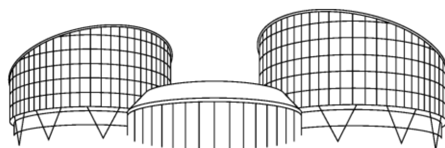

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 20427/05
Aleksandr Aleksandrovich BORGDORF
against Russia

The European Court of Human Rights (First Section), sitting on 22 October 2013 as a Chamber composed of:
Isabelle Berro-Lefèvre, *President,*
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 6 May 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Aleksandr Aleksandrovich Borgdorf, is a Russian national, who was born in 1974 and lives in Veseloyarsk, the Altay Region. He was represented before the Court by Mr V.A. Novitskiy, a lawyer practising in the town of Rubtsovsk of the Altay Region.

2. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

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

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CONSEIL DE L'EUROPE

## A. The circumstances of the case

### *1. The events of 1 June 2004*

4. On 1 June 2004 local policemen arrested the applicant while he was driving his truck near the border between Kazakhstan and Russia in the Altay Region and charged him with smuggling.

5. Further examination of the truck in the presence of witnesses proved that the applicant was carrying merchandise bypassing customs checks.

6. The applicant was then brought to the local police station for questioning. In a short while his lawyer arrived there. He demanded a meeting with the applicant, but the policemen refused to let him in.

7. The applicant alleged that while he was at the police station, officer V. beat him up in an attempt to force him to confess. The applicant refused to give any statements. It appears that after some time he was released and the subsequent investigative actions took place in the presence of his lawyer.

8. The next day, the applicant was examined by a forensic expert who reached the following conclusions:

> "... scratches on the right side of the forehead, small scratches over the right eyebrow, bruises in the area of the right radiocarpal articulation."

9. On one of the following days the applicant requested that the local prosecutor's office open criminal proceedings against officer V. on account of the alleged beatings.

10. On 7 June 2004 an investigator from the Rubtsovsk town prosecutor's office, having examined the results of the applicant's forensic examination and the testimonies of Mr V. and the other policemen who had met the applicant on the day of the event, decided not to open a criminal case.

11. On 26 August 2004 the deputy regional prosecutor of the Altay Regional Prosecutor's Office rejected the applicant's complaint against the above decision as groundless. It appears that the applicant made no further attempts to appeal against these decisions.

### *2. Criminal proceedings against the applicant*

12. As indicated above, on 1 June 2004 the applicant was arrested, brought to the police station and charged with smuggling. The applicant claims that while he was at the police station his lawyer tried to reach him, but he was denied access by other police officers.

13. On 23 July 2004 an investigator allegedly asked the applicant's lawyer to sign an undertaking to keep all information concerning the investigation confidential, but he refused to do so.

14. The trial commenced on an unspecified date. During the proceedings the applicant submitted that some evidence was inadmissible as he had been

subjected to “physical violence” at the police station. He gave no further details in that regard.

15. At the hearing of 16 January 2005 the defence lodged the motion seeking to question witness Mr G. The same day the trial court refused the request.

16. On 18 January 2005 the Rubtsovsk District Court found the applicant guilty of smuggling and gave him a suspended sentence of two years’ imprisonment.

17. On 27 January 2005 the applicant lodged a statement of appeal drafted with the help of his lawyer. He claimed that the trial court had assessed the facts of his case incorrectly and had applied the domestic law wrongly. He also claimed that the proposal that his lawyer should sign an undertaking to keep the information about the investigation confidential had infringed his right to defence.

18. On 24 February 2005 the Altay Regional Court upheld the judgment on appeal.

## B. Relevant domestic law

19. The Code of Criminal Procedure of the Russian Federation in force since 1 July 2002 (Law no. 174-FZ of 18 December 2001, the “CCrP”), establishes that a criminal investigation may be initiated by an investigator or prosecutor upon the complaint of an individual (Articles 140 and 146). Within three days of receiving such a complaint, the investigator or prosecutor must carry out a preliminary inquiry and take one of the following decisions: (1) to open criminal proceedings if there are reasons to believe that a crime has been committed; (2) to refuse to open criminal proceedings if the inquiry reveals that there are no grounds to initiate a criminal investigation; or (3) to refer the complaint to the relevant investigative authority. The complainant must be notified of any decision taken. Refusal to open criminal proceedings is amenable to appeal to a higher-ranking prosecutor or a court of general jurisdiction (Articles 144, 145 and 148). A prosecutor is responsible for overall supervision of the investigation (Article 37). He or she can order specific investigative actions, transfer the case from one investigator to another or order an additional investigation. Article 125 of the CCrP provides for judicial review of decisions by investigators and prosecutors that might infringe the constitutional rights of participants in proceedings or prevent access to court.

