

# EHRAC

## Bulletin



In partnership with Memorial Human Rights Centre (MHRC), the Slavic Centre for Law and Justice (SCLJ) and the Georgian Young Lawyers' Association (GYLA)

## Editorial:

On 20 December 2006, the UN General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance, which was opened for signature on 6 February 2007 (but is not yet in force).

This is the first universal binding human rights instrument to set out an absolute prohibition on enforced disappearances. It includes an obligation on states to examine allegations of disappearances promptly and impartially, and, where necessary, "to undertake without delay a thorough and impartial investigation".

In this edition, Ole Solvang and Roemer Lemaître of the Stichting Russian Justice Initiative discuss the European Court's case law on enforced

disappearances from Chechnya, in the light of the Court's previous decisions on disappearances concerning south-east Turkey. We also report on the recent 'disappearance' judgments in Alikhadzhiyeva and Magomadov and Magomadov.

The Court in Alikhadzhiyeva found, as a consequence of the 'disappearance' of the applicant's son, Ruslan Alikhadzhiyev, in May 2000, that it had been established beyond reasonable doubt that he must be presumed dead following his unacknowledged detention by State servicemen. In spite of these findings, the family are left not knowing whether or not Ruslan was killed, and, if so, when, or by whom.

Regrettably, in such circumstances, the European Court declined to order

the state to carry out an effective investigation, preferring instead to award compensation.

Also in this edition, we cover a wide variety of other subjects. Maria Voskobitova considers the extent to which the Russian criminal justice system complies with human rights standards, and Anton Burkov discusses the status of the European Convention on Human Rights in domestic law. Nadezhda Kutepova analyses the human rights issues arising in Russia's closed cities, and Roman Maranov discusses restrictions on the freedom to worship in Russia. Sophio Japaridze questions the motives behind the Russian collective expulsions of Georgians in Autumn 2006.

**Professor Philip Leach**  
Director, EHRAC

## Article 2 violations in disappearance cases

*Ole Solvang, Executive Director and Roemer Lemaître, Legal Director, Stichting Russian Justice Initiative*

Since July 2006 the European Court of Human Rights (ECtHR) has delivered a number of judgments in cases concerning enforced disappearances in Chechnya (see <http://www.srji.org/cases.html> for an overview of the cases). In several cases (Luluyev and Others v Russia (No. 69480/01, 9/11/06) and Akhmadova and Sadulayeva v Russia (No. 40464/02, 10/05/07)), the remains of the missing persons were later discovered. In the other cases, the victims are still missing. In all of them, however, the ECtHR held that the victims must be assumed dead following unacknowledged detention, and that Russia is responsible for their deaths and thereby has violated the right to life (Art. 2 of the European Convention on Human Rights). The first Chechen judgments might signify a different approach from the Court's case law on disappearances in south-east

Turkey in the early 1990s.

In a string of judgments against Turkey handed down since May 1998, the Court gradually developed its approach to enforced disappearances. A problematic issue was whether a disappearance constitutes a violation of the substantive part of Art. 2. In other words, can the respondent state be held responsible for having killed a person who is still missing and whose body has not yet been discovered?

In the first Turkish disappearance case that the Court reviewed, Kurt v Turkey (No. 24276/94, 25/05/98), the applicants referred to testimonies that the disappeared had last been seen surrounded by armed soldiers, to various reports about the problem of disappearances in the region, and to the fact that the person had been missing for more than four years and argued that the disappeared person must be considered dead. Even though the Court held that

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## **Article 2 violations in disappearance cases**

the government had illegally detained the disappeared, it nonetheless ruled that there was not enough 'concrete evidence' to establish that the person was in fact dead and that the government consequently could not be held in violation of Art. 2.

Subsequent judgments concerning disappearances in Turkey further developed the requirement of 'concrete evidence'. In *Cakici v Turkey* (No. 23657/94, 8/7/99) evidence that the disappeared had been ill-treated in custody was crucial in allowing the Court to find a violation of Art. 2. In *Timurtas v Turkey* (No. 23531/94, 13/6/00) and *Orhan v Turkey* (No. 25656/94, 18/6/02) the Court established that unacknowledged detention and subsequent disappearance of persons wanted by the authorities can be regarded as life-threatening.

In the 2004 judgment in the case *Ipek v Turkey* (No. 25760/94, 17/2/04), the Court determined that unacknowledged detention in and of itself – without evidence of ill-treatment or that the person was wanted – was life-threatening in the context of the situation in south-east Turkey in the given period. In cases from Turkey, therefore, it took six years of case law and almost 20 disappearance cases before the Court was willing to reach the conclusion that enforced disappearances were life-threatening.

With regard to disappearance cases from Chechnya, the development has been different. In the first Chechen case concerning disappearances, *Bazorkina v Russia* (No. 69481/01, 27/7/06), the Court relied on video footage of an execution order given by a senior military officer to reach the conclusion that the disappeared person must be assumed dead. In *Bazorkina*, therefore, the Court seemed to use the same approach as in the earlier Turkish cases, requiring circumstantial evidence, based on concrete elements to find that a disappeared person must be assumed dead.

However, in the second disappearance case from Chechnya, *Imakayeva v Russia* (No. 7615/02, 9/11/06), the Court's approach seems to differ from the one

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*Magomadov and Magomadov v Russia*  
(No. 68004/01), 12/07/07  
(ECHR: Judgment)  
*Disappearance*

### **Facts**

The applicants complained about the 'disappearance' of their brother, Ayubkhan, after he was detained by Russian State servicemen in Grozny on 2 October 2000. In April 2004 the first applicant, Yakub, also 'disappeared' - he was last seen in Moscow.

### **Judgment**

The Court noted that a number of cases had come before it which suggested that the phenomenon of 'disappearances' was well known in Chechnya.

The Court established beyond reasonable doubt that Ayubkhan must be presumed dead, following his unacknowledged detention by State servicemen, and held that there had been a violation of Art. 2 on that account.

It also found that the authorities had failed to carry out an effective criminal investigation into the circumstances surrounding the 'disappearance' and presumed death of Ayubkhan and held that there had been a violation of Art. 2 in that respect.

The Court found that Ayubkhan's detention was not logged in any custody records which "in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee". There was therefore a violation of Art. 5.

It also found that the applicants had suffered distress and anguish as a result of their brother's 'disappearance' and their inability to find out what had happened to him. The way in which their complaints had been dealt with by the authorities was found to be contrary to Art. 3.

The Court considered that it did not have sufficient material before it to conclude that there had been a violation of Art. 34 in respect of the first applicant, Yakub.

The Court awarded €40,000 to the second applicant as moral damages.

*Alikhadzhiyeva v Russia*  
(No. 68007/01), 05/07/07  
(ECHR: Judgment)  
*Disappearance*

### **Facts**

This case concerns the 'disappearance' of Ruslan Alikhadzhiyev, the former Speaker of the Chechen Parliament. In May 2000 he was apprehended in broad daylight at his home in Shali, Chechnya, by a large group of armed men in uniform, equipped with military vehicles and helicopters. He has not been heard of since.

### **Judgment**

The Court found a violation of Art. 2. Having noted the manner in which Alikhadzhiyev was arrested, the information disseminated by the media, the fact that state investigators accepted the involvement of law-enforcement bodies in his detention and the absence of any news from him for over six years, the Court was able to establish beyond reasonable doubt that Alikhadzhiyev must be presumed dead following his unacknowledged detention by State servicemen.

The Court also found that the investigation into the circumstances of Alikhadzhiyev's detention was not effective. It was not opened immediately following his arrest, there were "inexplicable delays in performing the most essential tasks", certain important investigative measures were not taken, and the case was adjourned and reopened many times without the applicant being informed of its progress.

