

EHRAC

Bulletin



In partnership with Memorial Human Rights Centre (MHRC), the Georgian Young Lawyers' Association (GYLA) and Article 42 of the Constitution

Human rights defenders and journalists in Russia: how many deaths will it take?

Mary Lawlor, Executive Director, Front Line, the International Foundation for the Protection of Human Rights Defenders (www.frontlinedefenders.org)

In 2006, the then President Vladimir Putin finally spoke out about the killing of Anna Politkovskaya: the murder was a “disgustingly cruel crime that cannot go unpunished.”¹ Since then, however, the legal and judicial apparatus of the Russian Federation have failed to bring the intellectual authors or the perpetrators of this crime to justice. Meanwhile the killing continues. Since the beginning of 2009 we have seen the assassinations of Natalia Estemirova, Stanislav Markelov

and journalist Anastasia Baburova.

In addition to high level killings, there have also been threats and attacks on Yelena Maglevannaya who works for the newspaper Svobodnoye Slovo (Free Speech), Malika Zubayraeva who campaigned against the use of torture during the war in Chechnya, Alexei Sokolov who is the chairman of the NGO Pravovaya Osnova (Legal Foundation) which defends prisoners' rights and Maxim Efimov who works to combat anti-Semitism and racism. In August 2009 the offices of the Mothers of Dagestan for Human Rights were burned down.

The pattern is clear: any human rights defender or independent journalist who

stands up for the rights of others, who challenges corruption or the abuse of power by the State or who demands accountability for war crimes is an immediate target for harassment, intimidation or, ultimately, assassination, while the authors of these crimes enjoy total immunity.

The State cannot absolve itself of complicity in these crimes

The State cannot absolve itself of complicity in these crimes by pointing the finger of blame at shadowy criminal or paramilitary groups. The political culture of the country and the attitude of State and non-State actors towards human rights defend-

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Editorial

Less than a year has passed since Natalia Estemirova (human rights defender and Memorial HRC board member) was murdered in July 2009. Her loss is still keenly felt by colleagues both in Russia and worldwide. Tragically, Natalia's murder was not an isolated event and in this edition of the *Bulletin* Mary Lawlor (*FrontLine*) provides a sobering reminder of the number of human rights defenders and journalists targeted and killed within Russia in recent years. She also highlights the continued failure to bring the perpetrators of such crimes to justice, the prevailing culture of impunity which exists in the absence of effective investigations and the increasing pressures placed upon civil society within Russia.

Also in this edition, Olga Tseytina (*EHRAC-Memorial*) reviews the impact of recent ECtHR decisions in extradition cases emanating from Russia and

Ukraine; Maxim Timofeyev (*Russian Law Academy of the Ministry of Justice*) explains the significance of a Russian Constitutional Court ruling providing guidance on the approach to ECtHR judgments in civil courts; and Alice Pillar (*EHRAC intern*) outlines the practical implications of Russia's ratification of Protocol 14 to the ECHR. Outside of Russia, Kirill Koroteev (*EHRAC case consultant and University of Strasbourg*) reports on problems in relation to political prisoners within contemporary Georgia.

Finally, articles by Costas Paraskeva (*Advocate*) and Helen Hardman (*HRSJ, London Metropolitan University*) give consideration to two important research projects from the Human Rights and Social Justice Research Institute at London Metropolitan University on fact-finding missions within the Strasbourg system and pilot judgments at the ECtHR.

Joanna Evans
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Human rights defenders and journalists in Russia: how many deaths will it take?

ers come from the top.

While President Putin made a strong statement on the killing of Anna Politkovskaya and on the need to bring the killers to justice, he also stated that Anna Politkovskaya's, "ability to influence political life in Russia was extremely insignificant," and that, "her killing had caused greater damage to Russia than her writings."

Throughout the Russian Federation, human rights defenders face endless difficulties in registering their organisations and in many cases their applications to register are denied. Their offices are subjected to repeated inspections and audits to ensure compliance with increasingly restrictive laws.

However, the official attitude to human rights defenders is best illustrated by the introduction of the 2006 NGO Legislation. According to a recent Human Rights Watch report, *Choking on Bureaucracy*,² Russian Ministry of Justice statistics for 2007 indicate that more than 11,000 denials were issued by the regional NGO registration offices. In 10 regions more than 20 percent of registrations were rejected; in St. Petersburg and the surrounding region more than 35 percent of registrations were denied.

If we also take note of the official statements which accused "certain non-governmental organisations" of trying to peel away Russia's Caucasian republics or the remarks earlier in the year by the director of the Federal Security Service (FSB), which accused unspecified foreign NGOs of supporting and recruiting terrorists in Russia, then it becomes clear that official hostility towards and harassment of human rights defenders and the independent media has created a climate in which those predisposed to oppressive tactics can act with impunity.

The Government of the Russian Federation may deny that a climate of impunity prevails for attacks on human rights defenders. The facts, however, speak for themselves. Maxim Efimov was assaulted by an unknown assailant in his home in Karelia on 31 July 2009. Maxim Efimov is the chairperson of the Karelia office of the Youth Human Rights Group and the editor of the anti-fascist human rights news-

paper, *Chas Nol* (Hour Zero). Konstantin Baranov is the head of the Rostov branch of Molodaya Evropa (Young Europe), which is an international network of organisations from Western and Eastern Europe and Central Asia promoting values such as tolerance, intercultural exchange and human rights. On 15 July 2009, Konstantin Baranov's name and contact details were published on the web page of one of the members of Slavic Union, an ultra right-wing movement, with an appeal to "all right-wing people of Rostov" to respond to Baranov "adequately". Since then, Konstantin Baranov has received multiple phone threats and the web page of Young Europe suffered from a spam attack.

Alexander Lashmankin is the chief editor of the human rights information centre, Liberty, in Samara. Liberty is a web resource that publishes information about human rights violations in the Russian Federation. On 28 April 2009, unknown assailants fired two shots at the windows of Alexander Lashmankin's apartment. Nobody was injured in the incident. Alexander Lashmankin filed a complaint at the Leninsky District Police Department in Samara, but it is not yet clear whether an investigation into the attack has been opened or not.

Since 2000, 16 journalists alone have been killed for doing their job reporting on human rights issues. These are clearly not just cases of violence linked to the war in Chechnya or Ingushetia or of a few journalists who got too close to the subjects of their articles on organised crime. We cannot explain away these incidents by inferring that they were exceptional or out of the norm.

Following the killing of Natalia Estemirova, President Medvedev of Russia, like President Putin before him, spoke out very strongly to state that every effort would be made to bring the perpetrators to justice. He added, "it is obvious to me that this murder is linked to her professional work and this work is necessary for any normal state."

³ While President Kadyrov of Chechnya promised to lead the investigation into the killing of Natalia Estemirova, this commitment was undermined by his comments on Natalia Estemirova in an interview with Radio Free Europe - "Estemirova never had any honor or sense of shame".⁴ Despite these strong words by Presidents Medvedev and

Kadyrov, what now appears to be the norm in the Russian Federation is that any human rights defender or journalist who challenges the interests of powerful people is in danger.

Context of unrelenting hostility

The context in which these killings are taking place is one of unrelenting hostility to the work of human rights defenders and independent journalists on the part of the State and its agencies. As a member of the Council of Europe since 1997 and a party to the ECHR since 1998, Russia has binding and clear obligations to respect both freedom of association and expression.

In April 2009 President Medvedev signalled that it was time to reverse the hostile rhetoric, to relax restrictions on civil society instituted during Putin's presidency and to amend laws regulating NGOs. During a meeting with members of the Presidential Council for Civil Society Institutions and Human Rights, President Medvedev acknowledged the unwarranted restrictions on NGOs and pledged his willingness to review the law. In an interview on the same day with *Novaya Gazeta*, an independent newspaper, Medvedev articulated a commitment to democracy, and to political rights and freedoms, stating that they cannot be traded for prosperity.

It is time for President Medvedev to translate those fine-sounding sentiments into practical protection measures for human rights defenders and independent journalists. Sadly, to date, there has been neither the moral commitment nor the political will to take meaningful action to investigate these crimes, to bring the perpetrators to justice or, above all, to take action to end the climate of impunity which prevents human rights defenders from continuing their legitimate work without the risk of further assassinations.

1 Radio Free Europe, 10 October 2006. *Russia. Where's Putin?* [Online]. Available at: <http://www.rferl.org/content/article/1071936.html>.

2 Available at: <http://www.hrw.org/en/reports/2008/02/19/choking-bureaucracy>.

3 BBC News. 16 July 2009. *Kremlin Tribute to Dead Activist*. [Online]. Available at: <http://news.bbc.co.uk/1/hi/8154620.stm>.

4 Radio Free Europe. 8 August 2009. *Chechen Leader Denies Blame For Killings, Accuses West Of Violence*. [Online]. Available at: http://www.rferl.org/content/Chechen_Leader_Kadyrov_Denies_Blame_For_Killings_Accuses_West_Of_Violence/1795686.html.

