

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

FIRST SECTION

DECISION

Application no. 4271/06
Batyr PSHIBIYEV and Khazratali PSHIBIYEV
against Russia

The European Court of Human Rights (First Section), sitting on 3 November 2011 as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and André Wampach, *Deputy Section Registrar,*

Having regard to the above application lodged on 3 November 2005,

Having regard to the decision of 4 May 2011 to grant priority to the above application under Rule 41 of the Rules of Court,

Having deliberated, decides as follows:

## THE FACTS

The applicants, Mr Batyr Pshibiyev and Mr Khazratali Pshibiyev, are Russian nationals who were born in 1978 and 1951 respectively and live in the village of Martan, the Kabardino-Balkariya Republic ("the KBR"). They are represented before the Court by Mr D. de Savornin Lohman, a lawyer with the Stichting Russian Justice Initiative ("the SRJI"), an NGO based in the Netherlands with a representative office in Russia.

The second applicant is the father of the first applicant.

The facts of the case, as submitted by the applicants, may be summarised as follows.

## A. The background to the case

### *1. The Nalchik raid*

On 13 October 2005 a group of gunmen launched attacks on several government institutions in Nalchik, including the Federal Security Service ("the FSB"), the "OMON" special police squad, three police stations and also the Nalchik airport. The Russian authorities deployed regular troops and special forces to regain control of the city.

In the ensuing hostilities between government forces and the gunmen, which lasted until the next day, more than 100 people, including about 14 civilians, 90 gunmen and dozens of law enforcement officers, were reported to have been killed and over 200 wounded.

### *2. Opening of the criminal investigation into the Nalchik raid*

On an unspecified date in October 2005 the Russian authorities opened a criminal investigation into the events of 13 October 2005. The investigation was entrusted to a special investigating group of the Prosecutor General's Office of the Russian Federation.

By 9 December 2005 the law-enforcement authorities had arrested some fifty-nine people on suspicion of participation in the events of 13 October 2005.

## B. The first applicant's arrest and placement in custody

On 21 October 2005 the first applicant and his relative R.Sh. were at the home of the first applicant's uncle, Z.Sh.

On the morning of 21 October 2005 the first applicant saw a number of police officers surrounding his uncle's house and he and R.Sh. hid in the attic.

The police searched the house, found the first applicant and R.Sh. and ordered them downstairs. The first applicant obeyed. The police officers immediately lay the first applicant and R.Sh. face-down on the ground, handcuffed them, put them in a car and took them to the police station.

On 22 October 2005 the Nalchik Town Court ("the town court") authorised the first applicant's placement in custody.

## C. The first applicant's alleged ill-treatment and the related investigation

### *1. The alleged ill-treatment*

#### (a) The applicants' description

According to the applicants, during the first applicant's transfer to the Leskinskiy police station ("the ROVD") on 21 October 2005, the police officers in the car with him and R.Sh. started kicking him and hitting him with their rifle butts.

Upon arrival at the police station the first applicant was taken to an office where police officers hit him all over the body with their hands and truncheons. The beating lasted for about two hours.

About two hours later a group of officers from Police Department no. 6 for the Fight against Organised Crime ("*Управление по борьбе с организованной преступностью номер 6*", hereinafter "the UBOP") arrived at the ROVD. They put a plastic bag over the first applicant's head and put him and R.Sh. in their vehicle, which drove off. On the way the UBOP officers beat the first applicant and R.Sh., to make them confess to their participation in the Nalchik raid and, in particular, in the attack on the Nalchik OMON. The first applicant denied having participated in those events but they continued beating him. At one point the car stopped in the vicinity of the town of Argudan. The first applicant was thrown out of the car and ordered to leave. He refused to do so, thinking that they would kill him. One of the UBOP officers said that several people had witnessed the first applicant's arrest and so the officers would have problems if they killed him. After that they put him back in the vehicle and took him to the UBOP.

After they arrived at the UBOP the beatings continued. Police officers hit the first applicant all over the body with their truncheons, gun butts and a chair. They also sent electric current through his fingers. Throughout the ill-treatment the officers urged him to confess to having taken part in the Nalchik raid on 13 October 2005. The first applicant fainted on several occasions. When he regained consciousness, the UBOP officers continued to beat him up.

On the night of 21 October 2005 the UBOP officers had to call an ambulance for the first applicant because he had fainted and had not regained consciousness. The ambulance doctors examined him and made a record of his bodily injuries. After they had left, the beating continued until the morning of 22 October 2005.

