MEMORIAL - EHRAC
BULLETIN:

International Human Rights Advocacy

Editorial

The European Court of Human Rights has now handed down its first three judgments arising out of the conflict in Chechnya. These were cases in which Memorial and EHRAC represented the six applicants who were successful in establishing various violations of the Convention, notably Article 2 (the right to life) and Article 13 (the right to an effective remedy). These landmark decisions are discussed more fully in this edition of the Memorial-EHRAC Bulletin. They establish important precedents about the unavailability to the Chechen applicants of any effective domestic remedies, and they contain very important analyses of the use by the Russian military of excessive force in the region, leading to the loss of civilian life.

Also in this third edition of the Bulletin, Anna Demeneva (Sutyajnik) considers the right to legal assistance under the Criminal Procedure Code. Besarion Bokhashvili (Georgian Young Lawyers' Association) describes a pending European Court case arising from the attempts of a Georgian journalist to cover the Beslan tragedy, and Vladislav Gribincea (Lawyers for Human Rights, Chişinău) discusses his attempts to secure the enforcement of the Court's judgment in the case of *Ilaşcu v Russia and Moldova*. There are summaries of important recent European Court decisions, together with an analysis of the UN Human Rights Committee's response to Russia's fifth periodic report under the International Covenant on Civil and Political Rights.

We would welcome feedback on the Bulletin and welcome the submission of articles to be considered for publication in future editions.

Philip Leach
Director, EHRAC

European Court Of Human Rights Delivers Landmark Chechen Decisions

On 24 February 2005 the European Court of Human Rights delivered three judgments in the first six cases arising from the on-going conflict in Chechnya. All six cases were handled by EHRAC's lawyers in London and Memorial's lawyers in Moscow.

The applicants in the cases of **Isayeva v Russia (57947/00), Yusupova v Russia (57948/00) and Bazayeva v Russia (57949/00)** claimed that they were the victims of the indiscriminate aerial bombing of a convoy of civilians in their cars attempting to leave Grozny on 29 October 1999. As a result of the bombing, two children of the first applicant were killed and the first and second applicants were injured. The third applicant's car and possessions were destroyed. The applicants alleged violations of Articles 2, 3 and 13 of the European Convention on Human Rights and of Article 1 of Protocol No. 1.

The applicants argued that the bombing operation had been planned, controlled and executed in such a way as to constitute a violation of their right to life. They submitted that the violation was intentional because the authorities should have known of the massive civilian presence at the time of the attack and because the aircraft flew for a relatively long time at low altitude above the convoy before firing at it.

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The Russian government did not dispute that the attack had taken place or that the first applicant's children had been killed or the first and second applicant injured. It did, however, argue that the pilots had not intended to cause harm to civilians because they had not, and could not have, seen the convoy. The use of force, it argued, had been justified under paragraph 2 (a) of Article 2, which provides that the deprivation of life shall not be regarded as inflicted in contravention of Article 2 when it results from the use of force, which is no more than absolutely necessary, in defence of any person from unlawful violence. The Government submitted that the use of air power was justified by the heavy fire opened by members of illegal armed formations which constituted a threat not only to the pilots but also to the civilians in the vicinity.

The Court noted that its ability to make an assessment of the legitimacy of the attack, as well as how the operation had been planned and executed, was severely hampered by the lack of information before it. No operational plan had been submitted by the Government and no information was provided as to what assessment of the perceived threats and constraints had been made, or whether other weapons or tactics had been at the pilots' disposal. Most notably, no reference had been made to assessing and preventing possible harm to the civilians who might have been present on the road or elsewhere in the vicinity.

The Court accepted that the situation in Chechnya called for exceptional measures including the employment of military aviation equipped with heavy combat weapons. The Court was prepared to accept in principle that if the planes were attacked by illegal armed groups, that could have justified the use of lethal force, thus falling within paragraph 2 of Article 2.

However, the Government was found to have failed to produce convincing evidence to support such findings in this case. The testimonies submitted by the pilots and air traffic controller were the only mention of such an attack by armed insurgents and these were collected over a year after the attack, were incomplete and referred to other statements which the Government had failed to disclose. They were in almost identical terms and contained very brief details of the attack. The Court questioned their credibility. The Government also failed to submit any other evidence that could be relevant to legitimise the attack.

In the absence of corroborating evidence that any unlawful violence was threatened, or likely, the Court doubted whether Article 2(2)(a) was, in any event, applicable. However, the Court proceeded on the basis that it was, in considering whether the attack was no more than "absolutely necessary" for achieving that purpose and whether the planning and conduct of the operation was consistent with Article 2.

On this issue the Court found that the attack had not been absolutely necessary for achieving the purposes set out in Article 2. In particular, the authorities should have been aware of the announcement of a humanitarian corridor leaving Grozny and the presence of civilians in the area. Consequently, they should have been alerted to the need for extreme caution regarding the use of lethal force. Neither the air controller, nor the pilots involved in the attack, had been made aware of the announcement of a humanitarian corridor or the presence of refugees in the area and therefore the need for extreme caution.

In view of this and certain other facts, namely the lack of a forward air controller on board to provide any independent evaluation of the targets, the duration of the attack over a period of four hours and the power of the weapons used, the Court concluded that the operation had not been planned and executed with the requisite care for the lives of the civilian population. Consequently the Court found that the applicants' rights under Article 2 had been violated both by the failure to protect their lives, and their children's lives, and also in failing to investigate the attack after it had taken place (see below re Article 13). The applicants were awarded a total sum of €42,000 (Euros) plus legal costs and expenses.

The judgment in the case of **Isayeva v Russia (57950/00)**, concerned the indiscriminate bombing of the village of Katyr-Yurt. It was not disputed that the applicant and her relatives were attacked as they tried to leave the village through what they perceived as a safe exit. It was established that an aviation bomb dropped from a Russian military plane exploded near the applicant's minivan killing the applicant's son and three nieces.

The applicant submitted that at the end of January 2000, a special operation was planned and executed by the federal military commanders to entice rebel forces from Grozny. That plan involved leading the fighters to believe that a safe exit would be possible out of Grozny. They were allowed to leave the city and were then caught in minefields and attacked by artillery and the air force. A group of fighters arrived in Katyr-Yurt early on 4 February 2000. The villagers were not warned in advance of their arrival or told of safe exit routes. On that day, shelling of the village began in the early hours of the morning. The shelling subsided at approximately 3pm and the applicant and her relatives attempted to leave, believing that the military had granted a safe passage out of the village. As they were leaving by road, planes appeared and bombed the cars on the road, killing the applicant's relatives.

The Government did not dispute that the attack had taken place or that the applicant's relatives had been killed, but argued that the use of force was justified under Article 2(2)(a) of the European Convention on Human Rights. The Court accepted that the situation in Chechnya at the relevant time called for exceptional measures including the deployment of armed military units equipped with combat weapons. However, the court did not accept that the use of force was proportionate. In particular it found that there was substantial evidence to suggest that the arrival of a group of armed insurgents in Katyr-Yurt was not unexpected by the Russian military and may even have been incited by them.

The military action against the insurgents was not spontaneous but had been planned for some time in advance. However, nothing was done to warn the villagers of the possibility of the arrival of armed insurgents and the danger to which they were exposed. The military should have considered the consequences of deploying aviation equipped with heavy combat weapons in a populated area and the dangers involved. There was no evidence that during the planning stage of the operation any calculations were made about the evacuation of civilians. The use of FAB-250 and FAB-500 bombs in a populated area, outside wartime and without prior evacuation of civilians was found to be impossible to reconcile with the degree of caution expected from a law enforcement body in a democratic society.

Consequently the Court found that although the operation in Katyr-Yurt was in pursuance of a legitimate aim, it was not planned and executed with the requisite care for the lives of the civilian population, in violation of Article 2 (see below re Article 13). The applicant was awarded €25,000 (Euros) in respect of non pecuniary losses. She was also awarded €18,710 (Euros) in respect of pecuniary losses (namely damage to property and the loss of earnings of her son).

In the case of **Khashiyev v Russia (57942/00) and Akayeva v Russia (57945/00)** the applicants' relatives were killed in disputed circumstances. The applicants were killed while the Russian Federal forces were in control of the area of Grozny in which they lived (Staropromyslovsky). The applicants themselves had left Grozny because of renewed hostilities. In January 2000 the applicants learned that their relatives had been killed. The bodies of the deceased showed signs of their having been killed by gunshots and stabbing.

The applicants argued that it was established beyond reasonable doubt that their relatives had been intentionally killed by federal soldiers. They submitted that there existed sufficiently strong, clear and concordant evidence to satisfy the established evidentiary standard. In particular, they referred to evidence to the effect that the first applicant's relatives were seen by eye-witnesses being detained by federal forces on 19 January 2000 and that their bodies were later found with bullet wounds and signs of beating. They also submitted that there was overwhelming and compelling evidence that acts of torture and extra-judicial killings by soldiers were widespread in Grozny at the beginning of 2000. This, together with the Government's failure to produce all the documents contained in the case file relating to the investigations should lead the Court to draw inferences as to the well-foundedness of the allegations.