The manner in which the applicant's complaints had been dealt with by the authorities constituted inhuman treatment contrary to Art. 3. Holding Alikhadzhiyev in unacknowledged detention without any of the safeguards of Art. 5 constituted "a particularly grave violation of the right to liberty and security". The State also failed in its obligations under Art. 13 (the right to an effective remedy) in conjunction with Arts. 2 and 3 of the Convention.

No violations of Art. 3 were found in respect of the applicant's son and no separate issues arose in respect of the investigation into his alleged ill-treatment. There was no need to examine the complaint under Art. 34 and no violation of Art. 38 (1)(a) was established.

The applicant was awarded €40,000 for non-pecuniary damage.

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### **Article 2 violations in disappearance cases**

in the early Turkish cases. To be sure, there are several differences between the Imakayeva case and the Kurt case. To begin with, the Imakayeva case concerned the disappearances of the applicant's son and father in two separate incidents. As regards the son, he was taken away by soldiers, while the disappeared in Kurt was last seen surrounded by soldiers. In Imakayeva, the son had been missing for more than six years, while the disappeared in Kurt had been missing for four and a half years. In addition, in Imakayeva the Court drew strong inferences from the fact that the government did not provide the Court with materials from

the criminal investigation file.

What is common for the two cases, however, is that in neither of them is there any information about the fate of the disappeared after the detention. There is no information that the disappeared were wanted prior to their detention either. Most importantly, however, when analysing the context in which the disappearance took place, the Court in Imakayeva states that "when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening". The qualifier included in the early Turkish cases – that it is only life-threatening if the person was wanted – is absent.

The first Chechen disappearance cases

decided by the Court seem to indicate that the Court has quickly gained an adequate understanding of the pattern of disappearances in Chechnya and the seriousness and extent of the problem. Indeed, the Court has on several occasions noted "with great concern" that "the phenomenon of 'disappearances' is well known" in Chechnya and lamented the authorities' apparent acquiescence in the situation (see for example para. 119, *Baysayeva v Russia* (No. 74237/01, 5/4/07). The finding that unacknowledged detention in and of itself can be considered life-threatening in the context of counter-terrorist operations in the North Caucasus will facilitate future judgments that will properly reflect the extent of violations in Chechnya and the North Caucasus.

## Protecting human rights in Russia's closed nuclear cities\*

*Nadezhda Kutepova, Planet of Hopes, Ozersk*

In Russia, it is felt that the safe operation of nuclear plants depends on the strength of the barbed wire fence surrounding the people who live nearby. Public officials in these closed cities actually believe that the more infrequently they allow relatives of those living permanently beyond the wire to cross it, and the more frequently they forbid meetings and create petty obstacles for spouses unfortunate enough to have married someone outside one of the closed cities, the better it will be for Russian security. Hundreds of thousands of people living in closed cities are known officially as residents of "closed administrative-territorial establishments of the Federal Nuclear Energy Authority of the Russian Federation". There are ten of these "ZATOs": three in the Chelyabinsk district; two each in the Sverdlovsk and Krasnoyarsk regions and one each in the Nizhegorodsk, Penzensk and Tomsk districts.

According to the letters sent by individuals to the Public Human Rights office in the ZATO Ozersk, in the Chelyabinsk district, the main violations in ZATOs are breaches of the following rights under the European Convention

on Human Rights and of the Russian Constitution (ECHR) - the right to respect for private and family life; the right to choose one's place of residence; and the right to freedom of movement.

In this article I summarise the main human rights issues which arise in relation to the ZATOs.

In the Russian Federation, the law governing the ZATOs is out of date. There are only two relevant pieces of legislation: the 1992 Law "On ZATOs" and the 1996 "Regulations on the introduction of special regimes in the ZATOs of the Nuclear Energy Authority", in which some of the clauses lay down rules which do not merely restrict people's human rights but actually remove them.

These laws were not properly worked out in the first place and do not meet today's needs, nor do they comply with Russian or international law as regards the observance of fundamental human rights. For example, by affording access to State secrets for all citizens living on the territory of the ZATOs, either permanently or temporarily, this apparently provides a pretext for preventing "unwelcome citizens" – such as former prisoners – from entering ZATOs.

The instruments that give ZATO authorities the right to frame their own

local regulations have never been tested to ascertain whether they comply with the framework legislation. Moreover, in their local regulations the ZATO authorities break the law by exceeding the powers they have under Federal law and the Russian Constitution. Local rules relating to ZATOs are increasingly restrictive of citizens' rights by comparison with the framework instruments.

Some of the legal issues relating to matters which are not reflected in the instruments governing ZATOs are 'resolved' by the ZATO authorities in an arbitrary manner, irrespective of citizens' rights. These issues include: succession and inheritance; family reunification; employment issues and the right to medical treatment for family members of ZATO residents who are not themselves registered in a ZATO.

The question whether citizens may enter, leave or live on ZATO territory is often decided in the light of notions extraneous to Russian and international law. Organisations without proper authority (instead of the Head of the Administration within the ZATO) seem frequently to perform this function. However, refusals as such are unlawful, as a ZATO administration only has the

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### **Protecting Human Rights in Russia's closed nuclear cities**

right to permit entry according to the legal requirements. There are in reality no legal obstacles preventing Russian residents from entering for lawful purposes or residing there permanently or temporarily, provided that one observes certain conditions which apply to the territory of any ZATO in Russia.

Furthermore, the extension of ZATOs beyond the limits of the original settlements has meant inhabitants of villages outside the perimeter cannot freely visit the centre of a ZATO to receive medical treatment, obtain civil registration or manage other personal affairs, and consequently have to apply for a permit.

Citizens are also prevented from any entrepreneurial activity in a ZATO. Access to premises is difficult and they are vulnerable to pressure from local administrative authorities.

Currently the law relating to ZATOs concerns not only citizens living within the ZATO, but also Russian citizens

with family or occupational links to a ZATO. The numbers grow year by year because of the demographic changes in the structure of ZATOs.

The law is also silent on obtaining information governing citizens' entry, departure and residence in certain ZATOs.

The framework instruments affecting the rights and freedoms of Russian citizens must be published and made accessible in accordance with the requirements of the Russian Constitution. The current vague situation allows the leadership of certain ZATOs to classify local laws for official usage only, thus denying the public access to them.

The ZATO system is arguably even outside the reach of Russian law. It is fertile ground for undemocratic decisions and human rights violations and virtually escapes scrutiny. Restrictions on people's rights which are invented by the local authorities are irrational and unlawful: people are suffering gravely and their rights are being violated.

In 1998 the Russian Federation ratified the ECHR. The ECHR enshrined the

right, if Russia felt it necessary, to stipulate special conditions for its observance in the case of ZATOs. This was not done, so residents of the ZATOs are of course subject to the jurisdiction of the ECHR. ZATO authorities must make decisions in accordance with Russian and international law. However, it does seem that only the European Court has the potential to make this clear to the local administrations of the ZATOs.

Moreover, there is a real need to bring the Federal Nuclear Energy Authority's rules governing ZATOs into line with Russian law. This is possible by amending existing instruments and developing new ones, at Federal and local levels, accompanied by an expert review of inconsistencies infringing citizens' rights and by excluding security matters from local instruments affecting human rights, thus preventing the local administrations of ZATOs from making arbitrary legal decisions.

\* The contents of this article have been taken from open sources.

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## Collective expulsion of Georgians from the Russian Federation - strict migration regulation policy or other hidden motives?

*Sophio Japaridze, Lawyer, EHRAC-GYLA joint project*

### **Factual background**

On 27 September 2006, the Georgian law-enforcement authorities detained four military officers, all citizens of the Russian Federation, and charged them with spying. The following day the Russian Federation's Consular Office in Georgia suspended the issuing of visas to Georgian citizens and the Russian Plenipotentiary Ambassador in Georgia was recalled to Moscow for consultations by the Russian Federation's Ministry of Foreign Affairs.

