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

FIFTH SECTION

CASE OF KUCHERUK v. UKRAINE

(Application no. 2570/04)

JUDGMENT

STRASBOURG

6 September 2007

FINAL

06/12/2007

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

In the case of Kucheruk v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr M. VILLIGER, *judges*,
and Mr J.S. PHILLIPS, *Deputy Section Registrar,*

Having deliberated in private on 10 July 2007,

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

PROCEDURE

1. The case originated in an application (no. 2570/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Vladimir Viktorovich Kucheruk ("the applicant"), on 29 December 2003.

2. The applicant, who had been granted legal aid, was represented by Mr A. P. Bushchenko, a lawyer practising in Kharkiv who submitted a power of attorney signed by the applicant. His mother also signed the form.

3. The Ukrainian Government ("the Government") were represented by their Agents, Ms Valeria Lutkovska and Mr Yuriy Zaytsev.

4. On 31 May 2005 the Court decided to communicate the application 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 FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The facts of the case

5. The applicant was born in 1980 and lives in the city of Kharkiv.

6. In 1998 the applicant was diagnosed as suffering from schizophrenia. Since then the applicant has undergone outpatient treatment at the City Psychoneurological Healthcare Centre no. 3 (hereafter “the Healthcare Centre”).

7. In March 2001 the applicant was convicted of theft and hooliganism and sentenced to one and a half year’s imprisonment suspended on probation.

1. The criminal proceedings against the applicant and his detention on remand

8. On 12 April 2002 the applicant was arrested and taken into police custody at the Kominternovskyy District Police Station on suspicion of hooliganism and theft.

9. On 15 April 2002 the police investigator assigned to the applicant’s case charged him with hooliganism and theft. On the same day, considering that there were serious suspicions against the applicant, that he had a previous conviction for similar offences and was on probation and that there was a serious risk that the applicant would commit further offences or escape trial, the judge of the Kominternovskyy District Court of Kharkiv (hereafter “the Kominternovskyy Court”) ordered the applicant’s detention on remand.

10. On that same date the applicant was examined at the City Hospital no. 13. He was found to be suffering from schizophrenia but fit for detention on remand.

11. On 16 April 2002 the applicant was brought to the Kharkiv Regional Pre-trial Detention Centre SIZO no. 27 (hereafter “the SIZO”) from the police station. On his admission the applicant was received by the SIZO medical department for observation and assessment. The prison psychiatrist diagnosed him as suffering from schizophrenia, but certified him fit for detention at the SIZO.

12. The applicant was admitted to a psychiatric ward of the medical wing of the SIZO. On 17 and 25 April 2002 he was visited by a prison therapist who prescribed him cardiovascular and systemic medication.

13. On 30 April 2002 the investigator asked the Healthcare Centre for information on whether the applicant had been known to be suffering from a mental disease. On 5 May 2002 the Healthcare Centre confirmed that the applicant had been under psychiatric treatment for schizophrenia since 1998. Relying on this information, on 13 May 2002, the investigator ordered an inpatient forensic psychiatric examination of the applicant to determine his sanity at the time of the offence.

14. The applicant was transferred to the Psychiatric Hospital no. 15 (hereafter “the Hospital”), where he was examined from 17 to 29 May 2002. On the latter date forensic experts drew up a report, which included the following findings:

> "...*Psychiatric status*
>
> The patient is available for verbal contact. However such contact is highly formal. Mimics and movements are spontaneous and incongruous. He cannot understand or appreciate the purpose of the examination or the situation in general. The patient is restless, euphoric, fidgety, talkative but incoherent in his speech. .... The patient ... roars with laughter and grimaces, sticking his tongue out. ... Sometimes he starts asking in a whisper whether he will be released, but having received the answer, asks the same question again. ... If asked about his experience after the arrest, the patient becomes restless, somewhat confused, the expression on his face becomes blank. ... His memory and intelligence cannot be tested for lack of productive contact... Sometimes he becomes tense, restless and quarrelsome....
>
> *Conclusion*
>
> 1. Mr Kucheruk currently shows symptoms of acute personality disorder in the form of a reactive state of mind.
>
> 2. It is at present impossible to determine the question of his sanity at the time of the offences on account of the complexity of the clinical manifestations of his reactive state of mind, which could also point to another mental illness.
>
> 3. Mr Kucheruk's mental state requires compulsory inpatient psychiatric treatment."

15. In early June 2002 the applicant was transferred back to the SIZO. On 6 June 2002 he was examined by the prison psychiatrist. No medication was prescribed on that occasion.

16. On 12 June 2002 the investigator requested compulsory psychiatric treatment for the applicant. On the same date the applicant's case-file was sent to the Kominternovskyy District Prosecutor's Office for approval. On 14 June 2002 the investigator's request and the case-file were received by the Kominternovskyy Court.

17. On 5 July 2002 the Kominternovskyy Court, following an adversarial trial in the presence of the applicant's lawyer, found him guilty of theft and hooliganism as charged. Referring to the experts' report of 29 May 2002, the court found that the applicant's acute personality disorder made it impossible at that stage to determine his sanity at the time of the offences and, consequently, to consider the question of punishment. The Kominternovskyy Court made an order under Article 421 of the Code of Criminal Procedure (hereafter the CCrP) committing the applicant for compulsory psychiatric treatment and suspended the criminal proceedings against him pending his recovery. The court also specified that:

> "Mr Kucheruk's preventive detention on remand is to be revoked upon his admission to the psychiatric establishment.
>
> The judgment may be appealed against to the Kharkov Regional Court of Appeal within fifteen days from its delivery."

18. On 10 July 2002 the court order of 5 July 2002 was sent to the SIZO for implementation.

2. The events of July 2002

19. In the meantime, the applicant, who was held in an ordinary cell, started to show signs of personality disorder. At the subsequent inquiry the inmates with whom he shared a cell stated that the applicant had acted in a strange way, mumbling incoherently, suddenly yelling at them or starting a fight. On 2 July 2002 the applicant assaulted one of his cellmates. On the same day he was transferred to the medical wing of the SIZO, where he shared a cell with other prisoners.

20. From 2 July 2002 onwards each new duty shift of the SIZO guards was regularly informed of the possibility of violent outbursts on the applicant's part, and of the threat he posed to other detainees, the SIZO staff and himself.

21. On 3 July 2002 the prison psychiatrist examined the applicant, diagnosed him as suffering from schizophrenia and catatonic stupor and prescribed tranquilisers, analeptics (drugs that stimulate the central nervous system) and systemic drugs. On 4 July 2002 the psychiatrist found that the applicant had recovered from the catatonic stupor, and prescribed a change in his medication.

22. On 8 July 2002 the applicant became particularly agitated, moving erratically around the cell, waving his arms, bumping into the furniture and swearing at prison guards. At 7.00 a.m. three prison guards on duty were called by the medical wing staff to deal with the applicant. Through the peephole they observed his erratic movements and, having classified them as an "outrage" (*буйство*) within the meaning of section 18 of the Law "on Detention on Remand", ordered the applicant to stand still, face the wall and put his hands behind his back. When the applicant failed to comply, the guards warned him that they were about to use force and entered the cell. The guards beat the applicant with truncheons, forced him to the floor and handcuffed him. Although a prison paramedic was called to attend to the applicant soon after the incident, there is no information that he received any treatment or medication for the injuries sustained during the struggle to restrain him.

23. In a report dated 8 July 2002 and amended, it would appear, on 15 July 2002, the three prison guards and the paramedic involved in the incident informed the Governor of the SIZO about the circumstances of the use of special police equipment (truncheons and handcuffs). In different handwriting it was added that the handcuffs were applied at 7.00 a.m. on 8 July 2002 and removed at 6.45 a.m. on 15 July 2002. At the bottom of the page, below the signatures of the officers and the paramedic, it is indicated that "distinct traces of the use of [truncheons and handcuffs] were found" and that "no other injuries ... could be detected". These notes were signed

by a certain Kh., apparently a prison doctor or paramedic, and dated 15 July 2002.

24. On 8 July 2002 the Governor ordered the applicant to be confined to a disciplinary cell for ten days for "serious breach of prison rules". Before his transfer the applicant was examined by two prison officers and a doctor, who indicated in their report that his shoulders and buttocks bore traces of injuries inflicted by truncheons. They concluded, however, that the applicant was fit to be detained in the disciplinary cell.

25. Whilst in the disciplinary cell the applicant was locked up for about twenty-three hours each day. Although the disciplinary cell was visited each day by a physician and psychiatrist, no treatment or medication was administered to him as, according to the medical records, he refused to accept them. The entries made by the prison physician in the applicant's medical record for 10, 12 and 16 July 2002 state:

> "10 July 2002 ... [the applicant] lurched towards me, stretching out his handcuffed hands...
>
> 12 July 2002 ... [the applicant] was moving quickly around the cell, bending down and trying to pull his legs between his handcuffed hands... banging his head against the wall trying to free himself from the handcuffs ...
>
> 16 July 2002 ... [the applicant] is trying to remove the handcuffs, rolling on the floor".