## COMPLAINTS

20. The applicant complained under Article 3 of the Convention of ill-treatment by officer V.

21. The applicant also claimed, under Article 5 of the Convention, that his arrest on 1 June 2004 had been unlawful.

22. Relying on Article 6 of the Convention, the applicant complained that he did not have a fair trial. In particular he complained that his right to legal assistance had been breached because he had been denied access to his lawyer at the police station after the arrest and because the lawyer had been asked to sign an undertaking to keep the information relating to the investigation secret. He also maintained that he had been unable to examine witness Mr G. during the trial and that the courts had incorrectly assessed his criminal case and had erred in the application of domestic law.

## THE LAW

23. Relying on Article 3 of the Convention, the applicant complained that he had been ill-treated by officer V. and that the authorities subsequently failed to investigate the incident. This provision of the Convention provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

24. The Government submitted that the applicant had not challenged before the courts the decisions of the investigative authorities concerning his complaints of ill-treatment. Therefore, he had failed to exhaust domestic remedies. In any event, the applicant had not proven the fact of the beatings "beyond reasonable doubt" and the investigation of his allegations by the authorities had been effective.

25. The applicant reiterated his complaints.

26. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance, and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, §§ 51-52, and *Akdıvar and Others v. Turkey*, judgment of 16 September 1996, Reports 1996-IV, §§ 65-67).

27. The Court has previously found that the possibility of challenging before a court of general jurisdiction a prosecutor's decision not to investigate complaints of ill-treatment constitutes an effective remedy available in the Russian legal system in respect of such complaints (see *Trubnikov v. Russia* (dec.), no. 49790/99, 14 October 2003 and *Belevitskiy v. Russia*, no. 72967/01, §§ 54-67, 1 March 2007).

28. Developing that position, the Court has later ruled that challenging a prosecutor's decision in civil proceedings (see *Vladimir Romanov v. Russia*, no. 41461/02, §§ 46-52, 24 July 2008) or even raising the issue of ill-treatment before a trial court examining charges against an applicant (see *Akulinin and Babich v. Russia*, no. 5742/02, §§ 25-34, 2 October 2008), provided that the courts examine the substance of the relevant allegations, could also in certain circumstances be regarded as an appropriate exhaustion of domestic remedies.

29. Turning to the present case, the Court observes that there is nothing in the case file to suggest that the applicant has challenged the refusals to institute criminal proceedings before the Russian courts.

30. The Court further observes that the applicant did not in any concrete or substantiated manner raise the issue of the alleged ill-treatment either during the trial, or in the statement of appeal (see paragraphs 14 and 17 above, respectively).

31. The Court particularly notes that from the day of the alleged beatings until the end of trial the applicant was represented by a professional counsel of his own choosing, and remained at liberty. He provided no explanation of the counsel's failure to lodge, or advise him to lodge a judicial appeal against the prosecutor's decision not to institute criminal proceedings.

32. It follows, therefore, that this complaint is inadmissible on account of the applicant's failure to exhaust the available domestic remedies and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

33. The applicant further complained under Article 5 of the Convention about the unlawfulness of his arrest on 1 June 2004 and under Article 6 that he had been denied access to his lawyer at the police station after the arrest, that his lawyer had been asked to sign an undertaking to keep the information relating to the investigation secret, that he had been unable to examine witness Mr G. during the trial and that the courts had incorrectly assessed his criminal case and had erred in the application of domestic law. The Court, having regard to all the material in its possession and in so far as the matters complained of are within its competence, finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

34. It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

| Søren Nielsen | Isabelle Berro-Lefèvre |
| --- | --- |
| Registrar | President |