

EHRAC

Bulletin



Redress and implementation in the Chechen cases – the Strasbourg Court increases the pressure

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Since the ECtHR delivered its first judgments, in 2005, highlighting egregious human rights violations in Chechnya in the period from 1999, the greatest challenge has undoubtedly been the effective implementation of those decisions. The Russian Government pays the damages awarded to the families of those who were ‘disappeared’, subject to state extra-judicial execution or killed by excessive

force deployed by the armed forces, but taking other steps to prevent such incidents, to investigate what happened and provide some measure of accountability still does not seem to enjoy the requisite political will. These questions have been taken up by the Committee of Ministers (CoM), in the course of its role of supervising the implementation of Strasbourg decisions. That process still continues – six years after the first Chechen decisions were published. However, in a significant judgment in December 2010, in the case of *Abuyeva v Russia*

(No. 27065/05) 2.12.10, the ECtHR has directly confronted this problem and ratcheted up the pressure. This brief piece discusses the *Abuyeva* case and its implications.

In February 2000 the village of Katyry-Yurt in Chechnya was subjected to an air and artillery attack by the Russian armed forces, after they became aware that a force of rebel fighters (numbering in their hundreds, or even thousands) had entered the village. There were considerable casualties on both sides – and, inevitably,

continued on page 2

Editorial

In this edition of the Bulletin Prof. Philip Leach (EHRAC) considers the ongoing challenges presented by the continued absence of effective investigations into serious human rights violations already established by the ECtHR in Russia and the ongoing absence of accountability for the perpetrators, particularly in Chechnya. In this context he explores the significance of the ECtHR’s application of Art. 46 in the *Abuyeva v Russia* decision and the hope that the possibility of justice for the victims of the attack at Katyry-Yurt in February 2000 is still within reach. In addition, Furkat Tishaev (Memorial HRC-EHRAC) discusses the case of *Kiladze v Georgia* and points out the potential limitations of the judgment’s application to Russian victims in the

light of the distinctions between the two domestic legislative regimes. In her article Nadezhda Ermolayeva (Memorial HRC-EHRAC) answers some of the criticisms of the ECtHR which have been made by the Chair of the Russian Constitutional Court, Valeriy Zorkin, with particular reference to the cases of *Konstantin Markin v Russia* and *Alekseyev v Russia*. Finally, Lydia Kurbanova (Women’s Dignity) examines the potential role of psychological rehabilitation in contributing to the recovery of a post-conflict society drawing on her experience of the psychological services offered by the NGO Women’s Dignity in the Chechen Republic.

Joanna Evans,
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Contents

Redress and implementation in the Chechen cases – the Strasbourg Court increases the pressure	1
Editorial	1
The European Court and Soviet political repression: a trap for potential applicants?	3
Recent activities of the Council of Europe Commissioner for Human Rights in the South Caucasus	5
Psychological rehabilitation of the population as a key condition for social stability in Chechnya	7
The wind of change	8
Human rights cases	10
News in brief	14

continued from page 1

Redress and implementation in the Chechen cases – the Strasbourg Court increases the pressure

civilian casualties. One villager, Zara Isayeva, subsequently complained to the ECtHR (represented by Memorial HRC and EHRAC) about the deaths of her son (aged 23) and three nieces (aged 15, 13 and 6) during the attack. They were killed when a shell fired from a Russian air force jet exploded near their minibus in which they were trying to flee from the fighting. Her case, introduced in 2000, succeeded in establishing, in February 2005, that the Russian authorities had violated their obligation to protect the right to life of Zara Isayeva, her son and three nieces (*Isayeva v Russia* (No. 57950/00) 24.2.05). In an unprecedented decision, using unprecedented language, the Russian authorities were the subject of excoriating criticism for the way they had conducted the operation at Katyr-Yurt. The Court found that the ‘massive use of indiscriminate weapons’ was in ‘flagrant contrast’ to the need to protect the civilian population. The commanding officer had called in jets carrying (apparently by default) heavy, free-falling bombs with a damage radius of more than a kilometre. The villagers were not given sufficient time to leave or provided with safe exit routes to get away from the fighting. The senior officers in charge were named (General Shamanov and Major-General Nedobitko) and their respective roles analysed.

What is more, the Court in *Isayeva* also found a separate violation of the right to life because of the authorities’ failure to carry out an effective investigation. Although a complaint was made to the military prosecutors a few weeks after the attack, an investigation was only opened once the Strasbourg complaint was communi-

cated to the Government months later. The ECtHR also identified several ‘serious flaws’ once the investigation was under way. For example, it failed to explain the ‘serious and credible’ allegations that the villagers were in some way ‘punished’ for their failure to co-operate with the military authorities. There was also a clear failure to identify other victims and witnesses of the attack.

More than five years after the *Isayeva* judgment came the decision in *Abuyeva*, concerning the same attack on Katyr-Yurt. This second application was brought by 29 villagers (again assisted by Memorial HRC and EHRAC), complaining to the ECtHR of the killing of 24 of their relatives and that some of the applicants themselves had sustained various injuries. For example, Malika Abdulkerimova described finding eight bodies in the cellar of her neighbour’s house which had been bombed. The Vakhayev family testified that there were 150 people taking cover from the heavy shelling in their basement. Their house was destroyed by two blasts which killed eleven people and injured others. In its judgment in *Abuyeva* the Court found violations of the right to life on the same basis as the *Isayeva* judgment. Furthermore, the investigative steps which had been carried out after the *Isayeva* judgment were found to have been subject to the same major flaws. In particular, the ECtHR could not discern any further steps taken to clarify the crucial issues of the responsibility for the safety of the villagers’ evacuation and the question of the ‘reprisal’ nature of the operation. No one has ever been charged with any crime in relation to the attack.

In the light of these repeated failings, the ECtHR then went on to apply Art. 46 of the ECHR, which

is unprecedented in the Chechen cases. In recent years, the ECtHR has increasingly been drawn to taking a more collective approach to its caseload, in some senses moving on from its traditional focus on individual cases. This undoubtedly has its root in states’ failure to tackle systemic violations of the ECHR effectively, leading to repeat findings by the ECtHR in ‘clone’ cases, in their hundreds and sometimes thousands. The ‘pilot judgment procedure’ has accordingly been developed by the ECtHR to deal with very large-scale endemic problems such as the failure to implement domestic court judgments (e.g. *Burdov v Russia* (No. 2) (No. 33509/04) 15.1.09 and *Ivanov v Ukraine* (No. 40450/04) 15.10.09) and other systemic failings caused by specific problems (such as *Broniowski v Poland* (No. 31443/96) 22.6.04 concerning the failure to compensate families who lost their homes after being repatriated following the conclusion of the Second World War). The ECtHR has applied Art. 46 to highlight legislative flaws, or gaps, and it has taken a more prescriptive approach in defining what measures need to be taken by the state in order to remedy the problem identified. For example, the case of *Klaus & Iouri Kildadze v Georgia* (No. 7975/06) 2.2.10 (discussed further in Furkat Tishaev’s article on page 3) highlighted a ‘legislative void’ which prevented victims of Soviet era political repressions from obtaining compensation. The ECtHR invoked Art. 46 in holding that the authorities were required to act swiftly to adopt legislative, administrative and budgetary measures in order to plug the gap. In *Poghosyan v Georgia* (No. 9870/07) 24.2.09 the ECtHR identified a systemic problem concerning the failure to provide adequate medical care to prisoners infected with viral hepati-

tis C, and other diseases. In applying Art. 46, the ECtHR proposed that the authorities should take legislative and administrative steps to prevent the transmission of viral hepatitis C in prisons, to introduce screening arrangements and to ensure timely and effective treatment.