Defending the rights of persons detained pending extradition in the light of ECHR judgments

Olga Tseytlina, Lawyer, EHRAC-Memorial; Advocate, Yuri Schmidt & Partners, St. Petersburg

Over the last two-and-a-half years the ECtHR has handed down a series of precedent judgments in extradition cases against Russia and Ukraine.¹ These judgments should dramatically change law enforcement practice as the ECHR, as a legal instrument guaranteeing the protection of human rights, requires that its norms be interpreted and applied so that the guarantees are practical and effective.²

People being detained pending extradition should have the right to regular judicial supervision of the periods they are held in custodial detention. The refusal to hear an appeal by a person held in custody pending extradition has been found to violate Art. 5(4) ECHR.³ It appears that the existing procedure for considering an appeal by a person held in custody pending extradition under Art. 125 of the Code of Criminal Procedure of the Russian Federation (CCP)⁴ is not an effective means of legal defence within the meaning of Art. 5(4) ECHR, because, even where a court finds a prosecutor's action or failure to act in relation to detention unlawful, it cannot immediately release the detainee; and the release procedure, which remains within the discretion of the prosecutor, is delayed for an indefinitely long period of time, sometimes many months.

It is clear that the period of detention of a person who is to be extradited may not exceed the limit set by national legislation and any extension must take place strictly in accordance with the manner prescribed by the Russian Law on Criminal Procedure (Chapter 13 of the CCP: Measures of Restraint). Under Art. 62 of the Minsk Convention,⁵ a

person who has been taken into custody pending receipt of a request for extradition must be released if the request for their extradition does not arrive within 40 days of the date of their being taken into custody. Under Art. 109 CCP the period of detention in custody for those held pending extradition may not exceed two months. The initial two-month period of detention may only be extended in exceptional circumstances, and in strict compliance with the rules of Art. 109 CCP. However, the norms of Arts. 108 and 109 CCP in extradition cases are often contravened by the Office of the Prosecutor General of the Russian Federation, which takes many months, or even years, to make an extradition decision without the relevant period of detention being judicially extended. This practice was declared illegal in, among others, Constitutional Court Decision No. 101-O of 4 April 2006 in the case of Mr Nasrulloev.⁶ The Constitutional Court stated that, "*Art. 466 of the CCP does not permit the authorities to apply a measure of restraint in the form of detention in custody without observing the procedure laid down in the Code of Criminal Procedure, or in excess of the periods stipulated in the Code*".

In cases of detention in custody pending extradition⁷ the ECtHR has found the rules of Russian law governing these procedures to be incoherent, mutually exclusive and not subject to adequate guarantees against arbitrariness, because there was no periodic judicial supervision of the periods of detention in custody set out in domestic law and law enforcement practice in this area. In these cases the ECtHR found that the provisions in Russian law governing extradition procedures were both unclear and unforeseeable in their application, and did not meet the 'quality of law' required

by the ECHR.

Following the ECtHR's judgments, on 29 October 2009, the Plenum of the Supreme Court of the Russian Federation confirmed that Art. 109 of the CCP should be applied to cases concerning extradition and indicated that, when extending a period of detention, courts must abide by the provisions of Art. 109 of the CCP. However, the Plenum did not alter the procedure used by the prosecutor for deciding on measures in instances where there is a court decision from another country that is not confirmed by a decision of a Russian court. In the case of *Dzuraev v Russia* (No. 38124/07) 17/12/09 the ECtHR ruled that, in the absence of a decision from a Russian court, the procedure for deciding on preventative measures in the form of detention in custody constituted a violation of Art. 5(1)(f) ECHR.

People may only be legally detained in custody pending extradition for the purpose of extradition itself and only where extradition may realistically be carried out. ECtHR practice in this context establishes that deprivation of freedom is justified only while the question of deportation is under consideration. If this procedure is not carried out with the requisite care, the detention ceases to be permissible under Art. 5(1)(f) ECHR and is only possible when the deportation can be effected (*Kolompar v Belgium* (No. 11613/85) 24/9/92; *Soldatenko v Ukraine* (No. 2440/07) 23/10/08; *Ryabikin v Russia* (No. 8320/04) 19/6/08).

Since the period of detention in custody pending extradition is actually determined by the time taken by the Office of the Prosecutor General to decide on extradition, the Office's actions must be transparent and accessible to judicial

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Defending the rights of persons detained pending extradition in the light of ECHR judgments

supervision. Otherwise, where the Office fails to act and the process of taking a decision on extradition drags out for an indefinite length of time, the person awaiting extradition continues to be held unlawfully and for an unjustifiably long time. This amounts to a violation of Art. 5(1)(f) ECHR as freedom may not be lost for a longer period than absolutely necessary and it must be possible to promptly restore this where its loss has not been justified.

Extradition is not permissible if there are substantial grounds for believing that the extradited person faces a real risk of torture or inhuman treatment or punishment in the country they are to be extradited to (*Chahal v UK* (No. 22414/93) 15/11/96). This is an absolute rule, and does not depend in any way on the conduct of the applicant, any negative characteristics they may possess, any risk to the receiving country or anything else. There are no exceptions to Art. 3 ECHR and, under Art. 15, no departure from it is permitted in times of war or other emergency situation. In its decisions on extradition cases the ECtHR has repeatedly emphasised that it is well aware of the considerable difficulties faced by states at the present time in protecting their populations from terrorist violence. Nevertheless, even in these circumstances Art. 3 ECHR prohibits torture or inhuman or degrading treatment or punishment in absolute terms, regardless of the conduct of the person being extradited. In these circumstances the activities of the person in question, however undesirable or dangerous, cannot call into question the absolute prohibition on torture (*Saadi v Italy* (No. 37201/06) 28/2/08; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08).

In analysing the general situation in each specific country, the ECtHR attaches great importance to the informa-

tion contained in reports from independent sources such as international human rights organisations like Amnesty International and Human Rights Watch, and also from government sources, including the US State Department (*Chahal v UK*; *Muslim v Turkey* (No. 53566/99) 26/4/05 para. 67; *Said v Netherlands* (No. 2345/02) 5/7/05 para. 54).

In its decisions against Russia concerning extradition to Uzbekistan, in the cases of *Ismoilov & Others* and *Muminov v Russia* (No. 42502/06) 11/12/08, the ECtHR found that: “no concrete evidence has been produced of any fundamental improvement in the protection against torture in Uzbekistan in recent years. Although the Uzbek government adopted certain measures designed to combat the practice of torture [...] there is no evidence that those measures produced any positive results. The Court is therefore persuaded that ill-treatment of detainees is a pervasive and enduring problem in Uzbekistan”.⁸

The ECtHR came to similar conclusions in cases involving extradition to Turkmenistan (*Ryabikin* and *Soldatenko*). In these decisions the ECtHR held that evidence from a number of objective sources pointed to extremely bad conditions of custody and also to the fact that cruel treatment and torture were continuing to arouse concern among all observers of the situation in Turkmenistan. It also noted that accurate information about the human rights situation in Turkmenistan, and especially about places of detention, is scarce and difficult to verify because of the exceptionally restrictive character of the present political regime, described as “one of the world’s most repressive and closed countries”.⁹

The ECtHR also found a violation of Art. 3 ECHR concerning extradition to Kazakhstan in the case of *Kaboulov v Ukraine* (No. 41015/04), 19/11/09 para. 111, indicating that: “there were numerous credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects by the Kazakh law-enforcement authorities to

obtain confessions. All the above reports equally noted very poor prison conditions, including overcrowding, poor nutrition and untreated diseases. It is also reported that allegations of torture and ill-treatment are not investigated by the competent Kazakh authorities”.

Accordingly, there are strong grounds for arguing against deportation of an applicant in a number of instances (for example, to Uzbekistan, Kazakhstan or Turkmenistan) because this may violate Art. 3 ECHR. It is, however, important to note that each case must be considered on its individual facts and the risk presented to the individual applicant, but where there is a strong argument against extradition for the reasons outlined above domestic practitioners may also wish to consider the argument that detention in custody for a lengthy period for the purpose of extradition is also clearly unjustified.

1 *Garabayev v Russia* (No. 38411/02) 7/6/07; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08; *Ryabikin v Russia* (No. 8320/04) 19/6/08; *Kaboulov v Ukraine* (No. 41015/04), 19/11/09; *Koktysh v Ukraine* (No. 43707/07) 10/12/09; *Kreydich v Ukraine* (No. 48495/07) 10/12/09; and *Dzhurayev v Russia* (No. 38124/07) 17/12/09.

2 See *inter alia Artico v Italy* (No. 6694/74) 13/5/80 para. 33.

3 *Ryabikin v Russia* (No. 8320/04) 19/6/08; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08; *Garabayev v Russia* (No. 38411/02) 7/6/07.

4 As required by paragraph 19 of Decision No. 1 of 10 February 2009 of the Plenum of the Supreme Court of the Russian Federation: How the Courts are to Deal with Complaints Relating to Art. 125 of the Code of Criminal Procedure of the Russian Federation.