Shortly afterwards, the families of a number of Russian diplomats in Georgia were evacuated to the Russian Federation

by plane. The Russian detainees were transferred to the Organization for Security and Co-operation in Europe (OSCE), which ensured their safe transportation to the Russian Federation. The Russian Government then suspended air, land and naval communications with Georgia and mail/parcel delivery between the two countries.

The Russian Ministry of the Interior sent an official request to all secondary schools and universities in the Russian Federation requiring them to provide local police stations with a list of all the children of Georgian ethnicity studying at their schools. The Saint Petersburg and Leningrad regional GUV D (Main Department of Internal Affairs) sent round a demand to their units to "conduct

large-scale measures to detect and deport the maximum number of Georgian citizens illegally staying on the territory of Russia and to initiate decisions only to deport the above-mentioned category of citizens through the GUV D detention centres."

The Russian authorities inspected numerous private businesses in the Russian Federation that had ties to ethnic Georgians or Georgian nationals, resulting in mass closures of those establishments.

On 6 October 2006, the first wave of Georgians, 143 people, were deported from the Russian Federation by cargo plane. Between 27 September 2006 and 30 January 2007 the Russian Courts adopted 4,634 deportation decisions

with regard to Georgians and 2,380 Georgians were<sup>1</sup> deported through detention centres.

Four Georgian citizens died during the process of their deportation from Russia, allegedly due to inadequate medical care. Throughout this period high-ranking Russian Federation officials continually appeared in the mass media and made various statements aimed at Georgia and its nationals. For example, the Chair of the State Duma, Boris Grizlov, stated that “In case of continuing provocations Georgia may be subjected to other, much stricter sanctions than restrictions on bank transfers;... not all sanctions are introduced yet”.

Senior officials from the Federal Migration Service (AVC) stated that the Russian<sup>2</sup> Federation did not need Georgians. The international community has expressed its concern over the expulsion of hundreds of<sup>3</sup> Georgians from the Russian Federation.

### Principal human rights issues arising

Notwithstanding the fact that the majority of the deported Georgians had valid documents certifying their legal residence in Russia, they were arrested on the street without a report being drawn up on their detention.

Without being given reasons for their arrest, they were taken to premises belonging to the Ministry of Internal Affairs, or directly to the courts. The courts delivered similar administrative penalties - ordering their expulsion from the territory of the Russian Federation without reasonable and objective examination of the particular circumstances of each case.

There was no separate examination of individual circumstances, no real

consideration of any arguments made by the applicants, and no particular identification of the reasons and purposes for expulsion or deportation. In the vast majority of cases the entire judicial process lasted between two and ten minutes. Some individuals were not even allowed into the trial rooms and the courts considered their cases in absentia, while they waited in the corridors or in cars.

In all cases the deportees were not provided with legal representation, and in the majority of cases they were not given copies of the decisions of the court; they were also effectively denied the right to appeal against the deportation decisions. They were placed in special detention centres for foreigners, in conditions that were arguably inhuman and degrading treatment. They were then deported, even before the expiration of the 10-day time limit for an appeal.

### Principles established by the relevant European Court case-law

Can this be described as collective expulsion? The European Court has defined the term ‘collective expulsion’ as being “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”<sup>4</sup>.

In *Andric v Sweden* the Court emphasized that “the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given an opportunity to put arguments against his expulsion to the competent<sup>5</sup> authorities on an individual basis”.

The authorities must therefore be

able to demonstrate that personal circumstances have been “genuinely and individually taken into account”<sup>6</sup>.

On 6 April 2007, the Georgian Young Lawyers’ Association (GYLA) and EHRAC submitted an application to the European Court of Human Rights on behalf of 12 Georgians deported from Russia,<sup>7</sup> which has been registered by the Court. An inter-state case has also been initiated by the Georgian Government against the Russian Federation.

1 See the report of the Parliamentary ad hoc Commission on Actions Against the Citizens of Georgia from the Russian Federation issued on 22 February 2007, p 14.

2 For a detailed summary of available information on statements made by Russian officials during this period, see the report prepared by the Civic Assistance Committee and Memorial Human Rights Centre for the fourth round of consultations on human rights between Russia and the EU, Brussels, on the 7-8 November 2006, 14.11.2006 available at: [http://refugee.memo.ru/For\\_ALL/RUPOR.NSF/450526ab8b3e4d91c325702e0065b29f/ef88d1c9aa97d6f1c32572260059cecb!OpenDocument](http://refugee.memo.ru/For_ALL/RUPOR.NSF/450526ab8b3e4d91c325702e0065b29f/ef88d1c9aa97d6f1c32572260059cecb!OpenDocument).

3 See the statement of 25.10.2006 made by Benita Ferrero Waldner - European Commissioner for External Relations; statement of 03.10.2006 made by the Secretary General of the Council of Europe - Terry Davis; statement of the European Commission against Racism and Intolerance on recent events affecting persons of Georgian origin in the Russian Federation (adopted on 15 December 2006 at ECRI 41 plenary meeting); US State Department 2006 Country Reports on Human Rights Practices; Human Rights Watch (World Report 2006); Council Conclusions on Georgian-Russian Federation relations (Council of the European Union, 2756th External Relations Council meeting, Luxembourg, 16-17 October 2006); European Parliament resolution on the situation in South Ossetia (26 October 2006, Strasbourg).

4 See *Andric v Sweden*, No. 45917/99, dec. 23.2.99; *Conka v Belgium*, No. 51564/99, 05.02.02, para. 59.

5 *Andric v Sweden*, No. 45917/99, dec. 23.02.99.

6 *Conka v Belgium*, No. 51564/99, 05.02.02, para. 63.

7 *Irina Chokheli and others v Russia*, No. 163691/07.

## New website for training judges and prosecutors on human rights

In October 2007 the Council of Europe launched a new website: Human Rights Education for Legal Professionals (<http://www.coe.int/help>). This website aims to support member states in

integrating the standards of the European Convention on Human Rights (ECHR) into the professional training of all judges and prosecutors.

The site contains downloadable

training materials, including slide shows and case studies, which can be searched by Convention article or thematically. The materials are available in several languages, including English and Russian.

# Implementation of the Framework Convention for the Protection of National Minorities by the Russian Federation

The Advisory Committee on the Framework Convention for the Protection of National Minorities adopted its Second Opinion on the Russian Federation (RF) on 11 May 2006,<sup>1</sup> in accordance with Art. 26 (1) of the Framework Convention and Rule 23 of Resolution (97) 10 of the Committee of Ministers.

The Advisory Committee noted the positive legislative steps and programmes introduced by the federal authority of the RF to protect national minorities and to promote tolerance and inter-cultural dialogue since the adoption of the Advisory Committee's First Opinion in September 2002. The Second Opinion reported that the RF continued to pay attention to the protection of the national minorities with further steps taken to combat discrimination. Representatives of the federal administration had publicly endorsed the fight against racism and adopted programmes to implement those objectives.

However, the Second Opinion highlighted a number of setbacks and negative trends. The RF reportedly failed to adopt comprehensive anti-discrimination legislation offering effective remedies for the victims of discrimination, particularly in housing and education. Despite efforts made to improve access to residency registration and citizenship for persons belonging to national minorities, the situation of a growing number of stateless persons

facing difficulties in implementing their economic, social and cultural rights remained. The RF had failed to implement adequate measures for the preservation and development of minority cultures and to enhance the social and economic situation of indigenous peoples in obtaining access to land and other resources. The Advisory Committee also reported an alarming increase of racially motivated violent assaults in the RF since the First Opinion and noted the reluctance of law-enforcement officials to acknowledge racial motivation in crimes committed against persons belonging to national minorities. The situation in the Northern Caucasus was disturbing, the report referring to incidents of violence and intolerance. Insufficient minority participation in decision-making bodies was also noted.