In *Abuyeva*, Art. 46 was expressly applied by the ECtHR in order to emphasise the obligation on the authorities to carry out an effective investigation into the Katyr-Yurt attack, with the ECtHR expressing its 'great dismay' at the lack of any real progress since 2005. Acknowledging the role of the CoM in assessing compliance, the ECtHR nevertheless considered it 'inevitable that a new, independent, investigation should take place'. In making this finding, the ECtHR once again declined to make a specific order (in the operative provisions of the judgment) to the effect that such an investigation must be carried out. In the course of litigating these Chechen cases, Memorial HRC and EHRAC have been seeking to secure such an order, notably as an aspect of redress for a litigant who successfully complains to the ECtHR about a 'disappearance' of a member of their family for which the state is found to be responsible. As yet the

ECtHR has declined to make such an order, although a number of dissenting judgments have agreed with this approach.¹ Nevertheless, *Abuyeva* represents an important step forward in exerting further pressure on the Russian authorities to implement an effective investigation.

Why this change of policy in *Abuyeva*? There were two important factors: the ECtHR's loss of patience with the Russian response and its sense that it could actually make a difference in this case. Thus, the ECtHR found that the Russian Government had 'manifestly disregarded the specific findings of a binding judgment concerning the ineffectiveness of the investigation'. Crucially, it also concluded that earlier omissions in the investigation were 'easily rectifiable'. This is significant in itself. It has frequently been argued before the ECtHR that at least some errors and omissions in flawed investigations *can* be rectified. For example, although evidence not recovered because of the failure to inspect the scene of a crime may be lost forever, key witnesses who have not been interviewed can later be traced and questioned. The ECtHR has not hitherto attempted to engage with such questions, but in *Abuyeva* it did. The outcome was

a clear signal that two particular steps would be especially important: firstly, that an independent assessment be carried out as to the proportionality and necessity of the use of lethal force, and secondly, the attribution of individual responsibility for the loss of life and the evaluation of such aspects by an independent body (preferably by a judge).

We now await the Russian authorities' compliance with this decision, in the absence of which the CoM must take further steps to ensure that the ECtHR's directions are heeded. In the absence of a speedy response, it will be time for the CoM to instigate 'infringement proceedings' – a new weapon in its armoury which was introduced by Protocol No. 14 in June 2010 and which enables the CoM to take states back to the ECtHR if they fail to comply with a judgment. For the sake of those who died at Katyr-Yurt, and for the sake of the credibility of the Strasbourg system, it is very important that there is sufficient collective European will to take these next steps.

¹ See the partly dissenting opinion of Judge Spielmann in *Medova v Russia* (No. 25385/04) 15.1.09. See also the concurring opinion of Judge Spielmann, joined by Judges Ziemele and Kalaydjewa in *Varnava & Others v Turkey* (No. 16064/90) 18.9.09.

The European Court and Soviet political repression: a trap for potential applicants?

Furkat Tishaev, Lawyer, EHRAC-Memorial HRC

On 2 February 2010, the ECtHR delivered a judgment in the case of *Klaus & Iouri Kiladze v Georgia* (No. 7975/06). The ECtHR found Georgia responsible for having failed to provide the applicants with the compensation to which they were legally entitled as victims of Soviet political repression.

It required Georgia to rapidly introduce the necessary legislative and budgetary measures to make the applicants' existing rights under Georgian law effective and ordered it to pay the applicants 4,000 EUR each if it failed to do so within six months of the judgment becoming final. As previously reported in this *Bulletin*, this judgment has significance for thousands of other Georgians in a

similar position.¹ The current progress of the implementation of the *Kiladze* judgment in Georgia is discussed below.

It would also appear that this judgment has significance for victims of political repression from other former USSR countries. In Russia, for example, many perceived *Kiladze* as a new European standard for compensation

continued on page 4

continued from page 3

The European Court and Soviet political repression: a trap for potential applicants?

for political repression. Some have already initiated judicial proceedings at the domestic and European level, referring to the *Kiladze* judgment. However, unlike legal professionals who are familiar with this judgment and with the European human rights system these individuals run the risk of misinterpreting the meaning and scope of the judgment, potentially leading to false expectations and wasted resources. Given that Memorial HRC estimates that there are around 700,000 victims of Soviet political repression in Russia, this issue is capable of generating very many doubtful ECtHR applications and therefore needs to be clarified for the general public.

The present situation in Russia is that victims of political repression are only entitled to compensation for pecuniary damages. According to Art. 16(1) of the Russian law on rehabilitation of victims of political repression of 18 October 1991, compensation for confiscated property may not exceed 4,000 RUB (100 EUR) for movable property and 10,000 RUB (250 EUR) for immovable property (if the restitution of property is impossible). Moreover, the Russian law establishes a time limit of three years from the date when victim status was granted in order to be eligible for compensation. As for non-pecuniary damage, after amendments made in April 2004 the law no longer officially includes the right to moral damages. Nevertheless, Art. 15 of the Russian law provides the right to compensation for deprivation of liberty or for coercive placement in psychiatric institutions, which may be regarded as the sole possibility to claim non-pecuniary damage.

According to Memorial HRC, the compensation paid to victims of political repression in Russia varies from region to region, but rarely exceeds 1,000 RUB (25 EUR) per case. Following the *Kiladze* judgment some Russian individuals who have victim status initiated administrative and judicial proceedings with a view to receiving the same type and amount of compensation as the ECtHR awarded to the *Kiladz*es.

In the case of *L.* the applicant argued before the Moscow City Court that the ECtHR awarded the applicants in *Kiladze* 4,000 EUR each as compensation for the moral damage they sustained during political repression in the Soviet period.² The applicant also referred to the Ruling of the Russian Constitutional Court of 26 February 2010, which recognised ECtHR judgments as grounds for re-considering a case.

In its decision the Moscow City Court dismissed the complaint, on the basis that the Constitutional Court ruling only applies to a person in respect of whom the ECtHR has delivered a judgment. Although the Moscow City Court duly applied this procedural provision in dismissing the complaint, it is also important to outline some relevant substantive issues.

The ECHR does not guarantee the right to compensation for political repression. Therefore, raising such a complaint on its own would be deemed to be manifestly incompatible *ratione materiae* with the ECtHR's jurisdiction. In fact the ECtHR began its reasoning in the *Kiladze* judgment by reiterating the absence of any specific obligation on a Contracting State to redress injustice or damages which were caused by its predecessors.³ The ECtHR only dealt with the issue of compensation for political repression in the *Kiladze* case as the

right to compensation was already prescribed *prima facie* in Georgian domestic legislation. The ECtHR explicitly stated that in the light of the right to property as set out in Art. 1 of Protocol 1 ECHR, it had to verify whether the right to compensation for pecuniary and non-pecuniary damage was sufficiently established in domestic law.⁴ Further proof of this is that the applicants' claims regarding Georgia's failure to compensate them for pecuniary damages were declared inadmissible. The ECtHR concluded that Art. 8(3) of the Georgian law of 11 December 1997 did not in itself create "*une espérance légitime*" (a legitimate expectation) and therefore, the applicants' claims under this head were incompatible *ratione materiae*.⁵ It is also important that the ECtHR explicitly pointed out that there are no restrictions on a state's freedom to choose the conditions applicable to the restitution of property or to the compensation of injured persons.

Another important point is that the compensation awarded to Klaus and Iouri Kiladze by the ECtHR should in no way be interpreted as compensation for Soviet political repression, as such. According to Art. 41 ECHR, the ECtHR may afford just satisfaction to the injured party if it finds a violation of the ECHR. Thus, the 4,000 EUR awarded to the *Kiladz*es represents compensation for a violation of their right to property under Art. 1 of Protocol 1 and *not* compensation for political repression. In *Kiladze* this compensation was an alternative form of reparation and would only come into force should Georgia fail to introduce the necessary legislative and other measures to allow the applicants and others in a similar position to effectively enjoy their rights within six months of the date of delivery of the judgment. The question of the appropri-

ate amount of compensation to be awarded in respect of political repression was completely outside the scope of the ECtHR's consideration – as it pointed out states have a wide margin of appreciation, *inter alia*, as to the extent of such compensation.⁶ Consequently, the amount of compensation provided by Russian law, even if it appears insignificant, cannot be regarded as breaching the ECHR in itself.

