



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

FIFTH SECTION

**CASE OF KATS AND OTHERS v. UKRAINE**

*(Application no. 29971/04)*

JUDGMENT

This version was rectified on 6 May 2009  
Under Rule 81 of the Rules of the Court

STRASBOURG

18 December 2008

**FINAL**

*18/03/2009*

*This judgment may be subject to editorial revision.*



**In the case of Kats and Others v. Ukraine,**

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

Rait Maruste, *President*,

Karel Jungwiert,

Volodymyr Butkevych,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 25 November 2008,

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

## PROCEDURE

1. The case originated in an application (no. 29971/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Ukrainian nationals, Mr Oleg Volodymyrovych Kats, Mrs Tetiana Yakivna Kats and Mr Stanislav Ihorovych Biliak <sup>1</sup>(“the applicants”), on 29 July 2004.

2. The applicants, who had been granted legal aid, were represented by Ms Zoya Shevchenko and Mr Arkadiy Bushchenko, lawyers practising in Kyiv and Kharkiv respectively. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Yuriy Zaytsev, of the Ministry of Justice.

3. On 14 March 2006 the Court declared the application partly inadmissible and decided to communicate the complaints concerning Articles 2, 3, 5 § 1 and 13 of the Convention to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. The case was given priority under Rule 41 of the Rules of the Court.

4. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

5. The Government's observations on the admissibility and merits of the application were received on 7 June 2006, 1 November 2006 and 29 March 2007. The applicants' observations in reply and just-satisfaction claims

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<sup>1</sup> The applicants' names were given in the judgment as Tetiana Volodymyrivna Kats and Stanislav Igorevich Biliak. On 6 May 2009, paragraph 1 of the judgment was rectified pursuant to Rule 81.

dated 5 September 2006, 29 January and 22 February 2007 were received on 18 September 2006, 13 February and 5 March 2007 and admitted to the file.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The first and second applicants, Mr Oleg Volodymyrovych Kats and Mrs Tetiana Yakivna Kats, born in 1946, are the father and mother of the late Ms Olga Olegivna Biliak (hereinafter Olga Biliak), who was born in 1971 and died in 2004. The third applicant, Mr Stanislav Ihorovych Biliak, born in 1993, is the son of Olga Biliak. All three applicants live in Kyiv.

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

#### A. Criminal proceedings against Olga Biliak

8. On 18 November 2002 the Solomyanskyy District Police Department of Kyiv (*Солом'янське РУ ГУ МВС України в м. Києві* – “the District Police Department”) instituted criminal proceedings against Olga Biliak and S. for assaulting and robbing a certain A. On 15 January 2003 the cases against Olga Biliak and S. were disjoined. S. was subsequently sentenced to seven years' imprisonment for assault and robbery committed jointly with “another person”.

9. On 16 April 2003 Olga Biliak was charged with robbery.

10. On the next day the Solomyanskyy District Court of Kyiv (*Солом'янський районний суд м. Києва* – “the Solomyanskyy Court”) ordered Olga Biliak's pre-trial detention.

11. On 27 August 2003 the Solomyanskyy Court convicted Olga Biliak of robbery and sentenced her to eight and a half years' imprisonment.

12. On 25 November 2003 the Kyiv City Court of Appeal (*Апеляційний суд м. Києва* – “the Court of Appeal”), following an appeal by Olga Biliak, quashed this judgment, remitted the case for further investigation and decided – without stating any grounds – that she should remain in detention. From that point on, according to the applicants, no investigative action was taken and Olga Biliak was on no occasion visited by the investigator.

13. On 1 February 2004 Olga Biliak died in pre-trial detention.

14. On 23 August 2004 the District Police Department discontinued the proceedings against Olga Biliak, in view of her death.

15. On 30 December 2004 the Solomyanskyy Court quashed the District Police Department's ruling and ordered the rehearing of the case. On 29 March 2005 the Court of Appeal dismissed a prosecution appeal against this decision.

16. On 31 January 2006 the Solomyanskyy Court found Olga Biliak guilty of robbery and discontinued the proceedings against her because of her death.

17. On 7 November 2006 the Court of Appeal upheld Olga Biliak's conviction. On the same date that court issued a separate ruling to the effect that, in breach of Article 165-1 of the Code of Criminal Procedure and section 20 of the Pre-trial Detention Act, the authorities had failed to implement immediately the investigator's decision to release Olga Biliak (see paragraph 45 below). The Court of Appeal decided to bring this violation of the domestic law to the attention of the Kyiv City Prosecutor (*прокурор міста Києва*).

18. On 14 June 2007 the Supreme Court of Ukraine quashed the decisions of 31 January and 7 November 2006, including separate rulings, and remitted the case for fresh consideration to the first-instance court. The proceedings are apparently still pending.

19. The applicants complained on many occasions that the real reason behind Olga Biliak's prosecution was revenge for her refusal to cooperate with officers T. and N. from the Anti-Narcotics Police Department (*Відділ по боротьбі з незаконним обігом наркотиків*), who had allegedly proposed that she sell drugs seized by the police from street dealers.

20. The applicants have requested on numerous occasions that criminal proceedings be instituted against the above-mentioned police officers; however, all their requests have been rejected.

## **B. Olga Biliak's pre-trial detention and medical treatment**

21. On 14 April 2003 Olga Biliak was arrested and brought to the District Police Department, where she was held until 22 April 2003.

22. On 18 April 2003 (according to some documents not until 18 December 2003), she was examined and X-rayed at the Institute of Physiotherapy and Pulmonology (*Інститут фізіатрії і пульмонології*). She was found to be healthy.

23. On 22 April 2003 Olga Biliak was transferred to Kyiv City Pre-Trial Detention Centre no. 13 (*Київський слідчий ізолятор № 13* – “the SIZO”).

24. Upon her arrival at the SIZO, Olga Biliak was examined by prison doctors, whom she informed that she had been using drugs since 1996. No other complaints were made during this examination. According to the Government, she refused to take an HIV test. She was found to be generally healthy and fit for detention in the SIZO.

25. On 7 May 2003 Olga Biliak wrote in her diary that she had pneumonia.

26. On 18 May 2003 a panel of psychiatrists examined Olga Biliak in the SIZO. It established that she was suffering from schizophrenia, but considered that a more detailed assessment was necessary.

