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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 712/2015*, **

Communication submitted by:	Olga Shestakova (unrepresented)
Alleged victim:	The complainant
State party:	Russian Federation
Date of complaint:	27 May 2014 (initial submission)
Date of adoption of decision:	28 November 2017
Subject matter:	Torture in detention
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issues:	Torture — prompt and impartial investigation
Articles of the Convention:	1, 2, 4, 12, 13 and 15

Background

1. The complainant is Olga Shestakova, a national of the Russian Federation born on 27 March 1973. She claims to be a victim of a violation by the Russian Federation of her rights under articles 1, 2, 4, 12, 13 and 15 of the Convention. The complainant is not represented by counsel. She is an attorney by profession.

The facts as presented by the complainant

2.1 On 3 July 2012, the complainant was arrested at 8 p.m. by Federal Security Service agents while she was meeting her client Ch. in his car. She submits that, at the time of arrest, no arrest warrant was shown, and therefore, her arrest was illegal. The complainant further alleges that she was not allowed to exit the vehicle, which had its motor running and into which exhaust fumes were entering. Despite the fact that the outside temperature was 30 degrees Celsius, the heating of the vehicle was on and she could not turn it off. The complainant suffered from the heat and she felt that she was suffocating, a situation which she considers amounts to torture. She was kept in the car for several hours.

2.2 The complainant further submits that the arresting officers issued death threats against her and her family. While she was in the car, an acquaintance called her on her mobile telephone; she answered and told him that she was detained. At that point, the officers took her mobile telephone from her hands. She was then transported to the regional

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller-Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang.

investigation department, where the threats against her family continued and where she was forced to sign documents that had been prepared and printed beforehand. She was subsequently taken home at 3.30 a.m. The next morning, a Federal Security Service agent broke into her apartment[1] and took her to the regional Federal Security Service office building, where she was forced to wear a wiretapping device and make audio recordings of a telephone conversation with B.I.A., who was later convicted together with the complainant for the same crime. The text she was forced to read out stated that she had given 30,000 Russian roubles (Rub) to Ch. so that he would change his testimony in another criminal case. Her request for forensic expertise, which would have proved that the telephone recordings were falsified, was refused by the court.

2.3 The complainant submits that the case file contains a warrant issued by a judge for a wiretap on her phone and the confiscation of her mail, but she maintains that the warrant was issued after her illegal detention.[2] She alleges that the warrant stated that officers were currently carrying out an investigation in her regard, indicating that, at the time the warrant was issued, Federal Security Service agents were already keeping her under surveillance and tapping her telephone. Those actions were illegal because of her status as an advocate. On 8 June 2013 and 27 June 2013, she submitted cassation appeals requesting the regional court to find the warrant unlawful, however both of her appeals were rejected.

2.4 On 12 July 2012, the complainant was placed in a psychiatric institution against her will, in order to undergo a mental-health assessment. The admitting doctor informed her that, if she cared about the safety of her family, she should sign a document confirming that she had been admitted voluntarily. She then signed the document. She remained in the psychiatric institution for three weeks, during which period, she was not allowed to go out for walks, was given substandard food and was forced to take psychotropic drugs that she did not require. She was discharged on 6 August 2012, with a diagnosis of acute stress and declared fit to stand trial.

2.5 On 13 February 2013, the complainant was found guilty by the Zasviyazh'ye District Court of the offence of bribing a witness to change his testimony under article 309 of the Criminal Code of the Russian Federation and fined 40,000 Rub.[3] On 1 July 2013, the Ulyanovsk Regional Court upheld the decision of the trial court.

2.6 The complainant submits that she has exhausted the available domestic remedies, given that she lodged separate appeals against her conviction with the courts and with the Prosecutor's Office, in which she complained about the treatment she had endured. Both of those appeals were ignored.

The complaint

3.1 The complainant claims that her rights under article 1 of the Convention were violated by the State party, since she was subjected to torture in the form of detention in a hot car for several hours, death threats and placement in a psychiatric hospital by State officials attempting to force her to confess to bribing a witness to change his testimony.

3.2 She further claims that her rights under article 2 of the Convention were violated, as the State party did not take effective administrative, judicial or other measures to prevent the acts of torture against her either before her detention or during the pretrial investigation.

3.3 She claims that her rights under articles 4, 12 and 13 of the Convention were violated, given that the State party authorities failed to conduct a prompt and impartial investigation into her allegations of torture.