Thus, the subject matter of the *Kiladze* judgment, as well as its practical and legal interest, focused on the effective implementation of the Georgian law in question and not on Soviet political repression, as it may seem at first sight. This may be disappointing to many individuals but, as was mentioned above, this knowledge may save them from false hopes and avoid wasted resources, as well as preventing the ECtHR from being

flooded with multiple clearly inadmissible applications.

1 *EHRAC Bulletin* No. 13, Summer 2010, p. 8.

2 No specific names or cases are described in the present article in order to maintain the privacy of all those involved.

3 *Klaus & Iouri Kiladze v Georgia* (No. 7975/06), 2/2/10. See in particular para.53.

4 *Ibid.*, para. 54.

5 *Ibid.*, paras. 60 and 61.

6 *Ibid.*, para. 58.

The judgment in the case of *Klaus & Iouri Kiladze v Georgia* (No. 7975/06) 2.2.10 entered into force on 2 May 2010. Since then the Georgian Ministry of Justice has taken a number of measures towards its implementation – the judgment was translated into Georgian and published on the Ministry's website and the costs and expenses incurred by the applicants in filing the case with the ECtHR

were paid in July 2010. However, the legislative, administrative and budgetary measures that the judgment required the Georgian Government to rapidly undertake have yet to be introduced. Nor have the applicants been paid the compensation awarded to them by the ECtHR in the event that the Government failed to undertake these measures within six months of the judgment becoming final. Accord-

ing to information provided to the Georgian Young Lawyers' Association (GYLA, the applicants' representatives) the Unit for the Execution of European Court Judgments at the Georgian Ministry of Justice has been working on the framework for the full implementation of the judgment and this should be adopted by April 2011.

Natia Katsitadze, GYLA

Recent activities of the Council of Europe Commissioner for Human Rights in the South Caucasus

The Office of the Commissioner for Human Rights, Council of Europe

The Commissioner for Human Rights, as an independent, non-judicial institution within the Council of Europe (CoE), is mandated to promote awareness of, and respect for, human rights in the CoE's 47 member states. His aim is to prevent violations of human rights as well as to propose remedies and concrete solutions to any specific problems identified.

The Commissioner monitors the human rights situation through country visits and reports. Recent activities in the South Caucasus region include a visit to Azerbaijan in March 2010,

followed by the publication of a report in June 2010, and the monitoring of investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia carried out by two experts between March and June 2010, which led to the publication of a report in September 2010.

Azerbaijan report

On 29 June 2010, the Commissioner published a report on his visit to Azerbaijan (available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1642017>). The report focuses on freedom of expression and association, the conduct of law enforcement officials and the administration of justice, and contains some observations on his visit to the

Autonomous Republic of Nakhchivan.

The Commissioner highlighted his continuing concerns about cases of threats, harassment and violence against journalists or human rights activists which have not been properly investigated. He stressed that anyone imprisoned because of views or opinions expressed, including Eynulla Fatullayev, should be released immediately. Furthermore, the Commissioner underlined that the decriminalisation of defamation is a prerequisite for bringing legislation into line with European standards. While recognising the need to promote professionalism among journalists, the Commissioner

continued on page 6

continued from page 5

Recent activities of the Council of Europe Commissioner for Human Rights in the South Caucasus

expressed strong reservations about the existence of a black-list of racketeering newspapers, published by the Press Council, and invited it to reconsider this practice.

The Commissioner acknowledged the willingness of the authorities to take steps to facilitate the registration of NGOs, but was concerned about recent legislative changes which could limit freedom of association.

As regards the issue of misconduct by law enforcement officials, the Commissioner called for an independent and effective investigation into all allegations of torture and ill-treatment with the imposition of appropriate sanctions. He recommended the adoption of adequate measures to ensure the independence of the judiciary and the respect of fair trial guarantees.

Concerning the situation in the Autonomous Republic of Nakhchivan, the Commissioner emphasised that involuntary placement in psychiatric institutions should only be allowed by court decisions issued on the basis of a medical assessment. In relation to the events that took place in Bananyar, the Commissioner recalled that any allegations of ill-treatment must be effectively investigated, in accordance with international standards.

Monitoring of investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia

On 29 September 2010, the Commissioner published a report concerning investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia (available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1675137>). The report is based on the work of Bruce Pegg and Nicolas Sébire, two international ex-

perts in the field of police investigations into serious crimes.

The cases which the experts were mandated to include in their work had all been published with some photographic evidence in the form of video recordings on the Internet. One of the cases related to three young Ossetians (Alan Khachirov, Alan Khugaev and Soltan Pliiev) who went missing on 13 October 2008, i.e. two months after the August 2008 conflict, close to the administrative boundary line (ABL). The other cases concerned disappearances which occurred during or immediately after the August 2008 hostilities. One case related to the fate of Radik Ikaev, who was reported to have been captured by Georgian troops on 8 August 2008, and who later disappeared.

The Georgian Ministry of Internal Affairs requested that the experts endeavour to find out what work had been done in Tskhinvali to clarify the fate of Giorgi Romelashvili, a Georgian soldier who disappeared along with two other soldiers who had been members of the same tank crew on 8 August 2008. The Ministry also provided a video showing a Georgian soldier, Giorgi Antsukhelidze, being subjected to serious ill-treatment during an interrogation. Antsukhelidze's body was subsequently handed over to the Georgian authorities by the *de facto* authorities of South Ossetia and his identity was established by DNA analysis. Subsequently, an application concerning this case was brought to the ECtHR. Another case raised by the Ministry of Internal Affairs related to a second Georgian soldier called Kakha Khubuluri, who could be seen injured on a video in a group with other captive Georgian soldiers. His body was also handed over by the *de facto* South Ossetian authorities to the Georgian authorities.

The experts' report highlighted some

serious shortcomings in the process of clarifying the fate of missing persons and ensuring accountability for the perpetrators of illegal acts. The experts encountered a situation where a variety of obstacles blocked the path to the truth.

In the cases of Khachirov, Khugaev and Pliiev, the experts found that very little activity had taken place to investigate this case in spite of prompting by the European Union Monitoring Mission in Georgia, the Georgian Young Lawyers' Association and the parents of the missing persons during the period of almost eighteen months which had elapsed since the disappearance. Though some steps were subsequently taken on the advice of the experts, including the possibility for the mothers of the missing to give testimony to prosecutorial authorities, there continued to be a number of technical shortcomings in the investigation. A major problem related to the very integrity and impartiality of the investigation: though there had been serious allegations implicating the involvement of law enforcement officials in the disappearances, the operational execution of the investigation was not kept separate from the service to which the implicated officials belonged. The experts therefore recommended that the necessary steps be taken to ensure that the investigation be fully independent and effective. In the case of Radik Ikaev, the experts noted that it is well established that Ikaev was captured and detained by Georgian military personnel, that he was seen by witnesses while in captivity and that he then disappeared. Obviously, these circumstances call for a criminal investigation.

During the work of the experts, it emerged that the man shown on a video recording provided to them, and identified as Giorgi Romelashvili, was not recognised by the mother of Giorgi Romelashvili as her missing

son. The experts nevertheless sought to contribute to the clarification of the fate of Giorgi Romelashvili, and concluded that the tank of which he was a crew member had been completely destroyed on 8 August 2008. It was therefore concluded that it is important to clarify the circumstances of this matter more precisely, as well as to determine the real identity of the soldier on the video in question.

The video recordings depicting Georgian soldiers (Giorgi Antsukhelidze and Kakha Khubuluri) captured

by opposing forces were discussed by the experts with representatives of the *de facto* authorities in Tskhinvali. The experts reported that the position of Tskhinvali was that the cases concerned did not involve disappearances (the bodies of the persons had been delivered to the Georgian authorities) and were therefore outside of the purview of the work of the experts. The experts therefore deduced that there has not been any attempt to ensure accountability of the persons who are shown

perpetrating violent acts against Antsukhelidze, nor has there been any attempt to clarify how Khubuluri apparently came to die while in captivity.

Ensuring the humane treatment of detained persons is a principle which must not be abandoned. Any crimes against such persons must be thoroughly investigated. Whether such crimes occur during armed conflict makes no difference in this regard. Ill-treatment of prisoners constitutes a violation of both human rights and international humanitarian law.