27. On 26 May 2003 the Solomyanskyy Court ordered an in-patient psychiatric examination of Olga Biliak. On the same day she was transferred to a psychiatric hospital.

28. On 18 June 2003, following completion of the psychiatric assessment, Olga Biliak was transferred back to the SIZO and again placed in the shared cell, where she remained until her death on 1 February 2004.

29. The psychiatric panel drew up a report on 1 July 2003. They concluded that Olga Biliak was suffering from a mental disorder but at the time of the offence would have been in control of her actions.

30. On 18 July, 11 August and 20 November 2003 Olga Biliak complained to a SIZO physician that her legs were swollen. She was examined and, since no abnormalities were revealed, no treatment was prescribed for her complaints. However, on the last of these dates Olga Biliak was diagnosed with pyelonephritis.

31. In early September 2003 Olga Biliak wrote in her diary that she had again developed pneumonia.

32. On 25 September 2003 her gastric ulcer worsened. She vomited undigested food and then blood. A paramedic (*фельдшер*) prescribed "medical activated charcoal" (*активоване вугілля*).

33. On 26 September 2003 the first applicant lodged a request with the SIZO seeking to have his daughter hospitalised. He attached to that request a letter of 25 September 2003 in which Kyiv City Hospital no. 5 confirmed that Olga Biliak had been HIV-positive since 1999 and had undergone related treatment.

34. On 1 and 21 October 2003 Olga Biliak was examined by a neuropathologist and a psychiatrist, who identified some problems with her mental health.

35. On 3 October 2003 the Governor of the SIZO and the head of its medical unit informed the first applicant that Olga Biliak had been examined by a cardiologist and a neuropsychiatrist and had been diagnosed with vasomotor neurosis (*вегето-судинна дистонія*) (a dysfunction in the nervous system affecting the blood vessels) and a stomach ulcer. According to them, she did not require inpatient treatment in hospital.

36. On 5 October 2003 Olga Biliak was prescribed a diet.

37. On 1 December 2003 Olga Biliak complained to a prison doctor of general weakness and pain in her lungs. She was diagnosed with chronic bronchitis and multi-drug dependence.

38. According to the entries of December 2003 in Olga Biliak's diary, her state of health started to deteriorate seriously. On 4 December 2003 she had shaking chills and a rising temperature. On 9 December 2003 Olga

Biliak wrote that she was losing weight rapidly. On 10 December 2003 she complained of nervous exhaustion, stating that she could hardly eat, being only able to keep down tiny pieces of food. She continued to lose weight very quickly. On 11 December 2003 Olga Biliak recorded that a high temperature had caused her fifth sleepless night. Constant weakness, drowsiness and a high temperature prevented her from going outside for walks. On 12 December 2003 Olga Biliak started to lose herself in time. On 13 December 2003, with her temperature constantly around 40°C, Olga Biliak was given a couple of fever-reducing pills. Her only friend in the cell prepared her tea in the morning, coffee and biscuits during the day and milk with sugar and butter in the evening. On 15 December 2003 Olga Biliak was given another pill and informed that she was to have her lungs X-rayed. Her body temperature that day was 39°C, subsequently receding to 35°C. On 17 December 2003 Olga Biliak was scheduled for an X-ray and given another fever-reducing pill.

39. From mid-December 2003 the applicants and Olga Biliak's lawyer repeatedly requested the authorities to release her on account, *inter alia*, of her rapidly deteriorating state of health. On 13 January 2004 the Deputy Prosecutor of the Solomyansky District of Kyiv (*заступник прокурора Солом'янського району м. Києва*) and, on 19 January 2004, the investigator dealing with her case, rejected those complaints without addressing the health issues.

40. On 6 January 2004 Olga Biliak complained of stomach pain and was diagnosed with chronic gastritis.

41. On 12 January 2004 Olga Biliak again complained to a physician that she had stomach pains and had vomited undigested food.

42. On 21 January 2004 Olga Biliak was examined by a cardiologist, a psychiatrist and the Head of the Medical Board of the Prison Department (*начальник медичного відділу управління Державного департаменту виконання покарань*), and underwent an X-ray and a blood test. The X-ray revealed no abnormalities. According to the blood test, there was serious inflammation in Olga Biliak's body. She was diagnosed with acute bronchitis, chronic gastritis, anaemia, cachexia and mental disorders. Her state of health was assessed as being of "medium seriousness". She was prescribed some anti-inflammatory and light tranquilising drugs, as well as some antibiotics. Olga Biliak was asked if she was HIV-positive. She replied that she was not and refused to take a HIV test. However, that was the date when, according to the Government, the prison doctors started to suspect that she was HIV-positive.

43. On 22 January 2004 the Governor of the SIZO applied to the Head of the District Police Department, stating that Olga Biliak's poor state of health prevented her from participating in any investigative actions and that she needed to be admitted to hospital urgently. He asked that the investigative authorities consider the possibility of her release on an undertaking not to abscond.

44. On 28 and 30 January 2004 Olga Biliak was examined by a SIZO physician. Her state of health was again assessed as being of “medium seriousness” and a recommendation was made to “continue treatment”.

45. On 29 January 2004 the investigator of the District Police Department ordered Olga Biliak's release on health grounds. From the documents submitted by the parties, it is unclear when exactly this decision was received by the SIZO. One available copy of the decision has a stamp of the SIZO on the reverse side and a handwritten date – “30.01.2004”. However, another copy of the decision bears a SIZO stamp for incoming correspondence with the number 2954 and an incoming date of 2 February 2004.

46. On 1 February 2004 at 9.15 p.m. Olga Biliak was visited by a prison doctor who gave her a painkiller and an anti-spasmodic drug. At 9.55 p.m. Olga Biliak died. The death certificate issued on the same day indicated bilateral pleurisy as the cause of death. According to the Government, Olga Biliak's death was caused by acute heart failure.

47. The applicants provided two colour photographs of Olga Biliak's body, which show that she had been in an advanced state of exhaustion when she died.

### **C. The investigation into the death of Olga Biliak**

48. Immediately after Olga Biliak's death, the applicants lodged a criminal complaint against the SIZO staff for negligence.

