



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

FIRST SECTION

Application no 36814/06
Shaukhat Galimovich CHUKAYEV
against Russia
lodged on 11 July 2006

STATEMENT OF FACTS

The applicant, Mr Shaukhat Galimovich Chukayev, is a Russian national who was born in 1960 and lived before his arrest in Vatazhnoe, a village in the Astrakhan region. He is currently serving a prison sentence in a correctional colony in Astrakhan.

A. The circumstances of the case

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

1. Criminal proceedings against the applicant

(a) Covert operation

In March 2004 the Voronezh branch of the Federal Drug Enforcement Agency (“the Agency”) instituted criminal proceedings against a certain B. and O. following a test purchase of drugs carried out by its agents. When questioned B. and O. submitted that they had purchased drugs from the applicant and that he lived in Astrakhan.

On 20 May 2004 the Agency instituted criminal proceedings in connection with the sale of drugs to B. and O. by an unidentified person and decided to organise a test purchase of drugs in respect of the applicant with the help of B. and two undercover police officers Sh. and P.

The covert operation took place between 3 and 5 June 2004 in a hotel in Astrakhan, where Sh. had booked a room. Audio recording devices were installed in the room and the hotel was placed under surveillance. The applicant alleges that during the covert operation policemen poisoned him

with an unknown substance and as a result the applicant was admitted to a prison hospital.

(b) The applicant's arrest, his personal search and questioning as a suspect

According to the record of arrest drafted at 3.30 pm on 5 June 2004, police arrested the applicant in the hall of the eighth floor of the hotel on the ground that “witnesses and eyewitnesses indicated that the applicant had committed a criminal offence”. The arrest record also indicated that the applicant had been searched immediately after his arrest. The search and its results were described in the arrest record as follows:

“Mr Chukayev was asked to deliver of his own free will any powerful narcotic substance ... which he had kept on him unlawfully; monies acquired illegally ... In reply to the investigator's request Mr Chukayev explained that he had none of those things except money, which he had received illegally through the sale of a narcotic substance, namely heroin in the quantity of approximately 38-50 grams. He also explained that the money he had received unlawfully was in his bag, and submitted that he wished to give it [to the investigator] of his own will. As a result of the personal search Mr Chukayev voluntarily took the money out of his bag. ...”

Following the applicant's personal search the investigator seized other money found in the applicant's pockets and also the applicant's identity papers, mobile phone and some other items. The applicant's personal search was photographed.

The applicant alleges that after his arrest investigator L. refused to provide him with a lawyer the ground that no investigating activities were being carried out in respect of the applicant and therefore he did not need a lawyer.

On the same day the investigator requested fingerprint and chemical expert reports. The applicant alleges that he was not informed of the request for these reports, and was not informed of their results. The applicant learnt of these expert studies only when he was familiarising himself with the materials of the criminal case in March 2005 (see below).

On 6 June 2004 the investigator questioned the applicant as a suspect, again in the absence of legal counsel. The applicant alleges that he refused to give a statement for health reasons, whereas the record of interview stated that he had refused to make a statement referring to his right not to incriminate himself.

(c) The applicant's placement in detention and the charges against him

On 6 June 2004 the Kirovskiy District Court of Astrakhan (“the District Court”) remanded the applicant in custody. The applicant alleges that counsel Or. did not represent him properly at that hearing. Subsequently the applicant's detention was extended on several occasions. He remained in detention until his conviction on 14 October 2005.

On 11 June 2004 the applicant was charged with drug offences and was questioned in the presence of counsel I. It follows from the record of that interview, duly signed by the applicant and his counsel, that the applicant had understood the charges against him and denied all of them. The applicant refused to make a statement.

On 16 August 2004 a new version of the charges was presented to the applicant in the presence of his counsel. The applicant was charged with

two counts of drug trafficking. Firstly, he was accused of unlawfully acquiring, transporting and possessing drugs with the intention of selling them, and of selling the drugs to B. and O. in December 2003 and, secondly, of selling drugs to Sh. on 5 June 2004.

