

Opinion No. 16/2009 (Ukraine)

Communication addressed to the Government on 1 May 2009

Concerning Mr. Alexandr Rafalskiy

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group welcomes the cooperation of the Government, which has submitted information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto, as well as observations by the source.
5. The case was reported to the Working Group on Arbitrary Detention and is summarized below.
6. Mr. Alexandr Rafalskiy, born on 21 May 1971; a Ukrainian citizen; deputy director of the private firm “Polimerzaschita”, usually residing in Kyiv, was arrested on 13 June 2001 in an apartment in Volgodonskiy Pereulok in Kyiv by officers from the Department of Internal Affairs. He was not provided with any warrant or explanation for the arrest. At first, Mr. Rafalskiy was held at a detention facility of the Department of Internal Affairs at Vladimirska Street 15, in Kyiv. On the next day, he was transferred to an unknown place of detention. Mr. Rafalskiy was allegedly tortured in both places in order to obtain a confession.
7. On 13 June 2001, at approximately 11.30 p.m., Mr. Rafalskiy was brought to the Obukhiv Central Regional Hospital. He was examined by two medical doctors, who diagnosed a wound on his head and numerous wounds on his back.
8. Between 14 and 16 June 2001, Mr. Rafalskiy was transferred to the Obukhov Temporary Detention Centre (TDC) run by the Obukhov District Police Department and held as a vagrant and unidentified person, pursuant to article 5, paragraph 5, of the Law on the Militia (Police), although the police officers were aware of his identity and arrested him under the identity of Alexandr Rafalskiy. On 16 June 2001, Mr. Rafalskiy wrote an application, requesting the Head of the Obukhov Temporary Detention Center to contact his parents and to inform them about his place of detention.
9. Mr. Rafalskiy was transferred three times from one TDC to another without any further explanation. On 17 June 2001 he was detained at Staviche TDC; between 17 and 21 June 2001, at Tetiev TDC; and from 21 until 25 June 2001, again at Staviche TDC. All these three detention centres are located in the Kyiv region. On 17 June 2001, at approximately 8.40 p.m., Mr. Rafalskiy received medical treatment at the Staviche Central Regional Hospital. He was diagnosed with a veins dysfunction and a wound in the area of the chest and waist.

10. Mr. Rafalskiy was continuously interrogated during the period of 14 and 21 June 2001. As Mr. Rafalskiy was not allowed access to his lawyer or his relatives, he was not able to resort to legal remedies to prevent violations of his rights. It was only on 25 June 2001 that he was informed that he was to remain in detention on suspicion of murder. Since then, he has been detained under the authority of the Kyiv Regional Prosecutor's Office at the Kyiv Investigating Detention Ward.

11. On 26 June 2001, Mr. Rafalskiy was, for the first time, brought before a judge, who ordered his detention. On 30 July 2004, Mr. Rafalskiy was convicted for murder and sentenced to life imprisonment. He is currently serving his sentence in Prison No. 1, Ostovski Street 2, Vinnitha.

12. Subsequently, Mr. Rafalskiy submitted applications and appeals alleging torture and illegal deprivation of liberty to the Office of the Prosecutor-General, the investigator, and the Court of first instance that examined his case. Despite these applications, supported by a judicial-medical expert opinion rendered on 19 July 2001 by the Central Regional Hospital of Kyiv, which does not exclude allegations of torture, no criminal investigation ensued.

13. According to the judicial-medical expertise, requested by an investigator of the Regional Prosecutor's Office in Kyiv, Mr. Rafalskiy sustained two wounds in the area of his right and left knees; a bruise on the internal surface under his left shoulder, and a wound ahead of the left interior fontanel on his head. Except for the wound on his head, the injuries could have resulted from the use of blunt objects, possibly from beatings by hands, kicks or from a fall on blunt objects. These are considered light injuries without longstanding implications on the state of health. The expert opinion concluded that it was not likely that the aforementioned injuries could have resulted from the use of a stick.

14. On 15 September 2001, the investigator of the Prosecutor-General's Office refused to institute criminal proceedings against the police officers who ill-treated him in custody to obtain a confession, on the grounds that Mr. Rafalskiy was most likely subjected to force because of his attempted escape on 13 June 2001 through the ventilation exit in the detention facility of the Department of Internal Affairs, Vladimirski Street 15, in Kyiv. In light of this fact, the police had to resort to "hand-fighting methods and special means" to prevent him from absconding, in strict compliance with the requirements of articles 13 and 14 of the Law on the Militia. The Prosecutor-General's Office considers critically the allegations of Mr. Rafalskiy as not corresponding to reality. With respect to the specific wound on his head, the Prosecutor-General argues that it could have resulted from the use of a sharp object and that it is not likely that it could have been inflicted by beating or similar means.

15. As the Office of the Prosecutor-General is the only body in Ukraine that could institute criminal proceedings against police officials, which has proven ineffective, Mr. Rafalskiy has no further domestic remedies available.