49. During the investigation into the applicants' complaint, the investigator questioned a SIZO physician, S., who had treated her, and the head of the SIZO medical unit. S. submitted that the deceased had been examined on a number of occasions; the last examination took place on 30 January 2004. According to him, at that time there were no grounds for placing Olga Biliak on the medical ward. She was found to be suffering from bronchitis, drug addiction, anaemia and cachexia. Taking into account her state of health, he had recommended her release.

50. The head of the medical unit testified that on her arrival at the SIZO Olga Biliak had been examined and found to be suffering from drug addiction and certain psychiatric problems (such as hysteria), but in general her state of health had been considered satisfactory. The instructions of the SIZO physician were fully complied with and there had been no reason to transfer her to the SIZO medical wing.

51. The head of the medical unit further stated that on 21 January 2004 he had examined Olga Biliak himself and found her state of health to be satisfactory. On the same day she was examined by the Head of the Medical Board of the Prison Department who diagnosed her with “possible AIDS, acute bronchitis, drug addiction and anaemia” and considered that she should be released on medical grounds.



52. The eight inmates who had shared the cell with Olga Biliak before her death claimed that during her detention she was frequently attended to by doctors and paramedics, and that her health had been satisfactory. Their written testimonies given to the Head of the SIZO are all very brief and drafted using the same style and expressions.

53. According to the autopsy report of 25 March 2004 Olga Biliak died from HIV-related advanced purulent pneumonia. The autopsy also revealed a number of bruises on her hands, legs, left cheekbone and chin.

54. In a decision of 30 April 2004 the investigator found that Olga Biliak's death was not caused by any violence or negligence, and decided not to institute criminal proceedings.

55. On 8 June 2004 the Kyiv Deputy Prosecutor instituted disciplinary proceedings against the employees of the SIZO administrative office for mishandling correspondence, since they had registered the decision of 29 January 2004 and handed it to the Head of the SIZO only on 2 February 2004, although it had been received on 30 January 2004.

56. On 14 June 2004 the Kyiv City Prosecutor's Office (*Прокуратура м. Києва*) rejected the applicants' request to set aside the decision of 30 April 2004, stating that the investigation had been thorough and complete. During her detention the deceased had had appropriate medical treatment, and had received food and medication from her relatives. Until 21 January 2004 the authorities had had no information about her HIV status.

57. On 18 June 2004, the Governor of the SIZO reprimanded the head of its registry for “antedating the letter from the investigator which contained Olga Biliak's release order”.

58. The applicants challenged the decision of 30 April 2004 before the Shevchenkivsky District Court of Kyiv (*Шевченківський районний суд м. Києва* – “the Shevchenkivsky Court”). On 16 December 2004 the court quashed that decision and ordered further inquiries, finding that the initial investigation had been inadequate and incomplete. It ordered an official post-mortem examination of the body and sought to clarify the following issues:

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

59. Following this decision, the Shevchenkivsky District Prosecutor's Office of Kyiv (*Прокуратура Шевченківського району м. Києва* – “the Shevchenkivsky Prosecutor's Office”) requested that the authorities of the SIZO carry out additional inquiries into the circumstances of the death of Olga Biliak. Having received no reply, on 21 February 2005 the Shevchenkivsky District Prosecutor's Office decided against instituting criminal

proceedings on the ground that there was no indication that her death had been caused by violence or that any other parties had been involved in her death. According to the applicants, they were not informed of this decision.

60. On 21 March 2005 the applicants inquired about the progress of proceedings in the case. In a letter of 11 April 2005 the Kyiv City Prosecutor's Office informed them that the investigations were still ongoing.

61. In August 2005 the applicants, in the course of proceedings concerning their civil action for damages against the SIZO (see paragraphs 68-74 below), learned of the Shevchenkivskyy Prosecutor's Office's decision of 21 February 2005. On 28 September 2005 the Shevchenkivskyy Court, following an application by the applicants, quashed that decision and ordered further investigations. The court found, in particular, that none of the actions indicated in the decision of 16 December 2004 had been taken.

62. It appears that the prosecution authorities were not informed of this decision and, on 17 January 2006, the Kyiv City Prosecutor's Office quashed the February 2005 decision of the Shevchenkivskyy Prosecutor's Office of its own motion and ordered reinvestigation.

63. In the course of the additional investigations the Shevchenkivskyy Prosecutor's Office ordered that further medical evidence be obtained.

64. On 17 November 2006 the Kyiv City Forensic Medical Bureau (*Київське міське бюро судово-медичної експертизи* – “the Bureau”) issued a report in which it stated that Olga Biliak's death was caused by the hematogenously disseminated tuberculosis affecting the lungs, liver, spleen and other parts of the body, which led to purulent necrotising pneumonia. All these diseases had developed against the background of the concurrent HIV-infection. The lack of correct diagnosis had resulted in a failure to provide appropriate medical treatment; therefore, the death of Olga Biliak had been indirectly caused by the actions of the SIZO officials.

65. On 22 December 2006 the Deputy Prosecutor of the Shevchenkivskyy District of Kyiv requested that the Bureau carry out further examinations with a view to establishing whether Olga Biliak had required urgent hospitalisation in October 2003 and in January 2004 and whether she had received adequate medical assistance during her detention in the SIZO.

66. However, on 25 December 2006 the investigator from the Shevchenkivskyy Prosecutor's Office, taking into account the fact that the reply from the Bureau could not be received before the expiry of the statutory time-limit for reaching a decision on a criminal complaint, decided not to institute criminal proceedings into the death of Olga Biliak as the evidence in the case file did not show that her death had been caused by violence or by the negligence of the SIZO staff.

67. On 12 July 2007 the Shevchenkivskyy Court, acting on an appeal lodged by the applicant, quashed this decision on the ground that the investigating authorities had failed to follow the instructions set out in that court's decisions of 16 December 2004 and 28 September 2005. The court

ordered that further investigations into the death of Olga Biliak be carried out. The proceedings are apparently still ongoing.

#### **D. Civil action against the SIZO**

68. On 21 July 2004 the applicants sued the SIZO for non-pecuniary damage incurred on account of the inadequate medical treatment of Olga Bilaik and the failure to hospitalise or release her on medical grounds. They also claimed compensation for burial expenses.

