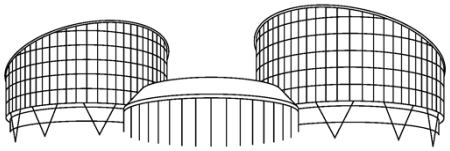

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF RUDYAK v. UKRAINE

(Application no. 40514/06)

JUDGMENT

STRASBOURG

4 September 2014

FINAL

04/12/2014

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

In the case of Rudyak v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Ann Power-Forde,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom, *judges,*
Myroslava Antonovych, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar*,
Having deliberated in private on 24 June 2014,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 40514/06) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Igor Mikhaylovich Rudyak ("the applicant"), on 26 September 2006.

2. The applicant, who had been granted legal aid, was represented by Mr Ye. Gryn, a lawyer practising in the town of Gadyach, Ukraine. The Ukrainian Government ("the Government") were represented by their Agent, most recently, Ms Nataly Sevostianova, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that he had been ill-treated by the police in 2005, that the subsequent investigation into these events had been ineffective and that he had not been provided with adequate medical assistance while in pre-trial detention.

4. On 18 March 2011 the application was communicated to the Government. Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Ms Myroslava Antonovych to sit as an ad hoc judge (Rule 29 § 1(b)).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Gadyach.

A. Events of 2004

6. On 25 February 2004 the applicant was arrested in Gadyach by the Kharkiv Chervonozavodskiy District Police Drug Squad (*Відділ по боротьбі із незаконним обігом наркотиків Червонозаводського районного відділу Харківського міського управління Міністерства внутрішніх справ України* – "the Drug Squad") and taken to Kharkiv. The applicant stated that he had been ill-treated by the police and that upon his arrest a police officer had hit him in the left eye.

7. On 19 July 2004 the Gadyachskiy District Court convicted the applicant of unlawful possession of weapons and drug trafficking and sentenced him to five years' imprisonment, suspended for three years. On the same date the applicant was released.

8. On 27 November 2004 the applicant was diagnosed with a cataract and a subatrophy of the left eyeball. The only recommendation after the diagnosis was to avoid hypothermia. According to the applicant, he planned to have eye surgery. No medical evidence was submitted in this respect.

B. The applicant's arrest in 2005 and subsequent events

9. On 19 April 2005 the applicant was again arrested in Gadyach after selling drugs to D. and taken to Kharkiv by the Drug Squad. The applicant stated that he "had been beaten by the police after his arrest for three days simply because he had wanted to have a lawyer". He further stated that "pending investigation" a gas mask had been put on his face with lit cigarettes inserted into the air valve.

10. On 20 April 2005 Kharkiv Hospital no. 11 issued a certificate stating that the applicant had head and left shoulder injuries, a haematoma on the left ear and had possibly suffered a closed craniocerebral injury. However, the certificate stated that the applicant could be detained, so long as he was under the supervision of a neurosurgeon.

11. On 22 April 2005 criminal proceedings on drug trafficking charges were instituted against the applicant and it was decided to arrest him.

12. On 29 April 2005 the Kharkiv Chervonozavodskiy District Court ("the Chervonozavodskiy Court") remanded the applicant in custody.

13. On 5 May 2005 Kharkiv Hospital no. 11 issued a certificate stating that the applicant was suffering from the after-effects of a head injury but

that he could be detained. He was also examined by an ophthalmologist and diagnosed with an old optic subatrophy in the left eye.

14. On 6 May 2005 the applicant was placed in Kharkiv Pre-Trial Detention Centre no. 27 ("the SIZO"). It was noted in his medical file that on 25 February 2004 he had suffered an eye injury and that on 19 April 2005 he had been suffering from a head injury. He was diagnosed with a cataract and with a subatrophy of the left eye.

15. On 3 June 2005 the Kharkiv Regional Prosecutor's Office ordered the Head of the Kharkiv Regional Office of the Ministry of Internal Affairs of Ukraine (*начальник Управління Міністерства внутрішніх справ України в Харківській області* – "the regional head") to look into the applicant's complaints of ill-treatment.

