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

FIFTH SECTION

CASE OF POLYAKOV v. RUSSIA

(Application no. 77018/01)

JUDGMENT

STRASBOURG

29 January 2009

FINAL

29/04/2009

This judgment may be subject to editorial revision.

In the case of Polyakov v. Russia,

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

Peer Lorenzen, *President,*
Rait Maruste,
Karel Jungwiert,
Anatoly Kovler,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 January 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 77018/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Valentin Valeryevich Polyakov ("the applicant"), on 18 July 2001.

2. The applicant was represented by Mr A. Manov, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. On 3 June 2005 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention). The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1979 and is serving a sentence of imprisonment in the Tver Region.

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

5. On 21 October 1999 the applicant was apprehended by police officers N and O. According to him, they beat him up and some bystanders, who did not realise that he was being beaten up by police officers, called the police. According to a letter dated 23 May 2000, produced by the Government, the Moscow Department of the Interior informed the applicant's representative that on 21 October 1999 there had been no call for police assistance in the area where the applicant had been apprehended.

6. After his arrest the applicant was taken to hospital where a doctor diagnosed him with "an injury; a bruise on the left shin; an injury on the left shoulder." The applicant was then brought to a police station and stayed there for three days on suspicion of drug trafficking.

7. The applicant complained to the prosecutor about the police brutality. As follows from a copy of the decision dated 17 March 2000, submitted by the Government, the Cheremushkinskiy Prosecutor's Office of Moscow refused to initiate criminal proceedings against officers N and O. It found that the applicant had resisted lawful arrest by swinging his hands and otherwise trying to escape. Thus, the officers had had to handcuff him. The investigator in charge of the applicant's criminal case at the material time affirmed that the applicant had not alerted her to any unjustified recourse to force against him. Apparently, the applicant was not apprised of the decision of 17 March 2000. According to the Government, that decision was quashed in October 2005 and a further inquiry was ordered. The outcome of that inquiry remains unclear.

8. The applicant also raised the ill-treatment matter at the trial (see paragraphs 11 and 15 below).

B. Trial

9. The applicant was charged with drug trafficking. The prosecution case was that the applicant had committed the following offences:

- on an unspecified date he had bought a large quantity of heroin and on 19 October 1999 sold it to Ms U;
- on an unspecified date he had bought a large quantity of heroin and on 21 October 1999 he attempted to sell it to Ms U, but the police stopped him.

10. On 22 and 23 October 1999 the applicant was questioned in relation to the charges against him. He was not provided with a lawyer because he had previously refused legal assistance. On 24 October 1999 the applicant was released on a written undertaking not to leave the town. On an unspecified date he retained a lawyer and several lay representatives.

11. At the trial the applicant pleaded that he had spent the whole day on 19 October 1999 at home. On 20 October Ms U had called him, but being short of time he had arranged to meet her the next day. It appears that the

police monitored that conversation on the second handset. According to the applicant, on 21 October 1999 in the course of his meeting with Ms U, he was approached by police officers who forcibly pinned him to the ground, handcuffed him and beat him up.

12. On 12 October 2000 the applicant asked the trial court to call Ms B, Mr S and Mr R, who could, he alleged, confirm that "he had been at home all day on 19 October 1999 and that he had not met Ms U on that day". The court rejected that application as premature. The applicant reiterated the request at a hearing on 25 October 2000 and also asked to call Mrs T, his aunt, who had allegedly been at home with him on 19 October 1999. The court rejected both applications as "premature and unfounded". At the hearing on 16 November 2000 the applicant's lay representative again requested to call Ms B, Mr S and another unspecified person (apparently Mr R), and a Ms P. As can be seen from the hearing record, the court decided that "it was unnecessary to examine those persons". Thereafter, the applicant unsuccessfully asked to have included in the file written statements made by Ms B, Mr S and a Ms Y confirming the applicant's alibi for 19 October 1999. The prosecution did not object to the above applications made by the defence.

