



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

FIFTH SECTION

CASE OF NABOYSHCHIKOV v. RUSSIA

(Application no. 21240/05)

JUDGMENT

STRASBOURG

27 October 2011

FINAL

27/01/2012

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

In the case of Naboyshchikov v. Russia,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Anatoly Kovler,

Isabelle Berro-Lefèvre,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 4 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 21240/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Sergey Viktorovich Naboyshchikov (“the applicant”), on 29 April 2005.

2. The applicant, who had been granted legal aid, was represented by Mr K.P. Krakovskiy, a lawyer practising in Moscow. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been ill-treated by State officials and that the subsequent investigation into his complaints had been ineffective.

4. On 2 March 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Rostov-on-Don.

A. The incident of 3 October 2003

6. The parties disagreed as to the course of the events that occurred on 3 October 2003. Their versions may be summarised as follows.

1. The version of the events presented by the applicant in his application form to the Court of 19 December 2005

7. On 2 October 2003 the applicant saw a road police inspector being bribed for permission to enter a restricted-access zone and informed a law-enforcement body about this incident. As no action followed on its part, the applicant decided to investigate independently the number of cars that were allowed to pass through the restricted-access zone. On the night of 3 October 2003 he was spotted by the guards of rifle division no. 16 of the Rostov extra-departmental security service of the North Caucasus Railway (*Стрелковая команда № 16 Ростовского отряда вневедомственной охраны Северо-Кавказской железной дороги*). He was searched and taken to the guardroom, where he was brutally beaten. Guard S. fired several shots at the applicant's legs with a Kalashnikov rifle, severely wounding him.

2. The version of the events presented by the Government based on the results of the domestic investigation

8. At 2 a.m. on 3 October 2003 the applicant entered the restricted-access zone guarded by rifle division no. 16 of the Rostov extra-departmental security service, which was responsible for the security of the railway bridge of the Zarechnaya-Bataysk sector of the North-Caucasus Railway.

9. The applicant set fire to a car owned by guard S. and was apprehended by the latter.

10. Guards L. and S. escorted the applicant to the guard premises. Upon entering the premises they proceeded in the direction of the guard commander's room, and guard N. stepped back into the kitchen to allow them to pass. L. was bringing up the rear.

11. Suddenly the applicant turned around and tried to stab S. with a knife. As the latter did not have enough time to take his handgun out of its holster he commanded L. to give him a rifle and warned the applicant. After repeating the warning and in view of the advancing applicant, S. fired away from the applicant, hitting a fire extinguisher which began discharging foam. The guards had difficulty seeing and breathing and left the building. After the foam began to settle down, S. entered the premises again and saw the applicant hiding behind the door frame. The applicant hopped into the corridor and again tried to stab S. S. leapt back but could not retreat further as his way was blocked by L. S., who was still holding the rifle, warned the applicant and fired at the floor below him. The applicant leapt aside but was

still threatening them. Fearing for his life S. fired two single shots, aiming at the applicant's legs. The applicant retreated to the room of the guard commander screaming that he was going to blow the place up. S. followed him and saw the applicant, who was wearing a jacket and hat belonging to the guards, sitting on a sofa with blood streaming down his legs. S. noticed that the phone cords had been cut. He ordered N. to summon the police and ambulance and, together with L., began to administer first aid. They then discovered the knife on the back of the sofa.

3. The version of the events presented by the applicant in his reply to the Government's observations

12. The applicant, who was suffering from a manic mental disorder, had a suspicion that the guards of rifle division no. 16 were aiding terrorists. On 2 October 2003, during the day, he arrived at the guarded zone on his bicycle and demanded that the guards stop letting the cars through. Having failed to achieve the desired result, at 2 a.m. on 3 October 2003 the applicant entered the restricted-access territory, where he might have tried to set fire to the car of guard S., who apprehended him while in a state of inebriation.