16. On 21 July 2005 the regional head informed the applicant that the police officers involved had not broken any laws.

17. On 5 October 2005 the applicant asked the Chervonozavodskiy Court to obtain medical evidence from his SIZO medical file which would confirm the infliction of injuries on him.

18. On 25 October 2005 the applicant complained to the regional head that:

> "... on 19 April 2005 police officers, M., S., Sh., K. and G., accompanied by two witnesses, arrived in Gadyach. Again on 20 April 2005 the same diagnosis [was established]: closed craniocerebral injury, facial fractures, nasal fracture, haematomas on the body, arms, legs and left ear, scratches."

19. On 19 April 2006 the Chervonozavodskiy Court, examining the applicant's case on the merits, ordered the Chervonozavodskiy District Prosecutor's Office (*Прокуратура Червонозаводського району м Харкова*) to look into the applicant's complaints of ill-treatment. The court noted that, according to the applicant, he had been beaten in Kharkiv by police officers M., S., Sh. and G., and that he had later been examined in Hospitals nos. 4 and 11.

20. On 27 June 2006 the Chervonozavodskiy District Prosecutor's Office refused to institute criminal proceedings against the police officers. It was noted that the decision to arrest the applicant had been adopted on 22 April 2005 and that the applicant had been questioned on this date. He had refused to have a lawyer present. The applicant had never complained of any ill-treatment. The police officers had stated that they had never ill-treated the applicant. On the same date the Prosecutor's Office informed the Chervonozavodskiy Court of the decision taken.

21. On 11 August 2006 the Chervonozavodskiy Court examined the applicant's case. The applicant pleaded guilty to some of the charges and stated that he was a drug addict, that the confiscated drugs had been for his personal use only and that he had confessed to drug trafficking after being subject to physical pressure by the police. The court convicted the applicant

of unlawful possession of weapons and drug trafficking and sentenced him to six and a half years' imprisonment.

22. The applicant appealed against this decision. On 7 August 2007 he amended his appeal stating, *inter alia*, that on 12 May 2005 he had asked for the severity of his injuries to be recorded and that he had not been able to appeal against the decision of 27 June 2006 as he had not received a copy of it.

23. On 10 January 2008 the Kharkiv Regional Court of Appeal quashed the decision of 11 August 2006 and remitted the case for fresh consideration.

24. On 20 November 2008 the Chervonozavodskiy Court again convicted the applicant of unlawful possession of weapons and drug trafficking and sentenced him to five years and six months' imprisonment. The applicant pleaded guilty. He did not appeal against the decision.

25. On 23 May 2009 the applicant was transferred to Poltava Correctional Colony no. 64. On 25 May 2010 he was released.

26. Between 17 and 28 January 2011 he was admitted to a hospital. He was diagnosed with hypertension, chronic cholecystitis, a cyst of left kidney and optic supatrophy in the left eye.

C. Medical assistance in detention

27. According to the Government, while in detention, the applicant was examined by an ophthalmologist on numerous occasions, namely on 17 and 22 August 2005 (on the latter date it was noted that the applicant's state has improved), 23 September 2005, 23 November 2005, 16 and 19 October 2006 (it was noted that the applicant needed no maintenance treatment for his optic subatrophy), 16 July 2009 and 14 March 2010. On no occasion had any deterioration of the applicant's state of health been established. When the applicant had complained of pain in his left eye, in particular, on 17 August 2005, 23 September 2005 and 23 November 2005, he had been prescribed treatment.

28. The applicant submitted that he had been taken to Kharkiv Ophthalmology Clinic but did not provide any further information in this respect.

29. On 16 July 2009 the applicant refused to be hospitalised in the ophthalmology department of the prison hospital at Correctional Colony no. 81.

30. According to the Government, the applicant had had the following consultations with other specialists:

(i) with a surgeon on 18 May 2006 (complaints about pain in the right leg, the applicant was prescribed medication) and 4 September 2007;

(ii) with a neuropathologist on 5 May 2005 and 13 June 2009;

(iii) with a psychiatrist on 18 May 2005 and 4 September 2007; and

(iv) with a general physician on 30 June 2005 (the applicant complained about a pain in the left eye and general weakness and was advised to see an ophthalmologist), 13 July 2005 (the applicant complained about pain in his back and was prescribed painkillers), 16 September 2005 (the applicant was issued a referral to a civil hospital in order to decide whether he is able to work and whether he falls into any disability group), 16 August 2006, 13 September 2006 and 4 September 2007.