[1] The complainant does not provide details of the break in.

[2] The complainant's allegation that the warrant was issued after she was arrested is based on the text of the warrant, which states that, on 3 June 2012, as a part of its inquiries, the regional office of the Federal Security Service received information regarding bribery and that officers were investigating the possibility of a link with Olga Shestakova in that regard.

[3] Approximately €1,000.

3.4 She claims that her rights under article 15 of the Convention were violated, because the courts took into account her forced confessions when ruling that she had committed an offence.

State party's observations on admissibility and the merits

4.1 By a note verbale of 23 May 2016, the State party challenged the admissibility of the complaint and provided its observations on the merits. The State party submits that the Committee shall not consider any complaint with regard to which domestic remedies have not been exhausted. The State party notes that, in accordance with article 401 (3) of the Code of Criminal Procedure of the Russian Federation, appeals against court decisions that have already entered into force may be lodged with the cassation instance of a regional court, or to the Judicial College on Criminal Cases of the Supreme Court of the Russian Federation. The State party further notes that, by its decision in *Abramyan and Others v. Russia*, applications Nos. 38951/13 and 59611/13, dated 12 May 2015, the European Court of Human Rights concluded that the cassation review procedure constituted an effective domestic remedy.

4.2 The complainant did not submit a cassation appeal against the rulings of the first and second instance courts, either to the Presidium of the Ulyanovsk Regional Court or to the Judicial College on Criminal Cases of the Supreme Court of the Russian Federation.

4.3 Since the complainant failed to exhaust that remedy, her complaint must be considered by the Committee to be inadmissible under article 22 of the Convention.

4.4 The State party claims that the complainant's allegations were duly investigated by the courts of first and second instance and were found to be false. The courts rightly found them to be unsubstantiated and provided convincing motives in their decisions.

4.5 The State party states that the complainant was not detained under articles 91 and 92 of the Russian Code of Criminal Procedure. Six different witnesses confirmed that the complainant was not detained. The fact that some of the documents in the case contain the word "detention" does not mean that the complainant was detained but rather that she was caught at the crime scene.

4.6 Allegations of law enforcement agents placing unlawful pressure on the complainant after she was caught at the scene of the crime have not been confirmed by the investigation.[4]

4.7 The complainant's allegations that she was forced to sit in a vehicle with running engine and into which exhaust fumes were entering, that she was unlawfully and forcibly transported to the regional office of the Investigation Department, that she was followed by Federal Security Service agents and that her house was broken into have not been objectively proven. Three Federal Security Service agents were questioned by the trial court and testified that they knew nothing about those allegations.

4.8 Witness Ch. stated that, on 3 July 2012, he met with the complainant at her behest so she could give him money for changing his testimony in the case against Y.T.K. He arrived at the scene in his car and, after the complainant got inside his vehicle, she gave him the agreed sum of 30,000 Rub.[5] Subsequently, several law enforcement agents approached the vehicle and started to fill out the necessary paperwork. While they were doing that, the complainant sat in the front seat of the car and was not threatened or pressured by the agents.

4.9 The court was correct in its assessment of Ch.'s character, his ability to assess actions and provide testimony and in concluding that there was no need for him to undergo a psychiatric examination.

4.10 Ch. denied that he was a client of the complainant, explaining that he had never hired her to represent him, or asked others to hire her on his behalf.

[4] See para. 4.18.

[5] Approximately €750.

4.11 Nine witnesses[6] have testified that there was no pressure put on the complainant and that the passenger side door of the car, where the complainant was seated, was open. After an inspection of the crime scene, the complainant was driven in one of the agents' cars to the offices of the investigation department, where she expressed her willingness to cooperate with the investigation.

4.12 Testimony, provided by Ch. and other witnesses, proves that the law enforcement agents observed Ch.'s car with the complainant in it. On searching the vehicle, the agents discovered a mobile telephone, which the complainant confirmed was hers, and 30,000 Rub. These facts refute the complainant's claim that her mobile telephone was forcibly taken from her by the law enforcement agents.