(d) Return of the case to the prosecuting authorities

On 17 February 2005 the District Court returned the criminal case to the prosecutor because the applicant had not had sufficient time to familiarise himself with the materials of the criminal case. In March 2005 the applicant familiarised himself with materials of the criminal case.

(e) The trial and the applicant's conviction for drug offences

The District Court heard the applicant's case between April and October 2005. The applicant was represented by counsel M. and I. The District Court first heard the applicant and then heard witness statements and examined other evidence.

(i) The applicant's submissions

The applicant denied all the charges against him. He submitted, in particular, that he had met B. in November 2003 and had helped him to buy fish wholesale. On 5 June 2004 he had met B. because the latter owed him money and was to give it back on that date and also B. and Sh. wanted to arrange with him another purchase of fish.

(ii) Witness statements regarding the first part of the charges

During the examination of the first part of the charges against the applicant, namely, unlawful acquisition and possession of drugs and sale of the drugs to B. and O. in December 2003, the District Court heard several prosecution witnesses. They submitted as follows:

Witness Av., a police officer, testified that he had taken part in the planning of the covert operation in June 2004 and was present at the moment of the applicant's arrest and personal search. He heard the applicant say at the moment of arrest that he had received money from the sale of drugs.

Witnesses Le. and Sv., police officers from the Voronezh police department, submitted that they had taken part in the arrest of B. and O. in March 2004.

Witness Iv. submitted that in March 2004 police had asked him to be an attesting witness during the search of B.'s apartment in Voronezh. Later in November 2004 he was hired to work for the Voronezh police department.

Witness Yu. submitted that in March 2004 police had asked him to be an attesting witness in the covert operation. Later he (Yu.) was hired to work for the Voronezh police department.

Witness O. testified that in November 2003 he and B. came to Astrakhan from Voronezh and bought fish from the applicant. Later the applicant had contacted them and said that he could supply more fish. They went again to Astrakhan, where B. bought drugs from somebody. At the end of the investigation of the criminal case against him and B., police asked them, in exchange for a more lenient sentence, to go to Astrakhan again and to incite the applicant to sell them drugs. He refused, whereas B. agreed.

However, since there were contradictions between O.'s testimony in court and his depositions given during the investigation, the District Court read out those depositions.

It followed from O.'s depositions that he and his business partner B. had been buying fish in Astrakhan and selling it in Voronezh. In November 2003, during their stay in Astrakhan, B. had met the applicant, who promised to help them with purchases of fish. In December 2003 they were again in Astrakhan where they had bought heroin from the applicant and transported it to Voronezh.

The District Court further read out depositions by several prosecution witnesses given during the investigation, despite the defence's objections.

The deposition by witness B. indicated that his business partner O. had introduced him to the applicant in November 2003 and the latter had agreed to be an intermediary in his business of supplying fish to Voronezh. In December 2003 he and O. came to Astrakhan to buy fish, however, the applicant did not have enough fish for them. He (B.) had serious financial difficulties and, therefore, O. suggested that he (B.) buy drugs from the applicant. O. assured him that he had a settled network of drug distribution in Voronezh and would help him to sell drugs within three days and thus B. would resolve his financial difficulties. That was the first time he (B.) learnt that the applicant was selling drugs. Within two days of this meeting the applicant had sold him a large quantity of heroin. He and O. had transported the heroin to Voronezh. Police arrested them in Voronezh when they were trying to sell heroin.

The deposition by witness Su., a police officer, indicated that he had acted as an undercover agent in the test purchase of drugs carried out in respect of B. and O.

(iii) Witness statements regarding the second part of the charges

During the examination of the second part of the charges against the applicant the District Court questioned several prosecution witnesses, including witness Sh, police officer.

Witness Sh. submitted that in June 2005 he had taken part in the test purchase of drugs in respect of the applicant, who had been identified by B. as the seller of drugs. During the covert operation he and B. had met the applicant several times in the hotel room. At their last meeting the applicant had sold him about 50 g of heroin.

The District Court also read out a statement by witness B., given during the investigation.