5 The Minsk Convention on Legal Assistance in Civil, Family and Criminal Cases, Minsk, 22 January 1993 (amended on 28 March 1997).

6 See also Decision No. 333-O-P of 1 March 2007 of the Constitutional Court on the complaint by the US Citizen Menachem Saidenfeld concerning a violation of Art. 1(3) and Art. 466(1) in relation to his rights under the Constitution of the Russian Federation.

7 *Nasrulloev v Russia* (No. 656/09) 11/10/07; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08; *Ryabikin v Russia* (No. 8320/04) 19/6/08; *Muminov v Russia* (No. 42502/06) 11/12/08.

8 *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08, para. 121.

9 *Ryabikin v Russia* (No. 8320/04) 19/6/08, para. 98.

Domestic violence in Georgia: national legislation and practice

Nazi Janezashvili, Chairperson of the Board, Article 42 of the Constitution

On 25 May 2006, the Georgian Parliament adopted the Law on the Prevention of Domestic Violence and Protection and Assistance for Victims of Domestic Violence. This law explicitly recognises crimes committed within the family framework as fully-fledged crimes and provides a system of protective orders which provide the Georgian police with a much-needed tool to deal with domestic violence. Under the new law, the Government of Georgia is obliged to support and ensure the implementation of mechanisms to prevent violence within the family. These preventative mechanisms comprise complex economic, legislative and other measures that seek to avert domestic violence. The Ministry of Labour, Health and Social Affairs, the Ministry of Education and Science, the Ministry of Internal Affairs, the Prosecutor's Office and judicial bodies in Georgia are obliged to implement preventive mechanisms within the framework of their competencies and in the way set out by the law. These state bodies may also cooperate with institutions working on domestic violence and human rights to ensure the fulfilment of joint programmes. Criminal, civil and administrative legislation can now be used both to uncover and prevent domestic violence: not only should a perpetrator be prosecuted under the criminal legislation of Georgia, but a victim can request compensation for moral or physical damage and should also be protected by a protective order issued under administrative proceedings.

Under this law, restraining or protective orders may be issued in order to protect victims from the actions of the perpetrator or to restrict the latter. The police may issue a 24-hour restraining order at the scene of an incident of domestic violence.¹ In addition, victims can appeal to the administrative courts for protective orders that last for up to three months. If the perpetrator does not comply with the

protective order, they can be prosecuted in criminal proceedings.

In March 2010 the US Department of State published a country report about human rights practices in Georgia for 2009 which indicates that since the new provisions were made law in 2006 increasing use has been made of them each year. According to the report: "*Restrictive orders were issued in 176 cases of domestic violence during the year [2009], compared with 141 cases in 2008. Within 24 hours the temporary order should be approved by a court, at which point it becomes a protective order that prohibits the abuser from coming within 100 meters (310 feet) of the victim and forbids the perpetrator to use common property, such as a residence or vehicle, for six months. The victim may request an unlimited number of extensions of the protective order. The Ministry of Internal Affairs has developed the legally required form that police should use to issue restrictive orders, but training for police in this area was lacking outside of Tbilisi.*"²

Perpetrators of domestic violence are prosecuted under criminal proceedings for such crimes as rape or battery.³ According to a report by the Ombudsman of Georgia, in the first half of 2009, 18 criminal cases on domestic violence were examined by the Collegium of Criminal Cases of the Tbilisi City Court. It should be noted that all the perpetrators were men. In most of these cases physical, psychological and verbal violence were alleged to have been committed by men against women

The NGO, Article 42 of the Constitution, implements a project called Strategic Litigation in the South Caucasus, in partnership with the Netherlands Helsinki Committee and INTERIGHTS.⁴ This project includes support for cases about domestic violence. In June 2009 an application in a case about domestic violence was lodged with the Committee on Elimination of all Forms of Discrimination Against Women (CEDAW). The authors' representatives are INTERIGHTS and the Georgian lawyer, Elena Fileeva.

The first author alleges that her husband sexually and physically abused their

daughter (the second applicant) and that the Georgian authorities failed to comply with its positive obligation both to enact criminal law provisions in order to effectively protect women and girls from physical and sexual abuse within the family. Furthermore, it failed to conduct appropriate investigations into the allegations made. It is further alleged that the authorities failed to provide equal protection under the law to victims of domestic violence and sexual abuse and that they subjected the authors to torture by failing to protect them from domestic violence. The authors allege violations of Arts. 1, 2(b), 2(c), 2(d), 2(e), 2(f) and 5(a) CEDAW. The case is currently at the communication stage.

The Government of Georgia has been successful at the legislative level as regards domestic violence and the Government and some local NGOs have created shelters for women and children. Regrettably, however, there are problems regarding the implementation of legal mechanisms in practice. Court hearings regarding domestic violence are closed and therefore it is difficult to analyse local practice, as case materials are not accessible. Additionally, societal stigma and stereotypes conspire to prevent the protection of those at risk of domestic violence and to prevent victims from getting assistance. However, in my opinion, if Georgian NGOs and state bodies conduct joint programmes regarding domestic violence this will decrease the incidence of infringement of legal rules and improve the implementation of the law in national practice.

1 Restraining orders are temporary protective measures and must be submitted to the court for approval within 24 hours.

2 US Department of State, 11 March 2010. *2009 Human rights report: Georgia* [Online]. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136032.htm>.

3 Art. 126 & 137 of the Criminal Code of Georgia.

4 The project's regional partners are the Armenian Institute for Development (Armenia) and Legal Education Society (Azerbaijan). The project is financed by the Netherlands Ministry of Foreign Affairs and the British Embassy.

HUMAN RIGHTS CASES

This section features selected decisions in recent human rights cases which have wider significance beyond the particular case or are cases in which EHRAC and its partners are representing the applicants.

EHRAC-Memorial cases

Isayev v Russia

(No. 20756/04), 22/10/09

(ECHR: Judgment)

Right to liberty and security

Facts

The applicant was arrested on 6 March 2003, in Astrakhan, Russia, on suspicion of murder. He complained that he had been severely beaten during his detention in the Chernoyarskiy District Police Department between 6 and 14 March 2003, resulting in him being admitted to hospital with a brain injury of medium severity as well as bruising. The applicant stated that his injuries were the result of being ill-treated by police, whereas police officers stated that the applicant repeatedly hit his own head against both the wall and bars of his cell.

Judgment

The ECtHR rejected the applicant's claims of a violation of Art. 3 (inhuman treatment) and noted particularly the inconsistencies in his accounts, as well as the fact that the applicant had failed to provide a detailed account of events "*recounting his side of the story day by day*". Furthermore, the ECtHR found that the investigation into the allegations had been prompt, diligent and not merely based on police officers' version of events and, therefore, there had been no violation of the procedural limb of Art. 3.

The ECtHR also examined the lawfulness of the applicant's detention from 6 November 2003 to 9 January 2004 (the prior period of pre-trial detention having ended more than six months before the applica-

tion was lodged with the ECtHR). The period from 6 November 2003 to 6 January 2004 was found to be lawful, as it had been authorised by a court on legitimate grounds. However, there was no judicial decision authorising the applicant's detention from 6-9 January 2004, resulting in a violation of Art. 5(1) (right to liberty and security). Notably, the domestic courts had been acting under a practice whereby an accused could be detained without a court order for up to six months from the date of receipt of the case file by a court, which had subsequently been found to be unconstitutional. A violation of Art. 5(4) was found, as the applicant's applications for release had not been examined 'speedily'. The ECtHR awarded the applicant 1,000 EUR in damages.

Comment

This case provides a reminder of the strict evidential threshold which applicants must strive to meet in complaints before the ECtHR. In particular, it underlines the importance of an applicant providing a clear, consistent and detailed account of events in respect of any allegations made.

Dubayev & Bersnukayeva v Russia

(Nos. 30613/05 & 30615/05),

11/02/10

(ECHR: Judgment)

Right to life

The applicants' sons were members of an illegal armed group in Chechnya. They surrendered to an infantry regiment of the Russian Federal Forces Group 'West' on 14 March 2000, during an amnesty announced by the State Duma. On 17 March 2000,

documents were issued in their names recording the voluntary surrender of their weapons and setting out the decision of the authorities not to institute criminal proceedings against them in application of the Amnesty Act. Although the Government submitted that the two men had been released, they had not been seen since their detention and the ECtHR specifically noted the absence of proper records in respect of their detention and release. The ECtHR found that, in the context of the Chechen conflict, the men must be presumed dead given their absence for several years following unacknowledged detention by State servicemen. As Russia failed to provide any evidence of their detention or release, and the two men had last been seen alive in State custody, the ECtHR found the deaths attributable to the State and, in the absence of any justification in respect of the use of lethal force by State agents, in violation of Art. 2 (right to life). The ECtHR also found a breach of the procedural aspect of Art. 2 on account of the authorities' failure to carry out an effective investigation into the disappearances. There were also violations of Art. 3 (inhuman treatment) in respect of the applicants' suffering as a result of their relatives' disappearance; of Art. 5 (right to liberty and security) regarding the detention of the men; and of Art. 13 (right to an effective remedy) in conjunction with Art. 2. Both applicants were awarded 60,000 EUR in damages.