The Government submitted that the circumstances surrounding the deaths of the applicants' relatives were unclear and provided alternative explanations submitting that they had been killed by Chechen fighters or by robbers or alternatively had been participating in armed resistance and were killed in action.

The Court requested the Government to submit a copy of the complete criminal investigation file into the case. In the event, only some two thirds of the file was produced, the Government arguing that the remainder of the documents were irrelevant.

The Court noted that a failure on the part of a government to produce such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicants' allegations. Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and deaths occurring during that detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

The Court was not convinced by the Government's argument that some of the documentation was irrelevant. Although no investigation was ever concluded and responsible individuals were never identified, the Court gleaned from the case file that the only version of events ever considered by the prosecution was that put forward by the applicants, the documents in the investigation file having repeatedly referred to the killings as having been committed by military servicemen. The Court concluded that, on the basis of the material in its possession, it was established that the victims had been killed by the Russian military and their deaths could be attributed to the state. No ground of justification had been relied on by the Government and accordingly there had been a violation of Article 2. Damages were awarded to the applicants of €35,000 (Euros) plus costs and expenses.

In all three judgments the Court found that the Russian government had violated the applicants' rights under Article 13 (the right to an effective remedy). In cases, such as these, where there were clearly arguable instances of violations of the applicants' rights under Articles 2 and 3, the applicants should have been able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible. The criminal investigations into the suspicious deaths of the applicants' relatives had lacked "sufficient objectivity and thoroughness". Any other remedy, including the civil remedies suggested by the Government, were consequently undermined and the government had failed in its obligations under Article 13.

The Court also considered the requirement under Article 35(1) that the applicants first exhaust domestic remedies in Chechnya or elsewhere, given that the courts in Chechnya were not operating at the time. The Court found that the applicants were not obliged to pursue civil remedies, for example an application to the Supreme Court or other domestic courts. No decision had been produced in which the domestic courts were able, in the absence of any results from criminal investigations, to consider the merits of such claims. The applicants were unaware of the identity of any potential defendant and, being dependent for such information on the outcome of criminal investigations, had not brought such actions.

The Court also noted the practical difficulties in bringing civil actions cited by the applicants and the fact that the law-enforcement bodies were not functioning properly in Chechnya at the time, considering these to be special circumstances which affected their obligation to exhaust remedies under Article 35 § 1. The Court noted that Mr Khashiyev had brought an action before the Nazran District Court and had been awarded damages. However, that court had not been able to pursue any independent investigation as to the persons responsible. Despite the financial award, a civil action was not capable of making any findings as to the identity of the perpetrators or to establish their responsibility.

At the time of writing, these judgments were not 'final'. In May 2005 the Government made a request that the cases be referred to the Grand Chamber (of 17 European Court judges) under Article 43 of the Convention. At the time of writing, the Government's request was being considered by the Court.

Potential ECHR Applicants:

If you think your human rights have been violated or of you are advising someone in that position, and you would like advice about bringing a case before the European Court of Human Rights, EHRAC may be able to assist.
Please email or write to us at the contact information on the last page.

The Right To A Defence At The Discretion Of Judges

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At first glance, it would seem that Russian legislation on securing the right to defend oneself during criminal proceedings conforms to international standards, because the Criminal Procedure Code (CPC) of the Constitution of the Russian Federation contains the right of access to qualified legal assistance, which may be at no cost to the defendant.

However, obstacles do arise in asserting the right to a defence in criminal proceedings in Russia, often related to the failure of Russian laws or developing jurisprudence to conform to international norms. One such area of serious discrepancy is the way in which Article 48 of the Russian Constitution and Article 49 of the Criminal Procedure Code are interpreted and applied.

In criminal proceedings, the right to a defence should be seen as inseparable from the right to collaboration in such legal defence, which means the right to the assistance of a defence lawyer or representative.

Article 48 of the Constitution provides that 'each person is guaranteed the right to receive qualified legal assistance'. In the cases provided by the law, legal assistance is rendered without charge. Each person who has been detained, taken into custody or accused of a crime has the right to seek the assistance of an attorney (a defence lawyer) from the moment of such detention, taking into custody or accusation.

Part I of Article 49 of the Criminal Procedure Code establishes that: 'A defence lawyer is a person who carries out, in the manner established by this Code, the defence of the rights and interests of a suspect or defendant, and affords them legal assistance during the criminal process.'

As a general rule, the interests of a defendant in criminal proceedings are represented by a lawyer. But according to para 2 of Article 49 of the CPC, another type of person can be permitted alongside the lawyer, in the capacity of a defender: 'Lawyers are admitted as defenders. By determination or order of the judge, alongside the lawyer can be admitted one of the defendant's close relatives or any other person for whom the defendant petitions. In the work of a Justice of the Peace, such a person can be admitted instead of a lawyer.'

'Another defender', for example, could in practice be a legal expert who is fully competent and familiar with the matter at hand, but who does not have the status of a lawyer; or a legal expert with specialist knowledge and experience – such as in the field of the international defence of human rights.

An accused could consider that a lawyer's assistance is inadequate, for example, where the lawyer has no training in the field of international human rights, and the accused submits a motion to the judge for the admission of another person as his defender, one who has no status as a lawyer, but who has such specialised knowledge. "Insofar as none of my lawyers have specialised knowledge in the field of international defence of human rights, and the government is not able to provide me with such a lawyer, I ask you to admit as one of my defenders the legal expert D., to collaborate with me in securing my right to qualified legal assistance and the right to approach international legal bodies." – this is how one of my clients addressed a motion to the court.

It is understandable that Article 49 of the CPC envisages the admission of another defender in the criminal process only alongside a lawyer. The state is required to guarantee the provision of qualified legal assistance, and the only system in existence – while somewhat reminiscent of the system of control by government bodies over the qualifying of practising legal experts – is membership of the legal bar, with its legally prescribed procedure for taking exams. The same law defines the activity of lawyers as 'qualified legal assistance, afforded on a professional basis by persons who have attained the status of lawyers.'

Another defender appears as a supplementary means of defence, and the right of a defendant to this supplementary means of defence is provided by the Criminal Procedure Code. Now we will turn our attention to the wording of Part 2 of Article 49 of the CPC: other persons '. . . may be admitted', which literally means 'or may not be admitted.'

If the judge grants the defendant's motion and admits another person as a defender, by issuing an order, no questions arise, the defender is availed of rights provided for him in the Russian Criminal Procedure Code. But what about the situation where a judge refuses to admit such a defender?

We note that the procedure for admitting a defender is defined in the Criminal Procedure Code: by order of the judge. But the Code does not oblige the judge to issue an opinion explaining an order to refuse admission of a defender. Judges happily take advantage of this, writing 'denied' on an application for a defender to be admitted; or, if the motion for admission of another person as defender is filed during court proceedings, they state that "the Court, having deliberated the matter in open session, has decided to deny the motion", thus issuing their decision on the record. This means that the refusal to admit someone as a defender cannot be appealed.

In addition, the Article gives the judge unlimited discretionary powers to refuse to admit another person as a defender: firstly, because the Article contains no examples, criteria or guidance as to when it is appropriate or inappropriate to deny such a request; and secondly, because the Article does not oblige judges to explain their denial. This is a very serious omission, making the Article into nothing more than a licence for arbitrary actions by judges. 'Other persons may be admitted or may not be admitted, but anyway what is the difference, after all, there is the right to a lawyer, and at no cost', this was how it was calmly expressed to me by one of the highest officials of the provincial court. What was most alarming is that his statement did not violate the standard of the CPC. Article 49

of the CPC allows him to use this kind of reasoning. I don't want to accuse judges of maliciously refusing to admit to the judicial process all legal experts other than lawyers. However, based on the content of Part 2 of Article 49 of the CPC, a judge decides a question regarding a person's right to a defence, using his own subjective evaluation of the reasonableness of such an admission. As has already been noted, the Article does not contain even the most formal guidelines – such as whether the judge should assess the qualifications of another defender and draw conclusions correspondingly; whether the judge should consider such factors as the category of the crime of which the defendant has been accused; whether it is a private or public lawyer who is providing his defence, and so on. Unfortunately, when judges are deciding such questions, they are more often guided by the popular understanding of law: 'you already have a lawyer, why should you need a legal expert from a voluntary organisation?, why do you need an international legal expert in the court of first instance? When you apply to the European Court, that will be the time to ask for such a legal expert to be admitted . . .'

