EUROPEAN COURT OF HUMAN RIGHTS

CASE OF KARDAVA v. UKRAINE (European Court of Human Rights)

by admin • May 11, 2020

FIFTH SECTION

CASE OF KARDAVA v. UKRAINE

(Application no. 19886/09)

JUDGMENT

STRASBOURG

17 December 2019

This judgment is final but it may be subject to editorial revision.

In the case of Kardava v. Ukraine,

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

Síofra O'Leary, President,
Ganna Yudkivska,
Lado Chanturia, judges,
and Milan Blaško, Deputy Section Registrar,

Having deliberated in private on 26 November 2019,

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

PROCEDURE

1. The case originated in an application (no. 19886/09) 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 Georgian national, Mr Tamaz Kardava ("the applicant"), on 27 March 2009.

2. After the applicant's death on 7 April 2010, his sister, Ms Manana Kardava, expressed her wish to pursue the application. She is represented before the Court by Mr O. Veremiyenko, a lawyer practising in Kyiv and Ms A. Mukanova, a lawyer practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr I. Lishchyna.

3. The applicant complained under Article 3 of the Convention that he had been ill-treated by the police and that the

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was a Georgian national who was born in Sokhumi in 1967 and lived in Kyiv from 1993 until his death on 7 April 2010.

A. The applicant's arrest and detention

6. On 7 August 2008 the applicant was arrested in Kyiv by the police on suspicion of robbery. Narcotic drugs were found on him. The applicant was taken to the Shevchenkivskyy District police station of Kyiv.The applicant's arrest was documented under the Code of Administrative Offences, for a violation of the rules on the circulation of drugs, which constituted an administrative offence.

7. On 10 August 2008, under Article 115 of the Code of Criminal Procedure, an investigator decided to place the applicant in custody on suspicion of robbery and the possession of drugs.

8. On 12 August 2008 the Shevchenkivskyy District Court of Kyiv remanded the applicant in custody, in view of the ongoing criminal investigations against him. The court noted that the applicant had a criminal record and, having regard to the gravity of the alleged crimes, concluded that if he remained at liberty then he might seek to evade investigation and trial, which would obstruct the establishment of the truth in the case.

---

9. Subsequently, the Shevchenkivskyy District Court and the Kyiv Court of Appeal extended the applicant's pre-trial detention.

10. On 27 July 2009 the applicant's case was referred to the Shevchenkiskyy District Court for trial, along with the bill of indictment.

11. In October 2009 the applicant asked the court to release him from detention, mainly because of his health problems (see below). By a decision of 22 October 2009, the court refused the applicant's application, finding that there was no evidence to conclude that he would not seek to evade investigation and trial or obstruct the establishment of the truth in the case.

12. In the course of a hearing on 30 March 2010 the applicant's lawyer requested the applicant's release for similar reasons. The application was refused by the court, on the same grounds as those stated in its decision of 22 October 2009. The court also stated that the lawyer's reference to the applicant's poor state of health did not constitute sufficient grounds for changing the preventive measure.

B. Alleged ill-treatment of the applicant and investigation into those allegations

13. According to the applicant, in the course of his arrest on 7 August2008 he was beaten by police officers. The beatings continued on the police premises. On 11 August 2008 the police officers beat the applicant on a number of occasions and abused him with the aim of obtaining a confession from him to the crimes of which he was suspected.

14. When the applicant was placed in police custody on 11 August 2008 a medical assistant noted that he had sustained haematomas on the right shoulder and left thigh, and that he had a closed injury on the chest.

15. From 14 August 2008 onwards the applicant, his family members and his lawyer submitted a number of complaints to the

kidneys, and a broken rib. The applicant was also found to be suffering from chronic internal haemorrhoids, discirculatory encephalopathy and chronic persistent hepatitis C.

17. On 22 December 2008 forensic medical experts issued a report stating that, at the time of their assessment, the applicant had been suffering from discirculatory encephalopathy and chronic persistent hepatitis C; the other diagnoses had not been confirmed.

18. By decisions of 8 September and 9 December 2008, and 9 April, 8 October and 10 December 2009, the Shevchenkivskyy District prosecutor's office, having conducted pre-investigation inquiries, refused to open criminal proceedings, finding that the applicant's allegations of ill-treatment by the police were unfounded.