13. After unsuccessfully searching the applicant for weapons, S. escorted him to the guard premises where, together with L. and N., he started beating him by way of a reprisal for the damaged car. Most of the blows were delivered by kicks to the groin area. Having realised that the applicant had mental-health problems, S. fired at the applicant but missed and hit the fire extinguisher. In a state of rage S. returned to the building after the foam had settled down and fired three shots at the applicant, two of which hit his legs and one the floor. Subsequently S. planted a knife in the area to support his argument that the applicant had attacked him.

B. Aftermath of the incident and damage to the applicant's health

14. Immediately after the incident the applicant was taken to hospital, where he was diagnosed as having gunshot wounds to the upper thigh areas of both legs and to the left popliteal artery, gangrene of the lower left leg, and urethritis. His left leg was amputated on 14 October 2003 and he subsequently received second-category disabled status. The amputated extremity was disposed of, and the medical records did not contain any information about the location of the bullet entry and exit holes on it.

15. The applicant submitted statements by several friends and family members testifying that before the incident they had known him as a very healthy person in good physical condition and that he had only started complaining of pain in the groin area after the incident when they had visited him in hospital. In particular, two individuals stated that on

8 October 2003, while removing the bedpan used by the applicant, they had noticed blood in his urine.

16. On 18 November 2003 the applicant consulted an urologist from the municipal hospital who diagnosed him with post-catheter urethritis. On 22 December 2003 he was diagnosed with chronic cystitis and pyelonephritis. Bladder and urethra perforation and bladder injury were not ruled out.

17. On 24 March 2004 the applicant complained to the office of the transport prosecutor of the North Caucasus that his urogenital apparatus had been damaged as a result of the beatings by the guards on the day of the incident.

18. On various dates the medical personnel questioned during the investigation into the shooting incident stated that they had not seen any bodily injuries other than the gunshot wounds. The trousers worn by the applicant during the incident and removed later for surgery had been lost or disposed of at the hospital.

19. From 2005 to 2009 the applicant underwent in-patient treatment on several occasions, including several operations to his urogenital apparatus. At present he has to use a nephrostome (a catheter removing urine directly from the kidneys).

C. Ensuing investigation into the incident

20. On 3 October 2003 an investigator from the office of the transport prosecutor of Rostov examined the site of the incident. On the same day the guards present during the incident were tested for the presence of alcohol in their bodies using a breath alcohol testing device. S.'s data were recorded as zero.

21. On 9 October 2003 the deputy transport prosecutor of Rostov opened a criminal investigation on account of the serious bodily harm suffered by the applicant. The latter was granted the procedural status of witness.

22. The investigation was conducted by the Line Interior Office of Bataysk, Rostov Region (*ЛЮВД на станции Батайск Ростовской области*).

23. On 23 October 2003 the applicant was summoned to be questioned but refused to make any statements referring to poor health.

24. In October and November 2003 the investigation procured the results of the expert medical and ballistic forensic examinations that had been carried out and questioned the witnesses.

25. On 15 December 2003 an expert psychiatric forensic examination found that the applicant had a type of chronic paranoid schizophrenia.

26. By a decision of 9 January 2004 the investigator of the Bataysk Line Interior Office terminated the criminal proceedings against S. for lack of *corpus delicti*. The decision was based on statements by the applicant's

father and the guards present during the incident, plus the results of several expert examinations. However, on 15 March 2004 the deputy transport prosecutor of Rostov quashed that decision on account of the erroneous legal qualification of the applicant's and S.'s actions, as well as the failure to question the applicant and to collect detailed data about his personality and capabilities, and the case was returned for further investigation.

27. On 24 March 2004 the applicant filed a request to be granted victim status in the proceedings. This request was refused by the investigator on the following day on the ground that the applicant had a mental disorder. On 30 March 2004 the investigator allowed the applicant's wife to act as his lawful representative and obtained statements from the applicant.

28. On an unspecified date the applicant retained legal counsel.

29. In reply to the complaints of the applicant's counsel, on 22 April and 27 May 2004 the deputy transport prosecutor of Rostov and the deputy prosecutor of the Rostov Region respectively refused to grant the applicant victim status, arguing that the infliction of bodily harm had not been unlawful.