69. On 27 October 2006 the Shevchenkivskyy Court partially allowed these claims. It found, *inter alia*, that the prison authorities had learned of Olga Bilaik's HIV status on 26 September 2003 from her father's letter. The court further indicated that although the relevant regulations provided that each newly admitted detainee should be examined and interviewed in relation to AIDS or HIV infection, this had never been done in respect of Olga Bilaik. The Shevchenkivskyy Court also established that, contrary to the domestic law, she had not been X-rayed within three days of her arrival at the SIZO. She did not undergo that examination until 18 December 2003.

70. The court further indicated that on 30 January 2004 the Head of the District Police Department had requested the SIZO to bring Olga Biliak to the District Police Department on 2 February 2004. According to the SIZO incoming mail register this request has been received on 30 January 2004. The decision of 29 January 2004 to release Olga Biliak was registered only on 2 February 2004 with the incoming mail number 2954.

71. The Shevchenkivskyy Court concluded that the applicants had suffered distress on account of the inadequate medical assistance offered to their daughter and mother in the SIZO. The court further stated that:

“It should be noted that [the finding of Olga Bilaik's lack of medical treatment in the SIZO] does not mean that there is a causal link with Olga Bilaik's death, the circumstances of which have not been established during the hearings and are currently being considered by the Shevchenkivsky District Prosecutor's Office of Kyiv in the context of the criminal investigation into the death of Olga Bilaik.”

72. The applicants were awarded 20,000<sup>2</sup> Ukrainian hryvnas (UAH) in total for non-pecuniary damage. The claim for burial expenses was rejected as unsubstantiated.

73. The SIZO and the applicants appealed against this judgment.

74. On 24 May 2007 the Kyiv City Court of Appeal quashed the judgment of 27 October 2006 and remitted the case for fresh consideration on the ground that the first-instance court had failed to identify the medical staff who had examined Olga Biliak, diagnosed her, prescribed her treatment, etc., and to decide whether they should have participated in the proceedings

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<sup>2</sup> Approximately 3,281.26 euros (EUR)

## II. RELEVANT DOMESTIC LAW

### A. Constitution of Ukraine

75. The relevant extract of the Constitution of Ukraine provides:

#### Article 27

“Every person has the inalienable right to life.

No one shall be arbitrarily deprived of life. The duty of the State is to protect human life. ...”

#### 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 55

“Human and citizens' rights and freedoms shall be protected by the courts.

Everyone shall be guaranteed a right to challenge in court the decisions, actions or omissions of bodies of State power, bodies of local self-government, officials and officers. ...

Everyone shall have a right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.”

#### Article 56

“Everyone shall have a right to compensation from public or municipal bodies for losses sustained as a result of unlawful decisions, acts or omissions by public or municipal bodies or civil servants in the performance of their official duties.”

### B. Code of Criminal Procedure, 1960

76. The Code requires a competent authority to institute criminal proceedings if there is a suspicion that a crime has been committed. That authority is under an obligation to carry out all measures provided for by law to establish the facts and to identify those responsible and secure their conviction (Article 4).

77. Article 94 of the Code provides that criminal proceedings shall be instituted in the following cases:

“Criminal proceedings shall be instituted following:

- (1) applications or communications from ... individuals; ...

(5) direct detection of signs of a crime by a body of inquiry, investigation, a prosecutor or a court.

A case can be instituted only when there is sufficient information indicating a crime.”

No criminal proceedings can be brought in the absence of a *corpus delicti* (Article 6).

78. According to Article 165-1 § 3 of the Code, the decision of the body of inquiry, investigator, prosecutor or court to apply, change or discontinue a preventive measure (including pre-trial detention) should be communicated to the person concerned immediately.

79. Article 236-1 of the Code provides:

“Within seven days of notification, a decision of the body of inquiry, investigator or prosecutor not to institute criminal proceedings or a refusal of the higher prosecutor to quash such a decision can be appealed against by an interested party or their representative to the district (town) court within whose area of jurisdiction the authority which took the decision falls...”

80. The relevant part of Article 236-2 of the Code provides:

“An appeal against the decision of the body of inquiry, investigator or prosecutor not to institute criminal proceedings shall be examined [by a court] in a single-judge formation within ten days of being lodged.

The judge shall request the materials on the basis of which the decision not to institute criminal proceedings was made, examine them and inform the prosecutor and the appellant of the date on which the hearing of the appeal is listed.

Having examined the case, the judge ... may take one of the following decisions:

(1) to set aside the decision not to institute criminal proceedings and to remit the case for further preliminary inquiries...

(2) to dismiss the appeal ...”

### **C. Civil Code, 2003**

81. Articles 1166 and 1167 of the Civil Code, as in force since 1 January 2004, provide for the possibility to claim pecuniary and non-pecuniary damages inflicted as a result of the unlawful decisions, actions or inactivity of an individual or a legal entity, including State bodies.

### **D. Code of Civil Procedure, 2004**

82. Article 201 § 1 (4) of the Code of Civil Procedure provides in its relevant part:

“The court must suspend its examination of a case if ...it is impossible to hear that case before the termination of another set of civil, criminal or administrative proceedings.”

#### **E. Pre-Trial Detention Act, 1993**

83. Article 20 § 4 reads as follows:

“Rulings, judgments or decisions granting release shall be implemented immediately upon their receipt by the detention centre.”

#### **F. Medical Assistance and Sanitary Rules in SIZO, approved by Order No. 3/6 of the State Department for Enforcement of Sentences and the Ministry of Health on 18 January 2000** («Порядок медико-санітарного забезпечення осіб, які утримуються в слідчих ізоляторах та виправно-трудовах установах Державного департаменту України з питань виконання покарань, затверджений наказом Державного департаменту України з питань виконання покарань та Міністерства охорони здоров'я України від 18 січня 2000 р. N 3/6»)

84. In accordance with Section 6.1.3 of the Rules, all persons should undergo an initial medical examination on their arrival at the SIZO. The results of this examination are entered in the SIZO medical register. During the examination the doctor should inform the detainee about the possibility of undergoing a HIV test.