31. On 18 December 2005, 6 June 2006, 13 September 2006, 12 October 2006, 9 January 2007, 27 October 2008, 12 January 2009 and 13 June 2009 the applicant underwent periodic medical screening.

32. On 10 May 2006 the applicant received treatment for a shoulder injury.

33. On 27 February 2010 the applicant complained of hypertension. He was offered an examination and, if necessary, treatment in the prison hospital, which he refused.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

34. The applicant complained that he had been ill-treated by the police in 2005 and that all of his complaints in this respect had been ignored. The applicant further stated that his state of health had deteriorated in detention after his arrest in 2005. The applicant relied upon 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

1. Ill-treatment by the police and subsequent investigation

35. The Government submitted that the applicant had failed to exhaust effective domestic remedies in respect of his complaint of ill-treatment by the police officers in April 2005, as he had not appealed against the decision of 27 June 2006 before a prosecutor or a court. The Government contended that such appeal was an effective remedy (see *Yakovenko v. Ukraine*, no. 15825/06, § 72, 25 October 2007; *Lysaya v. Ukraine* (dec.), no. 11408/02, 1 February 2011; and *Gabibullayev v. Ukraine* (dec.), no. 29725/05, 11 February 2011). The Government noted that the applicant had been aware of the decision, as he had mentioned it in his appeal of 7 August 2007. Moreover, the applicant had been aware that on

19 April 2006 the court had ordered that his complaints be investigated, so he should have enquired about the progress of the proceedings in his case (see *Gabibullayev*, cited above).

36. The Government maintained that the applicant's situation differed from other Ukrainian cases where the decisions not to institute criminal proceedings had been repeatedly quashed, with the result that after a certain lapse of time such appeals had became devoid of any prospect of success (see *Kobets v. Ukraine*, 16437/04, § 54, 14 February 2008). In the present case the applicant had never challenged the decision not to institute criminal proceedings. Therefore, in the present case there were no reasons to consider an appeal to a court against such a decision as an ineffective remedy.

37. The applicant submitted that on 12 May 2005 he had asked the investigating officer to record the severity of his injuries. However, this request had been ignored. He had also complained to various prosecutors of the unlawful actions of the police officers but to no avail.

38. The applicant further submitted that he had only learned about the decision of 27 June 2006 when he had been studying the case-file materials after his sentencing on 11 August 2006.

39. The Court notes that the Government's objection is closely linked to the applicant's complaint under the procedural limb of Article 3 of the Convention. In these circumstances, it joins the objection to the merits of the applicant's complaint (see *Lotarev v. Ukraine*, no. 29447/04, § 74, 8 April 2010).

40. The Court further notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Medical assistance in detention

41. The Government submitted that the applicant had not complained at the national level of a lack of adequate medical assistance in detention: neither to a prosecutor, nor to a court. He had also not raised this issue before the detention facility's administration (see *Vinokurov v. Russia and Ukraine* (dec.), no. 2937/04, 16 October 2007).

42. Moreover, the Government considered that the applicant's complaints in this respect were unsubstantiated. The Government noted that the applicant had been diagnosed with optic subatrophy in the left eye in November 2004. The applicant submitted that he had planned to have eye surgery. However, the Government submitted that there was no evidence that the applicant had ever been recommended for or prescribed such surgery. In detention, the applicant's state of health had been periodically supervised by an ophthalmologist. On no occasion had any deterioration of

the applicant's condition been established. The applicant had also been prescribed treatment.

43. In reply the applicant submitted that he had not been provided with adequate medical assistance after his arrest. The eye drops prescribed to him had not always helped, he had had a dental health problem which had not been properly treated and he had eventually been diagnosed with hypertension. The applicant further stated that his state of health had deteriorated while in detention, he had suffered constant headaches, his left eye had become inflamed, which he submitted could result in him losing sight in his right eye. However, he had not been admitted to a hospital. Although the applicant acknowledged that, while in detention, he had been taken to a civilian hospital for examinations, he stated that this had only occurred after he had gone on hunger strike. He had also refused to be admitted to the other detention facility's hospital because it had been situated far from his place of detention.

