European Court of Human Rights

16 February 2016

Request for referral from the Applicant

Application № 46998/08

Mikhaylova v Russia

1. **BACKGROUND/INTRODUCTION**

1.1 The requesting applicant is Ms Valentina Nikolayevna Mikhaylova, a Russian national. She brought an application (46998/08) on 10 September 2008 against the Russian Federation complaining of breaches of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

1.2 The procedural and factual history of this case is set out in paragraphs 1 to 22 of the judgment of the European Court of Human Rights ("the Court") dated 19 November 2015.

1.3 In its judgment the Court found that the rights set out in Article 6 § 3 (c) of the Convention are elements of the concept of a fair trial in criminal proceedings contained in Article 6 § 1[1]. It held that there had been violations of both Article 6 § § 1 and 3 (c) of the Convention[2].

1.4 The Court applied Article 41 of the Convention and awarded the applicant just satisfaction, in the form of monetary compensation.

1.5 The Court did not apply Article 46 of the Convention and did not address the question of whether Russia should take individual and/or general measures to put the applicant as far as possible back in the same position she would have been in had her rights not been violated. It declined to apply Article 46, notwithstanding the appended Concurring Opinion by two of the Court's judges, which set out forcefully the arguments in favour of specifying individual and/or general measures.

2. **GROUNDS**

2.1 Pursuant to Article 43 the applicant requests that the matter be referred to the Grand Chamber for further consideration on the basis that:

2.1.1 Her case raises a serious question affecting the application of the Convention; and

2.1.2 Her case raises a serious issue of general importance.

3. **APPLICATION OF THE CONVENTION**

3.1 Article 46 requires that High Contracting Parties abide by the final judgment of the Court in any case to which they are parties.

3.2 In accordance with the Court's established case law a state party is:

1 Court's judgment 19.11.15 at paragraph 76

2 Operative part of the Court's judgment, points 2 and 3.

1.1 “under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded.”[3]

3.3 The applicant also repeats and adopts the argument in the Concurring Opinion to the Court’s judgment in her own case that:

1.2 “In order to redress the violation of Article 6 §§ 1 and 3 (c) of the Convention and to fully comply with the obligations resulting from Article 46 of the Convention, the respondent State should adopt remedies of both an individual and a general nature”[4]

1.3 General measures

3.4 It is now established practice for the Court to indicate general measures in judgments which reveal problems or gaps in the legislation, administrative practices, and judicial remedies or a lack of other essential safeguards.

3.5 For instance, in *Faimblat v Romania*[5], the Court decided to indicate general measures in order to remedy systemic defects in legislation regarding the restitution of land, by holding that Romania was required to take general measures

1.4 “afin de s’assurer que les demandes de restitution reçoivent une réponse définitive de la part des autorités administratives dans des délais raisonnables. L’Etat doit veiller aussi à supprimer les obstacles juridiques empêchant l’exécution avec célérité des décisions définitives rendues par l’autorité administrative ou par les juridictions à propos des immeubles nationalises, afin que les anciens propriétaires obtiennent soit la restitution de leurs biens soit une indemnisation rapide et adéquate pour le préjudice subi, notamment par l’adoption des mesures législatives, administratives et budgétaires aptes à garantir une telle issue”[6].

3 *Vgt. Verein gegen Tierfabriken (VgT) v Switzerland (No. 2)* hudoc (2009) GC paras 85-86.

4 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 13.

5 *Faimblat v Romania* hudoc (2009) paras 50 - 54

6 Translation: “in order to ensure that the demands of restitution receive a definitive response by the administrative authorities within reasonable time limits. The state should also take care to remove the legal obstacles to the speedy execution of the final judgments made by the administrative authority or by the jurisdictions on nationalised buildings so that the former proprietors obtain restitution for their property or a rapid and adequate indemnity for the suffered loss, notably by adopting apt legislative, administrative and budgetary measures to guarantee this.”

