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

FIRST SECTION

Application no. 43305/07
Vyacheslav Anatolyevich SHARKOV
against Russia
lodged on 11 August 2007

STATEMENT OF FACTS

The applicant, Mr Vyacheslav Anatolyevich Sharkov, is a Russian national, who was born in 1969 and lives in Samara.

A. The circumstances of the case

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

At or around 8 a.m. on 7 June 2006 the applicant was driving a car when he was stopped by road police officers Kh. and B.. Having checked the applicant's identity documents, the officers told the applicant that he had no valid authority to drive the car (which was owned by his father). The applicant objected. The officers told the applicant that he should follow them to the road police station.

As subsequently established in the criminal case against the applicant, having arrived there, the applicant started to insult officer Kh. and punched him in the face on one occasion. Officer B. apprehended the applicant and handcuffed him.

In the applicant's submissions (both before the domestic authorities and the Court), he did not insult or assault any officers. When they arrived in front of Samarskiy police station Officer Kh. punched him and put violently his knee on his chest causing rib fractures. The applicant was then handcuffed. In the applicant's submission, several police officers saw the scene but did not react in any way.

Despite his requests, the applicant was refused medical assistance. In two hours following his arrival in the police station, he was, however, taken to a medical examination to determine whether he was drunk. The test was negative.

Having spent four hours in the police station, the applicant was released. He was not given a copy of the arrest record.

Immediately after his release, the applicant went to the Regional forensic expert office and obtained a report. The expert concluded that the applicant had several bruises on his arms and forehead; scratches on his neck, arms and his right knee. The expert also stated that the findings in respect of "the other injuries" could not be made without X-rays and "original" medical documents.

Thereafter, he was on sick leave and was undergoing out-patient treatment for some time.

In the meantime, on 8 or 9 June 2006 the applicant unsuccessfully sought a meeting with the Chief Officer of the Regional Department of the Interior (supervising police stations). On 15 June 2006 he lodged a complaint with the town department of the Interior. The content of this complaint is unclear. It appears that he also complained to the regional prosecutor, who informed him that a preliminary inquiry (*доследственная проверка*) was opened and was pending (see also the regional prosecutor's letter of 8 November 2006 below).

In the meantime, on 18 June 2006 investigator N. in Samarskiy district prosecutor's office initiated criminal proceedings against the applicant accusing him of use of force and insult against a public official (Articles 318 and 319 of the Criminal Code).

On 25 July 2006 investigator N. in Samarskiy district prosecutor's office issued a refusal to institute criminal proceedings against officers on account of an alleged excessive use of force against the applicant on 7 June 2006. Having listed the applicant's account of the events, as well as statements made by Officer Kh. and two eye-witnesses of the events on 7 June 2006, the investigator concluded that there had been no *corpus delicti* in so far as the offences under Articles 285 and 286 of the Criminal Code could be relevant (*ultra vires* actions by a public official and abuse of power by a public official, respectively).

It appears that this refusal was in reply to the applicant's complaint received by the investigating authority on 23 July 2006. According to the applicant, he became aware of the refusal of 25 July 2006 in January 2007 (see below). He did not seek judicial review of this refusal under Article 125 of the Code of Criminal Procedure.

On 31 July 2006 the applicant sought, at his own expense, another expert report. On 5 September 2006 expert U. issued a report stating that the applicant had no other injuries in addition to those already recorded in the expert report of 7 June 2006. The expert refuted the earlier conclusions concerning the presence of a chest injury.

Being dissatisfied with this new report, the applicant obtained an X-ray of his chest.

On 8 November 2006 the regional prosecutor's office informed the applicant that a procedural decision regarding his allegation of beating would be taken in the framework of the investigation against the applicant.

Allegedly, before and in December 2006 the applicant and his next of kin were threatened on various occasions. In particular, as allegedly confirmed by an audio recording, a district prosecutor and investigator N. compelled the applicant to decline the services of his privately-retained counsel.

On 15 December 2006 the applicant was arrested again. On 16 December 2006 a district court refused to authorise his continued detention. However,

the applicant was released only on 17 December 2006. According to the applicant, he was not provided with a copy of the arrest record.

The preliminary investigation in the criminal case against the applicant was completed in December 2006. When studying the case file, on 22 January 2007, the applicant became aware of the refusal of 25 July 2006 by which his allegation of beating had been dismissed.

On an unspecified date, the case against the applicant was submitted for trial before the Samarskiy District Court of Samara. The applicant pleaded not guilty and affirmed that he had not insulted or assaulted any officers on 7 June 2006. He argued instead that he had been beaten up by these officers.

By judgment of 5 February 2007, the District Court convicted the applicant as charged and imposed a suspended sentence of two years' imprisonment.

