CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 49790/99
by Vladimir Grigoryevich TRUBNIKOV
against Russia

The European Court of Human Rights (Second Section), sitting on 14 October 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE,
Mr A. KOVLER, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 12 March 1999,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Vladimir Grigoryevich Trubnikov, is a Russian national, born in the Krasnodar Region and living in the village of Khokholskiy, in the Voronezh Region. He is represented before the Court by Karinna Akopovna Moskalenko, a lawyer practising in Moscow.

A. The circumstances of the case

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

On 30 August 1993 the applicant's son, Viktor Trubnikov, ("the son") was convicted of manslaughter and sentenced to 7 years' imprisonment. He was serving his sentence in a correctional labour colony (*исправительно-трудовая колония)* OZH 118/8 in Rossosh in the Voronezh Region. He expected to be released in October 1998.

On 13 September 1998, a prison football team, of which the son was a member, took part in a match outside the prison. After the game he returned to the prison.

On the same day, at 7.15 p.m., the son was detained by a prison officer on suspicion of alcoholic intoxication. He was placed in solitary confinement. At 8.20 p.m. the son was found dead.

That evening of 13 September 1998, the prison governor decided not to institute a criminal investigation into the death, as no crime had been established. In his decision it was stated that the son had hanged himself using the sleeve of his jacket. It was also stated that he had had a suicidal tendency and, in particular, that he had attempted to commit suicide in June 1995.

On 15 September 1998 an autopsy was performed on the body. In October 1998 a post mortem report was issued, according to which abrasions and bruises were found on the nose, hand, forearm and elbow. The expert came to the conclusion that death had been caused by pressure on the neck through hanging.

The applicant was informed orally that his son had committed suicide. He asked the prison authorities to initiate a criminal investigation. The authorities did not inform him that a decision had already been taken not to do so.

In March 1999 the applicant requested the Voronezh Regional Prosecutor's Office to provide him with information on the circumstances of his son's death. The request was transmitted to the Voronezh City Special Prosecutor's Office supervising prisons' compliance with the law. On 8 April 1999 the latter Prosecutor's Office confirmed that the applicant's son had committed suicide and informed the applicant that a decision not to open a criminal investigation had been taken by the prison governor. The prosecutor also informed the applicant that the decision had been subject to the supervisory assessment by the Voronezh City Prosecutor's Office and had been found to be lawful and well-founded.

On 16 April 1999 the Voronezh Regional Prosecutor's Office authorised the applicant's access on 30 April 1999 to the materials attached to the decision of 13 September 1998. However, the prosecutor was absent at the time appointed and the applicant was unable to examine them.

On 26 June 1999 the applicant received a copy of the decision of 13 September 1998.

On 18 September 2000 the applicant seized the Rossoshanskiy District Court of the Voronezh Region with a request to order a criminal investigation into his son's death. The court, however, declined jurisdiction in the matter on 2 October 2000. It stated that the institution of criminal proceedings fell within the competence of the Prosecutor's Office.

On 23 March 2001 the applicant brought proceedings before the same court to have the refusal of the prison governor to institute criminal proceedings declared unlawful. The applicant alleges that this claim was accepted "several weeks later" when he had complied with the formal requirements for bringing an action. The Government submit that the Rossoshanskiy District Court of the Voronezh Region accepted the applicant's claim on 10 January 2002.

After communication of the case to the respondent Government by the Court, on 5 February 2002 the Voronezh Regional Prosecutor's Office instituted a criminal investigation into the death of the applicant's son.

On 20 March 2002 the Rossoshanskiy District Court of the Voronezh Region held that the decision of 13 September 1998 not to open criminal proceedings was unlawful. At the same time, the court terminated the proceedings, given that on 5 February 2002 the Voronezh Regional Prosecutor's Office had annulled the disputed decision and had opened the criminal investigation.

On 10 October 2002 the Voronezh Prosecutor's Office supervising the detention facilities decided to terminate the criminal investigation having established that the applicant's son had committed suicide. The termination order referred to the testimonies given by the prison officers, prisoners, including football team members, the prison psychiatrist who had been supervising the applicant's son, the expert who had conducted the post mortem examination, and to the conclusions of the post mortem examination and the posthumous expert opinion on the son's psychological and psychiatric condition prior to his death.

On 3 March 2003 the applicant received a copy of the termination order of 10 October 2002.