Consider the situation when the hearing in the court of first instance is over, the verdict has been pronounced. The client is in investigative solitary confinement, and is preparing to submit a cassation appeal against the verdict. Once again, along with the assistance of the lawyer, the convicted person would like another defender. This may be for many reasons: he may not be happy with the quality of the lawyer's work, or he may be planning to approach international bodies in the future defence of his rights. In the latter case, it is essential at the appellate stage to indicate competently those violations of the person's rights that are guaranteed by international instruments, so as to observe the principle of exhaustion of domestic legal remedies, as established by both the European Convention on Human Rights and by the International Covenant on Civil and Political Rights.

Once again, the same problem arises. 'Another defender' has no opportunity to meet with his or her client and discuss the process of writing the cassation appeal and other procedural documents, since he is not admitted into the isolation cell. In that case, the convicted person and the potential defender are obliged to turn to the Court that issued the verdict, to ask it to admit the desired person as a defender. At this point a wide range of obstacles can be produced against the admission of another defender. One judge, carefully reading Article 49 of the CPC, will announce that it applies only to judicial hearing processes, and that it is impossible to admit a defender when they are not in progress. My client and I were told to approach the cassation court with a motion to be admitted. The cassation appeals court indicated that I should bring this motion in the course of the cassation appeal hearing.

In another case, the court admits another person as a defender, but does not issue a ruling on it, indicating again that a ruling is issued only in connection with admission to a hearing; at the current stage, the court issues a pass into the isolation cell. It is then the turn of the staff of the isolation block to glance at the CPC, and use Article 49 to refuse the defender access to the person in custody. The reasons given are (a) that a pass from the Sverdlovsk provincial court is not binding on the SIZO (institution of confinement pending sentencing); (b) there is no written ruling from the judge, without which admission of another person as a defender is not possible, within the meaning of Article 49 of the CPC.

Apart from anything else, someone who is under investigation or who has been convicted, having no access to a particular legal expert that he has specially chosen for the purpose, is deprived of the possibility effectively to defend his rights in international forums. It is no secret that the procedure for applying to international bodies is quite complex. For the complaint to be acceptable, a person may need to consult with a specialist. As already indicated, such a specialist does not have to be a lawyer. He or she could be a legal expert from a voluntary organisation or a teacher of law. But in this case, how is a person in custody to obtain such a consultation or a specialist to provide it (so that a competent and effective document can be prepared), if access to the person in custody is denied? It is clear that such impediments also constitute a violation of the right to a legal defence in international forums – after all, Article 34 of the European Convention on Human Rights directly provides that 'The High Contracting Parties undertake not to hinder in any way with the effective exercise of this right.'

It is important to note that, in practice, judges and SIZO staff, along with prosecutor's offices charged with monitoring the observance of laws in places of custody, are extending the application of Article 49 of the CPC (restricting freedom of access to suspects and convicted criminals to lawyers only) to those cases emanating from a suspect or a convicted criminal in civil courts as well. In other words, a person who is not in prison has the right to authorise anyone to represent his interests in a civil matter, but the possibility for a suspect or someone who has been convicted to choose a defender is once again limited to lawyers. Of course, a form of authority will be accepted for a non-lawyer in a civil court, but the legal specialist will have no opportunity to discuss the case with the client, nor to report on his conduct of the case, because his form of authority in a civil matter will still not gain him access to the SIZO. This is a serious obstacle to realising one's right of access to justice in civil matters, remembering that part of a civil court's work includes the consideration of complaints by inmates of SIZOs concerning violations of their rights by the institution management, and complaints about the conditions of their custody.

As strange as it may seem, the source of the problem in the situation described above is the non-compliance of Article 48 of the Russian Constitution with international norms. Both Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention provide the right for persons to defend themselves by means of 'a defender of their choosing.' The Russian Constitution contains no reference to a defender of choice, resulting in a corresponding interpretation of the Article by agencies applying the law. The Secretariat of the Russian Constitutional Court, in response to a complaint to the Russian Constitutional Court indicated that " . . . Part 2 of Article 49 of the Russian CPC does not restrict a citizen's right to receive qualified legal assistance. The right of independent choice of a lawyer (defender) does not mean the right to choose as a defender any person at all at the discretion of the suspect or accused . . .".

However, remembering the content of part 4 of Article 15 of the Russian Constitution; of the Federal Law 'On Ratification of the Convention on Human Rights and Fundamental Freedoms'; of the Resolution of the Plenum of the Russian Supreme Court of 10th October 2003 'On the Application by Judges of the general jurisdiction of universally recognised principles and of norms of international law and international treaties of the Russian Federation', it is necessary to draw a different conclusion. The right to a defender of one's choice is guaranteed by international instruments, and it is submitted that Article 48 of the Russian Constitution should be interpreted in the light of international obligations of the Russian Federation for the defence of human rights.

Human Rights Cases

This section features selected decisions in recent human rights cases which have wider significance beyond the particular case and cases in which EHRAC/Memorial is representing the applicants

Broniowski v Poland (No. 31443/96)
22/6/2004 ECHR: Grand Chamber Judgment
Property Rights

Facts

The applicant's grandmother owned land in an area formerly part of Poland but now forming part of Ukraine. She was entitled to compensation from the Polish state by virtue of the international agreement under which the territory changed hands, and also under subsequent legislation. The applicant inherited his grandmother's claim through his mother. In 1981 the applicant's mother was granted a lease of land, the value of which was offset against the compensation due. The applicant inherited his mother's property and in 1992 sold the lease and applied to the Cracow District Court for an award of the remainder of the compensation. A later Government valuation (in 2003) found that the grant of the lease amounted to 2% of the total compensation.

In 1993 the Cracow District Office informed that applicant that it could not satisfy his claim because by virtue of 1990 legislation, any available land had been transferred to the Cracow Municipality.

In 1994 the Cracow Governor's Office informed the applicant that the State Treasury had no land for the purposes of providing compensation. The applicant filed a complaint with the Supreme Administrative Court alleging inactivity on the part of the Government in failing to introduce legislation and seeking alternative compensation. The Supreme Court rejected the complaint.

In July 2002, the Ombudsman, acting on behalf of repatriated persons, made an application to the Constitutional Court seeking legal provisions restricting their right to compensation to be declared unconstitutional. This application was granted and the judgment took effect in 2003. In January 2003, the Military Property Agency, which had previously been engaged in the auctioning of property, the value of which could be offset against compensation due, issued a communiqué announcing that the Constitutional Court judgment would require amendment to other legislation and that until that had taken place further auctions of property would be suspended. The State Treasury's Agricultural Property Agency issued a similar communiqué.

On 12 December 2003, a law was passed dealing with the offsetting of the price of State property sold by auction against compensation due. The December 2003 Act provided that the State's obligations towards persons who, like the applicant, had already obtained some compensatory property under previous statutes, were deemed to have been discharged.

The applicant alleged a breach of Article 1 of Protocol No. 1 to the European Convention of Human Rights in that his entitlement to compensation for property abandoned had not been satisfied.

Decision

The Court proceeded from the assumption that the acts of the Polish state were "provided for by law" within the meaning of Article 1 of Protocol No. 1. The Court also accepted that the aims of the Polish government in acting as they did, to reintroduce local government, to restructure the agricultural system and to generate finance for the modernisation of military institutions were legitimate in the interests of the general community.

Regarding the striking of a fair balance between the demands of the community and the individual, the Court accepted that the vast number of claimants and the amount of money involved were factors to be taken into account in ascertaining whether a fair balance had been struck.

The conduct of the authorities however, involving as it did, deliberate attempts to prevent the implementation of a final and enforceable judgment of the Constitutional Court, could not be explained in terms of any legitimate public interest or the interests of the community as a whole. The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference and a total lack of compensation would normally be justifiable only in exceptional circumstances.

The Court accepted that in situations such as the present one the national authorities must have a considerable discretion in selecting measures to secure respect for property rights or to regulate ownership relations within the country. Article 1 of Protocol No. 1 did not guarantee a right to full compensation in all circumstances. A wide margin of appreciation should be accorded to the respondent state.

However, the margin was not unlimited and the exercise of that discretion could not entail consequences at variance with Convention standards. Whilst the Court accepted that the radical reform of a country's finances might justify stringent limitations on compensation, the state had not adduced satisfactory grounds justifying the extent to which it had failed over many years to implement an entitlement conferred on the applicant by legislation.

The rule of law underlying the Convention required states to respect and apply the law in a foreseeable and consistent manner and to ensure the legal and practical conditions for their implementation. The state, by imposing successive limitations on the exercise of the applicant's right to compensation had rendered the right illusory and destroyed its very essence.

The December 2003 legislation introduced a difference of treatment between the various claimants in that those who had never received any compensation were awarded an amount which, though subject to a ceiling, was a specified proportion of 15% of their claims, whereas the applicant received no sum over and above the 2% already found to have been awarded. The applicant therefore had to bear a disproportionate and excessive burden which could not be justified in terms of the legitimate general community interest. There was therefore a violation of Article 1 of Protocol No. 1.