30. By decisions of 15 May 2004 the investigator again terminated the criminal proceedings against S. for lack of *corpus delicti* and refused to open a criminal case against the applicant, referring to his mental disorder. In particular, the decision to terminate the criminal proceedings against S. was additionally based on the statements of the applicant, the head of rifle division no. 16, the experts, the medical personnel and the police, as well as the results of re-enactments of the crime. A copy of the latter decision was sent to the applicant.

31. However, on 4 June 2004 these decisions were quashed by the supervising prosecutor, who remitted the case for further investigation. The prosecutor pointed out that there had been no adequate legal qualification of the deliberate damage to property and the murder threats in respect of the guard of the extra-departmental security service by the applicant, and that there was a need for an additional expert psychiatric examination to determine whether the applicant needed compulsory medical treatment.

32. On 11 June 2004 the investigator rejected requests by the applicant's lawyer for a copy of the decision of 15 May 2004 terminating the criminal proceedings against S. and the results of the medical and psychiatric forensic examinations. He also dismissed the lawyer's request for an expert examination of the lawfulness of the use of firearms by S., but granted his request to study the prosecutor's decision of 4 June 2004.

33. On 30 June 2004 the investigator apprised the applicant's lawyer and wife of the results of three expert psychiatric and medical forensic examinations.

34. By decisions of 7 July 2004 the investigator again terminated the criminal proceedings against S. and refused to open a criminal case against

the applicant for the same reasons as before. A copy of the latter decision was sent to the applicant.

35. Following a complaint by the applicant's wife, on 27 September 2004 the deputy prosecutor of the Rostov Region quashed the decisions of 7 July 2004 and returned the case for further investigation. The deputy prosecutor averred that the investigator had not given a legal qualification to the damage to property perpetrated by the applicant, or established the exact whereabouts of the entry and exit holes of the applicant's wounds and whether such wounds could have been caused by a single shot. According to the deputy prosecutor, the investigation had also not reconciled the contradictions between the two expert psychiatric examinations concerning the need for compulsory medical treatment of the applicant.

36. On 13 October 2004 the investigator again refused to grant the applicant victim status in the proceedings. That decision was confirmed on 5 November 2004.

37. On 28 December 2004 the investigator apprised the applicant's wife and lawyer of the results of the latest forensic medical examination. On the same day he again took decisions to terminate the criminal proceedings against S. for lack of *corpus delicti* and not to open a criminal case against the applicant on account of his mental-health status. The description of the events by the authorities remained identical throughout the investigation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure of Russia of 2002

38. Article 42 of the Code defines a victim as a person who has sustained physical, psychological or proprietary damage as the result of a criminal act. The provision further details that a victim has the right, among other things, to know about any charge brought against the accused, to participate in the investigative actions conducted at his or his representative's request, to study the criminal case materials upon completion of the investigation and copy them, to receive copies of any decisions concerning the opening, stay or termination of criminal proceedings, as well as decisions granting the status of victim or refusing to do so.

39. Article 56 of the Code lays down the definition, rights and obligations of a witness in criminal proceedings. In particular, Article 56 § 4 (5) provides that a witness is entitled to lodge requests and complaints in respect of the acts or omissions of an investigator, a prosecutor, or a court.

40. Chapter 16 of the Code lays down the procedure by which acts or decisions of a court or public official involved in criminal proceedings may be challenged. The acts or omissions of a police officer in charge of an

inquiry, an investigator, a prosecutor or a court may be challenged by “parties to criminal proceedings” or by “other persons in so far as the acts and decisions [in question] concern those persons’ interests” (Article 123). Such acts or omissions may be challenged before a prosecutor (Article 124). Decisions taken by police, investigators or prosecutors not to initiate criminal proceedings, or to terminate them, or any other decision or inaction capable of infringing upon the rights of “parties to criminal proceedings” or of “hindering an individual’s access to court” may be subject to judicial review (Article 125).