As to the medical evidence in the case, the trial court considered as follows:

> "The diagnosis made in the clinic that [the applicant] had a chest hematoma is not substantiated. The record of out-patient treatment does not cite any objective indications of a hematoma. In addition, the examination on 7 June 2006 in the forensic office did not disclose any chest injuries.
>
> In view of the confused nature of the medical evidence and because the experts did not have any X-ray images at their disposal, it was not possible to determine whether the applicant had any chest injury ...
>
> The defendant's allegation of beating is not supported by evidence. An expert report, which was compiled on the basis of documentary evidence, did not confirm any chest injury ...
>
> The additional expert report, which has been submitted to the court by the defendant, concludes that he had a fracture of three ribs. This report was issued on 18 January 2007 on the basis of the documents submitted by the defendant. However, this report does not provide a truthful picture of the way the injury had been caused. The court concludes that the above evidence is aimed at avoiding criminal responsibility ... It does not matter whether the officers' findings concerning the applicant's driving of the car were lawful or justified ..."

On 23 March 2007 the Samara Regional Court upheld the conviction but replaced the suspended custodial sentence with a fine of 2,600 Russian roubles (approx. 75 euros). The appeal court held as follows:

> "... It follows from the car certificate that the car owner (the defendant's father) had no right to authorise another person to use this car. Thus, since the defendant had no right to use the car, Officer Kh. had lawfully prevented him from continuing to drive it.
>
> Recourse to physical force against the defendant was justified by the latter's assault against the on-duty officer ..."

B. Relevant domestic law and practice

1. Criminal Code

Article 318 of the Criminal Code punishes recourse to physical force against a public official.

As indicated in the 1999 review of the military courts jurisprudence, the *corpus delicti* under Article 318 of the Code was constituted if recourse to violence was related to the official's exercise of his official duties. Recourse

to force was not punishable (under this Article) if related to unlawful actions of the official.

2. Code of Criminal Procedure (CCrP)

Article 125 of the CCrP provides for judicial review of the decisions or (in)actions on the part of an inquirer, investigator or a prosecutor, which has affected constitutional rights or freedoms. The judge is empowered to verify the lawfulness and reasonableness of the decision/(in)action and to grant the following forms of relief: (i) to declare the impugned decision/(in)action unlawful or unreasonable and to order the respective authority to remedy the violation; or (ii) to reject the complaint.

In its Resolution of 10 February 2009 the Plenary Supreme Court of Russia considered that it was incumbent on the judges to verify before processing an Article 125 complaint whether the preliminary investigation has been completed in the criminal case (point 9). If the criminal case has already been set for trial or has been completed, the complaint should not be examined unless it was brought by a person who was not a party to the main case or if such complaint was not amenable to judicial review at the trial stage of the proceedings. In all other situations, the complaint under Article 125 should be left without examination and the complainant be informed that he or she can raise the matter before the trial or/and appeal courts in the criminal case.

In the same vein, according to the interpretation given by the Constitutional Court, a complaint under Article 125 cannot be brought or pursued after the criminal case, to which this complaint is connected, has been submitted for trial. However, when it is established that a party to the proceedings (including a judge or a witness) has committed a criminal offence, thus seriously affecting the fairness of the proceedings, the Code exceptionally allows for a separate investigation of the relevant circumstances leading to a re-opening of the case (see Decision no. 1413-O-O of 17 November 2009; see also Ruling no. 20-П of 2 July 1998 and Ruling no. 5-П of 23 March 1999).

COMPLAINTS

Relying on Articles 1, 3, 5, 6-8, 13, 14 17 and 18 of the Convention, the applicant complains that he was beaten up by the road police officers and that he was refused medical assistance. He also argues that there was no investigation into his allegation of beating. In particular, he alleges that he was not timely informed of the refusal to prosecute dated 25 July 2006 and thus could not apply for judicial review; that investigator N. failed to order any forensic examinations.

The applicant further complains under the same provisions that he was wrongly prosecuted for and convicted of recourse to physical force against a public official. In the applicant's submission, the trial court failed to ascertain whether the officer had acted lawfully when he stopped his car, ordered him to follow him to the road police station and then inflicted injuries.

QUESTIONS TO THE PARTIES

1. Has the applicant exhausted domestic remedies in respect of his complaints under the substantive and procedural limbs of Article 3 of the Convention? In particular:

- Did the applicant lodge any hierarchical appeals against the decision of 25 July 2005? Was any such appeal successful? If yes, has he thereby complied with the exhaustion requirement?

- Did the applicant institute review proceedings under Article 125 of the Code of Criminal Procedure (CCrP) in respect of the decision of 25 July 2006 (see *Trubnikov v. Russia* (dec.), no. 49790/99, 14 October 2003)? Noting that the applicant first learnt about the decision of 25 July 2006 in January 2007, was the remedy under Article 125 of the CCrP no longer available to him because his own criminal case was already pending before a trial court (see "Relevant domestic law and practice") (see also *Nikolay Fedorov v. Russia*, no. 10393/04, § 46, 5 April 2011)? Did the procedure under Article 125 of the CCrP lose any prospect of success, following the applicant's conviction in February 2007 in respect of the related facts?