26. The applicant's detention in the disciplinary cell continued until his discharge from the SIZO on 17 July 2002.

3. The treatment in the psychiatric hospital

27. On 17 July 2002 the applicant was transferred to the Hospital for compulsory treatment pursuant to the Kominternovskyy Court's judgment of 5 July 2002.

28. On 27 January 2003, following a fresh assessment of the applicant's mental condition, the psychiatric commission of the Hospital recommended that his psychiatric treatment should continue.

29. On 28 February 2003, having regard to the experts' report of 29 May 2002 and the oral submissions of the doctor in attendance at the Hospital, the Kominternovskyy Court allowed the petition of the chief psychiatrist of the Hospital and ordered an extension of the applicant's compulsory psychiatric treatment pending his recovery.

30. On 2 April 2003 the applicant's mother filed a petition with the Moskovskyy District Court of Kharkiv (hereafter "the Moskovskyy Court") under Article 256 of the Code of Civil Procedure (hereafter "the CCivP") seeking to have her son declared incapable by reason of mental disorder.

31. On 26 May 2003 the psychiatric commission of the Hospital recommended that the applicant's compulsory treatment be discontinued.

32. On 28 May 2003 the Moskovskyy Court ordered a forensic psychiatric examination of the applicant under Article 258 of the CCivP in order to determine his sanity.

33. On 7 July 2003 the Kominternovskyy Court lifted the compulsory treatment order. It also indicated that criminal proceedings against the applicant should be resumed and a forensic psychiatric examination ordered to determine his sanity at the time of the offence.

34. On 1 August 2003 the pre-trial investigation against the applicant was resumed.

35. On 4 August 2003 the Hospital received the Kominternovskyy Court's ruling of 7 July 2003.

36. On 5 August 2003 the investigator requested the Kominternovskyy Court to authorise the applicant's inpatient psychiatric examination under Article 205 of the CCrP, which request was granted on 6 August 2003.

37. Both forensic examinations ordered by the Moskovskyy and Kominternovskyy Courts were completed on 1 September 2003. The psychiatric experts concluded that the applicant's mental disorder prevented him from understanding the consequences of his actions and controlling his behaviour.

38. On 2 September 2003 the applicant was discharged from the Hospital and handed over to his mother.

39. On 4 November 2003 the Kominternovskyy Court terminated the criminal proceedings against the applicant in view of his lack of criminal liability.

40. On 11 November 2003 the Moskovskyy Court allowed the mother's petition and declared the applicant legally incapacitated.

4. *The investigation into the alleged ill-treatment and unlawful detention*

41. Upon the applicant's admission to the Hospital on 17 July 2002 his mother was informed of his whereabouts. Ms Kucheruk stated that when she visited him the following day she saw that he was badly injured and could hardly move or talk. The only words he allegedly managed to utter were "[they] beat [me] severely" (*сильно били*).

42. On 25 July 2002 the applicant's mother filed a criminal complaint against the prison guards for ill-treatment of her son.

43. On 2 August 2002 the applicant's mother and a human rights activist from a local non-governmental organisation visited the applicant in his ward. They drew up a document attesting that the applicant had an injury on his head behind the left ear, several bruises on the face and forehead and deep cuts around his wrists.

44. On an unspecified date the Governor of the SIZO opened a criminal investigation into the applicant's mother's complaint. On 19 and 20 August 2002 written statements were taken from two of the inmates who had shared

an ordinary cell with the applicant, from his four cellmates in the medical wing who witnessed the incident of 8 July 2002, from three prison guards involved in that incident and from a prison paramedic. The inmates and the prison guards briefly outlined the events of 2-8 July 2002 as they are described above in paragraphs 19 and 22. The paramedic wrote that he had been called to attend to the applicant after the latter had been immobilised by the guards. He had observed truncheon marks on the applicant's shoulder blades and buttocks and marks on his wrists made by handcuffs.

45. As part of the inquiry, on 14 August 2002 the Governor of the SIZO ordered that medical evidence be obtained. On the same day the applicant was examined by an expert from the Kharkiv Forensic Medicine Institute. The expert's report stated the following:

> "*Examination*
>
> Mr Kucheruk has a 2.5x0.5 cm oblong abrasion with a thick scab on the outer part of his right wrist. The wound is horizontal. Similar abrasions are observed on the inner part of the right wrist and the outer and inner parts of the left wrist, as well as on the left elbow, the right occipital area and the inner-rear and frontal parts of the left thigh. These injuries measure from 1x0.2 cm. to 5.5x0.3 cm. ...
>
> Conclusion
>
> 1. According to the medical documents provided [by the Governor of the SIZO] it is established that Mr Kucheruk bore bruises and abrasions which had been inflicted by blunt solid objects.
>
> When Mr Kucheruk was examined on 14.08.2002 he had abrasions on his head, right foot, arms and left thigh. He also had bruises on the left eye and the left shoulder. All these injuries were inflicted by blunt solid objects. The bruises were three to five days old and the abrasions seven to ten days old...
>
> 2. Having regard to the description of the injuries in medical documents [drawn up by the SIZO staff], as well as the entries for 8 and 15 July 2002, where the injuries are not described at all, and the nature of the injuries (indicating the use of truncheons and handcuffs), it is impossible to draw any conclusions about the time of the injuries.
>
> 4. Mr Kucheruk's injuries could have been inflicted by special equipment (truncheons and handcuffs)."

46. On 21 August 2002 the Governor of the SIZO decided not to bring criminal proceedings against the guards involved in the incident, finding no wrongdoing on their part. He relied in this conclusion on the written statements made by the inmates and prison officers and the forensic report of 14 August 2002. On an unknown date the prison supervision department of the Kharkiv Regional Prosecutor's Office confirmed this decision.

47. On 4 September 2002 the applicant's mother received a letter from the Governor of the SIZO in which he informed her that no criminal investigation in respect of the accused prison officers was to be opened,

without, however, indicating the date of the relevant decision or providing a copy. In his letter the Governor also expressed the opinion that the truncheons and handcuffs had been used by the guards in accordance with the relevant regulations, to protect the SIZO staff and the applicant himself from his uncontrolled and aggressive behaviour.

48. On 26 December 2002 the Kharkiv Regional Prison Department (hereafter "the Department") informed the applicant's mother that an additional internal inquiry, undertaken, apparently, on her request, had revealed no wrongdoing on the part of the SIZO guards.

49. By a letter of 16 January 2003 the Head of the Department informed the applicant's mother that her further complaints were unsubstantiated. He referred in this connection to the inquiry carried out by the Governor of the SIZO, which had culminated in his decision of 21 August 2002. This was the first mention of the date of the Governor's decision in any official correspondence with the applicant's mother. On 8 February 2003 she requested a copy of the final report and access to the case-file. On 25 February 2003 the Head of the Department rejected this request. On 27 March 2003 he rejected her second request for access to the file.

50. On 31 March 2003 the applicant's mother challenged the Governor's decision of 21 August 2002 before a court. On 27 May 2003 the Zhovtnevy District Court of Kharkiv (hereafter "the Zhovtnevy Court"), having heard the prosecutor, rejected her complaint as unsubstantiated. The applicant's mother appealed.

51. In the course of the appeal proceedings, on 14 August 2003, the applicant's lawyer was, for the first time, given access to the case-file.

52. On 18 November 2003 the Kharkiv Regional Court of Appeal quashed the decision of the Zhovtnevy Court on the grounds that it had been taken in the complainant's absence, and remitted the case for fresh consideration.

53. On 24 December 2003 the Zhovtnevy Court found, without giving any details, that the inquiry was flawed. It reopened the case and handed it to the Governor of the SIZO for further investigation.

54. On 4 March 2004 the Governor, referring to the same evidence as before, discontinued the criminal proceedings again. His final report indicated, *inter alia*, that:

> "...Mr Kucheruk arrived at the [SIZO] with a medical certificate, issued by the city hospital no. 13 on 15 April 2002, according to which he was fit to be detained in a SIZO. ... On the basis of this information Mr Kucheruk was placed in a psychiatric ward of the medical wing.
>
> On 16 April 2002 Mr Kucheruk was examined by [the prison psychiatrist] who diagnosed him as suffering from schizophrenia. At the time of the examination his mental condition was satisfactory and he did not need any active treatment."

As to the applicant's conduct after the incident of 2 July 2002 and his transfer from the ordinary cell to the medical wing, the Governor stated that:

> "On 3 July 2002 Mr Kucheruk was examined by [the prison psychiatrist], who found him suffering from schizophrenia and catatonic stupor and prescribed the relevant medication.
>
> On 4 July 2002 the patient recovered from the catatonic stupor ... but continued to have tense relations with his cellmates.
>
> Accordingly, based on general information about Mr Kucheruk's behaviour, the officers on duty were warned daily about his possible violent outbursts against his cellmates or the SIZO staff."

The report of 4 March 2004 further states that, following the incident of 8 July 2002, the applicant was placed in the disciplinary cell for serious breach of prison rules. Having regard to the applicant's mental condition, the paramedic who examined him after the incident had recommended keeping him handcuffed.