### **III. RELEVANT INTERNATIONAL DOCUMENTATION**

#### **A. Recommendation No. R (87) 3 of the Committee of Ministers on the European Prison Rules (adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies)**

85. The relevant extracts from the European Prison Rules read as follows:

*“Medical services*

26. 1. At every institution there shall be available the services of at least one qualified general practitioner. The medical services should be organised in close relation with the general health administration of the community or nation. They shall

include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

2. Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be suitable for the medical care and treatment of sick prisoners, and there shall be staff of suitably trained officers.

...

30. 1. The medical officer shall have the care of the physical and mental health of the prisoners and shall see, under the conditions and with a frequency consistent with hospital standards, all sick prisoners, all who report illness or injury and any prisoner to whom attention is specially directed.

2. The medical officer shall report to the director whenever it is considered that a prisoner's physical or mental health has been or will be adversely affected by continued imprisonment or by any condition of imprisonment.”

## **B. Reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [“CPT”]**

86. The relevant extract from the Report of the CPT on a visit to Ukraine from 24 November to 6 December 2002 reads as follows:

“125. In addition to tuberculosis, the Ukrainian prison system is currently faced with an increase in the number of HIV-positive prisoners (Between 1987 and January 2002, 8,046 HIV-positive prisoners were identified. As of 1 October 2002, the prison system had 1,577 HIV-positive prisoners and 17 prisoners who had developed AIDS. It has to be added that the World Bank approved a \$60 million loan for a tuberculosis and HIV/AIDS control programme in Ukraine, which includes considerable support for the penitentiary system). The Department for the Execution of Sentences has therefore devised a priority strategy for curbing the spread of the virus, based on an awareness and information campaign targeting prisoners and prison staff, the introduction of confidential voluntary screening tests and follow-up after the tests, the provision of means of prevention and disinfection for prisoners and the absence of discrimination against HIV-positive prisoners.”

## **THE LAW**

### **I. SCOPE OF THE CASE**

87. The Court observes that further new complaints under Article 3 of the Convention were submitted after communication and in response to the Government's objections as to the admissibility and merits of the

application, and concerned the authorities' failure to account for the injuries to Olga Biliak's hands, legs, left cheekbone and chin disclosed by the autopsy. The applicants also complained under Article 5 § 3 of the Convention that Olga Biliak had not been released pending trial; they thus challenged the whole period of her detention from 22 April 2003 until 1 February 2004.

88. In the Court's view, the new complaints are related in a general sense to the present case, but do not constitute an elaboration of the applicants' original complaints to the Court communicated to the Government by the decision of 14 March 2006. The Court considers, therefore, that it is not appropriate to take this matter up separately now in the context of the present application (see, *inter alia*, *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005, and *Lyashko v. Ukraine*, no. 21040/02, § 29, 10 August 2006).

## II. ALLEGED VIOLATION OF ARTICLES 2 AND 13 OF THE CONVENTION

89. The applicants complained that the authorities had failed to provide Olga Biliak with the appropriate medical care while in detention and were thus responsible for her death. They also complained that the investigation into her death had been neither adequate nor effective.

90. The applicants relied on Article 2 of the Convention, which, in its relevant part, reads as follows:

“1. Everyone's right to life shall be protected by law. ...”

91. They also relied on Article 13 of the Convention, which reads as follows:

“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.”

### A. Admissibility

92. The Government contended that the applicants' complaints about the death of Olga Biliak were premature since the applicant's civil action against the SIZO for non-pecuniary and pecuniary damage incurred as a result of the death of their daughter and mother was still under consideration by the domestic courts. They further submitted that the criminal complaint lodged by the applicants before the prosecutor's office was an effective remedy and that they had made successful use of it. Moreover, the investigation into the applicants' criminal complaint was still pending.

93. The applicants stated that the remedies referred to by the Government were ineffective in their case.



94. The Court recalls at the outset that where a violation of the right to life is alleged, the Convention organs have accepted applications from relatives of the deceased. For example applications have been brought by a deceased's wife (*Aytekin v. Turkey*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII), a deceased's mother (*Çiçek v. Turkey*, no. 25704/94, 27 February 2001), a deceased's father (*Hugh Jordan v. the United Kingdom*, no. 24746/94, ECHR 2001-III (extracts)) and a deceased's brother and sister (see respectively *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV and *Şemsi Önen v. Turkey*, no. 22876/93, 14 May 2002). Therefore, the applicants in the present application can claim to be victims of the alleged violations under Article 2 of the Convention.

95. The Court further recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but that no recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI, and *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports* 1996-IV).

96. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means among other things that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69, and *Aksoy*, cited above, §§ 53 and 54).

97. The respondent Government argued that two avenues of recourse were available to the applicants, namely a claim for damages and a criminal complaint.

98. As regards the civil-law remedy, the Court recalls that in the cases of *Afanasyev v. Ukraine* (no. 38722/02, § 77, 5 April 2005) and *Kucheruk v.*

*Ukraine* (no. 2570/04, § 112, 6 September 2007), it dismissed the similar objection of the Government on the ground that in the absence of any results from the ongoing criminal investigation, the civil courts were prevented from considering the merits of claims relating to alleged criminal offences. In particular, the Court found that a claim for compensation could be lodged only against a particular person or persons. The remedy became futile if the offender was not identified and prosecuted. In particular, in the present case the national courts recognised the impossibility of deciding on the applicants' civil claims until the persons responsible for Olga Biliak's treatment were identified (see paragraph 74 above), and the Government did not provide any explanations as to whether this was possible in civil proceedings. Therefore, the Court sees no reason to depart in the present case from its previous findings.

99. As regards criminal-law remedies, the Court considers that this limb of the Government's preliminary objection raises issues concerning the effectiveness of the criminal investigation in establishing the facts concerning, and responsibility for, the events of which the applicants complained. These issues are closely linked to the merits of the applicants' complaints under Articles 2 and 13 of the Convention. In these circumstances, it joins the preliminary objection to the merits of the applicants' complaints.

