of his rights and obligations shall immediately be handed to the detainee and sent to the prosecutor. At the request of the prosecutor, the material which served as a ground for detention shall be sent to him as well. ...
>
> Within seventy-two hours of the arrest the body of inquiry shall:
>
> (1) release the detainee if the suspicion that he committed the crime has not been confirmed, if the term of detention established by law has expired or if the arrest has

been effected in violation of the requirements of paragraphs 1 and 2 of the present Article;

(2) release the detainee and select a non-custodial preventive measure;

(3) bring the detainee before a judge with a request to impose a custodial preventive measure on him or her. ...

Detention of a criminal suspect shall not last for more than seventy-two hours.

If, within the terms established by law, the ruling of the judge on the application of a custodial preventive measure or on the release of the detainee has not arrived at the pre-trial detention facility, the head of the pre-trial detention facility shall release the person concerned, drawing up the minutes to that effect, and shall inform the official or body that carried out the arrest accordingly."

44. Article 217 of the Code provides, *inter alia*, that after the completion of the investigation in the case, which has to be referred to the court for trial, the investigator gives relevant notices to the victim and his representative, civil plaintiff, civil defendant, or their representatives, and explains to them their right to familiarise themselves with the materials of the case file.

D. Administrative Offences Code of 7 December 1984

45. Article 44 of the Code prohibits the fabrication, purchase, storage, transport, or dispatch of drugs or psychotropic substances in small quantities without the purpose of their trafficking.

46. Article 263 of the Code provides, *inter alia*, that anyone who violates the rules on circulation of drugs may be arrested and detained for up to three hours in order for a report on the administrative offence to be drawn up. However, in order to identify the perpetrator of the offence, subject him to a medical examination, clarify the circumstances of purchase of the drugs or psychotropic substances and examine them, the detention may be extended by up to three days. In such cases the prosecutor shall be informed of the extension in writing within twenty-four hours. If the arrested person does not have identity documents the detention may be extended by up to ten days subject to the prosecutor's approval.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

47. The applicant complained that he had been tortured by police officers and that there had been no effective investigation of his complaints. 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

48. The Government maintained that the application had been inadmissible for non-exhaustion reasons, contending that the relevant criminal proceedings had been pending at the national level.

49. The applicant argued that the domestic criminal proceedings had proved ineffective and that he had been dispensed from the obligation to pursue that remedy.

50. The Court notes that the Government's objection is closely linked to the applicant's complaint under Article 3 of the Convention. In these circumstances, it joins the objection to the merits of the applicant's complaint.

51. The Court further notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

52. The applicant, referring to his account of facts, maintained that he had been ill-treated by police officers and that such ill-treatment amounted to torture. As to the procedural limb of Article 3 of the Convention, he insisted that the investigation of his ill-treatment had not been effective. In particular, he emphasised that the criminal proceedings had been instituted only on 3 November 2003, that is more than five months after the events complained of. This delay brought to the loss of evidence and seriously reduced the chances of establishing all the relevant facts and charging all the policemen involved. He further pointed out that the bill of indictment, referred to the trial court on 28 December 2007, clearly indicated that the other officers had participated in the applicant's ill-treatment, but those were never charged.

53. The Government maintained that the criminal proceeding had not been completed yet and it was therefore too early to make any conclusions as to the credibility of the applicant's allegations of ill-treatment. They further submitted that domestic authorities complied with procedural obligations under Article 3 of the Convention, contending that the investigation in question was being carried out thoroughly and comprehensively.

2. The Court's assessment

a. Substantive limb of Article 3 of the Convention

54. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Labita v. Italy* [GC], no. 26772/95, §§ 119-120, ECHR 2000-IV).

55. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, 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 such detention. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 34, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

56. In the present case the applicant made detailed submissions as to the methods of ill-treatment employed by police officers against him (see paragraphs 10 and 12 above) and insisted that such treatment had to be qualified as torture.

57. While the fact that the applicant seriously injured himself at the end of his detention could be to some extent an indirect indication of the applicant's account of torture, it will not suffice to make definite inferences in this regard, especially in view of the fact that the applicant was diagnosed with high depressive suicidal disorder at the relevant time (see paragraph 15 above). There is no detailed medical opinion as to the manner in which the injuries displayed by the applicant after the release could have been inflicted. The Court is further hindered from making affirmative conclusions as to the applicant's allegations of tortures given that those statements turned out to be inconsistent at the domestic level (see paragraphs 29 and 30 above). In sum, there is insufficient material to give preference to the applicant's description of ill-treatment as opposed to the other possible

versions, including the one of the trial court suggesting that the applicant had been ill-treated by being punched and kicked (see paragraph 35 above).