B. Rulings and decisions of the Constitutional Court of Russia

41. Ruling of the Constitutional Court no. 13-P of 29 April 1998 specifically invalidated the provision of Article 113 of the Code of Criminal Procedure of the RSFSR (in force until 2002) limiting access to judicial review of a refusal to open a criminal investigation, and conferred access to court in such matters on all persons affected.

42. Referring to its previous rulings, no. 5-P of 23 March 1999 and no. 11-P of 27 June 2000, as well as to Article 48 of the Constitution, which guarantees professional legal assistance, in its decision no. 119-O of 22 January 2004 the Constitutional Court stated that “the rights and freedoms guaranteed by the Constitution pertaining to criminal proceedings are conferred not by the formal status of a person in criminal proceedings but by the existence of certain material factors qualifying the *de facto* situation of this person as needing protection of the pertinent right”.

C. Extra-departmental security service of the Ministry of the Interior

43. The extra-departmental security service of the Ministry of the Interior was created by Government decree no. 589 of 14 August 1992 (“the Decree”).

44. Article 1 of the Decree stipulates that the extra-departmental security service was founded for the protection of private property and is guided in its actions by the Constitution of Russia, the Police Act and other federal laws, the decrees and orders of the President and the Government of the Russian Federation, the decisions of the governments of the entities of the Russian Federation, the present Decree, and the regulations of the Ministry of the Interior of Russia. Article 5 of the Decree provides that the extra-departmental security service is managed by the Department for the State Protection of Property of the Ministry of the Interior, the Extra-Departmental Security Operational Management Centre and the specialised police departments at the local level and the level of the federal entities. Article 8 of the Decree enables the officers of the

extra-departmental security service, among other things, to take individuals suspected of offences against protected property to guardrooms or to police stations in order to conduct personal searches in exceptional circumstances and to use firearms in the situations and in the manner prescribed by law.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

45. The applicant complained under Article 3 of the Convention that he had been tortured by the officers of the extra-departmental security service and that he had not been afforded effective protection by the domestic authorities. Article 3 of the Convention reads as follows:

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

A. Admissibility

1. *Submissions by the parties*

46. The Government submitted firstly that during the investigation the applicant had been apprised of his rights guaranteed by Article 56 of the Code of Criminal Procedure of Russia, namely, the right to lodge requests and bring complaints against the acts, omissions and decisions of the investigative authorities, prosecutor and court. Referring to the rulings of the Constitutional Court of Russia (described in paragraphs 41-42 above), they contended that the applicant’s procedural status of witness had not barred him from complaining to a court. They further pointed out that the applicant had not appealed to a court against any of the decisions not to institute criminal proceedings, although a court appeal had been recognised in the case of *Trubnikov v. Russia* (no. 49790/99, 14 October 2003) as an effective remedy against the arbitrary exercise of power by investigation authorities. The Government concluded that the applicant had failed to exhaust the available domestic remedies and suggested that the complaint concerning the substantive limb of Article 3 be declared inadmissible under Article 35 §§ 1 and 3 (a) of the Convention. They argued that the complaints of ineffectiveness in respect of the investigation and of lack of an effective remedy were manifestly ill-founded and should be declared inadmissible under Article 35 § 3 (a) of the Convention.

47. The applicant disagreed with the Government's arguments. He contended that he could not have appealed against the investigator's decision to a court as he had never received it due to his status of witness. In any event, his lack of access to most of the other case materials would have deprived such a remedy of any prospect of success.

2. The Court's assessment

48. The Court reiterates that the rule of exhaustion of domestic remedies under Article 35 § 1 of the Convention obliges applicants to use first the remedies which are 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 both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that 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 and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Khatsiyeva and Others v. Russia*, no. 5108/02, § 111, 17 January 2008, with further references).

49. The Court further 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, in particular, 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. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV; *Aksoy v. Turkey*, 18 December 1996, §§ 53-54, *Reports* 1996-VI; and *Tanrikulu v. Turkey* [GC], no. 23763/94, § 82, ECHR 1999-IV).