3.6 The applicant understands that the Court will generally exercise its discretion cautiously and give specific indications as to the type of individual and/or general measures that might be taken in order to put an end to violations in exceptional cases[7]. The applicant argues that hers is an exceptional case in that the nature of the violation found by the Court leaves no real choice as to the measures, required to remedy it. The violation found by the Court was breach of Article 6 fair trial requirements. In its judgement, the Court has failed to propose any general and/or individual measures that remedy the violation. Instead, the applicant has just been awarded a minor amount of monetary compensation in "just satisfaction".

3.7 The applicant agrees with the Concurring Opinion which stated:

> 1.5 "This case presented an excellent opportunity for the European Court of Human Rights (the Court) to provide much needed guidance to the Russian authorities on the general measures that should be taken to prevent similar situations, in view of the insufficient efforts made by the Russian Constitutional Court to address that systemic "failure.""[8]

3.8 Another feature of the case which makes it a suitable one ("a good example" in the words of the Concurring Opinion) for suggesting general measures is the fact that the Russian Constitutional Court recognised that the right to free legal assistance had "constitutional significance" but did not draw the necessary conclusion that free legal assistance is required for the protection persons facing "administrative" proceedings, where the penalties are severe enough for the proceedings to take on a criminal character.[9] This constituted a "malfunction in the national system of human-rights protection".[10]

3.9 The Concurring Opinion[11] also cited case law in support of the contention the Court should have indicated the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist.[12] It also relied on the Court's case law in support of the contention that the Court should have considered that general measures at the national level were clearly required in the applicant's case[13]. The applicant relies on the points set out below at paragraphs 3.10-3.18 derived from the cases cited in the Concurring Opinion and other cases.

3.10 In *Broniowski v. Poland*, having identified a systemic violation affecting a large number of people, the Court considered it was appropriate to recommend general measures:

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7 Revised draft CDDH final report on the longer-term future of the Convention system GT-GDR-F(2015)020 dated 28.10.15 at para 144

8 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 1.

9 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 8.

10 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 10

11 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 10

12 See *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012; *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 148, ECHR 2009; and *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V.

13 See *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-V

1.6 “With a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court has sought to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case”[14].

1.7 It appears from this case that where a systemic problem is identified that affects a large number of people, the Court will not shy away from recommending that the respondent State take steps remove any hindrance to the implementation of the rights of those people affected by the situation found, in respect of an individual, to have been in breach of the Convention. The applicant’s case is arguably similar in this regard, as the lack of access to legal aid to defend oneself against ‘administrative’ proceedings is a violation of Convention rights which plainly affects many people in Russia other than the applicant. It is unclear why the judgment did not tackle this systemic aspect.

3.11 *Stanev v Bulgaria* concerned a man being detained in a social care home by reason of his mental disability. Among other violations, his detention had not been in accordance with an appropriate legal procedure. This warranted individual measures to check that whether he still wanted to be in the home. The lack of any adequate procedure under national law for him to challenge his detention meant that there had additionally been an Article 6 violation:

1.8 “…direct access of this kind is not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation. That finding is sufficient for it to conclude that there has been a violation of Article 6 § 1 of the Convention”[15].

1.9 This in turn meant that the Court found it appropriate to indicate general measures to rectify the situation:

1.10 "Having regard to that finding, the Court recommends that the respondent State envisage the necessary general measures to ensure the effective possibility of such access."[16]

3.12 In *Scoppola v. Italy (no. 2)*, the Court stated that it was not necessary to indicate general measures, stressing the discretion that respondent States have to arrange their national legal system as they wish, as long as they secure Convention rights. Part of the Court’s reasoning was that the act of ratifying the Convention meant that the respondent State undertook to:

1.11 “remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.” [17]

3.13 While the Court did not specify general measures in that case, it expressed in clear language the individual measures that it considered necessary:

14 *Broniowski v. Poland* [GC], no. 31443/96, § 194
15 *Stanev v Bulgaria* [GC] no. 36760/06 § 246
16 *Stanev v Bulgaria* [GC] no. 36760/06 § 258
17 *Scoppola v. Italy (no. 2)* [GC], no. 10249/03 § 152

1.12 "…the respondent State is responsible for ensuring that the applicant's sentence of life imprisonment is replaced by a penalty consistent with the principles set out in the present judgment, which is a sentence not exceeding thirty years' imprisonment."[18]

3.14 Set alongside the Court's restatement of the requirement for respondent states to remove domestic legal obstacles, no one reading the judgment in *Scoppola v. Italy (no. 2)* would be left in any doubt that the Court was issuing a clear recommendation that Italy change its national law if that was necessary to achieve the individual measures.

3.15 In *Driza v. Albania*, the Court recommended specific measures of redress to the respondent State, explaining that its concern was to facilitate the rapid and effective suppression of a malfunctioning found in the national system of human-rights protection[19]. In that regard it held that general measures at the national level were undoubtedly called for in order to execute its judgment. The violations found in the applicant's case resulted from an equivalent failure of the national legal system in Russia to protect Convention rights. It is no less urgent that these rights be secured and, the applicant would argue, it is also clear what needs to happen in order for those rights to be secured. Therefore, consistent with its practice as evidenced by the case law, the Court ought to have made some recommendations for individual and general measures in the applicant's case.

3.16 In *Oleksandr Volkov v Ukraine,* the Court held:

1.13 "[…] the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power."[20]

1.14 The Court also deemed the 'safeguards' put in place by the Government in the meantime to be insufficient:

1.15 "these amendments do not in fact resolve the specific issue… as to the other legislative amendments outlined by the Government, the Court does not consider that they substantially address the whole range of the problems it has identified in the context of this case."[21]

1.16 This case again illustrates that where changes are necessary in the national legal regime in order to address systemic violations in particular, the Court has been prepared to make recommendations accordingly in its judgments.

3.17 In *Vyerentsov v Ukraine* the Court found violations of Articles 11 and 7 which stemmed from a legislative lacuna concerning freedom of assembly. This lacuna had persisted in the Ukrainian legal system for more than two decades. The Court stated:

18 *Scoppola v. Italy (no. 2)* [GC], no. 10249/03 § 154
19 *Driza v. Albania*, no. 33771/02, § 125
20 *Oleksandr Volkov v Ukraine*, no. 21722/11 § 199
21 *Oleksandr Volkov v Ukraine*, no. 21722/11 § 201

1.17 “It has been the Court’s practice, when discovering a shortcoming in the national legal system, to identify its source in order to assist the Contracting States in finding an appropriate solution and the Committee of Ministers in supervising the execution of judgments. Having regard to the structural nature of the problem disclosed in the present case, the Court stresses that specific reforms in Ukraine’s legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court’s conclusions in the present judgment and to ensure their compliance with the requirements of Articles 7 and 11 of the Convention.”[22]

1.18 The applicant argues that there is no difference in principle between the deficiencies identified in the Russian legal system in her case and those identified in the Ukrainian system in *Vyerentsov v Ukraine*. In that case, the Court recommended that specific reforms be urgently implemented in order to secure Article 7 and Article 11 rights. If the systemic deficiency identified as an Article 6 violation in the applicant’s case is not cured by the implementation of legal reform, this will significantly undermine the exercise of Convention rights in Russia in practice. The applicant notes in this regard that the Court thought it important to mention that the Article 6 violation arose in response to the applicant’s attempted exercise of Article 10 and 11 rights[23].