The deposition by witness B. indicated that he had agreed to take part in the test purchase of drugs in respect of the applicant. A police officer Sh. was to take part in that operation as a buyer. At the end of May he (B.) called the applicant and informed him that he had already sold the goods (drugs) to a certain person and that person was interested in buying more drugs from the applicant, but wished to do so in person and would come to Astrakhan. The applicant agreed and said that he would find a solution. Then B. described in detail how the covert operation had been carried out between 2 and 5 June 2004. In particular, on those days he had called the applicant several times to arrange a meeting with him. Finally, on 3 June 2004 the applicant came to the hotel and he introduced him to Sh. The latter

asked him to supply him with two kilos of heroin and discussed other terms of the deal. The applicant said that he could get only 1.2 kilos of heroin and they agreed to meet the following day. On 4 June 2004 the applicant came to their hotel and said that he had contacted the necessary people and they would call him back. They all stayed in the hotel room until the applicant received a phone call. The applicant informed them that he would bring the heroin the next day. On 5 June 2004 the applicant came to the hotel and brought about 38 g of heroin. Sh. asked him why he had brought such a small quantity of drugs. The applicant explained that he could bring more in two days. However, he had nine grams of his “own” heroin and Sh. agreed to buy that too. Sh. gave the applicant money. The applicant said that he would go downstairs to get change. When he left the room he was arrested by police.

(iv) The applicant’s conviction

On 14 October 2005 the District Court found the applicant guilty of drug offences and sentenced him to nine years’ imprisonment. In particular, the District Court held that the applicant’s guilt in the sale of drugs to B. and O. in December 2003 and his guilt in the sale of drugs to Sh. on 5 June 2004 had been proved by the statements of witnesses at the trial and depositions by witnesses made during the investigation, as well as by other evidence, including the record of the applicant’s arrest on 5 June 2004.

In his appeal against the conviction the applicant complained, among other things, that the trial court had not ensured the presence of a key prosecution witness, B.

On 2 March 2006 the Astrakhan Regional Court (“the Regional Court”) upheld the applicant’s conviction. Regarding witness B, the Regional Court held that according to medical certificates B. was suffering from cancer and could not speak, and therefore, the trial court had lawfully decided that such a situation could be considered as “other extraordinary circumstances” which prevented B. from appearing at the hearing and that his testimony could be read out in accordance with Article 281 of the Code of Criminal Procedure (see “Relevant domestic law” below).

(f) Supervisory review proceedings

(i) First round of supervisory review proceedings

On an unspecified date in 2006 the applicant applied to the Presidium of the Regional Court for a supervisory review of his conviction.

On 29 August 2006 the Presidium of the Regional Court examined the applicant’s case by way of supervisory review. Neither the applicant nor his counsel were present at that hearing. The Presidium of the Regional Court modified the judgment of 14 October 2005 as upheld on 2 March 2006 in so far as the applicant’s actions on 5 June 2004 had been qualified as a drug offence, and held that his actions should have been qualified as an attempt to commit a drug offence, and upheld the remainder of the judgment of 14 October 2005.

(ii) Second round of supervisory review proceedings

On 6 March 2009 a judge of the Supreme Court of the Russian Federation (“the Supreme Court”) referred the case for examination on the merits to the Presidium of the Supreme Court, at the request of the Prosecutor General of the Russian Federation.

On 2 April 2009 the Supreme Court of the Russian Federation quashed, by way of supervisory review, the decision of 29 August 2006, on the grounds that the applicant had not been duly informed of the date of the hearing of 29 August 2006, and therefore was unable to attend, and remitted the case for a fresh examination of the Presidium of the Regional Court.

(iii) Third round of supervisory review proceedings

On 19 May 2009 the applicant requested the Presidium of the Regional Court to provide him with legal-aid counsel for the hearing before it. He claimed that he did not have sufficient means to pay for counsel.

On 2 June 2009 the Presidium of the Regional Court examined the criminal case against the applicant by way of supervisory review. The applicant was present at the hearing and was assisted by legal-aid counsel K.