As regards the time of the applicant's discharge to the Hospital, the Governor indicated that:

> "The [Kominternovskyy Court's judgment of 5 July 2002] did not contain any provision for immediate execution. It set out a fifteen-day time limit for appeal; therefore the term provided by Article 404 of the Code of Criminal Procedure for execution of this judgment was complied with as the applicant was transferred to the [Hospital] on 17 July 2002."

55. On 1 October 2004 the Zhovtnevy Court, acting on a complaint lodged by the applicant's lawyer, quashed that decision and ordered further investigations, pointing out the following irregularities:

- failure to take account of the submissions of the applicant's mother concerning the applicant's state of health in July-August 2002;
- failure to measure the lawfulness and reasonableness of the guards' conduct against the legal principle prohibiting degrading treatment;
- failure to determine whether the applicant's misbehaviour constituted a breach of prison rules that warranted his placement in a disciplinary cell;
- failure to consider the proportionality of the force used;
- the fact that the investigation was conducted by the Governor of the SIZO, a person whose impartiality was highly doubtful.

56. The case-file was transmitted to the Kharkiv Regional Prosecutor's Office for additional investigations. In a final report of 1 November 2004 a prosecutor of the prison supervision department of the Kharkiv Regional Prosecutor's Office came to a similar conclusion to that reached by the Governor of the SIZO, that the applicant was fit for detention in the SIZO and the prison officers concerned acted properly on the basis of the orders they were given and the relevant regulations. The prosecutor referred to the evidence collected by the Governor's investigation and the statements of the

prison psychiatrist that certain drugs should normally be used to pacify mentally ill patients, and when no drugs were available, special equipment could be used to immobilise such patients. The prosecutor further agreed with the Governor's finding that the applicant's conduct constituted a flagrant violation of prison rules and warranted his detention in the disciplinary cell. The applicant's mother appealed.

57. On 30 July 2005 the Chervonozavodskyy District Court of Kharkiv (hereafter "the Chervonozavodskyy Court") quashed that report and ordered further investigations as the authorities had failed to follow the instructions of the Zhovtnevy Court.

58. On 6 September 2005 a senior prosecutor of the prison supervision department of the Kharkiv Regional Prosecutor's Office, following additional investigation, decided not to bring any charges against the prison officials. His final report repeated, in substance, the findings in the report of 1 November 2004 that the applicant had been fit to be detained in the SIZO and that there had been no wrongdoing on the part of the prison authorities. The senior prosecutor stated, *inter alia*, that the applicant's detention after 12 June 2002 had been based on a letter from the Head of the Investigative Department of the Kominternovskyy District Police Station that the applicant's case-file had been sent to the Kominternovskyy District Prosecutor's Office for approval. As to the applicant's ten-day confinement in the disciplinary cell, he considered that "the severity of the punishment imposed was fully in keeping with the nature of the offence committed". He further considered that the applicant had been held in the SIZO until 17 July 2002 because of the fifteen-day time-limit for entry into force of the judgment of 5 July 2002. Although the forensic report of 14 August 2002 recorded the use of handcuffs by the prison guards, the investigation did not establish whether or not, between 8 and 15 July 2002, the applicant was handcuffed all the time. The senior prosecutor concluded that there was no evidence that the prison officers had acted in bad faith or in violation of the relevant laws and regulations when restraining the applicant with truncheons and handcuffs, putting him in a disciplinary cell and holding him in the SIZO until 17 July 2002.

59. On 28 October 2005 the applicant's mother challenged that report before the Chervonozavodskyy Court, where the proceedings are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine

60. The relevant extracts from the Constitution read as follows:

“**Article 28**

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

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

Article 29

Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law...”

B. Criminal Code of 5 April 2001

1. Mentally ill offenders

61. The text of Article 19 and Articles 92 and 94-96 of the Criminal Code of 5 April 2001 can be found in the Court’s judgment in the case of *Gorshkov v. Ukraine* (no. 67531/01, § 28, 8 November 2005).

2. Criminal liability for excess of power and official negligence

62. Article 365 of the Code provides:

“Excess of authority or official powers, that is the wilful commission by an official of acts which patently exceed the rights and powers vested in him or her and which cause any significant damage to the legally protected rights and interests of individual citizens, state and public interests or those of legal entities shall be punishable ....”

63. Article 367 of the Code prescribes liability for official negligence:

“Neglect of official duty, that is failure to perform, or improper performance, by an official of his or her official duties due to negligence, where it causes any significant damage to the legally protected rights and interests of individual citizens, state and public interests or those of legal entities, shall be punishable ...”

C. Code of Criminal Procedure, 1960

1. Investigations into offences

64. The relevant provisions of the CCrP regulating the conduct of pre-trial investigation proceedings are summarised in the Court’s judgment in the case of *Sergey Shevchenko v. Ukraine* (no. 32478/02, §§ 38 and 39, 4 April 2006),

65. Article 101 enumerates the bodies responsible for inquiries. Normally these functions are discharged by the police. However, paragraph 5 of Article 101 also vests this power in the governors of prisons and pre-trial detention centres, who conduct inquiries into offences committed by prison officials involving infringements of prison rules.

2. Preventive measures

66. Articles 148 (purpose of and grounds for taking preventive measures), 149 (list of preventive measures), 150 (circumstances that should be taken into account in choosing a preventive measure) and 156 (time-limits for holding in custody) of the CCrP are to be found in the *Nevmerzhitsky v. Ukraine* judgment (no. 54825/00, § 53, ECHR 2005).

67. Article 155 of the CCrP insofar as relevant provides as follows:

> "Detention on remand as a preventive measure shall be applied in cases concerning offences for which the law envisages a penalty of more than three years' imprisonment...
>
> Persons against whom a detention on remand order is issued shall be held in pre-trial detention centres."

68. Article 237 of the CCrP insofar as relevant provides:

> "In a case received from the prosecutor [with the bill of indictment], the judge in a preliminary hearing shall resolve the following questions:
>
> ...4) whether there are any reasons to change, terminate or apply a preventive measure."

69. Article 241 of the CCrP reads as follows:

> "A preparatory hearing shall be held within 10 days or, in complex cases, 30 days of receipt of the case-file by the court."

3. Inpatient expert examination by a medical institution

70. Article 205 of the CCrP provides:

> "If forensic medical or psychiatric examination necessitates long-term monitoring or assessment of the suspect, the court, on the investigator's request and with the prosecutor's authorisation, may order the suspect's commitment to the relevant medical institution."

4. Appeal procedure

71. Article 347 of the CCrP provides:

> "An appeal may be lodged against:
>
> ...2) a court order concerning the application of ... compulsory medical treatment."

72. According to Article 349 of the CCrP:

"An appeal against a judgment, ruling or order of a first instance court ... may be filed within fifteen days of its adoption..."

5. *Execution of orders*

73. Article 402 of the CCrP reads as follows:

"The court order or ruling shall become final and enforceable upon the expiry of the time-limit for appeal."

6. *Application of compulsory medical measures*

74. Articles 416 (Grounds for the application of measures of compulsory medical treatment) and 422 (Termination or modification of the applicable compulsory measures of medical treatment) of the CCrP are set out in the *Gorshkov* judgment (cited above, § 31).

75. Article 424 provides as follows:

"An appeal or cassation appeal or an appellate or cassation petition by the prosecutor (*апеляційне чи касаційне подання прокурора*) against a ruling or resolution adopted by a judge or a court in the manner laid down by this Chapter, shall be entered in the ordinary manner."

76. According to Article 417 of the CCrP:

"Pre-trial investigation in cases concerning illegal acts committed by persons who are not criminally responsible or who bear only limited criminal responsibility, as well as in cases concerning offences committed by persons who become mentally ill after the events in question but before the imposition of the sentence, shall be conducted by the investigating authorities pursuant to the rules set out in Articles 111-130 and 148-222 of the present Code.

Following the completion of the pre-trial investigation, if the alleged offender is found to have no, or limited, criminal responsibility, the investigator shall draw up a ruling requesting the court to commit the person for compulsory medical treatment ... This ruling shall be sent to the prosecutor."

77. Article 418 of the CCrP reads as follows:

"Having received a case with the ruling under Article 417 of this Code, the prosecutor:

1) if he agrees with the ruling, shall confirm it and transmit the case to the court;

2) if he finds that the ... collected evidence is insufficient to reach a conclusion as to the mental condition of the accused or that the collected evidence is insufficient to prove that the illegal act was committed by the person concerned, shall return the case-file to the investigator with written instructions for further inquires."

78. Article 419 of the CCrP insofar as relevant provides:

"If the judge or the president of the relevant court who received the case-file with the request for compulsory medical treatment agrees with the investigator's ruling, he or she shall send the case directly for trial.

The trial in such cases shall be held in open hearing, with the obligatory participation of the prosecutor and defence lawyer, in accordance with rules laid down in Chapters 25 and 26 [Articles 283-317] of this Code."

79. According to Article 421 of the CCrP:

"When it is established that a [mentally ill] person has committed an illegal act or a person became mentally ill after committing an offence ... the court shall commit him or her for compulsory medical measures, indicating exactly what measure should be applied."

