



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

FIRST SECTION

Application no. 12297/06
Aleksandr Aleksandrovich MARKOV
against Russia
lodged on 16 January 2006

STATEMENT OF FACTS

The applicant, Mr Aleksandr Aleksandrovich Markov, is a Russian national, who was born in 1957 and lived until his arrest in the town of Petropavlovsk-Kamchatskiy. He is now serving his sentence in a correctional colony in the Kamchatka Region.

The circumstances of the case

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

The applicant is a co-owner and CEO of three fishing companies. He is also a co-owner of a fish processing plant in the Kamchatka Region.

According to the applicant, on 19 April 2004, during his meeting with a captain of a fishing vessel, he was arrested by officers of the Federal Security Service (hereinafter – the FSB). The applicant gives the following description of his arrest. A group of the officers broke into a cabin where the meeting took place and forced the applicant to lie on a sofa with his face down. They twice shot a gun near the applicant's head and handcuffed him. Having found an envelope with US dollars in the personal belongings of the applicant's business partner, the officers started questioning the applicant about the purpose of his visit to the ship. He responded that he came to organise the crab fishing business.

The FSB officers escorted the applicant and his business partner to the Petropavlovsk-Kamchatskiy Town prosecutor's office. They took the applicant to a lavatory room, which was closed for reconstruction, and

started beating him. The applicant had no opportunity to shield himself from blows as his hands were cuffed behind his back. When he fell to the floor, an officer stepped on the handcuffs and the applicant heard the crunch of breaking bones and felt a terrible pain. While beating the applicant and using fight methods on him, the officers urged him to confess to a kidnapping and extortion. The applicant was taken to an office of investigator T. where he was again subjected to the beating and torture. The FSB officers placed the applicant on the chair and handcuffed his hands to it. They continued kicking and hitting the applicant to various body parts. A plastic bag was put on his head and tied up around his neck, so the applicant would not scream. The applicant could not breathe, he became dizzy and experienced an unbearable pain. On a number of occasions investigator T. entered the office to inquire whether the applicant had already confessed. The officers assured the investigator that he would get the confession and went on with the beating. Unable to bear the pain any longer, the applicant wrote a confession statement as dictated by a FSB officer.

The applicant was taken to another room where he was searched, his personal belongings were seized and he was forced to sign an arrest record. He was again taken to the office of investigator T. where the beating continued. Investigator T. entered the room, the applicant was moved with the chair to a table and, with two FSB officers at his side, he started answering the investigator's questions. If the investigator did not like an answer, the officers threatened the applicant with violence. The applicant unsuccessfully begged investigator T. to call an ambulance. Ms A., legal aid counsel, was present during the questioning. Having been in pain and exhausted from the ill-treatment and the hours-long interrogation, the applicant lost consciousness.

An ambulance was called. The applicant told emergency doctors that he had been tortured by the FSB officials. A doctor ordered the investigator to remove the handcuffs. Report no. 89 was drawn up by the emergency doctors on 19 April 2004. It showed that they had received a call at 6.53 p.m. and had examined the applicant from 7.05 to 7.45 p.m. The applicant had complained about a pain in the chest during the breathing and a headache resulting from the beating. The doctors recorded an injury to the chest in the area from the sixth to eighth ribs, numerous haematomas, high blood pressure of 240 over 180 mmHg and a pulse rate of 90 strokes per minute.

After the doctors had left, the applicant was forced to sign the interrogation record and was transferred to a remand centre.

On the following day the applicant was taken to the Petropavlovsk-Kamchatskiy Town Court for an authorisation of his detention. The Town Court considered that the investigating authorities had not put forward sufficient grounds to detain the applicant and afforded them seventy-two hours to come up with new evidence warranting the detention. The applicant submitted that his complaints of ill-treatment were disregarded by the court.

On 21 April 2004 officers of the remand centre brought the applicant to outpatient clinic no. 1 in Petropavlovsk-Kamchatskiy, having finally complied with the recommendations of the emergency doctors.

