



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

FIFTH SECTION

CASE OF SHISHKOVI v. BULGARIA
(Application no. 17322/04)

JUDGMENT

STRASBOURG

25 March 2010

FINAL

25/06/2010

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

In the case of Shishkovi v. Bulgaria,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 17322/04) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Bulgarian nationals, Mr Svetlyu Georgiev Shishkov and Mr Slaveyko Svetlev Shishkov (“the applicants”), on 5 May 2004.

2. The applicants were represented by Mr G. Blagoev, a lawyer practising in Sofia. The Bulgarian Government (“the Government”) were represented by their Agents, Ms N. Nikolova and Ms R. Nikolova, of the Ministry of Justice.

3. The applicants alleged that they had been beaten by police officers and that the authorities had failed to investigate this effectively, in violation of Article 3 of the Convention.

4. On 24 June 2008 the President of the Fifth 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1953 and 1978 respectively and live in Sofia. They are father and son.

6. On 8 August 1999 the applicants and friends of theirs were holidaying beside a lake near Sofia. In turns, members of the group were riding a jetboat. On several occasions some of them rode close to a sports centre on the opposite shore.

7. Some time later, unexpectedly, two cars without licence plates arrived at the lakeside location where the applicants' group was situated. Seven men wearing camouflage uniforms got out of the cars, some of them wore vests with "Police" written on the back. The men were armed with sub-machine guns. They started insulting the applicants and their friends and threatening them, both verbally and by pointing their guns at them. The men made the applicants and their friends lie flat on the ground and then hit and kicked them repeatedly. The beating continued for several minutes. At the same time, the men repeatedly shot at the applicants' jetboat. After that they left.

8. On 10 and 11 August 1999 the first applicant was examined by doctors who established that he had four broken ribs, a superficial wound on his left temple and several bruises on his face, back and legs. The second applicant suffered bruises on his face, head and right leg.

9. On 11 August 1999 the applicants complained to the prosecution authorities. On 16 and 19 August 1999 the first applicant lodged additional submissions, stating that he and his son were being followed and that he had been threatened in an attempt to induce him to withdraw his complaints.

10. The prosecution authorities opened criminal proceedings in relation to the beating and, on unspecified dates, brought charges against seven police officers working in the Operative Investigation Directorate, a specialised unit of the Ministry of the Interior. It was established that, at the relevant time, the accused had been dispatched to the area where the beating had taken place, with the task of guarding a Ministry of the Interior training centre and a forest reserve.

11. The prosecution authorities collected witness testimonies from the applicants and their friends, as well as from other witnesses, including eye-witnesses to the beating. They commissioned a ballistic expert and carried out confrontations and identity parades.

12. On an unspecified date the applicants were admitted as civil claimants in the criminal proceedings.

13. Up to June 2003 the investigation had not resulted in indictments against the accused.

14. On an unspecified date after June 2003 the accused, relying on a new Code of Criminal Procedure provision, Article 239a (see paragraph 24 below), requested that their case be brought to court or terminated.

15. In October or November 2003 the prosecution indicted the seven police officers for causing bodily harm and for disorderly conduct.

16. On 19 December 2003 the Sofia Military Regional Court remitted the case, finding that the prosecution authorities had committed procedural violations. In particular, it found that: 1) it was not clear from the indictment whether the accused had been armed with sub-machine or automatic guns during the attack against the applicants; 2) the indictment had been based on insufficient evidence, and, in particular, on no material evidence; 3) two of the witnesses had been examined superficially; and 4) the prosecution had failed to comment on exonerating witness testimony.

17. On 21 January 2004 the prosecution filed a revised indictment against the police officers.

18. In a decision of 26 January 2004 the Military Regional Court established that the procedural violations found earlier had not been remedied. In addition, new deficiencies were identified: 1) the prosecution had not commented on the possibility of bringing charges for the verbal threats; 2) the date of the record of the examination of a witness had been amended, but this had not been certified by a valid signature of the witness; and 3) the records showing that the accused had been notified of the results of the investigation had been printed out on a printer but the respective dates and hours had been added on a typewriter; again, this additional information had not been certified by the accused's signatures.