D. Code of Civil Procedure, 1963

80. Article 221 of the CCivP provides in its relevant part:

"The court must suspend its examination of a case if ...it is impossible to hear the case before other civil, criminal or administrative proceedings have been terminated."

81. Article 256 of the CCivP provides that close relatives of a mentally ill person, associations, a prosecutor or a local board of tutorship may apply to the court with a view to declaring that person incapable by reason of mental disorder.

82. According to Article 257 of the CCivP a petition filed under Article 256 should include evidence of the mental disorder which prevents the person concerned from understanding his or her actions and conducting his or her affairs.

83. Article 258 of the CCivP empowers the court to order forensic psychiatric examination of the person concerned. In exceptional cases, when the person overtly avoids examination, the court may order his or her compulsory psychiatric examination.

E. 1993 Pre-trial Detention Act

84. Section 8 of the Act provides that:

"Detained persons shall be held in ordinary cells. In exceptional circumstances ... and for medical reasons, following a reasoned decision of the relevant investigating authority or governor of the relevant pre-trial detention facility, a detainee may be placed in solitary confinement."

85. Section 18 of the Act sets out rules governing the use of force by prison guards. Officers in pre-trial detention facilities are entitled to use physical force, police equipment and firearms against the inmates. The use of force should be preceded by a warning if the circumstances so allow. If the use of force cannot be avoided, it should not exceed the level necessary for fulfilment by the officers of their duties and should be carried out so as to inflict as little injury as possible. Prison officers are entitled to use force and special equipment, including unarmed combat, handcuffs, truncheons

etc., with a view to putting an end to physical resistance, violence, outrage (*буйство*) and opposition to the lawful directions of the administration of the detention facility when other means of achieving a legitimate objective prove ineffective.

Special police equipment and firearms must not be used on women with visible signs of pregnancy, elderly persons, persons with visible signs of invalidity or underage persons, except in the event of an assault by a group of these persons which is dangerous for the lives of the prison officers or others.

86. A governor has the power to place a prisoner in a disciplinary cell where this is necessary to put an end to physical resistance, violence, outrage and opposition to the lawful directions of the administration.

87. The choice of the means to be used and the time and intensity of their use depends on the circumstances, the nature of the wrongdoing and the personal characteristics of the perpetrator.

88. An officer who uses force or special equipment must immediately report it to his direct supervisor and the relevant prosecutor. All persons against whom the above means have been used should be immediately examined by a medical practitioner.

F. Psychiatric Medical Assistance Act, 2000

89. The relevant provisions of the Act are quoted in the case of *Gorshkov* (cited above, § 30).

G. Resolution no. 49 of the Cabinet of Ministers of Ukraine, of 27 February 1991, on the Rules of Application of Special Means in Maintaining Public Order

90. Paragraph 4 of the Resolution enumerates the cases when special means may be used, including when they are necessary for putting an end to resistance to police officers or other persons carrying out official public order duties.

91. Paragraph 6 of the Resolution provides that decisions to use special means must be taken by an official responsible for maintening public order or by the head of the particular operation. A person taking such a decision must immediately inform his or her superiors in writing.

92. Paragraph 7 of the Resolution obliges the police officers who applied the special means to ensure immediate medical assistance to the victims.

93. Paragraph 14 of the Resolution prohibits the application of rubber truncheons to the head, neck, collar area, stomach and genitalia.

H. Decree No. 346/877 of the Ministry of Health of 19 December 2000 on measures for the prevention of illegal actions of persons who suffer from severe mental disorder

94. According to Paragraph 2.5 of Decree no. 346/877 psychiatric establishments are obliged to inform the relevant local police department of the imminent release of mentally ill persons.

I. Decree No. 397 of the Ministry of Health

95. The relevant extracts from Decree no. 397 of the Ministry of Health of 8 August 2001 on the procedure for applying compulsory measures of medical treatment in psychiatric hospitals to persons who have mental illnesses and who have committed socially dangerous acts (approved by the Supreme Court of Ukraine, the Ministry of Internal Affairs and the General Prosecution Service) are set out in *Gorshkov* (cited above, § 32).

96. The relevant extracts from the Instruction on the procedure for applying measures of compulsory medical treatment to persons of unsound mind who have committed socially dangerous acts (adopted by Decree No. 397 of the Ministry of Health) are also quoted in the case of *Gorshkov* (cited above, § 33).

J. Resolution no. 15 of the Plenary Supreme Court on judicial practice in cases involving excess of power, of 26 December 2003

97. According to Section 8 of the Resolution, force, as an element of excess of power, can be both physical and psychological. Physical force may involve, *inter alia*, unlawful deprivation of liberty and inflicting blows.

98. Section 9 of the Resolution provides that illegal actions constituting an excess of power fall within the scope of criminal law when they are "painful or abusive", and the Supreme Court has declared that such actions are to be interpreted as "painful or abusive" when they inflict physical pain or moral suffering on the victim. These actions can involve, *inter alia*, the unlawful use of special police equipment such as truncheons and handcuffs.

K. Resolution no. 2 of the Plenary Supreme Court on judicial practice in the application of compulsory medical measures, of 19 March 1983 (with amendments of 4 June 1993), and Resolution no. 7 of the Plenary Supreme Court on practical application by the courts of compulsory medical measures and compulsory treatment, of 3 June 2005

99. The 1983 Resolution was valid at the material time. In 2005 it was replaced by Resolution no. 7 of 3 June 2005.

100. In both Resolutions (1983 and 2005 - Sections 9 and 15 respectively) the Supreme Court, interpreting domestic law regulating the types of compulsory measures of a medical character, stated that a court which orders compulsory treatment of a person against whom a preventive measure had been taken should simultaneously order the discontinuation of the preventive measure from the moment of the person's admission to a psychiatric institution.

L. Observance of human rights in preliminary detention facilities. Extracts from the reports of the Commissioner for Human Rights of the Parliament of Ukraine in 2001 (first annual report) and 2002 (second annual report)

101. The relevant provisions of the first and second annual reports are set out in the *Nevmerzhitsky* judgment (cited above, §§ 60 and 61).

III. RELEVANT INTERNATIONAL DOCUMENTATION

102. The relevant extracts from Committee of Ministers Recommendation No. R (87) 3 on the European Prison Rules (adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies) 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 heath 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.

Discipline and punishment

38. 1. Punishment by disciplinary confinement and any other punishment which might have an adverse effect on the physical or mental health of the prisoner shall only be imposed if the medical officer, after examination, certifies in writing that the prisoner is fit to sustain it.

Instruments of restraint

39. The use of chains and irons shall be prohibited. Handcuffs, restraint-jackets and other body restraints shall never be applied as a punishment. They shall not be used except in the following circumstances:

a. if necessary, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority unless that authority decides otherwise;

b. on medical grounds, by direction and under the supervision of the medical officer;

c. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

40. The patterns and manner of use of the instruments of restraint authorised in the preceding paragraph shall be decided by law or regulation. Such instruments must not be applied for any longer time than is strictly necessary.

Insane and mentally abnormal prisoners

100. 1. Persons who are found to be insane should not be detained in prisons and arrangements shall be made to remove them to appropriate establishments for the mentally ill as soon as possible.

2. Specialised institutions or sections under medical management should be available for the observation and treatment of prisoners suffering gravely from any other mental disease or abnormality.

3. The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all prisoners who are in need of such treatment."

103. The relevant extracts from the CPT Report [CPT/Inf (2004) 34] on a visit to Ukraine from 10 to 26 September 2000 read as follows:

"The CPT would point out that all mentally ill prisoners, including those serving life sentences, should be cared for and receive treatment in a hospital facility adequately equipped and with qualified staff. Forcing such prisoners to stay in prison, where they cannot receive appropriate treatment for lack of suitable facilities or because such a facility refuses to accept them, is an unacceptable state of affairs. The transfer of mentally ill prisoners to an appropriate psychiatric facility should be considered a high priority."

THE LAW

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

104. The applicant complained of unreasonable and disproportionate use of force by the prison guards during detention, his handcuffing whilst in a disciplinary cell, allegedly inadequate medical care and assistance whilst in detention and the lack of an effective and independent investigation into the alleged ill-treatment.

He relied on Article 3 of the Convention, which reads as follows:

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

The applicant also invoked Article 13 of the Convention, which provides 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

1. Exhaustion of domestic remedies

105. The Government contended that the applicant's complaints about ill-treatment were premature since the criminal investigations into the matter were still pending. They also pointed to the possibility of suing the authorities for damages in civil proceedings.

106. The Government also maintained that the applicant had failed to exhaust the domestic remedies available to him as required by Article 35 § 1 of the Convention, in that he had omitted to bring civil proceedings in respect of his conditions of detention or to raise before the administration of the SIZO the question of his transfer to another cell or the inadequacy of his conditions. Nor had he raised any complaint about the inadequate medical conditions in the context of the criminal proceedings against the SIZO officials.