On 22 October 2005 UBOP officers took the first applicant to the office of the head of the UBOP, where they continued to beat him. After two or three hours of this treatment he fainted. A doctor came and brought him back to his senses, after which the officers made him sign a number of

documents. He signed them without reading them. Subsequently, he learnt that he had signed a confession.

On the same date the first applicant was transferred to SIZO no. 1 remand prison in Nalchik, where he was again subjected to ill-treatment.

In the first applicant's submission, his ill-treatment continued during the ensuing two months, both in the remand prison and at the UBOP.

The description of the events mentioned above is based on the information contained in the application form and the first applicant's written statement made on an unspecified date in 2007.

**(b) Relevant medical documents**

On 21 October 2005 investigator Z.Sh. ordered the first applicant's medical examination.

It appears that the first applicant was examined around the same time by an expert from the Forensic Medical Examination Bureau of the KBR ("the forensic bureau"), between 21 and 31 October 2005 (the date is partly illegible in the documents). The expert's report no. 1458-A of 31 October 2005, in so far as relevant, reads as follows:

"...

According to [the first applicant]: ... On 21 October 2005 he sustained bodily injuries on his arrest...

Complaints: pain in injured region.

**Medical examination results**

A purplish-cyanotic bruise [measuring] 6×6 cm in the right orbital region. Analogous [bruises]: 2×3 cm on the nasal arch, 45×20 cm in the right and left scapular region, 11×10 cm on the rear of the right shoulder, 14×16 cm on the rear of the left shoulder, 24×17 cm on the front of the left shoulder, 15×8 cm on the right of the parasternal region, 6×6 cm in the left subclavian region, 14×16 cm near the lower surface of the costal arch on the right, 11×6 cm and 10×6 cm on the front of the right thigh..., 14×14 cm on the front of the left thigh, 12×7 cm on the external front part of the right thigh.

**Conclusions**

On the basis of the information obtained after examination of [the first applicant]..., taking into account the circumstances of the case and the questions put to the expert, I conclude:

[The first applicant] has: bruises on the face, thorax region and limbs.

The injuries described above were sustained as a result of impacts with hard blunt objects with a limited impact surface; they may have been sustained at the time and in the circumstances indicated in the order for the expert examination; they are not likely to cause health impairment or permanent disablement..."

According to an ambulance call card ("*карта вызова скорой помощи*") dated 21 October 2005, at about 7.30 p.m. on that date an ambulance was

called to the first applicant. The document, in so far as relevant, reads as follows:

> "Complaints, anamnesis: headache, nausea, dizziness, pain in the back. Origin of the traumas not known.
>
> Objectively: Patient has somewhat delayed reactions. Enters into contact. Response to stimuli retained. ... On the right [side] – a bruise to eyelids, haemorrhage of the eyeball. Moderate rigidity of cervical muscles. ... On the back and waist – injuries and bruises to the soft tissues...
>
> Diagnosis: closed craneocerebral injury, brain concussion. Bruises and injuries to soft tissues of the face, upper limbs, back.
>
> ...
>
> Hospitalisation refused (in need of convoy)..."

**(c) Photos of the first applicant after his arrest, published by the media**

On 15 December 2005 the internet newspaper "gazeta.ru" published an article entitled "General Ermolov joined the investigation" ("*Генерал Ермолов подключился к следствию*"). The article described the investigation into the Nalchik events, suggesting that local law-enforcement authorities were instilling terror in the town by conducting a cruel crackdown on its residents, torturing them, extorting confessions from them and even killing them.

The article contained photos of people arrested on suspicion of participation in the Nalchik events, including the first applicant, which, according to the newspaper, had been taken by the UBOP about three weeks after the arrest. In the photos the first applicant, who is holding a card with his name on it, has a bruise over the right eye and bruises on both sides of his nose.

*2. The investigation into the alleged ill-treatment*

On 27 October 2005 the second applicant signed an agreement with lawyer I.K. to represent the first applicant.

On 28 October 2005 I.K. visited the first applicant in detention.

On 3 November 2005 I.K. complained to a number of State authorities, including the Prosecutor of the KBR, about the first applicant's alleged ill-treatment. She submitted, in particular, that on 28 October 2005 she had visited the first applicant in the remand prison and he had told her that he had been ill-treated at the UBOP and at SIZO no. 1. She stressed that she had noticed a large bruise over the first applicant's eye and that he had complained to her about recurring pain all over his body. He had also told her that he had been hit and kicked in the throat and face and all over his body and that the officers had also hit him with truncheons. Moreover, an ambulance had twice been called to him in the UBOP.

