



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

FIRST SECTION

Application no. 46192/07
Aleksandr Pavlovich MALYSHEV
against Russia
lodged on 9 September 2007

STATEMENT OF FACTS

The applicant, Mr Aleksandr Pavlovich Malyshev, is a Russian national, who was born in 1979 and lives in Cherepovets. He is currently serving his sentence of imprisonment in correctional labour colony FBU IK-4 of the Vologda Region.

A. The applicant's alleged ill-treatment on 10 and 18 January 2007

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

1. Events of 10 January 2007

On 10 January 2007 the applicant was apprehended by the officers of the Cherepovets Unit of the Vologda Regional Department of the Federal Service of Drug Control ("the Drug Control Service") and brought to the Drug Control premises. The apprehension record was not drawn up.

According to the applicant, officer G. searched him, seized a mobile phone, 100 US dollars (USD) and 7,100 Russian roubles (RUB) allegedly won by the applicant in a casino. The officer planted four sachets of methamphetamine on him and "replaced" a part of the banknotes belonging to the applicant with those marked with special substance. G. allegedly beat the applicant up and threatened to rape him. Then at some point the officer searched the applicant in the presence of lay witnesses and seized the drugs from him.

The official account of the events is that 10 January 2007 the Drug Control Service decided to hold an operative-search activity "test purchase" on the basis of the operative information received from K., the applicant's acquaintance, who had identified the applicant as a person who had been selling drugs to her since November 2006. Between 8.20 p.m. and

21.20 p.m. on 10 January 2007 the applicant was searched at the Drug Control office in the presence of the lay witnesses. Eight sachets of methamphetamine and two doses of MDMA (3,4-methylenedioxy-N-methylamphetamine) were seized from him.

On the same date G. proposed the applicant to participate in an operational-search activity “test purchase”, that is to buy drugs from an unspecified private person. G. allegedly threatened the applicant to beat and rape him if the test purchase failed.

According to the refusal to initiate criminal proceedings of 14 January 2011 (see below), the applicant agreed that his USD 100 be used for the test purchase.

On 11 January 2007 the applicant met the dealer and gave him money but the latter allegedly fled police. The applicant did not come back to the Drug Control office, allegedly out of fear. The official account of the events is that the applicant escaped during the covert operation.

On the same date the applicant met B., his partner, and told her that he had been ill-treated by a Drug Control officer. She did not see any injuries on his body. The applicant told her that the policemen had hit him in the head, so that the injuries could not be seen on him.

It appears that the applicant did not undergo a medical examination after these events.

It further appears that the mobile phone and the money (RUB 7,100 and USD 100) were not returned to the applicant.

2. Events of 17 and 18 January 2007 and the applicant's injuries

At some point, apparently late in the evening on 17 January 2007, the Drug Control officers arrested the applicant and at 0.10 a.m. on 18 January 2007 transferred him to the Drug Control premises.

Between 3 and 4 a.m. on 18 January 2007 the applicant was transferred to the temporary detention centre of Cherepovets (“the IVS”). He was examined by the IVS doctors. No injuries were found on him.

According to the IVS logbooks, at 9.40 a.m. on 18 January 2007 the applicant was transferred from the IVS to the Drug Control Service. The applicant submits that G. threatened him in the presence of I. and Gan., private persons whom the applicant had not seen before and who had been transferred to the Drug Control office in connection with inquiries unrelated to the applicant's case.

Then the applicant was questioned by an investigator in the presence of a lawyer and charged with attempted sale of narcotic drugs. The applicant submits that he informed the investigator about G.'s threats. It appears that on the same date the investigator ordered his arrest.

The applicant further submits that G. took him to a gym in the Drug Control Service building and severely beat him up there. He hit the applicant in the face and body. He attempted to undress the applicant, threatened to rape him and to take pictures. He had a photo camera with him. G. ordered the applicant to write a confession; however, the applicant did not produce a self-incriminating statement.

According to the IVS records, at 3 p.m. the applicant was transferred to the IVS.

The applicant requested the IVS officers to call a doctor. They replied that the doctor would come and see him on 19 January 2007. According to the testimony of IVS officer V., the applicant had looked depressed but there had been no visible injuries on him.

On 19 January 2007 M., another IVS officer, called the ambulance for the applicant.

According to the medical certificate of 19 January 2007 by the local emergency hospital, the applicant had the following injuries: a trauma of the head and the neck, as well as bruises of the soft tissues of the face.

B. Inquiry into the applicant's allegations of ill-treatment

On 16 January 2007 the applicant complained about the events of 10 January 2007 to the prosecutor's office of Cherepovets of the Vologda Region ("the prosecutor's office"). He submitted, in particular, that he had been beaten up by G. and that his money and mobile phone had been stolen from him.

On 19 January 2007 the applicant lodged a complaint about the beatings of 17 January 2007.

In both complaints the applicant requested that criminal proceedings be brought against officer G. on account of abuse of power and ill-treatment. He also alleged that G. had stolen USD 100 and a mobile phone from him.

It appears that on 2 and 22 February 2007 an investigator of the town prosecutor's office on two occasions refused to bring criminal proceedings against G.