In response to the Advisory Committee's Second Opinion on the Framework Convention, the Government of the RF submitted its comments on 11 October 2006.<sup>2</sup> The Government stated that the Opinion of the Advisory Committee was "unreasonably negative" and expressed its concerns over "the somewhat biased interpretation of the Russian legislation and law enforcement practice" by the Advisory Committee.<sup>3</sup>

On 2 May 2007, at the 994<sup>th</sup> meeting of the Ministers' Deputies, the Committee of Ministers adopted Resolution CM/ResCMN(2007)7 on

the implementation of the Framework Convention by the RF.<sup>4</sup> The Resolution was largely based on the Second Opinion of the Advisory Committee and adopted recommendations for further action to be taken by the Russian authorities in order to improve the implementation of the Framework Convention. The authorities of the RF were encouraged to take further measures to improve the social, political, economic and cultural situation of the minorities and to ensure their equal participation in public life and on a federal level. Further recommendations included the adoption of comprehensive anti-discrimination legislation and the further investigation and prosecution of crimes motivated by racial and ethnic or religious hatred in the RF and in Chechnya.

1 The Second Opinion of the Advisory Committee on the Russian Federation is available at: [http://www.coe.int/t/e/human\\_rights/minorities/2.\\_framework\\_convention\\_\(monitoring\)/2.\\_monitoring\\_mechanism/4.\\_opinions\\_of\\_the\\_advisory\\_committee/1.\\_country\\_specific\\_opinions/2.\\_second\\_cycle/PDF\\_2nd\\_OP\\_RussianFederation\\_eng.pdf](http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_(monitoring)/2._monitoring_mechanism/4._opinions_of_the_advisory_committee/1._country_specific_opinions/2._second_cycle/PDF_2nd_OP_RussianFederation_eng.pdf).

2 Comments of the Government of the Russian Federation on the Second Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities by the Russian Federation is available online at: [http://www.coe.int/t/e/human\\_rights/minorities/2.\\_framework\\_convention\\_\(monitoring\)/2.\\_monitoring\\_mechanism/5.\\_comments\\_by\\_the\\_states\\_concerned/2.\\_second\\_cycle/PDF\\_2nd\\_Com\\_RussianFederation\\_eng.pdf](http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_(monitoring)/2._monitoring_mechanism/5._comments_by_the_states_concerned/2._second_cycle/PDF_2nd_Com_RussianFederation_eng.pdf).

3 Ibid.

4 The Resolution is available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResCMN\(2007\)7&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResCMN(2007)7&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

## NGO Register: link up with us!

EHRAC is interested in building a network of links with NGOs in Russia, Georgia and ultimately the wider area encompassing states formerly within the Soviet Union.

Through networking and sharing information and resources, it will be possible to reach more people and become yet more effective. If you are interested in our work or are involved in

similar areas of activity and would like to develop links with us, please do not hesitate to contact us.

# Restricting the right to freedom of assembly: the case of Barankevich v Russia

*Roman Maranov, Lawyer, EHRAC-SCLJ  
joint project*

The European Court of Human Rights (ECtHR) judgment in *Barankevich v Russia* (No. 10519/03, 26/7/2007) was the first concerning freedom of assembly against the Russian Federation.

In this case the local authorities refused permission to the pastor of the Christ's Grace Church of Evangelical Christians to hold a service of worship in a park in the town of Chekhov. The appeal against this decision was ultimately dismissed on the grounds that the church was different from those of the majority of local residents and a service could have led to discontent and public disorder. In its judgment the European Court considered the ban to have been unnecessary in a democratic society and found a violation of Art. 11 (freedom of assembly) interpreted in the light of Art. 9 (freedom of thought, conscience and religion).

Given that the coming year will see Parliamentary and Presidential elections in Russia, this decision from the ECtHR could not be more to the point.

The events considered in the case took place in 2002, prior to the passing of the Federal Law "On Assemblies, Meetings, Demonstrations, Marches and Picketing" (Law No. 54, 19/6/2004 – the Law on Assemblies) – but this in no way diminishes the significance of the decision, which formulates standards that are equally relevant to the situation today. In addition, the decision might be used not only by religious organisations, but also by all those that organise such public events.

For example, the Court stressed that a

"qualified need in a democratic society" to ban public events cannot simply be based on the fact that the event is being conducted by a minority group that could cause disturbance among bystanders. The Court emphasised that the state has a positive obligation to ensure that such events can be conducted, using other means of preserving public order than an outright ban.

With regard to statutory regulation of the conduct of public religious rites and ceremonies, it should be noted that the new Law on Assemblies has not eliminated a failing in the law. In para. 2, Art. 1 of the Law on Assemblies, it provides that the conduct of religious rites and ceremonies is regulated by Federal Law No. 125, promulgated on 26 September 1997, "On Freedom of Conscience and Religious Associations" (the Law on Freedom of Conscience). Yet at para. 5, Art. 16 of the Law on Freedom of Conscience, it states that public worship and other religious rites and ceremonies should be conducted in the manner established for the conduct of meetings, marches and demonstrations – thus producing a vicious circle.

In its memorandum submitted in the *Barankevich* case, the Russian government pointed to the new law as supposedly establishing an official procedure for conducting public events, thus correcting the potential for violation of human rights in this area. However, the Law on Assemblies does not in fact uphold this principle. There are only two principles contained in Article 3 of the Law on Assemblies: the lawful and voluntary nature of participation in public events. Lawfulness in general has no particular meaning in and of itself, because any regulation of public

relationships in a state is based on this principle. This leaves only the principle of voluntary participation.

A perusal of the entire law shows that it has established an official procedure for issuing permits for public events, but two kinds of public action are not covered by this procedure – the assembly and the individual demonstrator.

The law provides the authorities with a combination of measures for regulating the organisation and conduct of public events. The authorities have the right to suggest that the organiser change the place and/or the time of the event. Practice has shown that when the authorities are approving a public event they frequently also change the size and format of the proposed event. And since a request to conduct an event can be filed no more than 15 days in advance, the organisers do not then have time to appeal against adverse decisions made by the local authorities.

In 2007, the so-called 'marches of the disaffected' were effectively banned in a whole series of towns in Russia, and those who tried to participate in them were detained. It is obvious that the present law, in defining the procedure for organising and conducting public events, has not provided effective legal guarantees for the exercise of the right to freedom of assembly, as enunciated in Article 31 of the Russian Constitution and Article 11 of the European Convention on Human Rights.

It is also likely that the upcoming elections will inflame the situation around the right to freedom of assembly. We can therefore expect that the ECtHR will have to return to the subject more than once in the future.

## Potential ECHR Applicants:

If you think your human rights have been violated or if you are advising someone in such a position, and you would like advice about bringing a case before

the European Court of Human Rights, EHRAC may be able to assist. Please email or write to us; our contact information is on the last page.

## 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/Memorial is representing the applicants.

### *Zolotukhin v Russia*

(No. 14939/03), 07/06/07

(ECHR: Judgment)

*Criminal Justice*

#### *Facts*

The applicant was sentenced by a District Court to three days' administrative detention for offences of disorderly conduct committed whilst he was drunk on 4 January 2002.

On 23 January 2002, a criminal case was opened in relation to the same disorderly acts. On 2 December 2002, the District Court acquitted the applicant of the charge of having committed disorderly acts but found him guilty of insulting a state official and of threatening to use violence against a public official.

The applicant complained to the European Court of Human Rights (ECtHR) that he had been tried twice for the same offence (in violation of Art. 4 of Protocol 7).

#### *Judgment*

For the purposes of applying Art. 4 of Protocol 7 the Court first satisfied itself that the applicant's initial administrative detention amounted to a 'criminal' conviction.

The Court was not persuaded by the Government's argument that as the applicant had been acquitted in the second set of proceedings there had been no violation of Art. 4 of Protocol 7. The Court noted that the applicant's acquittal by the domestic court was

not based on an acknowledgement of the duplication of proceedings. The Court also confirmed in its judgment that Art. 4 of Protocol 7 encompasses not only the right not to be *punished* twice, but also the right not to be *prosecuted* or *tried* twice.

Therefore, the Court held that the fact that the applicant was eventually acquitted had "no bearing on his claim that he had been prosecuted and tried" on the same charge for a second time.

The Court found that the applicant was prosecuted and tried a second time for an offence of which he had already been convicted and for which he had served a term of detention. Accordingly, there had been a violation of Art. 4 of Protocol 7.

The Court ordered the Government to pay the applicant €1,500 in respect of non-pecuniary damage and €1,000 in respect of costs and expenses.

### *Bitiyeva and X v Russia*

(Nos. 57953/00 & 37392/03),

21/06/2007

(ECHR: Judgment)

*Right to Life*

#### *Facts*

Zura Bitiyeva, a Chechen peace activist, had originally complained of her ill-treatment in the Chernokozovo detention facility in 2000. She was subsequently shot along with three relatives in her home in May 2003. The case before the ECtHR was

continued by her daughter, the second applicant. This case was first reported in the Summer 2006 Bulletin, Issue 5.

#### *Judgment*

The Court made a number of findings:

- Taking into account the first applicant's age, health, and the length and conditions of detention, and the specific impact of the detention compounded by the poor conditions and lack of medical care, her treatment was found to be inhuman and degrading, contrary to Art. 3.
- The first applicant's detention between 25 January and 17 February 2000 was arbitrary and in total disregard of the requirements of lawfulness, in breach of Art. 5.
- The Government's failure to co-operate in the course of the European Court proceedings meant that there was a breach of its obligations under Art. 38 (1) (a) to furnish all necessary facilities to the Court in its task of establishing the facts. The Government had failed to supply relevant documents from the file relating to the investigation into the involvement of State servicemen in the killings.
- The second applicant had made out a prima facie case that her relatives had been extra-judicially executed by State agents on 21 May 2003. In the absence of

any justification for State agents using lethal force, the Court found a violation of Art. 2.

- The State had also failed in its obligation to conduct an effective, prompt and thorough investigation into the killing of the first applicant and her relatives.
- No effective remedies had been available to the second applicant, in violation of Art. 13.

The first applicant was awarded damages of €10,000 and the second applicant was awarded €75,000 in damages as claimed for violations of Arts. 2 and 13 on account of the unlawful killings of four relatives, failure to investigate and lack of effective remedies.

*Musayev and Others v Russia*  
(Nos. 57941/00, 58699/00 & 60403/00), 26/07/07  
(ECHR: Judgment)  
*Right to life*

### Facts

The five applicants lived in Novye Aldy, Grozny. The first applicant was a witness to nine killings by military servicemen, seven of the deceased being his relatives. The second and third applicants alleged that during the military operation neighbours witnessed the burning of a house belonging to their relatives. The remains of their relatives were later discovered in the cellar of the house by their neighbours. The fourth and fifth applicants brought a complaint concerning the shooting of the fifth applicant's brother and sister during a "mopping-up" operation.

### Judgment

The Court recognised that it must exercise caution in taking on the role of the first-instance tribunal of fact. It made the following findings:

- It was established that military servicemen killed the applicants' eleven relatives and that their deaths could be attributed to the State. In the absence of any grounds for justification, there was a violation of Art. 2 (right to life).
- Art. 2 was also violated in respect of the State's failure to conduct an effective investigation into the circumstances of the killings.
- The applicants were not afforded an effective remedy, as the criminal investigation into the deaths was ineffective and other civil remedies were undermined. The State had therefore failed in its obligation under Art.13 (right to an effective remedy).
- The first applicant experienced shock as a witness to the extrajudicial execution of several of his relatives and neighbours. This, coupled with the authorities' wholly inadequate and inefficient response in the aftermath of the events, constituted inhuman and degrading treatment. A violation of Art. 3 was found in respect of the first applicant.
- The Court ordered the Russian Government to pay the applicants €143,000 in damages:
  - €30,000 to the first applicant.
  - €5,000 to the first applicant in respect of a violation of Art. 3.

- €30,000 to the second applicant.
- €8,000 to the third applicant in respect of pecuniary damages.
- €40,000 to the third applicant and also in respect of the deceased's heirs.
- €30,000 to the fourth and fifth applicants.

*Lyanova and Aliyeva v Russia*  
(Nos. 12713/02 & 28440/03),  
28/06/07  
(ECHR: Admissibility)  
*Disappearance*

### Facts

The first applicant formerly lived in Grozny, but currently lives in Ingushetia as an internally displaced person. The second applicant was a resident of Grozny; both applicants complained of the disappearance of their sons, who were minors.

On 28 June 2000, the applicants' sons set off at 11 pm with their friend, T, to spend the night at T's home. The following morning, the first applicant found that her son had not returned. On the same day, soldiers told the second applicant, when she was making enquiries, that the boys had been detained, and later investigators informed them of the boys' transfer to the Khankala military base and that the Main Intelligence Service were in charge of them. The applicants have had no news of their sons since, despite intense searches and their applications both in person and in writing to numerous domestic authorities.

The applicants complained that

the circumstances of their sons' detention gave rise to an assumption of extra-judicial execution, which the authorities had failed to thoroughly investigate, in violation of Art. 2 of the Convention. They further submitted that they had been subjected to treatment contrary to Art. 3 during their detention, and that the applicants' distress over the State's inadequate response also constituted a violation of Art. 3. They claimed the detention of their sons was contrary to Art. 5, and that there was a breach of Art. 6 in that they had been denied a civil remedy, as such a claim would depend on the effectiveness of the criminal investigation. They contended that the disappearance manifested an unjustified interference with the right to respect for their family life under Art. 8. Finally they complained that they had no effective remedies, in breach of Art. 13.

### *Decision*

The complaints were declared admissible under Arts. 2, 3, 5, 8 and 13; the remaining complaints were declared inadmissible.

*Bersunkayeva v Russia*  
(No. 27233/03), 10/07/07  
(ECHR: Admissibility)  
*Disappearance*

### *Facts*

The applicant lived in Urus Martan, Chechnya; her son lived locally with his uncle, her brother-in-law.

On 13 June 2000, uniformed masked men entered the applicant's brother-in-law's house. After assaulting both nephew and uncle, they tied, gagged and blindfolded the nephew with

tape. The pair were interrogated until an officer declared they had the wrong address. While the uncle got dressed, his nephew was taken away. Despite threats of violence, he attempted to follow the men but was unsuccessful as they had driven off in an armoured vehicle. There has been no news of the applicant's son since then.

The applicant complained of a breach of Art. 2 of the ECHR as a result of her son's "disappearance"; arguing that it must be assumed that he had been killed and complaining that no effective investigation was undertaken. She submitted that her son had been subjected to treatment prohibited by Art. 3, relying on the circumstances of his apprehension and that she in turn suffered anguish because of the State's inadequate investigation. She complained that she had had no effective remedy to her complaints, contrary to Art. 13, and that the State's refusal to provide the relevant criminal case file amounted to a breach of Arts. 34 and 38(1) of the Convention.

### *Decision*

The Court declared the application admissible (the question of the exhaustion of domestic remedies was joined to the merits of the case).

*Ayubov v Russia*  
(No. 7654/02), 05/07/07  
(ECHR: Admissibility)  
*Disappearance*

### *Facts*

Due to the hostilities in the winter of 1999/2000, the applicant and most of his family left their home in

Grozny; his son remained to guard the property.

On 19 January 2000, a group of uniformed armed men came to the applicant's street - eyewitnesses maintained that they were servicemen. Having inspected documents, they drove the applicant's son and two other men, brothers, away in a truck. Later the armed men returned, destroying the applicant's home and vehicles with a flamethrower. The brothers were subsequently released, reporting that they had been detained by police special forces. Despite extensive searches and numerous enquiries with the authorities, the applicant's son has not been seen since. The applicant died in 2003; his wife pursued the application on his behalf.