3.18 In the applicant’s case, having argued that the Court ought to have suggested general measures, the Concurring Opinion went on to spell out what general measures ought to have been recommended:

1.19 “the respondent State should, through appropriate and timely measures taken by the legislative and/or judicial powers, secure in its domestic legal order a mechanism which allows individuals to obtain legal assistance in CAO proceedings whenever the person does not have sufficient means to pay for it and the interests of justice so require, and in particular whenever imprisonment is applicable, as either a principal or an alternative or subsidiary penalty.”[24]

3.19 In the applicant’s case, leaving aside the non-binding Concurring Opinion, while the Court held that the applicant’s rights had been violated, the Court did not offer any guidance or suggest any general measures which might ensure that Russia avoids breaching the Article 6 rights of its citizens in exactly the same way time and time again.

3.20 The Court’s reasoning for not recommending any general measures is not straightforward and appears to be based on the following text:

22 *Vyerentsov v Ukraine*, no. 20372/11 § 95

23 Court’s judgment 19.11.15 at paragraph 99

24 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 10

1.20 "The Court also notes that the applicant's complaint before the Court arises from the allegedly unsatisfactory state of domestic law. In this connection, the Court reiterates that in cases arising from individual petitions its task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it. Here, therefore, the Court's task is not to review, *in abstracto*, the compatibility with the Convention of the above procedure, but to determine, *in concreto*, the effect of the interference on the Convention right in the circumstances of the case (see, as a recent authority, *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], no. 13279/05, §§ 68-70, 20 October 2011)"[25]

3.21 This suggests that it is the job of the Court to act as a district court rather than a court whose job it is to oversee legal points of abstract principle. If this is indeed what the Court meant, then the applicant argues that the Court is mistaken in this respect. For the applicant to bring a matter to the Court's attention in the first place, she first had to exhaust all domestic remedies, including before the Russian Constitutional Court. It is surely precisely the function of the Court to safeguard the applicant's rights not simply in the circumstances of the concrete individual case, but also in the abstract, as a representative of the class of persons potentially affected by similar violations and surely precisely as a 'test case' for assessing the compatibility of aspects of national legal systems with the substance of the abstract universal rights embodied in the Convention.

3.22 The applicant also points out that, particularly in cases where there is no remedy available at national level, and where the violation affects a large number of individuals, the Court has been willing to consider the national position in the abstract. The applicant notes in this regard the remarks concerning the case of *Zakharov v. Russia*[26] made by the President of the ECHR in his speech delivered to mark the opening of the judicial year on 29 January 2016[27]. That case concerned the absence of protections in the Russian law concerning the interception of telecommunications. In that context the Court was prepared rule that the relevant provisions of Russian law did not contain adequate and effective safeguards against arbitrariness. In the applicant's case against Russia there is similarly no remedy in national law for the Article 6 violations found by the Court. It is hard to see why, with the exception of the judges who put their names to the Concurring Opinion, the Court was not prepared to address this obvious deficit at national level, at least to the same extent as the Court in *Zakharov v. Russia*.

3.23 Elsewhere in the judgment the Court seemingly sought to emphasize the limits of its own function to one of assessing the consistency of the operation of national law with the requirements of a fair trial, explaining that:

1.21 "Article 6 § 3 (c) leaves to the Contracting States the choice of the means of ensuring that the right to legal assistance is secured in their judicial systems"[28].

25 Court's judgment 19.11.15 at paragraph 86
26 *Zakharov v. Russia* 47143/06
27 http://www.echr.coe.int/Documents/Speech_20160129_Raimondi_JY_ENG.pdf
28 Court's judgment 19.11.15 at paragraph 94

1.22 It is not clear that the limits on the Court's function ought really to be so narrowly expressed. It would not be helpful in any case, either to individual applicants or to state parties for the Court simply to make a determination of consistency or otherwise based on the facts of the individual case, but to say nothing that would permit a state to adjust its laws and procedures to make them compatible with Convention rights, or that would give confidence to individuals about the extent of their rights and the legal protection of those right at both national and international level.

3.24 Elsewhere it has been clarified that a respondent State remains free, subject to the supervision of the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention. However, it is only free to do so provided that the means it chooses are compatible with the conclusions set out in the Court's judgments[29]. This strongly suggests that, if for no other reason than to help the respondent State, the Court should, in appropriate cases, make some suggestions that will assist it in securing the Convention rights of its citizens, as it has contracted to do.