- Was the above judicial procedure an effective remedy to be exhausted, noting that the reviewing court was not empowered to require any specific investigative measures to be carried out; there was no time-limit for lodging the complaint under Article 125 of the CCrP; there was no procedure for ensuring compliance with the court's order issued under Article 125 of the CCrP; this remedy is rendered devoid of purpose as soon as the criminal case in respect of the person concerned has been submitted for trial? Did the applicant have a privately-retained or legal-aid counsel during the preliminary investigation against him? Did the mandate of such counsel require him to bring review proceedings under Article 125 of the CCrP in respect of the alleged ill-treatment and ineffective investigation of the related complaint (cf. *Dedovskiy and Others v. Russia* (dec.), no. 7178/03, 12 October 2006, and *Belevitskiy v. Russia*, no. 72967/01, §§ 64 and 65, 1 March 2007)?

- Were the issue of ill-treatment (use of force) and the issue of an effective investigation of the related complaint examined in substance during the applicant's trial and on appeal against the judgment of 5 February 2007? Was the trial court empowered to afford any adequate redress in respect of these two issues? If yes, has the applicant thereby complied with the exhaustion requirement (see *Belevitskiy*, cited above, §§ 62-67; *Vladimir Romanov v. Russia*, no. 41461/02, §§ 50-52, 24 July 2008; *Akulinin and Babich v. Russia*, no. 5742/02, § 33, 2 October 2008; *Samoylov v. Russia*, no. 64398/01, §§ 43-44, 2 October 2008; *Vladimir Fedorov v. Russia*, no. 19223/04, §§ 44-50, 30 July 2009; *Toporkov v. Russia*, no. 66688/01, §§ 28-35, 1 October 2009; and *Lopata v. Russia*, no. 72250/01, § 107, 13 July 2010)?

2. With due regard to the parties' submissions in relation to the questions under section 1 above, did the applicant comply with the six-month time-limit for raising his complaints under the substantive and procedural limbs of Article 3 of the Convention?

If yes:

3. Has the applicant been subjected to inhuman or degrading treatment on 7 June 2006, in breach of Article 3 of the Convention?

The parties are requested to make submissions, *inter alia*, on the following points:

(a) Was the applicant's arrest (*задержание*) properly documented in compliance with the domestic requirements?

(b) Did the arresting officer(s) make any reports concerning use of force or handcuffing in respect of the applicant?

(c) Did the authorities make sure that the applicant be timely examined by a medical professional in relation to the circumstances of the arrest; that he be provided with first medical aid on 7 June 2006?

(d) Did any public authority, including courts, determine whether the officers' orders to or actions vis-à-vis the applicant were lawful under Russian law?

4. Having regard to the procedural protection from inhuman or degrading treatment, was the investigation in the present case by the domestic authorities in breach of Article 3 of the Convention? In particular:

(a) When did the authorities become aware or ought to be aware of the presence of injuries on the applicant's body, use of force against him or possible ill-treatment? When did the authorities open a preliminary inquiry (*доследственная проверка*)?

(b) Was the "effectiveness" of this inquiry undermined in the absence of a decision to initiate criminal proceedings (*возбуждение уголовного дела*) in reply to the applicant's allegations? Was the official or authority, who carried out the inquiry, independent of the alleged authors of ill-treatment? Did Article 3 of the Convention also require that the above official or authority be independent of the authority which was responsible for investigating the criminal case against the applicant?

(c) Was the applicant, officer B. or other persons interviewed during the inquiry? Were those persons liable for perjury or for the refusal to give evidence? Was any medical evidence obtained and assessed during the inquiry?

(d) Was the applicant given a possibility to participate effectively in the inquiry (for instance by lodging motions, obtaining copies of procedural decisions, including a possibility to seek judicial review of the refusal to prosecute the officers)?

Having regard to Article 38 of the Convention, the respondent Government are requested to submit a copy of the file(s) relating to the inquiry in relation to the applicant's allegations of ill-treatment.

5. Was it indispensable under Russian law, in a case under Article 318 of the Criminal Code, for the domestic courts to determine whether the

applicant's alleged recourse to violence against a public official related to the official's exercise of his official duties and whether the official's actions were lawful or unlawful? Did the domestic court delve, in any sufficient manner, into these questions? If not, did this omission constitute a violation of Article 6 of the Convention?

6. Also, was the offence under Article 318 of the Criminal Code clearly defined in law (with due regard to the applicable jurisprudence of Russian courts, if any)? Was it clear from the wording of Article 318 of the Criminal Code and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable? Could the applicant foresee, if need be with appropriate advice, the consequences which a given course of conduct (for instance, resistance to what he considered to be an unlawful action on the part of a public official) may entail? If not, was there a violation of Article 7 of the Convention?