EUROPEAN COURT
OF HUMAN RIGHTS

7 June 2010

REPLY
to memorandum № 14-2675-10 of 26 March 2010 from the Representative of the Russian Federation at the European Court of Human Rights in regards to Application № 12543/09 Borisov v. Russia

Having considered the government's responses to the European Court of Human Rights' questions (hereinafter — the Court) in Memorandum № 14-2675-10 of 26 March 2010 from the Representative of the Russian Federation at the European Court of Human Rights (hereinafter - the Memorandum), we would like to make the following observations on behalf of Mr Vyacheslav Viktorovich Borisov.

In regards to question № 1

Improper conditions of detention

1.According to the numbers provided by the Government to answer question 1(a)(b) and (d) of the European Court (para. 1-2-5 of the Memorandum) and the relevant calculation, the following conclusions arise in regards to the personal space afforded to Mr Borisov in remand center IZ-66/1.

- In cell no. 327 (time spent = 3 months and 8 days, floor surface = 31 sq. m.), the number of detainees including the applicant reached 30, which amounted to 1sq. m. per detainee.
- In cell no. 413 (time spent = 13 days, floor surface = 9 sq. m.), the number of detainees including the applicant reached 3, which amounted to 3 sq. m. per detainee.
- In cell no. 327 (time spent = 4 months and 7 days, floor surface = 31 sq. m.), the number of detainees including the applicant reached 21, which amounted to 1,5 sq. m. per detainee.
- In cell no. 424 (time spent = 4 months and 3 days, floor surface = 27 sq. m.), the number of detainees including the applicant reached 13, which amounted to 2,1 sq. m. per detainee.
- In cell no. 425 (time spent = one day, floor surface = 15 sq. m.), the number of detainees including the applicant reached 3, which amounted to 5 sq. m. per detainee.
- In cell no. 424 (time spent = 6 months and 23 days (by 26 March 2010), floor surface = 27 sq. m.), the number of detainees including the applicant reached 12, which amounted to 2,3 sq. m. per detainee.

Therefore, the only time when Mr Borisov was awarded sufficient personal space according to the informations provided by the Government was in cell no. 425, where he was detained for only one day. Indeed, considering that in cases where the Court found the cells to be overcrowded, the detainees were normally afforded less than 3/3.5m^2 of cell space"[1] and

[1] See *Aleksandr Makarov v. Russia*, application n°15217/07, 12 March 2009, para. 93; *Andreyevskiy v. Russia*, application n°1750/03, 29 January 2009, para. 86; *Moiseyev v. Russia*, application n°62936/00, 09 October 2008, para. 123; *Starokadomskiy v. Russia*, application n°42239/02, 31 July 2008, para. 43; *Guliyev v. Russia*, application

taking into account that the applicant is confined to his cell 23 hours per day, those numbers reveal that Mr Borisov suffers a severe lack of personal space in remand centre IZ-66/1 in violation of the guarantees of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention).

2.Recalling that in such situations of cell overpopulation, the Court has ruled in a number of cases that : "the fact that the applicant was obliged to live, sleep and use the toilet in the same cell with so many other inmates was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in him the feelings of fear, anguish and inferiority capable of humiliating and debasing him."[2]

3.In addition, on the facts of the applicant's case, he frequently has to share his sleeping place with others. The numbers provided in para. 3 and 5 of the Memorandum are in contradiction with the Government's statement of para. 4 of the Memorandum and show that the applicant was in fact not provided with an individual sleeping berth during the whole period of detention under examination in the Memorandum (up to 26 March 2010). According to para. 3 and 5 of this Memorandum, the only time when he had a secured access to an individual sleeping berth was in cell no. 425 (4 berths and 3 detainees), where he was only detained for one day.

- In cell no. 327 (01/09/08 to 09/12/08), he was forced to share his berth with 1 to 2 other detainees during the whole time.
- In cell no. 413 (09/12/08 to 22/12/08), he was forced to share his berth with 1 other detainee during the whole time.
- In cell no. 327 (22/12/08 to 29/0/09), no. 424 (29/0/09 to 02/09/09) and no. 424 (03/09/09 to 26/03/10), he was forced to share his berth with 1 other detainee during an uncertain period of time due to the lack of information in the Memorandum.

4.Recalling that for remand prisons, the Court considers that the amount of cell space afforded to the applicant is central to the analysis of compatibility of the conditions of the applicant's detention with Article 3 of the Convention.[3] Indeed, the Court has repeatedly found a violation of Article 3 of the Convention on account of a lack of personal space afforded to detainees in Russian remand centres.[4]

5.Furthermore, the applicant claims that in addition to the severe lack of personal space, the cells were he was and is still being detained are poorly lit and ventilated; the toilets are not

n°24650/02, 19 June 2008, para. 32.