The applicant complained under Art. 2 of the ECHR of a violation in respect of the "disappearance" of his son and the absence of any effective investigation into the matter. The applicant claimed that the provisions of Art. 5 generally had been breached in relation to his son's detention, that there was no effective remedy contrary to Art. 13 and that his property had been damaged contrary to Art. 1 of Protocol 1. Finally he contended that the State had, by failing to produce the criminal case file, breached Arts. 34 and 38(1) of the Convention.

### *Decision*

The Court declared the case admissible and joined the question of the exhaustion of domestic remedies to the merits.

## Report of the Group of Wise Persons to the Committee of Ministers

On 10 November 2006, the Group of Wise Persons (GWP), established to consider the long-term effectiveness of the ECtHR control mechanism, submitted its final report to the Committee of Ministers. In the Report, the GWP underlined that the survival of the judicial machinery was seriously under threat and proposed measures to permanently remedy the situation.

In particular, the Group suggested the need for an amendment to the Convention authorising the Committee of Ministers to carry out reforms through unanimously adopted resolutions without each time amending the Convention. However, it was underlined that this method could not apply to the substantive rights set forth in the Convention.

In the report the Group reiterated that the establishment of a new judicial filtering body, attached to, but separate from, the Court, was necessary. The Group considered that this Judicial Committee would be able to relieve the Court of a large number of cases.

In order to enhance the authority of the Court's case law, the GWP recommended that particularly important judgments should be more widely disseminated in the member states.

The Group paid close attention to the relations between the Court and the national courts. It considered that the best way for fostering dialogue was to introduce a system under which last instance courts of the States Parties could apply to the Court for advisory opinions on legal questions relating to the interpretation of the Convention.

The Group suggested that in order for the system to function effectively, domestic remedies must be improved. Such an improvement could be achieved by means of a Convention text placing an explicit obligation on the states to introduce domestic legal mechanisms to redress damage resulting from any Convention violation.

The Group considered that changes to the rules on just satisfaction were necessary in order to relieve the Court of tasks that could be carried out more effectively by national bodies. For example, decisions as to the amount of compensation should be referred to the state concerned.

The Group noted with satisfaction the lessons drawn from the 'pilot judgments'<sup>1</sup> procedure and encouraged the Court to make the fullest possible use of it. The procedure could relieve the Court of a large number of repetitive cases deriving from, among others, the same structural or systematic problem

at the national level.

Among other measures recommended for reducing the Court's workload, the Group encouraged, where applicable, recourse to mediation at the national or European level.

The Group considered that the European Commissioner for Human Rights should be able to play a more active role in the Convention's control system. In particular, the Commissioner should respond actively to Court decisions finding serious human rights violations and assist mediation machinery at the national level.

Finally, the Group recommended that the establishment of a social security scheme was of vital importance for ensuring the independence of European Court judges. The Group also looked at the "particularly sensitive issue" of the number of judges and suggested that their number could be reduced by the creation of the Judicial Committee.

The full text of the Report is available at <https://wcd.coe.int/ViewDoc.jsp?id=1070453>.

<sup>1</sup> See for instance, *Broniowski v Poland* (No. 31443/96) 22/06/04, where the Court for the first time found a systemic violation affecting a large number of people and ordered that "the respondent State must, through appropriate legal measures and administrative practice, secure the implementation of the property right in question in respect of the remaining claimants or provide them with equivalent redress in lieu."

## European Court Statistics

As of 1 October 2007, 104,150 cases were pending before the European Court of Human Rights. Of these, the largest number from any one state was 24,250 (23.3%) against Russia. This represents twice the number lodged against the next most common state – 12,300 (11.8%) against Romania.

The number of applications lodged with the Court continues to rise with 40,350 new applications lodged during the first nine months of 2007 - a 5% increase on the same period in 2006.

Of admissibility decisions delivered in 2006, only 5.7% of decisions in Georgian cases and 3%

in Russian cases were admissible – the remainder were declared inadmissible or struck off. In the same year the Court delivered five judgments (merits) regarding Georgia and 102 concerning Russia.

Source: European Court of Human Rights Survey of Activities 2006 and Statistical Information 2007

## The domestic status of the European Convention on Human Rights in Russian law

*Anton Burkov, LL.M., PhD candidate in law, Staff Attorney, Urals Centre for Constitutional and International Human Rights Protection*

The first sentence of Art. 15(4) of the Russian Constitution clearly identifies the Russian Federation as a monist country, stating that “the international treaties signed by the Russian Federation shall be a component part of its legal system.” It is therefore not necessary to transform these treaties into the domestic legal system in order for a judge to apply the provisions of international law.

The most important conclusion is that there is no bar to the domestic use of the interpretation of the European Convention on Human Rights (ECHR). The case law of the European Court of Human Rights (the Court) may thus be gradually transformed into Russian domestic jurisprudence.<sup>1</sup> According to the last paragraph of Art. 1 of the Law ‘On the Ratification of the Convention’, the Russian Federation recognises the compulsory jurisdiction of the Court with regard to the interpretation and application of the Convention.

Thus, theoretically there is no difference between the Convention and, for example, the Russian Civil Procedure Code in terms of their implementation in national courts. Indeed, the legal order set down by the Constitution is more favourable towards the Convention. The second sentence of Art. 15(4) of the Constitution sets out the priority of an international treaty over national statutes, stating that “[i]f an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.” The Convention is accordingly placed in between the Constitution on the one side and federal constitutional laws and federal laws on the other side.

The Constitutional provisions concerning the status of international law were reaffirmed in the 1996 Federal Constitutional Law ‘On the Judicial System of the Russian Federation’. According to Art. 3 of the 1996 Law, all Russian courts must apply generally

recognised principles and norms of international law and international treaties of the Russian Federation.

However, an obligation to apply international law provisions was expressed for the first time by the Constitutional Court even before the 1993 Russian Constitution and any other laws mentioned earlier entered into force. Danilenko has noted that, “while the previous Constitution [of the RSFSR of 12 April 1978] lacked a clear rule declaring international law to be part of the land, the Constitutional Court, in the Labour Code Case, stated that all Russian courts should ‘assess the applicable law from the point of view of its conformity with the principles and rules of international law’.”<sup>2</sup>

A later judgment - by the post-1993 Constitutional Court - is significant due to its innovative interpretation of Art. 46 of the Constitution. In the Case Concerning Arts. 371, 374 and 384 of the Criminal Procedure Code, the Constitutional Court provided an interpretation that “established an obligation to give direct domestic effect to decisions of international bodies, including the European Court of Human Rights.”<sup>3</sup>

The most unusual element of the machinery for implementing domestic law within the Russian legal system is the practice of issuing ‘Regulations’ (*postanovleniia*) or ‘guiding explanations’ (*rukovodiaschie raziasneniia*) passed by the Plenum of the Supreme Court and the Plenum of the Supreme Arbitration (Commercial) Court of the Russian Federation.

The first Regulation by the Supreme Court relating to the issue of implementation of international law was the 1995 Regulation ‘On Some Questions Concerning the Application of the Constitution of the Russian Federation by Courts’, section 5 of which instructed lower courts to apply international law. It should be pointed out that here the Supreme Court instructed lower courts to apply international law, but it did not suggest how the law should be applied.

The first Regulation by the Supreme Court entirely devoted to the

implementation of international law was the regulation ‘On the Application by Courts of General Jurisdiction of the Generally-recognized Principles and Norms of International Law and the International Treaties of the Russian Federation’, which was passed in 2003 - five and a half years after the ECHR entered into force (the 2003 Regulation). Although still limited, this Regulation was more advanced in terms of clarifying for judges their obligation to apply international law provisions - the ECHR in particular.