The Court reserved the question of the award of damages. As the violations was found to have originated in a systemic problem arising from failures in the domestic legislation and practice, the Court ordered the Government to take appropriate measures to ensure the implementation of the property rights in respect of all claimants in a similar position (or provide equivalent redress in lieu).

Gusinskiy v Russia (No. 70276/01)
19/05/2004 ECHR: Judgment
Criminal Justice

Facts

The applicant was the former Chairman of the Board of and majority shareholder in Media Most, a private Russian media holding company. In 2000 Media Most was involved in a bitter dispute with Gazprom, a natural gas monopoly controlled by the State, over Media Most's debts to Gazprom. After Gazprom had discontinued negotiations on the debts, the applicant was summoned to attend the Prosecutor's office in June 2000 to be questioned as a witness in relation to an unrelated criminal case. Upon arrival at the Prosecutor's office, the applicant was arrested and imprisoned in the Butyrka prison and detained there for three days. In the record of the interview prosecutors noted that the applicant had been awarded the Friendship of the Peoples Order, which qualified him for an amnesty passed just a few weeks earlier in May 2000. During the applicant's imprisonment, the Media Minister offered to obtain his release and the dismissal of the criminal charges if he would sell his shares in Media Most to Gazprom, at a price to be determined by Gazprom. The applicant signed an agreement with Gazprom under which all criminal charges would be dropped in return for the applicant's surrender of control of his company. The agreement was endorsed by the signature of the Media Minister, the criminal prosecution was subsequently terminated and the applicant was allowed to leave the country. The applicant immediately left the country for Spain, after which Media Most refused to honour the agreement, claiming that it had been entered into under duress. Shortly thereafter new criminal charges were brought against the applicant and his extradition was sought from Spain, as a result of which he was placed under house arrest. In April 2001 the Spanish authorities refused the extradition request on the basis that it was politically motivated.

Decision

The Court held that there had been a violation of Article 5. The evidence gathered by the investigating authorities could satisfy an objective observer that the applicant might have committed the Offence in respect of which he was originally arrested, and therefore the authorities could be said to have a "reasonable suspicion" that he had committed an offence as required by Article 5(1)(c). The detention, however, had been ordered before any charge had been brought against the applicant. Under Russian criminal procedure this was permitted only in undefined "exceptional circumstances". This did not meet the requirement of "lawfulness" in Article 5(1)(c), since the criteria were not sufficiently accessible and precise and contained no safeguard against arbitrariness. The detention was also unlawful because criminal proceedings should have been stopped under the terms of the amnesty. More significantly, however, the Court made its first finding of a violation of Article 18 of the Convention. The Court concluded on the evidence before it that the applicant's detention had been used to intimidate him into agreeing to transfer the shares in his media organisation over to a State-controlled company. The Court found that the use of criminal proceedings and detention on remand as part of commercial bargaining strategies was an abuse of State powers under Article 5, which in turn constituted a violation of Article 18.

In addition to its findings of violations of Articles 5 and 18, the Court awarded the applicant a global sum of EUR 88,000 in respect of damages, costs and expenses.

Novoselov v. Russia(No. 66460/01)
8/7/2004 ECHR: Admissibility
Prisoners' Rights

by Dina Vedernikova

Facts

On 27 October 1998 the applicant, following a complaint lodged by his neighbour about alleged verbal and physical assault, was arrested and taken into custody in detention facility no. IZ-18/3 of Novorossiysk. On 5 November 1998, the district court found him guilty of disorderly behaviour and sentenced him to six months' imprisonment. On 10 November the applicant sent out a document containing his grounds of appeal, via the detention facility. It appeared that this appeal was either not received or not examined. On 28 April 1999 the applicant was released, having served his sentence.

On 23 December 1998 the regional court, having examined the grounds of appeal submitted by the applicant's lawyer (of which the applicant was not aware), upheld the applicant's conviction.

The Presidium of the regional court subsequently quashed the judgment of 23 December on the ground that the court failed to consider the grounds of appeal submitted by the applicant. On 5 December 2001 the regional court held a new appeal hearing and again upheld the applicant's conviction. It appeared that the summons was sent to the detention facility where the applicant had served his sentence in 1998-1999.

The judgment of 5 December 2001 was also quashed on the ground that the applicant had not been duly notified of the hearing. The final appeal judgment upheld the applicant's conviction on 18 September 2002. This time the summons was sent to the applicant's last known address available to the court's registry, although the applicant no longer lived at that address and, as a result, did not receive the summons. His application to quash the judgment for that reason was refused.

The applicant was kept in a cell measuring approximately 42 sqm, which accommodated 42 to 51 inmates at any given time. The inmates had to sleep in turns. A lavatory was only separated from the rest of the cell with a bed sheet provided by one of the inmates. The table where the meals were eaten was just one metre away from the lavatory. The ventilation was only switched on when "controllers" visited the facility. Windows were covered with steel plates leaving an open slot of about 10cm. The food served was of very poor quality. Among other aggravating factors were the absence of bedding, swarms of insects, and the inadequate supply of detergents to the prisoners.

During his detention the applicant contracted scabies, nevertheless, he was not isolated from other inmates. He twice (over a period of 6 months) fell ill with flu. By the time of his release, the applicant had lost 15kg in weight, he felt short of breath while walking, he tired easily, could not run, and suffered from general weakness. On 30 July 2002 the applicant filed a civil action, claiming compensation for damage caused by the "inhuman and degrading" conditions of his detention. The district court dismissed the action and the regional court upheld this decision.

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Klyakhin v Russia (No. 46082/99)
30/11/2004 ECHR: Judgment
Criminal Justice

Facts

The applicant was arrested on suspicion of involvement in a robbery. After a sustained period of detention on remand, he was convicted, but subsequently the conviction was quashed because of procedural irregularities. In spite of this, the applicant was further detained until he was released as a result of an amnesty. The applicant invoked Articles, 5, 6 and 13 of the European Convention complaining that he was denied effective remedies, in respect of the length of criminal proceedings and the lack of procedures to challenge the lawfulness of his detention. Under Articles 8 and 34 the applicant complained that prison authorities interfered with his correspondence to and from the European Court.

On 26 August 1997 the applicant was arrested on suspicion of involvement in a robbery and on 5 September 1997 was officially charged. He denied the government's submission that the Armavir Town Court reviewed his appeals twice, and submitted that a judge ordered his continued detention without reason. On 4 March 1998 the hearing was adjourned because the applicant had had insufficient access to the case-file. The applicant submitted he was given insufficient time to review the documentation and was handcuffed while accessing it. Hearings were adjourned or cancelled five times until the trial resumed on 29 March 1999. On 6 April 1999 the case was returned to the prosecutor's office for further investigation. The applicant's detention was then extended without giving reasons and on 16 August 1999 the applicant was convicted of robbery and sentenced by the Town Court to five years' imprisonment. On 2 December 1999, the Presidium of the Krasnodar Regional Court quashed the onviction of 16 August 1999 for procedural irregularities and remitted the case to the first instance court. On 30 December 1999 the applicant was returned to the Armavir town detention centre. On 17 April 2000 the hearing opened at the Town Court and on 18 April it ordered a medical examination of the applicant in a psychiatric hospital. The applicant appealed against that decision and his continued detention on remand to the Town Court on 19, 24 and 25 April 2000, as well as 12, 23 and 25 May 2000, but received no reply. After nine requests between February and December 2000, the applicant was allowed access to the file. He submitted that he was allowed about 1½ hours to consider the case-file of about 500 pages. On 18 December the case was further adjourned. On 9 February 2001 the applicant was convicted of attempted robbery, sentenced, and then released from detention, as he had by that time spent three years, five months and thirteen days in detention and was granted an amnesty.

The applicant also claimed that in June 1998 the local administration, where he had been detained on remand, refused to forward his application to the European Court and on 25 March 1999 that he forwarded a letter to the European Court, with attachments, which never reached the Court.

Decision

The Court found a violation of the applicant's right to trial within a reasonable time or to release pending trial (Article 5(3)). It emphasised that its jurisdiction covers only the period after 5 May 1998, when the Convention entered into force in Russia, but recalled it would take into account the state of proceedings existing at the material date. The period for consideration runs from the taking into custody of the accused until the charge is determined. During this period, justifiable detention requires reasonable suspicion of the commission of an offence, but after a certain lapse of time this is insufficient. Justification of detention thereafter requires relevant and sufficient grounds, which the State submitted were the gravity of the charges and the risk of obstruction of trial proceedings. If these grounds are accepted, the Court then asks whether the national authorities displayed "special diligence" in the conduct of proceedings. However, it was held that the severity of charges alone would not suffice and no evidence of the risk of interference with due process was submitted.