107. The applicant stated that the remedies referred to by the Government were ineffective in his case.

108. The Court 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 need be had to remedies which are inadequate or ineffective (see the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, §§ 51-52, and the *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 65-67).

109. 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 amongst 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 the *Akdivar and Others* judgment cited above, p. 1211, § 69, and the *Aksoy* judgment cited above, p. 2276, §§ 53 and 54).

110. The Court will first consider the Government's submissions concerning the applicant's complaints about the allegedly disproportionate use of force and handcuffing.

111. The respondent Government invoked two avenues of recourse for the applicant, namely a claim for damages and a criminal complaint.

112. As regards the first alleged remedy, the Court notes that the Government have failed to specify under which procedure (civil, administrative or other) such an action could be filed with the court. No decision has been produced to the Court in which the domestic courts were able, in the absence of any results from the criminal investigation, to consider the merits of a claim relating to alleged serious criminal actions. Moreover, Article 221 of the CCivP in effect prohibits a finding in a civil case while the criminal case on the related facts is still pending (see paragraph 78 above). In the light of the above the Court finds that the applicant was not obliged to pursue a civil action in order to exhaust domestic remedies, and the preliminary objection is in this respect unfounded.

113. As regards criminal law remedies, the Court observes that a criminal investigation was instituted into the circumstances of the

applicant's detention in the SIZO and, in particular, into the incident of 8 July 2002. The first two rounds of the preliminary inquires were conducted by the Governor of the SIZO, who represented the authority involved. The prosecution's investigation commenced over two years and two months after the impugned events and still continues. It did not lead to charges being brought against any officials.

114. 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 about which the applicant complains. These issues are closely linked to the merits of the applicant's complaints under Articles 3 and 13 of the Convention. In these circumstances, it joins the preliminary objection to the merits of the applicant's complaints.

115. The Court will next examine the Government's arguments concerning the non-exhaustion of domestic remedies with respect to the complaints about the medical conditions of detention. The Government contended that the applicant should have complained to the prison authorities about the medical treatment, that he could have brought a civil action against the SIZO, and that he should have raised the issue in the subsequent investigation.

116. The Court first notes that, while it is true that the applicant did not lodge any complaints with the SIZO administration regarding his conditions (compare and contrast *Khokhlich v. Ukraine*, no. 41707/98, § 151, 29 April 2003), it should nevertheless be taken into account that during the period of detention in an ordinary cell (from early June to 2 July 2002, see paragraphs 15 and 19 above), which appears to give rise to most of the applicant's complaints, his mental condition was such as to impair substantially his ability to communicate with the outside world. It should further be noted that from the very outset the prison authorities were well aware of the applicant's mental problems and, after his forensic assessment in May 2002, that he should not be detained in ordinary prison hospital facilities or in an ordinary cell. The Court notes that the applicant had been diagnosed as suffering from schizophrenia at least from 15 April 2002, and handcuffs were applied to him at the latest on 8 July 2002. In the circumstances the applicant cannot be expected to have raised with the SIZO authorities specific complaints about the conditions. Accordingly, the Government have not shown that, in the particular circumstances, the applicant was required to address the prison authorities with complaints. This argument, therefore, should be rejected.

117. As to the possibility of lodging a civil action concerning the conditions of detention, the Court reiterates that Article 35 § 1 requires not only that a domestic remedy is available, but that it is effective to redress the alleged breach of an individual's Convention rights. The Court notes in this respect that the Government have not shown how recourse to civil

proceedings could have brought about an improvement in the applicant's conditions of detention. Nor have they supplied any example from domestic case-law to show that such proceedings by a prisoner would have had any prospect of success (see *Khokhlich*, cited above § 153). The Court, therefore, rejects this submission.

118. In so far as the Government argued that the applicant failed expressly to raise his complaint about the medical conditions before the prosecution authorities investigating the conduct of the prison officials, it should be noted that the issue of the applicant being detained in the SIZO, that is, an establishment which was not primarily designed to hold mentally ill prisoners, lay at the heart of his mother's criminal complaint. The question of the compatibility of the applicant's conditions of detention with the domestic legal order was therefore fully before the domestic authorities, and the Government's submission must be rejected.

119. The Court, therefore, joins the preliminary objection concerning the effectiveness of the criminal investigation to the merits of the applicant's complaints under Articles 3 and 13 of the Convention and dismisses the remainder of Government's objections regarding the alleged non-exhaustion of domestic remedies.

2. Compliance with the six-month rule

120. The Government submitted that, since the applicant claimed that there had been no effective remedy, his complaint about the disproportionate use of force should have been introduced within six months from the act alleged to constitute a violation of the Convention. They submitted that the impugned incident took place on 8 July 2002 whereas the application was introduced to the Court on 29 December 2003, more than six months later.

As to the complaint about the medical conditions, the Government suggested that the six-month period runs from 25 July 2002, when the applicant's mother lodged her criminal complaint.

121. The applicant maintained that he had never claimed that there was no remedy as regards Article 3 in principle. He rather argued that this remedy, a criminal investigation, proved ineffective in practice in his case.

122. Insofar as the Government argues that the complaints about the disproportionate use of force have been filed out of time in that they were introduced more than six months after the impugned events, the Court agrees with the Government that where no domestic remedy is available the six-month time-limit contained in Article 35 § 1 of the Convention in principle runs from the date of the act complained of in the application (cf. *Al Akidi v. Bulgaria* (dec.), no. 35825/97, 19 September 2000).

123. However, special considerations could apply in exceptional cases where applicants first avail themselves of a domestic remedy and only at a later stage become aware, or should become aware, of the circumstances

which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the applicant became aware, or should have become aware, of those circumstances (cf. Ekinci v. Turkey (dec.), no. 27602/95, 8 June 1999).

124. In the present case, it appears that soon after the incident of 8 July 2002 certain investigative steps into the allegedly disproportionate use of force were in fact taken, which included the carrying out of a forensic assessment of the applicant's injuries and the taking of evidence from witnesses and the officers involved in the incident. These investigations also concerned circumstances related to the applicant's medical conditions and handcuffing (see paragraphs 46-48 above). It does not appear unreasonable to the Court for the applicant, initially at least, to have awaited the results of the criminal investigation by the competent domestic authorities. The Court accepts that it was only after he had received a second unsatisfactory answer from the Governor of the SIZO (i.e. the very person whose decision not to prosecute he had successfully challenged in court), that the applicant was provided, on 4 March 2004, with a reason seriously to doubt the effectiveness of this investigation. In these circumstances, the Court accepts that the six-month time-limit within the meaning of Article 35 § 1 of the Convention started to run as from 4 March 2004 at the earliest and, consequently, that the complaints under Article 3 of the Convention have been brought within that time-limit.

125. As regards the Government's arguments concerning the medical conditions of detention, the Court notes that, as was stated above (see paragraph 118), this issue was put forward by the applicant in his criminal complaint. The question of the adequacy of the medical treatment received by the applicant during his detention in the SIZO was addressed in the course of criminal inquires instituted upon this complaint (see paragraphs 54, 56 and 58 above). Therefore, the above considerations concerning these criminal proceedings' impact on the determination of the starting point for calculation of the six-month period (see paragraphs 122-124) are fully applicable here.

126. The Court therefore dismisses this objection.

3. Conclusion

127. The Court 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. *Article 3 of the Convention*

a. Incident of 8 July 2002

128. The applicant maintained that the authorities knew or ought to have known about his deteriorating mental condition and that they had had ample time to consider appropriate measures to prevent his violent outburst on 8 July 2002. He considered that the use of force was unnecessary and excessive. The applicant also questioned the impartiality of the August 2002 forensic report.

129. The Government stated that on 8 July 2002 the guards had had recourse to force to restrain the applicant only to the extent that had been made necessary by his own conduct. In particular, the truncheons were used strictly in accordance with the relevant domestic regulations. The Government also expressed doubt as to the validity of the document drawn up by the applicant and the human rights activist, recording the applicant's injuries. The Government emphasised that according to the forensic report of 14 August 2002 the applicant's injuries were inflicted after 17 July 2002, i.e. after his transfer from the SIZO.

130. The Court notes that the parties agreed that the applicant sustained certain bodily injuries during the struggle on 8 July 2002. However, the extent of those injuries is in dispute between them. The Court notes that according to the prison doctors' records of 8 July 2002 the applicant's shoulders and buttocks bore "distinct traces" or "injuries" which had resulted from the use of truncheons and handcuffs (see paragraphs 23 and 24 above). This indicates that the applicant's injuries were sufficiently serious to bring this case within the scope of Article 3. There is, therefore, no need to resolve the disagreement about the actual extent of the bodily harm sustained by the applicant, since the following considerations would in any event apply.

131. The Court recalls that in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (cf. *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 38, and *Berliński v. Poland*, nos. 27715/95 and 30209/96, § 59, 20 June 2002).