19. Concluding that the deficiencies thus identified amounted to material procedural breaches within the meaning of Article 239a of the Code of Criminal Procedure (see paragraph 24 below), the Military Regional Court terminated the criminal proceedings.

20. The applicants and the prosecution authorities appealed against this decision arguing that the Military Regional Court had erred in concluding that the prosecution authorities had committed material procedural breaches. On 22 March 2004 those appeals were rejected by the Military Court of Appeal because decisions under Article 239a of the Code of Criminal Procedure were not subject to appeal.

21. Apparently, some internal inquiry into the officers' conduct was carried out by the Ministry of the Interior, but the Court has not been informed of its course and findings. No disciplinary punishments were ever imposed on the police officers allegedly involved in the beating.

II. RELEVANT DOMESTIC LAW

A. Ill-treatment by police officers

22. Articles 128, 129 and 130 of the Criminal Code make it an offence to cause a light, intermediate or severe bodily injury to another person. Article 131 § 1 (2) provides that if the injury is caused by a police officer in the course of, or in connection with, the performance of his or her duties, the offence is an aggravated one. This offence is a publicly prosecutable one.

23. Persons claiming that they have been beaten by police officers can seek damages under the State Responsibility for Damage Act 1988. The remedy has been described in more detail in the Court's judgment in the case of *Krastanov v. Bulgaria* (no. 50222/99, §§ 45-46, 30 September 2004).

B. Relevant provisions of the Code of Criminal Procedure 1974

24. In June 2003 the new Article 239a of the Code of Criminal Procedure 1974, in force at the relevant time, introduced the possibility for an accused person to request to have his case examined by a court if the preliminary investigation has not been completed within the statutory time-limit (two years for investigations concerning serious crimes and one year for all other investigations). In such instances, the courts would send the case to the relevant public prosecutor's office with instructions to either enter an indictment against the accused within two months or discontinue the criminal proceedings. If the prosecutor's office failed to take action, or if the case was remitted for material procedural breaches, which were not remedied within a new time-limit of one month, the courts would terminate the criminal proceedings themselves. The alleged victims could not participate in the proceedings under Article 239a of the Code of Criminal Procedure.

25. Under domestic law, as it stood at the relevant time, victims of crimes could only participate in pre-trial proceedings as civil claimants. In this capacity they could acquaint themselves with the case file, present evidence, make requests and appeal against acts of the courts to the extent that this was related to their civil claim.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

26. The applicants complained, relying on Articles 3 and 13 of the Convention, that they had been beaten by police officers and that the authorities had failed to investigate this beating effectively. The Court is of the view that the complaints fall to be examined solely under Article 3 of the Convention, which reads as follows:

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

A. Admissibility

27. The Court notes that the 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. They must therefore be declared admissible.

B. Merits

1. Substantive issue: the beating of the applicants by police officers

28. The applicants reiterated that they had been beaten by police officers for no reason.

29. The Government did not contest that the applicants had been beaten by police officers. However, they contended that the applicants' suffering had not attained the minimum level of severity required under Article 3 of the Convention. Furthermore, they considered that the applicants had themselves provoked the beating because, together with their friends, they had been spying on other people at a sports centre by the lake. Lastly, the Government argued that the applicants' ill-treatment had not been intended to cause them suffering and humiliation.

30. The Court notes that it is not disputed between the parties that on 8 August 1999 the applicants were beaten by men they did not know. Some of those men were wearing vests with “Police” written on the back. The domestic prosecuting authorities brought charges against seven officers from the Ministry of the Interior's Operative Investigation Directorate (see paragraph 10 above). In addition, the Government did not contest the applicants' averment that the men who had beaten them had been police officers (see paragraph 29 above) and did not present any evidence which could disprove it. Thus, the Court sees no reason to doubt the prosecution

authorities' findings and concludes that the applicants were the victims of violence by State agents for which the respondent Government are responsible.