58. The Court therefore cannot establish "beyond reasonable doubt" that the methods of ill-treatment described by the applicant had been used against him by police officers (see, by contrast, *Mikheyev v. Russia*, no. 77617/01, §§ 127-136, 26 January 2006, in which the Court established that the applicant had been subjected to torture, having regard to his attempted suicide and the evidence in the file).

59. Rejecting the applicant's allegations of torture, the Court still finds that there is sufficient evidence to conclude that the applicant sustained numerous injuries (see, in particular, paragraph 14 above) which were serious enough to amount to ill-treatment falling within the scope of Article 3 of the Convention. It remains to be established whether the State authorities should be held responsible under that Article of the Convention for having inflicted those injuries.

60. The Court notes that on 26 May 2003 the medical officers concluded that the injuries revealed on the applicant could have been sustained by him about five days before the examination, that is on 21 May 2003. That date falls squarely within the period when the applicant was under the control of police officers.

61. The Court further finds no possible indication in the case file that the injuries could have been inflicted on the applicant before his arrest or after his release. Moreover, to date the investigatory authorities have not offered any version suggesting that the police officers were not implicated in ill-treating the applicant. The Government in their observations refrained from any comments in this regard and did not expressly object to the applicant's statement that the injuries had been inflicted on him during detention.

62. In these circumstances the Court establishes that the injuries in question had been sustained by the applicant while under the control of the domestic authorities and considers that the State, having failed to provide any justifying explanation, should be held responsible for them.

63. There has been therefore a violation of a substantive limb of Article 3 of the Convention.

b. Procedural limb of Article 3 of the Convention

64. The Court reiterates that where an individual raises an arguable claim that he has been 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. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure

the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. 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, and a requirement of promptness and reasonable expedition is implicit in this context (see, among many authorities, *Mikheyev*, cited above, § 107 et seq., and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, §§ 102 et seq.).

65. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time (see *Labita*, cited above, §§ 133 et seq.). Consideration has been given to the opening of investigations, delays in taking statements (see *Timurtaş v. Turkey*, no. 23531/94, § 89, ECHR 2000-VI, and *Tekin v. Turkey*, 9 June 1998, § 67, *Reports* 1998-IV) and to the length of time taken for the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001).

66. For an investigation to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence (see *Kolevi v. Bulgaria*, no. 1108/02, § 193, 5 November 2009).

67. The Court recalls that the notion of an effective remedy in respect of allegation of ill-treatment entails also effective access for the complainant to the investigation procedure (see *Assenov and Others*, cited above, § 117). There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts (see *Kolevi*, cited above, § 194).

68. Turning to the present case, the Court has serious doubts that the initial inquiries of the applicant's allegations had been thorough. In this regard it refers to the decision of 21 July 2003, by which the authorities refused to institute criminal proceedings without, however, making any attempt to explain the origin of the injuries revealed on the applicant following his release from the police station.

69. The Court further agrees with the applicant that the effectiveness of the whole investigation was seriously undermined because of the initial five-month delay in the institution of criminal proceedings. Indeed, the most precious time for collecting the evidence had been wasted and this protraction significantly diminished the prospect of success of any further proceedings.

70. The Court next observes that on two occasions the applicant requested the General Prosecutor's Office to reassign the case to the other

investigative authority, contending that the Regional Prosecutor's Office could not impartially investigate the case against local police officers. However, those requests had been considered by the Regional Prosecutor's Office itself. It follows that the applicant had not been offered independent scrutiny of those requests which, given the circumstances of the case, did not appear manifestly unreasonable.

71. The Court further cannot overlook the difficulties the applicant experienced in gaining access to the procedural documents at the pre-trial stages of the proceedings. It observes that the Code of Criminal Procedure provides for victims' right of access to the case file after the completion of the investigation (see paragraph 44 above) but does not duly address the issue of such access by the victim or other interested person at the earlier stages.

72. The restrictions on the access to the case file at the stages of instituting criminal proceedings, inquiry and investigation may be admittedly justified by, among other things, the necessity to preserve the secrecy of the data possessed by the authorities and to protect the rights of the other persons. However, a fair balance should be struck between the above-mentioned interests, on the one hand, and the claimant's right of effective participation in the proceedings on the other.

73. In view of the fact that domestic law does not envisage a special procedure of granting access to the case file at the above-mentioned pre-trial stages and does not specify, in particular, the grounds for refusing and granting the access, the extent to which a claimant may be given access, the time-limits for consideration of the relevant requests and providing the access, the Court considers that the applicant's opportunities for effective participation in the proceedings had obviously been impaired during the period in question.

74. In this context the Court also notes that the applicant's requests for a copy of the decision of 25 September 2004 refusing to institute criminal proceedings against police officers Zh., K., and H. were rejected. There is nothing to show that the refusal of those requests was justified by any legitimate aim. It holds therefore that such a restriction of the applicant's right of access to the case file, which was made possible due to the lack of relevant safeguards in the domestic legal framework, had been disproportionate and had not met the requirement of effective access to the proceedings for the purpose of Article 3 of the Convention.