50. The Court considers that the Government's argument concerning the applicant's failure to exhaust the available domestic remedies raises issues which are closely linked to the question of the effectiveness of the investigation. Given the relevance of these issues to the substance of the

applicant's complaints under Article 3 of the Convention (see *Vladimir Romanov v. Russia*, no. 41461/02, § 53, 24 July 2008), the Court decides to join this matter to the merits.

51. The Court further notes that the application does not appear to be manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. Therefore, it must be declared admissible.

B. Merits

1. Submissions by the parties

52. The Government presented their version of the events as described above (see paragraphs 8-11) and stated that the use of firearms against the applicant had been justified as self-defence in a situation where S.'s life was being threatened. They further contended that the applicant's complaints of beatings resulting in serious bodily harm were farfetched. Finally, they submitted that the investigation into the incident had been expeditious and had included all necessary investigative measures, thus meeting the requirements laid down in the Court's case-law.

53. The applicant raised a number of objections to the Government's observations, pointing out inconsistencies and defects in the fact-finding carried out by the authorities. In particular, he stated that the knife had not been found on him during the body search carried out by the guards at the beginning of the incident and that the witnesses' accounts of the whereabouts of the weapon immediately after the incident were inconsistent. Furthermore, the knife had not been examined for fingerprints, nor had it ever been established who it belonged to. He further averred that the reasons given by the authorities to explain S.'s use of the rifle were not plausible as it would have been much easier in that situation for S. to use the handgun he was carrying at his waist. It was also unlikely, in conditions where it was difficult to breathe and see because of the foam from the fire extinguisher, that within one or two minutes he could have found and cut the phone cords, put on a jacket belonging to one of the guards and hidden behind the doorframe to further attack the guards. Upon analysing the results of the expert ballistic examination, he held them to demonstrate that he had been shot while lying on the floor. He further pointed out that the results of S.'s alcohol test showed that S. had avoided the test altogether and hence it was likely he had been in a state of inebriation. He presented statements from several individuals testifying that before the incident he had enjoyed good health and had never complained of any urogenital problems. Finally, he asserted that even if the authorities' version of his attack was true, the use of firearms against a person who obviously had mental health problems allegedly threatening a group of three robust armed men had been

unnecessary. The windows of the guardroom had been reinforced, and the only door had been lockable from the outside; it had thus been open to the guards to lock him inside and summon help.

54. As to the effectiveness of the investigation, he alleged that the authorities had tried to cover up the unlawful actions of guard S. and had failed to conduct an effective inquiry. He additionally pointed out that the proceedings had been terminated and resumed on three occasions on account of the incompleteness of the investigation.

2. The Court's assessment

(a) Alleged ill-treatment of the applicant

55. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV, and *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V). Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 of the Convention even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports* 1998-VIII).

56. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, *Series A* no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, strong presumptions of fact will arise in respect of injuries occurring during the time when an individual is kept within their control. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

57. In respect of a person deprived of his liberty or, more generally, confronted by security forces, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Tekin v. Turkey*, no. 22496/93, §§ 52 and 53, *Reports* 1998-IV; *Assenov and Others*, cited above, § 94; *Labita v. Italy* [GC], cited above, § 120; and *Güzel Şahin and Others v. Turkey*, no. 68263/01, § 46, 21 December 2006).

As such, Article 3 does not prohibit recourse to physical force by security agents during an arrest or other security operation. However, the force applied should be necessary and proportionate in the circumstances of the case (see, among many other authorities, *Rehbock v. Slovenia*, no. 29462/95, § 76, ECHR 2000-XII, and *Altay v. Turkey*, no. 22279/93, § 54, 22 May 2001).