B. Relevant domestic law

The Constitution of the Russian Federation adopted by referendum on 12 December 1993 provides, in so far as relevant, as follows:

Article 46 (1) and (2) of Section 1

"Everyone shall be guaranteed judicial protection of his or her rights and freedoms."

> "Decisions and actions or lack of action of State bodies, bodies of local self-government, public associations and officials may be appealed against in court."

According to Article 109 of the Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР 1960 г.*), as in force at the relevant time, a prosecutor, investigator, inquiry body or judge are obliged to consider applications and information about any crime committed and take a decision within three days. In exceptional cases, the term may be extended to ten days. The decision must be:

(i) to initiate a criminal investigation;

(ii) to refuse to initiate a criminal investigation, or

(iii) to transmit the application or the information to a competent authority.

Article 117 of the Code of Criminal Procedure includes prison governors in the definition of an "inquiry body".

Article 113 § 4 of the Code of Criminal Procedure provides that an appeal against the refusal to initiate a criminal investigation can be lodged with a prosecutor or an appellate court.

On 29 April 1998 the Constitutional Court of the Russian Federation interpreted Article 46 of the Constitution as providing everyone with a right of appeal to a court against decisions and actions of authorities and officials. The Constitutional Court referred to its earlier case-law conferring access to court in matters affecting individual rights, and held that any person whose interests are affected by a refusal to open criminal proceedings should have an opportunity to challenge it before a court. The offending provision of the Code of Criminal Procedure was declared incompatible with Article 46 of the Constitution in so far as it limited access to court to all affected parties, and thus the domestic courts could no longer rely on it to refuse the examination of such claims.

On 14 January 2000 the Constitutional Court declared the institution of criminal proceedings by a court to be incompatible with its independent role in adversarial proceedings. A court's function, as defined by the Constitutional Court, is "to examine the materials placed in its possession, as submitted by the investigating authority, and to assess whether the decision not to investigate was lawful and well-founded". The court may annul any unsatisfactory decision, in which case the investigating authority would be obliged to carry out additional checks, especially into the matters indicated by the court, and take a new decision whether a criminal case should be opened.

Section 79 § 4 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation states that if, as the result of an enactment found to be unconstitutional, there is a lacuna in the legislation, the Constitution shall be directly applied.

COMPLAINT

The applicant complains under Article 2 of the Convention that the responsibility for the death of his son lies with the prison authorities. Furthermore, the authorities' failure to investigate the circumstances of his son's death also engaged their responsibility under the same Article.

The applicant further complains that he had no effective remedy against the authorities' initial refusal to open an investigation into the death of his son. He invokes Article 13 of the Convention.

THE LAW

1. The applicant complains that the authorities failed to take appropriate steps to safeguard his son's life and to conduct an effective investigation into his death. He invokes Article 2 of the Convention in respect of both complaints.

Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

The parties' submissions

The Government acknowledge that the investigation into death of the applicant's son was incomplete. In particular, they accept that the authorities did not establish "what caused [the son's] death, what his relationships with other convicts were like and whether he faced threats or violence from other convicts or the facility's management on the day of his death or on previous days". Likewise, it "was not established under what circumstances [the son] drank liquor on the day of his death, and the validity of committing him to a solitary cell, given his suicidal disposition, was not investigated".

The Government state that, as the circumstances of the son's death were not properly established, the decision of 13 September was quashed and criminal proceedings were instituted on 5 February 2002.

The Government nonetheless raise a preliminary objection to the admissibility of the application on account of a failure by the applicant to exhaust domestic remedies.

Firstly, the Government contend that the applicant could have made a complaint to a superior prosecutor, in this case the Prosecutor General, who could quash a decision taken by a subordinate prosecutor and order a criminal investigation.

Secondly, the Government argue that it was open to the applicant from the outset to challenge the refusal to open criminal proceedings before a competent court. The Government invoke a number of rulings of the Constitutional Court of the Russian Federation ("the Constitutional Court"). They rely in particular on a ruling of 29 April 1998 which specifically invalidated the provision of Article 113 of the Code of Criminal Procedure limiting access to judicial review of a refusal to open a criminal investigation, and conferred access to court in such matters for all persons affected.