3.25 If, in the alternative, it is correct that Court must confine itself to the issues in the case before it, then the Court should at least pay particular attention to whether, in the circumstances of the individual case it should order any individual measures.

1.23 Individual measures

3.26 The Court in the applicant's case only ordered compensation. It did not order any individual measures to put the applicant as far as possible in the position she would have been in but for the violation. The breach of the applicant's Convention rights consisted in being denied the right to a fair trial in that she was denied public funding for legal representation to defend herself. The applicant still has a record of having been convicted of an offence. The Russian State has not reversed the conviction or expunged that conviction from her record. Nor has it ordered a re-trial to replace the previous unfair trial. It is clear that no relevant procedures even exist in the Russian legal system that would permit this. Ironically, even if there were such a procedure, the applicant could probably not avail herself of legal representation in seeking to overturn her conviction, because under Russian law it would still supposedly be an 'administrative' matter, for which no legal aid is available.

3.27 As noted in the Concurring Opinion:

> 1.24 "Unlike Article 413 of the Russian Code of Criminal Procedure, the Code of Administrative Offenses does not expressly provide for a possibility that the proceedings may be reopened if the Court [the ECHR] finds a violation of the Convention."[30]

29 Revised draft CDDH final report on the longer-term future of the Convention system GT-GDR-F(2015)020 dated 28.10.15 at para 142

30 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 12

1.25 In fact, far from allowing individual citizens to avail themselves of any remedy at national level, since July 2015, the Russian Constitutional Court has introduced a new procedure which allows Russian courts and state authorities (including the Ministry of Justice, which represents Russia before the ECHR) to ask the Constitutional Court to give a further ruling on whether, in its opinion, it is possible to execute an ECHR judgment without violating the Russian Constitution. No similar opportunity is given to non-state actors. In other words, individual citizens who have had the ECHR rule in their favour have nowhere to turn at national level to secure the execution of that judgment, but the Russian state can ask the Constitutional Court to rule any such judgment to be incompatible with the Russian Constitution. This new procedure arose out of a Constitutional Court judgment of 14 July 2015[31] and has now been embodied in Russian Federal law[32].

3.28 It is not clear in the present case why the Court decided that monetary compensation was an adequate means of putting the applicant back in the position she would have been in had her rights not been violated. The Court appears to have focused in places on "the low amount of the statutory fine"[33] and perhaps took the view that the disadvantage suffered by the applicant was minor and capable of being remedied by monetary compensation. However, this is nowhere made explicit as a reason for not recommending any measures. It would be contradictory if were to form part of the Court's reasoning, given that the Court ultimately found that the interests of justice required availability of free legal assistance in the applicant's case:

> 1.26 "the gravity of the penalty suffices for the Court to conclude that the applicant should have been given legal assistance free of charge since the "interests of justice" so required."[34]

1.27 The Court further stressed that the importance of the issue for the applicant in the exercise of other Convention rights:

> 1.28 "…the proceedings against the applicant directly related to her exercise of the fundamental freedoms protected under Articles 10 and 11 of the Convention. Thus, it cannot be assumed that little was at stake for the applicant."[35]

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31 Judgment of the Constitutional Court of the Russian Federation (14 July 2015) No 21-П, pp 33-34 on the case concerning the review of constitutionality of the provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto", Items 1 and 2 of Article 32 of the Federal Law "On International Treaties of the Russian Federation", Sections 1 and 4 of Article 11, Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation, Sections 1 and 4 of Article 13, Item 4 of Section 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, Sections 1 and 4 of Article 15, Item 4 of Section 1 of Article 350 of the Administrative Judicial Proceedings Code of the Russian Federation and Item 2 of Section 4 of Article 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of deputies of the State Duma; summarized at: http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf.