As follows from an extract from a medical record drawn up in the clinic, the applicant's chest was X-rayed and he was diagnosed with an injury on

the left side of the chest and a closed fracture of the eighth rib. An outpatient treatment was recommended. The applicant's lawyers, in their subsequent attempts to collect evidence of the applicant's ill-treatment, made a number of requests seeking copies of the medical records and X-ray tests. For instance, on 11 January 2006 they received a letter from the head of Petropavlovsk-Kamchatskiy Town outpatient clinic no. 3. The letter stated that a description of an X-ray scan of 21 April 2004 was found in the archive. The scan was received from the Traumatology centre of outpatient clinic no. 1. The description of the X-ray scan showed that there was "a suspicious shadow of a fracture of the eighth rib in the middle axillary line without a displacement of fragments". The same diagnosis was indicated in a referral for an X-ray examination of the applicant on 21 April 2004.

In the meantime, the applicant applied to various prosecution authorities and FSB officials complaining about the beating. He also asked them to authorise a medical expert examination to record his injuries.

On 23 April 2004 the Petropavlovsk-Kamchatskiy Town Court authorised the applicant's detention in view of the gravity of the charges against him. On the following day the applicant dismissed his two counsel, including Ms A., and informed the investigator that he had retained Mr Sa. as his lawyer.

In the aftermath of the applicant's expert examination, report no. 1213 of 28 April 2004 was issued which, in so far as relevant, read as follows:

"There are longitudinal haematomas measuring 4.5 [and] 3 centimetres of an incorrect oval shape and of greenish and purple colour ... on the palmar surface of the lower third part of the right forearm; there are four diametrical bruises oval in shape and separated from each other which have very intensive green colour in the middle and measure (from the top to the bottom) 6, 5 centimetres, 3.5 to 4 centimetres, 3 to 4 centimetres, 2 to 3 centimetres [and] 1.5 centimetres; [they are situated] at the longitudinal line between the left rear axillar and scapular lines at the level between eighth and twelfth ribs [and they] do not have clear borders and swelling ...

Conclusions: On 28 April 2004 [the applicant] has bruises on the right forearm and the left rear side of the chest which were caused by a blunt firm object (objects), possibly in the period which was indicated in the decision [authorising the expert examination]; they did not cause any damage to the health as they did not lead to a limitation or a loss of the general ability to work."

On 30 April 2004 investigator T. dismissed the applicant's request for exclusion of his confession statement and the record of his first interview on 19 April 2004 from evidence, having noted that the applicant's complaint of ill-treatment was no more than an attempt to avoid criminal liability and to obstruct investigation.

Three days later, on 3 May 2004, investigator T. dismissed the applicant's request for institution of criminal proceedings against the FSB officers. The entire decision read as follows:

"As follows from [the applicant's] complaint on 19 April 2004 he was arrested by [FSB officers] on suspicion of a crime and was beaten up by those officers.

In the course of the inquiry and following an examination of case file no. 420037 it was established that:

the criminal case was opened by the Petropavlovsk-Kamchatskiy Town prosecutor on 19 April 2004 on suspicion of crimes proscribed by Articles 127 § 2 and Article

163 § 2 (a) and (c) of the Russian Criminal Code given that Mr S. had been unlawfully detained and that money had been extorted from him. On 19 April 2004, in full compliance with the requirements of Articles 91 and 92 of the Russian Code of Criminal Procedure, [the applicant] was arrested on suspicion of crimes proscribed by Articles 127 § 2 and Article 163 § 2 (a) and (c) of the Russian Criminal Code. In the course of the arrest, in the presence of impartial third persons – lay witnesses, [the applicant] did not make any complaints concerning the use of physical force by [the FSB officers]. In the course of the interrogation of [the applicant] in the capacity of a suspect and in the presence of an impartial individual – a defence lawyer who had been appointed to represent [the applicant] in compliance with the law, [the applicant] did not make any complaints concerning the use of force by [the FSB officers]. On 23 April 2004 the Petropavlovsk-Kamchatskiy Town Court authorised [the applicant's] detention. On 28 April 2004, in compliance with Articles 171 and 172 of the Russian Code of Criminal Procedure, [the applicant] was charged with the crimes proscribed by Articles 127 § 2 and Article 163 § 2 (a) and (c) of the Russian Criminal Code. The measure of restraint applied to him remained unchanged.

It follows that [the applicant's] complaint about the use of physical and psychological influence by [the FSB officers] should be interpreted as his desire to avoid the criminal responsibility for a particularly grave crime committed and to obstruct the investigation. No violations of the criminal procedural law were committed by the investigation.

