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

FIRST SECTION

DECISION

Application no. 40521/06
Aleksandr Mikhaylovich GORBATENKO
against Russia

The European Court of Human Rights (First Section), sitting on 14 January 2014 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Ksenija Turković,
Dmitry Dedov, *judges*,
and Søren Nielsen, *Section Registrar*,

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

Having regard to the above application lodged on 21 August 2006,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Aleksandr Mikhaylovich Gorbatenko, is a Russian national, who was born in 1973 and lives in the town of Omsk.

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

A. The circumstances of the case

1. The applicant's detention and alleged ill-treatment

3. On 31 May 2005 the applicant was arrested on suspicion of inflicting bodily harm resulting in death. He was taken to the premises of the Omsk

Town Department of the Interior in the Tsentralniy district of Omsk. He was subsequently placed in its custody room. On 3 June 2005 he was transferred to temporary detention facility IZ-1 located in the town of Omsk. According to the applicant, one of the cells he occupied was in an appalling condition.

4. On 10 June 2005 the applicant was transported to correctional colony IK-7 located in the same town. A prison doctor examined him on admission and made the following entry in his medical record:

> "[The applicant] has no complaints. The medical examination indicates no pathology of bodily organs and systems. No traces of injuries found on [the applicant's] body. He states that he does not have any venereal diseases or HIV".

5. According to the applicant, on 10 June 2005, following his admission, he was ill-treated. Prison guards allegedly insulted and kicked him in his kidneys, put a gas mask with a closed air valve on his face and beat him on the ribs with a mallet.

6. The applicant stated that the next day he was forced to learn by heart the list of duties detainees must undertake while in prison. On that day, he was also handcuffed to a radiator and beaten with a mallet. According to the applicant, he was ill-treated by prison guards every day between 10 and 15 June 2005.

7. On 16 June 2005 a doctor from the correctional colony examined the applicant on his discharge. The relevant medical entry reads as follows:

> "[The applicant] has no complaints. His skin shows no pathological condition. No pathological conditions of the bodily organs or system. No bodily injuries"

2. The applicant's attempts to complaint about alleged ill-treatment

(a) Criminal complaint

8. On an unspecified date the applicant complained to the Prosecutor's Office of the Sovetskiy District of Omsk ("the prosecutor's office") that he had been subjected to ill-treatment between 10 and 15 June 2005.

9. On 29 December 2005 the prosecutor's office dismissed his complaint as unsubstantiated.

10. On 11 January 2006 the Prosecutor's Office of the Omsk Region ("the regional prosecutor's office") quashed the decision of 29 December 2005 as unfounded and ordered the prosecutor's office to perform an additional investigation into the applicant's allegations.

11. On 20 October 2006 the prosecutor's office again refused to institute criminal proceedings. The regional prosecutor's office informed the applicant about this decision by letter of 23 October 2006 and advised the applicant of his right to appeal against it in court. The applicant did not bring any court proceedings in this connection.

(b) Civil proceedings

12. In 2010 the applicant brought a claim against the correctional colony IK-7 and the Federal Service of Execution of Sentences seeking damages for the alleged ill-treatment he had suffered at the hands of prison guards between 10 and 15 June 2005.

13. On 22 February 2011 the Sovetskiy District Court dismissed the applicant's claim as unsubstantiated.

14. On 23 March 2011 he appealed against that judgment.

15. On 25 March 2011 the Sovetskiy District Court rejected the applicant's appeal for failure to comply with the statutory time-limit for lodging such claims, noting that the applicant had not applied for an extension of the deadline for appeal.

16. On 27 April 2011 the Omsk Regional Court upheld that decision.

3. Criminal proceedings against the applicant

17. On 31 May 2005, on the day of his arrest, the applicant was given access to defense counsel, Ms Z. The applicant allegedly considered her assistance ineffective and signed a waiver of his right to a lawyer, but did not ask the investigator to provide him with another defense counsel. The identification parade and a seizure of his personal effects, which took place on that day, were nevertheless carried out in the presence of Ms Z. During the identification parade the applicant was identified as a perpetrator of the crime by witnesses Bor., Bar. and Ya. The applicant did not take part in interrogations or cross-examinations on that day and did not give any evidence himself.