Psychological rehabilitation of the population as a key condition for social stability in Chechnya

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Women's Dignity*

Diagnosing the psychological condition of a society is today a strategic information resource within state programmes to improve the health of a nation. The socio-psychological rehabilitation of the Chechen population is a necessary step towards social stability within the post-war reality. This task is not possible without the provision of psychological services aimed at identifying psychological issues, providing counselling and, where possible, treating psycho-traumatic conditions. To this end a psychological service has been opened at the headquarters of the NGO, Women's Dignity, in the Chechen Republic. Data from this service can be used as an indicator of the psycho-social condition of the population, and may serve as a representative social map of the post-war situation in the Republic for all those working to ensure the psychological, social and political stability of Chechen society. A preliminary analysis of psychological consultations held between June

2009 and June 2010 has revealed the predominant types of psychological problems among clients, as well as giving a tentative diagnostic map of the socio-psychological state of Chechen society, which has lived through two military campaigns in a relatively short period of time.

The files of all 425 clients who underwent psychological consultations between June 2009 and June 2010 were analysed. 83% were women and 27% men. 1,687 appointments were conducted in total. The most common age group was 35-55 years comprising 63.6% of consultations. The largest number of complaints (38.3%) was about relatives who had disappeared during military operations. The issue of missing persons is one of the most acute and difficult to treat through psychological rehabilitation. Psychologists call this an 'unresolved trauma', as waiting for the missing relative makes the trauma 'incomplete' rendering this group extremely complex. Given that this psychological trauma is directly related to military incidents, it is likely to be the predominant 'psychological trauma of war' for the foreseeable fu-

ture.

The next complaint in terms of frequency (32.1%) is the problem of 'constant anxiety'. This could well be an indirect response to military incidents. The states of nervousness, unmotivated fear and anxiety are symptoms of having experienced a state of stress. However, this data could also indicate a sense of uncertainty about the immediate future due to a lack of social security and job stability.

There was an unexpectedly high number of visits regarding issues of domestic and sexual abuse (18.1% of clients, all of them women). This subject is extremely delicate in any society, and in the traditional society of Chechnya it is an absolute taboo. A detailed analysis of this issue within the context of monitoring future consultations will reveal whether this is an overt or a hidden trend. The general and specific conditions causing sexual abuse, both in relation to military incidents and the structural transformations of Chechen society over the last 20 years, need to be identified. In any event, the trends given below are evident, and are symptoms

continued on page 8

continued from page 7

Psychological rehabilitation of the population as a key condition for social stability in Chechnya

of a change in self-consciousness and societal stereotypes regarding the issue of sexual abuse. It is in these trends that we can see the future possibilities for psychological assistance and rehabilitation of this group of clients.

The first trend is that clients are overcoming a huge psychological barrier and are beginning to talk. This is extremely important as the articulation of the problem within society makes the issue of sexual abuse more openly discussed. Victims of abuse, who in the eyes of society are already guilty of having become victims, are given the opportunity for public sympathy, support and socio-psychological rehabilitation.

Secondly, there is the opportunity to give impetus to a mechanism for punishing those guilty of sexual abuse. At present legal proceedings

regarding this issue are especially difficult. Many lawyers say that the domination of traditional cultural stereotypes, in which a victim of sexual abuse has hardly any chance of living a normal, fulfilled life, forces a woman's relatives into accepting financial compensation instead of pursuing a perpetrator through the legal system, and therefore the criminal remains at large and is a potential danger to new victims. Things are no better in the case of victims of sexual abuse during military action – the victim's own low self-worth regarding their position also continues to dominate. If such clients do make it to a psychotherapist, it is generally concluded that they are socially and psychologically isolated from society.

To conclude, a general preliminary analysis of client psychological consultations for June 2009 to June 2010 shows that:

1. post-traumatic stress disorder caused by war is predominant;

2. a lack of social security and the resulting psychological stress is the second most significant trend;

3. male abuse of women within the family and sexual violence more generally have unexpectedly begun to be revealed contrary to the standard taboos of Chechen society;

4. the need for the provision of regular psychological consultations is clear;

5. psychological consultations, along with other forms of social assistance to the population, must become an integral part of a dynamically developing Chechen society.

It is evident that analysing the data from psychological consultations helps to reveal the predominant issues in society and provides indispensable empirical evidence for trying to understand and analyse the psychological state of society. From this information plans can be made for the psychological rehabilitation of the population.

The wind of change

*Nadezhda Ermolayeva, Lawyer,
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In the latter half of 2010 several publications¹ appeared in the Russian print media discussing the need for Russia to develop a mechanism to protect its national sovereignty from unfavourable ECtHR decisions. Such views appear regularly in Russia and these publications would not be taken seriously by the Russian intellectual elite if the initiator of the discussions were someone other than Professor of Law and Chair of the Russian Constitutional Court (CC), Valeriy Zorkin. Zorkin's publication in *Rossiyskaya Gazeta* appears to be a sudden explosion in the long-brewing conflict between Russia and Western democracies.

The trigger for Zorkin's strongly-titled article, *The Limit of Flexibility*, was the ECtHR judgment in the case of *Konstantin Markin v Russia* (No. 30078/06) 7.10.10 (see pg. 14) in which the ECtHR found that Russia had breached the prohibition on discrimination on grounds of sex (Art. 14 in conjunction with Art. 8). Zorkin complained that the ECtHR had criticised the CC's position in this case in a rude and unjust manner.² The case was about discrimination against fathers in the military. The Federal Law on the Status of Military Personnel (No. 76-FZ of 27 May 1998) provides that female military personnel are entitled to maternity and parental leave in accordance with section 11 § 13 of the Labour Code). There is no similar provision in respect of male personnel.

Unlike the CC, the ECtHR ruled that the existing legislative gap violated fathers' rights to respect for family life, and pointed out that this gap would affect a large number of people. The ECtHR deemed the CC's position to be based "on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests of maintaining the operational effectiveness of the army, on the one hand, and of protecting servicemen against discrimination in the sphere of family life and promoting the best interests of their children, on the other" (para. 57). It further noted that Russia's justification of the difference in treatment between men and women was based on "the perception of women as primary child-carers and men as primary breadwinners", and thus on

“gender prejudice”, which cannot be regarded as sufficient (para. 58).

Zorkin argued that the CC’s approach is justified by the inevitable need to protect national security and ensure the effectiveness of the military and is in compliance with Art. 38(1) of the Russian Constitution. However, the author asserts that the CC’s approach does breach these provisions, as among the objects of State protection alongside ‘maternity’ are ‘childhood’ and ‘family’. Furthermore, Art. 38(2) states that “*care for children and their upbringing shall be an equal right and obligation of parents*”. Additionally, it should be noted that the CC’s approach in the present case departs from a previous case about equal entitlement to a military pension. In Ruling No. 428-O of 1 December 2005, the CC found the failure to pay a social pension to the husband of a killed servicewoman on the grounds that only widows are entitled to this pension to be unconstitutional.

Zorkin also disagreed with the ECtHR judgment in *Alekseyev v Russia* (Nos. 4916/07, 25924/08 & 14599/09) 21.10.10 (see pg. 13) in which the ECtHR found the bans on the 2006, 2007 and 2008 Moscow Pride marches to be incompatible with the ECHR and discriminatory. Zorkin noted that the ECtHR’s findings in the case were based on the position previously expressed in *Smith & Grady v UK* (Nos. 3985/96 & 33986/96) 27.12.99, but he failed to understand the importance of the ECtHR’s findings in this case in its jurisprudence. In *Smith & Grady* the ECtHR found restrictions on homosexuals in the armed forces on the grounds of the possible negative attitude by heterosexual service personnel towards sexual minorities to be unreasonable (paras. 102-104). Therefore, we cannot accept Zorkin’s argument that the ban on the Pride March is justified by the possibility of mass disorder as a public reaction to the March, similar to that in Serbia.