4.13 The seizure protocol, dated 4 July 2013, and conducted on the basis of investigator S.'s order, shows that the complainant was found to be carrying 220,000 Rub.[7] After analysing the protocol, in conjunction with other evidence in the case, the courts found that the money had not been planted in the complainant's purse by the Federal Security Service agents, but rather was the remainder of 250,000 Rub given to the complainant by B.I.A. to bribe Ch. This conclusion was based on Ch.'s testimony, information provided by the complainant in the oral crime report protocol[8] and the testimonies of three witnesses. The seizure of the money was conducted in accordance with article 183 of the Russian Code of Criminal Procedure and in the presence of witnesses and the complainant's counsel, M.V.V., making it impossible for the law enforcement agents to have carried out any unlawful actions or put pressure on the complainant.

4.14 As can be seen from the criminal case materials, the head of the regional office of the Federal Security Service was ordered to verify information received by the regional investigation department concerning the complainant's plan to bribe Ch. to give misleading testimony in a criminal case. In order to carry out that task, a number of Federal Security Service agents placed the complainant and B.I.A. under surveillance on 3 July and 4 July 2012 respectively. Both surveillance operations were carried out with the approval of the head of the regional office of the Federal Security Service and based on a judicial warrant dated 3 July 2012 granting the regional office of the Federal Security Service permission to place the complainant under surveillance and, among other things, listen in on her telephone calls and monitor her mail. The judicial order was signed prior to the investigative actions of 3 July 2012, based on the relevant request made in compliance with the law. There is no information proving that the judicial order was falsified.

4.15 The results of the investigative actions of 3 and 4 July 2012, reflected in Sh.I.I.'s report, are consistent with the data contained on two disks, obtained with the use of special technical devices.[9] The disks were examined during the investigation and the video and audio recordings were studied and added to the criminal case file as evidence.

4.16 The verdict fully outlines the findings concerning the preservation of the data on the disks in their original form, free of any tampering. The court studied the allegations of possible editing of the audio and video files and found them to be unsubstantiated. No information was provided that would cast any doubt to authenticity and integrity of the audio and video files.

4.17 The allegations by the complainant that she was unlawfully placed in a psychiatric institution on 12 July 2012 were also found to be unsubstantiated. From the testimony of the complainant's mother, it is evident that the complainant started feeling ill on 5 July 2012, had insomnia and became anxious. On 12 July 2012, the complainant's mother contacted the psychiatric clinic because she thought that her daughter needed psychiatric care. The complainant received treatment at the psychiatric clinic until 6 August 2012. This testimony is in line with the forensic-psychiatric expert report, which states that the

[6] All of them were law enforcement agents.

[7] Approximately €5,500. The trial court's decision shows that this money was voluntarily submitted by the complainant to the investigator.

[8] The State party claims that, after going to the regional investigation department, the complainant voluntarily reported the offence she had committed.

[9] Video and audio recordings of the surveillance operation were made.

complainant was taken to the psychiatric clinic on 12 July 2012, accompanied by her mother, where she was diagnosed with an acute reaction to stress.

4.18 The complainant's allegations of the exercise of unlawful pressure on her by the law enforcement agents were investigated by the regional office of the Investigation Committee of the Russian Federation and the military investigation unit of the regional garrison.[10] They refused to open a criminal investigation into those allegations due to the lack of *corpus delicti*. There was no abuse of authority found in the actions of the law enforcement agents.

4.19 It shall be noted that the complainant did not lodge an appeal with the courts against the refusals to open a criminal investigation, as envisaged in article 125 of the Russian Code of Criminal Procedure.

4.20 Thus, the State party considers that no violations of the Convention were committed with respect to the complaint.

Complainant's comments on the State party's observations

5.1 On 6 October 2016, the complainant provided her comments on the State party's submission. She rejects the State party's claim that the cassation review procedure constitutes an effective domestic remedy, as found by the European Court of Human Rights in *Abramyan and Others v. Russia* dated 12 May 2015. She further notes that, since the Committee against Torture operates independently of the European Court of Human Rights, the State party cannot substantiate its claims with European Court of Human Rights jurisprudence.

5.2 She further notes that, during her legal training, she had been told by her lecturers, who were Russian Supreme Court judges, that all cassation appeals are denied automatically and that advocates should not lodge them on behalf of their clients.

5.3 The complainant reiterates that she exhausted all domestic remedies. The exhaustion is evidenced by the fact that the decision of the national court against her has entered into force, as required by the Committee, and appeal to the cassation court would not be an effective remedy in line with the requirements set out in article 22 paragraph 5 (b) of the Convention.