The applicant objected to the panel of the Presidium on the ground that that panel had already examined his case by way of supervisory review on 29 August 2006. The Presidium dismissed his objection, finding that the decision of 29 August 2006 had been quashed on procedural grounds and therefore, there was no reason to exclude these judges from the new examination of the case.

On the merits of the case the applicant submitted, in particular, that at the moment of his arrest his rights had not been explained to him, he had not been provided with a lawyer and had not received a copy of the arrest record, and had not been able to question key prosecution witness B. at the trial.

Having examined the materials of the case, the Presidium found that the applicant’s grounds of appeal had been unsubstantiated. In particular, it held, that the record of arrest of 5 June 2004 had been duly signed by the applicant and that the applicant had been informed of his rights, including the right to be represented by counsel. However, he did not request that counsel be instructed and did not make any comments in the record of his arrest. The Presidium further noted that depositions by prosecution witnesses had been read out at the trial in accordance with the law.

The Presidium of the Regional Court modified the judgment of 14 October 2005 as upheld on 2 March 2006, held that the applicant’s actions on 5 June 2004 should have been qualified as an attempt to commit a drug offence, and upheld the remainder of the judgment of 14 October 2005.

By a decision issued on the same day the Presidium of the Regional Court recovered from the applicant legal counsel’s fees in the amount of 1,485.85 Russian roubles.

2. Conditions of detention

During criminal proceedings against him the applicant was detained in Astrakhan remand prison IZ-30/1 (“remand prison. 30/1”). He was detained there during the following periods:

- (a) between 6 and 9 June 2004
- (b) between 9 July and 16 December 2004
- (c) between 28 December 2004 and 11 April 2006.
- (d) between 27 February and 26 March 2008.

During the first three periods of detention the applicant was detained in different cells. All of them were overcrowded and infested with insects. The cells measured about twenty-five square metres each and had six bunk beds. The applicant did not have an individual sleeping place and the inmates had to take turns to sleep. Some cells were not equipped with ventilation, in others it was not working. The electric light was on all the time. The toilet was not separated from the rest of the cells.

During his last stay in the remand prison the applicant was detained in cell 5 which was situated in the basement. The applicant was not provided with any bedding or cooking utensils. Remand prison officials explained to the applicant that he should have brought bedding with him. Cell 5 was very cold and damp. Since the applicant did not have any bedding he was obliged to sleep in his clothes. The windows were closed all the time and let no daylight in. The cell was never ventilated. The toilet was situated in the corner of the cell and offered no privacy. The dining table was very close to the toilet. The cell was infested with insects. The detainees could take a fifteen-minute shower once a week.

3. Alleged interference with the applicant’s correspondence with the Court

On an unspecified date the applicant was transferred to serve his sentence in correctional colony IK-2 in the Astrakhan region (“colony 2”). It appears that in 2010 he was transferred to correctional colony IK-6 in the Astrakhan region (“colony 6”).

The applicant submitted that the authorities of colonies 2 and 6 opened and read a number of the Court’s letters to him. In particular, they opened the Court’s letters of 13 September 2006, acknowledging receipt of the applicant’s application and giving him further information on the conduct of the proceedings before the Court. They also opened the Court’s letters of 21 November 2006, 15 January, 20 February and 22 and 29 May 2007, and of 26 February 2008. The applicant provided the Court with copies of these letters. All of them had been stamped by the colony authorities.

The applicant also submitted that the colony authorities had delivered the Court’s letters to him only after some delay.

The applicant alleges that he complained to the colony authorities about the opening and reading of his correspondence with the Court and also to higher authorities in the Federal Prison Service. During a meeting with the applicant in May 2008 the head of the Human Rights Department of the Astrakhan branch of the Federal Prison Service could not explain to the applicant why the Court’s letters addressed to him were being opened and read by the prison authorities.

4. Proceedings for conditional release

By a final decision of 25 November 2011 the Regional Court dismissed the applicant's request for conditional release.