Also, in *Alekseyev* the ECtHR directly indicated that the Russian authorities “*failed to carry out an adequate assessment of the risk to the safety of the participants in the events and to public order*” and did not accept the Government’s argument that “*the threat was so great as to require such a drastic measure as banning the event altogether*” (para. 77). It is of concern therefore, that even without such an assessment Zorkin is of the view that the safety of a relatively small group of people could not be assured by the authorities in such circumstances.

Returning to Zorkin’s position, it should be noted that prior to expressing his dissatisfaction with the above Strasbourg judgments, Zorkin provides details of successful dialogue between the ECtHR and the CC. Among his examples of successful collaboration is CC decision No. 2-P of 5 February 2007. Following numerous ECtHR judgments against Russia which have found the ‘nadzor’ (supervisory review) proceedings under the Code of Civil Procedure to be incompatible with Art. 6(1) ECHR, the CC stated that the existing system did not fully comply with the principle of judicial clarity. However, the CC ruled that the corresponding provisions of the Code of Civil Procedure could not be declared unconstitutional as this would create a gap in the legal system and instead recommended that the law be amended (see section 9.2 paras. 4 and 5). Unfortunately, the CC’s failure to take any decisive action in this respect froze the ‘nadzor’ issue by submitting it to the slow process of amending legislation and thus shielding the authorities from harassment from the Committee of Ministers. In support of his primary argument, Zorkin also referred to the German Federal Constitutional Court’s ‘resistance’ to unfavourable Strasbourg judgments. However, Zorkin did not specify which decision he was referring to, thereby hindering any meaningful examination of German practice in this regard.

During the 8th Forum on Constitutional Justice in St. Petersburg in November 2010, Zorkin made yet more ambitious claims stating that: “*If Russia wants to it may denounce the treaty [ECHR]*”. He insisted that Russia needs to develop a mechanism to protect its national sovereignty from Strasbourg judgments. This view was upheld by the majority of CC judges (among them the Vice-Chair of the CC, Sergey Mavrin, and Judge Nikolay Bondar). On 11 December 2010, after a meeting with CC judges, President Medvedev expressed views similar to those of Zorkin.³

Public statements by high-ranking officials about their attitude to the ECHR and ECtHR jurisprudence have a strong influence on Russian law enforcement officials. Russian lawyers, NGOs and public activists have gone to great efforts to destroy the culture of reluctance to implement the provisions of international law in the national legal system. Today, references to the ECHR and ECtHR case law during hearings in district courts no longer merely amuse judges. Their response is not yet in full compliance with ECtHR practice, but at least there is partial compliance. However, these gains could easily be lost.

What should we expect next? A change in Russia’s political climate or a CC decision giving a new interpretation of the binding force of ECtHR judgments? The latter is the most likely and it will be disappointing if such a decision creates a precedent.

1 Zorkin, V.D., 2010. The limit of flexibility. *Rossiyskaya Gazeta*, 29.10.10. Available at: <http://www.rg.ru/2010/10/29/zorkin.html> [in Russian]; Pushkarskaya, A., 2010. Valeriy Zorkin is ready to defend national legal sovereignty. *Kommersant*, 22.11.10. Available at: <http://www.kommersant.ru/Doc/1544077><http://www.kommersant.ru/Doc/1544077> [in Russian]; Newsru.com, 11.12.10. Medvedev: ECtHR verdicts are secondary to Russian legislation [in Russian]. Available at: <http://www.newsru.com/russia/11dec2010/ks.html>.

2 In Ruling No.187-O-O of 15.12.09 the CC found no violation of the Constitution in this case.

3 <http://www.newsru.com/russia/11dec2010/ks.html> [In Russian].

HUMAN RIGHTS CASES

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

EHRAC-Memorial HRC cases

Sultanov v Russia

(No. 15303/09), 04/11/10

(ECHR: Judgment)

Detention pending extradition

Facts

The applicant, Mr Nabi Sultanov, an Uzbek national, moved to Russia in March 2008. In June 2008, the Uzbek Ministry of the Interior charged the applicant with organisation of a criminal group, attempts to overthrow Uzbekistan's constitutional order and dissemination of radical and extreme views. The applicant was arrested and placed in a pre-trial detention facility in Perm, Russia. No time limit was provided for the applicant's detention. The applicant's arrest was extended in August 2008 but, again, no time limit was provided.

In September 2008, the Russian Prosecutor General's Office decided to extradite the applicant. The applicant appealed against this, arguing that he risked ill-treatment and torture if he were to be extradited to Uzbekistan. The Supreme Court of the Russian Federation rejected the applicant's appeal. The applicant was subsequently transferred to another detention facility in Moscow. The applicant was in custody for a total of 22 months. The applicant argued violations of Arts. 3 (risk of ill-treatment if extradited), 5(1) (the unlawfulness and indefinite nature of his detention) and 5(4) (the inability to challenge the lawfulness of his detention).

Judgment

The ECtHR stated that the ill-treatment of detainees is a pervasive and enduring problem in Uzbekistan. It noted that if the applicant were extradited it was probable that he would be placed in custody and he was therefore at serious risk of ill-treatment. The Court held that the applicant's forcible return to Uzbekistan would give rise to a violation of Art. 3 (prohibition of torture).

The Court, in upholding previous case law, found that Russian law governing detention of persons with a view to extradition lacked adequate safeguards against arbitrariness. In this case the Court observed that no time limits were provided for the applicant's detention. He was detained for 22 months without any applications for an extension lodged before the domestic courts. The national system therefore failed to protect him against arbitrariness and his detention was held unlawful, in violation of Art. 5(1).

The Court stated that Russia's Code of Criminal Procedure fell short of providing an avenue for judicial complaints by persons detained pending extradition. The applicant had no formal status under national criminal law since there was no criminal case against him in Russia. He could not, therefore, avail himself of Art. 125 of the Russian Criminal Code in order to judicially review his detention. The Court held that there was therefore a violation of Art. 5(4), given that the applicant had no access to a procedure through which the lawfulness of his detention could have been examined.

The Court dismissed his complaint under Art. 6 (violation of presumption of innocence) on the grounds that the documentation stated clearly that he was accused of offences in Uzbekistan.

Comment

As well as considering the individual merits of the case, the ECtHR acknowledged insufficiencies in Russia's detention and extradition law. Following a precedent from previous cases (see, for example, *Nasrullojev v Russia* (No. 656/06) 11.10.07), the ECtHR stated in *Sultanov* that "the provisions of Russian law governing detention of persons with a view to extradition were neither precise nor foreseeable in their application" and consequently fail to meet the 'quality of law' required by the ECHR. In addition to this, and echoing previous case law again (see, for example, *Ryabikin v Russia* (No.

8320/04) 19.6.08), the ECtHR held in *Sultanov* that Russia's Code of Criminal Procedure "cannot be considered as providing an avenue for judicial complaints by persons detained pending extradition".

Abuyeva & Others v Russia

(No. 27065/05), 02/12/10

(ECHR: Judgment)

Right to life

Facts

The 29 applicants were residents of Katyr-Yurt, Chechnya, when Chechen fighters captured it in February 2000. In response, the federal military assaulted the town using aviation bombs, missiles and other weaponry. The bombardment resulted in the death of 24 of the applicants' relatives and injuries to some of the applicants.

Between 2000 and 2001, an official criminal investigation was carried out by the State in which 11 of the applicants were granted victim status. In March 2002 the military prosecutor's office terminated the proceedings upon finding that the actions of the federal military had been appropriate, proportionate and in line with applicable laws. However, it was not until 2005 that the applicants learnt that the proceedings had been terminated.

On 6 June 2005, 26 of the applicants lodged a complaint with the military court of the North Caucasus Military Circuit, and in November 2005 the investigation was resumed with reference to the conclusions made by the ECtHR in *Isayeva v Russia* (No. 57950/00) 24.2.05. However, in June 2007, the investigation was again terminated after reaching the same conclusions as in March 2002.

