



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

1959 · 50 · 2009

FIRST SECTION

CASE OF ALIBEKOV v. RUSSIA

(Application no. 8413/02)

JUDGMENT

STRASBOURG

14 May 2009

FINAL

12/08/2009

This judgment may be subject to editorial revision.

In the case of Alibekov v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 14 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 8413/02) 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 Sulayman Kadyrovich Alibekov (“the applicant”), on 14 August 2001.

2. The applicant was represented by Ms T. Chichilenko, a lawyer practising in Nizhnevartovsk. The Russian Government (“the Government”) were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been subjected to ill-treatment and that no effective investigation had been conducted into that complaint.

4. On 30 September 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1961 and lives in the village of Inchkha in the Dagestan Republic of the Russian Federation.

A. The applicant's criminal convictions

7. On 16 April 1996 the Supreme Court of the Dagestan Republic, sitting as a court of last instance, found the applicant guilty of manslaughter and the unlawful possession of weapons and sentenced him to eight years' imprisonment in a correctional colony.

8. In separate proceedings on 16 May 1996 the Kizlyar Town Court of the Dagestan Republic found the applicant guilty of a grave traffic offence which led to the victim's death under Article 211 § 2 of the RSFSR Criminal Code and sentenced him to seven years' imprisonment, to run concurrently with the sentence imposed by the Supreme Court.

B. Applicant's detention in correctional colony no. IU-4

9. The applicant began serving his sentence in 1996 in colony no. IU-4 in the Tyumen Region.

1. Alleged ill-treatment in 2000

10. In 2000 a special police unit came to the colony in order to search the cells.

11. The applicant alleges that he was beaten up during the search and that his gall-bladder was damaged as a consequence. He also alleged that he contracted diabetes as a result of the injury.

12. In September 2000 the applicant sued the colony administration for damages.

13. On 21 September 2000 the Kalininskiy District Court of Tyumen returned the applicant's claim without examining it on the grounds that he had failed to comply with the procedural requirements prescribed by law, namely to pay a court fee, submit additional copies of his statement of claim and indicate possible evidence. Apparently the applicant did not rectify the mentioned shortcomings.

2. Alleged ill-treatment in August 2002

14. On 1 August 2002 a special police unit (*ОЧВ УИИ МЮ РФ в Тюменской области*) arrived at the colony. According to the applicant, the

unit stayed at the colony until 7 August 2002, and during that period he was severely beaten on several occasions. No medical assistance was provided after the beatings and the colony's doctors refused to record ill-treatment in his medical records.

15. The applicant alleged that his ribs were broken and his left kidney damaged. He was X-rayed but was never given a copy of the results.

16. According to the Government, at about 10.20 a.m. on 1 August 2002 warders searched the applicant's cell. A warder told the applicant to undress in readiness for a body search. When the applicant refused he was warned that his further refusal would result in the use of force in accordance with sections 28-30 of the Penitentiary Institutions Act. The warder gave the applicant a minute "to reconsider".

17. As the applicant refused to implement the order and became aggressive, the warders gripped his hands and forced him to undergo the body search.

18. On 1 August 2002, immediately after the events complained of, the applicant was examined by a colony doctor who made the following entry on the applicant's medical card:

"State of health after the use of force: no injuries."

19. On 9 August 2002 the applicant complained to the colony doctor of chest pain. He was examined and diagnosed with neurocirculatory dystonia. On 29 August 2002, following further complaints, he was re-examined.

20. On 2 September 2002 the applicant was admitted to the colony hospital. He claims that doctors diagnosed him with nephroptosis (a kidney disease) which resulted from the beatings. However, according to the documents submitted, he was diagnosed with diabetes.

21. On 4 September 2002 a surgeon at the colony hospital examined the applicant and diagnosed him with "an injury to the left side of the chest".

22. On 16 October 2002 the applicant underwent a "large picture frame photoroentgenography", which revealed no pathological changes.

3. Investigation into the applicant's complaints of ill-treatment

23. The applicant submitted his complaint about the alleged ill-treatment during the period from 1 to 7 August 2002 to the General Prosecutor's Office, which redirected it to the Tyumen Regional Prosecutor's Office.

24. On 30 August 2002 an investigator from the Tyumen Regional Prosecutor's Office rejected the applicant's request for criminal proceedings to be initiated against the warders, having found no evidence that an offence had been committed. He referred to a statement by one of the warders and to the entry made on the applicant's medical card on 1 August 2002, both of which indicated that the applicant had not been found to be suffering from any injuries.