Having assessed the circumstances established in the course of the inquiry, the investigator concludes that [the applicant's] arguments that he had been injured by [the FSB officers] were not objectively proven.”

On 13 May 2004 the chief of the remand centre where the applicant was detained sent a letter to the Petropavlovsk-Kamchatskiy Town Prosecutor informing him that the applicant had applied for medical assistance, having complained of a pain in the left side of the chest, persistent headache and high blood pressure. Relying on a medical certificate from the Traumatology centre of outpatient clinic no. 1, the chief also noted that an injury was discovered on the applicant's chest and that he also had haematomas from injections on the inside elbow regions.

On the same day a deputy prosecutor of Petropavlovsk-Kamchatskiy informed the applicant that as a result of the examination of his complaint the investigator's decision of 3 May 2004 had been annulled and a new round of inquiry had had to be carried out by the prosecutor's office of the Petropavlovsk-Kamchatskiy Military Garrison. He also informed the applicant that his requests for a dismissal of investigator T. from the criminal case, as well as for the exclusion of the confession statement and the record of his first interview, could not be accepted as those motions were illegal and unsubstantiated.

In the meantime, FSB officials carried out an internal inquiry into the actions of the arresting officers. The results of the inquiry, contained in a report of 24 May 2004, were as follows:

“[The FSB officers] who had taken part in the investigating activities in respect of [the applicant and his business partner] were questioned in the course of the inquiry: [names of four FSB officials were listed]. In addition, an interview was conducted with investigator T. and [the applicant].

As a result, it was established that in order to take actions in respect of a complaint about an extortion of 200,000 US dollars from the captain [of the fishing vessel] Mr S. by unknown individuals, on 19 April 2004, upon an authorisation of the Kamchatka Region FSB high-ranking officials, a decision was taken to arrest the extortionists in

the act, while they receive a part of the discussed sum in the amount of 15,000 US dollars. An arresting group comprising members of the FSB operative services was organised for that purpose ...

As follows from Mr S.'s complaint, the extortionists were armed, had physical training, knew combat methods, and, at the same time, could have served as officers of law-enforcement agencies. Moreover, the main purpose of the arrest exercise was to capture the extortionists in the act and to prevent them from getting rid of evidence.

Keeping that in mind, and also considering the difficulty of the measures to be taken, given the small size of the room in which the arrest was to be effected, the leaders of the group decided to use force while arresting the extortionists.

In the course [of the arrest] [the applicant and his business partner] refused to comply with lawful orders of the FSB officers and actively resisted the arrest with the use of force. In the course of the arrest [the applicant] tried to put his arm in a pocket which could have been a sign of his intention to use either cold arms or firearms which he could have had. In this connection, members of the arresting team used physical force against [the applicant and his business partner], and then handcuffed them. After the arrest, the scene of the crime was examined in the presence of lay witnesses.

When [the applicant and his business partner] were taken to the Petropavlovsk-Kamchatskiy Town prosecutor's office the FSB officers did not use either physical or psychological violence against them. In response to the complaint about the beating, investigator T. explained that, in his presence, no physical or moral pressure was applied to the arrestees. [The applicant's and his business partner's] interrogations were performed in the presence of lay witnesses. Reconstruction works carried out in the lavatory rooms in the building of the prosecutor's office exclude the unsupervised presence of third persons as workers are constantly present there during the day. At the same time [the applicant] did not mention either the lay witnesses or the workers in his complaint. [The applicant's] injuries, such as bruises on his chest, shoulders and hands, are typical for physical sequelae left by use of force during an arrest.

Moreover, in the course of the interview [the applicant] insisted that he had been beaten up in the prosecutor's office by the same FSB officers who had arrested him in the ship. However, in the prosecutor's office a change of escorting officers was effected."

On 30 June 2004 the applicant's lawyers sent an additional complaint to the Kamchatka Regional Prosecutor and Petropavlovsk-Kamchatskiy Town Prosecutor, describing the ill-treatment to which the applicant had allegedly been subjected on the day of his arrest.

Similar complaints were sent to the prosecution authorities in July and October 2004. The lawyers steadily repeated their requests for the dismissal of investigator T. from the case and for the exclusion of the applicant's confession statement and the interview record from evidence. The responses given to the lawyers by the prosecution authorities were always negative on both points. Each time the lawyers were reminded that the inquiry into the applicant's alleged ill-treatment was still pending.