Judgment

The ECtHR considered it to be of paramount importance in this case that the incident was a major military action resulting in many deaths, the investigation of which the applicants could legitimately assume would be treated propor-

tionately to its gravity by the authorities. It concluded that the operation in Katyr-Yurt, though having a legitimate aim, was not planned and executed with the requisite care for the lives of the civilian population, in violation of the State's obligation to protect the right to life (Art. 2) of the applicants and their relatives. It also found that the criminal investigations carried out by the State were incapable of identifying those responsible for the decisions regarding the bombardment and making them accountable, and were therefore ineffective, contrary to the State's obligations under Art. 2 and Art. 13 in conjunction with Art. 2. The applicants were collectively awarded €1,720,000 in non-pecuniary damages.

Comment

Of significance was the ECtHR's application of Art. 46 (binding force and execution of judgments). In response to the State's continued failure to prevent ongoing violations of Arts. 2 and 13 since the Court's earlier judgment in *Isayeva*, the ECtHR left it to the Committee of Ministers rather than the State to address what, in practical terms, Russia is required to do to comply with the judgment. At the same time it stated that it was 'inevitable' that this should include a 'new, independent investigation'. This issue is discussed further by Professor Leach in his article on pg. 1.

Gisayev v Russia

(No. 14811/04), 20/01/11

(ECHR: Judgment)

Torture

Facts

The applicant complained that he was kidnapped from his home in Grozny, Chechnya, in front of his family, taken to three separate locations, and tortured by Russian State agents for ten days. In particular, the applicant had electric currents passed through his body, was beaten for hours at a time, interrogated about Chechen rebel links, and subjected to threats to his life and those of his family. The applicant was released after his relatives paid a ransom of 1,500 USD. The applicant suffered from severe physical

and psychological injuries. The Russian authorities opened an investigation into the events which is still ongoing.

The applicant complained of torture (Art. 3), unlawful deprivation of his liberty (Art. 5), a lack of an effective domestic remedy (Art. 13), a violation of his right to private and family life (Art. 8) and intimidation while his application was pending before the ECtHR (Art. 34).

Judgment

The ECtHR found violations of Arts. 3, 5 and 13 and awarded the applicant 55,000 EUR in damages. The applicant gave a convincing account, supported by witnesses, that he was abducted by State agents and held in unacknowledged detention for fifteen days, about which the Government was unable to give any explanation or justification, thus constituting unlawful detention contrary to Art. 5. The applicant's medical evidence and witness statements supported a finding of ill-treatment that amounted to torture (Art. 3). The applicant was kept in a permanent state of physical pain and anxiety owing to uncertainty about his future and the level of violence inflicted on him. He had injuries and ongoing health problems, which were undisputed by the Government. The authorities had made no tangible effort in terms of an investigation to identify the perpetrators or bring them to justice (Art. 13). The Court stated that since the Russian Government had failed to submit any documentation in relation to the applicant's abduction, ill-treatment and the purported investigations undertaken, it was able to draw inferences supportive of the applicant's complaints.

In relation to Art. 34 (intimidation), the Court found that the applicant failed to provide a coherent account of any instances of intimidation (in stark contrast to the rest of his evidence). It was held that in respect of his claim under Art. 8, the unlawful search of his property, it was unlikely that he had exhausted domestic remedies. Nor was there any evidence to substantiate his claim of discrimination under Art. 14. The applicant did not recover the ransom as the ECtHR found that it was unsubstantiated.

Comment

The ECtHR reiterated that in order to find a violation in cases involving allegations of torture, it has to be satisfied "beyond reasonable doubt". However, this burden of proof can be established if "sufficiently strong, clear and concordant inferences or...similar unrebutted presumptions of fact" exist. Accordingly, if the State refuses to supply documentation in relation to *prima facie* human rights violations, the burden of proof shifts to the State, firstly, to "conclusively" demonstrate why the documents cannot be submitted and, secondly, to "provide a satisfactory and convincing explanation of how the events in question occurred". Furthermore, in cases where the authorities have failed to properly investigate ill-treatment by State agents, applicants do not need to bring separate civil proceedings in order to exhaust domestic remedies as "even the most convincing evidence to the contrary furnished by a plaintiff [in civil proceedings] would often be dismissed as 'irrelevant'."

Amuyeva & Others v Russia

(No. 17321/06), 25/11/10

(ECHR: Judgment)

Right to life

Facts

The applicants lived in the village of Gekhi-Chu, Chechnya. On the evening of 6 February 2000, the village came under fire from Russian military forces. On 7 February military helicopters and planes fired missiles on the village. The applicants took shelter along with other neighbours in the first applicant's basement. When the firing stopped Russian military servicemen ordered everyone into the courtyard, took aside four young men from the village (relatives of the applicants) and took them to another address on the same street. The applicants heard gunshots and later found the four men dead with gunshot and knife wounds on their bodies, along with the body of a fighter who had been shot earlier in an exchange of fire. A criminal investigation was instigated; however, it was suspended in December 2000 due to a failure to identify the culprits. The applicants did

not learn of the suspension until November 2005. The applicants complained of violations of Art. 2 (right to life) Art. 13 (effective remedy) and Art. 14 (discrimination).

Judgment

Russia contended that the complaint should be declared inadmissible as the investigation into the murders had not yet been completed and that domestic remedies had not been exhausted as civil complaints were not pursued. The applicants argued that they had not been obliged to apply to the civil courts in order to exhaust domestic remedies and that they had complied with the six-month time limit because they had only become aware of the ineffectiveness of the domestic investigation in November 2005.

The ECtHR held that under the requirement of expedition an applicant must bring a case within a matter of months, or at most, a very few years after the events. The ECtHR viewed that, as the closest relatives of the deceased, the applicants bore a duty to take steps to keep track of the investigation's progress. However, in the present case the ECtHR considered that the applicants complied with the requirement to submit their case within "a very few years after the events". The Court stated that it took special note of the conduct of the applicants after 2005, after which they pursued the investigation actively, in concluding that they were within the time limit.

Russia did not dispute the applicants' claims that their relatives had been killed by State agents and did not provide another explanation of events or a copy of the investigation files. The ECtHR noted it had developed a number of general principles relating to the establishment of facts in dispute and it takes into account the conduct of the parties. In the absence of any justification in respect of the use of lethal force by State agents, the ECtHR held that there had been a substantive violation of Art. 2.

The investigation had failed to identify and question the service personnel involved and bring charges against those responsible. The applicants had made use of Art. 125 of the Code of Criminal Pro-

cedure to review the prosecutor's decisions but could not be expected to review every decision. Therefore the Court also found a procedural violation of Art. 2 in that there was no effective investigation. There was a violation of Art. 13, but no evidence was given to show that there was a violation of Art. 14.

Comment

The Court stressed that the present case should be clearly distinguished from situations where information purportedly casting new light on circumstances of the killing may revive the procedural obligation to investigate, even though the substantive claim under Art. 2 and the alleged ineffectiveness of an investigation would be out of temporal jurisdiction.

EHRAC-Planet of Hopes cases

Karpacheva & Karpachev v Russia

(No. 34861/04), 27/01/11

(ECHR: Judgment)

Freedom of movement

Facts

The applicants were mother and son and lived in Ozersk, a closed town in the Chelyabinsk Region of Russia where the Mayak nuclear fuel reprocessing plant is located. In 2002 the son was sentenced to four years' imprisonment following a criminal conviction. Upon his release, the Ozersk Town Administration and the regional division of the Federal Security Service (FSB) prevented him from returning to the closed town or obtaining permanent residence there on the basis of his criminal conviction. The authorities' refusal to grant permanent residence had been found unlawful by the domestic judicial authorities but these judgments were not enforced.

Judgment

The ECtHR noted that it was common ground between the parties that the authorities' rejection of the application for permanent residence in Ozersk constituted an interference with the son's right to freedom to choose his own place of residence as protected by Art. 2 of Protocol 4 ECHR. The Russian Government contested that the interference had been

in accordance with the law and necessary in a democratic society.

The ECtHR found a violation of Art. 2 of Protocol 4, as it noted that the authorities' refusal to ensure permanent residence had been found unlawful by the domestic judicial authorities and nothing in the material before it supported the Government's assertion to the contrary. Accordingly, the interference with the second applicant's right to choose his own residence was not imposed in accordance with the law.