The applicant also complained that, although there were some detention reviews, there were many occasions when he had not been allowed to take proceedings to decide the lawfulness of his detention or when such appeals were not properly examined (a violation of Article 5(4)). It was held that while the procedure does not always necessitate the same guarantees as those required for full litigation, it must be of a judicial character appropriate to the kind of deprivation of liberty in question. Further, it must examine compliance with the domestic law's procedural requirements, reasonableness of suspicion leading to arrest and legitimacy of purpose of arrest and detention. The applicant submitted that many of his complaints were unanswered and the review which did take place did not address his submissions, which the Court considered to be neither implausible nor frivolous. This complaint was therefore also upheld.

There was also a violation of Article 6(1), the right to a hearing within a reasonable time. The period concerned begins with the charge and ends at the final determination or discontinuance of proceedings, of which two years and seven and a half months followed the date of entry into force of the Convention in relation to Russia. A pragmatic approach to reasonableness is taken, with consideration of the particular facts of the case, notably its complexity and the applicant's conduct. It was held that the case was not particularly complex, that the applicant did not significantly contribute to the length of proceedings and that in fact certain lapses of time were attributable to the authorities, especially that from April 1998 until March 1999, when no hearings took place, except for adjournments. The Court also found the applicant did not have any effective remedies for the excessive length of proceedings, in violation of Article 13. The State had failed to indicate any remedy which could have expedited the determination of the applicant's case or provided redress for delays.

Article 8 protects the right to respect for correspondence, allowing interference, for example, for the prevention of disorder or crime or for the protection of the rights of others. That the applicant's letters were opened was not disputed by the State, which argued simply that Russian law allowed such censorship at the time. However, the fact that such action was legal under domestic law does not suffice, as under Article 8 it was not "necessary in a democratic society" in pursuit of a specified legitimate aim. No such aim was offered by the Government, and therefore the interference was not necessary, in breach of Article 8(2). This did not, however constitute a further breach of Article 13 (right to an effective remedy) which does not extend to allowing a challenge to a State's primary legislation as being contrary to the Convention. Article 34, on the other hand, was breached by the refusal of the prison administration to send the applicant's letters to the Court. The Court highlighted the importance for applications to be made free from pressure in order for the system of individual application to function properly. The Government contested such interference but the evidence, notably a letter dated 8 June 2000 bearing a postmark of 20 October 2000 which contained none of the enclosures listed by the applicant, was in the applicant's favour. No reasonable explanation was offered by the Government and the Court found a breach of Article 34.

The applicant was awarded a total of €5,800 (Euros) for non-pecuniary damages and costs.

PACE Resolution on Chechnya

In resolution 1403 adopted on 7 October 2004, the Parliamentary Assembly of the Council of Europe (PACE) condemned all criminal acts constituting serious human rights violations committed by all sides of the conflict in the Chechen Republic.

In particular, PACE condemned the recent spate of terrorist attacks including the downing of two airliners on 24 August 2004 and the hostage-taking in Beslan and resulting massacre on 3 September 2004. They also condemned the numerous violations of human rights, such as murder, forced disappearance, torture and arbitrary detention committed by members of different federal and pro-Russian Chechen security forces during "special" or "targeted" operations in the Chechen Republic and, increasingly, in neighbouring regions.

The reconstruction of some of the social infrastructure and the promise of the payment of compensation to persons whose houses were destroyed was welcomed as being a positive development. However, PACE continues to believe that there can be no peace or sustainable political settlement in Chechnya without the ceasing of all human rights violations on all sides and the punishment of the perpetrators of the most serious violations.

The human rights situation, PACE noted, had not significantly changed since it last adopted texts on the situation in April of 2003. Whilst the number of "sweeps" by security forces had significantly decreased, arbitrary detentions, often followed by the disappearance or torture of a detainee and the theft or destruction of property by the security forces (and rebel groups) still continued on a massive scale. Furthermore a new and frightening trend had developed of taking the relatives of suspected terrorists hostage and threatening them with torture or murder in order to force them to give themselves up.

The climate of impunity, which PACE had referred to in earlier resolution 1323 (2003), appeared to be spreading to neighbouring Ingushetia. As to the crimes described in the earlier resolution, very little progress had been made and further crimes had been committed in the meantime. Replies to requests for detailed information from official sources had been incomplete and contradictory; there had been little progress in the prosecution of perpetrators of human rights violations by the national law enforcement bodies. PACE also expressed outrage that serious crimes had been committed against applicants to the European Court of Human Rights and their family members.

PACE therefore reiterated the recommendations previously made in Resolution 1323 and urged the Government of the Russian Federation to take additional measures to achieve the following aims:

(1) To eliminate the climate of impunity in the Chechen Republic by:

(a) Investigating and prosecuting all violations of human rights without regard to the identity of the perpetrators;

(b) Implementing the recommendations of the Council of Europe Commissioner for Human Rights;

(c) Providing reparation, including compensation, to all victims of human rights abuses;

(d) Enabling systematic monitoring by national and international human rights organisations;

(e) Co-operating with all Council of Europe mechanisms, in particular the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);

(f) Taking effective measures to prevent reprisals against applicants to the European Court of Human Rights;

(g) Facilitating access to the national and international news media.

(2) To ensure that anti-terrorism measures taken or planned are in conformity with standards of human rights and humanitarian law.

(3) To set up a parliamentary committee of inquiry to investigate the alleged abuses by different branches of the executive.

PACE also urged other member states of the Council of Europe to use every opportunity, in their bilateral and multilateral relations with the Russian Federation, to recall the need to respect human rights in the fight against terrorism and separatism and to continue to respect the Geneva Convention relating to the Status of Refugees in granting asylum to applicants from the Chechen Republic.

PACE supported the recommendation made by the CPT on 10 July 2003 that members of the federal forces and law enforcement agencies be reminded that they must respect the rights of persons in their custody.

Finally the PACE resolution welcomed the positive trend towards the establishment of regional ombudsmen in the Russian Federation and the initiative by the Commissioner for Human Rights of the Council of Europe and the Ombudsman for Human Rights of the Russian Federation to promote the establishment of a regional ombudsman for the Chechen Republic.

ECHR Case Statistics

According to the *European Court of Human Rights Survey of Activities for 2004*, Russia was again the leading country in terms of applications lodged with 6691, followed by Poland with 5445 and Romania with 3776. Russian cases accounted for 16 percent of all applications lodged. The highest number of applications declared inadmissible or struck off also came from Russia with 3704 which constituted 18 percent of all applications in this category. 64 applications were declared admissible - less than 1 percent of the total number of admissible applications (830). This compares with 15 applications declared admissible in 2003.

In 2004, the Court pronounced judgment in 15 Russian cases, four of which had been registered in 1999, five in 2000, three in 2001 and three in 2002. The Court found violations of the European Convention in all but two of these judgments.

Journalistic freedom in Russia – the case of Lejava v. Russia

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Everyone remembers the horrific events which occurred in Beslan on 1 September 2004. Civilized world society was shocked by the ongoing events, which was the main topic of news programmes of most leading broadcasting companies around the world. Broadcasters and news agencies sent their journalists on assignment to obtain and impart information about the events in Beslan. The incident provoked huge interest in neighbouring countries such as Georgia and one of the leading broadcasting companies in Georgia, "Rustavi 2", sent on an assignment to Beslan its journalist, Mrs. Nana Lejava, in order to collect information for news programmes.

On 4 September 2004 an operation was carried out by Russian Special Forces, after which Georgian journalists were able to obtain interviews from hostages released as a result of the operation. As a result, Nana Lejava produced several tapes of interviews with former hostages. During this process, the Georgian journalist was arrested and deprived of her camera and tapes, with all the materials recorded. Mrs. Lejava was taken to the preliminary detention centre of the FSB in Vladikavkaz, and there she was charged with unlawfully crossing the Georgian-Russian border. Mrs. Lejava and her camera operator were deprived of their passports - with loose leaves confirming that they were registered in Kazbegi, a region of Georgia neighbouring the Russian border at northern Ossetia. Pursuant to an agreement between the Georgian and Russian authorities, citizens of Georgia residing and registered in the Kazbegi region enjoy the right of a simplified crossing of the border, at the Larsi checkpoint. While in detention, Mrs Lejava and her cameraman were entirely isolated and held completely incommunicado. Mrs. Lejava was denied access to representatives from the Georgian Consulate. Subsequently, Russian lawyers hired by her company, "Rustavi 2", were also denied the right to visit the applicant.