19. Following an appeal by the applicant, the above-mentioned decisions were quashed by the higher prosecutors or by courts on the grounds that the inquiries had fallen short of the requirements of a full and objective examination of the circumstances of the case. In particular, on 30 March2010 the Shevchenkivskyy District Court found that the experts' report of 22 December 2008 had not included an analysis of the medical records on the applicant's treatment between August and October 2008. It had been necessary to obtain and verify the relevant medical information concerning his injuries, and question the applicant and the doctors who had examined him.

20. On 24 June 2010, referring to the experts' report of 22 December2008, the Shevchenkivskyy District prosecutor's office once again refused to open criminal proceedings regarding the alleged ill-treatment, considering that the available evidence did not indicate that police officers had been involved in any crime.

C. The applicant's medical treatment in detention and his death

21. During his pre-trial detention the applicant was predominantly held in Kyiv pre-trial detention centre ("the SIZO").

22. Between 15 August and 2 October 2008 the applicant was treated in a public hospital in relation to his physical injuries and illnesses. According to the hospital doctors, the treatment resulted in an improvement in his state of health, so much so that he could be discharged from hospital. However, the doctors recommended that the applicant continue inpatient treatment at a neurological centre.

23. On 21 January 2009 the applicant was examined by a neurologist in the SIZO, who noted that he was suffering from the after-effects of a head injury. On 16 April 2009 the applicant was examined by a chief SIZO doctor, who was of the opinion that the applicant had the remote effects of a head injury, chronic hepatitis C, and chronic gastroduodentitis. The doctors examining the applicant concluded that he was fit to remain in custody, and that he could obtain the necessary treatment in the SIZO.

24. By a letter of 22 October 2009, the SIZO governor informed the applicant's lawyer that during his stay in the SIZO the applicant had made a number of requests for medical assistance, and following those requests he had been examined by a general practitioner, a neurologist, a cardiologist, and an ophthalmologist. According to their conclusions, the applicant was suffering from coronary heart disease, atherosclerotic cardiosclerosis, hypertension, circulatory deficiency, circulatory encephalopathy, the remote effects of a head injury, cervical osteochondrosis, myopia, chronic hepatitis C, and chronic gastritis.

25. On 25 November 2009 the applicant was placed in a medical unit of the SIZO because of the deterioration in his state of

splenomegaly, chronic pyelonephritis, chronic pancreatitis, chronic choletistitis, and symptomatic hypertension. The doctors prescribed the applicant a number of drugs, in view of his health problems.

27. On 1 March 2010 the applicant was transferred back to the SIZO medical unit, where, according to a letter from the SIZO governor of the same date, he was placed under “intense observation” by the medical staff. The applicant was given medication.

28. On 11 and 31 March 2010 the SIZO doctors suggested that the applicant be admitted to a hospital within Bucha Correctional Colony. The applicant refused, arguing that detainees in that hospital were placed in solitary confinement, and that the hospital did not have the facilities for the operation which he needed.

29. On 1 April 2010 an ambulance was called for the applicant and he was taken to Kyiv Emergency Hospital, where he remained until his death on 7 April 2010. According to an autopsy carried out by a pathologist on 8 April 2010, the applicant died of pulmonary heart disease, lower lobe pneumonia complicated by an abscess, splenomegaly, and cirrhosis of the liver.

D. Investigation into the circumstances of the applicant’s death

30. On 28 October 2010, in reply to a complaint by the applicant’s sister, the Kyiv prosecutor’s office refused to open criminal proceedings in relation to the death of the applicant, finding that there were no elements of a crime.

31. On 28 March 2011 the Pecherskyy District Court quashed that decision as unfounded and ordered further inquiries.

32. On 25 April 2011 the Kyiv prosecutor’s office issued another decision refusing to open criminal proceedings in relation to the death of the applicant, finding that there were no elements of a crime.

II. RELEVANT DOMESTIC LAW

33. The relevant provisions of the Constitution of Ukraine, the Criminal Code and the Code of Criminal Procedure can be found, in particular, in the Court’s judgment in Nechiporuk and Yonkalo v. Ukraine (no. 42310/04, §§ 121, 131 and 134, with further references, 21 April 2011). The relevant provisions of the Code of Administrative Offences can be found in Nikolay Kucherenko v. Ukraine (no. 16447/04, §§ 19-21, 19 February 2009).