13. The applicant also asked to have examined Ms Ta., who had been present during the arrest of Ms U and who could have testified that Ms U had never claimed that the applicant had sold her drugs. The request was dismissed by the trial court. According to the Government, Ms Ta. was mentioned in the list of persons to be called to testify at the trial but she did not appear at the trial.

14. By a judgment of 20 November 2000, the Cheremushkinskiy District Court of Moscow found the applicant guilty of unlawfully procuring and being in possession of drugs with the intention of selling them and of selling a large supply of drugs. The trial court sentenced him to nine years' imprisonment. It based its judgment on the following evidence:

i) the statements by the officers who arrested the applicant on 21 October 1999. They stated that on 19 October 1999 they had arrested Ms U, performed a search on her person and seized a large quantity of drugs. Ms U claimed that she had just bought the drugs from the applicant and offered to assist the officers in the applicant's arrest. She called the applicant on the telephone and asked for drugs. The applicant agreed and fixed a meeting for 21 October 1999. The police arrested the applicant at that meeting, performed a search on his person and seized a large quantity of drugs;

ii) the deposition by Ms U made during the pre-trial investigation in which she confirmed the statements made by the officers. In her oral testimony at the trial Ms U retracted her earlier deposition;

iii) the statements by eyewitnesses who were present during the applicant's arrest and search on 21 October 1999 and who testified that a large quantity of drugs had been seized from the applicant;

iv) the depositions by an attesting witness, Ms S, who was present at the arrest of Ms U on 19 October 1999. In her depositions made during the pre-trial investigation Ms S confirmed the statements by the police officers. However, at the trial she partly retracted them, claiming that she had not heard Ms U mention the applicant's name and that she had signed a blank sheet of paper which was later filled in by the police;

v) the reports on the applicant's and Ms U's arrest and search;

vi) the expert reports confirming that the substances seized from the applicant and Ms U were heroin;

vii) the report on the medical examination of the applicant, according to which the applicant was in a state of drug intoxication.

15. The trial court rejected the applicant's allegation of ill-treatment with reference to the statements by the police officers and the prosecutor's decision not to open a criminal case against them.

16. The applicant appealed against the trial judgment arguing *inter alia* in his additional statement of appeal as follows:

> "[T]he court arbitrarily refused the defence's application to examine as witnesses Ms Y, Ms R, Ms B and three other persons who could confirm [the applicant's] alibi, namely the fact of his presence at home between noon and 3 p.m. on 19 October 1999. That refutes his involvement in the offences of which he has been charged by the prosecution on the basis of Ms U's pre-trial statement made under duress...No other evidence of the applicant's guilt has been adduced..."

On 21 February 2001 the Moscow City Court upheld the trial judgment. It did not address the trial court's refusal to hear witnesses on the applicant's behalf.

17. On 6 February 2003 the Presidium of the City Court, sitting as a supervisory-review court, reduced the applicant's sentence to seven years' imprisonment. On 22 April 2004 the Supreme Court of the Russian Federation examined an application by the applicant for supervisory review. It found that no conclusive evidence had been adduced confirming that the applicant had intended to sell heroin to Ms U on 21 October 1999. The Supreme Court upheld the applicant's conviction for procurement and possession of heroin on 21 October 1999 and his conviction in relation to the episode on 19 October 1999. The Supreme Court reduced the applicant's prison sentence to four years and six months.

II. RELEVANT DOMESTIC LAW

18. According to the RSFSR Code of Criminal Procedure (CCrP), in force at the material time, the bill of indictment should be accompanied by a list of persons who should, in the prosecutor's opinion, be called at the trial (Article 206).

19. When deciding to schedule a court hearing a judge shall examine all applications and decide, *inter alia*, who shall be called as witnesses

(Articles 223 and 228 CCrP). If refused, such applications may be renewed at the hearing; applications to call additional witnesses or adduce evidence shall be granted in all cases (Article 223). At the hearing, the judge shall ask the parties whether they want to call further witnesses or adduce further evidence (Article 276). A party making such an application shall specify the circumstances they intend to determine on the basis of such further evidence; having considered the application, the judge shall either grant it or issue a reasoned decision refusing it (ibid.).