44. The Court notes at the outset that, on a number of occasions, it has already dismissed objections similar to those made by the Government in the present case in respect of an applicant's failure to complain of inadequate medical treatment in detention to a prosecutor or a court (see, among other authorities, *Petukhov v. Ukraine*, no. 43374/02, §§ 76-78, 21 October 2010). The Court sees no reason to depart from those findings in the present case.

45. Moreover, upon the applicant's arrival at the SIZO, he underwent a medical examination and it was noted that he was suffering from optic subatrophy in the left eye. Therefore, the State authorities were aware of the applicant's health problem.

46. The Court further notes that the applicant was diagnosed with optic subatrophy in the left eye in November 2004. He did not submit any medical records for the period between November 2004 and April 2005 indicating what treatment he had received during this period and what recommendations had been given for his eye problem apart from the one given in November 2004 to avoid hypothermia.

47. The Court observes that the applicant did not advance any medical evidence in support of his statement that his state of health had deteriorated while in detention and, if so, that it happened because of a lack of adequate medical assistance. Neither has he provided evidence that his condition necessitated any particular treatment which had not been given to him. The applicant's references to other various health problems are not substantiated by any medical documents.

48. In such circumstances, the Court rejects the applicant's complaint of a lack of adequate medical assistance in detention as manifestly ill-founded under Article 35 §§ 3 (a) and 4 of the Convention.

B. Merits

1. Alleged ill-treatment by the police

49. The applicant reiterated his previous submissions that he had been ill-treated by the police in April 2005.

50. The Government submitted that the applicant's complaints had been investigated and it had been concluded that the applicant had not been ill-treated. The Government noted that the applicant's complaints at the national level had been too general and had been submitted too late (for example, his complaint of 25 October 2005 in which he had complained of his ill-treatment for the first time). They also stated that the medical evidence submitted by the applicant was irrelevant, as it did not contain information about the time and manner in which the injuries had been inflicted on the applicant. Therefore, the Government concluded that there had not been a breach of the applicant's rights guaranteed by Article 3 of the Convention.

51. The Court has stated on many occasions that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see, among other authorities, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV).

52. To fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this level 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 gender, age and state of health of the victim (see *Valašinas v. Lithuania*, no. 44558/98, §§ 100-01, ECHR 2001-VIII). The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000−XI).

53. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny, even if certain domestic proceedings and investigations have already taken place (see, *mutatis mutandis*, *Ribitsch v. Austria*,

4 December 1995, § 32, Series A no. 336, and *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001−VII (extracts)).

54. The Court reiterates its jurisprudence confirming that the standard of proof applied in its assessment of evidence is that of "beyond reasonable doubt" (see *Avşar*, cited above, § 282). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

55. In the present case, the applicant submitted medical evidence recording that, one day after his arrest on 19 April 2005, he had suffered various head and body injuries (see paragraphs 10, 13 and 14 above). The Court notes that such injuries are sufficiently serious to amount to ill-treatment within the meaning of Article 3. It remains to be considered whether the State authorities should be held responsible under Article 3 for the infliction of those injuries.

56. The Court reiterates that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of the cause of the injury, failing which a clear issue arises under Article 3 of the Convention (see *Tomasi v. France*, 27 August 1992, §§ 108-111, Series A no. 241−A, and *Ribitsch*, cited above, § 34).

57. In the present case, there is no evidence as to the applicant's condition at the time of his arrest. There is also no alternative explanation of the origin of the applicant's injuries.

58. The Court further notes that no medical examination of the applicant was performed upon his arrival at the police station. The Court reiterates in this respect that a medical examination, together with the right of access to a lawyer and the right to inform a third party of one's detention, constitute fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, and so forth) (see the 2nd General Report of the European Committee for the Prevention of Torture, CPT/Inf/E (2002) 1 - Rev. 2006, § 36, and *Korobov v. Ukraine,* no. 39598/03, § 70, 21 July 2011). This would not only ensure the applicant's rights are respected but would also enable the respondent Government to discharge their burden of providing a plausible explanation for those injuries. The absence of such a medical examination in the present case was even more disturbing, given that the applicant was arrested when no criminal proceedings were apparently pending against him and that he allegedly refused to have a lawyer present, while the applicant submitted that he had been beaten because he had requested the presence of a lawyer.