5.4 According to the complainant, every page of her criminal case file serves as proof that she suffered torture, cruel and inhuman treatment, because the allegations against her contradict the video and audio recordings used in the case and other available evidence.

5.5 The complainant reiterates that she was detained against her will for seven and a half hours, first in her client's car, where she suffered torture, and then in the car of the head of unit of the regional office of the Federal Security Service, Sh.I.I., who took her to the offices of the regional office of the investigation department. When she arrived at the offices of the investigation department, all of the relevant documents had already been prepared by the investigator, including the crime report protocol, the complainant's affidavit, and the crime scene examination protocol, which she was forced to sign under threats of torture, death and harm to her family. Moreover, the 220,000 Rub allegedly found in her purse were planted there in the investigator's office.

5.6 The complainant further states that, after being tortured, she complained to the law enforcement agencies on several occasions, with the first complaint being filed on 8 July 2012.[11] The military investigation unit of the regional garrison and the Investigative Committee of the Russian Federation should have looked into her complaints, however, the latter forwarded the complaints for investigation to the very officials against whom she was complaining. The officials failed to call in for questioning either the complainant or her two witnesses, who had information about her kidnapping and torture.

[10] The military investigation unit of the regional garrison is a part of the Investigative Committee of the Russian Federation, the body responsible for internal criminal investigations within the police force and the military.

[11] The complainant has not provided any proof of a complaint being filed on 8 July 2012.

5.7 The complainant argues that the witness testimony obtained from the Federal Security Service agents cannot be objective, because those agents would not want to be criminally prosecuted for their actions. Ch. has a psychiatric illness, has been registered at a psychiatric hospital since his childhood due to having schizophrenia, was previously found by a court to be mentally unfit[12] and cooperates with the regional office of the Federal Security Service. Consequently, his testimony cannot be used to support claims that the case was investigated in an objective manner. The complainant argues that the court is not competent to evaluate Ch.'s mental state, a task that can only be performed by a psychiatric expert.

5.8 In accordance with the legal services agreement and the order,[13] which are attached to the complaint, the complainant was representing Ch.'s interests. He never formally terminated her services. Advocates are allowed to give/receive money to/from their clients in case of compensation for moral and material damages.[14]

5.9 The complainant refutes the State party's assertion that she cooperated with the investigation. The criminal case files do not contain any reference to her cooperation with the investigation. Moreover, there was no criminal case against her on 3 July 2012, so there was no way for her to cooperate with the investigation. She further states that all of the witnesses in the case against her were the very law enforcement agents who tortured her and would never testify against themselves.

5.10 The complainant states that she later learned that her defence counsel was working for the investigation team and, on 1 December 2012, she submitted to the case investigator a letter stating her lack of confidence in her counsel.[15] She further states that her counsel was later fired from the regional collegium of advocates and that, on several occasions, she saw him entering and exiting the regional office of the Federal Security Service.[16]

5.11 The complainant claims that, because she was an advocate, any surveillance or other investigative actions against her could have been carried out only after obtaining an order from a judge. However, the text of the judicial order issued on 3 July 2012 implies that the surveillance operation targeting the complainant has already been carried out, which in itself is a gross violation of Russian law.

5.12 As to the authenticity of the disks containing audio and video recordings made during the course of the events of 3 and 4 July 2012, the complainant argues that she submitted requests for the recordings to be examined by technical and forensic experts, in order to check that they had not been edited or falsified, however both the courts concerned rejected her requests. The courts do not have the right, knowledge or technical means to verify the authenticity of audio and video files: that task can only be performed by technical and forensic experts in specialized laboratories.

5.13 The complainant refutes the State party's statement that she did not lodge an appeal to the courts against the refusals to open a criminal investigation into her allegations of torture, as provided for in article 125 of the Russian Code of Criminal Procedure. She claims that she did lodge an appeal under article 125, however, it was not considered by courts and was just added to the criminal case file.[17]

[12] The trial court examined the results of a psychiatric examination of Ch. conducted in another case, where he was a victim, and concluded that he was mentally fit.

[13] An order is a document that is usually submitted by advocates to investigators and courts as proof of their relationship with their clients. The complainant has attached copies of the order and the relevant client registration form.

[14] The complainant claims that the money was given to her by someone as compensation for moral damages awarded to Ch. in another criminal case and that she met Ch. on 3 July 2012 to hand over the money. However, the court documents show that, during the pretrial investigation, she claimed that she had borrowed the money from Ch. at an earlier date and that she had met Ch. on 3 July 2012 to repay her debt.