20. A court of appeal is competent to review the lawfulness and reasonableness of the judgment made by the court below on the basis of the case file and any additional materials available to it (Article 332 CCrP). Such review can extend beyond the issues raised by the prosecution or defence in their points of appeal (ibid.). The latter may be supported by additional materials adduced either before or during the appeal hearing, but prior to the prosecution's statement (Article 337).

21. The Code of Criminal Procedure, in force since 2002, provides for a possibility to re-open criminal proceedings on the basis of a finding of a violation of the Convention made by the European Court of Human Rights (Article 413).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

22. The applicant complained that he had been beaten up by the police on 21 October 1999, in breach of Article 3 of the Convention, which reads as follows:

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

23. The Government submitted that the applicant had unduly resisted lawful arrest and had thus had to be handcuffed. After the initial refusal to prosecute officers N and O in 2000, the proceedings had resumed in 2005 and were pending.

24. The applicant made no specific submissions on that matter.

25. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Article 3 does not prohibit the use of force for effecting a lawful arrest, but force may only be used if it is indispensable and must not be excessive (see *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007 with further references; and *Peleckas v. Lithuania* (dec.), no. 18293/03, 6 November 2007). Recourse to physical force which has not been made strictly

necessary by the person's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. In order to fall within the scope of Article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among others, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Zelilof v. Greece*, no. 17060/03, § 44, 24 May 2007).

26. The parties presented different versions of the applicant's arrest. The applicant affirmed that he had been beaten up during and immediately after his arrest. At the trial he pleaded that the police officers had forcibly pinned him to the ground, handcuffed him and beat him up. As can be seen from the medical report submitted by the applicant, after the arrest he had a bruise on his left shin and an injury to his left shoulder (see paragraph 6 above). While the Court does not exclude that the applicant could have sustained them during the arrest, no sufficient and cogent elements have been provided which could support the applicant's allegation of police brutality. Accordingly, the Court is unable to find, beyond reasonable doubt, that the applicant's complaint is sufficiently substantiated. Overall, the Court has doubts as to whether in the circumstances of the case the use of force by the police was excessive and whether the applicant's resulting injuries reached the level of severity required under Article 3. Finally, the Court notes that the parties made no submissions as regards the advancement of the investigation after its resumption in 2005. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (d) OF THE CONVENTION

27. The applicant complained under Article 6 § 3 (d) of the Convention that the domestic courts had arbitrarily rejected his requests to examine several witnesses whose testimony would confirm his alibi for 19 October 1999. This provision, in its relevant parts, reads as follows:

"3. Everyone charged with a criminal offence has the following minimum rights:

(d) ...to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;..."

A. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

29. The Government contended that the applicant could have raised the matter in the course of the preliminary investigation. The trial court rejected his request for witnesses as unfounded. The applicant and his representatives had raised no objections to concluding the trial proceedings in their absence. The court of appeal had no power to hear witnesses but could have remitted the case for further investigation, if need be (see paragraph 20 above).

30. The applicant maintained his complaint.

31. The Court reiterates that the right to call witnesses is not absolute and can be limited in the interests of the proper administration of justice. Article 6 § 3 (d) does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as indicated by the words "under the same conditions", is full equality of arms in the matter (see *Vidal v. Belgium*, judgment of 25 March 1992, Series A no. 235-B, pp. 32-33, § 33). An applicant claiming a violation of his right to obtain the attendance and examination of a defence witness should show that the examination of that person was necessary for the establishment of the truth and that the refusal to call that witness was prejudicial to the defence rights (see *Guilloury v. France*, no. 62236/00, § 55, 22 June 2006). Although it is normally for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce, there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6 (see *Destrehem v. France*, no. 56651/00, § 41, 18 May 2004, and *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

32. Turning to the circumstances of the present case, the Court observes at the outset that the applicant limited his argument to witnesses B, T, S and R and made no submissions in respect of any other persons. The Court also notes that this complaint relates to the first episode of drug trafficking for which he was charged. Thus, the Court will examine the applicant's complaint only in so far as it concerns his inability to obtain the attendance and examination of those four persons in relation to that episode.