On 6 September 2004, the District Court prolonged Mrs Lejava's detention for up to 10 days. Within the isolation of the FSB, the applicant was subjected to medical research without her consent. After a series of interrogations conducted by the FSB investigators, Mrs. Lejava was given a psychotropic substance (Benzodiazepam) in her coffee in order to break her moral resistance. She remembers vaguely that after drinking her coffee she was strictly questioned by two unknown persons who were shouting at her. Following the poisoning, the applicant slept for 25 hours and afterwards complained of feeling giddy, distemper, suffering from a dull headache and retching. On 9 September 2004 the criminal case against Mrs. Lejava was terminated and she and the cameraman were released due to lack of evidence. The FSB representatives escorted the Georgian journalists to the border.

The European Court case

As a result of these events, Mrs Lejava has lodged a complaint with the European Court of Human Rights, arguing that her rights under Articles 3, 5, 6, 10 and 13 have been violated. The case was lodged on her behalf by the Georgian Young Lawyers' Association (GYLA).

The applicant submits that during her detention she was subjected to treatment contrary to Article 3, with grave negative consequences for physical and mental health. Lejava alleges that the very fact of giving her a psychotropic substance in her coffee without her consent, and poisoning her, constituted inhuman and degrading treatment. The allegations of the applicant are corroborated by the conclusion of senior Georgian professors and doctors from the Institute of Radiology and Interventional Diagnostics of the Georgian Academy of Sciences.

The applicant also submits that there have been violations of several provisions of Articles 5 and 6 of the European Convention. First and foremost, the applicant emphasizes the fact that in detention she was held incommunicado. Mrs. Lejava had no opportunity even to make a telephone call to the broadcasting company or to inform any other person. Neither representatives from the Georgian Consulate, nor lawyers from the Moscow Bar Association, who had been to see the broadcasting company "Rustavi 2", were given access to the applicant. Thus, Mrs. Lejava was completely deprived of the opportunity to have adequate facilities for the preparation of her defence or the opportunity to defend herself through legal assistance of her own choosing. Several times she was questioned without having the benefit of any prior legal advice. Despite the fact that the applicant objected and requested the attendance of the lawyers hired by "Rustavi 2" before the district court, the authorities designated her a lawyer.

The applicant also submits that even after her release on 9 September 2004, she was deprived of the opportunity to stay on Russian territory to meet her Russian lawyers for the purpose of instigating proceedings against those who gave her psychotropic substances, to challenge the refusal of FSB representatives to allow access to the consulate representatives, to challenge the decision of the investigative authorities to deny her lawyers of her own choosing and to challenge the legality of her detention. Mrs Lejava therefore further alleges that there has been a violation of Article 5(4) on the basis that the applicant lacked procedural guarantees and had no possibility to undergo legal consultation with the lawyer of her own choosing and prepare argumentation for the court proceedings dealing with the question of her detention. The applicant alleges that the fact that she was denied the possibility of preparing her defence through lawyers of her own choosing meant that the judicial proceedings were not adversarial or fair and therefore violated her rights enshrined both by Articles 6(1) and 6(3)(c).

The applicant also argues that there has been a violation of Article 10, as she was prevented from obtaining information and interviews from hostages of the Beslan terrorist atrocity. She alleges that after the operation had been carried out by Russian special forces, there was no need to confiscate the recorded tapes and camera. The applicant was only obtaining interviews from hostages for the broadcasting company which sent her on the assignment. Mrs. Lejava submits that the Russian authorities were endeavoring to conceal the real and objective information on hostages and the number of people who unfortunately died during the anti-terrorist operation. Thus, the interference carried out by the Russian authorities was absolutely disproportionate to the legitimate aim pursued and was not necessary in a democratic society.

Finally, the applicant argues that she lacked an effective remedy before the Russian courts in respect of these various breaches of the Convention, in violation of Article 13. It is suggested that she clearly had no access to an effective remedy because of the following: she was held incommunicado; she was denied access to the representatives of the consulate of her state; she was refused the right to be defended by the lawyers of her own choosing; she did not have the opportunity to meet her Russian lawyers and to obtain legal advice and challenge the conduct of the authorities even after her release, and she was forced to leave Russia on the day of her release. For these reasons the applicant has requested the European Court to declare that she was not obliged to exhaust domestic remedies, as the Russian authorities had deprived her in practice of the right and opportunity to refer to any judicial or supervisory authorities and challenge the violation of her rights guaranteed by the European Convention.

Mrs. Lejava's complaint is currently pending before the European Court of Human Rights.

Execution of Judgments of the European Court of Human Rights – the Case Of Ilascu And Others v Russia and Moldova

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Legal Force of the Judgment of the European Court of Human Rights

Under Article 46 §1 of the European Convention on Human Rights (the Convention) the State parties have undertaken to abide by any final judgment of the European Court of Human Rights (the Court). A judgment in which the Court finds a breach imposes on the respondent State not only a political but also a legal obligation[1].

The international application of the Convention is based on the assumption that the national legal systems differ. Therefore, generally, the judgments of the Court are essentially declaratory and leave to the states the choice of the means to be utilized in the domestic legal systems for performance of the obligation under Article 46 §2 and it cannot of itself annul or repeal inconsistent national law and judgments[2]. The State is, however, under an obligation to put an end to the violation found, to make reparation for its consequences and to prevent the repetition of similar violations. Where possible, reparation will take the form of *restitutio in integrum*[3]. However, if *restitutio in integrum* is impossible the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach[4].

Supervision of the examination of execution of judgments of the European Court

The President of the Chamber will forward a judgment, once it has become final, to the Committee of Ministers in order for the latter to supervise, in accordance with Article 46 §2 of the Convention, the execution of any undertakings which may have been attached to the discontinuance, friendly settlement or solution of the matter[5]. The President of the Chamber forwards the final judgment to the Committee of Ministers, without the need for a particular request from the applicant's representative.

The Committee of Ministers is required, for its part, in carrying out its functions under Article 46 §2, to supervise the implementation by respondent States of the - strictly legal - obligations arising out of the judgments of the Court. When a judgment is transmitted to the Committee of Ministers, the case inscribed on the agenda of the Committee. The Committee invites the State concerned to inform it of the measures which the State has taken in consequence of the judgment[6]. Usually the decision is rendered at the next monthly meeting of the Committee and consideration of it cannot be adjourned for more than six months.

The Committee of Ministers will not indicate which measures the respondent state has to take, but it is empowered under Article 46 §2 to give directions to the Governments concerned[7]. This freedom of the respondent State goes hand in hand with the monitoring by the Committee of Ministers (assisted by the Department for the Execution of Judgments), which ensures that the measures taken are appropriate to achieve the outcome sought in the Court's judgment. Where a choice of measures is not possible because of the nature of the violation, the Court can itself directly require certain steps to be taken. To date, the Court has used this power only very rarely[8].

The applicant has no standing, as such, before the Committee of Ministers and cannot influence the course it takes. The deliberations of the Committee of Ministers are confidential even for the applicant. The Committee of Ministers is entitled however to consider any communication from the injured party with regard to the payment of just satisfaction or the taking of individual measures.

In the course of its supervision of the execution of a judgment, the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make relevant suggestions with respect to the execution. When the Committee is satisfied that the judgment has been complied with it will pass a resolution to that effect. The Committee can re-open the supervision of the execution of the judgment if, after passing a final resolution on the execution of the judgment, new circumstances arise which impair the essence of the judgment.

If a state party does not meet its obligations the Committee of Ministers can decide (by a two-thirds majority of the votes cast) to take certain measures. In practice there is very little that may be done under the Convention to persuade the state to respect its obligations. However, the Committee has the power to suspend or even expel any contracting party from the Council of Europe, which is found guilty of serious human rights abuses[9]. The Committee of Ministers is extremely reluctant to make full use of the powers it possesses – no member state has ever been suspended or expelled.

Ilaşcu Judgment

The application[10] was lodged with the Court against the Russian Federation and the Republic of Moldova in 1999 by 4 Moldovan citizens (Ilie Ilaşcu, Andrei Ivanţoc, Alexandru Leşco and Tudor Petrov-Popa) who were detained from 1992 in the "Moldavian Republic of Transdniestria" ("the MRT"), a region of Moldova known as Transdniestria, which declared its independence in 1991, and is not under the control of the Chişinău authorities. On 9 December 1993 the "Supreme Court of the MRT" sentenced the first applicant to death, the second and the fourth applicant to 15 years' imprisonment, and the third to 12 years' imprisonment.

The applicants complained that due to the political, financial, economic and military support of the Transdniestrian regime, the Russian Federation, in fact, exercised effective control over the Transdniestrian region. They also alleged that the Republic of Moldova did not discharge its positive obligation under Article 1 of the Convention to take all the steps necessary to ensure their freedom. They complained of violations of Articles 2 (in respect of the first applicant), 3, 5, 6, 8 and 34 of the Convention and Article 1 of Protocol No. 1.

On 5 May 2001 the first applicant was transmitted by the Transdniestrian forces to the Moldovan authorities and was released on 2 June 2004 after the expiration of the "sentence".