75. Lastly, the Court observes that on two occasions the domestic courts remitted the case against A. and M. to the Regional Prosecutor's Office, finding that the investigation had been conducted with serious shortcomings. The domestic courts ordered a number of elementary investigatory actions including those with respect to the other police officers whose participation in the alleged crimes had not been properly scrutinised. The Court considers that the repetition of such remittals, ordered after a

considerable lapse of time (for example, the first remittal was ordered more than four years after the events complained of), discloses a serious deficiency of the domestic criminal proceedings which are pending till now.

76. In view of the above the Court concludes that criminal proceedings conducted by the domestic authorities in respect of the applicant's allegations of ill-treatment did not prove to be effective. It therefore dismisses the Government's objection as to the non-exhaustion of domestic remedies and holds that there has been a violation of procedural limb of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 (c) and 3 OF THE CONVENTION

77. The applicant complained that his detention had been unlawful and that he had not been brought promptly before a judge after the arrest. The applicant relied on Article 5 §§ 1 (c) and 3 of the Convention which provides 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...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

78. The Government maintained that these complaints had been inadmissible for non-exhaustion reasons, stating that the criminal proceedings, where the relevant facts would be established, had been pending.

79. The applicant argued that the remedy invoked by the Government had not been effective.

80. The Court, having regard to its conclusion that this remedy was not effective in respect of the complaints under Article 3 of the Convention (see paragraph 76 above), rejects the Government's objection under this head also.

81. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

82. The applicant insisted that he had been detained in breach of domestic law. He argued that irrespective of the different formalisations of some intervals of his detention by the domestic authorities, the whole period of his detention had to be regarded as effected for the purpose of bringing him to criminal liability for the burglaries. The applicant further asserted that his detention, which lasted for more than six days, had not been subject to any judicial authorisation in violation of domestic law and the invoked provisions of the Convention. Even accepting the approach of the domestic authorities, there had been in any event gross procedural violations concerning his arrest and detention both under the Administrative Offences Code and the Code of Criminal Procedure.

83. The Government did not make any submissions as to the merits of the complaints, maintaining that the relevant facts had not been established by the domestic authorities.

2. The Court's assessment

a. Article 5 § 1 (c) of the Convention

84. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and lay down an obligation to conform to the substantive and procedural rules thereof. While it is for the national authorities, notably the courts, to interpret and apply domestic law, the Court may review whether national law has been observed for the purposes of this Convention provision. However, the "lawfulness" of detention under domestic law is the primary, but not always the decisive element. The Court must, in addition, be satisfied that the detention, during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner (see *Yeloyev v. Ukraine*, no. 17283/02, §§ 41-42, 6 November 2008).

85. As to the present case, the Court notes that on 17 May 2003 the authorities decided to arrest the applicant because they had received certain information indicating that he might have committed burglaries in the neighbourhood. During his arrest the authorities seized evidence attributable to the alleged burglaries. It follows that the applicant's arrest was effected with the aim of bringing him before the competent legal authority on suspicion of having committed burglaries.

86. Meanwhile, following the arrest the authorities formalised the first three days of the applicant's detention under the Administrative Offences Code. It was only the subsequent period of detention which was

documented under the Code of Criminal Procedure. However, it appears that during the whole period of detention the authorities had been collecting evidence in respect of the burglaries and had questioned the applicant in this connection. Therefore, the Court concludes that the applicant's administrative detention was in reality also a part of the longer uninterrupted period of the applicant's detention as a criminal suspect in respect of burglaries.

87. The Court next notes that the applicant's detention as a criminal suspect, which started on 17 May 2003 and ended on 24 May 2003, lasted more than six days but no judicial authorisation had been obtained within seventy-two hours, which was contrary to domestic law. It further concludes that in the circumstances of this case the administrative detention turned out to be the means of extending the applicant's deprivation of liberty without judicial authorisation.

88. That being so, the Court considers that the authorities acted in bad faith and deceitfully in respect of the applicant and did not make an attempt to apply domestic legislation properly so that the applicant's procedural rights connected with his status as a criminal suspect were duly ensured. The above conduct of the domestic authorities runs counter to the principles of legal certainty and protection from arbitrariness enshrined in Article 5 § 1 of the Convention (see, *mutatis mutandis, Doronin v. Ukraine*, no. 16505/02, § 56, 19 February 2009). It follows that there has been a violation of Article 5 § 1 of the Convention.

b. Article 5 § 3 of the Convention

89. The Court reiterates that Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty. It is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not, it is apparent, logically or temporally linked (see, for example, *Stephens v. Malta (no. 2)*, no. 33740/06, § 52, 21 April 2009).