132. In the instant case the applicant was injured when the prison guards attempted to put an end to his agitated behaviour by beating him with rubber truncheons. It is to be noted that after the applicant's assault on one of the detainees on 2 July 2002 the duty shifts of the SIZO were regularly informed about the possibility of his violent outbursts. The applicant's agitated behaviour, therefore, was by no means an unexpected development

to which the authorities might have been called upon to react without prior preparation. The three guards who were involved outnumbered the applicant. Furthermore, at no stage of the proceedings did any witnesses state that the applicant attempted to attack the officers or fellow inmates (see, *mutatis mutandis*, *Rehbock v. Slovenia*, no. 29462/95, § 72, ECHR 2000-XII) or that his erratic movements, classified by the guards as "outrage" (*буйство*), constituted any danger to their health or that of the applicant's cellmates. Against this background the Court finds that the use of truncheons in the present case was unjustified and amounted to inhuman treatment.

133. There has therefore been a violation of Article 3 of the Convention.

b. Handcuffing in the disciplinary cell

134. The applicant submitted that the conditions of his detention in the disciplinary cell were inadequate. In particular he maintained that his constant handcuffing and the insufficiency of the medical assistance afforded to him in the disciplinary cell amounted to a violation of Article 3.

135. The Government maintained that the applicant's handcuffing whilst in the disciplinary cell from 8 to 15 July 2002 was a proportionate and necessary measure in the circumstances, given the applicant's conduct and the threat which he posed to himself and others. Although the applicant received no medication following the incident on 8 July 2002, due to his refusal of any treatment, his state of health was under constant medical supervision.

136. The Government also maintained that the applicant's placement in the disciplinary cell did not constitute punishment. This measure was aimed at restraining the applicant and isolating him from other detainees to prevent him from causing any further harm to them or himself.

137. The Court recalls that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV).

138. In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will also have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (cf. *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-22, § 55). This has also been described as involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 66, § 167).

139. The Court next notes that the use of handcuffs or other instruments of restraint does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary (cf. *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 56, and *Mathew v. the Netherlands*, no. 24919/03, § 180, ECHR 2005). Moreover, a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria,* judgment of 24 September 1992, Series A no. 244, § 83). In this latter respect Court must ascertain that the procedural guarantees for the decision to restrain the applicant are complied with. Moreover, the manner in which the applicant is subjected to the measure in issue should not go beyond the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention (see, *mutatis mutandis*, *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, ECHR 2005).

140. Turning to the circumstances of the present case, the Court recalls that the applicant was suffering from chronic schizophrenia, a fact which was known to the authorities at least from 15 April 2002. The history of his detention in the SIZO discloses episodes of disturbed behaviour, including aggressive and violent outbursts. During the incident of 8 July 2002 the applicant, who at that time was detained in a medical cell under the supervision of the prison psychiatrist, was struck with truncheons and handcuffed. The applicant was then put in a disciplinary cell for nine days – seven of which (until 15 July 2002) he spent handcuffed – allegedly as a medically acceptable precaution against his violent behaviour.

141. The Court notes that when ordering the applicant's solitary confinement and his around the clock handcuffing – the Government's submissions that the handcuffs were removed during meals are not supported by any evidence – the prison authorities relied only on the opinion of a paramedic and a doctor unqualified in psychiatry. The documents, provided by the parties, show that it was not until 10 July 2002, i.e. two days into the applicant's detention in a disciplinary cell, that he was visited by a prison psychiatrist (see paragraph 25 above). Therefore, at the time when the handcuffing was ordered, the prison authorities made no reference to a psychiatrist for advice as to either the future treatment of the applicant or his fitness for such measures. Nor is there any indication that the psychiatrist's opinion was requested at any subsequent stage or that the doctor who attended the applicant in the disciplinary cell carried out any specific follow-up supervision of the necessity of the measures concerned or had a say in the decision as to when they should be discontinued.

142. The need for a professional input in this case was of particular importance since, as it appears from the prison psychiatrist's submissions at the subsequent investigation (see paragraph 56 above), handcuffing was not a normal method of restraining mentally ill persons and was applied only due to the lack of more suitable instruments.

143. The Court, next, cannot agree with the Government that the handcuffing could be justified by the danger posed by the applicant to his surroundings. The applicant was locked up for at least 23 hours a day in a solitary cell and only the SIZO staff had access to him. Moreover, despite his agitated behaviour in that cell, there is no indication that the applicant ever attempted to assault any of the prison officers and doctors who visited him.

144. As regards the Government's argument that the handcuffing was aimed at preventing the applicant from harming himself, the Court notes that, as the prison medical records show (see paragraph 25 above), not only were the handcuffs singularly ineffective in keeping the applicant from banging his head against the wall or otherwise causing harm to himself, but they gave rise to deep abrasions around the applicant's wrists (see paragraph 45 above) when he repeatedly attempted to free himself. The Court notes in this latter respect that nothing was done to prevent the applicant from acquiring the injuries or mitigating the consequences of the handcuffing. The Court is struck by the fact that, having incurred a degree of bodily harm during the restraining struggle and having been observed by the medical staff on several occasions to exhibit self-injurious behaviour, the applicant was not afforded any medical care for his injuries. The Government's argument that the applicant refused the treatment is unpersuasive, regard being had to the applicant's mental condition.

145. In the instant case the Court finds that the handcuffing of the mentally ill applicant for a period of seven days without any psychiatric justification, or any medical treatment for injuries sustained during his forced restraint and self-inflicted during the confinement in the disciplinary cell, must be regarded as constituting inhuman and degrading treatment.

146. In the light of the above, the Court considers that there has been a violation of Article 3 of the Convention.

c. Medical assistance and treatment provided for the applicant

147. The applicant submitted that he had not been provided with necessary medical treatment in the course of his detention in the SIZO from 16 April 2002 to 17 May 2002 and again from early June 2002 until 17 July 2002. The Government maintained that the applicant had received all necessary medical care and assistance while he was detained.

148. The Court recalls that the authorities are under an obligation to protect the health of persons deprived of liberty (see *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion

of the Commission, pp. 15-16, § 79). The lack of appropriate medical care may amount to treatment contrary to Article 3 (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII, and *Sarban v. Moldova*, no. 3456/05, § 90, 4 October 2005). In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment (see *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, p. 1966, § 66).

149. The Court next notes its findings with regard to the applicant's solitary confinement and handcuffing (see paragraphs 140-146 above), which in themselves suggest that the domestic authorities did not provide appropriate medical treatment and assistance to the applicant while he was in disciplinary detention.

150. It also notes that after the applicant's first examination on admission on 16 April 2002, following which he was placed in the psychiatric ward of the SIZO, there was no subsequent reference to a psychiatrist until 17 May 2002, when the applicant was transferred to the Hospital for forensic examination.

151. The forensic report of 29 May 2002 recommended that the applicant be given treatment in a specialised hospital. However, this recommendation was not followed immediately and in early June 2002 the applicant was transferred back to the SIZO and placed in an ordinary cell. For a month after his readmission to the SIZO the applicant was examined by a psychiatrist only on one occasion and remained in an ordinary cell until after his assault on an inmate on 2 July 2002. In the Court's view, this cannot be deemed to be adequate and reasonable medical attention, given the applicant's serious mental condition.

152. In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained on remand, amounting to inhuman and degrading treatment.

d. Effectiveness of the investigation

153. The applicant maintained the investigation into the excessive use of force by the prison guards lacked a number of crucial procedural safeguards, was not independent and lasted too long.

154. The Government submitted that the investigation into the applicant's allegations of ill-treatment was started immediately after the applicant's mother lodged her complaint. According to the Government, the course followed by the investigation, the number of measures taken and the remission of the case for further investigation by the courts, demonstrated

the intent of the State authorities to conduct a comprehensive and objective investigation.

155. The Court recalls that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others*, judgment of 28 October 1998, *Reports* 1998-VIII, § 102, and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, *Menesheva v. Russia*, no. 59261/00, § 67, ECHR 2006-...).

156. The Court finds that, in view of its findings above as regards the applicant's substantive complaint of ill-treatment (see paragraph 132 above), his allegations in this respect made before the domestic authorities were undeniably arguable. The authorities, therefore, had an obligation to carry out an effective investigation into the circumstances of the applicant's alleged maltreatment in custody.

157. The Court observes that the initial inquiry into the applicant's complaints about the ill-treatment did not satisfy the minimum requirement of independence since the investigating body – the SIZO governor – represented the authority involved. The scope of the examination was limited to establishing the fact that the guards used their special equipment in accordance with the relevant regulations. This conclusion was made on the basis of the written statements of the guards involved, taken at face value, and the outline of the events of 2 and 8 July 2002 from the inmates who shared a cell with the applicant. The forensic examination of the applicant's injuries was conducted 37 days after the use of force and was unable to establish the extent of the bodily harm sustained on that occasion.

158. Moreover, this inquiry did little to satisfy the need for public scrutiny. It is undisputed that until 16 January 2003 the applicant's mother was not even informed about the formal refusal to institute criminal proceedings. The applicant's lawyer was given access to the case-file only on 14 August 2003.

159. Although the Governor's decision of 21 August 2002 not to institute criminal proceedings was quashed by the Zhovtnevy Court as being unlawful, the additional inquires into the matter were again conducted by the same official and culminated in a similar decision. Only after the Zhovtnevy Court's decision of 1 October 2004, condemning, *inter alia*, the

lack of impartiality of such investigation, was the case taken over by the Kharkiv Regional Prosecutor's Office.