THE LAW

I. PRELIMINARY QUESTION

34. The applicant died while his application was pending before the Court. The Government admitted that the applicant’s sister was closely related to him. However, they argued that the application concerned eminently personal and non-transferable rights, and for those reasons the applicant’s sister was not a victim and could not continue the present proceedings in his stead.

35. The applicant’s sister maintained that she was the only relative who had gone from Georgia to Ukraine to live with the applicant. She had actively assisted the applicant after his arrest – finding him a lawyer, purchasing medicine and food, and filing applications with the domestic authorities.

36. The Court notes that the Government’s objection concerns the question of whether or not the applicant’s sister has

Court will continue to refer to Mr Tamaz Kardava as the applicant in the present judgment.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

38. The applicant complained under Article 3 of the Convention that he had been ill-treated by the police and that the authorities had failed to investigate the matter.

39. Article 3 of the Convention reads as follows:

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

A. Admissibility

40. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

41. The applicant insisted that his complaint was properly substantiated by the available evidence, and that the Government had failed to provide a plausible explanation for the injuries documented during his detention. The investigation had not been effective, given that basic investigative measures had not been taken, as the domestic authorities had repeatedly established.

42. The Government did not comment on the merits.

43. The Court refers to the general principles concerning Article 3 of the Convention, and the State’s obligations stemming from that provision are summarised in particular in Bouyid v. Belgium ([GC] no. 23380/09, §§ 81-90 and 100-101 ECHR 2015) and El-Masri v. the former Yugoslav Republic of Macedonia ([GC] no. 39630/09, §§ 182-185 and 195-198, ECHR 2012).

1. Substantive aspect of Article 3

44. In the present case, the applicant alleged that he had been ill-treated by police officers during the first days of his detention. In support of his allegations, he referred to the medical reports showing that at the relevant time he had been suffering from numerous injuries. Notably, a couple of days after his arrest the applicant displayed haematomas on the right shoulder and left thigh, and a closed injury on the chest (see paragraph 14above). A few days later, during his uninterrupted detention, the applicant was diagnosed with, among other things, a closed head injury, multiple blunt internal injuries, including contusion to the kidneys, and a broken rib (see paragraph 16 above). In these circumstances, the Court considers that under Article 3 of the Convention, the State was obliged to provide a satisfactory and convincing explanation for these injuries and effectively disprove the applicant’s allegations of ill-treatment by police officers.

45. In dismissing the applicant’s allegations, the domestic authorities relied on the experts’ report of 22 December 2008, which did not confirm the above-mentioned injuries (see paragraph 17 above). However, the domestic authorities themselves cast doubt on that report, finding that it had not included medical records for the relevant period, and they considered it necessary to carry out additional inquiries in that regard (see paragraph 19above). In these circumstances, it does not appear that the report of 22 December 2008 effectively discredited the earlier medical evidence. No other reasons for dismissing the applicant’s allegations were given by the authorities.

47. There has therefore been a violation of the substantive limb of Article 3 of the Convention in respect of the applicant's complaint concerning his ill-treatment by the police.

2. Procedural aspect of Article 3

48. The applicant's allegations of ill-treatment were examined exclusively by way of pre-investigation inquiries. The Court has held that such investigative procedures do not comply with the principles of an effective remedy, because an inquiring officer can only take a limited number of steps and a victim has no formal status, meaning that his or her effective participation in the procedure is excluded (see Strogan v. Ukraine, no. 30198/11, § 53, 6 October 2016, with further references). Indeed, during the period of pre-investigation inquiries, which lasted about three years, on numerous occasions the supervising authorities found that those inquiries had not been thorough, given that important investigative measures had not been taken (see paragraph 19 above). The repetition of such remittal orders may disclose a serious deficiency in criminal proceedings (in that regard and mutatis mutandis, see Zubkova v. Ukraine, no. 36660/08, § 40, 17 October 2013).

49. The Court notes that it has already condemned patterns of investigation similar to those in the present case in a number of other cases against Ukraine (see, for example, Drozd v. Ukraine, no. 12174/03, §§ 63-71, 30 July 2009; Savitskyy v. Ukraine, no. 38773/05, §§ 121-122, 26 July 2012; Grinenko v. Ukraine, no. 33627/06, § 62, 15 November 2012; and Zhyzitskyy v. Ukraine, no. 57980/11, §§ 49-53, 19 February 2015). Moreover, in the case of Kaverzin v. Ukraine (no. 23893/03, §§ 173-180, 15 May 2012), the Court found that the authorities' reluctance to ensure a prompt and thorough investigation into ill-treatment complaints by criminal suspects constituted a systemic problem within the meaning of Article 46 of the Convention.