90. The present case raises the issue of availability of initial automatic review of the applicant's arrest and detention. The Court has established under Article 5 § 1 (c) of the Convention that the applicant was detained as a criminal suspect for more than six days without being brought before a judge.

91. Having regard to the relevant case-law (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 62, Series A no. 145-B and *Salov v. Ukraine*, no. 65518/01, §§ 59 and 60, ECHR 2005-VIII (extracts)), the Court considers that the applicant's detention for such a long period without

judicial intervention fell outside the strict time constraints of Article 5 § 3 of the Convention. It concludes therefore that there has been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

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

94. The Government considered that this claim was unsubstantiated.

95. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

96. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

97. 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. *Joins to the merits* the Government's objections as to the exhaustion of domestic remedies and dismisses them after an examination on the merits;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;

4. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

5. *Holds* that there has been a violation of Article 5 § 1 (c) of the Convention;

6. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

7. *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), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias 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;

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

Done in English, and notified in writing on 24 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kalaydjieva is annexed to this judgment.

P.L.
C.W.

CONCURRING OPINION OF JUDGE KALAYDJIEVA

I join the findings of the majority that the circumstances of the present case disclose violations of the applicant rights under Articles 3 and 5 of the Convention. The majority's conclusions concerning the severity of the sustained treatment are based on the evidence before the Court and standard of proof "beyond reasonable doubt", which the applicant failed to meet – he provided no evidence that he was subjected to the alleged acts of torture and succeeded in substantiating only the claim of ill-treatment, which was indicated by remaining traces of injuries. The applicant could not obtain copies of certain investigation documents and the respondent Government did not submit them.

In the present case the respondent Government objected that the applicant's complaints concerning sustained torture and ill-treatment were the subject of proceedings before the national authorities, which have been pending for seven years. They furthermore maintained that a premature finding of the Court in these complaints might infringe the fairness of the future trial against two senior police officers. In the absence of such accusations against any officer possibly involved in the alleged treatment, I would see no such danger.

The question remains, however, whether in the face of the clearly ineffective domestic investigation of the applicant's complaints, which may be seen as amounting to a refusal to investigate, the Court may find itself in a situation, where – based on the absence of evidence resulting from this refusal – it may be prevented from subjecting such grave complaints to any scrutiny or even be required to exonerate alleged acts of torture as a result the national authorities' failure to investigate into them.

It is shocking that – despite the explicit indication of the prosecution authorities that the investigation found that "M. requested the other police officers to handcuff the applicant and to hang him over the crowbar which was placed between two chairs; to place a gas mask over the applicant's head and block the air flow" and that this "torture lasted from 1 a.m. on 21 May to 9.50 a.m. on 22 May 2003'" (see paragraph 32), officer M. was not charged with having those orders himself, nor were any of the officers who, according to the indictment, carried out this order, ever investigated or charged with the crime of torture envisaged by Article 27 of the Criminal Code. The national courts which were confronted with this indictment were not competent to instruct the prosecution authorities to bring charges or to investigate those police officers who had acted under the order to torture, nor could they require the reclassification of this officer's acts as an "excess of authority with no elements of torture present". Seven years after the

events this might no longer be possible. A year after the events – in June 2004 – the applicant stated that he could identify the policemen involved, but the relevant investigatory steps had not been taken (see paragraph 22) and according to the indictment, "the other police officers were not prosecuted as the applicant's mother submitted that, given the lapse of time [until 28 December 2007], the applicant would not be in position to identify any other police officer except for A. and M." (see paragraph 33) The attempted suicide after seven days of detention and interrogation in the police premises was explained with his diagnosis as having a "high depressive suicidal disorder" without further scrutiny whether the applicant suffered such a condition before his arrest or whether it was possibly related to the allegedly sustained treatment. In these circumstances I remain unconvinced that the domestic investigation was intended to "lead to the identification and punishment of those responsible" (see § 102, *Assenov and Others*, judgment of 28 October 1998, Reports 1998-VIII, with further reference to *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, p. 49, § 161, the *Kaya v. Turkey* judgment of 19 February 1998, Reports 1998-I, p. 324, § 86, and the *Yaşa v. Turkey* judgment of 2 September 1998, Reports 1998-VI, p. 2438, § 98).

The absence of any plausible explanation for the reasons of failure to collect key evidence at the time when this was possible should, in my view, be treated with particular vigilance. In fact the period of seven years of demonstrated, if not deliberate systematic refusals and failures to undertake timely and adequate investigation and to follow the instructions of the national courts by taking further necessary steps to investigate arguable allegations of torture seems to make it possible for at least some of the agents of the State to benefit from virtual impunity as a result of the lapse of time.

In such circumstances a victim of alleged torture will be further humiliated by the fact that the open denial of an investigation successfully prevented the Court's scrutiny and limited its role to witnessing acts, which appear to be better qualified as "collusion in or tolerance of unlawful acts".