32 Federal Constitutional Law of 14 December 2015 No. 7-FKZ "On Amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", available in English at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)006-e

33 Court's judgment 19.11.15 at paragraph 102

34 Court's judgment 19.11.15 at paragraph 92

35 Court's judgment 19.11.15 at paragraph 99

1.29 It is not clear why, in those circumstances, the Court chose not to address the question of individual measures.

3.29 By contrast, the Concurring Opinion attached to the judgment specifically addressed the issue stating that a convicted applicant whose rights are found to have been violated:

> 1.30 "…should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded"[36].

1.31 The Concurring Opinion also indicates that the most appropriate form of redress would, in principle, be the reopening of the proceedings, where requested. Relevant case law of the Court is cited in support.[37]

3.30 The Concurring Opinion notes however that there is no express provision for reopening administrative proceedings in Russia if the Court finds a violation of the Convention, but insists that it is not open to Russia to do nothing on grounds of reasonableness or practicability. Rather, Russia should:

> 1.32 "use all legal avenues available in the domestic legal order to suppress the negative effects of the conviction and sentence which are in breach of the Convention and, if this suppression is not possible within the existing legal framework, it should introduce a legal mechanism to reopen the proceedings for that purpose."[38]

3.31 The applicant agrees with the Concurring Opinion that individual measures could and should have been recommended in the judgment. In applying Article 46, it was open to the Court to recommend that the proceedings against the applicant be reopened and she be given the benefit of legal assistance to defend herself in those proceedings; and that, if the present laws in Russia do not permit this form of redress, that Russia should change its laws to permit adequate individual redress in these circumstances.

1.33 Interaction of general and individual measures

3.32 There are numerous examples in the case law of the Court where the most appropriate form of reparation for the violations found was deemed to be the reopening of the domestic proceedings[39]. For instance, in *Sejdovic v Italy*[40], the Grand Chamber recognised the deficiencies of the Italian legal system with respect to Art. 6 of the Convention, followed by acknowledging that legislative reform had taken place in Italy in the meantime, and therefore it would not be necessary to indicate general measures. However, the Court also stated:

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36 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 11.

37 See *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010

38 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 12.

39 E.g. *Huseyn and Others v Azerbaijan* hudoc (2010) para 262; *Lungoci v Romania* hudoc (2006) para 56

40 2006 - II paras. 119 *et seq* GC

1.34 “la Cour estime en conséquence que lorsqu’un particulier, comme en l’espèce, a été condamnée à l’issue d’une procédure entachée de manquements aux exigences de l’article 6 de la Convention, un nouveau procès ou une réouverture de la procédure à la demande de l’intéresse représente en principe un moyen approprié de redresser la violation constatée” [41]”

3.33 The lack of indication of any measures at all in the applicant’s case is inconsistent with the Court’s view in *Sejdovic* that individual measures may still be necessary even where general measures are considered inappropriate.

3.34 By contrast, in *Oleksandr Volkov v Ukraine,* the Court held that

1.35 “[h]aving regard to the above conclusions as to the necessity of introducing general measures for reforming the system of judicial discipline, the Court does not consider that the reopening of the domestic proceedings would constitute an appropriate form of redress for the violations of the applicant’s right”[42].

3.35 In *Oleksandr Volkov v Ukraine*, therefore, the lack of individual measures can be seen as compensated by the request for general measures to be taken by the State. The lack of any proposal of measures in the applicant’s case fails to address the issue at any level - the national or the strictly individual. In fact in *Oleksandr Volkov v Ukraine,* the Court effectively recommended individual measures after all, stating:

1.36 “that the respondent State shall secure the applicant’s reinstatement to the post of judge of the Supreme Court at the earliest possible date”[43],

3.36 In the applicant’s case, general and individual measures are inextricably interconnected. It would not, by itself, assist the applicant if the national law were changed to make legal aid available in cases such as hers. The applicant also needs the benefit of a further general measure, namely a change in the law to permit the reopening of cases such as hers so that they can be dealt with justly and in a manner consistent with upholding Convention rights. Further, the applicant needs the benefit of an individual measure, namely the actual rehearing of her case must take place, after it has been made possible, via the necessary changes to national law, for the case to be reopened and heard with the benefit of publicly-funded legal assistance for the applicant. It is therefore clear that both individual and general measures are necessary in the applicant’s case in order to restore her to the position she ought to have been in, had her rights not been violated. It is therefore hard to understand what principled reasons the Court had for leaving any recommendation of measures out of its judgment.

