



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

FIRST SECTION

Application no. 22495/08
Arsan Magomedovich MUKAYEV
against Russia
lodged on 30 April 2008

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Arsan Mukayev, is a Russian national, who was born in 1977 (in the documents submitted, also stated as 1979). He lived in Grozny, Chechnya, but is currently serving a prison sentence in an unspecified location in Russia. He is represented before the Court by lawyers of Stitching Russian Justice Initiative, an NGO practising in Moscow.

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

A. The applicant's arrest and alleged ill-treatment

1. The applicant's arrest

The applicant was suspected by the authorities of belonging to illegal armed groups, murder and aggravated robbery.

On 14 April 2001 the interim prosecutor of Grozny opened criminal case no. 11133 against the applicant. On 14 September 2001 the applicant was charged, *in absentia*, with aggravated murder. On 31 December 2001 he left Chechnya under a false identity and in January 2002 he arrived in Semipalatinsk, Kazakhstan.

On 13 January 2006 the applicant was arrested in Semipalatinsk. On 17 January 2006 the local authorities established his true identity and the Semipalatinsk town prosecutor extended the applicant's detention in view of extradition. On an unspecified date in January or February 2006 the Russian

authorities officially requested the applicant's extradition to Russia. On 23 February 2006 the applicant was taken to Astana airport and handed over to Russian law-enforcement officers.

2. Ill-treatment of the applicant while in detention on remand

(a) The applicant's ill-treatment in Moscow

On 23 February 2006 the applicant was taken by Russian police officers from Astana to Moscow. Upon his arrival at Domodedovo airport in Moscow, the applicant was filmed by a journalist of the RTR (Russian Public Television) company and a report about his extradition was televised on the same date in a news programme entitled *Vesti*. On the footage the applicant showed no signs of ill-treatment. His relatives learnt about his arrest and extradition from the news report.

On the same date, 23 February 2006, the applicant was taken to remand prison IZ-77/4 in Moscow. Upon arrival he was examined by a doctor, who found no evidence of ill-treatment.

On the same date the applicant was handed over from prison IZ-77/4 to Chechen investigators and police officers, for transfer to Grozny, Chechnya.

The applicant was placed in a vehicle with two Chechen police officers, Mr Kh. Mag. and Mr L.-A. Mud., who repeatedly punched and kicked him on the way to the airport.

At the airport the officers were joined by an investigator from Chechnya, Mr P. The applicant had signs of ill-treatment: his face was swollen, he was covered in blood and he could not eat or drink.

(b) The applicant's ill-treatment on the journey from Vladikavkaz to Grozny

Upon arrival at the airport in Vladikavkaz, Republic of North Ossetia-Alania, the applicant was taken in a Gazel minivan to Grozny, Chechnya.

The commander of the OMON (special task unit) police group ordered the applicant to lie on the floor of the minivan, and the police officers kicked him and beat him with their rifle butts.

(c) The applicant's ill-treatment in ORB-2

Late in the evening of 23 February 2006 the applicant arrived at Operational Search Bureau no. 2 ("ORB-2") in Grozny, where he was detained until 6 March 2006.

The same evening the applicant was taken to a large room on the ground floor of the ORB premises, where he was subjected to beatings by five police officers: the head of the operational search divisions, Mr Ib., the operational search officer, Mr As.Vak., the head of the department specialising in the investigation of aggravated robberies, and two other police officers from the ORB-2.

The officers questioned the applicant about, amongst other things, the murder of a prosecutor perpetrated in 2001. They punched and kicked him, suggesting that he confess to killing the State official and give statements against certain persons whom he had known personally. The applicant refused. The officers then tortured the applicant with an electric current and

beat him about the head with plastic bottles filled with water. Every time he lost consciousness, the officers poured water on him and continued the interrogation and torture.

Throughout the night of 23 to 24 February and during the day on 24 February 2006, the applicant was tortured and pressured to admit his involvement in a number of serious crimes. The applicant refused to do so.