By a decision of 9 November 2005 investigator K. removed lawyer I.K. from the first applicant's defence on the ground that he had interviewed her on the circumstances of the first applicant's ill-treatment (see below).

By a letter of 10 November 2005 the Prosecutor General's Office of the Russian Federation informed the first applicant's lawyer that her complaint of 3 November 2005 about her client's alleged ill-treatment had been examined and that an internal inquiry into the matter would be conducted by the Ministry of the Interior of the KBR.

On 22 November 2005 the Prosecutor General's Office of the Russian Federation informed the first applicant that the KBR Ministry of the Interior had been instructed to conduct an inquiry to establish the circumstances in which he had sustained his bodily injuries and that he would be informed of its results.

On an unspecified date in January 2006 the second applicant complained to the prosecutor of the KBR that the authorities had failed to react to I.K.'s complaint of 3 November 2005 about the first applicant's ill-treatment. He requested to be informed of the outcome of the inquiry and provided with copies of any decisions taken.

On 31 January 2006 lawyers from the SRJI wrote to the Prosecutor of the KBR on the applicants' behalf, submitting that the applicants had not received any reply to their complaint about the first applicant's ill-treatment, lodged on 3 November 2005. Stressing that the media had meanwhile cited the KBR Prosecutor's statement to the effect that the applicants' allegations of ill-treatment had not been confirmed, the SRJI requested copies of the decisions taken in the course of the inquiry.

By a letter of 12 March 2006 the town prosecutor's office informed the second applicant that on 12 December 2005 it had decided not to open a criminal case in respect of the first applicant's ill-treatment and that that decision had been found lawful and well-founded by unspecified higher-ranking prosecutors.

The enclosed decision of 12 December 2005 referred to a statement of a law enforcement officer, who submitted that police officers had had to apply force to subdue the first applicant's resistance during his arrest, and a statement by an investigator who submitted that the first applicant had never complained to him about ill-treatment. It was further noted that, while interviewed, the first applicant had himself stated that he had been injured during his arrest. The decision concluded that the first applicant must have sustained his injuries as a result of lawful use of martial art techniques against him by the arresting officers.

On 28 June 2006 the first applicant complained to the town court about the decision of 12 December 2005. He submitted that the investigators had based their conclusions solely on statements by police officers; that they had failed to verify properly the complaint by I.K. of 3 November 2005; that the character and gravity of his injuries contradicted the investigators' version

that they had been sustained during arrest and rather suggested that he had been ill-treated on purpose, and that, in any event, the investigators had failed to examine whether the use of force against him had been proportionate.

On 6 July 2006 the town court dismissed the first applicant's complaint, finding that the materials of the inquiry conducted by the prosecutor's office indicated that he had sustained his bodily injuries during his arrest.

On 14 July 2006 the first applicant appealed against the decision of 6 July 2006. He submitted, among other things, that the investigators had based their conclusions on the statements of law enforcement officials with a vested interest in the outcome of the inquiry, that they had failed to interview other persons who had witnessed his arrest and who could have confirmed that he had not offered any resistance, and that the number and gravity of the injuries sustained indicated that he had been severely ill-treated.

On 25 August 2006 the Supreme Court of the KBR ("the Supreme Court") set aside the decision of 6 July 2006 on the ground that the town court had based its conclusions on the materials of the inquiry which it had, in reality, never examined. The case was sent for fresh examination at first instance by a different panel of judges.

By a decision of 22 September 2006 the town court declared the refusal to institute criminal proceedings, issued on 12 December 2005, unlawful. The court held that the investigators had failed to identify and interview the police officers of the ROVD and UBOP who had been with the first applicant after his arrest, as well as the owner of the house in which he had been arrested and other witnesses to the arrest, including R.Sh. and the neighbours. Furthermore, the investigators had disregarded important contradictions in the statements of the police officers who claimed to have used martial art techniques on the first applicant, and had failed to establish exactly what those methods consisted of. Nor had it been established whether the police officers in question actually mastered any special martial art techniques. The town court instructed the town prosecutor's office to rectify the indicated shortcomings.

On 22 November 2006 the town prosecutor's office refused to institute criminal proceedings in respect of the first applicant's alleged ill-treatment. It referred to statements by two police officers who had participated in the first applicant's arrest and submitted that he had offered resistance and that they had had to apply force to subdue him. The decision also stated that, while being examined by a forensic expert, the first applicant himself had stated that he had sustained his injuries during his arrest.

It appears that the decision was quashed by higher-ranking prosecutors on an unspecified date.