100. The Court further notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds.

## **B. Merits**

### *1. Alleged failure of the Ukrainian authorities to protect Olga Biliak's right to life*

101. The applicants maintained that Olga Biliak had died in detention because she had not received timely and adequate medical aid and that the SIZO management had been in possession of all the information needed in order to take adequate measures to save Olga Biliak's life. In particular, they indicated that the SIZO management had been well aware of Olga Biliak's HIV status since September 2003 at the latest and not merely since January 2004 as the Government had submitted. Moreover, Olga Biliak had been suffering not only from the HIV infection but from numerous other diseases for which she had also failed to receive any treatment.

102. The Government claimed that Olga Biliak's death had not been a consequence of inadequate conditions of detention or medical assistance, but the outcome of an unpredictable development of the illness she had acquired prior to her placement in custody and of which she had failed to inform the prison authorities. The prison doctors had examined her on many

occasions and prescribed appropriate medical treatment and medication. Their recommendations had been fully complied with. As soon as the prison authorities had started to suspect that she was HIV-positive they had undertaken all necessary measures, including requesting the prosecution authorities to authorise her release. According to the Government, all Olga Biliak's health complaints had been addressed in timely and adequate fashion by the prison doctors, and the State could not bear responsibility for any suffering of which she had not informed the authorities. The Government reiterated that since the investigation into the circumstances of Olga Biliak's death was still pending, they could not comment on the existence or absence of a violation of the Convention provision.

103. The Court reiterates that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe. The first sentence of Article 2 enjoins the Contracting States not only to refrain from the taking of life “intentionally” or by the “use of force” disproportionate to the legitimate aims referred to in sub-paragraphs (a) to (c) of the second paragraph of that provision, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, *inter alia*, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III, and *Keenan v. the United Kingdom*, no. 27229/95, § 89, ECHR 2001-III).

104. Persons in custody are in a particularly vulnerable position and the authorities are under an obligation to account for their treatment. Having held that the Convention requires the State to protect the health and physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see, *inter alia*, *Keenan*, cited above, § 111; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; and *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 46, ECHR 2003-...), the Court considers that, where a detainee dies as a result of a health problem, the State must offer an explanation as to the cause of death and the treatment administered to the person concerned prior to his or her death.

As a general rule, the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the State has complied with its obligation to protect that person's right to life (see *Slimani v. France*, no. 57671/00, § 27, ECHR 2004-IX (extracts)).

105. The Court notes that from 14 April 2003 until her death on 1 February 2004 Olga Biliak was in custody and, accordingly, under the control of the Ukrainian authorities. On her arrival at the SIZO, Olga Biliak was examined by a doctor and was found to be generally healthy (see paragraph 24 above). However, throughout her detention she suffered from various chronic illnesses such as a gastric ulcer, chronic bronchitis,

pyelonephritis and other conditions which, exacerbated by her HIV infection, required constant medical supervision and appropriate treatment.

106. The Court next notes the Government's argument that due to Olga Biliak's reluctance to disclose her HIV status, the authorities learned of this only at a very late stage. In this respect the Court observes that in a letter of 26 September 2003 the first applicant informed the SIZO management of the fact that his daughter was HIV-positive. The Court therefore rejects this submission of the Government and finds that at least as far back as September 2003 the prison authorities should have been aware of Olga Biliak's HIV status.

107. In the light of this finding and having regard to the vulnerability of HIV-positive persons to other serious diseases, the Court finds the lack of medical attention to Olga Biliak's health problems striking. Although she was suffering from numerous serious diseases her treatment seems to have been very basic.

108. In particular, in December 2003 and January 2004, when Olga Biliak developed serious respiratory problems, suffered from an extremely high body temperature and was losing weight rapidly – a state of affairs not contested by the Government –, her health problems were not addressed accordingly, and it was only on 21 January 2004 that a more in-depth diagnosis of her state of health was made.

109. Moreover, the prison authorities not only refused to transfer Olga Biliak to a specialist hospital but also failed to move her to the medical wing of the SIZO. She remained on general location even after 22 January 2004, when the management of the SIZO acknowledged the need for her to be admitted to hospital and requested the investigating authorities' authorisation to release her on medical grounds.

110. On 13 and 19 January 2004, that is, forty-four and fifty days respectively after Olga Biliak's condition started to deteriorate, the prosecution authorities refused her and her lawyer's requests for release, without addressing her health issues. Moreover, the prison management's application for her urgent release was acted upon only seven days later and the decision to release her was processed with a four-day delay, during which time she died of HIV-related diseases.

111. The Court notes that according to the report of 17 November 2006 the death of Olga Biliak was indirectly caused by the inadequate medical assistance provided to her while she was in detention. The Government did not contest the accuracy of this report, nor did they produce any other medical evidence to refute this conclusion.

112. Accordingly, the Court finds that there has been a violation of Article 2 of the Convention on account of the Ukrainian authorities' failure to protect Olga Biliak's right to life.

## 2. Procedural obligations under Article 2 of the Convention

113. The Government maintained that the investigation into Olga Biliak's death had been carried out by the Shevchenkivskyy Prosecutor's Office, a body independent from the prison authorities. The investigators had thoroughly examined the circumstances of the victim's death, commissioned medical examinations and assessed the other available evidence. The somewhat protracted nature of the investigation had been due to the need to obtain medical evidence. The Government reiterated that in the absence of a final decision on the applicants' criminal complaints they could not comment on whether or not there had been a violation of the State's procedural obligations under Article 2 of the Convention.

114. The applicants did not submit any observations in this respect.

115. The Court reiterates that where lives have been lost in circumstances potentially engaging the responsibility of the State, Article 2 entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 91, ECHR 2004-XII). In particular, when a detainee dies in suspicious circumstances, an “official and effective investigation” capable of establishing the causes of death and identifying and punishing those responsible must be carried out of the authorities' own motion (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 74, ECHR 2002-II).

116. The system required by Article 2 must provide for an independent and impartial official investigation that satisfies certain minimum standards as to effectiveness. Accordingly, the competent authorities must act with exemplary diligence and promptness, and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved. The requirement of public scrutiny is also relevant in this context (see, *mutatis mutandis*, *Sergey Shevchenko v. Ukraine*, no. 32478/02, § 65, 4 April 2006).