160. The Court, therefore, concludes that an independent investigation into the applicant's grievances commenced over two years and two months after the incident. Although the lateness of these proceedings did not necessarily mean that they were doomed to failure, the prosecution's investigation did not remedy the omissions of the initial stages of the proceedings. In particular, there is no indication that the inmates who had witnessed the incident were ever re-interviewed after 20 August 2002 or that any attempts were made to compensate for the lack of medical information about the injuries sustained by the applicant.

161. The inquiries into the applicant's complaints have so far lasted for five years. The prosecutor's decision of 6 September 2005 not to open an investigation was challenged by the applicant before the Chervonozavodskyy Court, where the proceedings are still pending (see paragraph 59 above).

162. The Court further notes that on three occasions the domestic courts revoked the authorities' decisions not to bring criminal proceedings against the SIZO officials on the ground of the insufficiency of inquiries. In the Court's opinion the omissions established by the domestic courts, as well as the lack of independence, promptness, and public scrutiny on the part of the investigative authorities provide a sufficient basis for the conclusion that the investigation, which has still not ended, failed to meet the minimum standards of effectiveness.

163. In these circumstances, the Court concludes that there has been a procedural violation of Article 3 of the Convention. It follows that the Government's preliminary objection (see paragraphs 105 and 114 above) must be dismissed.

2. *Article 13 of the Convention*

164. The applicant maintained that Article 13 had been violated since the State authorities failed to conduct an effective investigation into his case. He claimed that the investigation into the excessive use of force by the prison guards lacked a number of crucial procedural safeguards, was not independent and lasted too long.

165. The Government maintained that the investigation into the applicant's allegations concerning the excessive use of force was a remedy which the applicant had used effectively. Moreover, they referred to the possibility to claim damages in a civil court.

166. Having regard to its findings above under Article 3 of the Convention that the authorities have failed to carry out effective investigation into the applicant's allegations of ill-treatment (see paragraphs 156-163), 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 5 OF THE CONVENTION

167. The applicant complained that his detention in the SIZO after the expiry on 15 June 2002 of his original detention order and until his transfer to the Hospital on 17 July 2002 and his confinement in the psychiatric hospital after the revocation on 7 July 2003 of the compulsory psychiatric treatment order until his release on 2 September 2003 were unlawful within the meaning of Article 5 § 1 of the Convention, which, insofar as relevant, provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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; ...
>
> (e) the lawful detention ... of persons of unsound mind ...;"

168. The applicant also complained that he did not have access to a court with jurisdiction to review the lawfulness of his continued detention in the SIZO and psychiatric hospital. In respect of these complaints, the applicant relied on Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

1. Detention in the SIZO

169. The Government maintained that the six-month period with regard to the applicant's complaints under Article 5 §§ 1 and 4 of the Convention about the alleged irregularities of his detention on remand ran from 17 July 2002, when the applicant was discharged from the SIZO, whereas the application was filed with the Court on 29 December 2003. Therefore, the complaints about the detention between 15 June and 17 July 2002 should be declared inadmissible as being lodged out of time.

170. The applicant stated that, although his representatives knew about his arrest and detention in April 2002, they gained access to the case-file concerning criminal proceedings against the prison officers only on 14 November 2003, which should be considered as a starting point of calculation of the six-month period in respect of these complaints.

171. The Court recalls that according to the established case-law of the Convention organs, where no domestic remedy is available the six-month period runs from the act alleged to constitute a violation of the Convention; however, where it concerns a continuing situation, it runs from the end of the situation concerned (see, for example, *Antonenkov and Others v. Ukraine*, no. 14183/02, § 32, 22 November 2005).

172. The applicant's complaints under Article 5 concerning his detention on remand in the period to 17 July 2002 are based on his contention that the application of the relevant domestic law (see paragraphs 62-69 and 76-79 above) resulted in his detention in the SIZO beyond the period authorised by the court detention order. Under Article 5 § 4 he claimed that the domestic law had prevented him from challenging his detention in the SIZO on medical grounds. Both of these complaints are dependent on the state of domestic law, in respect of which no remedy lay. It is true that the applicant contended that his representatives had access to the case-file only from 14 November 2003, but given that the representatives were aware of the applicant's arrest and detention in 2002, this fact can be of no bearing in determining whether the complaint has been introduced in time. Further, the applicant's mother was informed that he had been transferred from the SIZO shortly after 17 July 2002, whereas his first letter was submitted to the Court on 29 December 2003, which is more than six months after she received the information.

173. It follows that the above complaints have been introduced out of the six-month time-limit under Article 35 § 1 of the Convention and must be rejected in accordance with Article 35 § 4.

2. *The applicant's confinement in the Hospital*

a. Article 5 § 1 of the Convention

(i). The applicant's confinement in the Hospital from 7 July to 6 August 2003

174. The Court notes that the applicant's complaint under Article 5 § 1 concerning his confinement in the Hospital for the period between 7 July 2003, when the treatment order was revoked by the Kominternovskyy Court, and 6 August 2003, when that same court ordered his compulsory forensic examination, 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.

(ii). The applicant's confinement in the Hospital after 6 August 2003

175. In accordance with the Kominternovskyy Court's order of 6 August 2003, the applicant underwent inpatient forensic examination in the Hospital which continued until 1 September 2003. On 2 September 2003 the applicant was released. The applicant complained that his deprivation of liberty during this period was not proportionate to the aim pursued. The Government stated that the applicant's detention during this period was lawful and reasonable.

176. The Court recalls that Article 5 § 1 contains an exhaustive list of permissible grounds of deprivation of liberty. However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph (cf. *Harkmann v. Estonia*, no. 2192/03, § 32, 11 July 2006). In the present case the applicant was obliged under Article 205 of the CCrP to submit himself to an inpatient psychiatric examination by the forensic experts, ordered by a court in the context of criminal proceedings against him. The Court considers that his detention may be examined under sub-paragraphs (b) (c) and (e) of Article 5 § 1 of the Convention.

177. On the evidence adduced, the Court has no cause for finding that the applicant's deprivation of liberty during the period from 6 August to 2 September 2003 was "unlawful" in the sense of not being in accordance with the relevant domestic law. Nor was it arbitrary or effected for an ulterior purpose, contrary to Article 5 § 1 read in conjunction with Article 18 of the Convention.

178. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and therefore must be rejected in accordance with Article 35 § 4.

b. Article 5 § 4 of the Convention

179. The Government maintained that the applicant could have appealed against the court order committing him for compulsory psychiatric treatment. It followed therefore that the applicant had not done all that could be expected of him to exhaust domestic remedies as required by Article 35 of the Convention, and for that reason his complaint should have been declared inadmissible. The applicant disagreed.

180. The Court notes that the applicant does not challenge his original admission to the hospital, but rather his inability to initiate a judicial review of the lawfulness and reasonableness of his continued confinement in the Hospital after 7 July 2003, when his compulsory treatment order was quashed. This objection, therefore, should be rejected.

181. The Court notes that this complaint 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.

B. Merits

1. Article 5 § 1 of the Convention

182. The applicant complained that his detention from 7 July 2003 until 6 August 2003 was unlawful.

a. Parties' submissions

183. The Government maintained that the applicant's confinement in the psychiatric hospital had been lawfully ordered by the Kominternovskyy Court on 5 July 2002. The order for compulsory treatment was reviewed and extended by that court on 28 February 2003. On 7 July 2003 the Kominternovskyy Court revoked the compulsory treatment order. However, according to the Government, that decision became final only on 22 July 2003, i.e. after the expiry of the fifteen-day time limit for appeal. On the following day a copy of the decision was sent to the Hospital on the same date. It did not reach the Hospital until 4 August 2003, a delay for which the State bears no responsibility. The Government contended that the Hospital decided not to release the applicant for two more days as it had to comply with the requirement of Decree no. 346/877 of the Ministry of Health that the police should be notified in advance about the discharge of a psychiatric patient. On 6 August 2003 the Kominternovskyy Court ordered the applicant's inpatient forensic examination, thus authorising the applicant's further confinement until 1 September 2003, when the said examination was completed.

184. Alternatively, the Government suggested that the applicant's detention between 7 July and 6 August 2003 was authorised by virtue of the need for him to undergo forensic examination in keeping with the decision of 7 July 2003, or by the ruling of the Moskovskyy Court of 28 May 2003, ordering the applicant's forensic examination under Article 258 of the CCivP.

185. The applicant contended that his detention from 7 July to 6 August 2003 was not covered by any valid court order and was thus unlawful.

b. The Court's assessment

186. As from 17 July 2002 the applicant was treated as an inpatient in the Hospital. The court order for the applicant's compulsory psychiatric treatment was revoked on 7 July 2003. However, the applicant was not released from the Hospital until 6 August 2003, when the Kominternovskyy

Court ordered his inpatient forensic examination under Article 205 of the CCrP.