33. The Government contended that the applicant should have made his request for witnesses during the preliminary investigation. Without denying the probable effectiveness of adducing an alibi defence at the stage of a preliminary investigation, the Court observes that the Code of Criminal Procedure, in force at the material time, required a trial judge to determine who should be called as witnesses (see paragraph 19 above). Thus, it does not appear that the applicant was barred from making a request for witnesses during the trial, which he actually did on several occasions. The Court considers that the Government's argument, as presented, to the effect that the applicant had not objected to concluding the trial proceedings in the absence of the witnesses is devoid of any substance. Accordingly, the Court does not need to examine it.

34. The Court notes that, according to the prosecution, on 19 October 1999 the applicant sold heroin to Ms U. The applicant claimed that he had not met U on that date. Thus, it appears that one of the elements of the applicant's defence position was to prove his alibi for that date. It has not been claimed that the applicant's request for defence witnesses was vexatious or that he made no reasonable effort to obtain their attendance, for instance, by omitting to provide their full names and addresses. There is no doubt that the request was sufficiently reasoned, relevant to the subject-matter of the accusation and could arguably have strengthened the defence position or even led to the applicant's acquittal (see, in this respect, *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V, and *Guilloury*, cited above, § 64; *Dorokhov v. Russia*, no. 66802/01, § 74, 14 February 2008). The above finding is supported by the fact that the prosecution did not oppose the applicant's request.

35. The Court further notes that the applicant's offer to produce evidence was rejected by the trial court, without any reasons having been given. In that connection, it is observed that under Russian law, in force at the material time, an application to call additional witnesses or adduce evidence should have been granted in all cases and a refusal to grant it should have been given in a reasoned decision (see paragraph 19 above). It appears that no such decision was issued. Neither did the trial judgment contain any reasoning to that effect. Furthermore, the court of appeal did not address the applicant's argument concerning the trial court's refusal to call witnesses (see paragraph 16 above).

36. The Court has already found that the applicant's request was relevant to the subject matter of the accusation. The only direct evidence showing that the applicant had sold drugs on 19 October 1999 was the putative purchaser's deposition made during the pre-trial investigation, which she retracted at the trial. Thus, the Court considers that in circumstances where the applicant's conviction was based primarily on the assumption of his being in a particular place at a particular time, the right to obtain the attendance and examination of witnesses on his behalf and the principle of equality of arms, which are specific aspects of the right to a fair trial, imply that he should have been afforded a reasonable opportunity to challenge the assumption effectively (see, *mutatis mutandis, Popov v. Russia*, no. 26853/04, § 183, 13 July 2006).

37. In the light of the above considerations, the Court considers that there has been a violation of Article 6 § 3 (d) of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

38. The applicant further complained that his arrest had been unlawful, that he had not been provided with legal assistance on 22 and 23 October 1999, that his complaints about the investigator's actions had not been examined and that the trial judge was biased. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession and in so far as the matters fall within its competence, it 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. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

40. The applicant claimed 5,000 euros (EUR) in respect of pecuniary and EUR 5,000 in respect of non-pecuniary damage.

41. The Government submitted that this claim had not been substantiated and was excessive.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, having regard to the nature of the violation found and making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

43. The applicant also claimed EUR 300 for unspecified costs and expenses incurred before the domestic courts and EUR 3,000 for the lawyer's eventual travel to Strasbourg.

44. The Government submitted that the applicant had not specified the nature of the above costs and expenses, and had not provided any proof that these had actually been incurred.

45. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the courts' refusal to examine defence witnesses admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 3 (d) of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable,

to be converted into Russian roubles at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President