Regarding the ECHR, there are several points to emphasize. First of all, the Supreme Court again stressed the obligatory direct applicability of international treaties, and in particular the Convention, and its priority over national laws. The Supreme Court also stated that, according to Art. 31(3)b of the Vienna Convention on the Law of Treaties, when applying the Convention judges should interpret the treaty by taking into account any subsequent practice of a treaty body. For the first time it was stressed that non-application of an international treaty (including non-application of the treaty itself, the application of a treaty that is not applicable under particular circumstances, and the incorrect interpretation of a treaty) can bear the same consequences as non-application of the domestic law - namely, the quashing or altering of a judgment.<sup>4</sup> Another feature of the 2003 Regulation is that it provided a brief overview of European Court case law on Arts. 3, 5, 6, and 13 of the ECHR, albeit without mentioning any specific cases.

Regarding the Supreme Arbitration Court of the Russian Federation, to date, the Plenum of the Supreme Arbitration Court has passed no Regulations on the domestic implementation of the Convention. However, there is one document written by the Chief Justice of the Supreme Arbitration Court entirely devoted to this issue: On the Main Provisions Applied by the European Court of Human Rights for the Protection of Property Rights and Right to Justice.<sup>5</sup> It consists of very brief summaries of the

## Member States' Duty to Co-operate with the European Court of Human Rights - Report of the Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe (the Assembly) has issued a report and draft resolution noting the continued lack of investigation by competent authorities of cases involving the alleged killing, disappearance, beating or threatening of applicants bringing cases before the European Court of Human Rights (the Court). The Assembly has also noted that pressure has been brought to bear on lawyers and NGOs supporting these applicants. The Russian Federation (particularly the North Caucasus region: the Chechen and Ingush Republics, Dagestan, North Ossetia), Moldova, Azerbaijan and Turkey are specifically mentioned in this regard.

The report highlights various obligations on member States of the Council of Europe to comply with the Court. Art. 34 of the European Convention on Human Rights (the Convention) requires states "not to hinder in any way the effective exercise of [the right of individual petition]". Rule 39 of the Rules of the Court enables the Court to order states to apply interim measures for the protection of applicants where there is a threat of irreparable harm of a very serious nature, where that harm is imminent and irredeemable and where there is a prima facie case.

Art. 38 of the Convention requires states to "furnish all necessary facilities" for the effective conduct of an investigation. Under Art. 3 of

the European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (the European Agreement), parties must respect the rights of applicants and their representatives to correspond with the Court without delay or undue consequences. Art. 4 of the European Agreement recognises participants' freedom of movement with respect to attending and returning from Court proceedings.

The report suggests two measures that may be adopted by the Court to protect participants, based on the Rules of Procedure of the Inter-American Commission and Court of Human Rights. Firstly, Rule 39 allows facts alleged in a petition to the Inter-American Commission to be presumed to be true if the state concerned has not provided sufficient information during the maximum period allowed for provision of such information. Secondly, if states do not deny the alleged facts of a particular case, the Inter-American Court may consider those facts to be accepted (Rule 38(2)). The report recommends that similar requirements could be inserted in the Rules of the European Court.

The draft resolution makes a number of recommendations to both member states and the Court. States should refrain from bringing pressure to bear on applicants, potential applicants, their lawyers or members of their families with a view to preventing them from

bringing cases before the Court. States should also provide protection to these people, including witness protection programmes, police protection or political asylum. Alleged crimes against applicants, their families and lawyers should be investigated and the perpetrators punished. Finally, states should support the Court in providing documentation and identifying witnesses and those states that have not ratified the European Agreement should do so.

At the same time, the resolution makes similar recommendations as the report regarding interim measures and presumption of fact. Significantly, the resolution also recommends that the Court should continue to process applications that have been withdrawn under suspicious circumstances and to apply considerable flexibility, or even waive, the requirement of exhaustion of domestic remedies for applicants from the North Caucasus.

EHRAC was involved in the development of this report. EHRAC was represented at a public hearing and a memorandum from EHRAC/Memorial noting instances of intimidation in 23 cases in the North Caucasus has been appended to the report.

The full document can be accessed at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11183.htm>.

*continued from page 12:*

### **The domestic status of the European Convention on Human Rights in Russian law**

main provisions applied by the European Court on the issues of the protection of property and right to justice, and it advises on applying the Convention in the administration of justice at the domestic level. However, the document is very brief. There are no citations to the particular cases that served as a basis for this decision. The value of such a letter explaining the interconnection between the jurisdiction of the arbitration courts and the jurisdiction of the ECHR, and

informing arbitration judges about some provisions of the case-law of the ECHR, even in this brief form, cannot be overestimated. From December 1999 to October 2003,<sup>6</sup> this document was the only official document providing judges with information on the domestic implementation of the Convention.<sup>7</sup>

1 Danilenko, "Implementation of International Law in CIS States: Theory and Practice," *European Journal of International Law* 10:1 (1999): 68.

2 Ibid. 56.

3 Ibid. 68.

4 Section 9 of the 2003 Regulation. In Section 4 of

the Plenum of the Supreme Court Regulation no. 23 of 19 December 2003 'On Court Decision', the Supreme Court stressed the necessity of citing in the declaration section of the decision the material law applied, inter alia, the Convention, by taking into account judgments of the European Court of Human Rights.

5 Informational letter by the Chief Justice of the Supreme Arbitration Court of the Russian Federation no C1-7/CMII-1341 of 20 December 1999.

6 The month in which the 2003 Regulation was issued.

7 For more details on the domestic application of the Convention and the ECHR case-law please refer to Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006* (Stuttgart: ibidem-Verlag, 2007), [www.sutyajnik.ru/bal/ibidem](http://www.sutyajnik.ru/bal/ibidem).

# Is the European Court of Human Rights satisfied with the Russian criminal justice system?

*M. R. Voskobitova, Director, Criminal Law Reform Programme, American Bar Association*

About a third of the complaints against Russia that are filed at the European Court of Human Rights (ECtHR) relate to violations of rights, both of the accused and the victims in the context of the criminal procedural system. One can identify several categories of the most typical complaints: protracted court proceedings; unjustified and unlawful confinement in custody; the use of torture during the preliminary investigation; conditions of incarceration for prisoners; and violations of the rights of victims during initial confinement. All these matters have already been considered many times at the Court, but it is quite some time since the Court addressed violations in the Russian criminal process in respect of the requirements of 'justice' under Art. 6 of the Convention.

In 2005-2006, some long-awaited decisions were issued, where the ECtHR addressed issues of compliance with the requirements of justice for court proceedings in criminal cases. Although it cannot be said that the Court passed very harsh judgments on the Russian criminal process, three issues can be singled out on which the Court's position became clearer: the right of the defence to call witnesses; the issuing of decisions in the absence of a defendant whose mental capacity is in question; and the use of evidence obtained by means of incitement.

From the point of view of Russian defenders of human rights, the weakest area of Russian judicial proceedings in criminal cases is the inequality of opportunities for the defence and prosecution to present their witnesses. This issue was the subject of review in four decisions: *Popov v Russia*,<sup>1</sup> *Andandonskiy v Russia*,<sup>2</sup> *Klimentyev v Russia*<sup>3</sup> and *Zaytsev v Russia*.<sup>4</sup> In these decisions, the Court consistently maintained its well-established position that neither party to the process should be essentially at a disadvantage in relation to the other party. At the same time, in three of the four decisions, the Court did not hold that there had been any violations of the

rights of the applicants to call witnesses. The Court analysed this question in most detail in the case of *Klimentyev v Russia*: there, the applicant claimed that during a second court procedure, five witnesses were not heard, in addition to the 35 witnesses who were heard.<sup>5</sup> The applicant had indeed asked for these witnesses to be called, but two of them lived in Norway and had been questioned there at the request of the Russian law enforcement authorities. A third witness lived in Germany, and his place of residence could not be established, despite enquiries. It was also impossible to locate the place of residence of two other Russian witnesses, and they were not questioned. In the view of the Court, it could not be claimed that there was a violation of the right to a fair hearing, because the witnesses had all been examined during the first court proceedings,<sup>6</sup> the defence had had the opportunity to cross-examine them then and foreign citizens could not be forced to appear in court. In that particular case, according to the Court, the failure to call those witnesses had in no way affected the conclusions of the national court on the guilt of the applicant.<sup>7</sup>