Continued on next page

The other two applicants are, at the time of writing, still in detention in the Transdniestrian region. The judgment of the Court delivered on 8 July 2004 found that the applicants were under the "effective authority or at the very least under the decisive influence" of the Russian Federation (§392). The Moldovan Government had also failed to discharge its positive obligations under Article 1 of the Convention with regard to the acts complained of which had occurred after May 2001. The Court found that Articles 3, 5 and 34 of the Convention had been violated by both respondent States and ordered both Governments to pay the total sum of €190,000 in respect of pecuniary and non-pecuniary damages, and costs and expenses.

The Court further held, unanimously, that Moldova and Russia were to take all necessary steps to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release. Moreover, it emphasised the urgency of this measure in the following terms (§490): "any continuation of the unlawful and arbitrary detention of the applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 §1 of the Convention to abide by the Court's judgment". This is the first time that the Court has pronounced in such terms on Article 46 §1.

On 8 July 2004 the Minister of Foreign Affairs of the Russian Federation made a statement describing the judgment as wrong and obviously politically-motivated. He also stated that Russia had always complied with its international obligations, and would continue to do so, including complying with this judgment, but if the Russian Federation were to take steps to secure the applicants' release, this would constitute a grave interference with the internal affairs of the Republic of Moldova[11].

Given the terms of the judgment, the Committee of Ministers decided at its meeting of 9 September 2004 to continue examining the urgent measures ordered by the Court not only at their meetings devoted mainly to the supervision of the execution of judgments, but also at their regular meetings. Between 9 September 2004 and 7 February 2005 the issue of the execution of the judgment was considered 13 times at its meetings, leading to the preparation of a draft interim resolution in February 2005.

Measures taken by the respondent Governments to conform to the judgment

Both governments complied with their obligation under the Convention to pay the sums indicated in the judgment, by 8 October 2004.

The Moldovan Government translated the judgment and published it in the Official Gazette of the Republic of Moldova on 21 September 2004. The representative of Moldova at the Committee of Ministers also provided the Committee with a number of documents addressed to the Russian authorities, the Secretary General of the Council of Europe, the Norwegian Chairmanship of the Committee of Ministers and Transdniestrian "authorities" requesting their assistance in obtaining the release of the applicants.

At the meetings of the Committee of Ministers, the Russian authorities' informed the Delegates of the statement of the Ministry of Foreign Affairs of 8 July 2004 and made clear Russia's disagreement with the judgment on both legal and political grounds. The Russian authorities stated that they were not in a position to execute the judgment, since releasing the applicants through the use of force was out of the question. At the 907th meeting (24 November and 1 December 2004) of the Committee of Ministers, the Permanent Representative of the Russian Federation emphasized that his authorities considered that they had fulfilled their obligations completely by paying the just satisfaction awarded to the applicants; the examination of the case should therefore be closed as regards any measures to be taken by the Russian Federation. The execution of the second part of the judgment should, in the view of the Russian authorities, be dealt with in the framework of the political resolution of the situation in Transdniestria.

Comments

Respondent States have the opportunity to defend all cases in full before the Court. At the execution stage, judgments are a fact which can no longer be open to dispute. This principle applies equally to questions of jurisdiction. Any statements emanating from Governments which question the findings of a final European Court judgment are not compatible with Article 46 §1 of the Convention.

States are not at liberty to choose whether or not to execute certain parts of a judgment. Moreover, the question whether the lives of the applicants are at risk has no bearing on the respondent States' obligation to take the necessary measures.

Although this might in effect amount, in classical international law terms, to interference in their internal affairs, after the judgment of the Court has been delivered that is no longer the case. *A fortiori*, the principle of non-interference in the internal affairs of a State cannot be invoked so as to prevent the proper execution of a judgment of the European Court.

The obligation of States arising from the present Court's judgments is one of results and not of means; thus, as regards the individual measures required in the present case, the applicants should be released. It appears the Moldovan Government has taken some political steps aimed at the release of the two applicants still in detention. However, it would appear that the Russian Government has done nothing, at least at the political level, to release the applicants.

As is noted above, the detention of the two applicants after 8 July 2004 would appear to be incompatible with Article 46 §1 of the Convention and constitutes a continuing violation of Article 5 of the Convention. It is not clear whether the two applicants can claim in the Court compensation for non-execution of the judgment but it is clear they can claim compensation for their detention after the judgment in their case was adopted.

Endnotes

1. *Papamichalopoulos and Others v. Greece*, 31.10.1995, (art.50), §34
2. See *inter alia Markx v. Belgium*, 13.07.1979, §58
3. R.St.J. Macdonald, F. Matscher, H. Petzold "The European System for the Protection of Human Rights" (1993), p 793
4. *Akdivar and Others v. Turkey*, 01.04.1998, (Art. 50), §47.
5. Rule 43 p.3 of the Rules of the Court. Rules of the Court can be accessed at (http://www.echr.coe.int/Eng/EDocs/RULES%20OF%20COURTNOV2003.htm).
6. Rules for the application of article 46, paragraph 2, of the European Convention on Human Rights adopted at the 736th meeting of the Ministers' Deputies the Committee of Ministers (see http://www.coe.int/T/E/Human_Rights/Execution/02_Documents/CMrules46.asp#TopOfPage).
7. T.Barkhuysen a.a. The Execution of the Strasbourg and Geneva Human Rights Decisions in the National Legal Order (1999), p.81
8. See *Assanidze v.Georgia*, of 08.04.2004; *Broniowski v. Poland*, 22.06.2004 and *Ilascu and others v. Russia and Moldova*, 08.07.2004.
9. Art.8 Statute of the Council of Europe.
10. Application no. 48787/99
11. It can be accessed at http://www.ln.mid.ru/brp_4.nsf/sps/7D1BEC3C25B34D7EC3256ECB004647E4

Prisoners' Right to Vote: the Danger of Constitutional Limitations

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On 30 March 2004 the European Court of Human Rights (Fourth Section) gave its judgment in the case of *Hirst v. the United Kingdom (no. 2)*, no. 74025/01[1]. The applicant, serving a discretionary life sentence, submitted that the blanket disenfranchisement of all prisoners from voting in parliamentary elections infringed his right to free elections under Article 3 of Protocol 1 to the European Convention on Human Rights. Referring to the judgment of the Supreme Court of Canada in *Sauvé v. the Attorney General* (31 October 2002), the Court has unanimously ruled it was not convinced that this automatic and blanket ban pursues any legitimate aim under the Convention and that in any event such a ban is disproportionate to any aim pursued. The Court noted that despite the States' wide margin of appreciation in electoral matters, the absolute ban falls outside an acceptable margin.

Not only does Russian legislation contain a similar blanket disenfranchisement of any prisoner from voting (despite the nature of the crime and the duration of the sentence), but also this is a prohibition provided for in Article 32(3) of the Constitution of 1993. Since this article forms part of Chapter 2 ("Human and Civil Rights and Freedoms"), by virtue of Article 135(2) it can only be amended by way of adoption of a new Constitution either by referendum or by Constitutional Assembly (a special body convened for the purpose of adoption of a new Constitution).

It is to be noted that until 1989 Russian (as well as Soviet) constitutional acts didn't contain a prohibition of this type (usually, it was a matter of an 'ordinary' law). Starting with the Basic Laws of 1906 (though their constitutional nature is disputed) no blanket constitutional ban was imposed on prisoners' voting rights (though art. 10 of the Statute on Elections of the Duma of 1907 and art. 4 of the Statute of Elections of Constituent Assembly of 1917 - with their detailed regulations - disenfranchised the vast majority of convicted criminals). The same correlations were applicable to the Soviet constitutions and laws (however, the Soviet elections were a mere formality in any event). It was only with the Law of 27 October 1989, amending the Constitution of the RSFSR of 1978, that the prohibition was incorporated into the Constitution, although before 1993 this provision (Article 92(4)) was subject to parliamentary amendments.

It is suggested that contemporary legal doctrine does not provide any reasonable justification for the prohibition. One of the leading experts on the constitutional basis of electoral law, and Advisor to the Constitutional Court, Professor L. V. Lazarev, maintains that prisoners 'themselves waive the right to vote in elections and referendums by violating the law'[2] – an argument which is hardly convincing.

Thus the Russian legal order has to meet the challenge of evolving human rights developments in order to overcome the unreasonably vast and unamendable constitutional limitations. The possible solution may not even be '*contra legem*' but '*contra constitutionem*' jurisprudence of the Constitutional Court.

Endnotes

1: This case was referred to the Grand Chamber of the Court, under Article 43 of the Convention and a Grand Chamber. Hearing was held on 27 April 2005.
2. Commentary to the Constitution of the Russian Federation / Ed. by *Yu. V. Kudryavtsev*. – Moscow, 1996.