59. Given the seriousness of the applicant's injuries and the absence of any other explanations as to their origin, the Court concludes that the applicant was subjected to inhuman treatment by State agents. There has

accordingly been a violation of the substantive limb of Article 3 of the Convention.

2. Adequacy of the investigation

60. The applicant reiterated that his complaints of ill-treatment had remained unanswered. He had not appealed against the decision of 27 June 2006 because he had not received a copy of it.

61. The Government reiterated their observations that the applicant had failed to exhaust effective domestic remedies (see paragraphs 35-36 above).

62. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by 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. As with an investigation subject to Article 2 of the Convention, such an investigation should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII, and *Labita*, cited above).

63. In the present case the applicant raised his complaints of ill-treatment by police officers a month and a half after the events in question (see paragraph 15 above). In particular, on several occasions he submitted that on 12 May 2005 he had asked the investigation officer to record the severity of the injuries inflicted on him. The applicant further complained of ill-treatment in October 2005. These complaints do not appear to be unfounded; however, there is no evidence that they were properly answered.

64. The Court further notes that after the national court ordered an investigation into the applicant's complaints on 19 April 2006, the investigation authorities erroneously indicated that the applicant had never complained of ill-treatment before. The investigation was limited to questioning of the police officers involved, who denied that they had subjected the applicant to any ill-treatment.

65. Thus, the Court considers that the applicant had an arguable claim which he had brought before the national authorities. The national court had an opportunity to examine the applicant's complaints in this respect and ordered an investigation, which, however, appeared to be superficial.

66. The Court further notes that the applicant was not informed of the decision of 27 June 2006 and learned about it no earlier than towards the end of 2006 or in the first half of 2007.

67. The Court considers, being mindful of its subsidiary role, that the applicant's complaints of ill-treatment ought to have been examined by a domestic court on at least one occasion. In the present case the domestic court had the applicant's complaints before it, found them to be arguable and ordered an investigation, which turned out to be futile. The Court considers that in such circumstances the applicant was not required to bring

his complaint, nearly two years after the events in question, before the national court again.

68. All of the above factors are sufficient to enable the Court to conclude that the State failed to conduct an effective investigation following the applicant's complaints of ill-treatment. There has accordingly been a violation of the procedural limb of Article 3 of the Convention in the present case. At the same time, the Court notes that an applicant cannot be reproached for not pursuing a domestic investigation, which is found to be ineffective (see *mutatis mutandis Lotarev v. Ukraine* cited above § 93). The Court therefore dismisses the Government's objection of non-exhaustion of domestic remedies (see paragraphs 35-36 above).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

69. The applicant also complained that he had been ill-treated in 2004. He also complained of unlawful arrest and an unfair trial. He cited Articles 3, 5, 6, 8 and 13 of the Convention.

70. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

71. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. 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

73. In his initial application form the applicant claimed 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage. In his further observations the applicant reiterated his claims without any particular specification.

74. The Government reiterated that there had been no violations of the applicant's rights and that there was no causal link between the alleged violations and the damages claimed.

75. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, deciding on an equitable basis, it awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

76. The applicant did not claim any costs and expenses. The Court, therefore, makes no award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Joins*, unanimously, to the merits the Government's objection as to the admissibility of the applicant's complaint of ill-treatment by the police on the grounds of non-exhaustion of domestic remedies and dismisses this objection after an examination on the merits;

2. *Declares,*
   (a) unanimously, the complaints under Article 3 of the Convention concerning the applicant's ill-treatment by the police in April 2005 and the subsequent investigation admissible;
   (b) by five votes to two, the complaint under Article 3 of the Convention concerning alleged lack of adequate medical assistance to the applicant in detention inadmissible;
   (c) unanimously, the remainder of the application inadmissible;

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

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

5. *Holds,* unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros),

to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(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*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Power-Forde and Antonovych is annexed to this judgment.

M.V.
C.W.