18. On 15 November 2005 the applicant was convicted as charged by the Pervomayskiy District Court of Omsk and sentenced to eight years and six months of imprisonment. It held that on 11 May 2005 the applicant, who had been drunk at the time, had beaten up a stranger on the street. The next day the victim of the applicant's attack had died in hospital.

19. The applicant's conviction was based on testimonies of eyewitnesses Bor., Bar. and Ya. who had seen him hitting and kicking the victim during the incident. Their trial statements were consistent with their oral evidence given during the pre-trial stage of proceedings. The court also referred to expert reports, which attributed the victim's death to the injuries sustained during the beatings. The forensic examination established that the blood stains on the applicant's clothes belonged to the victim of his attack. The applicant's guilt was also confirmed by, among other things, the identification parade record of 31 May 2005. Throughout the trial the applicant was represented by defense counsel G.

20. The applicant challenged his conviction on appeal. He complained about the outcome of his case, in particular the findings of fact and law, the admission of allegedly inadmissible evidence, and the lack of effective legal

assistance during the identification parade on 31 May 2005. The applicant did not raise an issue of an alleged ill-treatment between 10 and 15 June 2005 during the trial or on appeal.

21. On 2 March 2006 the Omsk Regional Court upheld the applicant's conviction on appeal. It affirmed the findings of the lower court. It held that the identification parade had been performed in accordance with the applicable domestic rules. The court also noted that on 31 May 2005 the applicant's defense rights had been properly secured by Ms Z.

4. The conditions of the applicant's detention in various detention facilities

22. Between 17 June 2005 and 6 February 2006 the applicant was frequently transferred between various detention facilities, including correctional colony IK-3 and temporary detention facility IZ-1. According to the applicant, the conditions of his detention and transportation were consistently appalling owing to overcrowding, dirt, insects, rats, poor heating and insufficient ventilation.

B. Relevant domestic law

1. The Constitution

23. Article 21 provides that no one may be subjected to torture, violence or any other cruel or degrading treatment or punishment.

24. Article 48 provides that everyone has a right to qualified legal assistance. It also provides that an arrested or detained person or a person accused of a criminal offence should have a right to legal representation from the moment of his or her arrest, placement into custody or when charges are brought.

2. Criminal Code

25. Article 116 § 1 of the Criminal Code of the Russian Federation of 13 June 1996 provides that the application to another person of physical force which has caused physical pain but has not resulted in any health damage is punishable by a fine, compulsory or correctional labour or arrest for a period of up to three months.

26. Article 286 § 3 (a) provides that actions of a public official which clearly exceed his authority and entail a substantial violation of the rights and lawful interests of citizens, committed with violence or the threat of violence, are punishable by three to ten years' imprisonment, with a prohibition on occupying certain posts or engaging in certain activities for a period of three years.

3. Code of Criminal Procedure

27. Article 144 of the Code of Criminal Procedure of the Russian Federation provides that prosecutors, investigators and inquiry bodies must investigate every report of a crime committed or being planned, and take a decision on that information within three days. In exceptional cases, that time-limit can be extended to ten days. The decision should be one of the following: (a) to institute criminal proceedings; (b) to refuse to institute criminal proceedings; or (c) to transmit the information to another competent authority (Article 145).

28. Article 125 provides that the decision of an investigator or a prosecutor to dispense with or terminate criminal proceedings, and other decisions and acts or omissions which are liable to infringe the constitutional rights and freedoms of the parties to criminal proceedings or to impede citizens' access to justice, may be appealed against to a District Court, which is empowered to check the lawfulness and grounds of the impugned decisions.

29. Article 213 provides that, in order to terminate the proceedings, the investigator should adopt a reasoned decision with a statement of the substance of the case and the reasons for its termination. A copy of the decision to terminate the proceedings should be forwarded by the investigator to the prosecutor's office. The investigator should also notify the victim and the claimant in writing of the termination of the proceedings.

30. Under Article 221, the prosecutor's office is responsible for general supervision of the investigation. In particular, the prosecutor's office may order that specific investigative measures be carried out, transfer the case from one investigator to another, or reverse unlawful and unsubstantiated decisions taken by investigators and inquiry bodies.

31. Article 51 of the Code provides for mandatory legal representation if the accused faces serious charges carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty. Unless counsel is retained by the accused, it is the responsibility of the investigator, prosecutor or the court to appoint legal-aid counsel.