In the meantime, the applicant was committed to stand trial before the Petropavlovsk-Kamchatskiy Town Court. The prosecution version of events was as follows: the applicant and his "business partner", having assumed identity of FSB officers, had kidnapped the captain of a fishing vessel, Mr S., had drugged him and had threatened him with criminal proceedings for his illegal crab fishing activities. The applicant and his partner had allegedly recorded an interview with Mr S. in which he had confessed to illegal crab

fishing. They had promised to close a criminal case against Mr S. and to give him the audio recording tape with his interview in exchange for 200,000 US dollars. Given that Mr S. had not had the money, the kidnappers had released him on a promise to bring the money later. Mr S. had immediately applied to the local FSB office for assistance. The FSB officials provided Mr S. with 15,000 US dollars marked with a special substance and in traceable bills. The applicant and his partner had been arrested when Mr S. had handed them the money. As followed from the bill of indictment, in addition to the envelope with the traceable bills, FSB officers seized FSB identity cards, handcuffs, a gun, a balaclava hat and syringes from the applicant and his co-defendant. The tape, recording the interview with Mr S., was found in the applicant's car.

At a hearing on 25 April 2005 the applicant's lawyer asked the Town Court to authorise a forensic medical examination of the applicant to determine the gravity of the injuries sustained by him on the day of his arrest. The lawyer pointed out that during the first examination in April 2004 the experts had not examined the records of the applicant's X-ray testing showing that he had had a rib fracture. They also asked to call the emergency doctors who had attended on the applicant in the prosecutor's office on 19 April 2004. Both requests were dismissed with the Town Court's finding of no bearing on the applicant's criminal case.

The lawyers' repeated requests for the exclusion of the applicant's confession statement and the interview record from evidence were steadily dismissed by the Town Court.

In the course of a hearing on 27 April 2005, upon a prosecutor's request and despite the applicant's and his lawyers' objections, the Town Court read out the applicant's confession statement and the record of his first interview.

The applicant submitted that he had learned from the case file materials that the prosecution authorities had issued a decision refusing to institute criminal proceedings against the FSB officers. His lawyers applied to the Kamchatka Regional prosecutor's office for a clarification.

On 11 May 2005 the Town Court found the applicant guilty as charged and sentenced him to ten years of imprisonment. Having dismissed his arguments of ill-treatment, the Town Court based its finding on the applicant's confession statement and the record of his first interview. It held as follows:

"As follows from records of the [applicant's and his partner's] interrogations performed in the course of the pre-trial investigation and read out in open court, they planned Mr S.'s kidnapping and the extortion and they took active steps to reach the criminal purpose.

The above-mentioned statements by the defendants and [the applicant's] confession statement are reliable as they correspond, to a minor detail, to each other, were made at the initial stages of the pre-trial investigation immediately after the events in question, were properly recorded in the records of investigative actions and therefore can serve as the basis for the conviction; a subsequent change in the statements [of the applicant and his partner] which occurred at the closing phase of the investigation and in open court should be considered as a defence tactic and as a desire to avoid criminal liability. Moreover, those statements conform to other evidence in the case: testimony by Mr S ... and [other witnesses] ...; a record of a crime scene examination showing that the money had been given to the defendants ...; records of an expert medical examination of Mr S. which showed that he had fresh traces from injections

and traces from the handcuffing on the arms; records of the discussion between [the defendants] and Mr S. during his kidnapping; phone call records; an audio recording of the discussion between [the defendants] and Mr S. in his cabin on 19 April 2004 which shows that [the defendants] had attempted to commit an extortion against the victim to receive money from him.

In the course of the hearings the defendants argued that those statements had been made under pressure exerted by the FSB officials.

The defendants' statements are not convincing, they do not correspond to the reality and were made to make the court believe that the interviews were illegal and unlawful and that the records of the interviews could not be taken as the basis for the conviction, in addition to other evidence in the case.

The fact that those statements were made by the defendants voluntarily, without the use of any pressure or influence, is confirmed by a handwritten note made by [the applicant and his partner] in the presence of their counsel and demonstrating the veracity of their statements.

The internal inquiry did not establish the use of unlawful methods against [the applicant and his co-defendant] for a purpose of extracting their confessions. As follows from the conclusions of the inquiry, the FSB officials used force to arrest the defendants as, according to the victim, they had good physical training, could have been members of law-enforcement bodies and could have been armed.