On 25 February 2006 the applicant was told that his aunt, Ms Kh.Tas., had arrived with a food package for him. The officers detained her, questioned her about the applicant and threatened her. One of the officers then told the applicant that if he wanted nothing to happen to his aunt, he would have to sign confessions. The applicant signed the documents without familiarising himself with their contents.

Between 26 and 28 February 2006 the applicant was regularly ill-treated at night; he was bludgeoned, tortured with an electric current, and a gas mask was put over his head to provoke suffocation. He was forced to memorise statements concerning his forced confession to the commission of the crimes. The applicant also had to memorise the details of the crimes allegedly committed by him or with his participation.

On 6 March 2006 the applicant was transferred to remand prison no. 20/1 (“SIZO 20/1”). Between March and December 2006 he was sometimes returned to the ORB-2 premises for questioning and was subjected to further beatings, electrocutions and other forms of ill-treatment. The officers threatened to kill him if he complained to anyone of the ill-treatment. The applicant again had to memorise the details of the crimes allegedly perpetrated by him; the police officers instructed him about the places, methods and other details concerning the crimes he was accused of perpetrating. From the middle of March the police officers primarily used electric currents to torture the applicant in order to avoid leaving bruises and haematomas on his body. The police officer who was most active in torturing the applicant and pressurising him to confess was Mr As. Vak. from ORB-2.

On 30 April and 2 May, and again on 5 and 6 September 2006, the applicant was interviewed in SIZO 20/1 by an official from Strasbourg. The applicant described to him the torture to which he had been subjected on the premises.

On the night of 24 to 25 May 2006, after the applicant’s complaints of ill-treatment (see below), he was subjected to severe beatings: a plastic bag was put over his head, he was hit in the head with metal keys and kicked. The officers threatened to kill the applicant if he continued to complain about the ill-treatment.

On 1 June 2006 the applicant underwent a medical examination in SIZO-20/1, which established the following:

“... on his left upper shoulder there are circular purple bruises, both internal and external, measuring 2-3 cm. On his right hip there is a large circular purple haematoma measuring 6 cm and an abrasion measuring 3 cm ...”

In support of his allegations, the applicant furnished the Court with statements by witnesses who had also been detained in ORB-2 at the material time: Mr Sh.El. statement dated 12 September 2009; Mr U.Cha., undated statement; R.Le., statement dated 13 September 2007; and Mr M.Ga., statement dated 12 September 2007. The applicant also provided

two official statements by the administration of remand prison IZ-77/4 in Moscow, dated 20 and 29 October 2007.

(d) Investigation into the alleged ill-treatment

(i) The applicant's complaint to supervising prosecutors

On 1 March 2006 the applicant was examined by a medical expert at the Chechen Republic Bureau of Forensic Expert Evaluations ("the Bureau"). According to the applicant, out of fear for his life, he had had to tell the expert that he had sustained the haematomas as a result of several falls on 23 February 2006 while in Kazakhstan. The expert's conclusions of 9 March 2006 were as follows:

"... [the applicant] stated that he had not been subjected to beatings. His facial trauma was a result of several falls that occurred during his arrest by the local police officers in Kazakhstan. He does not complain about the state of his health. Observations: under the right eye and on the right eyelid there is a crimson and green bruise, yellow along the eye, about 3 by 1.5 cm. Other injuries or traces of traumas were not identified..."

Conclusions: the bruise on Mr A. Mukayev's right eye is the result of contact of this part of his head with a blunt object; possible date of occurrence – 23 February 2006, in the circumstances described by him. The injury does not qualify as harm ..."

On 11 May 2006 the applicant complained to the Chechnya prosecutor's office of ill-treatment in Moscow and in ORB-2, and submitted that the police officers had tortured him to make him confess to crimes he had not committed.

On 15 May 2006 the applicant complained of the ill-treatment to the Prosecutor General's office.

On 25 May 2006 an investigator from the Chechnya prosecutor's office refused to institute criminal proceedings against the police officers. The applicant was not provided with a copy of that decision.