25. On 13 September 2002 the applicant lodged a further complaint about the events of 1 August 2002. On 24 December 2002 the investigator at the Tyumen Regional Prosecutor's Office authorised a forensic medical examination of the applicant to be conducted on the basis of the latter's medical records.

26. The expert submitted his report on 24 January 2003. He had studied the photofluorograms taken of the applicant's chest on 24 July 2002 and 16 October 2002 and found no sign of injuries. Nonetheless, he noted that it was necessary to perform a plan (survey) X-ray of the applicant's chest in order "to establish whether he had had fractures of the ribs".

27. By a decision of 25 January 2003 the investigator of the Tyumen Regional Prosecutor's Office dismissed the applicant's second request for the institution of criminal proceedings. He questioned five colony warders and noted that on 1 August 2002 the applicant had disobeyed the lawful orders of the warders who had intended to perform the body search, in particular, he had "acted aggressively, pushed away the warders' hands and grabbed them by their clothes". The order to use force had been given because there were no other means to make the applicant obey a lawful order of the colony administration. Two warders had used physical force by holding the applicant's arm in an arm-lock behind his back. The applicant had agreed to the search and it was then carried out.

28. The investigator also established that the applicant had been examined by doctors on several occasions. On 1 August 2002 the colony doctor had found no evidence of ill-treatment on the applicant's body. On 12 September 2002, during the applicant's stay in the hospital, a bruise on the left side of his chest was reported. The investigator also noted that an additional X-ray had been scheduled for 9 October 2002, however there was no indication whether it had been performed.

29. The investigator relied, lastly, on the conclusion in the expert report of 24 January 2003 that the applicant's medical records contained no information about the alleged injuries.

30. On 5 March 2003 the Tyumen Regional Prosecutor's Office quashed the decision of 30 August 2002 concerning the applicant's first request (see paragraph 24 above) and remitted the case for further investigation.

31. On 11 June 2003 another investigator from the Tyumen Regional Prosecutor's Office again dismissed the applicant's request for the institution of criminal proceedings against the warders. He based his decision on the same grounds as in the decision of 25 January 2003 after questioning the police officers who had visited the colony on 1 August 2002 and who confirmed that they had not used any force against the applicant.

32. On 12 May 2005 the Tyumen Regional Prosecutor quashed the decision of 11 June 2003. He noted that the detainees C., M., L. and K. had confirmed the applicant's allegations about the use of force against him, so that there was a conflict in the evidence which needed to be settled. The

prosecutor ordered criminal proceedings to be instituted on the fact of alleged ill-treatment pursuant to Article 286 § 3 (a) of the Criminal Code of the Russian Federation (for abuse of official power associated with the use of violence).

33. On 28 November 2005 the applicant was granted victim status in the criminal proceedings.

34. Following the institution of the proceedings, on 30 November 2005 the applicant underwent a forensic medical examination. The X-ray showed some deformation of the applicant's left rib no. VIII, which according to the forensic experts "was consistent with a united fracture that occurred at the time and in the circumstances described in the documents". No further details were given in the report.

35. On 13 November 2006 the proceedings were suspended in accordance with Article 208 (1) § 1 of the Russian Code of Criminal Procedure (failure to identify the culprits).

36. On 24 February 2009 the Investigative Committee at the Tyumen Regional Prosecutor's Office quashed the decision of 13 November 2006 and resumed the proceedings with further instructions on investigative measures to be undertaken.

37. The proceedings are still pending.

C. Proceedings concerning the applicant's transfer

38. On an unspecified date the colony administration applied for a court order subjecting the applicant to a different detention regime, *inter alia*, because he had disturbed the order in the colony, disobeyed the lawful orders of warders, refused to work, and consumed alcohol and drugs.

39. On 12 November 2002 the Kalininskiy District Court of Tyumen ordered that the applicant should serve the remaining term of his sentence in a prison. The applicant was not present or represented at the hearing.

40. The applicant appealed against that decision. He also asked for Mr R. M. (who, at the time, was detained in colony no. IU-2) to be appointed as his representative.

41. On an unspecified date in November 2002 the applicant was transferred from the colony to a temporary detention facility pending a further transfer to a prison.

42. On 17 December 2002 the Tyumen Regional Court quashed the decision of 12 November 2002 and remitted the matter for fresh examination by the first-instance court.