16. Accordingly, the source argues that the arrest, detention and imprisonment of Mr. Rafalskiy are arbitrary. Under article 29, paragraph 3, of the Constitution and articles 106 and 165-2, paragraph 4, of the Code of Criminal Procedure, arrest without order is permissible only "in case of urgent necessity to prevent or stop a crime". Article 165-2, paragraph 4, of the Code of Criminal Procedure stipulates the procedure for issuing a reasoned court decision authorizing detention. The applicant was detained on the basis of suspicion of a crime, committed a few months before his actual detention, thereby not meeting the requirements enshrined in article 29 of the Constitution and articles 106 and 165-2, paragraph 4, of the Code of Criminal Procedure.

17. Furthermore, on 14 June 2001, State authorities detained subject as a vagrant, despite the fact that his identity had been well known to them since the day preceding his arrest. Such detention was used by police authorities as Ukrainian legislation does not

require judicial review of vagrant detention and does not oblige them to inform relatives or other persons about the detention and its place. It was only on 25 June 2001 that Mr. Rafalskiy's detention was approved by the Prosecutor's Office.

18. It is further argued by the source that actions of the authorities were aimed at avoiding obstacles for torturing Mr. Rafalskiy with the purpose of extracting a confession, hiding evidence of torture and preventing responsibility for these acts. Such actions violated article 5 of the Universal Declaration of Human Rights; articles 7 and 9 of the International Covenant on Civil and Political Rights; articles 3 and 5, paragraph 3, of the European Convention of Human Rights, and Principles 4, 6, 9 and 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

19. Finally, the source contends that the arbitrary arrest, detention without registration and subsequent false detention as a vagrant, resulted in the violation of Mr. Rafalskiy's right to fair trial, guaranteed by article 10 of the Universal Declaration of Human Rights; article 14 of the International Covenant on Civil and Political Rights; article 6 of the European Convention of Human Rights, as well as Principles 17, 18 and 21 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

20. On 1 May 2009, the Working Group transmitted these allegations to the Government of Ukraine requesting it to provide the Working Group with detailed information about the current situation of Mr. Alexandr Rafalskiy and clarification about the legal provisions justifying his arrest and continued detention. By note verbale dated 20 August 2009 the Working Group sent a reminder regarding its request for information to the Permanent Mission of Ukraine to the United Nations Office and other International Organizations at Geneva.

21. On 21 August 2009, the Government submitted its response. According to it, Mr. Rafalskiy was arrested on 25 June 2001 by agents working for the Regional Prosecutor's Office in Kyiv for suspicion of having committed a criminal offence under article 93 (g) of the Penal Code of Ukraine. By decision of the Regional Prosecutor's Office in Kyiv dated 26 June 2001, Mr. Rafalskiy was held at the Investigating Detention Ward of Kyiv. The term of his detention was prolonged several times by the decisions of the District Court and of the Regional Appeal Court of Kyiv.

22. The Government further reports that Mr. Rafalskiy was convicted for murder and sentenced to life imprisonment on 30 July 2004. The Supreme Court of Ukraine confirmed his sentence to life imprisonment. He is being held in detention in the prison of Vinnitha since 11 July 2006. The Government concludes that the findings of the investigation carried out do not cover any illegal actions attributable to the police officers. The acts practiced by officers of the Militia to avoid Mr. Rafalskiy's attempts to escape were fully legal.

23. In its observations to the Government's reply, submitted on 25 August 2009, the source considers that the information provided by the Government does not refute the allegations submitted concerning illegal arrest and acts of torture and ill-treatment carried out in order to extract a confession. The response from the Government is considered by the source irrelevant in connection with the allegations contained in its original communication. The Government simply ignores that Mr. Rafalskiy was detained between 13 and 25 June 2001, and it does not present any explanation concerning the legal grounds for this period of the detention. The Government's reply covers only the period subsequent to 25 June 2001. For that reasons, the source concludes that it could not be taken into account by the Working Group in its consideration of the case.

24. The Working Group considers that it should take into consideration the following circumstances:

(a) The original communication from the source contains allegations of torture, ill-treatment and illegal deprivation of Mr. Rafalskiy's liberty by police officers in several temporary detention centres during the first 13 days of his pretrial detention. There was not formal registration of his detention and Mr. Rafalskiy was even partially held in incommunicado detention.

(b) Two central regional hospitals in Kyiv have diagnosed that Mr. Rafalskiy presented wounds in several parts of his body.

(c) Mr. Rafalskiy was not allowed access to a defence lawyer nor to his relatives.

(d) The reasons of his detention were only communicated to him after 13 days of his detention, when he was informed that he should be held in detention on suspicion of murder. Only after that, Mr. Rafalskiy was, for the first time, brought before a court.

25. These allegations have not been refuted by the Government.

26. However, there is a discrepancy between the information provided by the source and that provided by the Government concerning the date of Mr. Rafalskiy's arrest (13 and 25 June 2001, respectively). It is during this period of pre-trial detention, immediately subsequent to Mr. Rafalskiy's apprehension, that the alleged acts of torture and ill-treatment and serious violations to the right to liberty and security took allegedly place.

27. Consequently, the Working Group requests the Government to provide it with more detailed information about the date, the legal grounds and the circumstances of the arrest of Mr. Rafalskiy; about the duration and conditions of his pre-trial detention and about the results of the investigation carried out concerning the actions of the police officers during his arrest and pre-trial detention.

28. The Working Group, in conformity with paragraph 17 (c) of its methods of work, decides to keep the case pending until the information requested to the Government is received.

Adopted on 4 September 2009