In the case of *Andandonskiy v Russia*, the applicant considered that his rights had been violated because there was no examination of a witness who had seen the incident in person, although at the court hearing he had not insisted that she be called. However, the verdict was based on the testimony of the wife of the victim and of a witness who knew of the incident only from what others had said. The Court considered that the applicant's rights had not been violated in that case either.<sup>8</sup>

However, the Court took a fundamentally different position in *Popov v Russia*. In that case, the defence had asked that some witnesses be called, who could have corroborated the applicant's alibi, but these witnesses were not questioned when they appeared in court, nor were they called on another day despite the defence's request. The ECtHR considered this to be impermissible, because the evidence concerning the applicant's participation in the crime was inconsistent, and most of the evidence

did not provide corroboration of his participation in the crime. In this case, the Court indicated that where the prosecution is based on the premise that a person was in a particular place at a particular time, the principle of equality of the parties requires that the accused be afforded the opportunity to refute this premise.<sup>9</sup>

In other words, the Court has once again affirmed its position that national courts are not obliged to examine all the witnesses that the defence has asked to call while the defence, for its part, must call its witnesses in good time, file a timely appeal of a refusal to call such witnesses, and must explain precisely what the witnesses can corroborate. National courts are obliged to hear witnesses only if the evidence gathered by the prosecution is contradictory and does not prove unambiguously that the defendant was involved, in order that the parties can put their cases on an equal footing.

It could be said that the position expressed by the Court in its decision in *Romanov v Russia* was unexpected for Russian lawyers, because the European Court held it impermissible for national courts to rely on the conclusion of an expert analysis as to the defendant's mental capacity, and for them to issue decisions in the absence of the defendant.<sup>10</sup> In the view of the ECtHR, this is a violation of the guarantees that a defendant should be present during court proceedings, even if his lawyer was present during the consideration of the case. This practice is widely accepted, and almost no Russian lawyer considers the practice to be a violation of the rights of a defendant who has been found to be innocent. However, the ECtHR's position means that this approach must be changed.

On the other hand, the position articulated by the ECtHR in its decisions, *Vanyan v Russia*<sup>11</sup> and *Khudobin v Russia*,<sup>12</sup> was an expected one: the ECtHR concluded unequivocally that a verdict of guilt, issued on the basis of evidence that was obtained through entrapment, is not a just one.<sup>13</sup> In both cases, the defendants obtained drugs at the request of police agents, using their money, and

## UN Rapporteur finds evidence of a “trend of racism and xenophobia” within the Russian Federation

After a visit to Moscow and St Petersburg from 12 to 17 June 2006, the UN Special Rapporteur on contemporary forms of racism, xenophobia and related intolerance, Doudou Diène, has published a Report of his findings.<sup>1</sup> Despite noting positive developments, including the reinforcement of criminal law and provisions aimed at combating racism and discrimination, the Special Rapporteur deduced that while no State ‘policy’ of racism exists in the Russian Federation, Russian society is facing “a profound trend of racism and xenophobia”.

The Rapporteur reports that the most obvious manifestations of this include the increasing number of racially motivated attacks and the extension of this violence to intellectuals and students engaged in the campaign against racism. In an attempt to explain this, the Report identifies profound “historical and cultural” ideas embedded within sections of Russian society. The “revitalization” of manifestations of racism faced by non-European minorities and foreigners from Africa, Asia and the Arab world, the report suggests, is primarily a result of a shift to an increasingly ‘nationalist

ideology’ within the Russian Federation. This has been exacerbated by perceptions exclusively linking ethnic and religious minorities with criminality, justified by the need to combat terrorism. The Report adds, moreover, that the roots of current trends can be traced to the contradictory policies of former Soviet regimes, with the ideology of ‘friendship amongst peoples’ masking mass deportations and the suppression of minority communities.

One recommendation of the Rapporteur is a reassessment of the provision of education, particularly the teaching of history, in order to confront and eradicate ‘deep root factors’ of racism and xenophobia. The current strength of neo-Nazi groups in the political arena is ascribed to the failure of the education system to instil memory and value systems emphasising the evils of Nazism and the human price paid in breaking the military strength of Nazi Germany. Other long-term proposals, aimed at addressing a climate of “basic prejudice and ignorance” include the construction of a culture of solidarity and an appreciation of different civilizations.

The Report noted a range of other specific problems requiring immediate

resolution. The Rapporteur emphasised the continued social, economic and political marginalisation faced by minorities culminating in violations of their most basic rights including access to employment, housing and health services. Particularly disturbing are the poor living conditions of the Roma community and the “prevailing culture of suspicion and segregation based on the traditional stigma, stereotypes and prejudices” associated with the Roma people. In order to promote a cohesive response, the Report recommends the adoption of a ‘Federal Plan of Action’ with the participation of all democratic political parties, independent human rights organisations and respective communities. On a final positive note, the Rapporteur acknowledges the adoption of measures designed to promote inter-ethnic dialogue and statements made by officials recognising an increase in the manifestations of racism and xenophobia. However, it was noted that only a few such officials appreciated the depth of the underlying causes of those manifestations and shared the urgency needed to address them.

1 Available at: - <http://www.ohchr.org/english/bodies/hrcouncil/docs/4session/A.HRC.4.19.Add.3.pdf>.

*continued from page 14:*

### ***Is the European Court of Human Rights satisfied with the Russian criminal justice system?***

they handed them over to the police; in other words, the crime would not have been committed if the police agents had not taken steps to organise the crimes. Furthermore, the ECtHR indicated that it cannot be sufficient for national courts to accept bare assertions from the police that information that the defendant was involved in selling drugs was the basis for conducting an operation - they must show proof of this to the court. This approach compels a change in national practice; but the problem is that the law on investigative activity formulates the

provisions on such activity in very general terms, and every enforcement agency has its own set of instructions to guide it; in other words, it will be necessary to carry out complex, painstaking work that will need time and a certain political will, to implement these decisions of the Court.

It can be said that hopes that the ECtHR would “not leave a stone unturned” in relation to the Russian criminal justice system have not been realised; but these decisions have shown up those aspects of the Russian criminal justice system which the Court considers impermissible. This makes it possible to direct our efforts inside Russia to bringing legislation and judicial practice into compliance with the Court’s standards.

1 (No. 26853/04) 13.7.06, paras. 175-189.

2 (No. 24015/02) 28.9.06, paras. 50-51.

3 (No. 46503/99) 16.11.06, paras. 125-126.

4 (No. 22644/02) 16.11.06, paras. 25-26.

5 Para. 22.

6 Para. 126.

7 Ibid.

8 Para. 53.

9 European Court of Human Rights (2006) “Information Note 88 on the Case-Law of the Court: July – August 2006.”

10 (No. 63993/00) 20.10.05, paras. 111-112.

11 (No. 53203/99) 15.12.05, para. 49.

12 (No. 59696/00) 26.10.06.

13 European Court of Human Rights (2006) “Information Note no. 90 on the Case Law of the Court: October 2006.”

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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 also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 110 cases involving more than 550 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 co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: [www.londonmet.ac.uk/ehrac](http://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 email.

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### EHRAC-SCLJ project

EHRAC established a formal partnership with the Slavic Centre for Law and Justice (SCLJ) in May 2007. EHRAC has been assisting SCLJ with European Court cases since 2005 and joint training seminars were held in 2006 and 2007. SCLJ focuses on religious and ethnic discrimination within Russia.

### EHRAC-Memorial project

EHRAC has been working in partnership with Memorial since 2003. Memorial is one of Russia's oldest and most respected human rights organizations. 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 of Human Rights and conducts training seminars in Georgia and facilitates the participation of a GYLA delegate in EHRAC's Legal Skills Development Programme in London and Strasbourg.

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