43. The outcome of the proceedings remains unclear. However, it appears that the applicant was returned to colony no. IU-4 where he remained until his release on 7 November 2003.

II. RELEVANT DOMESTIC LAW

A. Code on Execution of Punishments (no. 1-FZ of 8 January 1997)

44. Detainees and the premises where they live may be searched (Article 82 §§ 5 and 6).

45. Physical force, special means or weapons may be used against detainees if they offer resistance to the officers, persistently disobey lawful demands of the officers, engage in riotous conduct, take part in mass disorders, take hostages, attack individuals or commit other publicly dangerous acts, escape from the penitentiary institution or attempt to harm themselves or others (Article 86 § 1). The procedure for application of these security measures is determined in Russian legislation (Article 86 § 2).

B. Penitentiary Institutions Act (no. 5473-I of 21 July 1993)

46. When using physical force, special means or weapons, the penitentiary officers must:

- (1) state their intention to use them and afford the detainee(s) sufficient time to comply with their demands unless a delay would imperil life or limb of the officers or detainees;
- (2) ensure the least possible harm to detainees and provide medical assistance;
- (3) report every incident involving the use of physical force, special means or weapons to their immediate superiors (section 28).

47. Penitentiary officers may use physical force, including combat manoeuvres, for apprehension of detainees, repressing crimes or administrative offences by detainees; if nonviolent means are insufficient (section 29).

48. Rubber truncheons may be used for putting an end to assaults on officers, detainees or civilians and repressing mass disorders or group violations of public order by detainees, as well as for apprehension (*задержание*) of offenders who persistently disobey or resist the officers (section 30).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

49. The applicant complained that in August 2002 he had been subjected to ill-treatment and that the investigation into the incident had not been effective. He relied on Article 3 of the Convention, which provides as follows:

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

A. The parties' submissions

50. The Government denied any violation of the Convention in the present case. They pointed out that the criminal proceedings for the alleged ill-treatment had been reopened and were pending, so that the applicant's complaint should be dismissed for failure to exhaust domestic remedies, as it was premature. Furthermore, in their opinion, the use of force on 1 August 2002 had been lawful and proportionate since the applicant had refused to comply with the warders' orders.

51. The applicant maintained his complaints. Referring to the results of the forensic medical examination of 30 November 2005 (see paragraph 34 above), he considered that there was sufficient evidence to support his claim that he had sustained injuries.

B. The Court's assessment

1. Admissibility

52. The Court notes that the Government's objection on the grounds of non-exhaustion of domestic remedies is closely linked to the applicant's complaint under Article 3 of the Convention about the alleged ineffectiveness of the investigation. In these circumstances, it considers that the objection should be joined to the merits of the applicant's complaint.

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

2. Merits

(a) Alleged ill-treatment

54. The Court reiterates that to fall under Article 3 of the Convention ill-treatment must attain a minimum level of severity. The standard of proof relied upon by the Court is that “beyond reasonable doubt” (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Court must apply a particularly thorough scrutiny where the applicant raises an arguable ill-treatment complaint (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 32, and *Avşar v. Turkey*, cited above, § 283). However, it must also be sensitive to the subsidiary nature of its role and be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of the case.

55. Turning to the facts of the present application the Court notes a discrepancy between the applicant’s and the authorities’ descriptions of the events surrounding the use of force and the degree of coercion. While the authorities insisted that warders had only gripped the applicant’s hands, the applicant stated that as a result of the coercion he had suffered broken ribs and injured a kidney.

56. The Court observes that five warders made statements justifying their actions by the applicant’s failure to obey their lawful orders, despite being warned that his unruly behaviour and resistance would give rise to the use of force. They stated that they had merely held the applicant’s arm in an arm-lock behind his back and had not inflicted any injuries. Furthermore, the doctor who examined the applicant on 1 August 2002 immediately after the events at issue did not find any signs of ill-treatment while the photofluorogram of 16 October 2002 did not reveal any pathological changes.

57. For its part, the applicant’s version of events has not been backed up by persuasive evidence or reliable witness testimonies. Going beyond the domestic authorities’ findings of fact and applying a particularly thorough scrutiny (see, among other authorities, *Talat Tepe v. Turkey*, no. 31247/96, § 49, 21 December 2004), the Court itself is unable, in view of the deficient information in its possession, to establish beyond reasonable doubt that the applicant was the victim of a beating or that special means were used against him (see, *mutatis mutandis*, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 174, 24 February 2005, *Danelia v. Georgia*, no. 68622/01, §§ 42 and 43, 17 October 2006 and *Petropoulou-Tsakiris v. Greece*, no. 44803/04, § 42, 6 December 2007).