58. In the present case, it is common ground between the parties that S., a guard of rifle division no. 16 of the Rostov extra-departmental security service of the North Caucasus Railway, severely wounded the applicant by firing two rifle shots at his legs, as a result of which one of the applicant's legs had to be amputated. Regard being had to the standing of the extra-departmental security service in the national law enforcement system (as described in paragraphs 43-44 above) and the fact that the acts of violence against the applicant were committed by the guard in the performance of his duties, the Court considers that the State's responsibility is engaged.

59. The parties disagreed with each other as to the reasons for and proportionality of the force applied to the applicant in the circumstances described. It is also in dispute whether the applicant was beaten up by the guards with resulting damage to his urogenital apparatus. The Court is therefore called on to ascertain, taking into account the material submitted by the parties, the necessity and proportionality of the force applied.

60. The Court considers that, given the serious nature and the circumstances of the applicant's injuries, the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive (see *Vladimir Romanov*, cited above, § 61).

61. With regard to the part of the complaint concerning the gunshot wounds, the Court observes that according to the findings of the domestic authorities reiterated by the Government, they were inflicted as a result of self-defence against the applicant, who was threatening the life of the guards with a knife. Taking into account the arguments submitted by the applicant, in particular, the failure of the guards to find the knife on the applicant during the bodily search and the failure of the investigation authorities to examine the knife for fingerprints, the Court is compelled to regard the Government's version with a degree of caution. At the same time, owing to the failure of the domestic authorities to conduct a thorough investigation (see the conclusion in paragraph 74 below), the Court cannot independently assess the plausibility of the conclusions reached by them.

62. However, even assuming that the Government's version of the events is accurate, the Court is not convinced that the use of firearms against the applicant was justified in the circumstances of the case. As can be seen from the authorities' description of the events, after the unsuccessful first attack by the applicant, S. chose to return to the building, putting himself at risk of another attack, which he then presumably had to repel by firing at the

applicant's legs (see paragraph 11 above). Neither the findings of the domestic investigation nor the Government's subsequent submissions explain why this line of behaviour on the part of a professionally trained security guard was necessary, nor do they explain why the first shot was not sufficient.

63. As to the alleged beating of the applicant, the Court notes that the Government denied that there was any issue and the domestic investigation authorities failed to elucidate the matter. While the Court accepts that the applicant experienced serious urogenital health issues in the wake of the incident, it is not in possession of any medical documents capable of proving that the problem in question was the direct result of physical force applied on the day of the incident and had not pre-existed or did not stem from other causes. In this regard the Court particularly emphasises that its inability to reach any conclusions derives in considerable part from the failure of the domestic authorities to react effectively to the applicant's complaint at the relevant time (compare *Lopata v. Russia*, no. 72250/01, § 125, 13 July 2010).

64. Accordingly, having regard to the circumstances of the use of firearms and the nature and extent of the applicant's injuries, the Court concludes that the applicant was subjected to inhuman and degrading treatment contrary to Article 3 of the Convention. However, it cannot establish a violation of Article 3 in respect of the alleged beating of the applicant.

(b) Effectiveness of the investigation

65. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated 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. An obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 124, ECHR 2000-III).

66. An investigation into serious allegations of ill-treatment must therefore be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions (see *Assenov and Others*, cited above, §§ 103 et seq.). They must

take all reasonable steps available to them to secure evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see, *mutatis mutandis*, *Salman*, cited above, § 106; *Tanrıkulu*, cited above, §§ 104 et seq.; and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

67. Further, the Court reiterates that for an investigation into alleged torture or ill-treatment by State officials to be effective, it should be independent from those implicated in the events (see *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 37, 20 July 2004) and expeditious (see *Labita*, cited above, §§ 133 et seq.; *Timurtaş v. Turkey*, no. 23531/94, § 89, ECHR 2000-VI; *Tekin*, cited above, § 67; and *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001).

68. Finally, in order to maintain public confidence in the adherence of the authorities to the rule of law, and to prevent any appearance of collusion in or tolerance of unlawful facts, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 137, ECHR 2004-IV (extracts), with further references).