JOINT DISSENTING OPINION OF JUDGES POWER-FORDE AND ANTONOVYCH

We follow the Chamber's reasoning on a violation of Article 3 of the Convention both under its substantive and its procedural limbs. However, we cannot agree that the applicant's complaint concerning the lack of adequate medical assistance in detention is manifestly ill-founded (§§ 45-48). We consider that his complaint in this regard is well founded and admissible.

It is clear from the facts of the case that the State authorities were aware of the applicant's suffering from optic sub-atrophy in the left eye. Subatrophy is the most frequent reason for eye enucleation after trauma and a series of surgical operations for treatment of post-traumatic eyeball sub-atrophy may be required in order to save an individual's eyesight.[1] The evidence demonstrates that the applicant suffered sub-atrophy as a result of a trauma received during his first arrest on 25 February 2004. However, in our view, the State has not demonstrated that he received adequate medical treatment for this condition which was caused, clearly, by the trauma sustained. We accept that the applicant did not submit specific medical records from November 2004 to April 2005 indicating what treatment he had received during that period when he was not imprisoned. However, he does not claim to have received specific treatment at that time but rather that he was scheduled for eye surgery and that as a result of his second arrest he was prevented from proceeding with that planned surgical procedure.

On 20 April 2005, the day after his second arrest, Kharkiv Hospital no. 11 issued a certificate stating that the applicant had sustained head and left shoulder injuries and a haematoma on his left ear (§10). On 5 May 2005 the same hospital diagnosed him with an old optic sub-atrophy in the left eye (§ 13). On 6 May 2005 it was noted in the medical file of the SIZO that on 25 February 2004 (the date of his first arrest) the applicant had suffered an eye injury. He was diagnosed with a cataract and with a sub-atrophy of the left eye (§ 14). Numerous medical certificates testify that on many occasions the applicant requested medical assistance because of pain in his left eye. By way of response, according to the Government, the applicant had been prescribed 'treatment' (§ 42). This, in our view, is entirely insufficient.

The Court's jurisprudence on the right of prisoners to medical treatment whilst in detention is well established. The right to health in prison was developed at the same time as the right to humane conditions of detention. The State is under an obligation not only to provide some form of medical assistance to an ill prisoner, but to provide, the 'requisite medical

[1] http://www.reg-surgery.ru/1_2003/articles_eng/downloads/250503-003.pdf

assistance.'[1] In *Kudla v. Poland* the Court summarised the obligations incumbent upon the State:-

> 'Article 3 compels the State to ensure that a person is detained in conditions that are compatible with respect for his human dignity, that is the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding an unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well being are adequately secured, by among other things, providing him with the requisite medical assistance.'[2]

Thus, whilst the applicant in the instant case was not entitled to 'state of the art' medical assistance he was entitled to and ought to have received *requisite* medical assistance for the serious eye condition from which he suffered in order to have his health (and particularly his vision) and well being secured. Visits by or consultations with a prison doctor are not, in themselves, sufficient to discharge the State's obligations under Article 3.

In our view, in dismissing the applicant's claim in respect of the inadequacy of the medical care he received, the majority fails to address, sufficiently and convincingly, the question of the adequacy of the medical treatment which the applicant actually received whilst detained. The judgment refers, in very general terms, to the fact that the applicant was prescribed 'treatment' for his condition. However, such a general statement is made without any attempt to identify the actual treatment prescribed thus making it impossible to determine whether such treatment, if administered, was either requisite or adequate. In addition, no inquiries appear to have been made by the authorities as to whether the eye surgery was, in fact, scheduled for the applicant or, indeed, whether it could proceed.

The authorities must ensure that there is a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation rather than merely treating them on a symptomatic basis (see *Hummatov*, §§ 109, 114; *Popov v. Russia*, § 211). Furthermore, they must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (See *Hummatov*, §§ 116; and *Holomiov v. Moldova*).

The above considerations from our point of view are sufficient to conclude that the applicant was not provided with adequate medical assistance while in detention.

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[1] *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 46, ECHR 2003-V; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; *Aerts v. Belgium*, 30 July 1998, § 64, Reports of Judgments and Decisions 1998-V

[2] *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI