



Russian Federation v. Mikhail Benyash

July 2020

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS:

Human Rights Embassy is an international human rights nongovernmental organization based in Moldova and operating throughout the countries of the former Soviet Union and Europe. The organization's mission is to contribute to the promotion and respect for human rights worldwide. To achieve this goal, Human Rights Embassy undertakes professional development trainings of judicial actors, human rights trainings for NGOs and mass-media, trial monitoring, strategic litigation, solidarity campaigns for the protection of human rights lawyers/defenders, awareness raising campaigns, and advocacy. Human Rights Embassy monitored the trial of Mr. Benyash as part of the Clooney Foundation for Justice's TrialWatch initiative.

Hughes Hubbard & Reed LLP is an international law firm based in New York with locations in Washington, D.C.; Miami; Los Angeles; Kansas City; Paris; and Tokyo. James H. Boykin is a Partner and Chair of Hughes Hubbard's Investment Treaty Arbitration group. Vitaly Morozov is a Counsel with the firm and a member of the International Arbitration practice group. Tyler Grove is an Associate and a member of the International Trade practice group. Alexander Bedrosyan is an Associate and a member of the firm's International Arbitration practice group. Sean Mason is an Associate and a member of the firm's Litigation practice group.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The statements and analysis expressed have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this report should be considered legal advice for specific cases. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.



Staff from Human Rights Embassy and Hughes Hubbard, who are members of the TrialWatch Experts Panel, assigned this trial a grade of D:

The Russian Federation’s prosecution of Mikhail Benyash for allegedly assaulting two police officers entailed serious violations of international standards, including: the right to freedom from arbitrary detention; the right to call and examine witnesses; the right to the presumption of innocence; the right to judicial impartiality; the right to freedom from inhuman or degrading treatment; and guarantees against abuse of process. Because a review of the trial monitors’ notes and the record show that these violations affected the outcome of the trial and/or resulted in significant harm to Mr. Benyash, who spent over a month in detention, is at risk of being disbarred, and was convicted and fined 30,000 rubles, the trial has been assigned a “D” under the grading methodology described in the Annex.

From April to October 2019, Human Rights Embassy monitored the criminal trial of Mikhail Benyash as part of the Clooney Foundation for Justice’s TrialWatch initiative. Mr. Benyash is a well-known human rights lawyer in Russia. He has frequently represented activists arrested during demonstrations. In December 2018, Mr. Benyash was criminally indicted for allegedly assaulting police officers who had arrested him in connection with a protest. The evidence, however, suggested that it was in fact Mr. Benyash who had been assaulted by the police. He was convicted in October 2019. The proceedings against Mr. Benyash entailed significant violations of his rights under international law, including his right to be free from inhuman or degrading treatment; his right to be free from arbitrary detention; his right to be presumed innocent; and his right to an impartial court.

Mr. Benyash was detained by plainclothes officers on the basis of allegations that he organized an unauthorized protest. The officers appear to have failed to identify themselves before apprehending Mr. Benyash, causing him to believe he was being abducted. Mr. Benyash alleges that he was maltreated by these same officers, claims that were supported by his documented injuries, including internal hemorrhage and hearing loss. Notably, Mr. Benyash’s initial arrest and detention were based on the false premise that he had received and ignored a summons to appear at a local police station. It was later revealed that the summons had not been mailed until after Mr. Benyash’s arrest and detention. Mr. Benyash was quickly convicted of two administrative offenses (organizing an unauthorized protest and disobeying police orders) in proceedings riddled

with due process violations. After serving a two-week sentence for the latter conviction, he was criminally charged with having attacked his arresting officers.

Mr. Benyash's trial was marred by absurdities. The prosecution's case was so implausible, the judge's bias against Mr. Benyash so evident, and the verdict so illogical that no reasonable observer could have deemed the proceedings and resulting conviction fair. In one flagrant example, prosecution witnesses who testified that they had seen Mr. Benyash inflict his injuries upon himself in the police station parking lot were proven to have been nowhere near the police station at the time. In other examples, the presiding judge coached prosecution witnesses who could not remember their pretrial statements or were struggling to explain inconsistencies and harshly admonished defense counsel for standard lines of inquiry.

Mr. Benyash has appealed his conviction before the Krasnodar Regional Court. If the conviction is upheld, his legal license will be revoked. This would be a grave blow to Mr. Benyash himself, the legal profession more broadly, and the protesters who rely on Mr. Benyash's support. The Court should overturn Mr. Benyash's conviction and acquit him in full.

Background

Mr. Mikhail Benyash is a human rights lawyer who regularly defends individuals arrested during protests. On September 9, 2018, demonstrations against a proposal to raise the age of pension eligibility were scheduled to take place in cities across the country. Mr. Benyash was in Krasnodar to monitor one such protest and provide legal assistance to participants. Shortly before the protest was due to start, he was walking down a side-street with Ms. Irina Barkhatova, a client.

The two were approached by plainclothes policemen: Officers Dolgov and Yurchenko. The officers had been tasked with apprehending Mr. Benyash for the administrative offense of "call[ing] for participation in an unsanctioned rally."¹ To note, the order to arrest Mr. Benyash was predicated on a false premise - that Mr. Benyash had ignored a summons to appear at the Krasnodar Ministry of Internal Affairs. At trial it emerged that the summons was sent on September 11, 2018, two days after Mr. Benyash's arrest.

The account that follows was relayed by Mr. Benyash and supported by Ms. Barkhatova, a direct witness to the disputed events. Officers Dolgov and Yurchenko forced Mr. Benyash and Ms. Barkhatova into their unmarked car without introducing themselves or providing any reasons for the arrest. Mr. Benyash thereby believed that the officers were "titushki" (thugs), not policemen. The officers drove Mr. Benyash and Ms. Barkhatova to the police station. En route, Officer Yurchenko attacked Mr. Benyash, strangling him and gouging his eye. Upon arrival at the station, the officers threw Mr. Benyash onto the

¹ Krasnodar Police Delivery Order, September 8, 2018.

pavement face-first with his hands cuffed behind his back. Subsequently, Officer Yurchenko beat Mr. Benyash inside an interrogation room at the police station. Ms. Barkhatova heard Mr. Benyash screaming in pain and yelling for help. Photos, videos, and medical records introduced at trial showed that Mr. Benyash suffered serious injuries, including hearing loss and internal hemorrhage.

The account of Officers Dolgov and Yurchenko diverges from that of Mr. Benyash. In their initial reports on the arrest, the officers stated that Mr. Benyash agreed to accompany them to the police station but upon arrival started to hit himself in the face; started to beat his head against the car windows; attempted to provoke a fight with the officers; and attempted to flee the police station, prompting the officers to restrain him with handcuffs. The initial police reports do not state that Mr. Benyash deliberately assaulted the officers and do not recount any injuries inflicted on the officers.

Following his detention and interrogation at the police station, Mr. Benyash was charged with the administrative offenses of organizing an unauthorized protest and disobeying the lawful orders of a police officer. With respect to the latter charge, the police alleged that Mr. Benyash had disobeyed the officers' orders to remain calm after arriving at the police station. He was convicted on both counts and sentenced to two weeks administrative custody for disobeying police orders and 40 hours of community service for organizing a protest.

The day he completed his two-week administrative sentence for disobeying police orders, Mr. Benyash was charged with the criminal offense of assaulting a police officer, rearrested, and remanded to custody. The criminal charges were based on new claims raised by the officers: namely, that Mr. Benyash had assaulted them (biting Officer Dolgov and punching Officer Yurchenko in the head), resulting in various injuries. As noted above, the initial arrest reports completed by the officers did not state that Mr. Benyash had deliberately assaulted them and did not mention any injuries. Further, the doctor who initially examined the officers found no evidence of bite marks or head injuries.

The criminal case included allegations that in addition to beating his head on the car window, Mr. Benyash had beaten his head on the pavement outside the police station. Two city employees who testified that they witnessed this episode were proven to have perjured themselves. Video and administrative arrest record evidence showed that these purported witnesses were assisting police in a different location at the time in question.

Investigation and Detention

The investigative and pretrial stage of the proceedings against Mr. Benyash were marred by numerous flaws. The police order to apprehend Mr. Benyash was based on the false premise that he had evaded summons to appear for questioning. The summons

instructed Mr. Benyash to come to the police station on September 13 and was not mailed until September 11, two days after Mr. Benyash was arrested.

As recounted by Mr. Benyash and Ms. Barkhatova, the arresting police officers failed to introduce themselves or provide reasons for the arrest, as required by Russian legislation.² A video of the arrest filmed by Ms. Barkhatova shows Officer Yurchenko in civilian clothing pulling Mr. Benyash into an unmarked car while Officer Dolgov, also in civilian clothing, walks toward them. The defense additionally presented witnesses who had been arrested by Officers Dolgov and Yurchenko on other occasions, and who testified that the two had similarly failed to identify themselves or provide reasons for arrest, suggesting a certain *modus operandi*. Under the ICCPR and ECHR, arrests must be in line with domestic law (in addition to complying with other international standards). Given the preponderance of evidence that Mr. Benyash was immediately detained and pushed towards the car without Officers Dolgov or Yurchenko identifying themselves or their purpose, the arrest fell afoul of Russian domestic legislation and thereby afoul of the ICCPR and ECHR.

Subsequently, the various stages of Mr. Benyash's detention were arbitrary. When Mr. Benyash was first remanded to custody on the criminal charges, the presiding judge extended his detention for 72 hours on the pretext that his health was deteriorating and his diagnosis required clarification. Under the ICCPR and ECHR, the only detention objectives permitted in this situation are prevention of flight, prevention of re-offending, and prevention of frustration of the proceedings. Safeguarding a detainee's health is not a permissible objective for detention.

In addition, Mr. Benyash's detention pending his criminal trial was without any basis. In accordance with the ICCPR and ECHR, the default rule is pretrial release. Courts must undertake an individualized assessment to demonstrate the necessity of pretrial detention. In imposing pretrial detention in Mr. Benyash's case, however, the presiding judge (the same Judge Belyak who would later preside over Mr. Benyash's criminal trial) simply recited text from the Russian Code of Criminal Procedure regarding permissible justifications for pretrial detention. There was no reference to Mr. Benyash's specific situation and no reasoning as to why pretrial detention was necessary.

Trial

The trial before the Leninsky District Court for Krasnodar entailed numerous and flagrant violations, including violations of Mr. Benyash's right to call and cross-examine witnesses, right to be presumed innocent, and right to a fair and impartial tribunal.

² Federal Law "On Police", Articles 5(4)(1) and 5(4)(2).

As established by the ICCPR and ECHR, the defense is entitled to call and examine witnesses under the same conditions as that of the prosecution. In Mr. Benyash's case, the presiding judge, Judge Belyak, repeatedly curtailed the nature and scope of the defense's cross-examination of prosecution witnesses.

A retired police officer, for example, testified that he saw Mr. Benyash beating his head on the pavement outside the station. Asked to identify Mr. Benyash, he pointed at one of Mr. Benyash's attorneys. When the defense attempted to follow up on this issue, inquiring about the witness' eyesight, Judge Belyak halted cross-examination. Similarly, when the defense asked Officer Dolgov about whether he ever experienced memory lapses and Officer Yurchenko about why his initial arrest report varied from his testimony at trial, Judge Belyak ordered counsel to desist. At one point, Judge Belyak coached Officer Dolgov as to how to respond to defense questions about his inconsistent statements.

The defense was entitled to probe the discrepancies in the prosecution's case. Judge Belyak's restriction of such questioning violated Mr. Benyash's right to call and examine witnesses.

The proceedings also contravened the guarantee of judicial impartiality. Under the ICCPR and ECHR, judges must be impartial in fact (the absence of personal bias) and impartial in appearance. In this case both guarantees were violated.

With respect to the former, Judge Belyak consistently ruled to the detriment of the defense, was overtly deferential to the prosecution, assisted prosecution witnesses, and displayed a contemptuous attitude towards Mr. Benyash's attorneys, mocking defense questions and making inappropriate comments. In one example, Judge Belyak intervened to aid a prosecution witness who was struggling to recall the details of his prior statement. She stated: "Well, come on, remember! You put the prosecutor in a position when he should testify for you. Take pills or do whatever you need to remember."

Apart from evidence of personal bias, Judge Belyak failed to meet the standard for impartiality in appearance. She had ordered Mr. Benyash's pretrial detention, a decision that was overturned as baseless by an appellate court, and had also presided over the administrative trial of Ms. Barkhatova for disobeying police orders (Ms. Barkhatova's actions during Mr. Benyash's arrest). Judge Belyak's prior involvement with the case thus provided objective grounds for a reasonable observer to doubt her impartiality.

Judge Belyak's conduct additionally violated Mr. Benyash's right to the presumption of innocence. In accordance with this principle, courts must resolve all doubts in the accused's favor and cannot convict the accused unless the state has proven his guilt beyond a reasonable doubt. As noted above, there were serious discrepancies in the prosecution's case, which stood in stark contrast to the consistent testimony of Ms. Barkhatova and Mr. Benyash: that the police officers had forced them into an unmarked

car, had used violence against Mr. Benyash, and (in the case of Officer Yurchenko) had beaten Mr. Benyash at the police station.

In its verdict, the court did not resolve or even attempt to address these disparities, blithely stating: “the factual information ... does not cause the court to doubt its reliability.”³ The court likewise neglected to explain its dismissal of the defense case beyond asserting that defense witnesses were previously acquainted with Mr. Benyash and that the testimony of the examining doctor (who found neither bites on Officer Dolgov nor head injuries on Officer Yurchenko) did not disprove Mr. Benyash’s guilt. In convicting Mr. Benyash in the face of significant contradictory evidence and failing to provide reasons for such, the court functionally shifted the burden of proof to the defendant, in contravention of the ICCPR and ECHR.

Abuse of Process

Mr. Benyash’s case saw various organs of the Russian judicial system act in concert to prevent him from carrying out his human rights work. The ICCPR and ECHR protect against the use of criminal proceedings for an ulterior or improper motive. The European Court has set forth various indicia of improper motive, including the overarching political context; whether the charges concern the accused’s political activities; lack of reasonable suspicion to bring the charges; the conduct of the proceedings; and an improperly reasoned judgment.

Mr. Benyash’s case meets all of these criteria. With respect to the broader context, the Russian authorities are notorious for their suppression of peaceful protests and freedom of expression. On the day of his arrest, Mr. Benyash was planning to offer legal advice to participants in a protest against a recently announced government proposal. His apprehension and detention prevented him from providing any such assistance.

With respect to the grounds for the charges, the evidence - as discussed above - militated in favor of the prosecution of the police officers, not Mr. Benyash. The conduct of the subsequent trial was procedurally flawed, repeatedly violating Mr. Benyash’s rights, and the convicting verdict unreasoned, ignoring manifest inconsistencies in the evidence.

Notably, the circumstances surrounding the initiation of Mr. Benyash’s criminal case were highly suspect. Given his administrative conviction for disobeying police orders, a criminal prosecution based on the same facts would have violated the prohibition against double jeopardy. As such, after a criminal investigation was opened against Mr. Benyash, the prosecution appealed Mr. Benyash’s administrative conviction. The relevant appeals court then vacated the conviction, paving the way for the prosecution to formally indict Mr. Benyash only two weeks later.

³ Leninsky District Court of Krasnodar, Judgment, Case No. 1-178/19, October 11, 2019, pg. 41.

This sequence of events was highly coordinated, indicating the collusion of various branches of the judicial system and providing further evidence of abuse of process.

Lack of Recourse

Mr. Benyash's allegations that he was abused by Officers Dolgov and Yurchenko have yet to be addressed. His testimony, supported by that of Ms. Barkhatova as well as by medical and photo documentation, presents a *prima facie* case of inhuman or degrading treatment, prohibited by the ICCPR and ECHR. When an individual is taken into custody in good health but is subsequently found to be injured at the time of release, it is incumbent upon the state to provide a plausible explanation of how the injuries were caused. Both the ICCPR and ECHR require prompt investigation into claims of maltreatment.

The Russian authorities, however, have forestalled any such inquiry. In September 2018, Mr. Benyash filed a criminal complaint about the abuse allegedly inflicted by Officers Dolgov and Yurchenko. After the Krasnodar Investigative Committee repeatedly declined to open an investigation against the officers, Mr. Benyash filed several complaints with the Leninsky District Court for Krasnodar regarding the Investigative Committee's inaction. The District Court has dismissed these complaints on various grounds.

In October 2019, the Krasnodar Regional Court upheld the Leninsky District Court's rejection of Mr. Benyash's latest complaint, stating that the criminal trial had resolved all relevant issues. At trial, however, Judge Belyak ordered Mr. Benyash to pursue any grievances regarding the officers' actions in separate criminal proceedings. Subjected to circular reasoning and shuttled between various judicial bodies, he has been denied all recourse. The failure of the Investigative Committee, Judge Belyak, the Leninsky District Court, and the Krasnodar Regional Court to ensure an investigation into Mr. Benyash's credible allegations violates the ICCPR and ECHR.

Conclusion

Mr. Benyash's appeal against his conviction is pending before the Krasnodar Regional Court. Given the violations described above, the court should overturn his conviction and acquit him in full. As mentioned above, if Mr. Benyash's conviction is upheld on appeal, he will be barred from the future practice of law. The implications for the legal profession and the rule of law are alarming.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

The abusive proceedings against Mikhail Benyash reflect a documented pattern of the targeting of human rights advocates, including lawyers; fair trial violations; the squelching of public assembly; and the abuse of detainees.

Legislation to Suppress Dissent

Since Vladimir Putin reassumed the presidency in 2012, Russia has passed legislation “enabl[ing] it to more effectively target and punish its opponents,” restricting freedoms of expression, assembly, and association.⁴

In 2019, a report authored by Perseus Strategies and watchdog organization Memorial catalogued a litany of recently adopted administrative and criminal offenses, including “mass simultaneous presence in public causing a violation of public order”; criminal defamation; repeated violation of procedures regulating public events; “dissemination of inaccurate information”; and “disrespecting society, the state, state bodies, official state symbols, or the Constitution.”⁵ Another amendment to the criminal code in 2015 proscribed the undertaking of “undesirable activities” by foreign and international non-governmental organizations, an offense carrying a prison term of up to six years.⁶

Judicial Cooperation with the Executive and Systematic Fair Trial Violations

The enforcement of the above provisions is aided by the judiciary, the independence of which has been questioned by various international organizations and institutions.⁷ The

⁴ Perseus Strategies with support from Memorial Human Rights Center, “The Kremlin’s Political Prisoners: Advancing a Political Agenda by Crushing Dissent”, May 2019, pgs. 9-12. Available at <https://www.perseus-strategies.com/wp-content/uploads/2019/04/The-Kremlins-Political-Prisoners-May-2019.pdf>. See also Freedom House, “Russia: Freedom in the World 2020.” Available at <https://freedomhouse.org/country/russia/freedom-world/2020>.

⁵ Id. at pgs. 10-12.

⁶ See Federal Law dated 23.05.2015 No. 129-FZ, “On amendments to separate legislative acts of the Russian Federation”. Available at <http://www.kremlin.ru/acts/bank/39720>. The amendments this law made to the criminal code include the addition of Article 284-1, which proscribes “[c]arrying out activities in the territory of the Russian Federation by a foreign or international non-governmental organization in respect of which a decision was made on the undesirability of its activities in the territory of the Russian Federation.” The offense is punishable with a prison term of two to six years.

⁷ See Freedom House, “Russia: Freedom in the World 2020.” (“The judiciary lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences. The Presidential Personnel Commission and court chairmen control the appointment and reappointment of the country’s judges, who tend to be promoted from inside the judicial system rather than gaining independent experience as lawyers.”); U.S. Department of State, “2019 Country Reports on Human Rights Practices: Russia”, 2020, pg. 15. Available at <https://www.state.gov/wp-content/uploads/2020/03/RUSSIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

Council of Europe's Commissioner for Human Rights, for example, has raised concerns in this regard, observing that appointment and dismissal procedures "provide insufficient guarantees for objective and fair proceedings" and that "judges remain exposed to pressure from powerful political and economic interests."⁸ In its 2019 human rights report on Russia, the U.S. Department of State similarly stated: "judges remained subject to influence from the executive branch, the armed forces, and other security forces, particularly in high-profile or politically sensitive cases, as well as to corruption. The outcomes of some trials appeared predetermined."⁹

The UN Special Rapporteur on the Independence of Judges and Lawyers likewise remarked on continuing executive influence in its most recent report on the Russian Federation, citing "many allegations of direct and indirect threats to - and improper influence, interference and pressure on - the judiciary, which continue to adversely affect its independence and impartiality."¹⁰ The Special Rapporteur noted reports of the judiciary functioning in "close" cooperation with the prosecution and the executive.¹¹

The problem of judicial collusion has resulted in, and is exacerbated by, violations of fair trial rights. Per the U.S. Department of State's 2019 report, "executive interference with the judiciary and judicial corruption [has] undermined [the right to a fair trial]."¹² Abuses chronicled by various organizations and institutions include "lack of justification for verdicts rendered":¹³ violation of the principle of equality of arms;¹⁴ violation of the right to call and examine witnesses;¹⁵ and violation of the right to counsel.¹⁶

Pretrial violations are also rampant. As observed by the U.S. Department of State, "[w]hile the law prohibits arbitrary arrest and detention, authorities engaged in these practices with impunity."¹⁷ According to Freedom House, such violations are connected to the priorities of the executive: "[s]afeguards against arbitrary arrest and other due process

⁸ Statement of Nils Muižnieks, Council of Europe Commissioner for Human Rights 2012-2018, and former Commissioners Thomas Hammarberg and Álvaro Gil-Robles, "As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain", February 25, 2016. Available at <https://www.coe.int/en/web/commissioner/-/as-long-as-the-judicial-system-of-the-russian-federation-does-not-become-more-independent-doubts-about-its-effectiveness-remain>.

⁹ U.S. Department of State, "2019 Country Reports on Human Rights Practices: Russia", 2020, pg. 15.

¹⁰ Human Rights Council, Report of The Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. A/HRC/26/32/Add.1, April 30, 2014, para. 14.

¹¹ Id. at para. 16.

¹² U.S. Department of State, "2019 Country Reports on Human Rights Practices: Russia", 2020, pg. 15.

¹³ Human Rights Council, Report of The Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. A/HRC/26/32/Add.1, April 30, 2014, para. 16.

¹⁴ Statement of Nils Muižnieks, Council of Europe Commissioner for Human Rights 2012-2018, and former Commissioners Thomas Hammarberg and Álvaro Gil-Robles, "As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain", February 25, 2016.

¹⁵ Perseus Strategies with support from Memorial Human Rights Center, "The Kremlin's Political Prisoners: Advancing a Political Agenda by Crushing Dissent", May 2019, pgs. 117-118.

¹⁶ Id. at pgs. 120-121.

¹⁷ U.S. Department of State, "2019 Country Reports on Human Rights Practices: Russia", 2020, pg. 12.

guarantees are regularly violated, particularly for individuals who oppose or are perceived as threatening the interests of the political leadership and its allies.”¹⁸

With respect to administrative offenses, the authorities consistently abuse the “Delivery” procedure, under which the police may detain an individual for a short amount of time in order to draw up a citation for an administrative offense, as well as “Administrative Detention,” which is strictly limited in both purpose and duration by law.¹⁹ Both issues will be discussed at length below.

Targeting Human Rights Activists and Lawyers

The passing of increasingly draconian laws, enforced with the assistance of a judiciary subject to “executive interference,” has empowered the authorities to target and detain political adversaries.²⁰ Rights groups have documented a sharp rise in the number of political prisoners in recent years.²¹ As of December 2019, Russia-based human rights organization Memorial estimated the number of political prisoners in Russia at 64 (excluding many more persecuted for their religious beliefs).²² As noted by Memorial, however, “[t]he real number of political prisoners and other individuals deprived of their liberty for political reasons in today’s Russia is undoubtedly much higher.”²³

In particular, members of the opposition have been frequent targets of the authorities.²⁴ Alexey Navalnyy - a lawyer who rose to prominence by exposing corruption within the government and who has been described as the “most prominent face of Russian

¹⁸ Freedom House, “Russia, Freedom in the World 2020.”

¹⁹ See European Court of Human Rights, *Lashmankin and Others v. Russia*, App. Nos. 57818/09 and 14 others, February 7, 2017, paras. 486-492 (finding that the Delivery and Administrative Detention of several applicants was unlawful and/or arbitrary because the government failed to provide sufficient justification); European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, paras. 61-65 (finding that the Delivery and Administrative Detention of the applicant was unlawful due to insufficient justification); European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014, paras. 91-98 (finding the Delivery and Administrative Detention of the applicants unlawful and arbitrary due to lack of sufficient justification); European Court of Human Rights, *Frumkin v. Russia*, App. No. 74568/12, January 5, 2016, paras. 147-152 (finding the applicant’s 36-hour Administrative Detention pending trial arbitrary due to insufficient reasoning as to why his circumstances were “exceptional” within the statutory meaning); European Court of Human Rights, *Korneyeva v. Russia*, App. No. 72051/17, October 8, 2019, paras. 34-36 (finding the applicant’s Delivery and Administrative Detention arbitrary due to lack of justification under Russian law).

²⁰ See Freedom House, “Russia, Freedom in the World 2020.”

²¹ Radio Free Liberty Europe, “Activist: Number of Political Prisoners in Russia Twice What It Was in U.S.S.R.,” July 10, 2019. Available at <https://www.rferl.org/a/activist-number-of-political-prisoners-in-russia-twice-what-it-was-in-ussr/30048022.html>.

²² Memorial Human Rights Center, “Memorial publishes new lists of political prisoners in Russia”, December 12, 2019. Available at https://memohrc.org/en/news_old/memorial-publishes-new-lists-political-prisoners-russia.

²³ *Id.*

²⁴ See Amnesty International, “Russia: Opposition Activists Face Escalating Crackdown as Presidential Election Nears”, March 15, 2018. Available at <https://www.amnesty.org/en/latest/news/2018/03/russia-opposition-activists-face-escalating-crackdown-as-presidential-election-nears/>.

opposition to President Vladimir Putin”²⁵ - has continually been subjected to arbitrary detention and administrative and criminal proceedings, discussed more below.

Human rights activists and journalists critical of the Putin administration have likewise been targeted.²⁶ As observed by Amnesty International, the authorities “have used baseless criminal charges, often resulting in detention and imprisonment, as part of a smear campaign to obstruct and delegitimize the work of human rights defenders.”²⁷

The aforementioned restriction on foreign or international non-governmental organizations engaging in “undesirable activities” has provided the authorities with another tool to use against activists.²⁸ In January 2019 Anastasia Shevchenko, a member of the banned Open Russia Civic Movement, became the first activist to be investigated under the law; the authorities alleged that in her capacity as a member of the movement, Shevchenko “organized a workshop; spoke at a movement meeting about free legal aid, using social media, and participation in local elections; and attended a peaceful authorized protest, where she held a placard that read, ‘We’re tired of you.’”²⁹ At the time of writing, Shevchenko had been under house arrest for over a year in connection with the charges.

Finally, human rights lawyers like Mr. Benyash are regularly subjected to harassment. As documented by Human Rights Embassy, the Russian authorities have violated the rights of lawyers through “the use of concealed operative-investigative measures and of investigative activities against lawyers [that violated] established ... procedure, attempts

²⁵ BBC, “Alexei Navalny: Russia’s vociferous Putin critic”, July 30, 2019. Available at <https://www.bbc.com/news/world-europe-16057045>.

²⁶ See Amnesty International, “Unfair Game: Persecution of Human Rights Defenders in Russia Intensifies”, September 17, 2019, pgs. 12-17 (Mikhail Benyash’s case is discussed on pgs. 16-17). Available at <https://www.amnesty.org/en/documents/eur46/0950/2019/en/>. See also Human Rights Watch, “Russia’s Crackdown on Human Rights Defenders Escalates”, November 1, 2019. Available at <https://www.hrw.org/news/2019/11/01/russias-crackdown-human-rights-defenders-escalates-0>; Organization for Security and Cooperation in Europe, “OSCE Media Freedom Representative calls for dropping of criminal charges against Radio Ekho Moskvyy journalist Svetlana Prokopyeva in Russia”, February 11, 2019. Available at <https://www.osce.org/representative-on-freedom-of-media/411116>; Human Rights Watch, “Judge Vacates Activist’s Sentence, but Keeps Him Behind Bars”, March 2, 2020. Available at <https://www.hrw.org/news/2020/03/02/judge-vacates-activists-sentence-keeps-him-behind-bars#:~:text=A%20Russian%20man%20sentenced%20to,months%20%E2%80%93%20unjustly%20%E2%80%93%20behind%20bars.&text=The%20good%20news%20is%20that,had%20upheld%20Kotov's%20outrageous%20sentence>; Amnesty International, “Russia: Anastasia Shevchenko’s house arrest extended as persecution of opposition activists widens”, March 15, 2019. Available at <https://www.amnesty.org/en/latest/news/2019/03/russia-anastasia-shevchenkos-house-arrest-extended-as-persecution-of-opposition-activists-widens/>.

²⁷ Amnesty International, “Unfair Game: Persecution of Human Rights Defenders in Russia Intensifies”, September 17, 2019, pg. 12.

²⁸ Human Rights Watch, “Russia: Persecution of ‘Undesirable’ Activists”, January 18, 2020. Available at <https://www.hrw.org/news/2020/01/18/russia-persecution-undesirable-activists#>.

²⁹ Human Rights Watch, “Russia: First Criminal Case under ‘Undesirables’ Law”, January 24, 2019. Available at <https://www.hrw.org/news/2019/01/24/russia-first-criminal-case-under-undesirables-law>; Human Rights Watch, “A Perversion of Justice in Russia”, January 23, 2020. Available at <https://www.hrw.org/news/2020/01/23/perversion-justice-russia>.

to compel lawyers to cooperate with law enforcement agencies, summoning and questioning lawyers as witnesses in criminal cases where they have participated as defenders in order to obtain confidential information ... illegal initiation of criminal cases / proceedings in respect of lawyers ... [interrogating] lawyers as witnesses.”³⁰

In addition to administrative and criminal sanctions, human rights lawyers face the prospect of disbarment in retribution for their work. In January 2019, for example, the Russian Ministry of Justice called for the disbarment of Crimean human rights lawyer Emil Kurbedinov, designed to “deprive Emil of the possibility to practice law and deprive Emil’s clients, who have been subjected to politically motivated persecution, of the effective assistance.”³¹ While Mr. Kurbedinov has yet to be disbarred, the threat remains. Most recently, the authorities detained lawyers “holding one person pickets outside of Russia’s main criminal investigative agency” on the pretext of coronavirus restrictions.³² The lawyers were protesting “the detention of two attorneys in the republic of Kabardino-Balkaria on charges of violence against police,”³³ the same allegations deployed against Mr. Benyash.

Suppression of Peaceful Protest

Raids on peaceful protests are commonplace and have resulted in the arrest and charging of large numbers of demonstrators.³⁴ The “Moscow Case” of 2019 presents a typical example; the authorities violently disbanded peaceful protests across the city, arresting and charging 24 individuals.³⁵ 14 of these individuals were sentenced to between 2 and 3.5 years in prison.³⁶

The squelching of peaceful protest has spurred a profusion of complaints to courts both domestic and international. The European Court of Human Rights has weighed in on the issue so many times that it recently rebuked the Russian Federation for failing to amend

³⁰ Human Rights Embassy, “Update to the Report 2015 - Human Rights Lawyers at Risk”, September 16, 2019. Available at http://humanrightsembassy.org/attachments/article/230/Document_Update%20to%20the%20Report%202015_Human%20Rights%20Lawyers%20at%20Risk_16.09.2019.pdf.

³¹ Human Rights House, “Persecution of Lawyers and Human Rights Defenders in Occupied Crimea”, January 21, 2019. Available at <https://humanrightshouse.org/statements/persecution-of-lawyers-and-human-rights-defenders-in-occupied-crimea/>.

³² Associated Press, “Protesting Lawyers Detained in Moscow for Violating Coronavirus Lockdown”, May 31, 2020. Available at <https://apnews.com/dd7a639dadfb3f72607e8ece0223bc43>.

³³ *Id.*

³⁴ See Human Rights Watch, “World Report 2019: Russia, Peaceful Assembly”, 2020. Available at <https://www.hrw.org/world-report/2019/country-chapters/russia>; Amnesty International, “Russia: Police crush peaceful protests and arrest hundreds including children”, September 10, 2018. Available at <https://www.amnesty.org/en/latest/news/2018/09/russia-police-crush-peaceful-protests-and-arrest-hundreds-including-children/>.

³⁵ Human Rights Watch, “The ‘Moscow Case’: What You Need to Know”, October 30, 2019. Available at https://www.hrw.org/news/2019/10/30/moscow-case-what-you-need-know#Full_List.

³⁶ *Id.*

disproportionately harsh legislation regarding peaceful protests and failing to correct systemic deficiencies that facilitate abuse of the right to peaceful protest.³⁷

To note, such cases generally share key features: they involve defendants arrested in the act of peaceful protest; the defendants are apprehended under a “Delivery” procedure, by which the police may detain an individual for a short amount of time in order to draw up a citation for an administrative offense; the defendants are prosecuted and found guilty under Article 20.2 (participating in or organizing an unauthorized protest) and/or Article 19.3 (disobeying the orders of a police officer) of the Code of Administrative Offenses (CAO); the convicting court bases its decision solely, or in major part, on the testimonies of the arresting officers, whose version of events often departs significantly from that of the defendants; and the convictions result in stiff punishments, ranging from large fines to days or weeks of imprisonment.³⁸ In the 2019 European Court of Human Rights case of *Korneyeva v. Russia*, in which the applicant was convicted of violating both Articles 20.2 and 19.3, the Court remarked that it had over 100 applications pending in cases similar to that of Ms. Korneyeva, in addition to the many such cases it had already adjudicated.³⁹

As mentioned above, Alexey Navalnyy, a prominent opposition leader and frequent organizer of public protests, has faced continuous judicial harassment. His saga, as documented in European Court of Human Rights decisions, is laid out below, reflecting the authorities’ abuse of the court system to suppress dissent and freedom of assembly.

In December 2011, Mr. Navalnyy organized a demonstration protesting the State Duma elections, which were reported to have been “studded with red flags [suggesting] broad electoral fraud.”⁴⁰ At the protest, he was arrested and convicted of disobeying police orders. In its 2014 *Navalnyy and Yashin* verdict, the European Court of Human Rights found that the proceedings against Mr. Navalnyy had been riddled with fundamental rights violations, including violations of his right to peaceful public assembly, his right to be free

³⁷ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, November 15, 2018, paras. 172, 185-186.

³⁸ For examples of such cases, see European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, November 15, 2018; European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018; European Court of Human Rights, *Kasparov and others v. Russia*, App. No. 21613/07, October 3, 2013; European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014; European Court of Human Rights, *Frumkin v. Russia*, App. No. 74568/12, January 5, 2016; European Court of Human Rights, *Korneyeva v. Russia*, App. No. 72051/17, October 8, 2019; European Court of Human Rights, *Razvozhayev v. Russia and Ukraine & Udaltsov v. Russia*, App. Nos. 75734/12, 2695/15, and 55325/15, November 19, 2019, paras. 295-299.

³⁹ European Court of Human Rights, *Korneyeva v. Russia*, App. No. 72051/17, October 8, 2019, para. 68.

⁴⁰ See Wall Street Journal, “Russia’s Dubious Result: Analysis of Parliamentary Results Points to Widespread Fraud”, December 28, 2011. Available at <https://www.wsj.com/articles/SB10001424052970203391104577124540544822220>.

from arbitrary detention, his right to be free from inhuman or degrading treatment, his right to a fair trial, and his right to effective remedy.⁴¹

In 2012, while his application in *Navalnyy and Yashin* was pending before the European Court, Mr. Navalnyy was additionally charged with criminal fraud-related offenses and eventually convicted in proceedings that the European Court in its 2016 *Navalnyy and Ofitserov* judgment excoriated as profoundly unfair. In the court's words:

the domestic courts ... failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and may be taken as suggesting that they did not even care about appearances. It is noteworthy that the courts dismissed without examination the applicants' allegations of political persecution.⁴²

In light of these violations, the Court ordered a domestic retrial.

Between 2012 and 2014, Mr. Navalnyy was arrested and detained seven times in connection with political protests, proceedings which the European Court's Grand Chamber found in its 2018 *Navalnyy* verdict to have violated his right to be free from arbitrary detention, his right to peaceful assembly, and his right to a fair trial.⁴³ The Grand Chamber also ruled that the Russian authorities had saddled Mr. Navalnyy with administrative and criminal proceedings "to suppress that political pluralism which forms part of 'effective political democracy' governed by 'the rule of law'."⁴⁴

At his retrial on the aforementioned fraud charges in February 2017, Mr. Navalnyy was once again found guilty; this conviction legally prohibited him from challenging Mr. Putin in the 2018 federal elections.⁴⁵ A few months later, in *Navalnyy (no. 2)*, the European Court found that Mr. Navalnyy's house arrest as well as other measures imposed during the fraud investigation violated his right to be free from arbitrary detention and his right to freedom of expression.⁴⁶ The Court again concluded that the authorities had an improper motive in subjecting Mr. Navalnyy to these measures.⁴⁷

⁴¹ European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014.

⁴² European Court of Human Rights, *Navalnyy and Ofitserov v. Russia*, App. Nos. 46632/13 and 28671/14, February 23, 2016, paras. 116-120.

⁴³ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, November 15, 2018.

⁴⁴ *Id.* at para. 175.

⁴⁵ BBC, "Russian presidential election: Alexi Navalny barred from competing", December 25, 2017. Available at <https://www.bbc.com/news/world-europe-42479909>.

⁴⁶ European Court of Human Rights, *Navalnyy v. Russia (no. 2)*, App. No. 43734/14, April 9, 2019.

⁴⁷ *Id.* at paras. 92-99.

Abuse of detainees

The torture and inhuman treatment of detainees in Russian prisons has been widely documented and rarely prosecuted.⁴⁸ In its most recent Concluding Observations on Russia, the UN Committee against Torture expressed “deep” concern “at numerous reliable reports of the practice of torture and ill-treatment ... including as a means to extract confessions, and at many recent reports documenting cases of torture.”⁴⁹ The Committee further cited “consistent reports on the excessive use of force by law enforcement officials during demonstrations.”⁵⁰ The mortality rate within Russian prisons is estimated to be double the average of Council of Europe member states.⁵¹

The death of Sergei Magnitsky in 2009 catapulted this issue into the international spotlight. Mr. Magnitsky was a tax attorney who had exposed a scheme by Russian officials to acquire the equivalent of \$230 million in tax refunds.⁵² He was arrested in November 2008 and held for nearly a year without trial.⁵³ As a result of beatings by prison guards and prolonged lack of medical treatment for serious health problems, Mr. Magnitsky died in detention.⁵⁴ In response, the United States, European Union, and other jurisdictions have passed or proposed so-called “Magnitsky laws,” authorizing sanctions and other tools against human rights offenders.⁵⁵

Despite the heightened scrutiny generated by Mr. Magnitsky’s death, the situation has not improved. As noted above, the UN Committee against Torture recently denounced Russia for its continued abuse of detainees in prisons. Correspondingly, the last several years have seen videos of such maltreatment leaked to the media, making detainees’ allegations impossible to deny.⁵⁶ Meanwhile, the European Court of Human Rights has

⁴⁸ See Organization Crime and Corruption Reporting Project, “The Low Price of Torture in Russia”, October 9, 2018. Available at <https://www.occrp.org/en/investigations/8715-the-low-price-of-torture-in-russia>. See also U.S. Department of State, “2019 Country Reports on Human Rights Practices: Russia”, 2020, pgs. 5-6 (“[N]umerous credible reports indicated law enforcement personnel engaged in torture, abuse, and violence to coerce confessions from suspects, and authorities only occasionally held officials accountable for such actions”).

⁴⁹ Committee against Torture, Concluding observations on the sixth periodic report of the Russian Federation, U.N. Doc. CAT/C/RUS/CO/6, August 28, 2018, para. 12.

⁵⁰ *Id.* at para. 18.

⁵¹ Perseus Strategies with support from Memorial Human Rights Center, “The Kremlin’s Political Prisoners: Advancing a Political Agenda by Crushing Dissent”, May 2019, pg. 20 (citing ANNUAL PENAL STATISTICS SPACE I – PRISON POPULATIONS SURVEY 2015, COUNCIL OF EUROPE, updated April 25, 2017, pgs. 114-115. Available at http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf).

⁵² See Washington Post, “Finally, some accountability in the death of Sergei Magnitsky”, August 29, 2019. Available at https://www.washingtonpost.com/opinions/global-opinions/finally-some-accountability-in-the-death-of-sergei-magnitsky/2019/08/29/2bd2cf34-c9b7-11e9-a1fe-ca46e8d573c0_story.html.

⁵³ See BBC, “Magnitsky wins Russian rights battle 10 years after his death”, August 27, 2019. Available at <https://www.bbc.com/news/world-europe-49481471>.

⁵⁴ See *id.*

⁵⁵ See Sergei Magnitsky Rule of Law Accountability Act of 2012.

⁵⁶ See Human Rights Watch, “A Torture Scandal Makes Russia Pay Attention”, August 16, 2018. Available at <https://www.hrw.org/news/2018/08/16/torture-scandal-makes-russia-pay-attention>; Committee against

ruled against the Russian Federation in hundreds of complaints of torture and/or ill-treatment in recent years.⁵⁷ In February 2020 alone, the Court issued three judgments finding that the Russian authorities were responsible for torture and/or inhuman or degrading treatment with respect to 29 detainees, ordering restitution totaling 835,000 euros.⁵⁸

Mr. Benyash's Case

Mr. Benyash's case reflects the patterns outlined above: he is a human rights lawyer; he was arrested and detained in connection with a public protest organized by Alexey Navalnyy; the authorities appear to have abused the Delivery and Administrative Detention procedures; Mr. Benyash was unjustifiably detained pending trial; the case against him relied almost exclusively on the accounts of police officers; his trial was marred by serious violations of his right to a fair trial; and he made credible allegations that he was abused by the police while in detention, which have yet to be addressed by the authorities.

B. CASE HISTORY

Mikhail Benyash is a human rights lawyer known for his representation of Russian citizens detained while participating in peaceful public protests.

Arrest

In the run-up to a protest called for by Alexey Navalnyy, scheduled for September 9, 2018, Mr. Benyash made several posts on social media. In these posts, he warned would-be protestors that the government of Krasnodar, where the protest was planned, had rejected the organizer's application for a permit. He further explained that the absence of a permit did not mean that individuals with "different opinions" could not show up to the site of the planned protest and that a fine or even an arrest was a small price to pay for defense of one's values.⁵⁹ The posts caught the attention of the authorities in Krasnodar, with the result that on September 7, 2018, the Deputy Chief of the Administrative

Torture, Concluding observations on the sixth periodic report of the Russian Federation, U.N. Doc. CAT/C/RUS/CO/6, August 28, 2018, paras. 16-17; Radio Free Europe Radio Liberty, "New Videos Reveal More Evidence of Torture at Russian Prison", March 11, 2019. Available at <https://www.rferl.org/a/new-videos-reveal-more-evidence-of-torture-at-russian-prison/29814944.html>.

⁵⁷ See European Court of Human Rights, "Annual Report 2019", pg. 135. Available at https://echr.coe.int/Documents/Annual_report_2019_ENG.pdf; European Court of Human Rights, "Annual Report 2018", pg. 177. Available at https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf; European Court of Human Rights, "Annual Report 2017", pg. 173. Available at https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf.

⁵⁸ European Court of Human Rights, *Nigmatullin and others v. Russia*, App. No. 47821/09 and others, February 4, 2020, paras. 125-131; European Court of Human Rights, *Ishevskiy and others v. Russia*, App. No. 39619/09 and others, February 4, 2020, paras. 110-116; European Court of Human Rights, *Botov and others v. Russia*, App. No. 22463/07 and others, February 4, 2020, paras. 126-135.

⁵⁹ Benyash Facebook Post, Criminal Case File, Volume 1, pg. 168.

Enforcement Department of the Ministry of Internal Affairs for Krasnodar, Lt. Colonel Denis Pronsky, initiated administrative proceedings against Mr. Benyash for a potential violation of the Code of Administrative Offenses (CAO): specifically, Article 20.2, which proscribes organization and/or participation in an unauthorized protest.⁶⁰ The authorities were initially unable to locate Mr. Benyash for questioning.⁶¹

On September 8, the day before the planned protest, Mr. Pronsky issued an official order for Mr. Benyash to be apprehended and delivered to the police station to receive a charge sheet for the administrative offense (a Protocol).⁶² The order claimed that Mr. Benyash had intentionally ignored demands to appear at the Krasnodar Office of the Ministry of Internal Affairs of Russia (the police station). At trial it emerged that the police did not mail any such request to appear until *after* Mr. Benyash's arrest.⁶³

Mr. Benyash arrived in Krasnodar the day before the protest, planning to monitor it and provide legal assistance to protesters as required. Unaware that he was alleged to have committed an administrative offense,⁶⁴ Mr. Benyash noticed signs that he was being surveilled by the police.⁶⁵ Inferring that the police were illegally targeting him for his work as a defense attorney, he submitted a criminal complaint on unlawful surveillance to the Office of the Prosecutor and Krasnodar Investigative Committee on September 9, the

⁶⁰ Krasnodar Department of Internal Affairs, Resolution No 13889, September 7, 2018.

⁶¹ Krasnodar police sent a letter to the police department of Gelendzhik, a Black Sea coastal town where the Krasnodar police believed Mr. Benyash to be located. The letter contained instructions to interrogate Mr. Benyash about his online post, whether he called for participation in a protest, and whether he planned to participate in the protest on September 9. The Gelendzhik police responded on September 8, 2018 that they could not interrogate Mr. Benyash because he was located in a different town, Djubga. Letter (Teletype) from Krasnodar Police Department to the Gelendzhik Police Department (undated); Letter (Teletype) from Gelendzhik Police Department to the Krasnodar Police Department, September 8, 2018.

⁶² Krasnodar Police Delivery Order, September 8, 2018.

⁶³ The police issued a summons on September 7, 2018. However, it was not placed in the mail until September 11, 2018, as evidenced by police department records of outgoing mail, which were examined at trial. See Letter from Krasnodar Police to Leninsky District Court, dated July 3, 2019, enclosing List of Mail Packages No. 102. The police falsely claimed the summons was "delivered by mail" on September 7, 2018. Krasnodar Department of Internal Affairs, Resolution No. 13889, September 7, 2018.

⁶⁴ Although Lt. Colonel Pronsky testified at trial that he had called Mr. Benyash on his cellphone to speak about the administrative case, this claim was proven to be false by phone company records subpoenaed by Mr. Benyash, which he introduced at trial. Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, June 11, 2019, pg. 202. As discussed in the methodology section, a "protocol" is a record of a court hearing produced by the court clerk.

⁶⁵ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 10 (testimony of Mr. Benyash). According to Mr. Benyash, such surveillance would have been unlawful for two reasons. First, any surveillance of attorneys requires a court warrant, which had not been obtained in this case. Second, Russian law does not permit any surveillance in connection with the administrative offense of which Mr. Benyash was suspected. See Federal Law on Advocacy and the Attorneys in the Russian Federation dated 05.31.2002 N 63-, Article 8(3): "The carrying out of operational-search measures and investigative actions in relation to a lawyer (including in residential and office premises used by him to carry out advocacy activities) is allowed only on the basis of a court decision." Federal Law of 08/12/1995 N 144-FZ: Article 2 provides an exhaustive list of reasons for surveillance, such as investigation of criminal offenses or the acquisition of information presenting a threat to national security. Mr. Benyash's alleged offense was neither a criminal offense nor a threat to national security.

morning of the protest.⁶⁶ Around 1:30 pm, Mr. Benyash left the office of the Investigative Committee. As he walked down the street with a client, Irina Barkhatova, an unmarked vehicle pulled up beside them.⁶⁷ Two men in civilian clothing exited the car and approached Mr. Benyash.⁶⁸ It later emerged that they were Yegor Dolgov and Dmitri Yurchenko, junior operative officers from the criminal investigation department of the Ministry of Internal Affairs Office in Krasnodar.

According to Mr. Benyash and Ms. Barkhatova, the two officers did not identify themselves. Instead, one of the two simply told Mr. Benyash “let’s go” as he grabbed him by the arm and pushed him into the back seat of the car.⁶⁹ At this point, Ms. Barkhatova began filming the incident with her phone: the video shows Officer Yurchenko grasping Mr. Benyash by the elbow and moving him towards the vehicle.⁷⁰ Ms. Barkhatova put away her phone when one of the men ordered her to stop filming and forced her into the front seat of the car.⁷¹

In contrast, Officers Dolgov and Yurchenko claimed that they had followed all relevant protocols: that they introduced themselves; that they presented identification; and that Ms. Barkhatova and Mr. Benyash willingly accompanied them to the police station.⁷²

Mr. Benyash and Ms. Barkhatova testified that at the time of their apprehension they were unaware that the men were police officers and thus believed they were being abducted.⁷³ Mr. Benyash specifically stated that he assumed the abductors were “titushki” – violent

⁶⁶ Criminal complaint by Mikhail Benyash to the Investigative Committee for Krasnodar Region, September 9, 2018.

⁶⁷ Leninsky District Court for Krasnodar, Protocol on Court Hearing, September 10, 2018, pg. 1; Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019 (testimony of Mr. Benyash); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019 (testimony of Ms. Barkhatova); Investigative Committee of Krasnodar, Protocol of Barkhatova Witness Interrogation, October 13, 2018.

⁶⁸ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019 (testimony of Mr. Benyash); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019 (testimony of Ms. Barkhatova).

⁶⁹ Id.

⁷⁰ See Youtube video, “Lawyer in Krasnodar. Protects people at risk of health and freedom”, September 28, 2018. Available at https://www.youtube.com/watch?v=ss1_QHZlrSo.

⁷¹ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 11 (testimony of Mr. Benyash); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pgs. 147-8 (testimony of Ms. Barkhatova); Investigative Committee, Protocol of Barkhatova Witness Interrogation, October 13, 2018; Monitor’s Notes, April 23, 2019.

⁷² See Report of September 9, 2018, signed by Officer Dolgov; Report of September 9, 2018, signed by Officer Yurchenko; Monitor’s Notes, April 9 (testimony of Officer Dolgov and testimony of Officer Yurchenko); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pgs. 78-79 (testimony of Officer Dolgov), pg. 110 (testimony of Officer Yurchenko).

⁷³ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 11 (testimony of Mr. Benyash); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pgs. 147-8 (testimony of Ms. Barkhatova); Monitor’s Notes, April 23, 2019.

thugs who support the police in targeting protesters.⁷⁴ To note, this distinction would become crucial when Mr. Benyash was criminally charged for assaulting the officers under Article 318(1) of the Criminal Code (Assault Against a Representative of the Authority). To meet the intent element of Article 318(1), an accused must have been aware that the individuals he/she attacked were police officers.

Mr. Benyash and Ms. Barkhatova's account of what occurred inside the car and upon arrival at the police station is as follows. Mr. Benyash was in the back seat with Officer Yurchenko and Ms. Barkhatova was in the front with Officer Dolgov, who was driving. When Mr. Benyash asked the men who they were, one of them responded: "You know who we are, and we know who you are."⁷⁵ Mr. Benyash immediately attempted to make a call on his phone, prompting Officer Yurchenko to grab Mr. Benyash, twist Mr. Benyash's arm behind him, squeeze his finger into Mr. Benyash's eye, and begin choking Mr. Benyash.⁷⁶ During this confrontation, Mr. Benyash tried to wrench Officer Yurchenko's arm off of his neck.⁷⁷ Officer Yurchenko subsequently secured Mr. Benyash in the back seat with handcuffs.⁷⁸

A few minutes later, the car arrived at the gates of what turned out to be the Office of the Ministry of Internal Affairs (the police station), where it was surrounded by uniformed police. According to Mr. Benyash, only then did he realize that his abductors were police officers. In the parking lot of the Ministry, Officers Dolgov and Yurchenko opened the vehicle door and threw Mr. Benyash on the ground with his hands still cuffed behind him, causing injuries to the right side of his face.⁷⁹

In contrast, Officers Dolgov and Yurchenko claimed that the extensive injuries found on Mr. Benyash were self-inflicted. In their initial reports, the officers stated that upon arriving at the police station parking lot Mr. Benyash had thrashed about in the car and hit his head against the car window, omitting any mention that Mr. Benyash had directly attacked or harmed them.⁸⁰ Subsequently, the officers stated that Mr. Benyash had assaulted them

⁷⁴ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 11 (testimony of Mr. Benyash).

⁷⁵ *Id.* at pgs. 11-14.

⁷⁶ *Id.*

⁷⁷ *Id.*; Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pgs. 147-8 (testimony of Ms. Barkhatova); Monitor's Notes, April 23, 2019; Investigative Committee, Protocol of Barkhatova Witness Interrogation, October 13, 2018.

⁷⁸ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 11 (testimony of Mr. Benyash); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pgs. 147-8 (testimony of Ms. Barkhatova); Monitor's Notes, April 23, 2019.

⁷⁹ *Id.*

⁸⁰ Report of September 9, 2018, signed by Officer Dolgov; Report of September 9, 2018, signed by Officer Yurchenko. Both reports have identical wording, in relevant part as follows: "Arriving at about 2:00 p.m. in the parking lot of the police station of the Office of the Ministry of Internal Affairs of the Russian Federation in Krasnodar ... [Mr. Benyash] began to inflict bodily injuries on various parts of his face, banging his head against the glass of the car, kicking the doors, trying to flee the territory of the police department, he

in the car upon nearing the police station and had flown into a fit upon exiting the car, beating his head on the pavement of the police station parking lot.⁸¹

Custody at Police Station

Once inside the police station, Mr. Benyash was taken to an interrogation room. According to Mr. Benyash, Officer Yurchenko ordered others to leave, ordered Mr. Benyash to sit on a chair, and struck Mr. Benyash several times on his head and left ear, knocking him off the chair.⁸² Mr. Benyash's resulting injuries were so substantial that he was eventually taken in a police vehicle to a hospital, where he was examined in the presence of police while still wearing handcuffs, and then returned to the police station.⁸³ As reflected in photo and medical documentation, Mr. Benyash incurred bruising and bleeding on his face, hearing loss, and internal bleeding.⁸⁴

Mr. Benyash has asserted that he repeatedly requested access to counsel over the course of his detention at the police station,⁸⁵ which included his interrogation by Evgeny Danilchenko, an investigator. At approximately 4:45 pm, Mr. Benyash's lawyer, Mr. Alexey Avanesyan, arrived at the police station to meet with his client. He was denied entry by the police, who told him that there was an ongoing "lockdown" procedure in place at the station.⁸⁶ Mr. Avanesyan, however, testified that while waiting he saw civilians entering and leaving the police station.⁸⁷ He was granted access to his client after several hours, at which point Mr. Benyash had been in detention without legal counsel for approximately seven hours.⁸⁸

At approximately 10 pm, over eight hours after his arrest, Mr. Benyash was presented with two Protocols (the equivalent of charge sheets), which charged him - respectively - with violating Article 20.2(2) of the CAO for organizing an unauthorized protest and

responded with gross refusal to repeated legal demands by the police officers, trying to provoke a fight with the police officers. In order to suppress the illegal actions of citizen Benyash, physical force was used using the special means 'handcuffs,' since this citizen could cause physical harm to himself and others."

⁸¹ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pg. 79 (testimony of Officer Dolgov), pg. 111 (testimony of Officer Yurchenko); Monitor's Notes, April 9, 2019.

⁸² Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pgs. 12-15 (testimony of Mr. Benyash).

⁸³ See *id.* at pgs. 12-13.

⁸⁴ See Krasnodar City Hospital, Medical Records of Mr. Benyash Examination, September 9-10, 2018; Youtube video, "Lawyer in Krasnodar. Protects people at risk of health and freedom", September 28, 2018. Available at https://www.youtube.com/watch?v=ss1_QHZlrSo.

⁸⁵ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pgs. 12-15 (testimony of Mr. Benyash).

⁸⁶ Leninsky District Court of Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pg. 142 (testimony of Mr. Avanesyan); Monitor's Notes, April 23, 2019.

⁸⁷ *Id.*

⁸⁸ *Id.*

violating Article 19.3 for disobeying the lawful orders of a police officer.⁸⁹ The Protocol on Article 19.3 and two internal reports (the Reports) compiled by Officers Yurchenko and Dolgov and relayed to a superior officer assert that upon arrival at the police station, Mr. Benyash began to thrash about, hitting his head against the car windows and kicking the car doors.⁹⁰ According to the Reports and the Article 19.3 Protocol, when the officers asked Mr. Benyash to cease such activities, he refused and tried to provoke a fight, as a result of which the officers used physical force - putting handcuffs on Mr. Benyash.⁹¹ The Reports and Protocol further state that Mr. Benyash attempted to flee from police custody.⁹²

Mr. Benyash vigorously denied these allegations, writing on the Protocols that the officers' account was false and that his rights had been violated during the arrest.⁹³ In Mr. Benyash's words: the "Report is falsified, the plain-clothed agents did not introduce themselves, they did not present any demands, they immediately became violent, beat me and took away my phone."

On September 11, 2018, Mr. Benyash's attorney filed a complaint with the Investigative Committee of Krasnodar alleging inhuman and degrading treatment by Officers Dolgov and Yurchenko; as discussed below, the Committee has repeatedly declined to open an investigation.

Administrative Proceedings

After the issuance of the Protocols, Mr. Benyash was remanded to Administrative Detention until the adjudication of the two charges the following day.⁹⁴

At the hearing on the Article 20.2 charge for organizing an unauthorized protest, the court found Mr. Benyash guilty and sentenced him to 40 hours of community service.⁹⁵ Although the judge refused to admit any exculpatory evidence, the verdict asserted: "no evidence was presented to the court about the absence of guilt of the person brought to administrative responsibility and the commission of this administrative offense."⁹⁶

⁸⁹ Protocol on Administrative Offense (Article 20.2), September 9, 2018; Protocol on Administrative Offense (Article 19.3), September 9, 2018.

⁹⁰ Protocol on Administrative Offense (Article 19.3), September 9, 2018; Report of September 9, 2018, signed by Officer Dolgov; Report of September 9, 2018, signed by Officer Yurchenko.

⁹¹ Id.

⁹² Id.

⁹³ Protocol on Administrative Offense (Article 20.2), September 9, 2018; Protocol on Administrative Offense (Article 19.3), September 9, 2018.

⁹⁴ Protocol on Administrative Detention, September 9, 2018. Mr. Benyash wrote on the Protocol on Administrative Detention that his rights had been violated.

⁹⁵ Leninsky District Court for Krasnodar, Decision, September 10, 2018.

⁹⁶ Id.

At the second hearing on the Article 19.3 charge for disobeying the orders of a police officer, the same judge (Judge Burenko) convicted Mr. Benyash and sentenced him to 14 days in Administrative Custody - the maximum penalty allowed under the provision.⁹⁷

During the hearing on the Article 19.3 charge, Judge Burenko did not permit testimony from Ms. Barkhatova despite the fact that Ms. Barkhatova witnessed Mr. Benyash's arrest on September 9, 2018 and was even listed as a witness in the Reports.⁹⁸ Without providing reasons, Judge Burenko denied defense motions to make the hearing public and to allow more time for the defense to prepare its case. The judge further declined Mr. Benyash's motions to introduce video evidence showing his detention by Officers Dolgov and Yurchenko⁹⁹ and ignored the fact that the police officers failed to appear at the court hearing without cause.¹⁰⁰

In disregard of Mr. Benyash's testimony, the convicting verdict found that his guilt had been "established by cumulative evidence": i.e. the Protocol of September 9, 2018 and reports written by the officers on the same date.¹⁰¹ Mr. Benyash served the entirety of his 14-day administrative sentence.

The same day that Mr. Benyash completed his 14-day administrative sentence, September 23, 2018, the Krasnodar Prosecutor's Office charged him under Article 318(1) of the Russian criminal code ("Assault Against a Representative of the Authority") for allegedly attacking Officers Dolgov and Yurchenko during the car ride.¹⁰² The offense carries a sentence of up to five years imprisonment.

Notes on Fairness Concerns in Administrative Proceedings

The present report is centered on Mr. Benyash's criminal trial for assaulting Officers Yurchenko and Dolgov, not his Article 19.3 (disobeying police orders) administrative trial and conviction. The latter, however, raises significant concerns, reviewed in brief below.

First, it appears that Mr. Benyash's fair trial rights were grossly violated during the administrative hearing: namely, his right to call and examine witnesses, his right to

⁹⁷ Leninsky District Court for Krasnodar, Decision, September 10, 2018.

⁹⁸ Leninsky District Court for Krasnodar, Protocol on Judicial Session, September 10, 2018, pgs. 8-10. Ms. Barkhatova herself was convicted on the same day for disobeying police orders and fined 500 rubles. The conviction of Ms. Barkhatova was issued by Judge Belyak, who would subsequently serve as the judge in the criminal trial of Mr. Benyash. Leninsky District Court for Krasnodar, Decision, September 10, 2018, convicting Ms. Barkhatova under Article 19.3 of the Code of Administrative Offenses.

⁹⁹Id. at pgs. 4, 10.

¹⁰⁰ Leninsky District Court for Krasnodar, Protocol on Judicial Session, September 10, 2018.

¹⁰¹ Leninsky District Court for Krasnodar, Decision, September 10, 2018, pg. 2.

¹⁰² Leninsky District Court for Krasnodar, Decision on Pretrial Detention, September 28, 2018, pg. 2; Prosecutor's Office of Krasnodar, Closing Indictment, December 28, 2018, pg. 1.

confront the evidence against him, his right to prepare his defense, and his right to the presumption of innocence.

Second, the administrative judgment convicting Mr. Benyash for the Article 19.3 offense (disobeying police orders) was vacated by an appellate court in December 2018.¹⁰³ This appellate decision was issued only after criminal charges were brought against Mr. Benyash - charges that likely would have been barred on double jeopardy grounds if his administrative conviction had been upheld. The issue of improper motivations will be discussed further in the Abuse of Process section.

Due to the vacating of the Article 19.3 judgment, a court ordered that Mr. Benyash be paid compensation.¹⁰⁴ As of the time of publication, the authorities have reportedly still not paid Mr. Benyash. The conviction under Article 20.2 of the Code of Administrative Offenses remains in force. On March 23, 2019, Mr. Benyash filed a complaint to the European Court of Human Rights with respect to this conviction.

Criminal proceedings

As noted above, on September 23, 2018, Mr. Benyash was charged under Article 318(1) of the Russian Criminal Code for allegedly attacking Officers Dolgov and Yurchenko, including by punching Officer Yurchenko in the head and biting Officer Dolgov.¹⁰⁵ As also mentioned above, the officers' initial reports on the arrest did not include these allegations.

In connection with the criminal charge, Judge Diana Belyak of the Leninsky District Court of Krasnodar issued an order remanding Mr. Benyash to 72 hours in custody,¹⁰⁶ upon completion of which Judge Belyak authorized two months of pretrial detention.¹⁰⁷ During the pretrial detention hearing, Judge Belyak refused to admit as evidence Ms. Barkhatova's testimony.¹⁰⁸ One month into Mr. Benyash's pretrial detention, amid intense public pressure,¹⁰⁹ the Krasnodar prosecutor filed a motion supporting Mr. Benyash's

¹⁰³ Krasnodar Regional Court, Decision, December 14, 2018.

¹⁰⁴ Pervomaisk District Court for Krasnodar, Decision, April 22, 2019.

¹⁰⁵ Leninsky District Court for Krasnodar, Decision on Pretrial Detention, September 28, 2018, pg. 2. See also Prosecutor's Office of Krasnodar, Closing Indictment, December 28, 2018, pg. 1.

¹⁰⁶ Leninsky District Court for Krasnodar, Decision on Extension of Detention, September 25, 2018.

Custody following an arrest is authorized for up to 48 hours. Judge Belyak's order extended this period for an additional 72 hours.

¹⁰⁷ Leninsky District Court for Krasnodar, Decision on Pretrial Detention, September 28, 2018.

¹⁰⁸ Leninsky District Court for Krasnodar, Protocol on Judicial Session, September 28, 2018.

¹⁰⁹ See Human Rights Watch, "Russia: Defense Lawyer Arrested, Beaten", October 4, 2018. Available at <https://www.hrw.org/news/2018/10/04/russia-defense-lawyer-arrested-beaten#>; Advokatskaya Gazyeta, "FCL President Appeals to the Prosecutor of the Krasnodar District in the Case of Mikhail Benyash", October 22, 2019 (Russian only). Available at <https://www.advgazeta.ru/novosti/prezident-fpa-obratilsya-k-prokuroru-krasnodarskogo-kraya-po-delu-mikhaila-benyasha/>; Amnesty International, "URGENT ACTION: Lawyer assaulted and arbitrarily detained", September 12, 2018. Available at <https://www.amnesty.org/download/Documents/EUR4690692018ENGLISH.pdf>.

appeal of the Leninsky District Court's pretrial detention order. On October 28, 2018, the reviewing court found that the pretrial detention order was not substantiated by individualized reasoning and ordered Mr. Benyash to be released on bail.¹¹⁰

The prosecution formally indicted Mr. Benyash on December 28, 2018.¹¹¹ His trial commenced on February 21, 2019. The presiding judge at trial was the same Judge Belyak who decided on Mr. Benyash's pretrial detention (and a parallel administrative hearing against Ms. Barkhatova in connection with the same events). 25 hearings were held, during which the prosecution and defense introduced witnesses and documentary evidence as well as presented opening and closing statements.

The primary witnesses for the prosecution were Officer Yurchenko (who alleged he had been punched in the head) and Officer Dolgov (who alleged he had been bitten) , whose testimony was supplemented by several other police officers and two city government employees: these witnesses gave various, often inconsistent, accounts that they had seen Mr. Benyash inflict injuries on himself in the police station parking lot. The prosecution also presented two medical experts who examined Officers Dolgov and Yurchenko some time after the alleged incident. The prosecution further introduced documentary evidence, including statements provided by Officers Yurchenko and Dolgov two weeks after Mr. Benyash's arrest, medical assessments of their injuries, surveillance footage from outside the police station showing their police vehicle approaching the gate, and scene inspection reports, showing the street where Mr. Benyash was arrested and the police parking lot.

The primary witnesses for the defense were Mr. Benyash, Ms. Barkhatova, Mr. Benyash's lawyer Alexey Avanesyan, Dr. Nazir Khapsirokov (the doctor who examined Officers Dolgov and Yurchenko immediately after the alleged attack and who testified that he found soft tissue abrasions but no evidence of bites or head injuries, that Officer Dolgov had not mentioned being bitten, and that Officer Yurchenko had not complained of being punched in the head),¹¹² and a number of individuals who testified that they had previously been arrested by Officers Dolgov and Yurchenko and that neither had introduced themselves as police officers or presented credentials to that effect.¹¹³ The defense supplemented this testimony with documentary evidence, including photo and medical documentation of Mr. Benyash's injuries and the video of the arrest filmed by Ms. Barkhatova.

¹¹⁰ Krasnodar Regional Court, Appeal Judgment, October 23, 2018.

¹¹¹ To note, Mr. Benyash was presented with the charges on December 12, 2018.

¹¹² Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, August 13, 2019, pgs. 273-274; Monitor's Notes, August 13, 2019.

¹¹³ Monitor's Notes, May 14, 2019; Monitor's Notes, May 28, 2019.

On October 11, 2019, Judge Belyak pronounced Mr. Benyash guilty of violating Article 318(1).¹¹⁴ The court sentenced him to a fine of 60,000 rubles, which it commuted to 30,000 rubles in light of time served in pretrial detention.¹¹⁵

Mr. Benyash's appeal against the decision is pending. If the conviction is upheld, Mr. Benyash will be barred from the practice of law under the applicable Russian legislation.¹¹⁶

¹¹⁴ Monitor's Notes, October 18, 2019.

¹¹⁵ Leninsky District Court for Krasnodar, Judgment, Case No. 1-178/19, October 11, 2019.

¹¹⁶ Articles 9(2)(2) and 17(1)(4) of the Federal Law on the Profession of the Lawyer in Russian Federation, May 31, 2002 (as amended on 02 December 2019).

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's TrialWatch initiative, Human Rights Embassy deployed monitors to the trial of Mikhail Benyash before the Leninsky District Court in Krasnodar in the Russian Federation. The trial was in Russian and the monitors were able to follow the proceedings. The monitors did not experience any impediments in entering the courtroom and were present for the majority of the trial.¹¹⁷ The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, legal experts at Human Rights Embassy reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), notes taken during the proceedings, and court documents.

To evaluate the trial's fairness and arrive at a grade, legal experts at Hughes Hubbard & Reed LLP reviewed numerous documents, including (i) court decisions; (ii) arrest records, protocols (charge sheets), and pre-trial reports; (iii) court-issued trial protocols (records of hearings); (iv) documentary evidence submitted by the parties during the trial; (v) medical records; (vi) photos and video recordings; (viii) contemporaneous media reports about the trial; (ix) audio recordings from the trial; and (x) monitors' notes. Hughes Hubbard & Reed LLP has taken every opportunity and measure to test the evidence in the record and to ensure it has the information necessary to reach the findings contained in this Report.

In Russia, hearings are not contemporaneously transcribed by court reporters and official court protocols (produced by court clerks) represent a censored and sanitized version of the proceedings, as confirmed by audio recordings of the hearings recorded by defense counsel. However, due to its wide publicity, the trial of Mr. Benyash was covered by a number of Russian media outlets. Hughes Hubbard relied on two media resources, Mediazona and The Free Media, which published contemporaneous reporting of the trial

¹¹⁷ Human Rights Embassy was not present for hearings on February 21, March 5, March 12, March 19, March 26, and April 2. These hearings entailed Mr. Benyash's not guilty plea, Mr. Benyash's testimony, and the examination of several prosecution witnesses. Human Rights Embassy started monitoring the case on April 9, 2019, on which date the prosecution's presentation of its key witnesses, Officers Dolgov and Yurchenko, commenced. From that date onward, Human Rights Embassy monitored all hearings excepting one (April 16) up until the conclusion of the case: hearings on April 23, May 14, May 28, June 11, June 18, June 25, July 2, July 9, July 30, August 6, August 13, August 20, September 3, September 10, September 17, October 4, and October 11.

online. Hughes Hubbard & Reed LLP has used the court protocols and media reports to supplement monitors' notes.

Human Rights Embassy and Hughes Hubbard found that the proceedings against Mr. Benyash were marred by grave violations of his fundamental rights, such as his right to be free from arbitrary detention, his right to call and examine witnesses, his right to judicial impartiality, his right to the presumption of innocence, and his right to be free from cruel, inhuman, or degrading treatment. Human Rights Embassy and Hughes Hubbard also found Mr. Benyash's trial to constitute a severe abuse of process, initiated by the authorities with the purpose of suppressing the right to freedom of assembly, the right to freedom of expression, and the right to counsel.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR);¹¹⁸ jurisprudence from the United Nations Human Rights Committee (HRC), tasked with monitoring implementation of the ICCPR; the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT);¹¹⁹ the European Convention on Human Rights (ECHR); and jurisprudence from the European Court of Human Rights, tasked with monitoring the implementation of and enforcing the ECHR. Russia acceded to the ICCPR in 1973 and to the CAT in 1987. Russia ratified the ECHR on May 5, 1998, subject to certain reservations.¹²⁰

The report additionally cites provisions in Russia’s criminal and criminal procedure codes, and Code of Administrative Offenses (CAO).

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Unlawful Arrest

Under Article 9(1) of the ICCPR and Article 5(1) of the ECHR, arrests must be in line with domestic legislation. The UN Human Rights Committee, for example, has noted that “deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law.”¹²¹

Mr. Benyash’s administrative arrest appears to have flouted applicable domestic laws. Russian legislation provides that police officers must introduce themselves with their name and rank when approaching a citizen¹²² and must provide reasons for any restrictions on an individual’s freedom or rights.¹²³ Mr. Benyash and Ms. Barkhatova, however, have consistently asserted that Officers Yurchenko and Dolgov failed to introduce themselves or to give any reasons for their actions.¹²⁴ The short video clip of the arrest, showing Officer Yurchenko firmly grasping Mr. Benyash’s elbow as he pushes

¹¹⁸ U.N. General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations, Treaty Series, Vol. 999, pg. 171 [hereinafter “ICCPR”].

¹¹⁹ U.N. General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, United Nations, Treaty Series, Vol. 1465, pg. 85 [hereinafter “CAT”].

¹²⁰ The reservations have no effect on the present analysis.

¹²¹ Human Rights Committee, *Khoroshenko v. Russian Federation*, U.N. Doc. CCPR/C/101/D/1304/2004, March 29, 2011, para. 9.3.

¹²² Federal Law “On Police”, Article 5(4)(1).

¹²³ *Id.* at Article 5(4)(2).

¹²⁴ Mr. Benyash wrote that the police did not introduce themselves on the Protocol of Administrative Offense, testified to this fact during the administrative hearing, and repeated the same account during his testimony at his criminal trial.

him towards an unmarked vehicle,¹²⁵ supports Mr. Benyash and Ms. Barkhatova's description of events. Their account was further bolstered by the trial testimony of individuals who had been arrested by Officers Dolgov and Yurchenko on other occasions, and who stated that the two had similarly failed to identify themselves or provide reasons for arrest, suggesting a certain *modus operandi*.¹²⁶ Given the preponderance of evidence that Mr. Benyash was immediately detained and pushed towards the car without Officers Dolgov or Yurchenko identifying themselves or their purpose, Mr. Benyash's arrest was *per se* unlawful and a violation of Article 9(1) of the ICCPR and Article 5(1) of the ECHR.

Right to be Informed of the Reasons for Arrest

Article 9(2) of the ICCPR and Article 5(2) of the ECHR require that anyone arrested be promptly informed of the reasons for arrest.

The UN Human Rights Committee has unequivocally stated that an individual must be provided with such an explanation "immediately upon arrest" barring exceptional circumstances, such as the need for an interpreter.¹²⁷ In *M.T. v. Uzbekistan*, for example, the Committee found a violation of Article 9(2) where police officers failed to promptly inform a human rights activist of the reasons for her arrest, charging her the subsequent day with "offending an officer" and "refusing to follow police orders."¹²⁸

The European Court of Human Rights has further stated: "any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest... [w]hilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest."¹²⁹ As noted by the court, it is impossible for an accused to obtain review of the lawfulness of his detention if he is unaware of its basis.¹³⁰

According to Mr. Benyash and Ms. Barkhatova, Officers Dolgov and Yurchenko did not provide any reasons for the arrest, remaining reticent throughout the ride to the police station. Mr. Benyash has stated that he was not notified of the purpose of the arrest until

¹²⁵ The video clip was included in an online news report. See Youtube video, "Lawyer in Krasnodar. Protects people at risk of health and freedom", September 28, 2018, 0:18 (showing Officer Yurchenko placing Mr. Benyash into the unmarked vehicle with force). Available at https://www.youtube.com/watch?v=ss1_QHZlrSo.

¹²⁶ See Monitor's Notes, May 14, 2019 (testimony of Mr. Razmik Simonyan); Monitor's Notes, May 28, 2019 (testimony of Mr. Grigory Rusin).

¹²⁷ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 27.

¹²⁸ Human Rights Committee, *M.T. v. Uzbekistan*, U.N. Doc. CCPR/C/114/D/2234/2013, October 21, 2015, paras. 2.1, 7.7-7.9.

¹²⁹ European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, App. No. 12244/86 & 2 others, August 1990, para. 40

¹³⁰ European Court of Human Rights, *Van der Leer v. the Netherlands*, App. No. 12/1988/156/210, February 21, 1990, para. 28.

10 pm, when the Article 20.2 charge sheet (Protocol) was presented to him for signature. There was no possible justification for delaying this notification: as discussed above, Officers Dolgov and Yurchenko had in hand a Delivery Order that clearly specified the administrative offense with which Mr. Benyash had been charged. Assuming the veracity of Mr. Benyash's account, his right to be informed of the reasons for his arrest was violated.

Unlawful and Arbitrary Deprivation of Liberty in Mr. Benyash's Administrative Case

Governing Standards and Precedent

Under Article 5(1) of the ECHR and Article 9(1) of the ICCPR, any deprivation of liberty must be in accordance with domestic legislation. Both Articles also prohibit arbitrary deprivation of liberty.

As noted by the UN Human Rights Committee, the concept of arbitrariness should be "interpreted broadly" and encompasses "elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."¹³¹ This means that "remand in custody [must be] reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."¹³² If detention is not reasonable or necessary, it becomes arbitrary.¹³³

In *Bakur v. Belarus*, for example, the UN Human Rights Committee found that Belarus had violated the author's rights under Article 9. The author was apprehended at a public meeting of the Belarusian Popular Front political party, detained for six and a half hours, and charged with "the administrative offence of participating in an unauthorized meeting."¹³⁴ The Committee noted that Belarus "had not explained why it was necessary to detain the author after he had been identified and after the preparation of an official record," rendering the author's time in custody arbitrary.¹³⁵

Article 5(1) of the European Court of Human Rights explicitly enumerates permissible justifications for detention, including "arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent

¹³¹ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 12. See also Human Rights Committee, *Izmet Oselik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

¹³² Human Rights Committee, *Womah Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994, para. 9.8.

¹³³ See *id.*

¹³⁴ Human Rights Committee, *Bakur v. Belarus*, U.N. Doc. CCPR/C/114/D/1902/2009, July 15, 2015, paras. 2.1-2.2.

¹³⁵ *Id.* at para. 7.2.

[a suspect] committing an offence or fleeing after having done so.” According to the court, detention that falls afoul of the justifications listed in Article 5(1) is arbitrary.¹³⁶

Delivery and Administrative Detention in the Russian Federation

The Russian Code of Administrative Offenses (CAO) provides for several types of lawful detention, including: 1) Delivery¹³⁷ (Russian: доставление), which is envisaged in cases where the police must bring a person apprehended for an administrative offense to a police station in order to draw up the charge sheet (Protocol) and which is allowed only where it is not possible to issue a Protocol in the same location where the alleged offense took place;¹³⁸ and 2) Administrative Detention (Russian: задержание), defined as “a short-term restraint” permissible only in “exceptional instances where it is necessary for securing correct and timely consideration of a case concerning an administrative offence and for carrying out a decision in a case concerning an administrative offense in order to ascertain facts.”¹³⁹ Administrative Detention is capped at a maximum term of three hours unless the charged offense carries a penalty of Administrative Custody, in which case the maximum length is 48 hours.¹⁴⁰

In *Korneyeva v. Russia*, the European Court found that the Delivery and Administrative Detention of a participant in an unauthorized protest violated Article 5(1) because the government could provide no compelling reasons for 1) why Delivery was necessary following the applicant’s arrest, since the Protocol could have been issued on the spot;¹⁴¹ and 2) why her case was so “exceptional” as to require Administrative Detention for 24 hours.¹⁴² With respect to the latter, the Court reasoned that once the authorities had issued the relevant Protocol, the potentially legitimate aim of the applicant’s Administrative Detention (to draw up and relay the Protocol) was rendered obsolete and that any further time in custody could only be justified by a demonstrated risk of flight, risk of reoffending, or risk of interference with the proceedings.¹⁴³

In *Navalnyy v. Russia*, the Grand Chamber of the European Court of Human Rights reached similar conclusions.¹⁴⁴ The authorities had repeatedly employed the Delivery

¹³⁶ See European Court of Human Rights, *X. v. United Kingdom*, App. No. 7215/75, November 5, 1981, paras. 42-43.

¹³⁷ The European Court of Human Rights refers to detention under this provision as an “escorting procedure.” In this report, it will be referred to by its literal translation, “delivery.”

¹³⁸ Code of Administrative Offenses, Article 27.2(1).

¹³⁹ *Id.* at Article 27.3(1).

¹⁴⁰ *Id.* at Article 27.5.

¹⁴¹ European Court of Human Rights, *Korneyeva v. Russia*, App. No. 72051/17, October 8, 2019, paras. 34, 36.

¹⁴² *Id.* at paras. 35-36.

¹⁴³ *Id.* at para. 35.

¹⁴⁴ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, November 15, 2018, paras. 71-72. See also European Court of Human Rights, *Lashmankin and Others v. Russia*, App. Nos. 57818/09 and 14 others,

procedure in arresting the applicant in connection with various protests, even though Protocols could have been issued on the spot.¹⁴⁵ Given that this conduct contravened applicable CAO provisions, the Court found it in violation of Article 5(1)'s requirement of lawfulness.¹⁴⁶ The applicant was additionally kept in Administrative Detention on two occasions following his Delivery and the issuance of a Protocol - once for several hours and the second time overnight.¹⁴⁷ Since the government failed to provide "explicit reasons" (apart from the fact that the offense was punishable with an administrative sentence) for the necessity of extended custody, the Court deemed the applicant's Administrative Detention unlawful and arbitrary.¹⁴⁸

The Delivery Procedure in Mr. Benyash's Case

The initial deprivation of Mr. Benyash's liberty via the Delivery provision was not in accordance with Russian law and thus violated his right to liberty under the ICCPR and ECHR.¹⁴⁹ As detailed above, Russian legislation stipulates that Delivery is only permissible if the relevant Protocol cannot be issued at the location of the alleged offense.

The Delivery Order provided to Officers Dolgov and Yurchenko stated that Mr. Benyash had "called for participation" in an unauthorized protest and that "during an administrative investigation into this fact, it was established that the actions" of Mr. Benyash indicated a violation of Article 20.2 of the CAO.¹⁵⁰ The Order additionally noted that Mr. Benyash had thus far "avoid[ed] appearing in the Office of the Ministry of Internal Affairs of the Russian Federation in Krasnodar and [was] trying to escape administrative responsibility for the offense."¹⁵¹

February 7, 2017, paras. 486-492 (finding that the Delivery and Administrative Detention of several applicants was unlawful because the government failed to provide sufficient reasons for them); European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, paras. 61-65 (finding Delivery and Administrative Detention unlawful because the Russian authorities did not justify them under domestic statute); European Court of Human Rights, *Frumkin v. Russia*, App. No. 74568/12, January 5, 2016, paras. 147-152 (finding the applicant's 36-hour Administrative Detention pending trial arbitrary due to insufficient reasoning as to why his circumstances were "exceptional" within the statutory meaning).

¹⁴⁵ *Id.* at para. 71.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The Resolution to initiate the administrative case, dated September 7, 2018 and issued by Lt. Colonel Pronsky, was in itself unlawful. Such a resolution cannot be issued under Art. 20.2. Art. 28.7 of the CAO provides that a resolution can be issued only if an investigation is necessary with respect to certain offenses. An Article 20.2 offense is not one of them. This was confirmed by the testimony of Lt. Colonel Pronsky's superior, the Head of the Administrative Enforcement Department Ms. Nechaeva, and her other deputy, Mr. Shershen. Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, May 28, 2019, pg. 189 (cross-examination of K. Shershen), pg. 192 (cross-examination of T. Nechaeva).

¹⁵⁰ Krasnodar Police Delivery Order, Sept. 8, 2018 (signed by Mr. Denis Pronsky, the Deputy Head of the Department for Administrative Enforcement of the Office of the Ministry of Internal Affairs in Krasnodar).

¹⁵¹ *Id.*

Pursuant to the Order, Mr. Benyash was to be delivered to the Office of the Ministry of Internal Affairs (police station) “to draw up a Report on Administrative Offense under Art. 20.2” of the CAO.¹⁵² The Order fails to clarify why Mr. Benyash could not have been directly served with the Protocol once he was located by the police officers - and no such explanation was offered at trial.¹⁵³ Due to the lack of any justification for transporting Mr. Benyash to the police station, the Delivery contravened Russian law and thereby constituted unlawful detention under the ICCPR and ECHR.

To note, the Delivery Order was predicated upon a false premise - that Mr. Benyash had been served with a summons to appear at the Ministry of the Internal Affairs and ignored it. At trial it emerged that the summons was in fact sent on September 11, 2018 - two days after his arrest.¹⁵⁴ In any event, the summons directed Mr. Benyash to come to the police office on September 13.¹⁵⁵ During his testimony at trial, Lt. Colonel Pronsky was unable to explain why Mr. Benyash needed to be delivered on September 9 when he had been summoned to appear at the police station on September 13. This evidence further highlights the unjustified application of Delivery.

Administrative Detention at the Office of the Ministry of Internal Affairs (Police Station)

In an echo of two of the incidents at issue in *Navalnyy*, Mr. Benyash was kept in custody at the police station for eight hours before being served with a Protocol.¹⁵⁶ He was then formally remanded to Administrative Detention at approximately 10pm on September 9,¹⁵⁷ where he remained until his administrative hearings the following day at 9:30pm (for the 20.2 charge) and 10:30pm (for the 19.3 charge);¹⁵⁸ at 11:55pm he was sentenced to 14 days of Administrative Custody.¹⁵⁹ He was therefore officially held in Administrative

¹⁵² Id.

¹⁵³ At trial, the prosecution argued that Mr. Benyash’s Delivery was justified because he needed to be questioned regarding his possible commission of an administrative offense and it was impossible to draw up the report at the scene of the alleged offense. However, the prosecution provided no further explanation as to this purported impossibility. Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, February 21, 2019.

¹⁵⁴ Ministry of Internal Affairs, Summons, September 7, 2018. The police issued a summons signed by Lt. Col. Pronsky on September 7, 2018, requesting that Mr. Benyash appear at the police station by September 13, 2018. The summons claimed it was delivered by mail on September 7, 2018, the same day it was issued. This claim was proven to be false at trial through documents demonstrating that the summons was put in the mail on September 11, 2018. See Letter from Krasnodar Police Department of the Ministry of Internal Affairs to Leninsky District Court, July 3, 2019, enclosing List of Mail Packages No. 102. See also Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, August 20, 2019, pg. 279 (cross-examination of Lt. Col. Pronsky).

¹⁵⁵ The summons instructed Mr. Benyash to appear at the police office in Krasnodar at 9 am on September 13, 2018. The summons warned that in case of failure to appear without reasonable cause Mr. Benyash could be brought to the police station or the Protocol on Administrative Offense could be drawn up in his absence.

¹⁵⁶ It is unclear why it took until 10 pm, approximately 8 hours after Mr. Benyash’s arrival at the police station, to draw up the relevant Protocols.

¹⁵⁷ Report on Administrative Detention, September 9, 2018.

¹⁵⁸ Leninsky District Court for Krasnodar, Protocols of Administrative Hearings, September 10, 2018.

¹⁵⁹ Leninsky District Court for Krasnodar, Decision, September 10, 2018.

Detention for approximately 24 hours, although his effective time in detention (from the time of his arrest) exceeded 33 hours. The authorities offered no explanation for the necessity of Administrative Detention and indeed, there was no evident rationale.

In failing to comply with domestic legislation, which permits Administrative Detention solely in the event of “exceptional circumstances,” the authorities violated the prohibition on unlawful detention outlined in Article 5(1) of the ECHR and Article 9(1) of the ICCPR.

The authorities likewise violated the prohibition on arbitrary detention enshrined in the ECHR and ICCPR. Once the authorities had drawn up the relevant Protocols, the only permissible justifications for further detention would have been a demonstrated risk of flight, risk of interference with the evidence, or risk of reoffending. However, as was the case in *Bakur v. Belarus*, the authorities failed to provide any such justification for Mr. Benyash’s Administrative Detention, in contravention of his right to freedom from arbitrary detention.

Arbitrary Detention in Mr. Benyash’s Criminal Case

Initial Remand in Custody

As noted above, the UN Human Rights Committee has emphasized that remand in custody must be “reasonable and necessary in all circumstances”¹⁶⁰ and is only appropriate to prevent recurrence of crime, flight, and interference with the evidence.¹⁶¹

As also noted above, Article 5 of the European Convention provides an exhaustive list of permissible objectives for detention. Objectives applicable to remand in custody following arrest are “detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law”; “detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”; and “detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.”

On September 23, 2018, Mr. Benyash, having just completed a 14-day sentence for his Article 19.3 (disobeying police orders) administrative conviction, was arrested under Article 318(1) of the Criminal Code for allegedly assaulting Officers Dolgov and

¹⁶⁰ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 12.

¹⁶¹ Human Rights Committee, *Kulov v. Kyrgyzstan*, U.N. Doc. CCPR/C/99/D/1369/2005, August 19, 2010, para. 8.3 (“Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. In the absence of any further information, the Committee concludes that there has been a violation of article 9, paragraph 1, of the Covenant”).

Yurchenko. Mr. Benyash was initially remanded to custody for 48 hours. Subsequently the Leninsky District Court for Krasnodar extended Mr. Benyash's detention for another 72 hours, basing its decision on the deterioration of Mr. Benyash's health condition and "to clarify his diagnosis."¹⁶²

This justification for detention is impermissible under the ECHR and ICCPR.

"[C]larification of a diagnosis" is not listed amongst the detention justifications common to both treaties and, with respect to the ECHR, it was not alleged that Mr. Benyash had any form of infectious disease that necessitated his confinement. As such, the 72 hours that Mr. Benyash spent in police custody on the basis of the Leninsky Court's decision constituted arbitrary detention.

Pretrial Detention

Article 9(3) of the ICCPR specifies that detention pending trial "shall not be the general rule." As noted by the UN Human Rights Committee, pretrial detention should be as short as possible and "reasonable and necessary in all circumstances, for example to prevent flight, interference with the evidence or repetition of the crime."¹⁶³ In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an "individualized determination."¹⁶⁴ Vague pronouncements fail to meet this standard and reference to the severity of the charges is - on its own - insufficient.¹⁶⁵ Courts must additionally provide reasons for forgoing non-custodial alternatives, such as bail and monitoring devices.¹⁶⁶ The Committee has found a violation of Article 9, for example, where a court imposed pretrial detention on the "mere assumption" that the accused would flee justice, offering no specific evidence to support this conclusion and failing to explore other options for preventing flight.¹⁶⁷

The European Court of Human Rights has adopted a similar position under Article 5 of the Convention, deeming pretrial detention "an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases."¹⁶⁸ The Court recognizes four categories of acceptable justifications for pretrial

¹⁶² Decision on Extension of Detention dated Sept. 25, 2018, Leninsky District Court for Krasnodar.

¹⁶³ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 12; Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

¹⁶⁴ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10 ("[T]he Committee considers that the State party has not given sufficient reasons, other than the mere assumption that he would try to abscond, to justify the initial pretrial detention of the author or its subsequent extension; nor has it explained why it could not take other measures to prevent his possible flight").

¹⁶⁸ European Court of Human Rights, *Aleksanyan v. Russia*, App. No. 46468/06, June 5, 2009, para. 179.

detention: 1) the risk that the accused will not appear for trial; 2) the risk that the accused will attempt to influence the course of the proceedings; 3) the risk that the accused will commit further offenses; and 4) the risk that the accused will cause public disorder.¹⁶⁹

In imposing pretrial detention, the presiding court must set forth in written form all applicable reasons for “depart[ing] from the rule of respect for individual liberty,” with specific reference to the accused’s circumstances. Like the UN Human Rights Committee, the European Court requires that judicial authorities examine all possible alternatives to detention.¹⁷⁰ To note, the Court typically considers such issues under Article 5(3) of the Convention, which provides that “[e]veryone arrested or detained ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”

With respect to the Russian Federation, the Court has repeatedly found Article 5(3) violations where courts have based pretrial detention on “stereotyped formulae without addressing specific facts or considering alternative preventive measures.”¹⁷¹ The UN Working Group on Arbitrary Detention has likewise found violations of Article 9(3) of the ICCPR where courts in the Russian Federation failed to provide individualized justification for pretrial detention.¹⁷² In a 2019 decision, for example, the Working Group asserted that the pretrial detention of a minister “had no legal basis” where the court reportedly “repeated” relevant provisions of the Criminal Procedure Code in a “stereotyped and abstract way.”¹⁷³

Mr. Benyash’s detention pending his criminal trial was similarly arbitrary because of the lack of individualized analysis justifying its necessity. The decision of the Leninsky District

¹⁶⁹ European Court of Human Rights, *Khudobin v. Russia*, App. No. 59696/00, October 26, 2006, para. 104. See also European Convention, Article 5(1).

¹⁷⁰ See European Court of Human Rights, *Aleksanyan v. Russia*, App. No. 46468/06, June 5, 2009, para. 180.

¹⁷¹ European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, para. 141. See also European Court of Human Rights, *Rokhlina v. Russia*, App. No. 54071/00, April 7, 2005, para. 67; European Court of Human Rights, *Belevitskiy v. Russia*, App. No. 72967/01, March 1, 2007, paras. 99-103; European Court of Human Rights, *Khudobin v. Russia*, App. No. 59696/00, October 26, 2006, paras. 106-109; European Court of Human Rights, *Mamedova v. Russia*, App. No. 7064/05, June 1, 2006, paras. 72-84; European Court of Human Rights, *Dolgova v. Russia*, App. No. 11886/05, March 2, 2006, paras. 38-50; European Court of Human Rights, *Khudoyorov v. Russia*, App. No. 6847/02, November 8, 2005, paras. 175-189; European Court of Human Rights, *Smirnova v. Russia*, App. Nos. 46133/99 and 48183/99, July 24, 2003, paras. 65-71; European Court of Human Rights, *Panchenko v. Russia*, App. No. 45100/98, February 8, 2005, paras. 101-109.

¹⁷² See Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 11/2019 concerning Dmitriy Mikhaylov (Russian Federation) (Advance Edited Version), U.N. Doc. A/HRC/WGAD/2019/11, June 12, 2019, para. 59.

¹⁷³ Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 34/2019 concerning Vladimir Alushkin (Russian Federation) (Advance Edited Version), U.N. Doc A/HRC/WGAD/2019/34, September 20, 2019, paras. 17, 61-63.

Court for Krasnodar plainly failed both to assess Mr. Benyash's particular circumstances and to consider alternatives to detention.

The court's reasoning on detention comprises only a single sentence, identical to the wording in the prosecution's application:¹⁷⁴ because Mr. Benyash was accused of committing "a crime of moderate seriousness," he might "hide from the bodies of the preliminary investigation or court, continue to engage in criminal activities, threaten or destroy evidence, or otherwise impede criminal proceedings."¹⁷⁵ This wording is drawn directly from the relevant Criminal Procedure Code provision, a practice that has repeatedly earned the censure of the UN Human Rights Committee, the UN Working Group on Arbitrary Detention, and the European Court of Human Rights.

The Krasnodar Court's failure to examine Mr. Benyash's individual circumstances is particularly troubling given that there were no objectively reasonable grounds for pretrial detention. Mr. Benyash did not have a criminal history and the charges were not of such a nature - occurring during an extraordinary arrest - that one could reasonably argue he would re-offend. Additionally, Mr. Benyash resides within Russia, is a qualified lawyer practicing in the region, and was the father of a two-month-old child at the time of the detention, making it unlikely he would have attempted to flee justice.¹⁷⁶ Finally, because the evidence marshaled by the prosecution was almost exclusively based on the accounts of police officers, there was no indication that Mr. Benyash would have been able to threaten witnesses or obstruct the investigation.

Even assuming there was a risk of flight, interference with the proceedings, or recurrence of crime, the Leninsky District Court violated the requirement to explore and eliminate all possible alternatives to detention. On the contrary, the court's circular analysis states that due to the listed risks, "no other, milder, measure of restraint c[ould] be applied that is not related to isolation from society."¹⁷⁷

¹⁷⁴ Leninsky District Court for Krasnodar, Pretrial Detention Decision, September 28, 2018, pg. 2.

¹⁷⁵ *Id.* at pg. 3.

¹⁷⁶ Indeed, these circumstances were noted by the Krasnodar Regional Court in its appeal judgment overturning Mr. Benyash's detention order. In the decision, the court found that the investigator had failed to provide "sufficient and reasonable grounds" for Mr. Benyash's remand to pretrial detention: "The court found that the arguments of the investigator – about the possible pressure on witnesses and victims by the accused, that he could hide from the investigation and the court, continue committing crimes, take measures to conceal or destroy evidence, or otherwise impede the criminal proceedings – were not confirmed and are refuted by the materials presented in which there is information that Benyash M.M. is a lawyer, he was not previously convicted of a crime, he is married, he has a dependent infant and an elderly mother, and he has a permanent place of work and residence in the Russian territory, while the case file does not contain information that Benyash M.M. was previously announced as wanted, took any measures to travel abroad, or tried to hide from administrative custody." Krasnodar Regional Court, Appeal Judgment, October 23, 2018, pgs. 3-4.

¹⁷⁷ See Leninsky District Court for Krasnodar, Decision on Pretrial Detention, September 28, 2018, pg. 3.

In recognition of these facts - and in the face of rising pressure to release Mr. Benyash, culminating in a letter from the president of the Federal Chamber of Lawyers to the Krasnodar District Prosecutor's Office -¹⁷⁸ the Krasnodar Regional Court overturned the pretrial detention decision on appeal.¹⁷⁹ The court noted that the lower court had failed to evaluate Mr. Benyash's particular circumstances and ordered that he be released on bail.¹⁸⁰

Given the above, Mr. Benyash's month in pretrial detention was undoubtedly arbitrary and thus a violation of his rights under Article 9(3) of the ICCPR and Article 5(3) of the ECHR.

Nature of Detention Hearing

Article 9(4) of the ICCPR provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 5(4) of the European Convention offers a similar guarantee. As stated by the European Court of Human Rights:

in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him.¹⁸¹

This may include the calling and examination of witnesses whose testimony "*prima facie* appears to have a material bearing on the issue of the continuing lawfulness of the detention."¹⁸² In *Turcan v. Moldova*, for example, the Court found a violation of Article

¹⁷⁸ See Advokatskaya Gazyeta, "FCL President Appeals to the Prosecutor of the Krasnodar District in the Case of Mikhail Benyash", October 22, 2019 (Russian only). Available at <https://www.advgazeta.ru/novosti/prezident-fpa-obratilsya-k-prokuroru-krasnodarskogo-kraya-po-delu-mikhaila-benyasha/>.

¹⁷⁹ Krasnodar Regional Court, Appeal Judgment, October 23, 2018, pgs. 3-4.

¹⁸⁰ *Id.* at pg. 4. The court concluded: "The danger that the accused will threaten witnesses or participants in the criminal process, destroy evidence or otherwise obstruct the criminal proceedings, must be evaluated not in the abstract, but concretely, based on the established factual circumstances. In such circumstances, given the data characterizing the identity of the accused, Benyash M.M., which deserve attention and are objectively confirmed by the materials presented, the court of appeal finds the application of pretrial detention and considers it necessary to choose bail as a preventive measure for the accused, which is capable of ensuring the normal course of the investigation. The amount of bail is determined by the court of appeal, taking into account the accusation of the commission of a crime of moderate severity, and information about the identity of the accused."

¹⁸¹ European Court of Human Rights (Grand Chamber), *A. and Others v. United Kingdom*, App. No. 3455/05, February 15, 2009, para. 204.

¹⁸² European Court of Human Rights, *Turcan v. Moldova*, App. No. 39835/05, October 23, 2007, para. 67-70.

5(4) where the applicant was prevented from calling and examining a witness whose testimony was important for determining the necessity of house arrest.¹⁸³

In accordance with this standard, Mr. Benyash's rights under the European Convention were violated by the refusal of the Leninsky District Court to admit the testimony of Ms. Barkhatova, who witnessed the entirety of the events forming the basis of the prosecution's charges against Mr. Benyash.¹⁸⁴ In response to defense efforts to introduce evidence that would prove Mr. Benyash was himself a victim and had been assaulted by the police officers, the court stated that such facts were irrelevant and told the defense it could provide this evidence to the investigative authorities.¹⁸⁵ As in *Turcan*, the court stripped Mr. Benyash of the opportunity to challenge the basis of his detention and thus violated his right to judicial review.

Right to Counsel

Mr. Benyash's detention by the Krasnodar police department of the Russian Ministry of Internal Affairs violated his right to communicate with counsel.

Under Article 14(3)(b) of the ICCPR, anyone charged with a criminal offense must be allowed "to communicate with counsel of his own choosing." The UN Human Rights Committee has held that this right obligates States to "facilitate access to counsel for detainees in criminal cases from the outset of their detention."¹⁸⁶ The Committee has found a violation of Article 14(3)(b) where an individual's requests for access to a lawyer were repeatedly denied over the course of several days in police custody.¹⁸⁷

The European Court of Human Rights has reached similar conclusions regarding the corresponding right under Article 6(3)(c) of the Convention, holding that "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."¹⁸⁸ The Court has deemed Article 6(3) one of the core principles that "contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or

¹⁸³ *Id.* The reason for the applicant's house arrest was that he allegedly pressured a witness. The Court found that by refusing to call that witness to testify as to whether she had been pressured by the applicant, the judge had violated the applicant's rights under Article 5(4).

¹⁸⁴ Leninsky District Court for Krasnodar, Protocol on Judicial Session, September 28, 2018.

¹⁸⁵ *Id.* at pg. 32. As described below, Mr. Benyash *had* provided evidence of the assault to the authorities but the Investigative Committee of Krasnodar refused to investigate the police officers.

¹⁸⁶ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 35.

¹⁸⁷ Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.5.

¹⁸⁸ European Court of Human Rights (Grand Chamber), *Salduz v. Turkey*, App. No. 36391/02, November 27, 2008, para. 55; European Court of Human Rights, *Pishchalnikov v. Russia*, App. No. 7025/04, September 24, 2009, para. 70.

prosecuting authorities and the accused.”¹⁸⁹ In this regard, the Court has stated that access to an attorney at the investigation stage is critical, particularly during interrogations held in custody.¹⁹⁰ In *Pishchalnikov v. Russia*, for example, the Court found a violation of Article 6(3)(c) where the applicant was denied a lawyer for his first two days in police custody despite requesting counsel.¹⁹¹

In the present case, Mr. Benyash’s requests for a lawyer were repeatedly denied during his detention at the police station, which encompassed his interrogation by investigator Danilchenko. Mr. Avanesyan, Mr. Benyash’s lawyer, testified that he arrived at the police station to meet with Mr. Benyash shortly after Mr. Benyash’s arrest but was refused entry.¹⁹² At trial, representatives from the Ministry of Internal Affairs did not dispute that Mr. Benyash had been denied access to an attorney but attempted to justify the restriction on the basis of a contemporaneous training for police officers on how to implement a lockdown procedure.¹⁹³ This assertion was undermined by the testimony of Mr. Avanesyan and another defense witness, both of whom saw civilians such as food deliverers freely coming and going from the station during the period of the alleged lockdown.¹⁹⁴ Even assuming the lockdown protocol was in place, the implementation of a training exercise for police officers cannot be considered a “compelling reason” for restriction of a fundamental right.

Notably, the European Court of Human Rights has emphasized that one aim of Article 6(3)(c) is to establish “a fundamental safeguard against ill-treatment” in detention.¹⁹⁵ It is for this reason that the denial of access to counsel in Mr. Benyash’s case was so problematic. During the period of his initial detention, Mr. Benyash asserts that he was beaten, knocked to the ground, and otherwise abused by the authorities, allegations that are supported by: photographs taken by Mr. Benyash’s lawyer, Mr. Avanesyan, when he

¹⁸⁹ European Court of Human Rights, *Pishchalnikov v. Russia*, App. No. 7025/04, September 24, 2009, para. 68.

¹⁹⁰ European Court of Human Rights, *Mader v. Croatia*, App. No. 56185/07, June 21, 2011, paras. 150-158 (violation of 6(3)(c) where detainee was denied access to a lawyer for the first three days of police custody).

¹⁹¹ European Court of Human Rights, *Pishchalnikov v. Russia*, App. No. 7025/04, September 24, 2009, paras. 75, 92.

¹⁹² Monitor’s Notes, April 23, 2019 (testimony of Mr. Avanesyan); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019.

¹⁹³ Monitor’s Notes, July 30. The Ministry of Internal Affairs responded to the defense request for information about the “lockdown” procedure with a letter stating that the lockdown was in place from 16:52 until 21:30 on September 9, the day Mr. Benyash was detained, and that its purpose was to train police officers on the actions that they should undertake in case of a real lockdown. The letter was read aloud by Judge Belyak during the court hearing on July 30, 2019.

¹⁹⁴ See Monitor’s Notes, April 23, 2019 (testimony of Mr. Avanesyan); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pg. 142; Monitor’s Notes, May 14, 2019 (testimony of Mr. Sergei Romanov).

¹⁹⁵ See European Court of Human Rights (Grand Chamber), *Salduz v. Turkey*, App. No. 36391/02, November 27, 2008, para. 54; European Court of Human Rights, *Mader v. Croatia*, App. No. 56185/07, June 21, 2011, para. 149.

was eventually able to gain access to Mr. Benyash;¹⁹⁶ a subsequent medical examination;¹⁹⁷ and the testimony of Ms. Barkhatova, who said she heard the sound of blows and screams coming from the interrogation room.¹⁹⁸ This alleged maltreatment, which will be discussed at length below, could have been forestalled had Mr. Avanesyan been granted entry.

In light of the above, Mr. Benyash's right to communicate with counsel was violated by the Russian authorities.

C. VIOLATIONS AT TRIAL

Equality of Arms Concerns

Article 14 of the ICCPR provides a series of guarantees designed to ensure that anyone accused of a crime receives "a fair and public hearing by a competent, independent and impartial tribunal established by law." The corresponding Article 6 of the European Convention on Human Rights similarly establishes fair trial rights guaranteed to everyone accused of a criminal offense. These articles are essential for effecting equality of arms between the state and the accused and preventing repressive use of criminal proceedings.¹⁹⁹ The criminal trial against Mr. Benyash violated his rights under numerous sub-sections of Article 14 of the ICCPR and Article 6 of the ECHR.

Right to Obtain the Attendance and Examination of Witnesses

Governing Standards and Precedent

Article 14(3)(e) of the ICCPR entitles defendants "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." As stated by the UN Human Rights Committee, Article 14(3)(e) is "important for ensuring an effective defense by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any

¹⁹⁶ Monitor's Notes, April 23, 2019 (testimony of Mr. Avanesyan); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pg. 145.

¹⁹⁷ See Krasnodar City Hospital, Medical Records of Mr. Benyash Examination, September 9-10, 2018.

¹⁹⁸ Monitor's Notes, April 23, 2019 (testimony of Ms. Barkhatova); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pgs. 147-150.

¹⁹⁹ See Organization for Security and Cooperation in Europe, "Legal Digest of International Fair Trial Rights", 2012, pg. 110. See also Human Rights Committee, *Bondar v. Uzbekistan*, U.N. Doc. CCPR/C/101/D/1769/2008, April 28, 2011, para. 7.5; Human Rights Committee, *Nazarov v. Uzbekistan*, U.N. Doc. CCPR/C/81/D/911/2000, August 19, 2004, para. 6.3.

witnesses as are available to the prosecution.”²⁰⁰ Although defendants do not have an unlimited right to obtain the attendance of witnesses, they do have the “right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.”²⁰¹

In interpreting Article 14(3)(e), the Committee has held that a court’s excessive curtailment of defense questions can amount to a violation. In *Larranaga v. The Philippines*, for example, the Committee ruled that the presiding court violated Article 14(3)(e) not only by refusing to call proposed defense witnesses without adequate justification but also by cutting short the defense’s cross-examination of a key prosecution witness.²⁰²

Article 6(3)(d) of the ECHR guarantees everyone charged with a criminal offense the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” The European Court has clarified that “the essential aim of that provision, as indicated by the words ‘under the same conditions’ is to ensure a full ‘equality of arms’ in the matter.”²⁰³

While the right to call witnesses is not absolute, the domestic authorities bear the burden of presenting a sufficient rationale for rejecting a witness request that is “not vexatious, and which is sufficiently reasoned, relevant to the subject matter of the accusation and could arguably have strengthened [the] position of the defense or even led to the defendant’s acquittal.”²⁰⁴ The Court has further found a violation of Article 6(3)(d) where the presiding judge strictly limited and struck questions relating to the credibility of a key witness.²⁰⁵

²⁰⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39; Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, March 21, 2017, para. 8.8.

²⁰¹ *Id.*

²⁰² Human Rights Committee, *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7.

²⁰³ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, December 18, 2018, para. 139.

²⁰⁴ European Court of Human Rights, *Kartvelishvili v. Georgia*, App. No. 17716/08, June 7, 2018, para. 61. See also European Court of Human Rights, *Polyakov v. Russia*, App. No. 77018/01, January 29, 2009, paras. 34-37.

²⁰⁵ European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, paras. 172, 210-212. The Court found that by dismissing “all questions concerning [the witness]’s criminal record, the reasons for not giving testimony inculcating the applicant during his first questionings in 1999 and his motivation for starting to give such evidence in 2003, as well as concerning possible pressure on him from the prosecuting authorities,” the domestic court had violated the applicant’s fair trial rights: namely Articles 6(1) and 6(3)(d) of the Convention. The Court further observed that in order to properly perform their function, the jurors “needed to be aware of all relevant circumstances affecting the [witness] statement’s accuracy and credibility, including any incentive [the witness] might have had to misrepresent the facts. It was therefore important for the defense to discuss the above issues in the presence of the jury in order to test [the witness]’s reliability and credibility.” *Id.* at para. 210.

For the purposes of an Article 6 examination, the term “witness” encompasses victims²⁰⁶ as well as police officers when their statements or reports are used as evidence to prove the defendant’s guilt, “irrespective of the classifications in domestic legal systems.”²⁰⁷ In examining complaints against the Russian Federation, the Court has repeatedly emphasized that where the prosecution relies solely on the accounts of “police officers who had played an active role in the contested events,”²⁰⁸ the domestic court must “use every reasonable opportunity to verify their incriminating statements.”²⁰⁹

With respect to police reports admitted as evidence, the Court has long held that the defense has the right to challenge both the contents of the report and the credibility of those who prepared it. In *Butkevich v. Russia*, the Court found a fair trial violation because the defense was not permitted to cross-examine the applicant’s arresting officers, who had prepared pretrial reports as part of the investigation (the basis of the applicant’s Article 19.3 conviction under the Code of Administrative Offenses).²¹⁰

Against the standards established by the UN Human Rights Committee and European Court, the presiding authority of the Leninsky District Court for Krasnodar, Judge Belyak, clearly violated Mr. Benyash’s right to call and examine witnesses throughout the course of his criminal trial.

Calling the Investigator as a Witness

Mr. Benyash’s right to confront the witnesses against him was violated by Judge Belyak’s refusal to permit the defense to call Mr. Danilchenko, a lead investigator in the case. Mr. Danilchenko interrogated Mr. Benyash at the police station on the day of the alleged offense and questioned the two alleged victims about the incident.²¹¹ He also compiled the case file which formed the basis for the criminal charge against Mr. Benyash, including copies of recordings captured by surveillance cameras in the police station parking lot,

²⁰⁶ European Court of Human Rights, *Romanov v. Russia*, App. No. 41461/02, July 24, 2008, para. 97.

²⁰⁷ European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, para. 98; European Court of Human Rights, *Ürek and Ürek v. Turkey*, App. No. 74845/12, July 30, 2019, para. 50.

²⁰⁸ European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014, para. 83.

²⁰⁹ European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, para. 102. See also European Court of Human Rights, *Kasparov and Others v. Russia*, App. No. 21613/07, October 3, 2013, para. 66; European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014, para. 83; European Court of Human Rights, *Frumkin v. Russia*, App. No. 74568/12, January 5, 2016, paras. 163-68.

²¹⁰ European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, paras. 97-103 In this case, the Court found a violation of Article 6(1) writ large on the basis of the witness issue and several other deficits in the trial process.

²¹¹ Monitor’s Notes, June 11, 2019 (defense motion to call Officer Danilchenko).

which the prosecution submitted as evidence (the surveillance videos showed the police car driven by Officers Yurchenko and Dolgov entering the station).²¹²

In light of these facts, Mr. Benyash's counsel submitted a motion to the court for Mr. Danilchenko's examination, arguing that his testimony was important to the defense case in a number of respects. First, the defense submitted that Mr. Danilchenko could help clarify inconsistencies in the prosecution's case²¹³ (in particular the conspicuous absence in the police officers' original reports on the arrest²¹⁴ of any accusation that Mr. Benyash had harmed them or, specifically, bit Officer Dolgov, and the lack of supporting evidence to that effect) given that Mr. Danilchenko questioned Officers Dolgov and Yurchenko during the investigation.²¹⁵

Second, the defense submitted that Mr. Danilchenko should be questioned as to the procedure for compiling the evidence in the case file against Mr. Benyash. Specifically, the defense observed that the surveillance video showing the police vehicle entering the parking lot could have been selectively edited to exclude exculpatory sections.²¹⁶ The defense further questioned why surveillance footage from the parking lot (where Mr. Benyash claimed that he had been thrown out of the police vehicle face-first and where prosecution witnesses claimed that Mr. Benyash had beaten his head on the pavement) was not included in the case file. Notwithstanding these compelling justifications for calling Mr. Danilchenko, Judge Belyak prohibited his questioning, stating that the court and parties would be in charge of evaluating the evidence at hand.²¹⁷

This decision flew in the face of long-established case law of the UN Human Rights Committee and European Court of Human Rights. For the reasons stated above, Mr. Danilchenko's testimony "could arguably have strengthened [the] position of the defense," and the request for his examination was "not vexatious" and "sufficiently reasoned."²¹⁸ Mr.

²¹² Id.

²¹³ Id (remarks of defense attorneys Ms. Aleksandrova and Mr. Popkov).

²¹⁴ Report of September 9, 2018, signed by Officer Dolgov; Report of September 9, 2018, signed by Officer Yurchenko.

²¹⁵ Monitor's Notes, June 11, 2019 (defense motion to call Officer Danilchenko). The defense attorney Mr. Popkov argued that there were contradictions between the first and second interrogations of the victims regarding the nature of Mr. Benyash's assault and the officers' injuries and that the investigator should have eliminated those inconsistencies since the evidence aided the prosecution. Mr. Benyash also remarked that Mr. Danilchenko needed to be questioned about the evidently false testimonies of Messrs. Bolbat and Borisov during the presentation of the prosecution's case, discussed further below.

²¹⁶ Id (remarks of defense attorneys Ms. Aleksandrova and Mr. Popkov).

²¹⁷ Id. Upon the motion to call Mr. Danilchenko, Judge Belyak initially refused; upon a second motion later in the hearing, the judge stated that she would agree to call Mr. Danilchenko on the condition that the defense limit its questioning to the circumstances surrounding the editing of the surveillance video; she stated that she would strike any and all questions relating to the gathering of evidence and inconsistencies in the record. As one of Mr. Benyash's lawyers pointed out, it is impermissible to limit questions to a witness in advance of their testimony. On this basis, Judge Belyak refused to call Mr. Danilchenko altogether.

²¹⁸ European Court of Human Rights, *Kartvelishvili v. Georgia*, App. No. 17716/08, June 7, 2018, para. 61.

Benyash's rights under Article 14(3)(e) of the ICCPR and Article 6(3)(d) of the ECHR were therefore violated.

Restrictions on Cross-examination of Prosecution Witnesses

Judge Belyak further violated Mr. Benyash's right to call and examine witnesses by repeatedly interrupting and abridging the cross-examination of key prosecution witnesses on material aspects of their testimonies.

Most notably, Judge Belyak limited the cross-examination of the alleged victims, Officers Dolgov and Yurchenko.²¹⁹ With respect to Officer Dolgov's cross-examination, Mr. Benyash submitted an objection that Judge Belyak had struck 46 defense questions.²²⁰ In one particular exchange, the judge struck 12 out of 15 defense questions.²²¹ The defense, for example, attempted to ask Officer Dolgov about whether he had ever experienced memory lapses or head trauma, a relevant line of inquiry given the inconsistencies in his account of events.²²² Nonetheless, Judge Belyak struck the question.²²³

The defense received a similar response when asking Officer Dolgov about his understanding of Russian laws on detention.²²⁴ As noted above, in order for Mr. Benyash to be found guilty of violating Article 318(1), the prosecution had to prove that he had known Dolgov and Yurchenko were police officers when he allegedly assaulted them.²²⁵ If Officer Dolgov had displayed a lack of familiarity with applicable arrest protocols, this would have assisted the defense case. Despite the importance of this subject matter, Judge Belyak abruptly cut off defense questions, stating that the relevant attorney was "testing the victim" and "abus[ing] the law."²²⁶ She further stated: "There is a policeman before you!"²²⁷

Meanwhile, the defense was repeatedly interrupted when it tried to ask Officer Yurchenko about various inconsistencies in his statements. At one point during the officer's cross-

²¹⁹ This is also relevant to Mr. Benyash's right to be presumed innocent, which will be discussed below.

²²⁰ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178-19, April 16, 2019, pg. 120; Monitor's Notes, April 16, 2019.

²²¹ Monitor's Notes, April 9, 2019 (cross-examination of Officer Dolgov); Mediazona, "Case of Krasnodar lawyer Benyash: Seventh Day", April 9, 2019. Available at <https://zona.media/online/2019/04/09/benyash7>.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Article 318(1) also requires that the use of violence be "in connection with the discharge [of] official duties." This implies that the officers had to have been acting lawfully in order for Article 318(1) to apply. As discussed throughout this report, there is ample evidence that Officers Dolgov and Yurchenko were not acting lawfully in apprehending and delivering Mr. Benyash.

²²⁶ Monitor's Notes, April 9, 2019 (cross-examination of Officer Dolgov); Mediazona, "Case of Krasnodar lawyer Benyash: Seventh Day", April 9, 2019.

²²⁷ *Id.*

examination on April 9, for example, Judge Belyak cut off questioning. She expressed concern that Officer Yurchenko's answers to questions about Mr. Benyash's arrest could result in his criminal liability, telling the defense: "[Y]ou have completed your questions regarding administrative cases."²²⁸

At the next session on April 16, Judge Belyak continued to intervene in defense questioning. Officer Yurchenko, for example, had testified that Mr. Benyash willingly accompanied him into the police vehicle. Mr. Benyash's counsel presented an initial interrogation report in which Officer Yurchenko had stated that Mr. Benyash resisted getting into the police vehicle. When Mr. Benyash asked Officer Yurchenko about the discrepancies, Judge Belyak struck this line of inquiry.²²⁹

She also struck without explanation questions aimed at establishing the legality (or lack thereof) of the arrest, such as whether or not Mr. Benyash had voluntarily presented his passport to Officer Yurchenko.²³⁰ Again, these inquiries were central to the defense argument that Officers Dolgov and Yurchenko had acted unlawfully in failing to either identify themselves or explain the arrest; that Mr. Benyash had not known they were police officers; and that any resistance on his end was due to the officers' misconduct.

These limitations on questioning persisted into the defense's presentation of its own case. When introducing into evidence video clips that Ms. Barkhatova shot of the arrest with her phone, for example, the defense moved to question Officers Dolgov and Yurchenko about the events shown therein, to which Judge Belyak agreed. The videos showed the officers forcing Mr. Benyash into the police vehicle and demanding that Ms. Barkhatova surrender her phone.²³¹ Once questioning began, however, Judge Belyak limited defense questions on the circumstances depicted in the videos, stating that the defense was abusing its right to ask questions.²³²

The dismissal of defense efforts to probe the credibility of Officers Dolgov and Yurchenko was particularly problematic because their testimony formed the foundation of the prosecution's case. As noted above, the European Court has held that where the prosecution relies solely on the accounts of "police officers who had played an active role in the contested events,"²³³ the domestic court must "use every reasonable opportunity to

²²⁸ Mediazona, "Case of Krasnodar lawyer Benyash: Seventh Day", April 9, 2019.

²²⁹ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178-19, April 16, 2019, pg. 120 (cross-examination of Officer Yurchenko); Mediazona, "Case of Krasnodar lawyer Benyash: Eighth Day", April 16, 2019. Available at <https://zona.media/online/2019/04/16/benyash8>.

²³⁰ Id.

²³¹ Mediazona, "Case of Krasnodar lawyer Benyash: Day Thirteen", June 18, 2019. Available at <https://zona.media/online/2019/06/18/benyash13>.

²³² Id.; Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, June 18, 2019, pgs. 214-216.

²³³ European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014, para. 83.

verify their incriminating statements.”²³⁴ The accounts of Officers Dolgov and Yurchenko were the only evidence as to Mr. Benyash’s alleged knowledge they were police officers, a necessary element of Article 318(1), and the primary evidence as to one of the prosecution’s core allegations - that Mr. Benyash had bitten Officer Dolgov inside the car (this act was not observed by any of the prosecution’s other witnesses and only weakly supported by the testimonies of the prosecution’s medical experts, if at all. Dr. Khapsirokov, who examined both officers the day of the incident, found no traces of bites. Meanwhile, the prosecution’s forensic medical expert, who examined Officer Dolgov the day after the incident, stated that the bite-like nature of one bruise was “assumed” and the other was unclear.²³⁵ She was also unable to give a clear answer at trial about the precise time frame within which the injury could have occurred²³⁶).

As such, given that key facets of the prosecution’s case were solely supported by the officers’ testimony, Judge Belyak should have made every effort to verify their statements - as opposed to shutting down defense efforts to interrogate inconsistencies.

Notably, the defense submitted a motion to sequester Officers Yurchenko and Dolgov during their respective testimonies because of the risk of collusion. Judge Belyak denied this motion without any explanation.²³⁷ Officer Yurchenko remained in the hearing room during the examination and cross-examination of Officer Dolgov, who was questioned first. When Officer Yurchenko then took the stand, he repeated many of Officer Dolgov’s answers almost verbatim.²³⁸ Judge Belyak’s refusal to sequester witnesses was a further violation of the defense’s right to test the credibility of the prosecution’s case.

Finally, Judge Belyak materially limited the cross-examination of other prosecution witnesses. In one such instance, a retired police officer testifying for the prosecution claimed that he had witnessed Mr. Benyash beating his head on the pavement of the police parking lot at a distance of 20-25 meters. Throughout his testimony, however, the witness constantly confused Mr. Benyash with one of Mr. Benyash’s defense attorneys. When another defense attorney asked the witness about his eyesight and why he wore glasses - patently relevant information to the defense’s case in light of the circumstances

²³⁴ European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, para. 102. See also European Court of Human Rights, *Kasparov and Others v. Russia*, App. No. 21613/07, October 3, 2013, para. 66; European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, December 4, 2014, para. 83; European Court of Human Rights, *Frumkin v. Russia*, App. No. 74568/12, January 5, 2016, paras. 163-168.

²³⁵ Monitor’s Notes, August 6, 2019 (cross-examination of Ms. Victoria Kuzeleva). Mediazona, “Case of Krasnodar lawyer Benyash: Day Eighteen”, August 6, 2019.

²³⁶ *Id.*

²³⁷ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pgs. 76-77.

²³⁸ Mediazona, “Case of Krasnodar lawyer Benyash: Seventh Day”, April 9, 2019.

- Judge Belyak abruptly struck the question, saying to the defense attorney, “Don’t. You have no right.”²³⁹

In sum, Judge Belyak’s restrictions on the defense calling of witnesses as well as her severe limitations on the nature and extent of cross-examination of prosecution witnesses violated Mr. Benyash’s rights under Article 14(3)(e) of the ICCPR and Article 6(3)(d) of the ECHR.

Presumption of Innocence

Governing Standards and Precedent

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” The UN Human Rights Committee has stated that Article 14(2) “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”²⁴⁰ It follows that a conviction notwithstanding the prosecution’s failure to prove its case beyond a reasonable doubt violates Article 14(2) of the ICCPR.²⁴¹ The protections of this article also prohibit public authorities from prejudging the outcome of a trial.²⁴²

The corresponding guarantee under Article 6(2) of the ECHR provides, almost identically, that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” Like Article 14(2) of the ICCPR, Article 6(2) requires that the relevant judicial authority not predetermine the outcome of the case; predetermination may be inferred from the existence of “some reasoning suggesting that the court or the official regards the accused as guilty,” even if there is no formal finding of such.²⁴³

²³⁹ Protocol on Judicial Session in Case No. 1-178/19, March 19, 2019, pg. 7 (cross-examination of Mr. Eduard Fedorov).

²⁴⁰ Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30. See also Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4.

²⁴¹ See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

²⁴² Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.3.

²⁴³ European Court of Human Rights, *Garycki v. Poland*, App. No. 14348/02, February 6, 2007, para. 66. See also European Court of Human Rights, *Daktaras v. Lithuania*, App. No. 42095/98, October 10, 2000, para. 41; European Court of Human Rights, *Nešťák v. Slovakia*, App. No. 65559/01, February 27, 2007, para. 88. The issue of judicial pre-judgment of a case is closely linked to judicial bias as a violation of the right to be tried by an impartial tribunal, which is covered below.

In the European Court's case law, the right to be presumed innocent is inextricably linked with the principle of *in dubio pro reo*, meaning that any doubts should be resolved in favor of the accused.²⁴⁴ In this regard, the Court has established that an insufficiently reasoned convicting judgment can constitute a violation of Article 6(2).²⁴⁵ The Court has further held that the *in dubio pro reo* principle is violated where a judicial body rejects relevant testimony from a defense witness in issuing a conviction, and fails to provide justification for why the testimony of defense witness(es) lacked probative value.²⁴⁶

The case of *Navalnyy v. Russia* is particularly applicable to that of Mr. Benyash. In *Navalnyy*, domestic courts had "based their decisions [against Mr. Navalnyy] exclusively on the versions of events put forward by the police."²⁴⁷ With respect to this conduct, the Grand Chamber approvingly quoted the prior Chamber judgment as follows:

[by] dismissing all evidence in the defendant's favor without justification the domestic courts had placed an extreme and unattainable burden of proof on the applicant, contrary to the basic requirement that the prosecution has to prove its case and to one of the fundamental principles of criminal law, namely *in dubio pro reo*.²⁴⁸

As stated by the Court, the Russian authorities' inattention to defense arguments and evidence had "resulted in judicial decisions which were not based on an acceptable assessment of the relevant facts" and thus violated the applicant's right to a fair trial.²⁴⁹

Implausibility of Prosecution's Case

In light of the above standards, Mr. Benyash's trial entailed severe and repeated violations of his right to be presumed innocent. The case against Mr. Benyash was marred by

²⁴⁴ European Court of Human Rights, *Melich and Beck v. Czech Republic*, App. No. 35450/04, July 24, 2008, para. 49.

²⁴⁵ *Id.* at paras. 49-55; European Court of Human Rights, *Ajdarić v. Croatia*, App. No. 20883/09, December 13, 2011, paras. 46-52.

²⁴⁶ See European Court of Human Rights, *Melich and Beck v. Czech Republic*, App. No. 35450/04, July 24, 2008, paras. 52-55.

²⁴⁷ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12 and others, November 15, 2018, para. 83. "[T]he [domestic] courts in the six other sets of proceedings decided to base their judgments exclusively on the versions of events put forward by the police. They systematically failed to check the factual allegations made by the police, having refused the applicant's requests for additional evidence such as video recordings to be admitted, or for witnesses to be called, in the absence of any obstacles to doing so. Moreover, when the courts did examine witnesses other than the police officers, they automatically presumed bias on the part of all witnesses who had testified in the applicant's favor; on the contrary, the police officers were presumed to be parties with no vested interest.... The Court considers that the six sets of administrative proceedings in this case were all flawed in a similar way; they resulted in judicial decisions which were not based on an acceptable assessment of the relevant facts."

²⁴⁸ *Id.*

²⁴⁹ *Id.* at paras. 83-84.

significant flaws: primarily 1) substantial contradictions and gaps in the evidence regarding Mr. Benyash's arrest, his alleged assault of Officers Yurchenko and Dolgov, and the officers' alleged injuries; 2) the patently false testimony of two witnesses for the prosecution; and 3) the existence of strong and consistent witness accounts from Ms. Barkhatova and Mr. Benyash disputing the version of events put forth by Officers Dolgov and Yurchenko. In convicting Mr. Benyash notwithstanding these flaws and failing to provide reasons for its decision, the court functionally shifted the burden of proof to Mr. Benyash, in contravention of Article 14(2) of the ICCPR and Article 6(2) of the ECHR.

As noted above, the criminal charge under Article 318(1) of the Criminal Code, Assault Against a Representative of the Authority, required the prosecution to prove intent to assault representatives of the authority, meaning that the prosecution had to prove that Mr. Benyash knew, or at least should have known, that the purported victims were police officers lawfully performing their official duties. The prosecution's only evidence in this regard were the accounts of Officers Dolgov and Yurchenko themselves. As noted above, the officers testified that they had followed all relevant protocols, including identifying themselves, and that Mr. Benyash willingly entered the police vehicle.²⁵⁰ The credibility of their account was undermined by the video showing Officer Yurchenko forcefully grabbing Mr. Benyash by the elbow and moving him towards the car.²⁵¹ In the video, the officers are shown wearing ordinary t-shirts: there is no indication that they are anything other than civilians. As confirmed by Officer Dolgov, they were also driving an unmarked car (personally owned by Officer Dolgov).²⁵²

Mr. Benyash and Ms. Barkhatova both disputed the account of Officers Dolgov and Yurchenko. Ms. Barkhatova testified that the officers had not introduced themselves and had forced them in the car,²⁵³ while Mr. Benyash testified that he had believed the officers were *titushki* - violent thugs who join police crackdowns on protesters and who would have had no authority to detain civilians.²⁵⁴ In addition, other witnesses who had been arrested by Officers Dolgov and Yurchenko testified that they had failed to identify themselves as police officers, demonstrating a pattern.²⁵⁵ As such, the evidence left serious doubts about whether Mr. Benyash had known that Dolgov and Yurchenko were police officers.

²⁵⁰ See Monitor's Notes, April 9, 2019; Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019.

²⁵¹ See Youtube video, "Lawyer in Krasnodar. Protects people at risk of health and freedom", September 28, 2018. Available at https://www.youtube.com/watch?v=ss1_QHZlrSo.

²⁵² See Monitor's Notes, April 9, 2019; Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pg. 79 (testimony of Officer Dolgov).

²⁵³ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019; Investigative Committee of Krasnodar, Protocol of Barkhatova Witness Interrogation, October 13, 2018.

²⁵⁴ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 11.

²⁵⁵ See Monitor's Notes, May 14, 2019 (testimony of Mr. Razmik Simonyan); Monitor's Notes, May 28, 2019 (testimony of Mr. Grigory Rusin).

The evidence regarding the assault on Officers Dolgov and Yurchenko and their resulting injuries was likewise inadequate. Officers Dolgov and Yurchenko furnished contradictory accounts of the alleged incident, to which the only other witnesses were Mr. Benyash and Mr. Barkhatova. In the officers' initial reports, they stated that Mr. Benyash had thrashed about in the car upon arrival at the police station, beating his head on the windows, kicking the doors, and harming only himself.²⁵⁶ While the reports noted that Mr. Benyash had disobeyed orders and had attempted to provoke a fight, there was no reference to either an assault or any injuries suffered by the officers. In contrast, the officers testified at trial that Mr. Benyash had directly attacked them in the car, punching Officer Yurchenko in the head and biting Officer Dolgov - and that Mr. Benyash had also beaten his head on the pavement in the police station parking lot.²⁵⁷ Officer Dolgov stated that he could not recall why he had omitted the purported bite from his initial report.²⁵⁸

Further inconsistencies were discovered between Officer Dolgov's pretrial statements and testimony at trial. During an initial interrogation conducted as part of the investigation, Officer Dolgov stated that Mr. Benyash had bitten him on his left forearm when he was pulling Mr. Benyash out of the car in the police station parking lot.²⁵⁹ In contrast, Officer Dolgov testified at trial that Mr. Benyash had bitten him in the right forearm when they were both still inside the car.²⁶⁰ Officer Dolgov failed to explain these disparities.

Meanwhile, there was little physical evidence or documentation of the officers' injuries. According to Mr. Benyash, neither the investigative authorities nor the prosecution provided the defense with records of the medical examination of the officers conducted on September 9, 2018, the day of the alleged offense. Only after repeated efforts by the defense to subpoena Dr. Khapsirokov, the examining doctor, did it emerge that the sole injuries discovered during the examination were bruises on the officers' arms. The doctor had not seen (nor heard Officer Dolgov complain of) the bites allegedly inflicted by Mr. Benyash.²⁶¹ Dr. Khapsirokov testified that if either of the two officers had mentioned being bitten, he would certainly have included that in his report.²⁶² Dr. Khapsirokov similarly did

²⁵⁶ Report of September 9, 2018, signed by Officer Dolgov; Report of September 9, 2018, signed by Officer Yurchenko.

²⁵⁷ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pgs. 79-80, 110 (testimony of Officers Dolgov and Yurchenko); Mediazona, "Case of Krasnodar lawyer Benyash: Seventh Day", April 9, 2019.

²⁵⁸ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pg. 104 (cross-examination of Officer Dolgov); Mediazona, "Case of Krasnodar lawyer Benyash: Seventh Day", April 9, 2019.

²⁵⁹ Criminal Case File, Record of Interrogation of Officer Dolgov, September 22, 2018.

²⁶⁰ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 9, 2019, pg. 79 (testimony of Officer Dolgov).

²⁶¹ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, August 13, 2019, pgs. 273-274; Monitor's Notes, August 13, 2019.

²⁶² *Id.*

not find head injuries on Officer Yurchenko.²⁶³ Notably, the bruises on Officer Yurchenko's arms were consistent with Mr. Benyash's testimony that he tried to wrench Officer Yurchenko off of him because Officer Yurchenko was choking him. The prosecution did not introduce any photo or video evidence of the alleged injuries suffered by the purported victims.

The credibility of the prosecution's case also suffered when it was proven that two prosecution witnesses who supported the version of events presented by Officers Dolgov and Yurchenko had perjured themselves. City employees Bolbat and Borisov testified at trial that they personally witnessed Mr. Benyash beating his head against the pavement at the police station, thereby explaining his head injuries.²⁶⁴ In the subsequent court hearing, however, the defense presented video and administrative arrest record evidence to show that Bolbat and Borisov could not possibly have witnessed these events since at that same time they were at the rally in the center of Krasnodar, monitoring alleged disobedience by protesters so as to assist the police in mass arrests.²⁶⁵ Given that Messrs. Bolbat and Borisov were city employees who had been habitually employed by the police, their false testimony strongly suggested collusion among prosecution witnesses, an issue that merited heightened scrutiny by the court.

In contrast to evidence presented by the prosecution, the accounts provided by Ms. Barkhatova and Mr. Benyash to various bodies and in various venues were consistent. Ms. Barkhatova, who witnessed the entirety of the events for which Mr. Benyash was ultimately charged, stated during the pretrial investigation as well as at Mr. Benyash's criminal trial that Officers Dolgov and Yurchenko did not introduce themselves or show identification when they apprehended the two.²⁶⁶ Ms. Barkhatova further testified that she witnessed the officers hitting Mr. Benyash in the car, heard Mr. Benyash screaming in the interrogation room, and never saw Mr. Benyash inflicting injuries on himself.²⁶⁷

²⁶³ Krasnodar City Hospital, Medical Record of Dmitry Yurchenko, September 9, 2018; Mediazona, "Case of Krasnodar lawyer Benyash: Nineteenth Day", August 13, 2019.

²⁶⁴ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 26, 2019 (testimony of Mr. Bolbat and testimony of Mr. Borisov).

²⁶⁵ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178-19, April 2, 2019, pgs. 65-67 (cross-examination of Mr. Bolbat and cross-examination of Mr. Borisov). A letter subpoenaed from the prosecutor's office also confirmed that Borisov and Bolbat were at a rally near the Aurora movie theater and not at the police station at the time when Mr. Benyash was brought to the police station. See Free Media, "Trial of lawyer Mikhail Benyash: Day 14", June 25, 2019. Available at <https://freemedia.io/2019/06/benyash-online14>; Letter from the Prosecutor's Office, June 10, 2019. In its final verdict, the court acknowledged that the testimony of Borisov and Bolbat was false but did not comment on how this affected the prosecution's case against Mr. Benyash. See Leninsky District Court for Krasnodar, Judgment, Case No. 1-178/19, October 11, 2019, pg. 47.

²⁶⁶ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019; Investigative Committee of Krasnodar, Protocol of Barkhatova Witness Interrogation, October 13, 2018.

²⁶⁷ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019.

The account of Mr. Benyash himself did not change from his original handwritten notes on the administrative offense, delivery, and administrative detention Protocols to his testimony at trial,²⁶⁸ belying the officers' statements as to the lawfulness of the arrest, the origin of Mr. Benyash's injuries, and the purported assault. Mr. Benyash testified that any injuries found on the police officers stemmed from his resistance when he believed he was being abducted.²⁶⁹

Convicting Judgment

The Leninsky District Court for Krasnodar was obligated to address all critical facts at issue.²⁷⁰ In accordance with the *in dubio pro reo* principle, reflected in Article 49 of the Russian Constitution, the court was also obligated to resolve any lingering uncertainties in Mr. Benyash's favor. The court's convicting verdict plainly flouts these responsibilities.

In its 50-page verdict, the court endorses the version of facts presented by Officers Dolgov and Yurchenko without explaining why their accounts were given credence over those of Mr. Benyash and Ms. Barkhatova. The judgment states that Officers Dolgov and Yurchenko approached Mr. Benyash on the street, introduced themselves - presenting identification - and notified him in full of the reasons for the arrest.²⁷¹ The judgment makes no attempt to assess evidence in the record demonstrating that Mr. Benyash did not and could not have reasonably known that he had been detained by the police officers, a requisite element of the crime under Article 318(1) of the Criminal Code.

The verdict subsequently declares that upon nearing the police station, Mr. Benyash, "on the basis of personal hostile relations, realizing the social danger of his actions" and aiming to avoid liability for Article 20.2(2) of the CAO, "had criminal intent to use violence against officials of the law enforcement agency."²⁷² As stated in the verdict, Mr. Benyash "acted with violence" against Officer Yurchenko: Mr. Benyash "appl[ied] at least three hits with the elbow of the right arm to the face, at least three hits with the head to the temporal region of the head, at least one hit with the elbow with the right arm to the left arm, and at least three hits with the elbow to the chest of D. D. Yurchenko, which caused him

²⁶⁸ See Protocol on Administrative Offense (Article 19.3), September 9, 2018 (Mr. Benyash's handwriting is visible at bottom of the document, reading: "the Report is falsified, the plain-clothed agents had not introduced themselves, they did not present any demands, they immediately became violent, beat me and took away my phone."); Protocol on Delivery, September 9, 2018 (with similar handwritten comments); Protocol on Administrative Detention, September 9, 2018 (with similar handwritten comments); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pgs. 12-15.

²⁶⁹ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pgs. 12-15 (testimony of Mr. Benyash).

²⁷⁰ See European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12 and others, November 15, 2018, para. 83 (quoting approvingly from relevant Chamber Judgment).

²⁷¹ Leninsky District Court for Krasnodar, Judgment, Case No. 1-178/19, October 11, 2019, pg. 5.

²⁷² *Id.* at pg. 5.

bruising to the soft tissue of the face, multiple bruises to the chest, multiple bruises to the right upper limb, multiple bruises to the upper left limb.”²⁷³

The verdict correspondingly concludes that Mr. Benyash took action against Officer Dolgov: Mr. Benyash made “at least two bites to the region of the right forearm, to the region of the left shoulder, as well as in the form of grabbing E. D. Dolgov with his hands around the left clavicle and left shoulder, the right forearm and [compressing] with force, pushing with his hands on the indicated parts of the body, which caused E. D. Dolgov physical pain and bodily injury in the form of bruising in the area of the left clavicle, bruising and abrasions in the area of the left shoulder, bruising in the area of the right forearm.”²⁷⁴

After summarizing the entirety of the police officers’ testimony and the remainder of the prosecution’s evidence,²⁷⁵ the verdict asserts:

An analysis of the above evidence indicates that they relate to the event under investigation, objectively illuminate it, are consistent, complement each other, are fully consistent with each other in place, time and other actual circumstances of the crime. They detail and objectively reveal the event of an unlawful act committed by the defendant. The evidence was obtained by the proper person in the manner prescribed by law and the factual information contained in it does not cause the court to doubt its reliability. ... The court also does not raise doubts about the testimonies of the interrogated victims, experts and witnesses, since they are consistent with each other and the evidence examined, the court has not established grounds for the stipulation for the defendant.²⁷⁶

There is no explanation as to why the court does not “doubt [the] reliability” of the prosecution’s evidence or how it can possibly deem the testimony of prosecution witnesses and experts “consistent.” There is likewise no commentary on the disparities identified above, such as why the officers’ accounts regarding whether Mr. Benyash hit and bit them changed between the time they filed their reports and the time they testified at trial. The verdict is not much clearer with respect to another major flaw in the prosecution’s case - the patent perjury of city employees Bolbat and Borisov. While acknowledging that the testimony of Messrs. Bolbat and Borisov lacked probative value since they were shown to have been in a different location at the time of Mr. Benyash’s

²⁷³ Id. at pg. 6.

²⁷⁴ Id. at pgs. 6-7.

²⁷⁵ Id. at pgs. 10-41. The only testimony that was not included in support of the court’s finding of guilt was that of Bolbat and Borisov, shown to have perjured themselves. The court dismissed their testimony simply by saying that it “doubted they were eyewitnesses to the events.” Id. at pg. 47.

²⁷⁶ Id. at pg. 40.

arrival at the police station,²⁷⁷ the court does not comment on whether their perjury might cast doubt on the testimony of other prosecution witnesses and, therefore, on the prosecution's case.

The verdict inexplicably cites as proof of Mr. Benyash's guilt the site visit protocols.²⁷⁸ The protocols reflect the criminal investigator's site visit on November 9, 2018 to the street where Mr. Benyash was arrested and to the police parking lot. The investigator's only observations in this regard were that he did not see any video cameras at either location. It therefore appears that the court interpreted the absence of video recordings of Mr. Benyash's arrest and arrival in the parking lot as evidence of his guilt.

Also concerning is the verdict's treatment of Mr. Benyash's consistent account disputing the prosecution's case. After summarizing Mr. Benyash's testimony, the verdict rejects it with a single sentence:

The court critically evaluates the testimony of the defendant, believing that his guilt for the perpetration of the act incriminated to him is confirmed by the totality of the evidence presented and investigated during the judicial investigation.²⁷⁹

At the end of the verdict, the court again asserts that Mr. Benyash's version of events was "refuted by the totality of the above evidence - testimonies of the victims D. D. Yurchenko and E. D. Dolgov, testimony of witnesses, given by them during the judicial investigation, testimony of experts V. V. Kuzeleva and N. P. Kirichkova, as well as other evidence in the case."²⁸⁰ There are no details as to why the court found the testimony of prosecution witnesses more credible than that of Mr. Benyash - excepting a conclusory statement that "non-recognition of guilt by the accused M. M. Benyash [was] his chosen form of defense."²⁸¹

The verdict likewise dismisses all remaining testimony favorable to the defense - specifically that of Ms. Barkhatova, Mr. Avanesyan, and Dr. Khapsirokov. Stating that Ms. Barkhatova "ha[d] long been familiar with the defendant, maintains friendly relations with him, and previously participated in other processions and rallies, where M. M. Benyash was her lawyer by agreement," the court finds that her testimony was motivated by "a desire to lead the defendant away from criminal liability for the crime he committed."²⁸²

²⁷⁷ Id. at pg. 47. "The court critically evaluates the testimony of witnesses D. I. Bolbat and M. V. Borisov, believing that they were not direct eyewitnesses to the crime committed by M. M. Benyash, which is confirmed by the evidence studied during the judicial investigation, in particular cases of administrative offenses against persons detained at an unauthorized rally on 09/09/2018, and witness statements."

²⁷⁸ Id. at pg. 34.

²⁷⁹ Id. at pg. 9.

²⁸⁰ Id. at pg. 41.

²⁸¹ Id.

²⁸² Id. at pg. 42.

The court finds Mr. Avanesyan's testimony to have been similarly motivated.²⁸³ As noted above, the court did not assess the motivations of prosecution witnesses.

With respect to Dr. Khapsirokov (who testified that neither officer complained of being punched in the head or bitten when he evaluated them on the day of the alleged attack and that he did not find bites on Officer Dolgov or head injuries on Officer Yurchenko), the court states only that the doctor's testimony "d[id] not justify the actions of the defendant and [was]not direct evidence of his innocence, since the doctor did not make a definitive conclusion about the absence of injury by biting caused to E.D. Dolgov by M.M. Benyash."²⁸⁴ The court's analysis of the doctor's testimony assumes that the defense was responsible for proving Mr. Benyash's innocence - not the prosecution Mr. Benyash's guilt. The verdict characterizes all other evidence presented by the defense as irrelevant.²⁸⁵

The court's unquestioning acceptance of the police officers' accounts constituted a stark violation of Mr. Benyash's right to be presumed innocent. The court was required to duly weigh all the evidence in the case and provide explicit reasoning for why different pieces possessed greater probative value than others. The convicting verdict was correspondingly required to explain how the prosecution had proven its case beyond a reasonable doubt - particularly how it managed to do so in spite of the doubts raised by the defense during trial.²⁸⁶ Instead, by resolving all uncertainties in the prosecution's favor and failing to explain itself, the court effectively shifted the burden of proof to Mr. Benyash. His rights under Article 14(2) of the ICCPR and Article 6(2) of the ECHR were thereby violated.

Judicial Impartiality

Governing Standards and Precedent

Article 14(1) of the ICCPR provides that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The UN Human Rights Committee has explicitly stated that the competence, independence, and impartiality requirements represent "an absolute right that is not subject to any exception."²⁸⁷

²⁸³ Id. at pg. 46.

²⁸⁴ Id. at pg. 42.

²⁸⁵ Id. at pg. 45 (assessing testimony by S.T. Romanov, D.A. Svitnev, V.N. Demin, and G.N. Rusin as irrelevant to the proceedings).

²⁸⁶ See European Court of Human Rights, *Ajdarić v. Croatia*, App. No. 20883/09, December 13, 2011, paras. 46-52; European Court of Human Rights, *Melich and Beck v. Czech Republic*, App. No. 35450/04, July 24, 2008, paras. 52-55.

²⁸⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 19.

The guarantee of judicial impartiality encompasses both a subjective dimension, meaning that judges must be free from preconceptions, prejudice, or personal bias that might influence their judgments, and that judges must refrain from taking actions that would unfairly advantage one party to the proceedings over another;²⁸⁸ and an objective dimension, requiring that even in the absence of actual bias, a tribunal must appear to be impartial to a reasonable observer.²⁸⁹ In *Ashurov v. Tajikistan*, the Human Rights Committee found an Article 14(1) violation where a judge - as recounted by the complainant - “asked leading questions to prosecution witnesses, corrected and completed their answers and instructed the court’s secretary to record only those testimonies establishing [the accused’s] guilt.”²⁹⁰ To note, the Committee generally does not explicitly distinguish between subjective and objective bias in finding violations of Article 14(1).

Article 6(1) of the ECHR entitles defendants “to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” In interpreting this right, the European Court of Human Rights has emphasized that democratic societies demand courts which “inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused.”²⁹¹

Like the UN Human Rights Committee, the European Court assesses a tribunal’s impartiality along both subjective and objective lines. Under the subjective standard, a judge cannot hold any personal bias or prejudice in adjudicating a case.²⁹² The Court assumes no bias upon the part of an individual judge until there are indications otherwise, such as displays of hostility.²⁹³ The case of *Ramishvili and Kokhreidze v. Georgia* (although it involved pretrial detention proceedings and thereby implicated Article 5(4), not Article 6(1)) provides an instructive example of how subjective bias can manifest itself in the courtroom.

The proceedings under review in *Ramishvili and Kokhreidze v. Georgia* were described as follows: when the defense posed questions “which perplexed the prosecutor, the judge either directly replied instead ... or rephrased the questions in a leading manner, thereby

²⁸⁸ Id. at para. 21. See also Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6; Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

²⁸⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21.

²⁹⁰ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6.

²⁹¹ European Court of Human Rights, *Kyprianou v. Cyprus*, App. No. 73797/01, December 15, 2005, para. 118.

²⁹² European Court of Human Rights, *Nicholas v. Cyprus*, App. No. 63246/10, January 9, 2018, para. 49.

²⁹³ European Court of Human Rights, *Kyprianou v. Cyprus*, App. No. 73797/01, December 15, 2005, paras. 118-119.

suggesting a suitable answer for the prosecutor.”²⁹⁴ In such circumstances, the Court concluded that “the judge was obviously aiding the prosecutor during the hearing, by either directly responding to the questions of the defense instead of the latter or rephrasing these questions in a manner more advantageous to the prosecutor.”²⁹⁵ The Court consequently found that the judge’s conduct “could not be said ... to be devoid of bias.”²⁹⁶

With respect to the objective assessment, the Court seeks to verify the existence of facts that could lead a reasonable observer to question the tribunal’s impartiality.²⁹⁷ As stated by the Court in *Nicholas v. Cyprus*:

it must be determined whether, quite apart from the judge’s conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.²⁹⁸

The objective test primarily concerns “hierarchical or other links between the judge and other protagonists in the proceedings or the exercise of different functions within the judicial process by the same person.”²⁹⁹ The Court has held that although the “mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality,” the specific “nature and scope” of said decisions *can* potentially give rise to doubts about impartiality.³⁰⁰ In particular, “it is necessary to consider whether the link between substantive issues determined at various stages of the proceedings is so close as to cast doubt on the impartiality of the judge participating in the decision-making at these stages.”³⁰¹

As noted by the Court:

appearances may be of a certain importance or, in other words “justice must not only be done, it must also be seen to be done” ... What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus,

²⁹⁴ European Court of Human Rights, *Ramishvili and Kokhreidze v. Georgia*, App. No. 1704/06, January 27, 2009, paras. 61, 134, 136.

²⁹⁵ *Id.* at para. 134.

²⁹⁶ *Id.*

²⁹⁷ European Court of Human Rights, *Kyprianou v. Cyprus*, App. No. 73797/01, December 15, 2005, paras. 118-119.

²⁹⁸ European Court of Human Rights, *Nicholas v. Cyprus*, App. No. 63246/10, January 9, 2018, para. 52.

²⁹⁹ *Id.* at para. 53.

³⁰⁰ European Court, *Morel v. France*, App. No. 34130/96, June 6, 2000, para. 45.

³⁰¹ European Court, *Toziczka v. Poland*, App. No. 29995/08, July 24, 2012, para. 36.

any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.”³⁰²

Mr. Benyash’s Case

In Mr. Benyash’s case, the Leninsky District Court violated both the objective and subjective guarantees against judicial bias.

With respect to the objective standard, Judge Belyak had previously presided over two proceedings related to Mr. Benyash’s criminal trial: Mr. Benyash’s pretrial detention hearing and the administrative hearing and conviction of Ms. Barkhatova on charges of disobeying police orders. While, as detailed above, mere participation in the pretrial stage of a case is insufficient grounds for doubting a judge’s impartiality, “the nature and scope of” relevant pretrial decisions must be examined.

At Mr. Benyash’s pretrial detention hearing, Judge Belyak refused to admit Ms. Barkhatova’s testimony, in violation of Mr. Benyash’s due process rights. Judge Belyak’s decision imposing two months of pretrial detention on Mr. Benyash was subsequently overturned by a reviewing court, which concluded that the judge had failed to sufficiently consider Mr. Benyash’s individual circumstances. Mr. Benyash was released. Given that both the conduct of the hearing at which pretrial detention was imposed *and* the decision itself were flawed, there were objective grounds to doubt Judge Belyak’s impartiality heading into Mr. Benyash’s criminal trial.

Further, Judge Belyak had already found Ms. Barkhatova’s account of the arrest and the alleged misconduct of Officers Dolgov and Yurchenko to be incredible: she convicted Ms. Barkhatova of violating Article 19.3 of the CAO (disobeying police orders) for her purported resistance during the same events that formed the basis of Mr. Benyash’s criminal prosecution. Given that Ms. Barkhatova’s testimony on this subject was key to the defense case in Mr. Benyash’s trial, there were objective grounds to doubt Judge Belyak’s impartiality.

As noted above, the European Court places great emphasis on “appearances” and the “confidence which the courts in a democratic society must inspire in the public.” Even if either the pretrial detention decision in Mr. Benyash’s criminal case or the conviction in Ms. Barkhatova’s administrative case was not sufficient on its own to create objective doubts about Judge Belyak’s impartiality, the two combined could not but lead a reasonable observer to question the court’s impartiality, undermining public “confidence” in the fairness of Mr. Benyash’s trial.

³⁰² European Court of Human Rights (Grand Chamber), *Micallef v. Malta*, App. No.17056/06, October 15, 2009, para. 98.

With respect to the subjective framework Judge Belyak repeatedly displayed hostility towards the defense, conduct sufficient to meet even the more stringent standard of subjective bias.

As described above, the judge frequently interrupted defense counsel during cross-examination of prosecution witnesses, striking questions about issues central to the defense case and admonishing defense counsel for pursuing standard lines of inquiry. Additionally, the judge refused to allow Mr. Benyash to call as a witness the investigator who compiled the case against him, failing to provide a reasonable justification for her decision.³⁰³

In contrast, like the judge in *Ramishvili and Kokhreidze*, Judge Belyak explicitly aided the prosecution, criticizing those witnesses who failed to shore up the prosecution's case. During the investigation stage, for example, prosecution witness Maxim Danilenko - a police officer at the time of the incident and brother to another police officer and witness in the case - gave a statement identical to that of his brother, in which he said he had seen Mr. Benyash physically attack Officer Yurchenko in the parking lot of the police station.³⁰⁴ During his testimony at trial, however, Mr. Danilenko repeated over and over that he did not recall any details of the incident, which prompted the prosecutor, frustrated, to confront him with his original statement.³⁰⁵ When Mr. Danilenko still could not recall any details, struggling to remember who Mr. Benyash was, Judge Belyak exclaimed, "Well, come on, remember! You put the prosecutor in a position when he should testify for you. Take pills or do whatever you need to remember."³⁰⁶ Although these comments failed to elicit any further recollection, Mr. Danilenko's testimony was cited as evidence of Mr. Benyash's guilt in the court's verdict convicting Mr. Benyash.³⁰⁷

In another example, Judge Belyak helped Officer Dolgov formulate responses when he struggled to answer defense questions about his inconsistent accounts of Mr. Benyash's arrest (namely, whether Mr. Benyash willingly entered the police vehicle). As stated by Judge Belyak in one such exchange: "I strike the last question by the defense, but I urge [Mr. Dolgov] to seriously address the question. Here is the formulation - if in the beginning it was proposed [that Mr. Benyash entered into a car willingly] then in the process [Mr. Benyash] changed his position. Please tell it clearly in your own words."³⁰⁸ Even after Officer Dolgov began answering the question just as Judge Belyak had instructed, Judge

³⁰³ Monitor's Notes, June 11, 2019.

³⁰⁴ The prosecution read his investigative statement aloud at trial after Mr. Danilenko failed to recall any details of the incident. Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 12, 2019, pgs. 24-25 (testimony of Mr. Maxim Danilenko).

³⁰⁵ See Mediazona, "Case of Krasnodar lawyer Benyash: Third Day", March 12, 2019. Available at <https://zona.media/online/2019/03/12/benyash3>; Free Media, "Trial of lawyer Mikhail Benyash: Day 3", March 12, 2019. Available at <https://freemedia.io/2019/03/benyash-online3>.

³⁰⁶ *Id.*

³⁰⁷ Leninsky District Court of Krasnodar, Judgment, Case No. 1-178/19, October 11, 2019, pgs. 24-25.

³⁰⁸ Audio Recording, cross-examination of Officer Dolgov, April 9, 2019, 2:49.

Belyak continued giving Officer Dolgov cues, interrupting his testimony with suggestions emphasizing that Mr. Benyash “willingly” entered the car.³⁰⁹ After Officer Dolgov finished his answer, Judge Belyak ruled that no further questions on this issue would be allowed.³¹⁰

Lastly, Judge Belyak evinced bias through her contemptuous remarks to the defense. During the cross-examination of Officer Dolgov, for example, Judge Belyak struck the question “What did the bite feel like?”, deeming it “mocking” and an “abuse of right”; when Mr. Benyash attempted to clarify the question, asking “Did you feel teeth?”, Judge Belyak sarcastically remarked, “Now it’s interesting to me. Dolgov, were those teeth exactly? Or maybe they were fingers? Or maybe they were flippers?”³¹¹ Judge Belyak made similarly sarcastic comments in response to defense questions about the interior of the police vehicle, a relevant line of inquiry given that Mr. Benyash was alleged to have inflicted violence on both the Officers and himself notwithstanding the car’s confined layout.³¹² Interrupting defense questions, the judge stated: “Counsel, do you want to buy a car?”³¹³ Several such remarks prompted objections from Mr. Benyash and defense counsel, who noted the judge’s inappropriate behavior and overly familiar manner with Officer Dolgov.³¹⁴

In sum, Judge Belyak’s conduct - in so much as she ruled to the explicit advantage of the prosecution, at points even coaching prosecution witnesses, and behaved in a hostile manner towards the defense - failed the subjective partiality test. Further, there were objective grounds to question her impartiality, in contravention of the objective bias standard.

D. OTHER FAIRNESS CONCERNS

Inhuman or Degrading Treatment³¹⁵

In addition to prohibiting arbitrary arrest and detention, Article 9(1) of the ICCPR encompasses broader guarantees for the physical integrity of an individual. In interpreting the first sentence of Article 9(1) - “[e]veryone has the right to liberty and security of person” - the UN Human Rights Committee has explained that it “protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained

³⁰⁹ Id.

³¹⁰ Id.

³¹¹ See Monitor’s Notes, April 9, 2019.

³¹² Id.

³¹³ Id.

³¹⁴ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 16, 2019, pg. 120 (Mr. Benyash’s statements to presiding judge).

³¹⁵ This section refers to “inhuman or degrading treatment” as opposed to “cruel, inhuman, or degrading treatment” because the former is the wording used in the European Convention.

or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury.”³¹⁶

Article 7 of the ICCPR establishes that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In recognition of the vulnerability of those in state detention, Article 10 of the ICCPR further states that “[a]ll persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person.” In this regard, the Committee noted that detainees should not “be subjected to any hardship or constraint other than that resulting from deprivation of liberty.”³¹⁷

Article 7 must be read in conjunction with Article 2(3) of the ICCPR, under which States Parties are obligated to provide an effective remedy to persons whose Covenant rights are violated.³¹⁸ In accordance with Article 2(3), States Parties are required to ensure that any allegation of torture or cruel, inhuman, or degrading treatment is promptly investigated by an impartial factfinder.³¹⁹

In the Human Rights Committee case of *Petrovets v. Belarus*, for example, the applicant complained of inhuman and degrading treatment. He had been arrested while monitoring a peaceful protest and subsequently beaten in detention, resulting in a fractured nose.³²⁰ In finding that Belarus had violated both Article 7 and Article 2(3) (for failure to investigate), the Committee highlighted “the State party’s inability or unwillingness to explain the visible signs of mistreatment that were witnessed by a number of persons.”³²¹ To note, the Committee’s case law typically does not distinguish between torture and inhuman or degrading treatment.

Like Article 7 of the ICCPR, Article 3 of the ECHR guarantees that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The Court’s case law draws a clear distinction between a substantive violation of Article 3 - the existence of the treatment itself - and a procedural violation of Article 3: the failure of the relevant State Party to effectively investigate allegations of such.³²² The Court also distinguishes between torture and inhuman or degrading treatment. To qualify as torture,

³¹⁶ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 9.

³¹⁷ Human Rights Committee, General Comment No. 21, U.N. Doc. CCPR/C/21/Rev.1/Add.3, April 10, 1992, para. 3.

³¹⁸ Human Rights Committee, General Comment No. 20, “Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)”, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), March 10, 1992, para. 14.