[2] See *Andreyevskiy v. Russia*, application n°1750/03, 29 January 2009, para. 87; *Lind v. Russia*, application n°25664/05, 06 December 2007, para. 61; *Grishin v. Russia*, application n°30983/02, 15 November 2007, para. 92; *Babushkin v. Russia*, application n°67253/01, 18 October 2007, para. 47; *Andrey Frolov v. Russia*, application n°205/02, 29 March 2007, para. 50; *Mamedova v. Russia*, application n°7064/05, 01 June 2006, para. 65; *Khudoyorov v. Russia*, application n° 6847/02, 08 November 2005, para. 107; *Labzov v. Russia*, application n°62208/00, 16 June 2005, para. 46.

[3] See *Andreyevskiy v. Russia*, application n°1750/03, 29 January 2009, para. 84; *Starokadomskiy v. Russia*, application n°42239/02, 31 July 2008, para. 39; *Igor Ivanov v. Russia*, application n°34000/02, 07 June 2007, para. 40; *Benediktov v. Russia*, application n°106/02, 10 May 2007, para. 40; *Khudoyorov v. Russia*, application n° 6847/02, 08 November 2005, para. 107; *Labzov v. Russia*, application n°62208/00, 16 June 2005, para. 46; *Novoselov v. Russia*, application n°66460/01, 02 June 2005, para. 41.

[4] See *Guliyev v. Russia*, application n°24650/02, 19 June 2008, para. 44; *Lind v. Russia*, application n°25664/05, 06 December 2007, para. 60; *Trepashkin v. Russia*, application n°36898/03, 19 July 2007, para. 92; *Kantyrev v. Russia*, application n°37213/02, 21 June 2007, para. 51; *Mamedova v. Russia*, application n°7064/05, 01 June 2006, para. 64.

separated from the living area and therefore do not offer any privacy; he was not provided with any toiletries or individual bedding; the nutrition is inadequate and shower is only allowed once in ten days. Such elements have been previously considered by the Court as being relevant to its assessment of compliance with Article 3 of the Convention.[5]

6.Thus, even in cases where the prison cell was larger, the Court has found a violation of Article 3 of the Convention since the space factor was coupled with the established lack of ventilation and lighting.[6] In the case of Mr Borisov, noting that in respect to question 1(e) of the Court, Annex no. 6 does not actually provide the necessary information as to wether or not the cells are equipped with a functionning mandatory ventilation (para. 18-19 of the Memorandum).

7.As to the answer to question 1(g) (para. 25-26 of the Memorandum), highlighting that Annex no. 8 also does not provide the necessary information in regards to the distance between the pan and the dining table and between the pan and the nearest sleeping place as requested by the Court.

8.At last, Annex no.11, provided by the Government in its answer to question 2 (para.35 of the Memorandum), also lacks the necessary information to wether the bedding handed out to Mr Borisov was in good condition and wether it was in fact changed every week during the sanitary process.

9.Therefore, in addition with the overpopulation and the lack of personal space in the cells where Mr Borisov is detained, the cumulative effect of the other factors mentionned above have caused to the applicant distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention[7], with the result that he is subject to both inhuman and degrading treatment according to the guarantees of Article 3 of the Convention and the case-law of the Court.
10.

In regards to question № 2

Conditions of detention

11.Recalling, in regards to para. 42-43 of the Memorandum, that in Interim Resolution CM/ResDH(2010)35, Adopted by the Committee of Ministers on 4 March 2010 at the 1078th meeting of the Ministers' Deputies (hereinafter — the Resolution), the Committee emphasized "that in any event the creation of new places of detention cannot in itself provide a lasting solution to the problem of prison overcrowding, and that this measure should be closely supported by others aimed at reducing the overall number of remand prisoners;"

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5 See *Gultyayeva v. Russia*, application n°67413/01, 01 April 2010, para. 158; *Aleksandr Makarov v. Russia*, application n°15217/07, 12 March 2009, para. 93; *Moiseyev v. Russia*, application n°62936/00, 09 October 2008, para. 123.

6 See *Aleksandr Makarov v. Russia*, application n°15217/07, 12 March 2009, para. 96; *Moiseyev v. Russia*, application n°62936/00, 09 October 2008, para. 125; *Starokadomskiy v. Russia*, application n°42239/02, 31 July 2008, para. 43.

7 See *Aleksandr Makarov v. Russia*, application n°15217/07, 12 March 2009, para. 92; *Moiseyev v. Russia*, application n°62936/00, 09 October 2008, para. 121; *Mironov v. Russia*, application n°22625/02, 08 November 2007, para. 71; *Kalashnikov v. Russia*, application n°47095/99, 15 July 2002, para. 95.