Zakayev & Safanova v Russia
(No. 11870/03), 11/02/10
(ECHR: Judgment)
Right to family life

Facts

The first applicant, a Kazakh national of Chechen ethnicity, moved to Chechnya from Kazakhstan in 1992. In 1994 he married the second applicant, a Russian national of Chechen ethnicity. The applicants had three children between 1994 and 1999. The first applicant appeared to make no attempt to obtain Russian nationality or regularise his stay during his period in Chechnya.

In December 2000 the second applicant moved to Moscow followed by the three children in August 2001. In February 2002 the second applicant notified the police that she was having problems obtaining a temporary registration permit. The first applicant moved to Moscow in March 2002. He was arrested and questioned on 28 October and 15 November 2002 about his status in Moscow.

On 17 January 2003, the first applicant was ordered to pay a fine and was to be removed to Kazakhstan. This was upheld on appeal and he was removed to Kazakhstan on 15 April 2003. The second applicant and the three children continued to live in Moscow. On 30 September 2003, the applicants' fourth child was born.

Judgment

The ECtHR held that the first applicant's removal in 2003 for breach of residence regulations had far-reaching negative consequences for the family life of the applicants and the children and amounted to a violation of Art. 8. It concluded that the first applicant's offence was not a particularly serious one. The applicants had been married for ten years, had four chil-

dren and there were strong emotional ties between the family. The second applicant and the four children were also citizens of Russia. Moreover, the children had been subject to forced migration in the past and moving them to another unfamiliar environment would be contrary to their best interests.

The ECtHR did not overlook that the first applicant had failed to comply with Russian legislation concerning the residence of foreign nationals. However, it noted that the applicants had lived in Chechnya for a significant time period, which had experienced a complete breakdown in law and order where State institutions had ceased to function. In addition, the applicants had also attempted to apply for temporary registration in 2002.

Comment

The applicants had also complained to the ECtHR of additional violations under other ECHR articles, including Art. 3 in relation to the first applicant's removal to Kazakhstan; Art. 5(5) in relation to his pre-removal detention; Art. 6(1) in respect of the decision taken by one of the domestic courts; and Art. 14 on the basis that the violations complained of had occurred on account of the applicants' Chechen ethnicity. The ECtHR found that, on the material in its possession, these complaints were manifestly ill-founded and were thus rejected.

EHRAC-GYLA cases

Klaus & Yuri Kiladze v Georgia
(No. 7975/06), 02/02/10
(ECHR: Judgment)
Right to property for victims of political repression

Facts

The applicants' father was executed in 1937 and their mother was sent to

a GULAG (corrective labour camp) in 1938 for alleged crimes against the Soviet regime. Their parents' flat in Tbilisi and all their belongings were confiscated. The applicants spent two years in an orphanage in Russia in cramped and unsanitary conditions before being able to return to Georgia. In 1956 and 1957 the applicants' mother and father were rehabilitated.

The applicants were recognised as victims of political repression in 1998. In 2005 they applied to the Georgian domestic courts seeking compensation on the basis of Art. 9 of the Law on the Recognition of Citizens of Georgia as Victims of Political Repressions and Social Security of the Repressed of 11 December 1997 (the 1997 law). Ultimately, the Supreme Court concluded that, as no regulatory act relating to the payment of compensation, as referred to in Art. 9 of the 1997 law, had been adopted, the applicants' request could not be granted.

Judgment

The Government submitted that the case was inadmissible *ratione temporis*. The ECtHR responded that the right granted by the 1997 law prior to Georgia's ratification of Protocol No. 1, was still in effect and the applicants continued to suffer as a result of the Government's failure to legislate in this regard. The ECtHR dismissed the Government's objections based on incompatibility *ratione materiae*, as when the domestic proceedings began the applicants possessed, by virtue of the 1997, law, a debt sufficiently established to be payable.

As for the merits, the ECtHR found that it was the Government's failure to adopt the necessary laws to determine the amount of compensation and the rules for its payment which had restricted the applicants'

effective exercise of the right protected by Art. 1 of Protocol No. 1 (protection of property). Moreover, the ECtHR found that the State had not provided convincing or reasoned arguments to explain its failure, nor had it shown readiness to address the root causes of that failure. It had placed a disproportionate and excessive burden on the applicants that could not be justified by the public interest. Thus, the ECtHR found a violation of Art. 1 of Protocol No. 1. The Court awarded 4,000 EUR to each applicant in damages.

Comment

This judgment has significance for thousands of others in a similar position to the applicants, as the ECtHR, referring to Art. 46 (execution of judgments), has required Georgia to rapidly introduce the necessary legislative, administrative or budgetary measures to ensure that those people who are entitled can benefit from their rights under the 1997 law. If Georgia does this, there will be no need for thousands of further ECtHR applications on the same issue.

Other ECHR cases

Rantsev v Cyprus & Russia

(No. 25965/04), 07/01/10

(ECHR: Judgment)

Prohibition of slavery & forced labour; right to life

Facts

The applicant's daughter, Ms. Rantseva, a 20-year-old Russian national, arrived in Cyprus on 5 March 2001, on an 'artiste' visa to work in a cabaret. After only three days at the cabaret, she ran away from her place of work and lodging leaving a note which said that she was returning to Russia. She was found by the cabaret manager on 28 March 2001, who took her to the police apparently with a view to securing her ex-

pulsion so that he could replace her at the cabaret. The police refused to detain her, as she was not illegal and instead handed Ms. Rantseva over to the manager and asked him to return with her later in the day for further investigation. Around an hour after she had been collected by the manager Ms. Rantseva was found dead in the street below the apartment to which he had taken her; a bedspread was looped through the apartment's balcony.

It was concluded that Ms. Rantseva's death was accidental. Following a second autopsy in Russia, the Russian authorities requested further investigation. In October 2006, Cyprus confirmed the verdict of accidental death.

Judgment

The ECtHR held that:

- Cyprus had no obligation to prevent an unforeseeable risk to Ms. Rantseva's life, but the failure to effectively investigate her death violated its procedural obligation under Art. 2;
- Art. 4 prohibits trafficking and entails positive obligations to protect potential victims, as well as to prosecute trafficking;
- Cyprus violated its Art. 4 obligation to establish a framework to combat trafficking; the ECtHR emphasised the failings of the 'artiste' visa regime;
- Cyprus violated Art. 4 when the police handed Ms. Rantseva over to the cabaret manager without making enquiries into the circumstances indicating she was a victim of trafficking;
- Ms. Rantseva's detention at the police station, transfer and confinement to the apartment violated Art. 5;
- Russia violated Art. 4 by failing to investigate Ms. Rantseva's recruit-

ment in Russia.

Comment

In this case the ECtHR widened the positive obligations to protect potential victims of trafficking entailed by Art. 4 (*Siliadin v France* (No. 73316/01) 26/07/05), had dealt exclusively with the State's failure to put in place adequate criminal law provisions to prosecute trafficking). Firstly, Art. 4 may entail an obligation to take protective measures where state authorities were aware, or ought to have been aware, that an identified individual had been or was at real and immediate risk of being trafficked. Secondly, Art. 4 entails a procedural obligation on states to investigate potential trafficking domestically and to cooperate effectively with other states to investigate events occurring outside their territories.

Varnava & Others v Turkey

(Nos. 16064-66/90 & 16068-

73/90), 18/09/09

(ECHR: Grand Chamber judgment)

Disappearance

Facts

Applications were made in the names of nine men (eight servicemen and one civilian) who it was alleged had disappeared after being detained by the Turkish military during operations in Northern Cyprus during July and August 1974. The men had not been accounted for since their disappearance, but the applicants relied on evidence that six of the servicemen had been held in Turkish prisons and another two were identified in photographs taken of Cypriot prisoners being transported to Turkey. The body of the ninth applicant was found in a mass grave in 2007, which was exhumed by the Committee of Missing Persons (CMP). The respondent Government disputed that the missing men had been taken into captivity.

Judgment

The ECtHR dismissed Turkey's preliminary objections regarding lack of temporal jurisdiction and failure to comply with the six-month deadline for the submission of cases to the ECtHR. Although Turkey had not ratified the right of individual petition until 1987, the ECtHR held that the obligation to account for the fate of the missing men by conducting an effective investigation was of a continuing nature and could persist for as long as the fate of the missing persons was unaccounted for. In respect of the applicants' late submission to the ECtHR, it held that, having regard to the exceptional situation brought about by the international conflict, the applicants had acted with reasonable expedition.