On 21 January 2007 the town prosecutor's office refused to open a criminal case in respect of the first applicant's alleged ill-treatment. The

decision referred to statements by three police officers according to which force had had to be used against the first applicant because he had resisted arrest. They flatly denied that he had been ill-treated subsequently. It also cited a statement by M.Sh., who submitted that she had not seen the first applicant resist his arrest, and the statement of an ambulance doctor who had treated the first applicant on the evening of 21 October 2005, stating that she had done so in the presence of several police officers and that the first applicant had refused to tell her about the origin of his injuries in their presence. The decision concluded that the first applicant had sustained his injuries during the arrest and that the conduct of the police officers had been lawful.

On 27 January 2007 the first applicant complained to the town court about the refusal to institute criminal proceedings issued on 22 November 2006, reiterating the arguments he had raised in his previous complaints and stressing that the investigators had failed to rectify the shortcomings indicated in the town court decision of 22 September 2006.

On 7 February 2007 the town court dismissed the first applicant's complaint. It found that the decision of 22 November 2006 had since been set aside by the Nalchik deputy prosecutor and that on 21 January 2007 a new refusal to institute criminal proceedings had been issued. Accordingly, the first applicant's complaint relating to the decision of 22 November 2006 was devoid of purpose.

On 14 February 2007 the first applicant lodged a complaint with the town court about the decision of 21 January 2007.

On 23 March 2007 the town court declared the refusal of 21 January 2007 unlawful and unfounded. The court noted, among other things, that the inquiry materials showed that the forensic report and the ambulance call card contained records concerning two different groups of injuries sustained by the first applicant, a fact which the investigators had disregarded. Moreover, submissions by the first applicant and M.Sh. to the effect that he had not resisted arrest contradicted statements by police officers who claimed that they had had to use force to subdue him and prevent him from fleeing. In any event, the interviewing of the police officers had been superficial; the investigators had failed to question them on the most relevant issues, such as when they had had to use force against the first applicant, how many officers had done it and in what manner.

On 8 May 2007 the Supreme Court rejected the town prosecutor's office's appeal against the decision of 23 March 2007.

By a decision of 21 July 2007 the town prosecutor's office refused to institute criminal proceedings in respect of the first applicant's alleged ill-treatment, finding that he had sustained his bodily injuries during his arrest.

The first applicant challenged that decision and on 24 January 2008 the town court granted his complaint and declared the decision of 21 July 2007

unlawful. It averred that although it had on several occasions invalidated decisions of the town prosecutor's office refusing to open a criminal case in respect of the first applicant's ill-treatment, the prosecutor's office had disregarded its findings and refused to rectify the shortcomings specifically indicated by the court. Among other things, the investigators had failed to account for the injuries sustained by the first applicant after his forensic examination and before his examination by the ambulance doctors and had omitted to identify and interview the UBOP officers. The town prosecutor's office was instructed to remedy those failures.

On 4 March 2008 the Supreme Court quashed the town court's decision following an appeal by the town prosecutor's office and remitted the case for fresh examination at first instance by a different bench.

On 26 March 2008 the town court invalidated the decision of 21 July 2007, reiterating the arguments mentioned in its decision of 24 January 2008.

On 10 June 2008 the Supreme Court set aside the town court's decision of 26 March 2008, against which the investigating authorities had appealed, and remitted the case for fresh examination by the town court in a different composition.

On 24 June 2008 the Nalchik deputy town prosecutor set aside the refusal of 21 July 2007 to institute criminal proceedings. He instructed the investigators to carry out an additional inquiry and to take the following investigative steps: identifying and interviewing the UBOP officers who had transferred the first applicant to the ROVD and the UBOP on 21 October 2005; interviewing the first applicant, R.Sh., officers at remand prison SIZO no. 1 and ROVD officers Kh.G. and Kh.B., and rectifying the shortcomings indicated in the town court's decision of 26 March 2008.

By a decision of 24 June 2008 the Supreme Court terminated the proceedings concerning the first applicant's complaint about the decision of 21 July 2007, owing to the fact that, in the meantime, it had been set aside by the deputy town prosecutor.

The outcome of the investigation remains unclear.

### D. Removal of the first applicant's lawyer I.K. from his defence in the criminal proceedings against him

On 9 November 2005 investigator M. summoned the first applicant's lawyer I.K. to the prosecutor's office with a view to discussing her complaint of 3 November 2005 concerning her client's alleged ill-treatment.

In spite of his threats to prosecute her for failure to testify, she initially refused to give him the information he wanted. Eventually, however, fearing criminal prosecution, she gave him the information.