12.Highlighting that the Committee of Ministers also stated in the Resolution that "there are still remand prisons where the number of remand prisoners exceeds the design capacity of the facilities, and the requirement of Russian legislation concerning personal space is not complied with;"

13.As to the Federal Target Programme "Development of the Detention Facilities System for 2007-2016" (hereinafter — the Programme) (para. 42-43 of the Memorandum), and according to the informations provided by the Government of the Russian Federation in Appendix II of the Interim Resolution CM/ResDH(2010)35 during the examination of the *Kalashnikov* group of cases by the Committee of Ministers (hereinafter — Appendix II), only 71,1% of the total number of remand prisons in Russia were expected to comply with the domestic legislation in 2010 under the Programme. According to domestic legislation, 4 sq. m. should be afforded to prisonners in remand centers.

14.Moreover, it was in fact reported in Appendix II that in 2008, only 54% of the total number of remand prisons complied with the domestic legislation, already 4,4% less than the number estimated under the Programme (58,4%).

15.Furthermore, highlighting that in Appendix II, the Government of the Russian Federation stated that : "In 2009, the financing of the Programme was reduced by 30%. It is planned to reduce the financing of the Programme in 2010 by 45%." Therefore, reasonnable doubts are to be expressed regarding the actual results of the implementation of the Programme.

16.Consistent with the conclusions expressed in the first section of this document and the claim of Mr Borisov that he is detained in improper conditions of detention in violation with the guarantees of Article 3 of the Convention, it can not be reasonnably believed that as described in the Memorandum, IZ-66/1 is part of the uncertain percentage of remand centers that comply with the domestic legislation. Indeed, IZ-66/1 was identified as part of the most problematics remand prisons in Russia in a decree of 31 January 2005 by the Director of Federal Service for the Execution of Sentences. Since no construction of new facilities in Yekaterinburg or the Sverdlovsk region and no reconstruction/renovation has been reported by the Government either in Appendix II or the Memorandum for IZ-66/1, high doubts are reasonnably expressed and further confirmed by the following numbers, in addition to the ones already demonstrated.

17.In Appendix II, the Government of the Russian Federation reported that in IZ-66/1, the prison population rate in percentage compared to the facility's design capacity was of 144,6% in 2005 and was now currently of 144,2%. As to the personnal space per detainee it is now of 2,8 sq. m. as stated in the updated information provided in Appendix II which is in violation of both the domestic legislation and the guarantees of the Convention.

18.Conclusively, with all due respect to the authority of the Court, we reject the Government's claim that Mr Borisov application alleging the violation of his rights guaranteed by Article 3 of the Convention is ill-founded and consolidate our argument that he was and is still detained in improper conditions of detention.
19.

Remedies for improper conditions of detention

20.In regards to the provisions of Chapter 25 of the Code of Civil Procedure and the ruling of the Plenum of the Supreme Court of the Russian Federation of 10 February 2009 (para. 45-46 of the

Memorandum), the Committee of Ministers stated in the Resolution "that the effectiveness of this remedy in particular with regard to overcrowding, has not yet been demonstrated;"

21.Recalling that in a number of cases regarding conditions of detention in Russian remand centres, the Court "found that the Government had failed to demonstrate what redress could have been afforded to the applicants by a prosecutor or a court, taking into account that the problems arising from the conditions of their detention had apparently been of a structural nature and had not concerned their personal situations alone".[8]

22.Furthermore, noting that although the Government referred to the case of V.M. Buzychkin (para. 46 of the Memorandum) where the Sovetskiy Court of Nizhny Novgorod on 14 October 2009 granted the detainee compensation for non-pecuniary damage incurred due to inadequate conditions of detention, he did not provide a copy of the judgment to which he refered to and it is not clear on what ground the damages were awarded.[9]

23.The Court has established in its case-law on numerous occasions that no effective remedy exists in the Russian legal system in relation to complaints concerning the general conditions of detention in remand prisons.[10] There is no evidence provided by the Government that the situation has changed and/or is different in Mr Borisov's case.

24.In conclusion, with due respect to the Court's authority, we reject the Government's claim that effective national remedies are available to prisoners submitted to improper conditions of detention such as Mr Borisov and refute the State's argument that the applicant failed to use the mentionned remedies of para. 44 to 47 of the Memorandum.
25.

In regards to question № 3

Right to be present and participate at an appeal hearing

26.It should first be emphasized that the jurisdiction of appeal courts in the Russian legal system extents to both issues of facts and issues of law, as it has been duly noted by the European Court in its case-law.[11] Moreover, the Court also observed that Regional Courts of the Russian Federation have the power to fully review a case and consider additional arguments which have not been examined at the first-instance proceedings.[12]

27.Hence, when considering the right of Mr Borisov to be present and participate effectively at his appeal proceeding of 21 November 2008, it should be taken into consideration that the

[8] See *Pitalev v. Russia*, application n°34393, 30 July 2009, para. 33; *Igor Ivanov v. Russia*, application n°34000/02, 07 June 2007, para. 26; *Benediktov v. Russia*, application n°106/02, 10 May 2007, para. 29; *Mamedova v. Russia*, application n°7064/05, 01 June 2006, para. 57.