The ECtHR found: a procedural violation of Art. 2 on the basis of the Government's failure to comply with its continuing obligation to account for the whereabouts and fate of missing persons; a violation of Art. 3 in relation to the inhuman treatment suffered by the applicants' relatives due to the number of years of silence they had endured; and a violation of Art. 5 in relation to two of the men who had been included on a list of detainees provided by the ICRC, but whose detention had never been acknowledged by Turkey. The applicants were awarded 12,000 EUR for non-pecuniary damage in respect of each application.

Comment

The applicants' submission that the Government be directed to conduct a prompt and effective investigation into the fate and whereabouts of the missing men was refused by the ECtHR. Significantly, however, Judge Spielmann, in his concurring opinion (joined by Judges Ziemele and Kalaydjieva), stated that such an investigation should have been held and the Court should have made a direction

to that effect. He went on to say that *"the supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers' task in discharging these functions."* Finally, he expressed the opinion that, *"the Court should [...] indicate to the State concerned [...] the measures it considers most appropriate in order to secure redress for the violation."*

Al-Saadoon & Mufdhi v UK
(No. 61498/08), 02/03/10
(ECHR: Judgment)
Prohibition of torture

Facts

The applicants are Iraqi nationals who were suspected of involvement in the deaths of two British servicemen in Iraq in March 2003. UK forces in Iraq arrested the first applicant on 30 April 2003 and the second applicant on 21 November 2003. Both were then detained in UK-run detention facilities in Iraq.

In September 2004 the applicants' case was referred to the Central Criminal Court of Iraq and on 27 December 2007 the Iraqi Higher Tribunal (IHT) requested that the applicants be transferred into its custody to stand trial on charges carrying the death penalty. Despite an ECtHR Rule 39 indication on 30 December 2008 not to transfer the applicants, they were transferred on 31 December 2008.

The applicants submitted that their transfer violated their rights under Arts. 6 (right to a fair trial) and 13 (right to an effective remedy) and that, as a result of their transfer, they faced a substantial risk of the death penalty in breach of Art. 3 (prohibition of inhuman treatment).

Judgment

The ECtHR held that:

- The UK authorities subjected the applicants (since at least May 2006) to the fear of execution by the Iraqi authorities thereby causing the applicants psychological suffering in violation of Art. 3;
- There was no objective justification for the transfer of the applicants to the Iraqi authorities and the effectiveness of any domestic appeal was unjustifiably nullified as a result of the transfer resulting in violations of Arts. 13 and 34;
- There was no violation of Art. 6 because at the date of transfer it was not established that the applicants would risk a flagrantly unfair trial before the IHT.

Comment

The ECtHR considered that the number of signatories to Protocol No. 13, together with consistent state practice in observing the moratorium on capital punishment, is strongly indicative that Art. 2 (right to life) has been amended so as to prohibit the death penalty in all circumstances. Therefore, the wording of Art. 2 does not continue to act as a bar to interpreting the wording of Art. 3, *"torture or inhuman or degrading treatment or punishment"*, to include the death penalty.

The ECtHR also considered that, from 1 February 2004 when Protocol No. 13 came into force for the UK, the UK should not have subjected individuals within its jurisdiction in any way to a real risk of being sentenced to the death penalty and executed. However, given its finding of a violation of Art. 3 on the grounds of psychological suffering, the ECtHR did not consider it necessary to rule on whether there had been violations of Art. 2 or of Art. 1 of Protocol No. 13.

Political prisoners in contemporary Georgia

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The issue of political prisoners in Georgia did not disappear following the 2003 'Rose Revolution'. After coming to power, President Saakashvili released those who had been considered as political prisoners under the rule of President Shevardnadze, but the policies of the new administration against the opposition forced civil society to raise the issue anew. The former Public Defender, Mr Sozar Subari, issued reports on the matter, naming a number of persons as political prisoners,¹ and the US Department of State dedicated a chapter of its 2008 *Human Rights Report: Georgia*² to this problem. A commission comprising representatives of Georgian NGOs, albeit under the aegis of the Georgian Conservative Party, sits regularly to discuss whether a convicted person is actually a political prisoner.

This controversy prompted the International Federation for Human Rights (FIDH) to conduct a mission to Georgia in order to investigate the issue. The mission's report, published in autumn 2009,³ does not aim to provide a comprehensive list of political prisoners, but rather to ascertain whether there are indeed political prisoners in contemporary Georgia - even one being too many for a modern democratic European state. In its assessment, the mission relied on the Council of Europe (CoE) criteria first elaborated in the framework of the accession of Armenia

and Azerbaijan to the CoE. The criteria include a conviction in violation of the ECHR (in particular under Arts. 9-11 (freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association)), a conviction based on purely political reasons unrelated to any offence, disproportionate length or conditions of detention imposed for political reasons, discrimination for political reasons or unfair trial for political reasons.

The mission examined 8 'pilot cases'. These either involve a large number of people, are representative of a larger group of cases or are isolated high-profile cases. Nora Kvitsiani, an economist by education, was convicted for illegal possession of weapons found in her home and misappropriation of humanitarian aid for the distribution of which she was responsible as the *de facto* head of the local government in a village in the Kodori Valley, which separates the undisputed territory of Georgia from its breakaway region of Abkhazia. The case is linked to the Government's actions against her brother, Emzar Kvitsiani, who had led the Monadire Squadron that was in charge of protecting the local neighbourhood and who fled from prosecution following a conflict with Irakli Okruashvili, the then Minister of Defence. Jony Jikia, Merab Ratisvili and Demur Antia were all convicted of drug- or weapon-related charges. However, there were strong reasons to believe that they were arrested and tried in order to put an end to their political activities. Revaz Kldiashvili, the former

head of the Georgian Military Police, was a prominent supporter of Mr Okruashvili at the time when the latter declared his opposition to President Saakashvili. Kldiashvili was arrested on charges of illegal possession of and failure to return his military police ID to the authorities after being dismissed from his post. Even if the charges against him were genuine, there is no explanation as to why a first-time offender, whose service to the country had been recognised, was sentenced to the maximum terms under both offences. Maya Topuria and her numerous co-defendants were sentenced for masterminding a *coup d'état* in favour of Igor Giorgadze, a Georgian politician heavily supported by Russia. The prosecution's only evidence was that the accused gathered together on a certain date, not that they were plotting something against the Government.

The report found that political persecution still exists in Georgia. It also highlighted the problems faced by the accused in criminal proceedings in Georgia, notably the exceptionally low percentage of acquittals and large discretion of trial judges on sentencing matters.

1 See, e.g., <http://www.ombudsman.ge/uploads/reports/annualreport2007part2.pdf> (in English) or http://www.ombudsman.ge/uploads/reports/moxseneba_2008_1naxevari.pdf (in Georgian).

2 <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119080.htm>.

3 <http://www.fidh.org/IMG/pdf/PolPrisGeorgia.pdf>.

Tackling systemic human rights violations: the ECtHR's pilot judgment procedure

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In recent years the ECtHR has attempted to tackle the growing backlog of 'clone cases' coming before it.¹ To this end, since 2004, the ECtHR has been applying a 'pilot judgment' procedure which highlights wide-scale, systemic human rights violations and calls on states to take adequate measures to solve such problems. In 2009-2010 the Human Rights and Social Justice Research Institute (HRSJ) at London Metropolitan University carried out research (funded by the Leverhulme Trust) into ECtHR 'pilot

judgments' and their impact within national systems.

Since the pilot judgment procedure has been applied 'flexibly'² by the ECtHR, and has not yet been codified in the Rules of Court, there is still some confusion as to what constitutes a pilot judgment. All the ECtHR and Council of Europe officials interviewed during the course of the research agreed that *Broniowski v Poland*,³ *Hutten-Czapska v Poland*⁴ and *Burdov v Russia (No. 2)*⁵ were pilot judgments *per se*. What these cases all share in common is:

(i) the explicit application by the ECtHR of the pilot judgment procedure;

(ii) the identification by the ECtHR of a systemic violation of the ECHR;

(iii) that general measures are stipulated in the operative part of the judgment so that the respondent state resolves the systemic issue (which may be subject to specific time limits).

Additionally, in a pilot judgment, the ECtHR *may* also adjourn all other cases arising from the same systemic issue, either for a particular period of time or, more generally, pending the resolution of the issue by the state. Since *Broniowski*, *Hutten-Czapska* and *Burdov (No. 2)*, the ECtHR has issued three other 'full' pilot judgments which share

all these features: *Olaru & Others v Moldova*,⁶ *Yuriy Nikolayevich Ivanov v Ukraine*⁷ and *Suljagić v Bosnia & Herzegovina*.⁸

However, pilot judgments are not issued in every case where the ECtHR has identified a systemic violation of the ECHR and the research examines in what circumstances the ECtHR has issued pilot judgments, assesses the procedure from the ECtHR's perspective and evaluates how states have responded to this new approach.