69. Turning to the present case, the Court refers to its finding of a violation of the substantive limb of Article 3 concerning the use of firearms against the applicant (see paragraph 64 above) to observe that the applicant had an “arguable claim” that merited a thorough investigation. It further observes that a criminal investigation into the incident was opened immediately and that most of the essential investigative actions, such as the examination of the site, questioning of the participants and witnesses, and forensic medical, ballistic and psychiatric examinations were carried out within three months of the incident.

70. At the same time, taking into account the applicant’s arguments concerning the various alleged omissions and inconsistencies in the investigation, the Court cannot but find some of them to be substantiated. In particular, it notes the lack of an attempt to explain the failure of the guards to find the knife, with which the applicant allegedly threatened the life of guard S., during the bodily search of the applicant. It further notes that the investigation authorities failed to examine the knife for fingerprints. It appears that in the disputed circumstances of the incident, an examination of the fingerprints on the weapon would have been decisive for the determination of the plausibility of the version of the events offered by the guards present during the incident. It also does not lose sight of the negligence in respect of a crucial piece of evidence, the amputated

extremity, which was disposed of in a careless manner at the time when the investigation was already under way. The Court considers that these unexplained omissions undermine the credibility of the investigation as an attempt to elucidate the facts of the case in an unbiased and truthful manner.

71. Furthermore, the Court observes that the investigation authorities neglected the applicant's complaint that he had been beaten by the guards with resulting serious damage to his urogenital apparatus. The investigation merely relied on the statements of the medical personnel who had examined the applicant following the incident, according to which they had not noticed any injuries on the applicant other than the gunshot wounds. There were no attempts to reconcile these statements with the initial diagnosis of urethritis made at the hospital where the applicant had been taken following the shootings, or with the severe health problems experienced by the applicant in the wake of the incident and witnessed by the medical staff, as well as his family and friends.

72. Finally, the Court attaches special importance to the fact that the applicant had no opportunity to dispute the above omissions, having been denied the status of victim on numerous occasions. It does not consider the authorities' reasons for this, including the applicant's mental disorder and the alleged lack of *corpus delicti* in the actions of the guards (see paragraphs 27 and 29 above), to be sufficient. While the applicant might have been entitled under Article 56 of the Code of Criminal Procedure of Russia to lodge requests and challenge the acts or omissions of the authorities as a witness, he was never consistently informed of such acts or omissions and, having been denied access to the case file, learned about some of them in a very haphazard manner. The Court thus considers that the element of "public scrutiny" necessary for the investigation to be found effective was missing in the instant case.

73. Turning to the Government's argument concerning the applicant's alleged failure to exhaust the available domestic remedies by appealing to a court against the acts or omissions of the investigators, the Court notes that, firstly, the Government did not indicate which particular acts or omissions the applicant should have challenged before a court, and, secondly, the applicant did not have a real chance to do so because he was denied information about the investigation as a result of his procedural status. The Court finds that in the particular circumstances of the present case the applicant was not obliged to pursue a court appeal and that the Government's objection as to the admissibility of the complaint should therefore be dismissed.

74. In the light of the foregoing, the Court further concludes that the authorities failed to carry out a thorough and effective investigation into the circumstances of the applicant's injuries.

75. The Court accordingly holds that there has been a violation of Article 3 of the Convention under its procedural limb.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

76. 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.”

77. The applicant requested that the Court award him just satisfaction on account of the non-pecuniary damage sustained, in accordance with its own relevant practice.

78. The Government disputed the claim as unfounded and uncorroborated by any supporting documents.

79. The Court accepts that as a result of the excessive use of force against him and the authorities’ failure to effectively investigate his complaints the applicant suffered serious bodily harm resulting in partial disability and considerable psychological distress. Deciding on an equitable basis, it awards the applicant 23,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

80. The applicant did not submit any claim concerning costs and expenses. The Court will therefore make no award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of the excessive use of firearms against the applicant and that there has been no violation on account of his alleged beating;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the authorities' failure to carry out an effective investigation into the applicant's complaints of ill-treatment;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 23,000 (twenty-three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 27 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President