32. Article 52 provides that an accused can waive his right to legal assistance, but such a waiver must be established in writing. The waiver may be revoked at any point in the proceedings.

COMPLAINTS

33. The applicant complained under Articles 3, 4 and 8 of the Convention that he had been ill-treated by prison guards between 10 and 15 June 2005 and that the investigation into his allegations of ill-treatment had been ineffective.

34. Under Article 3 and Article 5 §§ 1 and 3 of the Convention he also complained about the conditions of his detention in IZ-1 between 3 and 10 June 2005, his detention in IK-3 and IZ-1 between 15 June and 6 February 2006 and his frequent transfers between detention facilities during that period.

35. Relying on Article 6 of the Convention the applicant complained that the criminal proceedings against him had been unfair. In support of this the applicant in particular maintained that he had not enjoyed the assistance of counsel during the investigative measures conducted on 31 May 2005 and that the national courts had convicted him on the basis of a wrongful interpretation of the facts.

THE LAW

A. Complaint concerning the applicant's ill-treatment

36. Relying on Articles 3, 4 and 8 of the Convention, the applicant complained about the alleged ill-treatment at the hand of his prison guards between 10 and 15 June 2005. He was also dissatisfied that the competent authorities had failed to conduct an effective investigation into that matter. The Court will examine these grievances under Article 3 of the Convention, which provides as follows:

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

37. According to the Government, the applicant failed to exhaust domestic remedies in respect of his complaints of ill-treatment because he had not exercised his right of appeal against the prosecutor's office's decision of 20 October 2006 not to initiate criminal proceedings. The Government submitted further that the applicant had not been subjected to the ill-treatment alleged. They referred to the medical records of 10 and 16 June 2005 indicating that no injuries had been found on the applicant's body. They also argued that in the course of the domestic proceedings the applicant's allegations of ill-treatment had been investigated thoroughly and dismissed as unsubstantiated.

38. The applicant maintained his complaints. He also stated that he had exhausted all available domestic remedies.

39. As regards the applicant's complaint under the substantive aspect of Article 3 of the Convention, 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).

40. 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).

41. 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.

42. 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. It is true that he attempted to sue the detention facility for ill-treatment by way of a civil action. The Court would note, however, that there is no case-law authority for Russian civil courts to be able, in the absence of a finding of guilt in criminal proceedings, to consider the merits of a civil claim relating to alleged serious criminal actions (see *Denis Vasilyev v. Russia*, no. 32704/04, § 136, 17 December 2009).

43. 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 paragraph 20 above). Furthermore, he provided no explanation for failure to lodge a judicial appeal against the prosecutor's decision not to institute criminal proceedings (see, for example, *Borgdorf v. Russia* (dec.), no. 20427/05, §§ 29-32, 22 October 2013).

44. It follows, therefore, that the complaint of ill-treatment 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.

45. As to the part of the applicant's complaint that the domestic authorities failed to investigate his allegations of ill-treatment, the Court reiterates that a preliminary check into the applicant's allegations was

conducted by the competent authority. These proceedings were terminated by the investigator's decision against which the applicant failed to appeal before the domestic courts. As established above the applicant has not shown convincingly that such a review was bound to be ineffective. It follows that the applicant's allegation that the authorities failed to investigate his complaint is unsubstantiated.

46. For these reasons, the Court finds that this part of the complaint must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Complaint concerning various aspects of his detention on remand

47. Under Article 3 and Article 5 §§ 1 and 3 of the Convention he also complained about the conditions of his detention in IZ-1 between 3 and 10 June 2005, his detention in IK-3 and IZ-1 between 15 June 2005 and 6 February 2006 and his frequent transfers between detention facilities during that period.

48. The Court notes that the period referred to by the applicant in this part of the case ended on 6 February 2006, whilst he first raised these complaints in substance before the Court on 21 August 2006. Assuming, in the applicant's favour, that he had no specific remedies to exhaust, the Court concludes that this complaint has been introduced out of time (see *Norkin v. Russia* (dec.), no. 21056/11, §§ 15-25, 5 February 2013 and *Malofeyeva v. Russia, no. 36673/04*, § 144, 30 May 2013).