³¹⁹ *Id.*

³²⁰ Human Rights Committee, *Ilya Petrovets v. Belarus*, U.N. Doc CCPR/C/125/D/2333/2014, April 18, 2019, paras. 2.1-2.6; 8.1-8.3.

³²¹ *Id.* at para. 8.2.

³²² See European Court of Human Rights, *Salikhov v. Russia*, App. No. 23880/05, May 3, 2012, paras. 81, 86.

the relevant act must entail “deliberate inhuman treatment causing very serious and cruel suffering.”³²³ What rises to the level of inhuman or degrading treatment for the purposes of Article 3 is assessed on a case by case basis according to the victim’s specific circumstances; the severity, effects, and purpose of the treatment; and the context in which it took place.³²⁴

The European Court’s case law abounds with findings of Article 3 violations in the Russian Federation. In such cases, the Court has emphasized that “any recourse to physical force in respect of a person deprived of his liberty which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.”³²⁵ Where the events leading to the use of force against a detainee are in dispute, the Court has regarded the Russian authorities’ submissions with caution.³²⁶

The *Magnitsky* case provides a recent example of the Court’s analysis of inhuman or degrading treatment of detainees. Mr. Magnitsky, who died in detention awaiting trial, was revealed in a post-mortem examination to have suffered abrasions and bruising all over his body as well as a possible head injury. In response to his death, the Russian authorities stated that he had inflicted the injuries upon himself during a fit of “aggressive and inappropriate behavior”³²⁷ and swiftly closed the investigation. In finding a substantive violation of Article 3 for inhuman or degrading treatment³²⁸ and a procedural violation for failure to investigate,³²⁹ the Court excoriated the “inadequacy of such a poor explanation against the credible allegation of ill-treatment.”³³⁰

³²³ European Court of Human Rights, *Dedovskiy and Others v. Russia*, App. No. 7178/03, May 15, 2008, para. 84 (noting that the severe beating of detainees with rubber truncheons constituted torture due to the “retaliatory” nature of the beatings and the resulting “intense mental and physical suffering.” The Court also found a violation under the procedural limb. *Id.* at para. 94).

³²⁴ See European Court of Human Rights, *Bouyid v. Belgium*, App. No. 23380/09, September 28, 2015, para. 86.

³²⁵ European Court of Human Rights, *Salikhov v. Russia*, App. No. 23880/05, May 3, 2012, para. 78 (the applicant was arrested, beaten with a rubber truncheon, and subjected to the forcible cutting of his fingernails for forensic purposes, which resulted in pain and bleeding; the Court found a violation of Article 3 in its substantive limb for inhuman and degrading treatment and in its procedural limb for failure to effectively investigate). See also European Court of Human Rights, *Kopylov v. Russia*, App. No. 3933/04, July 29, 2010, para. 157.

³²⁶ European Court of Human Rights, *Kopylov v. Russia*, App. No. 3933/04, July 29, 2010, paras. 160-161, 165 (finding a violation of Article 3 for inhuman treatment where the applicant was beaten by the police with rubber truncheons, allegedly because he had attacked the police, although he was handcuffed and other eyewitnesses said that they did not see the applicant attack the police. The Court also found a violation of Article 3 under the procedural limb for the Russian authorities’ failure to effectively investigate the allegations. *Id.* at para. 173); European Court of Human Rights, *Magnitskiy and Others v. Russia*, App. Nos. 32631/09 and 53799/12, August 27, 2019, paras. 234-235.

³²⁷ European Court of Human Rights, *Magnitskiy and Others v. Russia*, App. Nos. 32631/09 and 53799/12, August 27, 2019, paras. 233-236, 240-241.

³²⁸ *Id.* at para. 240.

³²⁹ *Id.* at para. 236.

³³⁰ *Id.* at paras. 235-238.

Similarly, in *Ribitsch v. Austria*, the Court held that when an individual is taken into custody in good health but is subsequently found to be injured upon release, it is incumbent upon the state to provide a plausible explanation of how the injuries were caused, failing which Article 3 is violated.³³¹ In *Ribitsch*, the authorities claimed that the applicant's injuries had been caused by a fall; this account was undermined by significant contradictory evidence.³³² The Court thereby concluded that "the Government ha[d] not satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody," finding a violation of the Article 3's prohibition against inhuman or degrading treatment.³³³

Finally, the Convention Against Torture prohibits "torture and other cruel, inhuman or degrading treatment or punishment throughout the world."³³⁴ Article 16 of the Convention requires States parties to prevent cruel, inhuman, or degrading treatment at the hands of public officials and Article 12 imposes an obligation on competent authorities to promptly investigate any allegations of such.

The assault alleged by Mr. Benyash did not rise to the level of "very serious and very cruel suffering" under the European Court's definition of torture. However, the evidence strongly suggests that Mr. Benyash was subjected to inhuman or degrading treatment by police officers from the Ministry of Internal Affairs in Krasnodar, in contravention of the ICCPR, CAT, and the ECHR. In any event, Mr. Benyash's rights were violated by the authorities' failure to investigate his credible allegations.

Medical and photo documentation from the evening of Mr. Benyash's arrest and detention showed visible and serious injuries on his face.³³⁵ Mr. Benyash's medical examination also found that he had suffered internal hemorrhage and lasting hearing loss.³³⁶ In an echo of *Magnitsky*, Officers Dolgov and Yurchenko reported that Mr. Benyash had inflicted his own injuries; as discussed above, the officers' reports diverged over time as to whether Mr. Benyash did so by hitting his head against the car windows during the ride to the station³³⁷ or also by repeatedly hitting his face on the asphalt of the parking lot upon

³³¹ European Court of Human Rights, *Ribitsch v Austria*, App. No. 18896/91, December 4, 1995, para. 34.

³³² *Id.* at paras 34-40.

³³³ *Id.* at paras. 34. 39-40.

³³⁴ CAT, preamble.

³³⁵ Video and photo documentation of Mr. Benyash's injuries taken by Mr. Avanesyan may be seen in the Youtube video "Lawyer in Krasnodar. Protects people at risk of health and freedom", September 28, 2018. Available at https://www.youtube.com/watch?v=ss1_QHZlrSo, at 0:29. See also Krasnodar City Hospital, Medical Records of Mr. Benyash Examination, September 9-10, 2018.

³³⁶ Krasnodar City Hospital, Medical Records of Mr. Benyash Examination, September 9-10, 2018.

³³⁷ Report of September 9, 2018, signed by Officer Dolgov; Report of September 9, 2018, signed by Officer Yurchenko. Both reports have identical wording, in relevant part as follows: "Arriving at about 2:00 p.m. in the parking lot of the police station of the Office of the Ministry of Internal Affairs of the Russian Federation in Krasnodar ... [Mr. Benyash] began to inflict bodily injuries on various parts of his face, banging his head against the glass of the car, kicking the doors, trying to flee the territory of the police department, he responded with gross refusal to repeated legal demands by the police officers, trying to provoke a fight

arrival at the police station.³³⁸ Notably, two prosecution witnesses who claimed to have seen these acts of self-injury were shown to have perjured themselves at trial.³³⁹

Mr. Benyash himself has consistently stated that he received the injuries at the hands of the arresting police officers. In his handwritten notes on the administrative offense and detention protocols,³⁴⁰ his conversation with his lawyer several hours after his interrogation,³⁴¹ his testimony at his administrative offense hearing,³⁴² his testimony during his criminal trial,³⁴³ and a series of other complaints,³⁴⁴ Mr. Benyash reported that the police apprehended him without identifying themselves and proceeded to beat him once in the vehicle. He further testified that upon arrival at the police station, Officers Dolgov and Yurchenko pulled him from the vehicle and threw him face-first on the asphalt while he was handcuffed, which led to facial abrasions; and that in the interrogation room at the police station, Officer Yurchenko closed the door and struck him repeatedly on the face with his hands still cuffed behind him, knocking him off his chair so that he hit his head upon a safe in the office, causing further head injuries.³⁴⁵

Mr. Benyash's account was further bolstered by the testimony of Ms. Barkhatova, who stated that she saw Officer Yurchenko attack Mr. Benyash in the car, saw the officers push Mr. Benyash to the ground in the parking lot, heard the sound of blows coming from the interrogation room in which she saw the officers take Mr. Benyash, and also heard Mr. Benyash screaming in pain and yelling for her to call an ambulance.³⁴⁶

with the police officers. In order to suppress the illegal actions of citizen Benyash, physical force was used using the special means 'handcuffs,' since this citizen could cause physical harm to himself and others."

³³⁸ Monitor's Notes, April 9, 2019 (testimony of Officer Dolgov). Officer Dolgov testified as to Mr. Benyash's behavior in the car, stating that he had "behaved inappropriately" once they arrived at the police station, kicking at the headrest and trying to open the doors; he testified that Mr. Benyash hit his own head on the asphalt of the parking lot after Officer Dolgov pulled him out of the car. Later, when asked by the prosecutor for more details, Officer Dolgov stated that Mr. Benyash kicked the door, banged his head on the rear pillars, knocked out the headrest, damaged the tint and ceiling, and scratched the car by kicking it when he got out.

³³⁹ See Presumption of Innocence section above.

³⁴⁰ The Article 19.3 Protocol, in which police officers alleged that Mr. Benyash's injuries were self-inflicted, included the following written remarks from Mr. Benyash: "the Report is falsified, the plain-clothed agents had not introduced themselves, they did not present any demands, they immediately became violent, beat me and took away my phone." He also wrote that the police officers had not explained his constitutional rights and that he had demanded to see an attorney and a doctor. Protocol on Administrative Offense (Article 19.3), September 9, 2018. Mr. Benyash wrote similar remarks on his detention protocol. Protocol on Administrative Detention, September 9, 2018.

³⁴¹ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pg. 142 (testimony of Mr. Avanesyan).

³⁴² Leninsky District Court for Krasnodar, Protocol on Judicial Session, September 10, 2018, pgs. 5-6.

³⁴³ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pgs. 4-26 (testimony of Mr. Benyash).

³⁴⁴ These complaints are described below.

³⁴⁵ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, March 5, 2019, pg. 12 (testimony of Mr. Benyash).

³⁴⁶ Monitor's Notes, April 23, 2019 (testimony of Ms. Irina Barkhatova); Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, April 23, 2019, pgs. 147-157.

In light of the inconsistencies and gaps in the officers' accounts and the evidence to support Mr. Benyash's allegations, there is a strong *prima facie* case of inhuman or degrading treatment by the officers of the Ministry of Internal Affairs in Krasnodar, in violation of Articles 7, 9(1), and 10 of the ICCPR, Article 16 of the CAT, and the substantive limb of Article 3 of the ECHR. As in *Ribitsch*, the authorities have yet to provide a satisfactory explanation of how Mr. Benyash's injuries occurred.

At the very least, Mr. Benyash's allegations should have merited a thorough investigation. As of this date, however, there has been no such enquiry. The trajectory of Mr. Benyash's efforts to prompt an investigation is laid out below.

On September 11, 2018 Mr. Avanesyan filed a criminal complaint on behalf of Mr. Benyash with the Krasnodar Investigative Committee, reporting that Mr. Benyash had been abducted and beaten by Officers Dolgov and Yurchenko.³⁴⁷ On October 11, 2018, investigator Paleev issued a resolution declining to initiate a criminal investigation due to the absence of an expert report proving Mr. Benyash's injuries. On October 16, 2018, a medical examiner issued an expert report confirming that Mr. Benyash had suffered injuries.³⁴⁸ The Krasnodar Investigative Committee nonetheless continued to refuse to open an investigation against the police officers.³⁴⁹ In these resolutions, the Investigative Committee simply stated that the testimony of Mr. Benyash and Ms. Barkhatova "[had to] be viewed critically" because Mr. Benyash was a defendant in a criminal case where the officers had the status of victims.³⁵⁰

After the Investigative Committee issued a resolution on January 28, 2019 again refusing to investigate the police officers, Mr. Benyash filed a complaint with the Leninsky District Court for Krasnodar against the inaction of the authorities. The court, however, dismissed the complaint, claiming that the complaint did not provide sufficient information about "interested persons": namely, Officers Dolgov and Yurchenko. The judge did not specify what further information about the named officers was required.³⁵¹ Mr. Benyash filed an appeal, arguing that the Leninsky Court's dismissal of his complaint had no basis in law. His appeal was rejected by the Krasnodar Regional Court on June 18, 2019.³⁵²

Subsequently, Mr. Benyash attempted to file a another complaint against the inaction of the Investigative Committee.³⁵³ On August 12, 2019, the Leninsky District Court of Krasnodar denied Mr. Benyash's complaint, stating that the criminal case against Mr.

³⁴⁷ See Benyash Complaint to the ECtHR, para. 59.

³⁴⁸ Medical Expert Report, October 16, 2018.

³⁴⁹ The Investigative Committee issued resolutions refusing to open a criminal case against the police officers on October 11, 2018; November 11, 2018; December 26, 2018 and January 28, 2019. Benyash Complaint to the ECtHR, para. 59.

³⁵⁰ *Id.*

³⁵¹ See Leninsky District Court for Krasnodar, Judgment, February 21, 2019.

³⁵² Krasnodar Regional Court, Appeal Decision, June 18, 2019.

³⁵³ Leninsky District Court for Krasnodar, Mr. Benyash's Complaint, August 6, 2019.

Benyash was being examined by the same court.³⁵⁴ However, on August 13, 2019, Judge Belyak (the judge presiding over Mr. Benyash's criminal trial) refused to admit evidence of the police officers' guilt on the basis that any pursuit of the officers' criminal prosecution should be handled in separate proceedings.³⁵⁵ Finally, on October 23, 2019 the Krasnodar Regional Court upheld the Leninsky District Court's August decision. The Krasnodar Regional Court found that because the facts concerning Mr. Benyash's criminal complaint against the police officers were under review in Mr. Benyash's criminal trial, the lower court was correct in dismissing Mr. Benyash's complaint against the inaction of the Investigative Committee.³⁵⁶

The authorities' documented failure to act - and apparent coordinated obstruction of any remedy - amounts to a violation of Mr. Benyash's rights under Article 2(3) of the ICCPR, Article 12 of the CAT, and the procedural limb of Article 3 of the ECHR. The Russian authorities have left Mr. Benyash with no recourse for his injuries, prompting him to file a complaint in the European Court of Human Rights.³⁵⁷

Abuse of Process

The ICCPR prohibits the abuse of judicial proceedings to intimidate, discriminate against, or punish individuals for the exercise of their rights. The UN Human Rights Committee, for example, has determined that detention on the basis of human rights and journalistic work violates the right to liberty protected by Article 9(1).³⁵⁸

Article 18 of the ECHR explicitly protects against abuse of process: "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." Article 18 can only be applied in conjunction with one or more substantive rights delineated in the Convention³⁵⁹ and establishes that such rights cannot be restricted for improper or ulterior purposes, which may include intimidation, punishment, and suppression of dissent.³⁶⁰

³⁵⁴ Leninsky District Court for Krasnodar, Judgment, August 12, 2019.

³⁵⁵ Leninsky District Court for Krasnodar, Protocol on Judicial Session in Case No. 1-178/19, August 13, 2019, pg. 276.

³⁵⁶ Krasnodar Regional Court, Appeal Decision, October 23, 2019.

³⁵⁷ Benyash Complaint to the ECtHR, August 28, 2019.

³⁵⁸ Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, U.N. Doc. CCPR/C/122/D/2252/2013, 2018, para. 7.7.

³⁵⁹ See European Court of Human Rights, *Gusinskiy v. Russia*, App. No. 70276/01, May 19, 2004, para. 73.

³⁶⁰ See *id.* at paras. 76-78; European Court of Human Rights, *Cebotari v. Moldova*, App. No. 35615/06, November 13, 2007, para. 53; European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 353; European Court of Human Rights, *Lutsenko v. Ukraine*, App. No. 6492/11, August 1, 2012, para. 109; European Court of Human Rights, *Tymoshenko v. Ukraine*, App. No. 49872/11, May 22, 2013, para. 299; European Court of Human Rights, *Mammadov v. Azerbaijan*, App. No. 15172/13, May 22, 2014, para. 143; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14, April 19, 2018, paras. 104-105; European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, paras. 175-176.

In evaluating whether legal proceedings are driven by improper motives, the European Court of Human Rights considers circumstantial evidence, including: the political context in which the prosecution was brought;³⁶¹ whether the court was independent from executive authorities;³⁶² whether “there was a political impetus behind the charges”;³⁶³ whether the authorities undertook actions against the applicant amidst their “increasing awareness that the practices in question were incompatible with Convention standards”;³⁶⁴ whether the prosecution had reasonable suspicion to bring the charges;³⁶⁵ how the criminal proceedings were conducted;³⁶⁶ and whether the ultimate decision was well-reasoned and based on law.³⁶⁷

In Article 18 cases, the Court has further held that improper motive need not be the sole purpose for the prosecution, but the predominant one: in other words, even a prosecution that possesses a legitimate aim can be rendered unlawful due to ulterior motive.³⁶⁸

The European Court’s Grand Chamber ruling in *Navalnyy v. Russia* provides contemporaneous guidance on abusive process in the Russian context. In finding that the repeated arrest and detention of Mr. Navalnyy violated his right to be free from arbitrary detention and his right to peaceful assembly (in addition to his fair trial rights), the Court concluded that the authorities were improperly motivated: specifically, that the proceedings were aimed at preventing Mr. Navalnyy from participating in the political process.³⁶⁹ In accordance with precedent, the Court cited indicia such as patterns of

³⁶¹ European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights”, August 31, 2018, para. 57. Available at https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf (citing *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 322; European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, para. 257; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 901; European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14, March 17, 2016, paras. 159-161; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14, April 19, 2018, para. 103; European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13, June 7, 2018, para. 124).

³⁶² See European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 324.

³⁶³ See *id.* at para. 320.

³⁶⁴ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, para. 171.

³⁶⁵ See European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, para. 258; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 908.

³⁶⁶ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, para. 171.

³⁶⁷ European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107.

³⁶⁸ European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, paras. 292-308.

³⁶⁹ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, paras. 174-176.

harassment of political opposition members, the lack of justification for some of the arrests, the flawed conduct of the proceedings against Mr. Navalnyy, and the apparent targeting of Mr. Navalnyy amongst similarly situated individuals.³⁷⁰ As noted by the Court, “a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids abuse of a dominant position.”³⁷¹

Examining Mr. Benyash’s case against the indicators used by the European Court, it is clear that the authorities brought proceedings against him in order to suppress his legal representation of government critics and, in so doing, to undercut the rights to freedom of expression and freedom of assembly.

First, with respect to the broader political context, the Russian authorities have systematically suppressed dissent and peaceful public protest through the arrest, detention, conviction, and imprisonment of protesters and those who support them.³⁷² As a human rights attorney specialized in defending participants in unauthorized protests, Mr. Benyash was an obvious target for abusive prosecution.

Second, the facts of the case indicate there were not reasonable grounds for the criminal prosecution of Mr. Benyash. As discussed above, the evidence was rife with inconsistencies: the officers’ shifting reports, Mr. Benyash’s injuries, the absence of any discernible bite marks or head injuries in the initial medical examination of the officers, Ms. Barkhatova’s account, the video of the arrest, and so on.

Third, regarding the conduct of the proceedings, Mr. Benyash’s trial was riddled with grave procedural errors and rights abuses from start to finish. Moreover, the poorly reasoned verdict convicting Mr. Benyash violated his right to the presumption of innocence.

The proceedings were particularly suspect in that they constituted a *de facto* violation of the guarantee against double jeopardy (*ne bis in idem*).³⁷³ Namely, after being tried and convicted for violating Article 19.3 (disobeying police orders) of the Code of Administrative Offenses, for which he served a 14-day prison sentence, Mr. Benyash was criminally charged for the same alleged conduct. The criminal proceedings would have been barred by the *ne bis in idem* doctrine had the administrative verdict become final and binding,

³⁷⁰ Id. at paras. 167-176.

³⁷¹ Id. at para. 175.

³⁷² See Political and Legal Context section.

³⁷³ Article 14(7) of the ICCPR provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” Article 4 of Protocol 7 to the ECHR states that “[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

such as through the upholding of the conviction on appeal.³⁷⁴ It appears that the authorities acted in concert to avoid this outcome and facilitate Mr. Benyash's criminal prosecution.

On September 23, 2018, the day Mr. Benyash completed his administrative sentence, the authorities initiated a criminal investigation against him for assaulting Officers Dolgov and Yurchenko. He was immediately placed in pretrial detention. Two months later, in December 2018, a reviewing court granted an appeal brought by the prosecutor's office and vacated Mr. Benyash's conviction for the administrative offense of disobeying Officers Dolgov and Yurchenko, thereby clearing the path for criminal prosecution.³⁷⁵ At the end of December 2018, the prosecutor's office formally indicted Mr. Benyash. The timing of this sequence of events strongly suggests that the purpose of the vacating decision was not to exonerate Mr. Benyash of the administrative charges but to enable harsher punishment, evading the double jeopardy prohibition.

Finally, the abusive nature of the criminal case against Mr. Benyash is highlighted by the fact that with a criminal conviction, he is barred from future practice of law - the primary mechanism through which he has fought to protect the rights of freedom of expression and assembly.

Against this backdrop, it appears that the proceedings against Mr. Benyash were a means of intimidating and punishing him for his work as a human rights lawyer and activist.

³⁷⁴ The right not to be tried and punished twice for the same offense within the meaning of Article 4 of Protocol 7 applies to new prosecutions brought after a case based on the same facts has acquired the status of *res judicata*, meaning that the proceedings have culminated in a final and binding verdict. See European Court of Human Rights, *Korneyeva v. Russia*, App. No. 72051/17, October 8, 2019, para. 48 (In this case, the Court found a violation of Article 4 of Protocol 7 where the applicant was tried, sentenced, and fined for two separate administrative offenses based on her alleged participation in an unauthorized public protest. *Id.* at paras. 62-65).

³⁷⁵ Krasnodar Regional Court, Decision, December 14, 2018.

CONCLUSION AND GRADE



The violations described throughout this report cannot go unaddressed. The proceedings against Mr. Benyash entailed severe abuse of his fair trial rights, his right to liberty and security of person, and his right to be free from inhuman or degrading treatment. At no stage of the proceedings did the evidence against Mr. Benyash warrant the bringing of charges, let alone a conviction. A reasonable review of the absurdities and inconsistencies in the prosecution's case should have spurred the prosecution of the police officers, *not* Mr. Benyash. In any event, the documented violations must be remedied and impunity countered. Mr. Benyash should be compensated for his unjust administrative conviction and sentence as well as for his arbitrary pretrial detention. The Krasnodar Regional Court should overturn Mr. Benyash's unsubstantiated criminal conviction and acquit him in full. And, finally, the authorities should conduct an investigation into Mr. Benyash's credible allegations of inhuman and degrading treatment at the hands of Officers Dolgov and Yurchenko.

GRADE:

D



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”³⁷⁶ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

³⁷⁶ ICCPR, Article 26.