58. Therefore, the Court considers that there is no sufficient evidence for it to conclude that there has been a violation of the substantive limb of Article 3 of the Convention.

(b) Alleged inadequacy of the investigation

59. The Court notes that in a number of judgments it has found that where a credible assertion is made that an individual has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, 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. The investigation into arguable allegations of ill-treatment must also be thorough. This 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 of their decisions (see *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 103 et seq, *Reports of Judgments and Decisions* 1998-VIII). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, §§ 104 et seq.; and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000).

60. The procedural limb of Article 3 is invoked, in particular, where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by Article 3 of the Convention, deriving, at least in part, from the failure of the authorities to react effectively to such complaints at the relevant time (see *İlhan v. Turkey* [GC], no. 22277/93, §§ 89- 92, ECHR 2000-VII).

61. In the present case the Court notes at the outset that the investigation of the applicant's complaints commenced in September 2002 and is still pending. The proceedings were discontinued on several occasions in view of the lack of *prima facie* evidence of criminal conduct on the warders' behalf. Subsequently, following appeals by the applicant, they were reopened and the case was remitted for further investigation. In the Court's opinion, repeated remittals of a case for further investigation may disclose a serious deficiency in the domestic prosecution system (see *Kozinets v. Ukraine*, no. 75520/01, § 61, 6 December 2007).

62. The Court also notes essential omissions capable of calling into question the reliability and effectiveness of the investigation. On the basis of information on the investigative measures reflected in the decisions of 30 August 2002, 25 January and 11 June 2003, the Court observes that certain potential sources of evidence have not been properly explored. In particular, the colony doctors who treated the applicant following his alleged injury were never questioned and no attempts were made to

investigate how the applicant sustained the chest injury reported on 4 September 2002.

63. The first decision of 30 August 2002 not to institute criminal proceedings was based merely on the statement of one of the warders and the applicant's medical record. It was not until several months later that the investigator questioned the other warders who had participated in the events and ordered an expert examination of the applicant's medical records. The police officers who had visited the colony on 1 August 2002 were not questioned until June 2003 and it was only in May 2005, that is to say about three years after the events, that a reference to the statements of the applicant's fellow inmates first appeared in the prosecutor's decision (see paragraph 32 above). Despite the existence of two completely different versions of the events, at no stage of the proceedings was a reconstruction held or a confrontation between the applicant and warders organised and the applicant was not given any opportunity to provide the investigating authorities with his account of the events in question.

64. Finally, the Court reiterates that proper medical examinations are an essential safeguard against the ill-treatment of persons in custody (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X). In this respect it notes that the investigators' decisions of 25 January and 11 June 2003 were based on the expert report which had advised that an additional, more detailed X-ray of the applicant's chest was needed (see paragraph 26 above). Such an X-ray could have been expected to enable a final, indisputable conclusion to be made in respect of the applicant's allegations, but none was performed until November 2005. The above flaws, for which no explanation was provided to the Court, suffice to render the investigation ineffective.

65. In view of these considerations, the Court dismisses the Government's objection as to the necessity for the applicant to await the final result of the investigation into his allegations and concludes that there has been a violation of the procedural limb of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

66. The applicant also complained that the investigation into his allegations of ill-treatment was ineffective contrary to Article 13 of the Convention, which provides:

“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.”

67. The Court observes that this complaint concerns the same issues as those examined in paragraphs 59 to 65 above under the procedural limb of Article 3 of the Convention. Having regard to the grounds on which it has

found a violation of the procedural aspect of Article 3, the Court considers it unnecessary to examine those issues separately under Article 13 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

68. The applicant further complained under Article 3 of the Convention that he had contracted several diseases and had been ill-treated in the colony in 2000. He also complained under Article 6 § 3 (b)-(d) of the Convention that he had been denied a “fair hearing” in the proceedings concerning his transfer to a different detention facility as he had not been given time and opportunity to prepare his defence, had not been present at the hearings or provided with legal assistance and witnesses on his behalf had not been called to testify before the court. He further complained under Article 2 of Protocol No. 1 of a violation of his right to education.

69. However, having regard to all the material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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.”

71. The Court points out that 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 or vouchers, “failing which the Chamber may reject the claim in whole or in part”.

72. On 20 January 2006 the Court invited the applicant to submit his claims for just satisfaction. He did not submit any such claims within the time allowed.