On 15 March 2007 the Cherepovets Town Court quashed the decisions upon the applicant's complaint, having found that the investigator had failed to make legal assessment of the applicant's allegations of theft and ill-treatment.

On 4 April 2007 the prosecutor's office held an inquiry in accordance with Article 144 of the Code of Criminal Procedure and refused to bring criminal proceedings against G., for the lack of *corpus delicti* in his actions.

On 1 June 2007 the Deputy Prosecutor of Cherepovets quashed the decision and ordered an additional inquiry in the duress allegations.

On 10 June 2007 the prosecutor's office issued a refusal to bring criminal proceedings against the policeman.

As regards the events of 10 January 2007, the prosecutor found that there was no medical evidence confirming the alleged injuries. Furthermore, two lay witnesses who were present at the applicant's search had not seen G. beating the applicant.

As regards the allegations that the applicant's mobile phone had been stolen, the prosecutor found no evidence of the offence apart from the applicant's own statements. However, they contradicted to the submissions of G. who denied accusations of theft. Thus, the prosecutor concluded that the applicant complained about the theft in order to avoid responsibility for drug trafficking.

As regards the alleged ill-treatment on 18 January 2007, the prosecutor referred to the applicant's account of the events, as well as to the depositions of I. and Gan., who confirmed that on 18 January 2007 they had seen the applicant at the Drug Control office; his lip had been split and there

had been a bruise on his face. The prosecutor referred to the testimony by IVS officer Yu. who had submitted that the medical examination on 18 January 2007 had not revealed any injuries on his body; to the submissions of the IVS official M. who had called the ambulance for the applicant on 19 January 2007; and to the depositions of G. and another Drug Control officer who denied any use of force against the applicant. G. further submitted that the applicant had told him that he would injure himself and then lodge a complaint against the policeman. The prosecutor concluded that the testimony of Gan. and I. was unreliable since they had been the applicant's acquaintances (in particular, between January and 28 April 2007 I. and the applicant shared the same cell in a remand centre and could agree on a version of the events favourable to the applicant), and in any event these witnesses' statements had been contradictory. He noted that on 18 January 2007 the applicant had not had visible injuries and therefore the traumas revealed on 19 January 2007 had been self-inflicted.

It appears that the decision was subsequently set aside by an unspecified authority. On 8 July 2007 the town prosecutor's office issued another refusal to initiate criminal proceedings. This decision was upheld by the deputy prosecutor of Cherepovets on 7 September 2007. The applicant challenged the refusals in court.

On 12 February 2008 the Cherepovets Town Court granted his complaint and quashed the impugned decisions. The court observed, in particular, that the prosecutor's office had failed to examine the episode of the applicant's transfer from the IVS to the Drug Control Service between 9.40 a.m. and 3 p.m. on 18 January 2007, that several persons, including lay witnesses, had not been interviewed and that the investigation authorities had failed to establish all relevant facts.

Thereafter the prosecutor's office issued at least one refusal to bring criminal proceedings against G., which was, in turn, set aside by the town court on 15 March 2007.

On 21 November 2008 the prosecutor's office again decided that there were no grounds to open a criminal case against G.

The applicant challenged the refusal at the town court, arguing that the town court's earlier instructions had not been complied with; the investigators had failed to provide a plausible explanations of his injuries; that the testimonies of I., Gan. and the IVS officers had been rejected without a reasonable explanation; that the theft complaint had remained unanswered; that the investigators had relied on G.'s account of the events, even though it had not been corroborated by any evidence.

On 24 April 2009 the deputy town prosecutor quashed the decision of 21 November 2008.

On the same date the town court rejected the applicant's complaint as devoid of purpose, referring to the quashing.

On 4 May 2009 the Investigative Department of the Prosecutor's Office of Cherepovets ("the investigative department") refused to bring criminal proceedings against G. The applicant challenged the refusal in court, and also complained to a higher-ranking prosecutor.

On 15 September 2010 the Town Prosecutor of Cherepovets instructed the investigative department "to hold a check" in respect of the applicant's case, since the inquiry into his allegations of duress had been incomplete.

On 27 December 2010 the Head of the investigative department annulled the decision of 4 May 2009, since the inquiry had had been incomplete, and ordered to hold an additional inquiry.

On 14 January 2011 the investigative department on yet another occasion refused to bring criminal proceedings against G.

On 26 May 2011 the town court refused to examine the applicant's complaint about the decision of 4 May 2009, since it had been quashed in the meantime.

The decision of 14 January 2011 was set aside on 2 June 2011 by a higher-ranking prosecutor. Next day, on 3 June 2011, the town court discontinued the proceedings in respect of the applicant's complaint about that decision, since the disputed act had no longer existed.

At some point the applicant complained to the town court about the investigative authorities' inaction, arguing that his case had been pending since 16 January 2007; that the investigative department had not rectified the omissions revealed by the higher-ranking prosecutor; that the decision of 14 January 2011 had reproduced *verbatim* the earlier refusal of 4 May 2009, despite the higher-ranking prosecutor's clear and repetitive instructions to rectify several shortcomings of the inquiry.