[15] No copy of the letter was provided; however, during the trial, she was represented by another counsel.

[16] No documentary evidence was provided in that regard.

[17] The complainant does not provide a copy of the appeal or any other evidence to substantiate this claim.

5.14 The complainant further claims that, prior to the events of 3, 4 and 12 July 2012, she had been a healthy and active person and spent a lot of time working. In the wake of those events, her health has deteriorated, as can be seen from a copy of her medical history form.[18]

5.15 In the light of the foregoing, the complainant requests the Committee to conclude that her rights under articles 1, 2, 4, 12, 13 and 15 of the Convention have been violated.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party argues that the complainant has not appealed to the cassation instance of a regional court, or to the Judicial College on Criminal Cases of the Supreme Court of the Russian Federation, and that, therefore, the complaint must be considered by the Committee as inadmissible under article 22 of the Convention. The State party further notes that, by its decision in *Abramyan and Others v. Russia*, the European Court of Human Rights concluded that the cassation review procedure constituted an effective domestic remedy.

6.3 The Committee recalls that the European Court of Human Right's decision in *Abramyan and Others v. Russia* concerns the exhaustion of domestic remedies only for civil cases. On the contrary, in *Kashlan v. Russian Federation*, the European Court of Human Rights came to the conclusion that the new cassation review procedure under the Russian Code of Criminal Procedure, as amended in 2014, did not constitute an ordinary remedy within the meaning of Article 35, paragraph 1, of the European Convention on Human Rights and therefore did not have to be exhausted by the applicants before lodging a complaint with the Court.[19]

6.4 The Committee must now decide if the lodging of cassation appeals against court decisions that have entered into force constitutes effective relief as required by article 22 (5) (b) of the Convention. The Committee notes the State party's submission that a court decision which has entered into force may be appealed against before the cassation instance of a regional court or the Judicial College on Criminal Cases of the Supreme Court of the Russian Federation. The Committee further notes that article 401 (8) of the Code of Criminal Procedure of the Russian Federation provides that, upon receiving a cassation appeal, a single judge of a regional court or the Supreme Court then decides whether the cassation appeal shall be heard by the cassation instance court or rejected. The Committee notes that such a review depends on the discretionary power of a single judge. The Committee is therefore of the view that the current cassation appeal procedure is of a discretionary nature and constitutes an extraordinary remedy; therefore, the State party must show that there is a reasonable prospect that such an appeal would provide effective relief in the circumstances of the case. The Committee considers that, since the State party has not shown whether, and in how many cases, cassation review procedures were successfully applied in cases concerning torture, the State party has not provided sufficient information to demonstrate the effectiveness of filing a cassation appeal with regional courts or with the Supreme Court concerning ill-treatment or torture. In the present circumstances, the Committee cannot conclude that the cassation appeal is likely to bring

[18] The complainant provided a copy of her medical history form, which shows that, in February 2013, she was diagnosed with cardiovascular dystonia (a condition similar to a panic attack).

[19] See *Kashlan v. Russia*, application No. 60189/15, 19 April 2016, para. 29.

effective relief to the complainant, and therefore considers that it is not precluded by article 22 (5) (b) of the Convention from examining the present complaint.

6.5 The Committee notes the complainant's allegations that she was subjected to torture when she was held in a car for several hours, that she was kidnapped by Federal Security Service agents and taken to the offices of the investigation department, received death threats and was later forcibly placed in a psychiatric institution. The Committee takes note of the State party's argument that the complainant's allegations were examined by the domestic courts during the judicial proceedings that resulted in the conviction and fining of the complainant and were also the subject of a separate investigation carried out by the military investigation unit of the regional garrison, which did not uncover any violations. The Committee also notes that the complainant has not provided any documentation to substantiate her allegations in that regard. Documents submitted to the Committee show that the complainant first made allegations of torture in December 2012, when the investigation was nearing its end, while the alleged torture itself took place on 3 and 4 July 2012. Although the complainant claims that she complained about the torture to the relevant authorities on 8 July 2012, she did not provide proof of any such complaints. In these circumstances and in the absence of any further relevant information, the Committee concludes that the complainant has failed to sufficiently substantiate her claims for the purpose of admissibility.

6.6 The Committee against Torture therefore decides:

(a) That the communication is inadmissible under article 22 (2) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.