On 6 September the Chechnya deputy prosecutor overruled the decision of 25 May 2006 and returned the case for further inquiries. The four police officers allegedly implicated in the ill-treatment were questioned and gave statements to the effect that they had not ill-treated the applicant. On 15 September 2006, upon completion of the inquiry, the investigator, V.A., refused to open a criminal case against the officers. His report contained the following remarks:

"... according to the record of the initial medical examination carried out by the IVS of ORB-2, the examinations conducted on 7 March, 17 March, 29 March, 10 April, 24 May, 13 June and 11 July 2006 did not reveal any bodily injuries..."

Thus, no evidence was obtained as a result of the inquiry ... the allegations of A. Mukayev ... were not confirmed".

The applicant was not provided with a copy of this decision.

On 10 October 2006 the decision of 15 September 2006 was overruled by the supervisory prosecutor and the complaint was forwarded for further inquiries. On 20 October 2006 the investigator, Mr I.Kh. of the Chechnya prosecutor's office, questioned the officers who had brought the applicant from Moscow to Grozny and the investigator of the criminal case against

the applicant. Mr I.Kh. refused to investigate the applicant's allegations of ill-treatment, stating, *inter alia*:

“... according to the record of the initial medical examination carried out by the IVS of ORB-2, the examinations conducted on 7 March, 17 March, 29 March, 10 April, 24 May, 13 June and 11 July 2006 did not reveal any bodily injuries ...

According to the documents received from IZ-20/1 dated 14 March 2006 and 5 June 2006 concerning bodily injuries allegedly sustained by A. Mukayev, the Leninskiy district prosecutor's office refused to institute criminal proceedings.

For instance, when questioned about his bodily injuries, such as the haematoma of one third of the right shoulder, a bruise under his right eye, scratches on the back of his head and handcuff marks on both wrists, which were found when he was transferred to IZ-20/1 on 1 June 2006, A. Mukayev explained that these injuries had been sustained by him on the way to SIZO-20/1 and on the way back to the IVS. The guards did not use physical force against him ...

When questioned about the origins of the injuries, including the haemorrhage of the upper right arm and the haematoma on his left hip found on [the applicant] when he was brought to SIZO-20/1 on 1 June 2006, A. Mukayev explained that he had been taken for interrogation. At the exit he had been beaten in the buttocks and shoulder, but he did not know who had hit him. The escort guards behaved normally towards him ...”

The applicant was not provided with a copy of this decision.

On 23 November 2007 the investigator's refusal of 20 October 2006 was overruled by the supervisory prosecutor and the case was forwarded for further inquiries. On 9 December 2007 the investigator of the Leninskiy District Investigations Committee refused to institute criminal proceedings against the police officers on the grounds of lack of *corpus delicti*. The applicant was not provided with a copy of that decision.

On 27 December 2007 the applicant's lawyers appealed against the investigators' decisions in respect of the applicant's complaint of ill-treatment and requested that the supervisory prosecutor recognise as unlawful the following:

“(a) the delays in the verification of A. Mukayev's complaints concerning the unlawful actions of the law-enforcement officers against him;

(b) the investigator's refusal to question important witnesses who could confirm the use of violence against A. Mukayev;

(c) the investigator's refusal to question A. Mukayev.”

On 17 January 2008 the investigator's refusal of 9 December 2007 to initiate a criminal investigation was overruled by the supervisory prosecutor, and the applicant's complaints of ill-treatment were forwarded for further inquiries. The applicant was informed of that decision on 24 January 2008.

(ii) *The applicant's judicial appeals against the prosecutor's refusals to investigate allegations of ill-treatment*

On an unspecified date in June 2007 the applicant's lawyer complained to the Zavodskoy District Court in Grozny, stating amongst other things:

“... During the inquiry into the complaints of A. Mukayev, a forensic medical examination was conducted on 9 March 2006 ...