B. Relevant domestic law

Article 281 of the Criminal Procedure Code provides that where a victim or a witness do not appear at the court hearing, the court may decide, at the request of a party to the proceedings or on its own initiative, to read out the testimony previously given by the victim or witness during the preliminary investigation. It may do so if the victim or witness has died or cannot appear at the hearing because of a serious illness; if the victim or witness, who is a foreign national, refuses to appear before the court, and in cases of natural disaster or if other extraordinary circumstances prevent him or her from appearing before the court.

COMPLAINTS

1. The applicant complains under Article 2 that during the covert operation policemen poisoned him with an unknown substance and that the domestic authorities refused to investigate that incident. The applicant was treated in a prison hospital instead of a civilian one, despite the fact that he had not yet been convicted of any criminal offence.

2. The applicant complains under Article 3 that:

(a) the investigating authorities took him from the remand prison and then from hospital to their office for questioning every day; he stayed there for several hours and was not given food or provided with medical assistance;

(b) he was detained in inhuman conditions of detention in Astrakhan remand prison IZ-30/1.

3. The applicant complains under Article 5 that:

(a) he was not informed of the reasons for his arrest and was not provided with a copy of the arrest record; the original of the arrest record disappeared from the case file; there were not sufficient grounds to place him in pre-trial detention;

(b) his pre-trial detention was unlawful and unreasonably long

(c) there were numerous shortcomings in the proceedings concerning review of the lawfulness of his detention;

4. The applicant complains under Article 6 that criminal proceedings against him were unfair. In particular, he complains that:

(a) he was not informed of the charges against him;

(b) he was not provided with a lawyer immediately after arrest;

(c) the investigator did not inform him of the appointment of experts for reports and their results;

(d) the trial court did not ensure the presence at the trial of a key prosecution witness, B., and also of a number of other witnesses and therefore the applicant could not question them ;

(e) the trial court refused to summons prosecution witness Yu for the second time;

(f) the trial court based his conviction on inadmissible evidence, a part of which was falsified and another part obtained in breach of procedure;

(g) the applicant did not familiarise himself with the materials of the criminal case ;

(h) he was not informed of the date of the supervisory hearing of 29 August 2006 and so could not send additional submissions and appoint legal counsel;

(i) he was not duly informed of the date of the hearing of 2 April 2009 and could not inform the court of his wish to attend it and appoint legal counsel;

(j) the court which examined his case on 2 June 2009 was not established in accordance with law and was not impartial and independent, because some of the judges had taken part in the examination of the case on 29 August 2006;

(k) by a decision of 2 June 2009 the court recovered from the applicant legal-aid counsel's fees;

(l) domestic courts violated the principle of presumption of innocence because he was obliged to prove his innocence;

(m) proceedings concerning his conditional release were unfair.

5. The applicant complains under Article 6 that the criminal proceedings against him were excessively long.

6. The applicant complains under Article 7 that criminal proceedings in respect of events of December 2003 were instituted unlawfully and no criminal proceedings were formally instituted in respect of events of 5 June 2004 and, therefore, his punishment was not based on law.

7. The applicant complains under Article 8 that:

(a) a list of calls made by the applicant from his phone between 1 December 2003 and 5 June 2004 was obtained by the investigating authorities from the telephone company without a court order;

(b) the operational search activity "undisclosed audio recording" carried out between 3 and 5 June 2004 in the hotel room did not comply with the requirements of domestic law;

(c) because of the criminal proceedings against him he lost his family, could not be involved in the education of his son, lost his job and his health, and could not financially support his parents;

(d) the attempt by police to incite him to commit a crime violated his right to respect for his private life;

(e) the authorities of colonies IK-2 and IK-6 opened and read letters from the Court addressed to the applicant and handed them over to him only after some delay

(f) the colony authorities did not dispatch his letter to the President of the Russian Federation.

8. The applicant complains under Article 13 that he did not have effective remedies for his complaints under Articles 2 and 6.