117. Turning to the circumstances of the present case, the Court, in the light of the above principles, finds that a procedural obligation arose under Article 2 of the Convention to investigate the circumstances of the death of the applicants' daughter and mother (see *Slimani v. France*, cited above, §§ 29-34). It considers that the criminal investigation into the death of Olga Biliak revealed some serious inconsistencies and deficiencies.

118. The Court notes at the outset that the investigation into the applicants' complaints has lasted so far for four years and nine months and, apparently, is still pending. During this period the investigation authorities refused on three occasions to institute criminal proceedings, but these

decisions were subsequently quashed by the national courts and the case was submitted for further investigation. In particular, in its first decision on 30 April 2004 the Shevchenkivskyy Court gave detailed instructions as to what evidence should be obtained and what circumstances established in the context of the investigation into the death of Olga Biliak. However, as the decisions of that court of 28 September 2005 and 12 July 2007 evince, those instructions have to date not been fully complied with by the investigating authorities.

119. The Court also notes that the Shevchenkivskyy Prosecutor's Office's decisions of 21 February 2005 and 25 December 2006 not to institute criminal proceedings were taken before important evidence – the results of the additional inquiry and the additional medical evidence – had been obtained. Both these decisions were strikingly terse and limited to the finding that in the absence of the above evidence there was no indication that Olga Biliak's death had been caused by violence or medical negligence.

120. The Court further observes that the investigation authorities have never properly addressed the main issue of the applicants' complaints – the quality of the medical treatment provided to Olga Biliak viewed in the context of the diseases she had been diagnosed with.

121. Moreover, some parts of the investigation did not satisfy the minimum requirement of independence. In particular, a part of the witness evidence, namely the statements of Olga Biliak's cellmates, was obtained by the authority directly involved (see paragraph 52 above) (see, *mutatis mutandis*, *Sergey Shevchenko v. Ukraine*, no. 32478/02, § 70, 4 April 2006). No attempt was made by the prosecution to interview those persons again or to confirm their statements by any other means. This is especially striking given that the statements appear to be identical although provided by eight different persons.

122. Finally, the Court notes that throughout the investigation the applicants were to a large extent excluded from the proceedings. Having no formal status in the proceedings, the applicants were denied access to the file and were never informed or consulted about any proposed evidence or witnesses. On some occasions the applicants did not receive any information about the progress of the investigation and, when it was discontinued on 21 February 2005, they were not informed of this development. On the contrary, the applicants were misled by the letter from the Kyiv City Prosecutor's Office of 11 April 2005, which stated that the investigation was still under way. It was not until August 2005 that they learned of the decision to discontinue it. Moreover, there was a lack of coordination even between the national authorities themselves since the decision of 21 February 2005 was quashed by the higher prosecutor although it had been already quashed by the court (see paragraphs 61-62 above). Accordingly, the investigation did not ensure the investigation and its results with a sufficient element of public scrutiny; nor did it safeguard the interests of the next-of-kin.

123. In the light of these circumstances, the Court concludes that there has been a violation of the respondent State's obligation under Article 2 of the Convention because of the failure to conduct an effective and independent investigation into the death of Olga Biliak. It follows that the Government's preliminary objection (see paragraph 99 above) must be dismissed.

### *3. Article 13 of the Convention*

124. The Government maintained that the civil claim lodged by the applicants was a remedy which the applicants had used effectively. Furthermore, they referred to the possibility for them to claim damages in a civil court.

125. The applicants claimed that the investigation into the death of their mother and daughter, which had been limited to a pre-investigation examination (*дослідча перевірка*), had been insufficient. They also stated that the investigation had lacked independence and had been unduly delayed. Finally, the applicants submitted that their exclusion from the proceedings had been contrary to the requirement of public scrutiny.

126. Having regard to its finding above under Article 2 of the Convention that the authorities failed to carry out an effective investigation into the circumstances of Olga Biliak's death (see paragraph 123 above), the Court does not find it necessary to examine this issue also in the context of Article 13 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

127. The applicants complained that during her detention in the SIZO Olga Biliak had been held in inadequate conditions. They 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**

128. The Court notes that the applicants' complaint about the inadequate conditions of Olga Biliak's detention is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### **B. Merits**

129. The applicants alleged that Olga Biliak had been held in seriously substandard conditions in the SIZO.

130. The Government contested the applicants' arguments.

131. The Court notes that these complaints arise out of the same facts as those considered under Article 2. In the light of its conclusion with respect to that Article (see paragraph 112 above), the Court does not consider it necessary to examine these complaints separately.

#### IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

132. The applicants complained that Olga Biliak's detention between 29 January 2004 and 1 February 2004 had been unlawful. They relied on Article 5 § 1 of the Convention, the relevant part of which reads 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; ...”

##### A. Admissibility

133. The Government contended that the applicants' complaints were premature since the applicants' civil case was still under consideration by the domestic courts.

134. The applicants stated that there were no effective remedies in respect of this complaint.

135. The Court recalls that while the next-of-kin of persons who have died in circumstances giving rise to issues under Article 2 of the Convention may apply as applicants in their own right (see paragraph 94 above), the Court has held that the rights guaranteed under Article 5 of the Convention belonged to the category of non-transferable rights (see, *Bic and others v. Turkey* (dec.), no. 55955/00, 2 February 2006). However, in a number of cases where unlawful detention was related to the disappearances of the applicants' next-of-kin, the Court held that the applicants could also raise complaints concerning such detention and found a violation of Article 5 of the Convention (see, *Çakıcı v. Turkey* [GC], no. 23657/94, § 107, ECHR 1999-IV). Turning to the facts of the present case, the Court notes, without prejudging on the merits of the applicants' complaint, that Olga Biliak had to be released on 29 January 2004 because of her health problems but the decision on her release had not been enforced immediately as the national law provides and on 1 February 2004 Olga Biliak died. Therefore, the



applicants' complaint about Olga Biliak's unlawful detention between 29 January 2004 and 1 February 2004 is closely linked to their complaint under Article 2 of the Convention and the applicants should be entitled to allege a violation of Article 5 of the Convention.