Other ECHR cases

Korolev v Russia

(No. 25551/05), dec. 01/07/10

(ECHR: Admissibility decision)

No significant disadvantage

Facts

In July 2002, the applicant was awarded 22.50 RUB for court costs against the Head of the Passport and Visa Department. In December 2003, the applicant issued proceedings against the inactivity of the bailiff to fulfil a writ of execution to recoup the costs. On appeal, the Sverdlovskiy Regional District Court upheld the decision that the applicant had not met the procedural requirements to pursue his claim. The applicant complained that the authorities' failure to pay, and the domestic courts' dismissal of his claim, violated his rights under Art. 6 ECHR (right to a fair trial) and his right to property under Art. 1 of Protocol 1.

Judgment

The ECtHR examined whether the application met the new admissibility criteria under Art. 35(3)(b), which states that an application should be ruled inadmissible where "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

First, the ECtHR found that the applicant had not suffered "significant disadvantage" as the sum owed amounted to less than a euro, described as "tiny", "neg-

ligible” and “petty”. Secondly, the case did not require an examination on the merits as it had reviewed the non-enforcement of Russian judicial decisions many times, and this case added nothing further. Finally, the ECtHR held that this case had received due domestic judicial consideration.

Comment

Given that the aim of the amendment is to increase the efficiency with which the ECtHR deals with its caseload, it is unlikely that the ECtHR will produce such in-depth inadmissibility decisions in the future. Although not the first Art. 35(3)(b) inadmissibility decision, this case offers helpful guidance.

The ECtHR stated that the interpretation of “significant damage” was flexible and not open to exhaustive definition and continued that: “a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court”. The assessment of the level of severity is both objective and subjective. Where the applicant suffers no significant disadvantage, the middle criterion is a “safeguard”, compelling the examination of applications where, for example, clarification regarding states’ ECHR obligations is needed.

Alekseyev v Russia

(Nos. 4916/07, 25924/08 & 14599/09), 21/10/10

(ECHR: Judgment)

Freedom of assembly

Facts

The applicant organised multiple demonstrations between 2006 and 2008, seeking to draw attention to discrimination against the gay and lesbian minority in Russia, to promote respect for human rights and freedoms and to call for tolerance on the part of the Russian authorities and the public towards this minority. Each protest was banned by the Moscow authorities, initially on moral and then on safety grounds. When the applicant led a protest despite the bans, the protesters were attacked by a counter-demonstration. The authorities banned

subsequent protests on the grounds of potential breaches of public order and violence against the participants. The applicant submitted alternative route proposals, gave notice to the President of Russia and brought several court actions, but none dislodged the ban.

Judgment

The ECtHR found a violation of Art. 11 (freedom of assembly), holding that the ban did not correspond to a pressing social need and was thus not necessary in a democratic society. The mere existence of a risk was held insufficient evidence that the proposed events would cause the controversy claimed by the Government. The ECtHR rejected the Government’s argument that a lack of European consensus on conferring substantive rights on homosexuals also stayed their right to campaign for such rights. The Court found a violation of Art. 13 (right to an effective remedy) in conjunction with the violation of Art. 11. Additionally there was held to be a violation of Art. 14 (prohibition of discrimination), on the grounds that Russia failed to provide any justification that the applicant’s discrimination on grounds of sexual orientation was compatible with ECHR standards. The applicant was awarded €12,000 in respect of non-pecuniary damage.

Comment

In rejecting the argument based on the risk of public disorder from counter-protesters, the ECtHR outlined what was required for such an argument to run. The authorities must conduct a preliminary assessment of risk, producing concrete estimates of the scale of the disturbance, so as to evaluate the resources necessary for neutralising the threat of violent clashes. If they had done so in the instant case, they would have found a figure of around a hundred counter-protesters, which would not have overwhelmed Moscow’s police. This reasoning added to the trend leading from *Wilson, NUJ & Others v UK* (Nos. 30668/96, 30671/96 & 30678/96) 2.7.02, that Art. 11 entails a positive obligation to secure the effective enjoyment of the right to freedom of association and assembly and cannot be

reduced to a mere duty on the state not to interfere in the right.

Kurić & Others v Slovenia

(No. 26828/06), 13/07/10

(ECHR: Judgment)

Right to private life

Facts

Before 25 June 1991, the day Slovenia declared independence, the applicants were citizens of both the Socialist Federal Republic of Yugoslavia (SFRY) and one of its constituent republics other than Slovenia. They had permanent resident status in Slovenia as SFRY citizens. Following independence, the applicants became subject to the Aliens Act and their names were ‘erased’ from the Register of Permanent Residents. The applicants alleged that they were not notified of their removal from the Register and were not therefore in a position to apply for citizenship within the six-month time limit allowed by the Citizenship Act. After 26 February 1992 those who had not applied for citizenship became aliens. Some of the applicants were also unable to acquire citizenship of any other former SFRY state and have become, *de facto*, stateless persons. The applicants claimed that Slovenia had breached Arts. 8 (right to respect for private life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) ECHR as they had been denied permanent residence or citizenship and that Slovenia had failed to adopt appropriate legislative measures to regulate the legal status of the ‘erased’.

Judgment

Slovenia submitted that the application was incompatible with the ECHR *rationae temporis* as the ECHR came into force in Slovenia on 28 June 1994. However, the ECtHR found that it may have regard to facts prior to ratification if the violation is of a continuing nature.

The ECtHR held that while the right to acquire or retain a nationality is not within the freedoms guaranteed by the ECHR, the social ties between settled migrants and the community in which they are living constitute part of the concept of private life within the meaning

of Art. 8. The applicants had all spent a substantial part of their lives in Slovenia and had settled there as SFRY citizens, therefore the ECtHR held that the prolonged refusal of the Slovenian authorities to regulate the applicants' status and pass appropriate legislation constituted an interference with their Art. 8 rights.

The ECtHR further noted that on 4 February 1999, the Constitutional Court (CC) held the Aliens Act to be unconstitutional as it failed to set out the conditions for the acquisition of permanent residence by those citizens of the SFRY settled in Slovenia at the material time. The CC also held subsequent legislation (2003) passed to regulate the situation of the 'erased' to be unlawful since it failed to grant retroactive permanent residence permits. The ECtHR found no reason to depart from the CC's findings and held that the interference constituted a violation of Arts. 8 and 13. In view of its findings under Art. 8, the ECtHR did not feel it was necessary to consider if there had been a violation of Art. 14. Under Art. 46 (execution of judgments) the ECtHR suggested that issuing retroactive permanent residence permits would satisfy its judgment.

Konstantin Markin v Russia

(No. 30078/06), 07/10/10
(ECHR: Judgment)

Gender-based discrimination

Facts

The applicant is a Russian national and military serviceman. Subsequent to his divorce on 30 September 2005, the applicant's two children (including a newborn baby) were to live with him. On 11 October 2005, the applicant requested three years' paternity leave, but

this was rejected on the grounds that the three-year leave could only be granted to servicewomen. Instead the applicant was granted his entitlement to three months' parental leave; however, on 23 November 2005, he was recalled to duty.

Further to unsuccessful applications to the Military Court of the Pushkin Garrison and the Military Court of the Leningradskiy Command, in October 2006 the head of the applicant's military unit granted the applicant parental leave until September 2008 and 200,000 RUB financial aid, in view of his difficult family situation. However, this decision met with strong criticism from the Military Court of the Pushkin Garrison.

The applicant, unsuccessfully, took his case to the Constitutional Court (CC) where he challenged the incompatibility of the provisions of the Military Service Act concerning the three-year parental leave with the principle of equality between men and women as guaranteed by the Constitution. The CC declared that the limitation imposed on servicemen in respect of parental leave was in recognition of the negative effect it would otherwise have on the fighting power and operational effectiveness of the armed forces and that the provision was compatible with the Constitution.

The applicant brought claims to the ECtHR under Art. 8 (right to private and family life) and Art. 14 (prohibition of discrimination).