However, this examination was incomplete, as on 6 March 2006 when A. Mukayev had been taken to SIZO-1 (remand prison no.1) in Grozny, the following injuries had been noted [in the medical record]:

- headaches;
- healing haematoma in the right shoulder;
- scar on the back of the knee measuring 2 cm;
- haemorrhage in the right eye;
- abrasion on the back of the head;
- handcuff marks on both wrists.

All of the above objectively confirms that physical force was used against A. Mukayev ... In addition, [the policemen] used threats and intimidation to force A. Mukayev to state that he had not been subjected to beatings and that his facial trauma had been caused on 23 February 2006 during the arrest by law-enforcement officers in Kazakhstan.

The use of torture against A. Mukayev is confirmed by his allegedly voluntary confession to committing serious crimes ...

Before his arrest, A. Mukayev had been a healthy man. However, after his arrest he started to have health problems ... In spite of consistent allegations [of torture] in the complaint lodged by A. Mukayev, the investigator refused to open a criminal case ...

On the basis of the above, it is requested that the court:

Order the Chechnya prosecutor's office to furnish the materials of the inquiry which resulted in the refusal to institute criminal proceedings based on the complaints of A. Mukayev, as he was neither provided with a copy of this decision nor familiarised with the contents of the file;

Recognise as unlawful the failure of the prosecutor's office to investigate substantiated allegations of torture;

Order the Chechnya prosecutor's office to conduct a thorough, objective and effective investigation of the applicant's torture, and to prosecute the culprits ..."

On 26 September 2007 the applicant's lawyer lodged an additional complaint with the Zavodskoy District Court in Grozny.

On 3 October 2007 the Zavodskoy District Court upheld the complaint in full and recognised as unlawful the refusal to institute criminal proceedings. The decision stated, amongst other things:

"On 1 March 2006 a forensic medical expert ... examined A. Mukayev... according to his report, he found '... under the right eye and on the right eyelid there is a crimson and green bruise, yellow along the eye, about 3 by 1.5 cm ...'

Therefore, between his extradition to Russia on 23 February 2006 and 1 March 2006, A. Mukayev was subjected to physical violence.

On 6 March 2006, when he arrived at SIZO 20/1 in Grozny, Mukayev was examined by a doctor, who made the following notes in Mukayev's medical record: '... complaints of headaches; healing haematoma in the upper right shoulder; fresh scar

on the back of the knee measuring 2 cm; haemorrhage in the right eye; abrasion on the back of the head... handcuff marks on both wrists ...’

Consequently, assuming that the examination conducted on 1 March 2006 was full and thorough, A. Mukayev was subjected to further physical violence between 1 and 6 March 2006. This is confirmed by the documents.

On 10 April 2006 the following note was made in Mukayev’s medical record: ‘numbness of the right side [the following part of the phrase is illegible]. According to [A. Mukayev], he had been beaten in the head on the journey from Moscow ...’

On 10 May 2006 in SIZO 20/1, the following note was made in Mukayev’s medical record: ‘complaints of numbness in the right side of his face; lacrimation of the right eye; sharp pains in the right side of the face, the ear and the gums.’

On 1 June 2006 in SIZO 20/1, the following note was made in Mukayev’s medical record ...: ‘... on the upper left shoulder there are round purple bruises, both internal and external, measuring 2-3 cm. On the right hip – a large round purple haematoma measuring 6 cm and a straight 3 cm long abrasion ...’

Consequently, Mukayev was subjected to torture between 10 May and 1 June 2006. This is confirmed by the documents.

The inmates who were detained in the IVS of ORB-2 at the same time as A. Mukayev also confirm the use of violence against him. ... all these [three] persons confirmed that they were prepared to give statements to the prosecutors if necessary.

A. Mukayev’s lawyer, who had a short meeting with him in March 2006 in ORB-2, also confirms that physical violence was used against A. Mukayev.