EHRAC Case Report

Novoselov v Russia continued

Decision: admissible under Article 3; inadmissible for the remainder

The European Court found that the issue as to whether the applicant's detention conditions were compatible with Article 3, required an examination on the merits.

As to Article 6(1), the Court found that "the authorities cannot be held responsible for the failure to serve a summons on the applicant, because he did not take necessary steps to ensure receipt of his mail at his new place of residence and was thereby unable to apprise himself of the appeal hearing date".

Protocol 12 to the European Convention

Protocol 12 to the European Convention on Human Rights, providing for a general prohibition of discrimination, entered into force, following ratification by the first 10 states, on 1 April 2005.

Protocol 12 is wider in its application than Article 14 of the Convention, which forbids discrimination only in the enjoyment of one of the other rights guaranteed by the Convention. Protocol 12 guarantees that no-one shall be discriminated against on any ground by any public authority.

The Russian Federation signed Protocol 12 on 4 November 2000 but has not, as yet, deposited any notice of ratification with the Council of Europe – until that happens, it will not therefore be possible to invoke Protocol 12 against Russia. Among the former Soviet states, Armenia and Georgia have ratified Protocol 12.

UN Human Rights Committee's report on Russia's compliance with ICCPR

This article summarises the Concluding Observations of the Human Rights Committee in response to Russia's fifth periodic report under the International Covenant on Civil and Political Rights: 6 November 2003

The Committee noted that the fifth Periodic Report from Russia did not include full information on the follow up given to its previous concluding observations, which was also delayed for almost four years. Several positive factors were noted by the Committee:

° Legislative developments and efforts to strengthen the judiciary, which had generally improved the protection of Covenant rights.

° A Supreme Court decision instructing general courts in their obligation to be guided by relevant international treaties.

° Federal Constitutional Law No.1, creating the institution and setting out the functions and responsibilities of the Federal Commissioner for Human Rights, and the election of the first Federal Commissioner in May 1998.

° Achievements in addressing the problem of overcrowding in prisons.

The following points of concern were found to arise:

° Russia's failure to implement the Committee's views under the First Optional Protocol individual petition procedure, which were set out in the cases of *Gridin v. Russian Federation* and *Lantsov v. Russian Federation.* In this regard, Russia should review its position in relation to the Optional Protocol and implement the Committee's views in accordance with Article 2(3) of the Covenant.

° Persistent inequality in the enjoyment of Covenant rights by women, especially high levels of poverty, domestic violence and unequal pay for equal work. Russia should take effective measures to ensure the full enjoyment of Covenant rights by women, (Art.3).

° Human trafficking for sexual and labour exploitation, mainly to destinations outside Russia. This problem persists despite the fact that anti-trafficking legislation has been drafted and Russia is working towards ratifying UN treaties in this field. Russia should therefore reinforce measures to prevent and combat trafficking in women, including not only the adoption of punitive legislation, but also increasing protection and support for the victims.

° Although the death penalty has now de facto been abolished and is soon to be abolished *de jure*, the moratorium may end in 2007 once the jury system has been introduced in all constituent entities. Therefore, Russia should abolish the death penalty *de jure* before the expiration of the moratorium and accede to the Second Optional Protocol.

° Suspects and detainees are not sufficiently protected under current legislation, especially in relation to incidents of torture or ill-treatment during informal interrogations, which do not require the presence of a lawyer. Law enforcement officials must be prosecuted for acts contrary to Article 7 and, as a corollary, must be trained in the rights of suspects and detainees.

° Reports of human rights violations in the Chechen Republic pose a particular problem. Although abuse and violations there also involve non-state actors, the State is not relieved of its Covenant obligations. The Committee is particularly concerned about the implications of legislation relating to terrorism. In this regard, operations in Chechnya must comply with international human rights obligations, and all cases of abuse must be investigated, their perpetrators prosecuted and victims or their families compensated (Articles 2, 6, 7 and 9).

° The outcome of the rescue operation in the Dubrovka theatre in Moscow on 26th October 2002. The circumstances of this operation must be investigated profoundly and independently, the results of the investigation must be made public, prosecutions initiated and compensation paid if appropriate.

° Reports of poor hygiene and violence by prison officers in some places of detention. Reform of the prison system must therefore endeavour to comply with Article 10, and the problem of overcrowding must be completely eliminated. The Committee, to this effect, encourages the adoption of draft federal law "On public control over ensuring human rights in places of forced detention and assistance of public associations in their activities."

Continued on next page

° Reports of undue pressure on displaced camp-dwellers in Ingushetia to return to Chechnya. The non-coercion of such persons must be ensured.

° The Alternative Civil Service Act appears to be punitive in nature and does not guarantee that tasks performed by conscientious objectors are compatible with their convictions. Its terms must therefore be rendered compatible with Articles 18 and 26, and the length of civilian service should be reduced to that of military service.

° The closure of some independent media companies and an increase in State control of major media outlets. Russia ought to protect media pluralism and avoid state monopolisation of mass media (Article 19).

° Post September 11th amendments to the laws "On Mass Media" and "On Combating Terrorism" are incompatible with Article 19, although the Committee is pleased to note that the President has vetoed the amendments. These amendments, due to be debated again, must conform to Russia's Covenant obligations.

° The federal law "On Combating Extremist Activities" provides too vague a definition of this term and does not ensure against arbitrariness in its application. Russia ought to revise this law both to render this term more precise and to exclude any possibility of its arbitrary application.

° In disseminating information of public interest, journalists, researchers and environmental activists have been tried and convicted on treason charges. Where charges were not proven, they were handed back to the prosecutors instead of being dismissed. No one should be criminally charged or convicted for carrying out legitimate journalistic or investigative scientific work (Article 19).

° General frequency of harassment, violent attacks or murders of journalists. All such cases should be thoroughly investigated and all perpetrators brought to justice (Articles 19 and 6).

° General elections in the Chechen Republic did not meet all the requirements of Article 25. The restoration of the rule of law and political legitimacy in Chechnya should be done in full conformity with Article 25.

° Increase in racially motivated violent attacks against ethnic and religious minorities, racial profiling by law enforcement officers and xenophobic statements by public officials. Two significant steps should be taken:

(i) law enforcement personnel should receive training in protecting minorities against harassment, and

(ii) specific legislation should be adopted to criminalize both racist acts and racially motivated statements by public officials.

° Long delays, especially in and around Moscow, in the processing of asylum claims. Also, the Migration Service has not allowed children to lodge asylum claims unless accompanied by a legal guardian. Timely access to the refugee status determination procedure should be ensured and the relevant authorities must appoint legal guardians for asylum seeking children.

The text of Russia's Fifth Periodic Report, together with these concluding observations, should be disseminated widely.

European Convention on Human Rights – Rights ratified by the Russian Federation

Article 1 : Obligation to respect human rights.

Article 2 : Right to life.

Article 3 : Prohibition of torture.

Article 4 : Prohibition of slavery & forced labour.

Article 5 : Right to liberty and security.

Article 6 : Right to a fair trial.

Article 7 : No punishment without law.

Article 8 : Right to respect for private & family life.

Article 9 : Freedom of thought, conscience & religion.

Article 10: Freedom of Expression.

Article 11: Freedom of assembly and association.

Article 12: Right to marry.

Article 13: Right of an effective remedy.

Article 14: Prohibition of discrimination.

Protocol No. 1
Article 1: Protection of property.
Article 2: Right to education.
Article 3: Right to free elections.

Protocol No. 4
Article 1: Prohibition of imprisonment for debt.
Article 2: Freedom of Movement.
Article 3: Prohibition of expulsion of nationals.
Article 4: Prohibition of collective expulsion of aliens.

Protocol No. 7
Article 1: Procedural Safeguards re: Expulsion of Aliens.
Article 2: Rights of Appeal in Criminal Matters.
Article 3: Compensation for Wrongful Conviction.
Article 4: Right not be tried or punished twice.
Article 5: Equality between spouses.

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About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University to assist individuals, lawyers and non-governmental organisations (NGOs) within the Russian Federation to utilise regional and international human rights mechanisms. EHRAC works in partnership with Memorial and other NGOs and lawyers throughout Russia, as well as the Bar Human Rights Committee of England and Wales (BHRC). EHRAC seeks to transfer skills and build capacity in Russia by conducting internships, carrying out training seminars and disseminating training materials.

Internship Opportunities

Internship opportunities, legal and general, are available at EHRAC's offices in London and Moscow. Internships will be geared to the abilities and experience of the applicant. EHRAC currently manages over 60 applications to the ECtHR, produces and disseminates educational material, and delivers training. The work will range from assisting with the casework and preparation of training materials, and conducting research, to basic administrative duties and fundraising. EHRAC is, regrettably, unable to afford paid internships but offers the opportunity to gain valuable experience in human rights work and the operation of an NGO. If interested, please contact us by email.

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