50. In view of the circumstances of the present case and its earlier case-law, the Court concludes that, in the present case, no serious effort was made to investigate the allegations of ill-treatment made by the applicant.

51. It follows that there has been a violation of Article 3 of the Convention under its procedural limb in respect of the investigation into the applicant's complaint concerning his ill-treatment by the police.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

52. The applicant complained under Articles 2 and 3 of the Convention that the authorities had failed to provide him with adequate medical assistance during his detention, placing his health and life in danger.

53. Given the applicant's death during his detention, the Court will examine the complaint from the standpoint of Article 2 of the Convention alone, as regards the authorities' obligation to protect the applicant's right to life (for a similar approach, see Kats and Others v. Ukraine, no. 29971/04, §§ 112 and 131, 18 December 2008).

54. The relevant part of Article 2 of the Convention reads as follows:

"1. Everyone's right to life shall be protected by law. …"

A. Admissibility

55. The Government submitted that this part of application was inadmissible on the grounds of non-exhaustion of domestic remedies, given that the last decision refusing to open criminal proceedings had not been challenged.

56. The applicant disagreed.

considers that the applicant sufficiently pursued a preventive domestic remedy in order to comply with the rule of exhaustion of domestic remedies. After the applicant's death, recourse to the retrospective remedy referred to by the Government was not essential for the purposes of this admissibility criterion. The Government's objection is therefore dismissed.

58. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

59. The applicant maintained the complaint.

60. The Government did not provide comments on the merits.

61. The Court reiterates that the "adequacy" of medical assistance remains the most difficult element to determine (see Blokhin v. Russia [GC], no. 47152/06, § 137, ECHR 2016). In this context, it has previously clarified that authorities must ensure that diagnosis and care are prompt and accurate (see Pokhlebin v. Ukraine, no. 35581/06, § 62, 20 May 2010, and Gorbulya v. Russia, no. 31535/09, § 62, 6 March 2014, with further references) and that – where necessitated by the nature of a medical condition – supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at successfully treating the detainee's health problems or preventing their aggravation (see, inter alia, Ukhan v. Ukraine, no. 30628/02, § 74, 18 December 2008, and Kolesnikovich v. Russia, no. 44694/13, § 70, 22 March 2016, with further references). The Court stresses that medical treatment within prison facilities must be appropriate and comparable to the quality of treatment which the State authorities have committed themselves to providing for the entirety of the population. Nevertheless, this does not mean that each detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities (see Sadretdinov v. Russia, no. 17564/06, § 67, 24 May 2016, and Konovalchuk v. Ukraine, no. 31928/15, § 52, 13 October 2016, with further references).

62. In the present case, the Court notes that on 11 August 2008, a few days after his arrest, the applicant was assessed by a medical assistant, who diagnosed him with a number of injuries (see paragraph 14 above). However, it does not appear that the applicant was provided with any medical assistance in relation to those injuries until 15 August 2008, when his health deteriorated to the point that he had to be taken to a hospital, where it was found that he had a much wider range of injuries and conditions (see paragraph 16 above). Bearing in mind the gravity of the conditions identified, nothing suggests that this delay as regards medical examination and treatment was justified.

63. The Court further notes that the applicant suffered from numerous illnesses, including hepatitis C and cirrhosis of the liver. His state of health required regular and systematic supervision and comprehensive therapeutic strategy and treatment. However, it is doubtful that such supervision and treatment was properly ensured. The Court observes that the applicant died because of several conditions, including lower lobe pneumonia complicated by an abscess and pulmonary heart disease (see paragraph 29 above). However, it does not appear that any pulmonary issue was identified by medical staff prior to his death, or that the applicant was provided with any treatment in that regard.

64. The Court has already found violations in respect of issues similar to those in the present case (see Kats and Others, cited above, § 112; Salakhov and Islyamova v. Ukraine, cited above, § 183; and Karpylenko v. Ukraine, no. 15509/12, § 93, 11 February 2016). It reiterates that when examining the State's discharge of its positive obligation to protect an applicant's health and life, it is not decisive whether or not the authorities' efforts could in principle have averted the fatal outcome (see,

66. The applicant further complained that there had been other violations of the Convention. In particular, the applicant argued that his rights under Articles 5, 6 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention had been breached. He also referred to Articles 16, 17 and 18 of the Convention.