The use of torture against A. Mukayev is substantiated by the following evidence:

- (a) his complaints (requests);
- (b) forensic expert examination report no. 186 of 1 March 2006;
- (c) copy of A. Mukayev’s medical record;
- (d) witness statement of Mr Sh.El.;
- (e) witness statement of Mr M.Ga.;
- (f) witness statement of Mr R.Le.;
- (g) complaint lodged by [the applicant’s] lawyer, Mr B.El.

The absence of signs of ill-treatment on A. Mukayev’s face on 23 February 2006 when he arrived at SIZO 77/4 in Moscow can be confirmed by the following:

- the witness statements of A. Mukayev’s relatives, who had seen the television programme of 23 February 2006;
- the video footage of the television programmes supplied by the television companies;
- a reply from SIZO-77/4 if requested...

...

The court, having examined the evidence ..., finds the complaint substantiated and upholds it. When refusing to institute criminal proceedings, the investigators failed to examine and take into account Mukayev's bodily injuries, the origins of which are an important factor in resolving the issue. Therefore, the ruling of 15 September 2006 not to open a criminal investigation was taken without fully examining the evidence or the complaints of Mukayev and his lawyer.

The court finds that further verification of all the arguments advanced by Mukayev concerning the use of violence against him is required ...”

On 9 December 2007 the investigator of the Leninskiy District Investigations Committee refused to institute criminal proceedings against the police officers on the grounds of lack of *corpus delicti*. The applicant appealed against that decision to the Zavodskoy District Court of Grozny.

On 19 March 2008 the Zavodskoy District Court rejected the applicant's appeal, stating that the impugned refusal to institute criminal proceedings of 9 December 2007 had just been overruled on the same date, 19 March 2008, by the head of the Investigations Department of the Leninskiy District.

On 29 March 2008 the investigator of the Leninskiy District Investigations Committee again ruled against instituting criminal proceedings against the police officers. The applicant again appealed against that decision to the Leninskiy District Court of Grozny.

On 26 June 2008 the Leninskiy District Court rejected the applicant's appeal as unsubstantiated, stating that

“... the facts of the alleged violations of the criminal procedure regulations [by the impugned police officers] were not confirmed by the numerous inquiries. A. Mukayev was found guilty as charged ...”

The applicant appealed against that decision to the Chechnya Supreme Court. On 6 August 2008 the latter upheld the decision of the Leninskiy District Court, stating the following:

“... in raising the issue of the overruling of the decision to refuse to open a criminal investigation within the framework of a criminal case which has been resolved by a sentence, [the applicant's representative] is in fact proposing that the court examine and evaluate evidence that has already been examined and evaluated by the Chechnya Supreme Court and the Supreme Court of the Russian Federation. Those courts have already delivered decisions which are now binding; such a situation is not provided for by the current legislation ...”

The documents submitted show that the applicant had raised, consistently and in detail, complaints of ill-treatment during his trial in the Chechnya Supreme Court and in an appeal against his sentence that he lodged with the Supreme Court of the Russian Federation (see below).

B. Criminal proceedings against the applicant

1. The applicant's legal counsel

According to the applicant, between 23 and 26 February 2006, while he was being questioned and tortured, he had had no access to a lawyer. The investigator had not explained to him his right to legal counsel, nor that anything he said during questioning could be used as evidence in criminal proceedings against him.

On 26 February 2006 the investigator appointed Mr G. Ber. as the applicant's lawyer. Rather than requesting a lawyer from the local Bar Association as prescribed by law, the investigator had appointed Mr G. Ber. directly. The applicant had agreed to that lawyer's services on 2 March 2006 only on the insistence of the investigator of the criminal case against him, and only after he had already been questioned and charged with a number of crimes.

On 28 February 2006 the applicant's relatives retained Mr B. El. as his lawyer, but the investigators did not allow him access to the applicant. Meanwhile, G. Ber. was acting as the applicant's lawyer. According to the applicant, G. Ber. had not been present during questioning; the lawyer had known that the applicant was being subjected to ill-treatment, but had failed to raise the issue before the authorities. The lawyer had signed the procedural document *post factum*, as requested by the investigators.