3.37 In conclusion, the applicant argues that, in her case Article 46 has not been applied correctly or at all, because, despite the exceptional circumstances and the serious issue of general importance outlined below, the Court did not stipulate any general or individual corrective measures in the judgment.

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41 Para. 126: (translation): the Court therefore considers that when an individual, as in the present case, has been convicted in a procedure that does not conform to the requirements of Art. 6 of the Convention, a new process or a reopening of the proceedings at the demand of the interested party represents in principle an appropriate means of rectifying the established violation.

42 *Oleksandr Volkov v Ukraine*, no. 21722/11 § 207

43 *Oleksandr Volkov v Ukraine*, no. 21722/11 §§ 196 - 208

4. SERIOUS ISSUE OF GENERAL IMPORTANCE

4.1 The arguments on this ground overlap with those on the application of the Convention set out above.

1.37 Serious issue

4.2 The serious issue in this case is the lack of availability of legal aid for an individual to defend themselves where they are facing an administrative penalty of sufficient seriousness to engage the protections required by the Convention in criminal law cases. Since the Court made a finding of fact to this effect, it was not open to the Court to use the limited nature of the penalty as a reason for treating the violation as a more-or-less *de minimis* violation requiring no action by the respondent State beyond payment of a small amount of compensation.

4.3 The seriousness of the issue speaks for itself inasmuch as it relates to fairness of the structures within which the power relationships between the individual and the state issue operate.

1.38 General importance

4.4 A breach of Article 6 has been found in this specific case. However, the facts of the case have revealed a real disadvantage faced by individuals in Russia in a systemic way.

4.5 The Court provides inadequate protection of the rights of the individual and acts contrary to the purposes of the Convention if it is left up to individuals to challenge this systemic issue alone and without the benefit of legal aid before their national courts.

4.6 The Concurring Opinion also stated that:

1.39 "…there are a number of pending applications before the Court raising similar issues. To put it in Convention terms, the applicant's case evinces a structural deficiency likely to affect other individuals in the same position as her."[44]

4.7 As a matter of practicality and good administration it must be important to set precedent guidance for High Contracting Parties to give them the best chance to avoid facing further such cases and to avoid the Court having to face a backlog of similar cases.

5. CONCLUSION

5.1 In all the circumstances of the case, there were clear points upon which, correctly applying Article 46, and properly addressing a serious issue of general importance, it was open to the Court to propose appropriate individual and general measures.

5.1.1 the rehearing of the applicant's case;

5.1.2 the provision of legal assistance to make any such rehearing a fair one; and

5.1.3 necessary amendments to national law to make the previous two points possible.

44 Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov at 9

5.2 The applicant accepts that it is in the Court's discretion to specify appropriate individual and/or general measures and that the Court will generally only do so in exceptional cases. The applicant argues that hers is one such exceptional case, in that the Article 6 violations found by the Court cannot be remedied without some measures being taken by the respondent State to address the systemic deficiencies in terms of the safeguarding of Convention rights which have been identified by the Court in the respondent State's legal system in this case.

5.3 The fact that, in all these circumstances, the Court chose not to do so, despite the forthright and cogent arguments of a minority of the Chamber in the Concurring Opinion, indicates that this is a matter that is suitable for reconsideration by the Grand Chamber.

5.4 It is on this basis that the Applicant respectfully requests the Grand Chamber to accept the referral and consider the matter.

Representative of Mikhaylova

Anton Burkov