The defendants' position is not convincing when the court performs an overall assessment of the evidence. The court considers that [the co-defendants'] denial of their involvement in the kidnapping and extortion ... is, in facts, a defence tactic and a desire to avoid criminal responsibility for the very serious criminal offences committed ..."

The applicant and his lawyers appealed, having argued, *inter alia*, that the conviction was based on evidence obtained under duress.

On 9 August 2005 the Kamchatka Regional Court upheld the conviction, having endorsed the Town Court's reasoning. The Regional Court also agreed with the Town Court's conclusion that there had been no evidence of ill-treatment and that the confession statement and the interview record could therefore serve as the basis for the applicant's conviction.

On 22 June 2006 the applicant received a letter from the Military Prosecutor of the Petropavlovsk-Kamchatskiy Garrison, informing him that on 17 May 2004 a decision was taken to close the inquiry into the allegations of the ill-treatment by the FSB officers. A copy of the decision was enclosed. As followed from the decision, as a result of a one-day inquiry¹ the investigator had been able to collect sufficient evidence in support of his conclusion that the injuries recorded on the applicant's body had been a consequence of the use of force during the arrest given the applicant's provocative behaviour and the risks that he and his co-defendant had posed to the arresting team and the victim. The text of the decision was a compilation of the findings made by investigator T. in his decision of 3 May 2004 and those reached by the FSB officials within the internal inquiry.

¹ The decision indicated that the applicant's complaint was received by the prosecutor's office on 17 May 2004. On the same day the investigator issued the decision refusing the institution of the criminal proceedings.

The applicant sent a letter to the Prosecutor General of the Russian Federation, complaining about the belated notification of the decision of 17 May 2004 and the incorrect character of the findings contained in it. He also lodged a similar complaint with the Military Court of the 35th Garrison.

On 31 October 2006 the Military Court rejected the applicant's complaint as unfounded.

Ten days later the applicant was served with a letter from a deputy prosecutor of the Military Prosecutor of the Pacific Fleet. He was notified that the decision of 17 May 2004 had been annulled and that the inquiry was re-opened.

On 28 December 2006 the Military Court of the Pacific Fleet quashed the decision of 31 October 2006 and discontinued the proceedings in view of the fact that the investigator's decision of 17 May 2004 was no longer in force.

Despite the applicant's numerous requests for a copy of the decision by which the new round of inquiry had been opened, it was not served on him. The same fate awaited his requests for information on the progress of the inquiry.

The applicant provided the Court with a certificate from the detention facility where he had been detained between 2004 and 2006 showing that he had not received any letters from the prosecution authorities in that period. He insisted that he had only learned about the decision of 17 May 2004 in the course of his trial in 2005 and had only been provided with it in June 2006.

The applicant also submitted a number of medical certificates and extracts from his medical history, showing that his state of health had deteriorated in the course of the criminal proceedings and his detention. In particular, he started suffering from nephroptosis of the right kidney. The applicant argued that the deterioration of his health was the direct consequence of the ill-treatment.

COMPLAINTS

1. The applicant complained under Articles 3 and 6 of the Convention about the ill-treatment following his arrest, ineffective inquiry into the ill-treatment and the conviction on the basis of the confession statement and the record of his first interrogation which had been extracted under duress.

2. In his subsequent letters to the Court sent on 25 May 2006 and after that date, the applicant, while maintaining his previous complaints, raised a number of other issues concerning his pre-trial detention and the criminal proceedings against him.

QUESTIONS TO THE PARTIES

1. Was there a violation of Article 3 of the Convention as regards the applicant's complaint about the ill-treatment by the FSB officials following his arrest and the absence of an effective investigation of these allegations? In particular, was the applicant subjected to a treatment contrary to Article 3 while in custody? Was the investigation into his allegations of ill-treatment compatible with the procedural requirements of Article 3? The Government are requested to provide copies of the complete investigation file pertaining to the applicant's complaints of ill-treatment, including a copy of the record of the applicant's medical examination on 21 April 2004 and of the record of his examination on admission to the remand centre on 19 April 2004.

2. Was the principle of the fairness of proceedings enshrined in Article 6 § 1 of the Convention respected in the present case, given that the domestic courts convicted the applicant, in particular, on the basis of his confession statement and the record of his interrogation obtained on 19 April 2004?