In all six cases violations were a significant source, or estimated source, of applications to the ECtHR from the respective state. The most striking example concerns the Bosnian Government's failure to provide adequate compensation to people for the loss of their 'hard-currency' savings that had been frozen since Yugoslavia's financial crisis of the 1980s. The ECtHR noted in its judgment that there were already 1,350 similar applications, that the potential number of affected persons could reach one million and that the violation therefore constituted "a serious threat to the future effectiveness of the Convention machinery."⁹ The cases against Russia, Ukraine and Moldova all concerned the failure by state authorities to execute domestic court judgments. The number of cases pending at the ECtHR concerning these violations has been estimated as the most significant source of admissible applications to the ECtHR.¹⁰ Both *Broniowski v Poland* and *Hutten-Czapska v Poland* concerned the violation of property rights. *Broniowski* was estimated to potentially affect 80,000 people who have the right to claim compensation for property in eastern Poland, in the Bug River Region, lost following boundary changes during the Second World War.¹¹ The ECtHR's judgment

in *Hutten-Czapska* identified that the same violation, regarding landlords' rights to raise rent, could affect up to 100,000 landlords and 600,000-900,000 tenants.¹²

The research also examines the roles of the executive, legislature and judiciary of states in implementing Strasbourg judgments within the domestic context. A number of patterns emerge, indicating that domestic legislatures and executives are generally unresponsive to constitutional court judgments. The research shows how the ECtHR adopts a stance which often mirrors that of judgments given by national constitutional courts, either before or after the case has gone to the ECtHR. The problem arises because of a failure by the legislature and executive to implement the guidance provided in constitutional court judgments. The ECtHR's subsequent issue of a pilot judgment making a repeat finding of the same violation exerts greater pressure on the executive and legislature to respond. This, consequently, lends greater authority to constitutional courts in forcing a legislative response from government and parliament. Apparently, therefore, through the pilot judgment procedure, the ECtHR is strengthening constitutional courts vis-à-vis the other branches of the state, confirming Wojciech Sadurski's findings with respect to Poland.¹³

In addition to 'full' pilot judgments, the research examined another category of decisions which also highlight systemic violations of the ECHR – variously known as 'quasi-pilot judgments' or 'Art. 46 judgments'. As with the 'full' variant, the ECtHR identifies a widespread or systemic dysfunction in legislation or practice. It then invokes Art. 46 ECHR to remind the respondent state of its obligation to remedy the violation holisti-

cally. These judgments are distinct from the 'full' variant in three ways. Firstly, the ECtHR does not explicitly apply the pilot judgment procedure. Secondly, general measures are not usually specified in the operative provisions (with the exception of *Lukenda v Slovenia*,¹⁴ *Sejdović v Italy*¹⁵ and *Xenides-Arestis v Turkey*¹⁶). Thirdly, other similar cases are not usually adjourned.¹⁷ This type of 'quasi' pilot judgment has become fairly commonplace.

Finally, the research also examined a third category of judgment in which there is no explicit application of Art. 46, but the ECtHR notes that the problem which the case raises is systemic or widespread and that holistic measures are required to resolve the problem. It is difficult to precisely define this 'third tier' of judgments and a number of such cases pre-date the pilot judgment procedure. Examples of these include *Bottazzi v Italy*¹⁸ and *Kudła v Poland*.¹⁹ More recent examples are: *Krawczak v Poland*,²⁰ *Robert Lesjak v Slovenia*,²¹ *Šilih v Slovenia*,²² *Matko v Slovenia*,²³ and *Saadi v Italy*.²⁴ However, in the latter cases, the respective governments responded as if the ECtHR had issued a quasi-pilot judgment that identified a systemic issue requiring holistic resolution.

The research was conducted by Prof. Philip Leach, Dr. Svetlana Stephenson, Prof. Brad Blitz and Dr. Helen Hardman. The full report is being published by Intersentia as: *Responding to Systemic Human Rights Violations - An analysis of pilot judgments of the European Court of Human Rights and their impact at national level*. For further information on the project see: <http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm>.

1 Clone cases are groups of similar cases where the ECtHR has found the same violation of the ECHR, which apparently stem from the same legislative defect or malfunction. These in turn indicate the repetitive and therefore systemic nature of the violation.

2 ECtHR, 2009. *The Pilot Judgment Procedure: information note issued by the Registrar* [Online]. Available at: http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf.

3 No. 31443/96, 22/6/04.

4 No. 35014/97, 19/6/06.

5 No. 33509/04, 15/1/09.

6 Nos. 476/07, 22539/05, 17911/08 & 13136/07, 28/7/09.

7 No. 40450/04, 15/10/09.

8 No. 27912/02, 3/11/09.

9 *Suljagić v Bosnia & Herzegovina* (No. 27912/02) 3/11/09, para. 63.

10 Ukraine (*Yuriy Nikolaevich Ivanov v Ukraine* (No. 40450/04) 15/10/09, para.73); Moldova (*Olaru & Others v Moldova* (Nos. 476/07, 22539/05, 17911/08 & 13136/07) 28.7.09, para.53); Russia, see: Leach, P., 2007. Strasbourg's oversight of Russia – an increasingly strained Relationship. *Public Law*, Winter, pp. 640-54 (Also available online at: <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/media-and-journals/russia/strasbourgs-oversight-of-russia---an-increasingly-strained-relationship.cfm>); Trochev, A., 2009. All appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights on Russia. *Demokratizatsiya*, 17:2, pp. 145-78.

11 No. 31443/96, 22/6/04, para. 193.

12 No. 35014/97, 19/6/06, paras. 235-6.

13 Sadurski, W., 2008. Partnering with Strasbourg: Constitutionalization of the European Court of Human

Rights, the Accession of Central and East European States to the Council of Europe and the idea of Pilot Judgments. *EUI Working Papers Law*, 2008/33.

14 No. 23032/02, 6/10/05.

15 No. 56581/00, 10/11/04; GC 1/3/06.

16 No. 46347/99, 22/12/05.

17 With the exception of *Xenides-Arestis* (No. 46347/99) 22/12/05, para.50.

18 No. 34884/97, 28/7/99.

19 No. 30210/96, 26/10/00.

20 No. 40387/06, 8/4/08.

21 No. 33946/03, 13/7/09.

22 No. 71463/01, 9/4/09.

23 No. 43393/98, 2/11/06.

24 No. 37201/06, 28/2/08.

Russian Constitutional Court: European Court judgments are ‘newly discovered circumstances’ in civil cases

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On 26 February 2010, the Constitutional Court of the Russian Federation (CC) ruled that Russian courts of general jurisdiction are obliged to reconsider a civil case where the ECtHR has found a violation of an applicant’s rights in that case. It also ordered the Russian Parliament to amend the Code of Civil Procedure (CCP) to provide the legal grounds for lodging an application for a final court judgment to be reviewed in cases where the ECtHR has found violations of applicants’ rights.

Background

Constitutional complaints were lodged by three Russian nationals: Aleksey Doroshok, Anatoliy Kot and Yelena Fedotova. The ECtHR had previously ruled that the Russian courts had violated their rights under the ECHR.¹ The applicants had requested Russian courts of general jurisdiction to review their cases substantiating their claims using the ECtHR judgments in their cases. The national courts refused to reconsider the applicants’ cases as the

CCP did not contain a provision allowing the review of a final court judgment on the grounds invoked by the applicants. In contrast, both the Code of Criminal Procedure and the Code of Arbitration Procedure have provisions allowing the courts to reconsider a case on the grounds of an ECtHR judgment under the heading of ‘new circumstances’ (criminal cases) or ‘newly discovered circumstances’ (commercial cases).

Ruling

The CC held that the provisions of Art. 392(2) CCP complied with the Russian Constitution *per se*. It also gave a ‘pro-constitutional’ interpretation of the impugned provision, stating that, for the purposes of Art. 392(2) CCP, a ECtHR judgment should be treated as a ‘newly discovered circumstance’ thus granting a person the right to request the reconsideration of the civil case and preventing national courts from rejecting such applications as unsubstantiated.

The CC noted that ECtHR judgments and the ECHR form an integral part of the Russian legal system and should be taken into consideration by the legislature and other authorities. The Court cited

*Burdov v Russia (No.2)*² stating that the Russian authorities’ undertaking to abide by final ECtHR judgments includes not only the payment of monetary compensation, but also the adoption of general and individual measures.

The CC further noted that the ECtHR does not have the power to review the judgments of national courts and it is incumbent on national judicial authorities to reconsider a case where it is necessary to rehabilitate the applicant. The CC stated that the discrepancy between a ECtHR judgment falling within the category of ‘newly discovered circumstances’ in the Code of Arbitration Procedure but not in the CCP had led to a lower level of human rights guarantees in civil judicial process, which could not be justified by the nature of the cases to be decided by the courts of general jurisdiction.

1 *Kulkov & Others v Russia* (Nos. 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 & 45022/06) 8/1/09; *Kot v Russia* (No. 20887/03) 18/1/07; *Fedotova v Russia* (No. 73225/01) 13/4/06.

2 *Burdov v Russia (No. 2)* (No. 33509/04) 15/1/09.