[9] See *Pitalev v. Russia*, application n°34393, 30 July 2009, para. 33.

[10] See *Gultyayeva v. Russia*, application n°67413/01, 01 April 2010, para. 147; *Aleksandr Makarov v. Russia*, application n°15217/07, 12 March 2009, para. 76; *Polufakin and Chernyshev v. Russia*, application n°30997/02, 25 September 2008, § 141.

[11] See *Sidorova v. Russia*, Application no.4537/04, 14 February 2008, §25 and *Sinichkin v. Russia,* Application no. 20508/03, 8 April 2010, para 38.

[12] See *Sinichkin v. Russia,* Application no. 20508/03, 8 April 2010, para 38, see also *Sidorova (Adukevich) v. Russia*, Application no. 4537/04, 14 February 2008, § 25 and *Shulepov v. Russia*, Application no. 15435/03, 26 June 2008, § 34.

Sverdlovsk Regional Court had the power during this hearing to examine both questions of law and questions of fact. Recalling that the duty of domestic courts to guarantee the right of a criminal defendant to be present in the courtroom, either during the original proceedings or in a retrial, ranks as one of the essential requirements of Article 6.[13]

28.Highlighting that contrary to the Government's observations in response to question 3 of the Court (para. 61, 64, 67 of the Memorandum), Mr Borisov did in fact file a motion to the Judicial Division for Criminal Cases of the Sverdlovsk Regional Court to express his wish to be present and participate in his appeal hearing before the Sverdlovsk Oblast Court in accordance with Article 376(3) of the Code of Criminal Procedure of the Russian Federation. It was stated that his motion filed according to all the necessary requirements had been lost, with the result that he could not take part in the examination of the criminal case by the cassational instance court.

29.In previous cases, the European Court has specified that the procedural means offered by domestic law "must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial."[14] In the case of Mr Borisov, not only has he not waived his right to appear and to defend himself nor sought to escape trial, but he expressly requested to be present at the examination of the criminal case by the cassational instance court. The fact that the applicant's motion was not considered, moreover that it was declared unexistant, shows that the procedural means offered by Article 376(3) of the Code of Criminal Procedure of the Russian Federation were not effective in practice for Mr Borisov, wich resulted in a violation of his rights under Article 6(1) and (3(c)) of the Convention.

30.Indeed, although he expressly requested to be present at his appeal hearing, the fact that he was denied the opportunity to have knowledge of and comment on the observations made by the other party is a breach to the principle of 'equality of arms' which has been recognized by the Court to be one of the aspect of the right to a fair trial under Article 6 of the Convention, that includes the fundamental right that criminal proceedings should be adversarial.[15]

31.In conclusion, we express, on behalf of Mr Borisov, our concern that the procedural means provided by Article 376(3) of the Russian Code of Criminal Procedure were not effective and resulted in regards to the applicant in a violation of his rights under Article 6(1)(3(c)) of the Convention.

32.Finally, stressing that Mr Borisov is still being detained in improper conditions of detention in IZ-66/1, although the judgment on his criminal case by the cassational instance has not entered into force due to the fact that Mr Borisov was not awarded a fair trial in his appeal hearing. He is therefore being detained on the grounds of an invalid judgment under the guarantees of the Convention.

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[13] See *Stoichkov v. Bulgaria*, Application no. 9808/02, 24 March 2005, § 56.

[14] *See Somogyi v Italy*, Application no. 67972/01, 18 May 2004, §67, see also *Colozza v. Italy*, Application no. 9024/80, 12 February 1985, § 29, *Medenica v. Switzerland*, Application no. 20491/92, 14 June 2001, § 55 and *Poitrimol v. France*, Application no. 14032/88, 23 November 1993, § 31.

[15] See *Sabayev v Russia*, application no. 11994/03, 8 April 2010, para35, see also *Brandstetter v. Austria*, 28 August 1991, §§ 66-67.

CLAIMS FOR JUST SATISFACTION

As duly invited by the President of the Chamber and according to Rule 60 (claims for just satisfaction), we would like to make the following claims for just satisfaction on behalf of Mr Vyacheslav Viktorovich Borisov :

As set out by the Practice Direction (just satisfaction claim) :

For the violation of his rights under Article 3 and Article 6(1)(3(c)) of the Convention, the applicant claims 15,000 euros in non-pecuniary damage.

As to the costs and expenses incurred for legal assistance in trying to obtain redress before the ECHR for the violation of the applicant's rights under Article 3 and Article 6(1)(3(c)), Mr Borisov claims 2,275 euros (65 hours x 35euros/hour).