By a decision of 10 November 2005 investigator K. of the Prosecutor General's Office of the Russian Federation issued a decision to remove I.K.

from the first applicant's defence ("*постановление об отводе защитника*") on the ground that as she had testified as a witness in his criminal case and thus could not represent her client any longer.

On 18 November 2005 the town court granted I.K.'s complaint about the decision of 10 November 2005 in part. It found that the investigator had unlawfully interviewed her about the facts she had learnt while representing her client and that her fears of being criminally prosecuted for refusal to testify had been well-founded. It nevertheless held that the decision to remove her from the first applicant's defence could not be considered unlawful.

On 13 January 2006 the Supreme Court set aside the decision of 18 November 2005 and remitted the case for fresh examination at first instance.

On 17 February 2006 the town court dismissed I.K.'s complaint, finding that she had testified of her own free will, and upheld the decision to remove her from the first applicant's defence.

It is unclear whether the decision of 17 February 2006 was challenged on appeal.

### E. The events of March 2011

On 3 March 2011 Mr P. became the new head of SIZO no. 1 remand prison. In the applicants' submission, after his arrival the authorities started a massive crackdown on the inmates, especially those charged with participation in the Nalchik raid and those who practised the Muslim faith. Since 3 March 2011 an OMON unit has been permanently stationed on the premises of the remand prison and its officers have constantly beaten up the detainees and insulted their religious beliefs.

The first applicant was also allegedly beaten up.

### F. Information concerning criminal proceedings against the first applicant

Criminal proceedings against the first applicant have been pending since October 2005.

It appears that on an unspecified date in 2007 the criminal case against the first applicant and fifty-seven other people charged with having participated in the Nalchik raid was transferred for examination at first instance to the Supreme Court. It seems that the proceedings at first instance are pending.

# COMPLAINTS

The applicants complained under Article 3 of the Convention that the first applicant had been repeatedly ill-treated and tortured after his arrest and that the authorities had failed to carry out an effective investigation of his alleged ill-treatment.

Relying on Article 6 § 3 of the Convention, the applicants complained that the investigating authorities had arbitrarily and intentionally removed I.K, from the first applicant's defence, thereby depriving him of the services of a lawyer of his choice.

Lastly, the applicants complained that the first applicant had not had effective remedies in respect of their aforementioned complaints, in breach of Article 13 of the Convention.

# THE LAW

## A. As regards the second applicant

The Court notes at the outset that the second applicant complains about a number of alleged violations of the Convention in respect of the first applicant. However, it does not consider in respect of any of the complaints enumerated above that the second applicant may claim to be a victim of the alleged violations (see, for example, *O'Brien v. the United Kingdom* (dec.), no. 61391/00, 8 October 2002).

It follows that this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## B. As regards the first applicant

### *1. Complaints about the alleged ill-treatment and the investigation*

The first applicant complained, with reference to Article 3 of the Convention, that he had been repeatedly ill-treated after his arrest and that the authorities had failed to properly investigate his alleged ill-treatment. Article 3 reads as follows:

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

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

*2. Complaint about legal assistance*

The first applicant complained, with reference to Article 6 § 3 of the Convention, that the investigating authorities had breached his right to legal assistance. The Court considers that this complaint should be examined under Article 6 § 1 and § 3 (c) which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
>
> ..."

The Court notes that the criminal proceedings against the first applicant are currently pending before the domestic courts. This complaint under Article 6 is, therefore, premature. Accordingly, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies (see, for example, *Koç v. Turkey* (dec.), no. 36686/07, 26 February 2008).

*3. Complaints about lack of effective remedies*

Lastly, the first applicant complained under Article 13 of the Convention that he did not have effective remedies with regard to the aforementioned alleged violations of the Convention. Article 13 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."

In so far as the first applicant may be understood to rely on Article 13 of the Convention in respect of his complaint under Article 6 §§ 1 and 3 (c), The Court observes that Article 6 is *lex specialis* in regard to his submissions under Article 13 and that it has found above that his complaint under the former provision is premature.

As to the first applicant's complaint under Article 13 in conjunction with Article 3 concerning the alleged lack of effective remedies in respect of his complaints about the ill-treatment and the related investigation, the Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

For these reasons, the Court unanimously

*Decides* to adjourn the examination of the first applicant's complaints under Articles 3 and 13 concerning his alleged ill-treatment, the related investigation and the absence of effective remedies;

*Declares* the remainder of the application inadmissible.

André Wampach
Deputy Registrar

Nina Vajić
President