Fact-finding missions: The Strasbourg experience

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In the vast majority of cases brought before it the ECtHR is able to reach a judgment on the basis of decisions made and documents created in the course of prior domestic proceedings. However, where fundamental facts remain in dispute between the parties, the ECtHR has, in the past, conducted fact-finding missions.¹

The basis upon which such fact-finding missions are conducted is to be found in Art. 38(1) ECHR which provides simply that the Court may, “if need be, undertake an investigation”. However, in 2003, the ECtHR introduced an annex to its Rules of Court which deals specifically and in some detail with the conduct of such in-

vestigations.²

The ECtHR has, in the past, carried out its fact-finding role by sending judicial delegations to hear witnesses and by conducting judicial ‘on-the-spot’ investigations. For example, in the case of *Ireland v UK* (18/1/78, Series A No. 25), concerning the arrest and detention of IRA suspects by the British security forces, 119 witnesses were heard by the (former) European Commission. In a series of cases brought by individuals against Turkey from the mid-1990s the former Commission and (since 1998) the new Court have held fact-finding hearings in order to adjudicate on fundamental factual differences between the parties. The cases against Turkey have concerned the destruction of homes, ex-

trajudicial killings, disappearances and torture occurring in south-east Turkey. Other more recent examples of fact-finding missions include the inter-state case of *Cyprus v Turkey* (No. 25781/94) 10/5/01 (missing persons, etc.), *Valasinas v Lithuania* (No. 44558/98) 24/7/01 (prison conditions) and *Poltoratskiy v Ukraine* (No. 38812/97) 29/04/03 (treatment of prisoners on death row). In March 2003 a delegation of four judges took evidence from 43 witnesses in Chişinău and Tiraspol, Moldova, in the case of *Ilaşcu & Others v Moldova & Russia* (No. 48787/99) GC 8/7/04, in which the Moldovan applicants complained of their continuing unlawful detention in the Russian-occupied area of Transdniestria.

Despite its potentially crucial role for

applicants in obtaining redress from the ECHR system, this procedure is undoubtedly expensive and time-consuming. A significant number of these missions can take up to a week and involve at least five or six ECtHR officials (usually three judges, a registrar and lawyers) and interpreters. In addition, some of the ECtHR judges consider that evidence taken five to seven years after the events in question (the time period that a case might take to reach Strasbourg) is likely to be unreliable. However, other judges believe that the fact-finding procedures of the ECtHR could serve as an important check on efforts to conceal or distort the record on human rights.³

It should be noted that whilst states are obliged to cooperate fully with the ECtHR in the conduct of its fact-finding investigations this does not always happen in reality. For example, in *Shamayev & Others v Georgia & Russia* (No. 36378/02) 12/4/05, the ECtHR's delegation was refused access to five allegedly detained/extradited applicants who were being held in Russia within the jurisdiction of the Stavropol Regional

Court. The ECtHR (and the former Commission) have also acknowledged their own limitations in establishing the facts. One feature of the fact-finding process, which may reduce its effectiveness, is the inability to compel a witness to attend and give evidence to the ECtHR. For example, this problem was evident in *Denizci & Others v Cyprus* (Nos. 25316-25321/94 & 27207/95) 23/5/01, *Ipek v Turkey* (No. 25760/94) 17/2/04 and *Nuray Şen v Turkey (No. 2)* (No. 25354/94) 30/3/04. Fact-finding missions would appear to be necessary in such cases which raise issues of gross violations of the ECHR, especially because of the likelihood of no prior effective proceedings.

The post-Protocol 11 ECtHR has continued to engage in fact-finding hearings, although it is understood that the ECtHR is extremely conscious of the time and cost of such proceedings. In recent years, however, partly because of its heavy caseload (124,650 cases pending on 31 March 2010), the new ECtHR has conducted fact-finding missions relatively rarely. Nevertheless, Strasbourg continues to re-

ceive serious applications from European 'trouble spots' (such as Russia (Chechnya),⁴ Georgia,⁵ Turkey,⁶ Moldova,⁷ and Cyprus⁸).

Fact-finding missions are clearly crucial to the proceedings of the ECtHR and should not be forgotten during the ongoing debates for the reform of the ECtHR. Furthermore, as already discussed, fact-finding missions are more likely to be necessary in cases involving gross and systematic violations. Despite the problems which may arise in holding fact-finding missions some years after the events in question, the ECtHR should not rule out holding such missions solely on this ground. An effective fact-finding mechanism within the ECtHR is of paramount importance in ensuring access to justice for victims of grave human rights violations within Europe and, in the absence of effective domestic proceedings, the ECtHR should be able to continue to conduct fact-finding missions in order to establish the facts in question.

1 The Human Rights and Social Justice Research Institute at London Metropolitan University has conducted research on the fact-finding missions carried out by the European Court (and Commission) of Human Rights. See: Leach, P., Paraskeva, C. & Uzelac, G., 2009. *International Human Rights & Fact-finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, [Online]. Available at: http://www.londonmet.ac.uk/londonmet/library/e40396_3.pdf.

2 Rules A1-8, adopted on 7 July 2003, available at: <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>.

3 Shelton, D., 2003. *The Boundaries of Human*

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The Russian judicial system: the state of the problem

In October 2009 the Moscow Centre for Political Technologies published a report in Russian entitled: *The Russian judicial system: the state of the problem*.¹

According to the report, the judiciary lacks independence, primarily due to corruption stemming from dependence on a bureaucratic hierarchy and the practices of lawyers and judges. The judicial system is embedded within the State machinery and, in cases involving officials, is often subject to bureaucratic interference. Rus-

sia's judges have come to see themselves as servants of the State and often think about how their decisions will be viewed by the regional authorities. Sanctions designed to encourage the effective working of the judiciary can be selectively applied against 'disloyal' colleagues to ensure compliance with the status quo. Corruption is further sustained as lawyers and judges often make decisions on the basis of a phone call or as the result of a bribe. However, those cases which concern neither big business nor of-

ficialdom are generally decided objectively. Nevertheless, the courts' reputation among Russians remains low due to prominent negative examples.

Cases take too long to come to court; courts frequently fail to track down witnesses whose testimony is vital to a case and claimants face great difficulties in obtaining access to documentary evidence. Furthermore, given the cost of legal serv-

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The Russian judicial system: the state of the problem

ices, it is difficult for ordinary Russians to feel that they enjoy equality before the law. Those lawyers who work in the legal aid sector are often of poor quality.

The report proposes a number of solutions. As regards independence, it suggests the periodic regional rotation of judges, the introduction of new individuals into the judiciary, reforms in the role and appointment of court representatives and judges, further use of juries, increased 'competition' between courts resulting from greater flexibility for applicants and removing life

tenure for judges. The judiciary is often underpaid and underqualified and the report recommends increasing pay and improving the standard of judges as possible solutions to the problem of lengthy proceedings. The report also advocates the broadening of the category of persons eligible for legal aid and better information for citizens about their right to claim aid.

These proposals are not all uncontroversial. In particular, it is sometimes argued that life tenure in fact bolsters judges' independence from officialdom and rights activists in Russia are concerned that efforts to reduce the length of proceedings will make it impossible for individual appli-

cants to prepare their case effectively due to time constraints.

There have been several recent legal reforms aimed at increasing the independence of the judiciary and more are planned, including a law on access to information on the courts, which comes into force on 1 July 2010 and forms part of a wider plan to make the courts more transparent. However, the report suggests that progress is likely to be slow due to the inherent conservatism of the Russian judiciary.

1 Available at: http://www.politcom.ru/tables/otchet_sud.doc.

The practical implications of Protocol 14 to the ECHR

Alice Pillar, Intern, EHRAC

Protocol 14 to the ECHR was adopted by the Committee of Ministers (CoM) of the Council of Europe (CoE) and opened for signature on 12 May 2004. On 15 January 2010, the Russian Federation was the last of the 47 Parties to the ECHR to ratify the Protocol, which came into force on 1 May 2010.

The main purpose of the Protocol is to improve the functioning of the ECtHR, which is currently overburdened by the number of individual applications, by giving it the procedural means and flexibility it needs to process all applications in a timely fashion and at the same time allowing it to concentrate on the most important cases. In particular, the Protocol addresses the following issues: the process for examining applications, a new criterion for admissibility, friendly settlements and the supervisory procedure for the execution of judgments.

The filtering process

The Protocol introduces a new 'filtering mechanism' for applications to the ECtHR. This takes the form of a new single-judge formation which, with the assistance of a non-judicial rapporteur, has the power to strike out an application or to declare it inadmissible where there is no need for further examination.¹ Previously, this power was reserved to a Committee of three judges where the decision could be taken unanimously and without the need for further examination by a Chamber.

This was the fate of around 90% of all applications submitted to the ECtHR. It is hoped, therefore, that the new single-judge formation will increase the ease and speed with which the ECtHR deals with a large proportion of the applications it receives. As remains the case for Committee decisions, the decision of the single judge as to admissibility is final. However, a single judge cannot declare an application inadmissible against the state in respect of which that judge has been elected.