31. The Court reiterates that any ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative and depends on all the circumstances of the case (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). In the present case, pursuant to the beating on 8 August 1999, the first applicant suffered serious injuries, including broken ribs and a wound on his head. The second applicant suffered lighter injuries – bruises on his face, head and right leg (see paragraph 8 above). The attack on the applicants was sudden and unprovoked, by armed State agents who at the same time threatened the applicants and fired repeatedly at their jetboat (see paragraph 7 above). Therefore, in view of all the circumstances of the case the Court considers that the applicants' ill-treatment attained the minimum level of severity required under Article 3 and can be considered as inhuman treatment.

32. The Court considers that the applicants' ill-treatment by State agents could not be justified on any valid ground. As to the argument put forward by the Government, namely, that the applicants had themselves provoked the attack by spying on other people (see paragraph 29 above), the Court reiterates that Article 3 prohibits ill-treatment in absolute terms. Furthermore, even if the applicants had encroached upon the rights of others, in a democratic society governed by the rule of law the police could never be called upon to respond to breaches of the law by beating citizens.

33. The Court thus concludes that there has been a violation of Article 3 of the Convention, taken in its substantive aspect.

2. Procedural issue: the effectiveness of the investigation

34. The applicants considered that the authorities had failed to investigate their ill-treatment effectively.

35. The Government contested this argument. They considered that the national authorities had taken all necessary steps to ensure that the applicants' attackers be brought to justice. However, as the facts of the case had been complex and this had prolonged the investigation, the accused had been entitled to resort to the remedy under Article 239a of the Code of Criminal Procedure 1974 (see paragraph 24 above).

36. The Court reiterates that, where an individual makes a credible assertion that he has suffered treatment by the police infringing 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. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of

torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, *mutatis mutandis*, *Labita*, cited above, § 131).

37. On the basis of the evidence presented in the present case, the Court has found that the respondent State is responsible under Article 3 for the applicants' ill-treatment (see paragraph 33 above). The applicants' complaints in this regard were therefore “arguable” and the authorities were under an obligation to carry out an effective investigation.

38. In fact, in the present case, the authorities opened an investigation, collected evidence and identified and charged those allegedly responsible (see paragraphs 10-11 above). However, the proceedings were eventually terminated without the accused having been brought to trial and punished. The authorities also conducted some sort of internal inquiry (see paragraph 21 above). Consequently, the question in the present case is not so much whether there was an investigation, but whether it was effective, that is, whether it was conducted diligently and with the required determination to identify and prosecute those responsible (see *Krastanov*, cited above, § 59).

39. In that regard, the Court observes that it has not been informed of the exact course of the criminal proceedings. It notes that those proceedings continued for four years, from 1999 to 2003, without any indictments having been filed against the accused (see paragraphs 10 and 13 above). This delay gave rise to an entitlement of the accused to request that their case be brought to trial or terminated pursuant to Article 239a of the Code of Criminal Procedure 1974 (see paragraphs 14 and 24 above). Once the procedure under Article 239a had commenced, the prosecuting authorities filed an indictment against the accused and, after receiving instructions from the Regional Military Court to rectify a number of alleged deficiencies, filed a revised indictment (see paragraphs 15-17 above). The Court is thus ready to conclude that, despite their initial delay and despite committing later some procedural shortcomings, once the procedure under Article 239a had commenced the prosecution authorities acted with determination to identify and prosecute those responsible.

40. However, the Regional Military Court terminated the proceedings, finding that the prosecution authorities had committed material procedural breaches (see paragraphs 16-19 above). The Court cannot but note that some of the those “material” breaches were in fact small flaws of no particular consequence for the proceedings, like the prosecution's failure to specify whether the accused had been armed with sub-machine or automatic guns (see paragraph 16 above). Other deficiencies identified, like the prosecution's alleged failures to support the charges with sufficient evidence and to discuss exonerating evidence (see paragraph 16 above), related to the merits of the case, not the lawfulness of the indictment, and fell to be

examined during an ensuing trial. The Court cannot therefore accept that they represented a valid ground for terminating the proceedings. In fact, the Court does not consider that any of the deficiencies indicated by the Regional Military Court (see paragraphs 16 and 18 above) amounted to a “material procedural breach” within the meaning of Article 239a of the Code of Criminal Procedure, warranting the termination of the proceedings. Rather, it is of the view that the Regional Military Court adopted an excessively formalistic approach, which resulted in the accused not being brought to trial and secured their impunity for the beating. It is also noteworthy in that respect that the prosecution itself lodged an appeal against the impugned decision of the Regional Military Court, challenging its conclusions (see paragraph 20 above).