73. In such circumstances the Court would usually make no award. In the present case, however, it has found a violation of the applicant’s right guaranteed by Article 3 of the Convention. Since this right is absolute in character, the Court finds it possible to award the applicant 3,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

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

FOR THESE REASONS, THE COURT

1. *Joins* to the merits the Government's objection as to the exhaustion of domestic remedies, and *rejects* it unanimously;
2. *Declares* unanimously the complaints concerning the alleged ill-treatment and the failure of the domestic authorities to carry out an effective investigation admissible and the remainder of the application inadmissible;
3. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention as regards the alleged ill-treatment;
4. *Holds* unanimously that there has been a violation of Article 3 of the Convention on account of the lack of an effective investigation into the applicant's complaints that he had sustained injuries in the colony;
5. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 13 of the Convention;
6. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
 - (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 14 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Spielmann is annexed to this judgment.

C.L.R.
A.M.W.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN

1. I agree with the conclusion finding a violation of Article 3 of the Convention on account of the lack of an effective investigation into the applicant's complaints that he sustained injuries in the prison colony.

2. However, I cannot share the majority's opinion that there was no violation of Article 3 in its substantive aspects as regards the alleged ill-treatment.

I. As to the factual circumstances of the case

3. According to the applicant, during the period of 1 to 7 August 2002 he was severely beaten on several occasions by members of the special unit, who had arrived in the colony to carry out searches of the cells (see paragraph 14 of the judgment).¹

4. The applicant made very serious allegations, namely that as a result of the use of force, his ribs were broken and his left kidney damaged. The recollection of the events as presented by the applicant do not contain the slightest contradiction. It is undisputed that he was X-rayed but was never given a copy of the results (see paragraph 15). Admittedly, the colony doctor indicated "no injuries" on the applicant's medical card on 1 August 2002 (see paragraph 18). Subsequently, after having been admitted to the colony hospital in early September 2002, the applicant was diagnosed with a kidney disease (according to the applicant) or with diabetes (according to the documents submitted) (see paragraph 20). A surgeon at the colony hospital examined the applicant and diagnosed him with "an injury to the left side of the chest" (see paragraph 21). More than a month later, the applicant underwent a "large picture from photoroentgenography", which revealed no pathological changes" (see paragraph 22). However, an expert noted in January 2003 that it was necessary to perform a plan (survey) X-ray of the applicant's chest in order to "establish whether he had [sustained] fractures of the ribs" (see paragraph 26). An X-ray performed in November 2005 showed some deformation of the applicant's left rib no. VIII, which, according to the forensic experts "was consistent with a united fracture that

¹ I would like to emphasise that this is not the first time that the Court has had to deal with operations conducted by special-purpose squads in Russian prison colonies. In *Dedovskiy and Others v. Russia* (no. 7178/03, 15 May 2008), the Court found that the applicants were subjected to torture. In *Vladimir Romanov v. Russia* (no. 41461/02, 24 July 2008), the Court again found that the applicant was subjected to treatment which can be described as torture. In *Sharomov v. Russia* (no. 8927/02, 15 January 2009), the Court, on the basis of a report, statements and the fact that the presence of a squad had been authorised and the officers had been advised of the applicable rules on the use of force, found no violation of the substantive limb of Article 3. In that case, no separate claim concerning an alleged ineffective investigation was made.

occurred at the time and in the circumstances described in the documents” (see paragraph 34).

5. It should also be noted that the use of force as such (see paragraph 27) has not been disputed by the respondent Government.

6. For my part, I consider those limited findings – established only within the closed prison environment, that is, within the prison colony –, taken together with the applicant’s account of the events, very worrying. I am satisfied that the applicant has, at the least, established an arguable claim.

7. As the Court rightly notes in paragraph 54 of the judgment, a particularly thorough scrutiny should be applied where the applicant raises an arguable complaint of ill-treatment.

8. In paragraph 57, however, the majority regrettably places emphasis on the fact that “the applicant’s version of events has not been backed up by persuasive evidence or reliable witness testimonies”. In my view, the majority view does not take sufficient account of the enormous difficulties faced by the applicant in gathering evidence in the context of a closed prison environment.

9. The applicant’s arguable complaint of ill-treatment should have prompted a serious and detailed investigation. The numerous shortcomings of the investigation (paragraphs 59-65) have led the Court to find a violation of the procedural limb of Article 3. The inadequacy of the investigation deprived the Court of more precise information concerning the substance of the claim.