67. Having regard to the facts of the case, the submissions of the parties and its findings under Articles 2 and 3 of the Convention, the Court considers that it has examined the main legal questions raised in the present application, and that there is no need to give a separate ruling on the remaining complaints (see, among other authorities, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], cited above, § 156, with further references).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant’s sister claimed 964 euros (EUR) in respect of pecuniary damage and EUR 80,000 in respect of non-pecuniary damage.

70. The Government contended that these claims were unfounded.

71. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. The Court further considers that the applicant suffered non-pecuniary damage which cannot be compensated for by the mere finding of a violation of Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, the Court awards the applicant’s sister EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

72. The applicant’s sister also claimed EUR 3,294 for the costs and expenses incurred before the domestic authorities and the Court. This claim consisted of costs for legal services provided by Mr O. Veremiyenko and Ms A. Mukanova.

73. The Government submitted that the claim was unfounded.

74. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award each of the above representatives the sum of EUR 500 covering costs for the proceedings before the Court. Having regard to the request of the applicant’s sister, the amounts awarded under this head should be paid directly into the bank accounts of Mr O. Veremiyenko and Ms A. Mukanova (see, for example, Khlaifia and Others v. Italy [GC], no. 16483/12, § 288, 15 December 2016).

C. Default interest

75. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the

2. Declares admissible the complaints under Articles 2 and 3 of the Convention (concerning the applicant's ill-treatment and the alleged lack of an effective investigation in that regard, as well as the authorities' alleged failure to protect the applicant's right to life);

3. Holdsthat there has been a violation of Article 3 of the Convention in respect of the applicant's ill-treatment in detention;

4. Holds that there has been a violation of Article 3 of the Convention in respect of the lack of an effective investigation into the allegation of the applicant's ill-treatment;

5. Holds that there has been a violation of Article 2 of the Convention in respect of the authorities' failure to protect the applicant's right to life;

6. Holdsthat there is no need to examine the remaining complaints under the Convention;

7. Holds

(a) that the respondent State is to pay the applicant's sister, within three months, the following amounts,to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant's sister, in respect of costs and expenses, this amount to be paid into the bank account of Mr O. Veremiyenko;

(iii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant's sister, in respect of costs and expenses, this amount to be paid into the bank account of Ms A. Mukanova;

(b) 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. Dismissesthe remainder of the claim for just satisfaction.

Done in English, and notified in writing on 17 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Síofra O'Leary
Deputy Registrar President

← CASE OF AZYUKOVSKA v. UKRAINE (European Court of Human Rights)

CASE OF MYAKOTIN v. UKRAINE (European Court of Human Rights) →

Leave a Reply

Your email address will not be published.

Comment

Name

Captcha *

Type the text displayed above:

Post Comment

Search …

APPLY TO THE COURT

EUROPEAN COURT OF HUMAN RIGHTS

How to make a valid application

If you decide to apply to the Court, please ensure that your application complies with Rule 47 of the Rules of Court, which sets out the information and documents that must be provided.

	Common Mistakes in Filling in the Application Form and How to Avoid Them
	Notes for filling in the application form (How to fill out the correct application form to apply to the European Court of Human Rights)
	Institution of proceedings – Practice Directions “Rules of the European Court of Human Rights”

LawEuro

- European Court of Human Rights
- Overview of the Case-law
- European Convention on Human Rights
- ECHR Available in French
- Official Journal of the European Union
- Factsheet
- European Union laws
- Public and Private Laws U.S.
- Science articles

RECENT POSTS

- CASE OF MININ AND OTHERS v. RUSSIA (European Court of Human Rights) Applications nos. 29120/06 and 8 others – see appended list
- CASE OF X v. THE NETHERLANDS (European Court of Human Rights) Application no. 72631/17
- Karimov and Others v. Azerbaijan – 24219/16, 56908/16 and 60139/16 (European Court of Human Rights)
- Gumenyuk and Others v. Ukraine (European Court of Human Rights)
- Gachechiladze v. Georgia – 2591/19 (European Court of Human Rights)
- Reczkowicz v. Poland (European Court of Human Rights)
- CASE OF IVKOVIĆ AND OTHERS v. SERBIA (European Court of Human Rights) Application no. 62554/19 and 4 others – see appended list

Select Category