9. The applicant complains under Article 14 that:

(a) on 6 May 2006 his parents were not allowed to visit him in colony IK-2 because it was noted in his personal file that he did not have any relatives;

(b) he was discriminated against by the domestic courts because they did not apply in his case a number of the Court's judgments concerning criminal proceedings for drug offences.

QUESTION TO THE PARTIES

1. Were the conditions of the applicant's detention in Astrakhan remand prison IZ-30/1 compatible with Article 3 of the Convention?

The Government are requested to indicate the exact dates of the applicant's detention in the above-mentioned facility and the cells in which he was detained. They are also requested to comment on all aspects of the conditions of detention in the above-mentioned detention facility, as outlined by the applicant, with special emphasis on the overcrowding problem. In respect of each cell in which the applicant was detained the Government are requested to indicate:

(a) the cell number and the dates the applicant was detained there;

(b) the area of the cell (in square metres);

(c) the number of bunk beds and/or sleeping places that were available in the cell;

(d) the exact number of detainees held in the cell (supported by copies of original documents, such as cell registers (*покамерные карточки*) or statistical data;

(e) whether the cell was equipped with a functioning mandatory ventilation system;

(f) what kind of lighting was available in the cell; if the lighting was natural, indicate the dimensions of the window(s) and the number and thickness of the metal bars; if the lighting was artificial, indicate the number of bulbs and their power;

(g) the number of toilets per cell and their placing (corner, wall-mounted, and so on) and the distances between (i) the lavatory pan and the dining table; and (ii) the lavatory pan and the nearest sleeping place;

(h) whether there was a partition separating the lavatory pan from the rest of the cell; if so, its height and the material it was made of;

(i) the frequency of outdoor exercise, the area of the exercise yard (in square metres) and the type of roof above the yard (metal bars, solid roof, netting, and so on).

2. Did the applicant have a fair hearing in the determination of the criminal charge against him, in accordance with Article 6 §§ 1 and 3 (c) and (d) of the Convention? In particular:

(a) Was the applicant able to defend himself through legal assistance of his own choosing, or was he afforded free legal assistance? What was the exact time when police arrested the applicant on 5 June 2004? Which investigative measures were carried out from the moment of the applicant's arrest until he met his counsel? Was the applicant provided with legal assistance immediately after his arrest on 5 June 2004 and did the interest of justice require that such assistance be provided to him free? When was he provided with legal-aid counsel or when was he allowed to contact counsel of his choosing for the first time? If the applicant could not benefit from legal assistance immediately after his arrest, was the restriction of the applicant's defence rights justified? Did that restriction unduly and irretrievably prejudice the overall fairness of the trial in the applicant's case?

(b) Did the applicant receive free legal assistance, given that by its decision of 2 June 2009 the Astrakhan Regional Court ordered the applicant to pay the legal-aid lawyer's fees? In particular, did the domestic court consider whether after his conviction the applicant had sufficient means to pay for the service provided by legal-aid counsel during the criminal proceedings against him?

(c) Was the applicant able to examine the witness against him Mr B.? Was the applicant's conviction based solely or decisively on B.'s statements? If so, were there sufficient counterbalancing factors in place, including strong procedural safeguards, to compensate for the difficulties to the defence which resulted from the admission of B.'s statements (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 147 and §§ 152-165, 15 December 2011)?

3. Regarding the alleged opening and reading of the applicant's correspondence with the Court by the authorities of correctional colonies IK-2 and IK-6 in the Astrakhan region, was there a violation of the applicant's rights under Articles 8 and 34 of the Convention? The Government are requested to provide the following information:

(a) How many letters from the Court did the applicant receive while in detention in colonies 2 and 6, and how many letters did he address to the Court?

(b) Were the Court's letters forwarded to the applicant in sealed envelopes, with all their enclosures and without delay? If not, why not? Were the applicant's letters forwarded to the Court without being opened and read by the authorities? If not, why not?

The Government are requested to provide copies of the following documents:

- record of the court hearing of the applicant's criminal case;
- records of all the applicant's interviews with police;
- an official record of the applicant's incoming and outgoing correspondence with the Court.