(i). The applicant's confinement between 7 and 22 July 2003

187. The Government argued (see paragraph 183 above) that the court order of 7 July 2003 became final only after the expiry of the time-limit for appeal on 22 July 2003. The applicant has not challenged this view of domestic law, and the Court, in the light of the provisions of Article 402 of the CCrP read in conjunction with Articles 349 and 424 of the CCrP (see paragraphs 72, 73 and 75 above), sees no reason to demur from the Government's contention. It follows that the applicant's detention in this period was covered by the order of 5 July 2002, which remained valid until the decision to revoke it became final on 22 July 2003. Therefore, there was no violation of Article 5 § 1 during that period.

(ii). The applicant's confinement between 22 July and 6 August 2003

188. As to the period from 22 July to 6 August 2003, the Government submitted that the applicant's detention was based on the Moskovskyy and Kominternovskyy Courts' orders of 28 May 2003 and 7 July 2003 respectively, or continued on account of the need for the relevant administrative formalities. The Court will examine these arguments in turn.

189. The Moskovskyy Court's ruling of 28 May 2003 ordered the applicant's examination in the context of the civil proceedings under Article 258 of the CCivP (see paragraph 83 above). Article 258 does not expressly purport to authorise detention, and it does not appear that the court on 28 May 2003 intended that the applicant should be detained as a result of its order. Accordingly, the Court cannot accept the Government's contention that the applicant's detention between 22 July and 6 August 2006 was ordered or authorised by the Moskovskyy Court.

190. As to the Government's claim that the applicant's detention from 22 July 2003 to 6 August 2003 was based on the Kominternovskyy Court's decision of 7 July 2003, the Court observes that that decision did no more than lift a compulsory treatment order, recommend the resumption of criminal proceedings against the applicant and indicate that the applicant should be subjected to a psychiatric examination. Such a decision cannot be equated to an order authorising a person's detention and cannot serve as a legal basis for the applicant's continued detention after 22 July 2003.

191. The Government suggested that the applicant's deprivation of liberty during the period under consideration was caused by slow progress of the copy of the court order of 7 July 2003 from the Kominternovskyy Court to the Hospital and the need to warn the competent authorities about the release of a mentally ill person. The Court takes this to be an argument that, in the circumstances, the applicant's detention was still authorised by the decision of 5 July 2002. The Court reiterates that administrative

formalities connected with release cannot justify a delay of more than several hours (see *Nikolov v. Bulgaria*, no. 38884/97, § 82, 30 January 2003; see also *Giulia Manzoni v. Italy*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, § 25; *Labita v. Italy* [GC], no. 26772/95, § 172, ECHR 2000-IV, and *Quinn v. France*, judgment of 22 March 1995, Series A no. 311, § 42).

192. The Court, having regard to the absence of any account of the relevant events capable of showing difficulties in communication between the Kominternovskyy Court and the Hospital or between the Hospital and the relevant police department, rejects the Government's position that the period of the applicant's deprivation of liberty between 22 July and 6 August 2003 was justified under paragraph 1 (e) of Article 5.

193. In these circumstances, the applicant's continued detention in the Hospital after the court order committing him to compulsory psychiatric treatment was revoked could not be regarded as a first step in the execution of the order for his release and therefore did not come within sub-paragraph 1 (e), nor did it fall within any other sub-paragraph, of Article 5.

194. Accordingly, there has been a violation of Article 5 § 1 on that account.

2. *Article 5 § 4 of the Convention*

195. The applicant complained under Article 5 § 4 of the Convention that since 7 July 2003, when the court order committing him to compulsory psychiatric treatment was quashed, until his release from the Hospital on 6 August 2003 he had not been able to take proceedings to have the lawfulness of his detention decided by a judge.

196. The Government maintained that the issue of the applicant's compulsory psychiatric treatment was examined by the domestic courts on two occasions on the basis of the applications lodged after his medical examinations by competent doctors. Given the frequency of the review of the lawfulness of the applicant's compulsory medical treatment, the Government considered that Article 5 § 4 had not been breached. The applicant disagreed.

197. The Court points out that it has already considered the system of periodic review of confinement under sections 19-22 of the Psychiatric Medical Assistance Act and Chapter 34 of the CCrP in *Gorshkov v. Ukraine* (no. 67531/01, §§ 37-46, 8 November 2005), when it found that:

> "44. The Court reiterates that a key guarantee under Article 5 § 4 is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion (see, for example, *Musial v. Poland*, judgment of 25 March 1999, *Reports* 1999-II, § 43, and the aforementioned *Rakevich v. Russia* judgment, § 45). Article 5 § 4 therefore requires, in the first place, an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee's access to the judge should not

> depend on the good will of the detaining authority, activated at the discretion of the medical corps or the hospital administration.
>
> 45. Whilst the legal mechanism contained in sections 19-22 of the Psychiatric Medical Assistance Act and Chapter 34 of the Code of Criminal Procedure, in force at the material time (...), ensuring that a mental health patient is brought before a judge automatically, constitutes an important safeguard against arbitrary detention, it is insufficient on its own. Such surplus guarantees do not eliminate the need for an independent right of individual application by the patient.
>
> 46. The Court concludes that the applicant was not entitled to take proceedings to test the lawfulness of his continued detention for compulsory medical treatment by a court, as required by Article 5 § 4 of the Convention. There has, accordingly, been a violation of this provision."

198. The applicant was detained pursuant to the same legal provisions as Mr Gorshkov, and the Court sees no reason to depart from its finding in the above judgment. It considers, therefore, that there has been a violation of Article 5 § 4 in respect of the applicant's inability to take proceedings to test the lawfulness of his confinement in a psychiatric institution by a court.

199. There has, accordingly, been a violation of Article 5 § 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

200. 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

201. Under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing, together with the relevant supporting documents, failing which the Court may reject the claim in whole or in part.

(a) pecuniary damage

202. The applicant did not submit any claim under this head within the prescribed time-limit; the Court therefore makes no award.

(b) non-pecuniary damage

203. The applicant claimed 20,000 Euros (EUR) as compensation for non-pecuniary damage. His representative, Ms Kucheruk claimed EUR 10,000 in her own right.

204. The Government maintained that the claim is unsubstantiated and too high.

205. As regards the claims of Ms Kucheruk (the applicant's mother), the Court notes that Article 41 does not provide for the possibility of awarding damages to anyone save the injured party. The Court, therefore, rejects this claim.

206. The Court observes that it has found above that the authorities subjected the applicant to inhuman and degrading treatment and failed to provide a prompt and public investigation meeting the requirements of Article 3 of the Convention. It has also been established that he was deprived of liberty in violation of Article 5. The applicant must have suffered anguish and distress from these circumstances. Having regard to these considerations and to the comparable case-law (see, for example, *Nevmerzhitsky*, cited above, § 145; *Menesheva*, cited above, § 112; *Khudoyorov v. Russia*, no. 6847/02, § 224, ECHR 2005), the Court awards the applicant, on an equitable basis, EUR 20,000 for non-pecuniary damage.

B. Costs and expenses

207. The applicant claimed EUR 2,500 for the costs and expenses incurred in the domestic and Convention proceedings.

208. The Government maintained that this claim was exaggerated. Moreover, there was no indication that those costs were actually incurred.

209**.** The Court finds that the costs of the domestic and Convention proceedings claimed by the applicant were actually and necessarily incurred and reasonable as to the quantum. It, therefore, awards the full amount claimed, namely EUR 2,500, which, after the deduction of EUR 371, received by the applicant in legal aid from the Council of Europe, amounts to EUR 2,129 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objection concerning the effectiveness of the criminal investigation of the applicant's complaints under Articles 3 and 13 of the Convention;

2. *Declares* the applicant's complaints under Articles 3 and 13 of the Convention, under Article 5 § 1 of the Convention with respect to the periods of the applicant's detention from 7 July to 6 August 2003 and the complaint under Article 5 § 4 of the Convention concerning the applicant's inability to challenge in court the lawfulness of his detention

in the Kharkiv Psychiatric Hospital no. 15 admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention in respect of the prison officers' excessive use of force;

4. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicant's handcuffing whilst in detention in the disciplinary cell;

5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the lack of adequate medical treatment and assistance;

6. *Holds* that there has been a violation of Article 3 of the Convention in respect in respect of the lack of adequate investigation into the applicant's complaints of ill-treatment;

7. *Holds* that there has been no violation of Article 5 § 1 of the Convention in respect of the applicant's detention for the period from 7 to 22 July 2003

8. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention for the period from 22 July to 6 August 2003;

9. *Holds* that there has been a violation of Article 5 § 4 of the Convention with respect to the applicant's inability to take proceedings to test the lawfulness of his detention in the Kharkiv Psychiatric Hospital no. 15;

10. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

11. *Holds*
(a) that the respondent State is to pay the applicant, 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 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
(ii) EUR 2,129 (two thousand one hundred and twenty-nine euros) in respect of costs and expenses;
(iii) any tax that may be chargeable on the above amounts;
(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;

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

Done in English, and notified in writing on 6 September 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen PHILLIPS	Peer LORENZEN
Deputy Registrar	President