On 15 June 2011 the town court allowed the applicant's complaint and ordered investigator Kh. of the investigative department to rectify the shortcomings of the inquiry.

It appears that the inquiry into the applicant's allegations of ill-treatment has been pending to date.

C. Criminal proceedings against the applicant

On 19 January 2007 the Cherepovets Town Court of the Vologda Region ordered the applicant's placement into custody pending trial. On 15 March 2007 and, apparently, on an unspecified date in April 2007 the applicant's pre-trial detention was further extended by the same court.

On 28 April 2007 the Cherepovets Town Court convicted the applicant of illicit purchase and attempted sale of narcotic drugs on 10 January 2007 and sentenced him to five years and six months' imprisonment.

During the trial the applicant argued that some of the banknotes and drugs seized from him on 10 January 2007 had been planted on him by G. He further submitted that on 10 and 17-18 January 2007 G. had beaten him up. The court heard witnesses I. and Gan. They submitted that they had seen bruises on his face on 18 January 2007. The court found that these witnesses' depositions did not corroborate the applicant's allegations of beatings on 10 January 2007.

On 5 June 2007 the Vologda Regional Court excluded the conviction for illicit purchase of drugs and upheld the remainder of the judgment.

COMPLAINTS

By letter of 9 September 2007 the applicant submits, without further details, that Articles 3, 5 § 2, 6 §§ 1, 3 (a) and 3 (b) were violated in his case, apparently as a result of the criminal proceedings against him.

In the application form of 22 April 2008 applicant complains under Article 3 of the Convention that he was ill-treated by the Drug Control officers and the investigation into his allegations was ineffective.

He complains under Article 5 that his arrest on 18 January 2007 was unlawful and that his pre-trial detention was not based on sufficient evidence of his involvement into any criminal activity.

He complains under Article 6 that his conviction was unlawful, the trial court's judgment was unfounded, that he was convicted in the absence of a final decision in the proceedings concerning his allegations of duress, that the conviction was based on the evidence unlawfully transferred from the criminal case concerning a different person and that the testimony of witness V. was inaccurately recorded by the trial court.

QUESTIONS TO THE PARTIES

1. Was the applicant subjected to treatment contrary to Article 3 of the Convention following his apprehension on 10 and 17-18 January 2007? The Government are invited to address the following factual questions.

(a) Once in the hands of the police:

(i) Was the applicant informed of his rights? If so, when, and what rights was he informed about?

(ii) Was he given the possibility of informing a third party (family member, friend, etc.) about his detention and his location and, if so, when?

(iii) Was he given access to a lawyer and, if so, when?

(iv) Was he given access to a doctor and, if so, when?

(b) What activities involving the applicant were conducted at the premises of the Drug Control Service on 10 and 17-18 January 2007, and at which times of the day? If any of them were held at night, was it lawful? What was the applicant's procedural status? What confessions and/or statements did the applicant give during that period (please submit relevant documents, in particular, records containing the applicant's statements/confessions)? Was the applicant given access to a lawyer before and during each such activity?

(c) The parties are invited, in particular, to specify which medical specialists examined the applicant on 10 and 17-18 January 2007 and to provide copies of the respective medical document(s), including medical certificates/other documents drawn up on that date.

2. Have the authorities complied with their positive obligation under Article 3 of the Convention to carry out an effective investigation into the applicant's allegations of ill-treatment on 10 and 17-18 January 2007? In particular:

(a) Were the investigators (investigating authority) who carried out the inquiry into the applicant's allegations of police ill-treatment independent from the investigators (investigating authority) who were responsible for investigating the criminal case against the applicant?

(b) Which officers (police, Drug Control Service, etc.) from which police department(s) were involved in the inquiry into the applicant's complaint of police ill-treatment? What operational and other activities did they carry out in the course of the inquiry and were those sufficient to ensure that the investigation into alleged torture be thorough and effective?

(c) Did the absence of instituted criminal proceedings prevent investigative measures, which could correspond to the notion of an effective investigation, as required by the Court's case-law under Article 3 of the Convention (see, *mutatis mutandis*, *Taraburca v. Moldova*, no. 18919/10, § 57, 6 December 2011, and *Shanin v. Russia*, no. 24460/04, § 69, 27 January 2011)? Which of the investigation methods employed for a preliminary investigation under Articles 150-226 of the Code of Criminal Procedure (CCrP) could be and were employed, in the present case, in the course of the inquiry under Article 144 of the Code?

(d) Were persons from whom explanations («объяснения») were taken liable for false statements or a refusal to testify?

(e) Has a medical expert examination been ordered and held in order to establish the origin of the applicant's injuries?

The Government are requested to submit relevant documents in response to each of the above questions.

3. Did the applicant have at his disposal an effective domestic remedy for his complaints under Article 3 of the Convention as required by Article 13 of the Convention?

4. Given that on 10 January 2007 the applicant's mobile phone, 7,100 Russian roubles and 100 US dollars were taken away from him and allegedly never returned, has the applicant been deprived of his possessions in the public interest, and in accordance with the conditions provided for by law, within the meaning of Article 1 of Protocol No. 1? The parties are invited to submit relevant documents.