Repetitive cases

Repetitive cases account for a significant proportion of the ECtHR's caseload. Therefore, in cases concerning matters for which there is well-established case law,² Protocol 14 empowers a Committee of three judges to make a unanimous decision on admissibility and merits simultaneously. Previously, Art. 29(3) provided for the simultaneous examination of admissibility and merits in exceptional cases only. This position is preserved for decisions on inter-state applications under Art. 33, however Protocol 14 makes simultaneous rulings the norm rather than the exception. Nonetheless, a Committee can choose not to follow the simplified procedure if a case requires more detailed examination by a Chamber.

It is noteworthy that all decisions made by a Committee are final and, unlike Chamber rulings, cannot be referred to the Grand Chamber. Consequently, it will not be possible to refer simultaneous rulings on admissibility and merits by a

Committee to the Grand Chamber. Previously, in contrast, a request could be made to refer any judgment on the merits. This change is logical however, as the Committee is only empowered to rule unanimously on cases for which there is well-established case law. Parties may, of course, contest the 'well-established' nature of case law before the Committee. The Grand Chamber will continue to deal with individual applications forwarded by a Chamber and with requests for referral by Parties in exceptional circumstances under Art. 43.

Friendly settlements

Protocol 14 strengthens the role of friendly settlements; it is particularly hoped that they will be used in repetitive cases. Firstly, it gathers the provisions relating to friendly settlements into one Article, Art. 39. The new Art. 39 provides that the ECtHR may now place itself at the disposal of Parties for friendly settlement at any stage in proceedings. Art. 39 further provides that decisions on friendly settlements will be transmitted to the CoM, which will supervise the execution of the terms as set out in the decision.³

Admissibility criteria

Protocol 14 introduces a new admissibility criterion: the ECtHR shall declare an application inadmissible if it considers that the applicant has not suffered a significant disadvantage. This criterion also contains two safeguard provisions: it can only be applied where, firstly, the principle of respect for human rights does not require an

examination on the merits, and, secondly, where the case has been duly considered by a domestic tribunal.

The general aim of the admissibility criteria is to reduce the time spent by the ECtHR on clearly inadmissible applications. The purpose of the new criterion should be understood in conjunction with these other criteria as being to enable the ECtHR to focus on those cases that raise important human rights issues. The wording of the new criterion leaves much to the ECtHR's discretion. This appears to be an intentional response to the perceived inflexibility of the original criteria, which have been fully defined in previous case law. To allow the development of appropriate case law for the application of this new criterion, an interim provision dictates that it may only be applied by a Chamber or by the Grand Chamber for the first two years following the entry into force of the Protocol.⁴

Execution of judgments

Protocol 14 seeks to strengthen the powers of the CoM to supervise the execution

of judgments. The Protocol introduces the right of the CoM, in cases where it considers that its supervision is hindered by a problem of interpretation of the judgment, to refer the matter by a two-thirds majority⁵ to the ECtHR for a ruling on the question of interpretation. Additionally, where the CoM considers that a Party is refusing to abide by a final judgment, it may, after serving formal notice on that Party and by a two-thirds majority decision, refer the matter to the ECtHR. If the ECtHR finds a violation of the Party's obligation to abide by the judgment under Art. 46(1), the case will be referred back to the CoM for consideration of the measures to be taken. The Protocol does not provide for the payment of a financial penalty, however. Such referrals will only be made in exceptional circumstances, and the provision does not mean that it will be possible to re-examine the initial finding of a violation.

In addition to the main implications detailed above, Protocol 14 seeks to reinforce judges' independence by increasing

their term of office from six to nine years and prohibiting their re-election. It also expressly provides for the right of the Commissioner for Human Rights to intervene in proceedings as a third party.

1 This means clear-cut cases where the inadmissibility of the application is manifest from the outset.

2 Normally case law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute 'well-established case law', particularly when rendered by the Grand Chamber.

3 Previously, the CoM only supervised 'judgments' and, consequently, the ECtHR largely endorsed friendly settlements through 'judgments', rather than 'decisions'. The new provision recognises that a 'decision' has fewer negative connotations for the Parties and may, therefore, increase the chance of a friendly settlement being reached.

4 The 'well-established case law' requirement for admissibility rulings by single judges and simultaneous admissibility and merits rulings by Committees is the primary motivation for this interim provision.

5 The requirement of a qualified majority vote indicates that the CoM should use this possibility sparingly.

UN Human Rights Council report on secret detention: Russian Federation objections

A study by the UN Human Rights Council (HRC) on secret detention in the context of the 'global war on terror' in the post-11 September 2001 era¹ has been criticised by the Russian representative to the Council. The 220-page report, which looks at secret detention in countries in Europe, Asia and Africa, also reports on US involvement in secret detention and is critical of both the US and the UK. Secret detention, in the report, does not necessarily mean that locations are secret, but that the detainee is incommunicado and the authorities do not disclose information about the whereabouts or fate of the detainee.

As regards Russia, the study refers to concern expressed by the Council of Europe's Committee on the Prevention of Torture that "a considerable number of persons alleged that they had been held for some time, and in most cases ill-treated, in places which did not appear to be official detention facilities," and that "unlawful detention persisted in the Chechen Republic as well as oth-

er parts of the North Caucasian region," and to the HRC's own concern "about ongoing reports of torture and ill-treatment, enforced disappearance, arbitrary arrest, extrajudicial killing and secret detention in Chechnya and other parts of the North Caucasus", saying it was "particularly concerned that the number of disappearances and abduction cases in Chechnya has increased in the period 2008-2009". The Russian Government's reply was one of denial:

- "No instances of secret detention in the Russian system.
- No involvement or collaboration in secret detention on the territory of another State.
- All detentions fall within the supervision of the Federal penitentiary and the Ministry of Interior.
- From 2007-2016 there is a programme being undertaken to improve detention conditions.
- The office of the General Prosecutor supervises situations of detention, and if there is a violation, it is reported.
- All places of deprivation of liberty are subordinate to the Federal Service on the Execution of Punishment or the Ministry of Interior."

Having recorded the official Russian Government response, the study then summarises interviews held with three men from the North Caucasus. Each reported being seized, held incommunicado and tortured. One interviewee "described being held in an old concrete building, 'recalled a terrible smell and walls covered in blood', and explained that he was 'severely tortured' for ten days, which included receiving electric shocks, being beaten with iron bars, and being burned with a lighter".²

According to the Associated Press,³ a Russian diplomat, Vladimir Zheglov, "said the report was 'confrontational' and should be removed from a U.N. Web site where it has been available since last month". The report can only be blocked by agreement of a majority of the HRC's 47 members.

1 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.doc>.

2 *ibid*, para. 214.

3 <http://www.the-daily-politics.com/news/35-worldnews/495-russia-seeks-to-suppress-un-secret-prisons-report->

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About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University. Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights, whilst working to transfer skills and build the capacity of the local human rights community, and raise awareness of the human rights violations in these countries. Launched initially to focus on Russia, EHRAC has broadened its geographical remit to Georgia and Azerbaijan, and also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 270 cases involving more than 900 primary victims and their immediate family members. These cases concern such issues as extrajudicial execution, ethnic discrimination, disappearances, environmental pollution and criminal justice amongst others. In addition to the formal partnerships below, EHRAC works with the Bar Human Rights Committee of England and Wales and the International Human Rights Committee of the Law Society of England and Wales and co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: www.londonmet.ac.uk/ehrac.

Internship opportunities

Internship opportunities, legal and general, are available at EHRAC's London and Moscow offices. Depending on individual qualifications and skills, tasks may include assisting with the casework, preparing case summaries, collating and preparing training materials, conducting research, fundraising, writing awareness-raising material, press work and basic administrative duties. EHRAC is, regrettably, unable to afford paid internships, but offers the opportunity to gain valuable experience in human rights and NGO work. To apply, or for more information, please contact us by e-mail.

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EHRAC-Memorial project

EHRAC has been working in partnership with Memorial HRC since 2003. Memorial HRC is one of Russia's oldest and most respected human rights organisations. The EHRAC-Memorial project is implemented in three main areas: human rights litigation and advocacy; human rights training; and raising awareness and dissemination of information.

EHRAC-GYLA project

In early 2006 EHRAC formalised a partnership with the highly respected NGO, the Georgian Young Lawyers' Association (GYLA). This joint project supports litigation at the European Court, including the provision of litigation expertise in cases arising from the Russia-Georgia conflict, conducts training seminars in Georgia and facilitates the participation of a GYLA delegate in EHRAC's Legal Skills Development Programme.

EHRAC-Article 42 project

In 2008 EHRAC formalised its cooperation with the Georgian NGO, Article 42 of the Constitution. EHRAC has been providing advice to Article 42 on European Court cases since 2006 and current litigation work includes cases arising from the 2008 Russia-Georgia conflict.

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