136. The Court further notes that in their civil claim against the SIZO the applicants indeed indicated that their daughter and mother had died in the SIZO, *inter alia*, because of the failure of its management to release her immediately after the relevant decision had been taken. However, the main issue in the applicants' action before the national courts is the claim for compensation for the lack of proper medical assistance afforded to Olga Biliak while she was in detention. Furthermore, the applicants' claim was lodged against the management of the SIZO, whereas it is unclear from the documents provided by the parties whether the latter was solely responsible for the failure to immediately release Olga Biliak. In particular, the date on which the decision of 29 January 2004 reached the SIZO has not been definitively established. Moreover, the Court even has doubts about the date on which this decision was taken, since one day later the Head of the District Police Department requested the SIZO to bring Olga Biliak to the District Police Department on 2 February 2004, despite the fact that she should have already been released by that date (see paragraph 45 and 70 above). The Court further notes that the civil proceedings in question have already lasted for four years and four months for two instances and are apparently still pending before the first-instance court. In such circumstances, the Court is of the opinion that this remedy cannot be regarded as effective within the meaning of Article 35 § 1 of the Convention.

137. The Court therefore dismisses this objection. It further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds.

## **B. Merits**

138. The applicants contended that the decision of 29 January 2004 on Olga Biliak's release had not been executed for three days. Such a delay could not be justified by the necessity of completing administrative formalities and her detention had thus been unlawful within the meaning of Article 5 § 1 of the Convention.

139. The Government reiterated that in the absence of the final decision in the applicants' civil case, they could not comment as to whether or not there had been a violation of the applicant's right to liberty.

140. 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 state the obligation to conform to the substantive and procedural rules thereof. However, the “lawfulness” of

detention under domestic law is not always the decisive element. The Court must in addition be satisfied that 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 fashion (see *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX).

141. The Court observes that Article 165-1 of the Code of Criminal Procedure stipulates that the detained person should be immediately informed of the decision to release him or her. Article 20 of the Pre-trial Detention Act provides that the management of the detention centre is obliged to discharge the detained person immediately on receipt of the release order. It is not in dispute that none of the above was done in the present case.

142. The Court therefore finds that the detention of Olga Biliak from 29 January to 1 February 2004 was not lawful within the meaning of Article 5 § 1 (c).

143. There has thus been a violation of Article 5 § 1 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

144. 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

145. In respect of pecuniary damage the applicants claimed UAH 2,600<sup>3</sup> for the money they spent on Olga Biliak's medication while in detention and the costs of her funeral. The applicants also claimed UAH 300,000<sup>4</sup> in respect of non-pecuniary damage.

146. As to the amount claimed in respect of pecuniary damage, the Government stated that the applicants have produced documents only in support of the medical expenses in the amount of UAH 1,901<sup>5</sup>. While conceding to the fact that the applicants had incurred certain expenses in connection with Olga Biliak's funeral, the Government pointed out that they had failed to produce any evidence proving the exact sum of these costs.

147. As regards non-pecuniary damage, the Government maintained that the amount claimed by the applicants was unsubstantiated and exorbitant.

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<sup>3</sup> Approximately 389 euros (EUR)

<sup>4</sup> Approximately EUR 44,886.6

<sup>5</sup> Approximately EUR 284.43

148. The Court notes that on 14 December 2006 the applicants were requested to submit by 29 January 2007 their claims for just-satisfaction. They failed to submit any such claims within the required time-limits but a month later without any explanation of the delay.

149. In such circumstances the Court would usually make no award. In the present case, however, the Court has found a violation of Article 2 of the Convention. Since this right is of a fundamental character, the Court finds it possible, exceptionally, to award the applicants EUR 7,000 each by way of non-pecuniary damage (see, *Nadrosov v. Russia*, no. 9297/02, §§ 53-54, 31 July 2008), plus any tax that may be chargeable.

### **B. Costs and expenses**

150. The applicants also claimed USD 10,000<sup>6</sup> for the costs and expenses. In this respect they have provided two agreements concluded between the first applicant and Ms Shevchenko, the first one for amount of UAH 10,000<sup>7</sup> for legal representation in the criminal proceedings against Olga Biliak, and the second one for UAH 7,000<sup>8</sup> for legal representation in the proceedings on the applicants' criminal complaints (see paragraphs 46-65).

151. The Government invited the Court to disregard the claim for costs incurred during the Convention proceedings, referring to the fact that the applicants were granted legal aid before the Court. The Government further maintained that the applicants' claim was exaggerated and not supported by the relevant documents.

152. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and are reasonable as to quantum (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII). The Court considers that these requirements have not been fully met in the instant case. In particular, it finds that the claim for reimbursement of fees for legal representation in the criminal proceedings against Olga Biliak cannot be granted since these proceedings are not related to the violations found by the Court in the present case. However, it is clear that the applicants have already bore some legal expenses, given the steps taken by their lawyers at the domestic level in the criminal proceedings following the applicant's complaints about the death of Olga Biliak.

153. Having regard to all the relevant factors, the Court awards the first applicant EUR 1,900, which, less EUR 850 received in legal aid from the

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<sup>6</sup> Approximately EUR 7,005.74

<sup>7</sup> Approximately EUR 1,496.22

<sup>8</sup> Approximately EUR 1,047.35

Council of Europe, comes to EUR 1,050 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

### **C. Default interest**

154. 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**

1. *Decides* unanimously to join to the merits the Government's preliminary objection as to the exhaustion of domestic remedies in respect of Article 2 of the Convention, and dismisses it;
2. *Declares* unanimously the application admissible;
3. *Holds* unanimously that there has been a violation of Article 2 of the Convention in respect of the authorities' failure to protect Olga Biliak's right to life;
4. *Holds* unanimously that there has been a violation of Article 2 of the Convention in respect of the lack of an adequate investigation into the circumstances of Olga Biliak's death;
5. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;
6. *Holds* unanimously that there is no need to examine the complaints under Articles 3 and 13 of the Convention;
7. *Holds* by four votes to three
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 7,000 (seven thousand euros) each in respect of non-pecuniary damage, plus any tax that may be chargeable on these amounts;
    - (ii) EUR 1,050 (one thousand and fifty euros) to the first applicant in respect of costs and expenses, plus any tax that may be chargeable on this amount;
  - (b) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction and for costs and expenses.

Done in English, and notified in writing on 18 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Rait Maruste  
President