To illustrate the point, the Government refer to the proceedings eventually brought by the applicant. His claim to declare the refusal to open criminal proceedings unlawful was accepted by the competent court, although on 20 March 2002 the proceedings were terminated as by then a decision to open a criminal investigation had already been taken. The Government contend that applying to a court was an ordinary and accessible procedure which the applicant should have employed from the outset.

The Government point out that a decision declaring a refusal to open criminal proceedings unlawful, if taken by a court, does not of itself open criminal proceedings, as the courts cannot institute them of their own motion. They refer to the Constitutional Court's ruling of 14 January 2000 which interprets the courts' function as being "to assess whether the decision not to investigate was lawful and well-founded", with a power to annul any unsatisfactory decision.

The applicant challenges the claim that he could pursue appeals through the prosecution hierarchy. He states that in March 1999 he complained to the Voronezh Regional Prosecutor's Office. On 8 April 1999 the prosecutor supervising the detention facilities in Voronezh informed the applicant in writing of the absence of any grounds for measures to be taken by the Prosecutor's Office. On 16 April 1999 the Voronezh Regional Prosecutor's Office informed the applicant in writing that the decision to refuse the institution of criminal proceedings had been reviewed and confirmed. The applicant claims that complaining further was of no avail.

As to the court proceedings, the applicant claims that he applied to a court on two occasions. First, on 18 September 2000 the applicant seized

the Rossoshanskiy District Court of the Voronezh Region with a request to order a criminal investigation into his son's death. The examination of this claim was refused as being outside the court's competence. Secondly, on 23 March 2001 the applicant brought proceedings before the same court to declare the refusal to institute criminal proceedings unlawful. The applicant considers that although formal examination of his complaint took place, these proceedings afforded no redress. He alleges that the criminal proceedings he sought were instituted due to his application to the Court, rather than through successful domestic proceedings. He therefore claims that this remedy has been exhausted.

The applicant further challenges the effectiveness of the investigation carried out in 2002. He claims that it was opened too late, lacked objectivity and that neither he himself nor the rest of the family were involved in it.

The Court's assessment

The Court recalls that in the area of exhaustion of domestic remedies the burden of proof is on the Government to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof is satisfied, it falls to the applicant to show that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see, for example, the *Akdivar and Others* judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, p. 1211, § 68). The Court notes the Government's argument that the applicant could have complained to the Prosecutor General. However, the Court is not persuaded that such an appeal could have constituted an effective remedy for his complaint about the absence of an effective investigation into his son's death. The powers conferred on the superior prosecutors constitute extraordinary remedies, the use of which depends upon the prosecutors' discretionary powers. The Court does not accept that the applicant was required to exhaust this remedy in order to comply with the requirements of Article 35 § 1 of the Convention.

As to the possibility to appeal to a court against the investigating authorities' refusal to open criminal proceedings, the Court notes that the Constitutional Court's rulings invoked by the Government expressly require the courts to examine such claims. The rulings leave no doubt as to whether this remedy has been formally available since 1998. The Court notes that although a court itself has no competence to institute criminal proceedings, its power to annul a refusal to institute criminal proceedings and indicate the defects to be addressed appears to be a substantial safeguard against the arbitrary exercise of powers by the investigating authority.

However, the Court notes that in the present case this remedy was employed by the applicant. The claim examined by the Rossoshanskiy District Court of the Voronezh Region on 20 March 2002 clearly fell into the category put forward by the Government, as they accept. It follows that the application cannot be rejected for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention.

The Court considers, in the light of the parties' submissions, that this part of the application raises serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complains under Article 13 of the Convention that he had no effective remedy against the authorities' initial refusal to conduct investigation into the death of his son serving his sentence in prison.

Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

As discussed above in relation to the Government's preliminary objection concerning non-exhaustion of domestic remedies, the applicant could have applied to a court for redress and did so. However at the time when he resorted to a judicial procedure the disputed decision had already been annulled by the prosecutor and the criminal investigation had been ordered. For this reason the court proceedings were terminated. The Court refers to the finding above that the court procedure provided for by the domestic law for this category of complaints constitutes a sufficient safeguard against the arbitrary exercise of powers by the investigating authority. The Court does not find that in the particular circumstances of the present case an appeal to a court was devoid of any chance of success, or was inadequate or ineffective.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares inadmissible the applicant's complaint that he had no effective remedy against the authorities' refusal to conduct investigation into his son's death;

Declares the remainder of the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.-P. COSTA
President