The applicant furnished the Court with a letter from the head of the Chechnya Bar Association of 14 December 2007, which read as follows:

“... the investigator [of the criminal case against the applicant] did not request the Nisam Bar Association to assign lawyer G. Ber. as legal counsel for A. Mukayev.

... in accordance with the law, a lawyer must obtain approval of the head of the Bar Association for a client's representation in criminal proceedings. However, Mr G. Ber. failed to do that; ... his retainer agreement to represent A. Mukayev was filled out by Mr G. Ber. unlawfully.

On the basis of the complaints received by the Bar Association against the lawyer G. Ber., including those of A. Mukayev, on 30 November 2007 G. Ber. was disbarred ...”

The applicant's lawyer Mr B. El. was allowed to meet with the applicant for the first time in the middle of March 2006.

The applicant unsuccessfully raised the complaint of the flaws in the legal aid before the trial court and on appeal. His complaints were dismissed as unsubstantiated.

2. Trial and appellate proceedings

During the trial the applicant was represented by a lawyer, Mr B. El. The applicant retracted his confession and claimed that he had made self-incriminating statements under torture. He complained to the trial judge that during his arrest and detention at ORB-2, he had been repeatedly tortured and threatened, and had finally been forced to confess. He pleaded not guilty in respect of the murders and admitted his guilt only in respect of the unlawful acquisition of a gun and of being in possession of false identity documents.

On 22 May 2007 the Chechnya Supreme Court found the applicant guilty of, amongst other things, the murder of twelve people, and sentenced him to life imprisonment. Its ruling was based on the applicant's confession, statements made by witnesses and victims to the investigator and the court, and ballistic expert reports concluding that one of the victims had been shot with the gun found on the applicant.

In respect of the applicant's allegations of torture, the trial court stated that there were

“... no grounds for distrusting the statement given by the operational search officer Mr As.Vak. or for casting doubt on the results of the inquiries conducted by the prosecutor’s office [into the applicant’s allegation].”

On 30 October 2007 the sentence was upheld on appeal by the Supreme Court of the Russian Federation. In respect of the applicant’s allegations of ill-treatment, the court stated that

“... the fact that unlawful methods of investigation were used against the applicant was not confirmed.”

COMPLAINTS

The applicant complains under Article 3 of the Convention that he was tortured by State agents while in pre-trial detention and that the authorities failed to investigate effectively his allegations on that account.

Under the same heading he complains that the conditions of his detention in the IVS of the ORB-2 were inadequate.

Invoking Article 5 of the Convention, the applicant complains that his detention between 23 February and 6 March 2006 in the IVS of ORB-2 was unlawful and that his pre-trial detention from 13 March 2006 was not in compliance with the domestic legislation.

The applicant alleges under Article 6 § 1 that the criminal trial against him was unfair as the courts relied on his confession, which had been obtained under duress.

The applicant complains under Article 6 § 3 (c) that he was deprived of the right to defend himself through legal assistance of his own choosing. In particular, between 23 and 26 February 2006 he was deprived of legal counsel; between 28 February and 2 March 2006 the applicant did not have access to his own lawyer; the appointed lawyer was unlawfully designated as his legal counsel and failed to represent the applicant properly.

Lastly, the applicant complains under Article 13 that he did not have effective domestic remedies against the alleged violations.

QUESTIONS

1. Was the applicant subjected to torture or inhuman or degrading treatment, in breach of Article 3 of the Convention? Was the investigation into the allegations of ill-treatment thorough and effective?

2. In the determination of the criminal charge against him, did the applicant have a fair hearing as required by Article 6 § 1 of the Convention? In particular, was his right to remain silent and not to incriminate himself respected, having regard to the fact that the confession statements made by the applicant during the investigation served as the ground for his conviction?

3. Was the applicant able to defend himself, as required by Article 6 § 3 (c) of the Convention, during the pre-trial investigation? In particular, was the applicant afforded the chance to defend himself through legal assistance of his own choosing, within the meaning of Article 6 § 3 (c) of the Convention?

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