49. It follows that this complaint is inadmissible for non-compliance with the six-month rule set out in Article 35 § 1 of the Convention, and must be rejected pursuant to Article 35 § 4.

C. Complaint concerning the right to a fair trial

50. Relying on Article 6 of the Convention, the applicant complained that the criminal proceedings in his case had been unfair. In particular, he disagreed with the factual findings of the domestic criminal courts and the lack of effective legal assistance during the identification parade. In so far as relevant, Article 6 of the Convention provides as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

51. The Court notes at the outset that since the requirements of paragraph 3 (c) of Article 6 represent specific aspects of the right to a fair trial set forth in paragraph 1, it will examine the applicant's complaints

under the two provisions taken together (see, among many other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 203, § 25).

1. General principles

52. At the outset the Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility and assessment of evidence, which are primarily a matter for regulation under national law, the task of the Court being to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V).

53. Article 6 §§ 1 and 3 (c) of the Convention requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008; see also *Dayanan v. Turkey*, no. 7377/03, §§ 29-34, 13 October 2009). Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 (ibid).

54. The Court further emphasises the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Salduz*, cited above, § 54). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect for the right of an accused not to incriminate himself (see *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-IX, and *Kolu v. Turkey*, no. 35811/97, § 51, 2 August 2005).

55. Lastly, the Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II). Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would

be (see *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

2. Application of these principles

56. Turning to the circumstances of the present case, the Court notes as regards the complaint about the lack of legal assistance on 31 May 2005 that the applicant was arrested by the police on that day and after his arrest was represented by defense counsel Ms Z. The applicant considered her assistance ineffective and signed a waiver of his right to a lawyer, without requesting the investigator to replace Ms Z with another counsel. Later on the same day the applicant took part in the identification parade in the presence of Ms Z. during which he was identified by witnesses Bar., Bor. and Ya. as a perpetrator of crime (see paragraph 17 above).

57. The Court observes that the applicant failed to describe in detail the alleged inadequacies or deficiencies in the quality of the legal assistance provided to him by counsel Ms Z. during the events of 31 May 2005, did not explain his decision to waive his right to all legal assistance and also did not give any reasons for his failure to avail himself of the possibility to request the investigator to provide him with another counsel (see paragraph 17 above).

58. In such circumstances, the Court finds that the applicant validly waived his right to legal assistance on that day, as nothing in the case-file or the parties' submissions indicates that this was not a voluntary, knowing and intelligent relinquishment of a right (see, by contrast, *Savaş v. Turkey*, no. 9762/03, §§ 66-67, 8 December 2009; and *Pishchalnikov v. Russia*, no. 7025/04, §§ 78-80, 24 September 2009). It notes that by contrast to the mentioned cases where the Court invalidated the waiver on account of various circumstances casting doubt on the voluntary or knowing character of the waiver, the applicant in the present case did not allege that the police had put any pressure on him in connection with the investigative actions which took place on 31 May 2005 or that they did not make clear his procedural rights during the relevant investigative measures.

59. Lastly, his participation in the identification parade of 31 May 2005 was essentially a passive one, as it follows from the case file that on that day the applicant did not participate in interview or cross-examinations (see paragraph 17 above). In any event, it should be noted that the same witnesses who had identified him on 31 May 2005 later testified in person during the trial, having essentially confirmed their earlier identification and testimonies (see paragraph 19 above). Throughout the trial and appeal proceedings the applicant was assisted by Ms G, the defense counsel of his own choosing, and the applicant was therefore fully able to challenge that particular piece of evidence in court.

60. Having regard to the above and the fact that the applicant's conviction was firmly corroborated by various other pieces of evidence such

as the trial statements of the direct eye witnesses and medical evidence tracing the victim's blood to the applicant (see paragraphs 18 and 19 above), the Court concludes that the legal assistance provided on 31 May 2005 was not contrary to Article 6 § 3 (c) of the Convention.

61. In so far as the applicant was dissatisfied with the allegedly erroneous findings of facts made by the courts in his case, the Court notes that the applicant, both personally and through his defense counsel, was fully able to present his case and contest the evidence he considered to be false. Having regard to the facts as submitted by the applicant the Court has not found any reason to believe that the proceedings did not comply with the fairness requirement of Article 6 of the Convention.

62. It follows that this part of the case is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President