41. For the reasons above, the Court concludes that, as regards the criminal investigation in the case, the authorities, and in particular the Regional Military Court which terminated the proceedings for no convincing reason, failed to act with the effectiveness, diligence and determination to punish those responsible required under Article 3 of the Convention (see paragraph 37 above).

42. The Court also points out that the applicants had no opportunity to effectively participate in the criminal proceedings, because domestic law at the time allowed them to participate only as civil claimants and, accordingly, in so far as their civil claim was at issue (see paragraph 23 above). For the Court, this is an additional argument in support of the conclusion that the criminal investigation was ineffective.

43. As to the internal inquiry carried out by the Ministry of the Interior (see paragraph 21 above), the Court notes that it has not been informed about its course or findings. However, seeing that this inquiry did not result in any disciplinary action or any other punishment of those responsible, the Court concludes that, similarly to the criminal investigation, it was not effective.

44. Accordingly, the Court concludes that there has been a violation of Article 3 of the Convention in its procedural respect.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN THAT THE APPLICANTS COULD NOT OBTAIN DAMAGES

45. The applicants further complained of a violation of Article 13 of the Convention, in that they did not have an available domestic remedy to obtain damages from their attackers. Article 13 of the Convention reads:

“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.”

46. The Government considered that there was no opportunity available to the applicants to bring an action for damages outside of the framework of the criminal proceedings, in view of the grounds on which the criminal proceedings had been terminated.

A. Admissibility

47. The Court considers that this complaint is linked to the complaints examined above and must therefore likewise be declared admissible.

B. Merits

48. The Court takes note of the Government's position that there was no opportunity for the applicants to seek damages outside of the framework of the criminal proceedings (see paragraph 46 above) and sees no reason to hold otherwise. Accordingly, it finds that there has been a violation of Article 13 in the case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicants did not claim pecuniary damage. In respect of non-pecuniary damage, the first applicant claimed 50,000 euros (EUR) and the second applicant claimed EUR 25,000. The applicants submitted that they had suffered pain and humiliation.

51. The Government urged the Court to dismiss these claims.

52. The Court considers that the applicants must have suffered pain and frustration as a result of the violations found in the case. Accordingly, the Court awards EUR 10,000 to the first applicant and EUR 9,000 to the second applicant in respect of non-pecuniary damage.

B. Costs and expenses

53. The applicants claimed, jointly, EUR 10,000 for the legal fees charged by their lawyer, Mr Blagoev, and EUR 500 for other costs and expenses incurred in the proceedings before the Court.

54. The Government argued that the claim for legal fees was excessive and pointed out that the claim for costs and expenses was not supported by any documents.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. To this end, Rule 60 §§ 2 and 3 of the Rules of Court stipulates that applicants must enclose with their claims for just satisfaction "any relevant supporting documents", failing which the Court may reject the claims in whole or in part. In the present case, noting that the applicants have failed to produce any documents in support of their claim, the Court does not make any award under this head.

C. Default interest

56. 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 in that the State was responsible for the applicants' ill-treatment on 8 August 1999;
3. *Holds* that there has been a violation of Article 3 of the Convention in that the authorities failed to investigate the applicants' ill-treatment effectively;
4. *Holds* that there has been a violation of Article 13 of the Convention in that the applicants had no effective remedy to seek damages;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into Bulgarian leva at the rate applicable on the date of settlement:
 - (i) to the first applicant EUR 10,000 (ten thousand euros);

- (ii) to the second applicant EUR 9,000 (nine thousand euros);
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 25 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President