II. As to the uncertainties surrounding the burden and standard of proof in proceedings concerning alleged violations of Article 3 of the Convention.

10. This case highlights once again the two technical problems faced by the Court when it comes to establishing the factual circumstances related to allegations of ill-treatment.

11. Firstly, the question of the burden of proof and, secondly, the question as to the standard of proof.

12. As to the *burden of proof*, and in the event of an arguable complaint of ill-treatment, I am of the opinion that the onus of proof should shift to the State to provide a full account of the events.¹ In the present case the State has provided nothing by way of explanation. The Court found in this respect a procedural violation of Article 3 of the Convention.

13. As to the *standard of proof*, I would like to emphasise firstly that in exceptional cases such as the present one, the standard of proof “beyond a

¹ See Judge Bonello’s partly dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey*, no. 32357/96, 11 April 2000.

reasonable doubt” is too stringent a standard to be of practical use. Indeed, one should not forget that the victim of alleged violations of Article 3 is, in most cases, deprived of the means of substantiating his grievance and the only evidence he can produce is his own testimony.¹ Admittedly, the Court has never softened this standard in its case-law.² However, as Judge Bonello pointed out in his partly dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey* (no. 32357/96, 11 April 2000),

“expecting those who claim to be victims of torture to prove their allegations ‘beyond reasonable doubt’ places on them a burden that is as impossible to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim’s complaint is almost invariably confronted with the negation ‘corroborated’ by many” (see paragraph 14 of the Opinion).

This is even more true where the alleged ill-treatment occurred in the closed environment of a prison.

14. In my view, therefore, the time has come for the Court to reconsider its traditional approach as to the burden and standard of proof in those cases where it identifies numerous and serious shortcomings in the investigation.

III. As to the consequences to be drawn from an inadequate and ineffective investigation

15. However, even applying the traditional standard of “proof beyond a reasonable doubt”, I am of the opinion that the Court should have found a violation of Article 3 in its substantive aspect.

16. The applicant set out his complaint in a coherent and convincing manner. He presented an arguable claim based on credible assertions which, regrettably, did not prompt an effective and thorough official investigation.

17. Consequently, in my view, the inadequacy and ineffectiveness of the investigation into the applicant’s complaint amounts not only to a violation of the procedural aspect of the complaint in question. It amounts also to a strong corroboration of the same complaint in its substantive aspects, as there is a serious risk that a deficient investigation covered up guilty behaviour by the members of the special unit.

¹ See Loukis Loucaides, “Standards of Proof in Proceedings Under the European Convention on Human Rights”, in *Présence du droit public et des droits de l’homme. Mélanges offerts à Jacques Velu*, Bruxelles, Bruylant, 1992, p. 1431, and reprint in *Essays on the Developing Law of Human Rights*, Leiden, Boston, Martinus Nijhoff, 2007, p. 158.

² On the standard of proof, see Patrick Kinsch, “On the Uncertainties surrounding the Standards of Proof in Proceedings before International Courts and Tribunals”, in *Individual Rights and International Justice, Liber Fausto Pocar*, Milan, Giuffrè Editore, 2009, p. 427.

18. As Judge Loucaides rightly pointed out in his dissenting opinion in the case of *Petropoulou-Tsakiris v. Greece* (no. 44803/04, 6 December 2007), the majority's approach may encourage the authorities to use unacceptable methods of investigation into facts amounting to ill-treatment in respect of individuals such as the applicant or other persons who do not have eyewitnesses to corroborate their complaints of ill-treatment. This is particularly true with regard to violence within the closed prison environment. Or, as Judge Bonello put it in his partly dissenting opinion in the case of *Veznedaroğlu v. Turkey*, "[the applicant] has been penalised for not coming up with evidence that the Convention *obliges* the State to procure" (see paragraph 19 of the Opinion).

19. In the case of *Ireland v. the United Kingdom* (18 January 1978, Series A no. 25), the Court stated that it:

"adopts the standard of proof beyond reasonable doubt but adds that such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context the **conduct of the parties** when evidence is being obtained has to be taken into account (emphasis added)"¹

20. To sum up, and in the light of the above, I believe that the applicant's version of events is true and I am satisfied that there has been a violation of Article 3 in its substantive aspect.

¹ See also the partly dissenting opinion of Judge Loucaides, joined by myself, in the case of *Zubayrayev v. Russia* (no. 67797/01, 10 January 2008).