Judgment

The ECtHR held that the leave period and financial aid already granted to the applicant had not eliminated his victim status as this had not served as recognition of, or redress for, the breach of his ECHR rights. Neither were they sufficient to

justify striking the application out under Art. 37, since they were granted on an exceptional basis and the Military Service Act which provided the legal basis for the repeated refusals to grant the applicant parental leave remained in force. Consequently, there was an important issue of general interest which required further consideration.

The ECtHR found the argument relating to operational effectiveness to be unconvincing. No evidence was offered to support the theory that the numbers of servicemen simultaneously taking parental leave would be so significant as to undermine the fighting power of the army. The CC had based its finding on pure assumption without weighing up the conflicting interests of the operational effectiveness of the army against protecting servicemen from discrimination in the sphere of family life. Thus the exclusion of servicemen from the entitlement to parental leave violated Art. 8 in conjunction with Art. 14. Under Art. 46 (execution of judgments) the Court recommended that the legislation in question be amended.

Comment

This case is notable for its approach to victim status and individual redress (failing to address the violation), therefore requiring further examination by the ECtHR. In its reasoning on equality of treatment the ECtHR also referred to the 'choice' presented by the Government that the serviceman could resign from the army. This was found to be an unfair choice, particularly considering the unique qualifications for the army that are not easily translated into civilian life and jobs.

NEWS IN BRIEF

Kotov v Russia

On 12 January 2011, the Grand Chamber held an oral hearing in the case of *Kotov v Russia* (No. 54522/00) 14.1.10 (Chamber). Mr Kotov alleged that he had suffered violations of his rights under Art. 1 of Protocol 1 ECHR as well as Arts. 6 and 13 due to an interference

with his property rights (initially in the form of a deposit in a savings account). In 1994 Mr Kotov had deposited a sum of money in a savings account with a private bank. Within a few months the bank informed Mr Kotov that it was unable to return to him either his initial deposit or the interest due to him upon it. Mr

Kotov commenced domestic proceedings and succeeded in obtaining a judgment in his favour against the bank but while proceedings were ongoing the bank went into liquidation. As an individual deposit holder, Mr Kotov's claim against the bank should have taken first priority in the distribution of the bank's assets. However,

the liquidator failed to follow the provisions of domestic law in the distribution process and instead divided the bank's assets between an arbitrarily created group of creditors which did not include the applicant. Mr Kotov complained to the domestic courts, which subsequently found in his favour and ordered the liquidator to remedy the breaches of domestic law which had occurred during the distribution process. This judgment was never enforced and the applicant's subsequent attempt to bring proceedings against the liquidator personally were not successful. Mr Kotov was represented at the Grand Chamber by EHRAC-Memorial HRC.

Court fees petition

A high-level Council of Europe (CoE) conference was held in Turkey in April 2011 to discuss the follow-up to the Interlaken Declaration and Action Plan. One of the proposals considered was the charging of fees to individuals submitting petitions to the ECtHR. A group of NGOs (including EHRAC) is concerned that this proposal undermines and is detrimental to the right of individual petition. To this end a petition outlining the concerns was presented to the CoE before the conference. The text of the petition can be viewed at <http://www.amnesty.org/en/library/info/IOR61/005/2011/en> along with the names of the 270 civil society organisations that are signatories to it.

Guide to ECHR admissibility criteria

The ECtHR has produced a *Practical Guide on Admissibility Criteria*. The Guide addresses provisions C-6 (a) and (b) of the Interlaken Declaration, which articulate the need to provide potential applicants with comprehensive and objective information on the application procedure. The Guide provides definitions of the notions of individual applications and victim status and then examines inadmissibility on the grounds of procedure, jurisdiction and merit. It is available at: http://www.echr.coe.int/NR/rdonlyres/91AEEEBC-B90F-4913-ABCC-E181A44B75AD/0/Practical_Guide_on_Admissibility_Criteria.pdf.

New twin-track supervision system for ECtHR judgments

On 1 January 2011, a new twin-track supervision system for the execution of ECtHR judgments by the Committee of Ministers (CoM) came into force. The new system is designed to ease the CoM's heavy caseload and is implemented under the Interlaken Action Plan. Under the new system, all cases are assigned to the 'standard' procedure unless the nature of the case warrants consideration under the 'enhanced' procedure. The standard procedure is based on the principle of subsidiarity – state parties should ensure the effective execution of judgments. The enhanced procedure only applies to cases that require the intensive involvement of the Secretariat (interstate cases, cases necessitating urgent individual measures, pilot judgments or judgments raising structural and/or complex problems). Member states or the Secretariat can request that cases be transferred from the standard to the enhanced supervision process. All cases that became final after 1 January 2011 are being examined under the new system. Earlier cases are being absorbed into the new system over the course of 2011. Further information on the new procedures can be found at: <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694239&SecMode=1&DocId=1616248&Usage=2>.

ECtHR prioritisation of cases

In June 2009 the ECtHR amended Rule 41 of its Rules of Court concerning the order in which it deals with cases. Instead of dealing with cases in chronological order, the ECtHR will have regard to the importance and urgency of the issues raised. The aim is to ensure that the most serious cases and the cases which disclose the existence of widespread problems are dealt with more rapidly. Low priority is given to repetitive cases, cases which follow a pilot judgment, and cases which are identified as failing to satisfy the admissibility conditions. A table setting out the order of priorities can be viewed at: http://www.echr.coe.int/NR/rdonlyres/AA56DA0F-DEE5-4FB6-BDD3-A5B34123FFAE/0/2010__Priority_policy__Public_communication.pdf.

1,549 Russia-Georgia conflict cases inadmissible

The case of *Khetagurova & Others v Georgia* joined 1,549 applications against Georgia about the Russia-Georgia hostilities of August 2008. On 14 December 2010, the ECtHR struck these cases from its list deeming that the applicants no longer wished to pursue their cases, as no reply had been received from their representatives in response to ECtHR requests for information and submissions.

From Judgment to Justice

In November 2010, the Open Society Justice Initiative published a report entitled *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*. This examines the UN human rights bodies and the European, Inter-American and African systems and the extent to which respondent States comply with their decisions. It focuses on and points out that, to date, relatively little attention has been paid to the degree to which, and under what conditions, states implement their judgments and gives recommendations as to how implementation mechanisms could be improved at both the domestic and the international level. The report is available at: [http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/publications/from-judgment-to-justice20101122](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/from-judgment-to-justice20101122).

7th PACE report on the implementation of ECtHR judgments

Rapporteur Christos Pougourides was mandated by PACE to address the problematic instances of delayed and/or non-execution of ECtHR judgments. His report, published on 9 November 2010, includes the Parliamentary Assembly's draft resolution and recommendations on the issue of judgment implementation. The report also includes a memorandum explaining the background to the issues at hand and an overview of which states have substantial implementation problems. The report can be viewed at: http://www.assembly.coe.int/Communication/20101109_arretsCE_E.pdf.

EHRAC receives funding from a number of grant-making institutions, but is very much in need of your assistance to support the costs of some of our project activities.

EHRAC would be most grateful for any help you are able to give. If you would like to make a donation, please complete this form and send it to us with your donation.

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About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University and is part of the Faculty of Applied Social Sciences (FASS). Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights through the means of knowledge transfer initiatives to build partnerships to 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 the South Caucasus, and also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 285 cases involving more than 1,000 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. For more information, please see: www.londonmet.ac.uk/ehrac.

Internship opportunities

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

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EHRAC partnerships

We have worked in partnership with the Russian NGO Memorial Human Rights Centre since EHRAC was founded in 2003 and our close cooperation continues on substantial and varied litigation work, and training and capacity building initiatives, as well as awareness raising about the European Court mechanism. Since 2003 we have developed other partnerships in Russia and expanded our work into Georgia in 2006 and Azerbaijan in 2010, as well as cooperating with many other NGOs, lawyers and individuals across the former Soviet Union. The main focus of our work with all our partners is on mentoring joint project lawyers to develop their professional skills and independence as litigators. In the UK we also work in partnership with the Bar Human Rights Committee and the International Human Rights Committee of the Law Society of England and Wales. The contact details of our regional partners are provided below.

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