

EHRAC

Bulletin



Russia's New Law on Foreign Agents Raises Significant Concerns for Civil Society

05.11.2012, Awaz Raoof, Lawyer

Russia has recently adopted a series of measures which could potentially restrict civil society activities, and have disastrous repercussions for civil liberties and human rights within the State.

In July 2012, President Vladimir Putin signed into law a controversial bill, under which non-governmental organisations (NGOs) in receipt of foreign funding and conducting political activities must register as 'foreign agents', and comply with an onerous disclosure and reporting regime (the 'Law'). Failure to comply with the new regime can result in the suspension of the NGO and/or criminal convictions for the individuals responsible. In Oc-

tober 2012, Russia's parliament also approved amendments which would broaden the definition of 'treason' to include all forms of assistance to foreign states or international organisations directed at harming Russia's security.

Although it is premature to determine the precise impact of these measures, there is a real risk that their wide and ambiguous provisions could lead to self-censorship, intrusive government surveillance, and arbitrary interferences with the rights to freedoms of expression and association.

The Law

Under the Law, which enters into force on 21 November 2012, an NGO

which receives or intends to receive funding from a 'foreign source', and which conducts or intends to conduct 'political activities', must register as an NGO 'performing the functions of a foreign agent' ('Foreign Agent'). The regime imposes several obligations on Foreign Agents, the key aspects of which can be categorised under the following headings: Registration, Public Disclosure, and Financial Reporting.

Registration: Details of the registration procedure are not laid out in the Law. It is expected that the author-

continued on page 2

Editorial

In the region in which EHRAC operates, it is not unusual for repressive laws to be introduced which specifically target civil society organisations. Of real concern in Russia at present is a new Federal law which imposes an obligation on NGOs in receipt of foreign funding to identify themselves as 'foreign agents' - which therefore represents a serious threat to their ability to operate effectively and independently. This new law is discussed in an article by Awaz Raoof.

Also in this edition of the Bulletin, Siranush Sahakyan (Protection of Rights without Borders) considers the extent to which Article 3 ECHR

(the prohibition of torture) and the Convention against Torture have been implemented in Armenia. By analysing recently communicated cases, Kirill Koroteev (Memorial) considers 'what's in store for Georgia at the European Court', and Dmytro Kotlyar (former Deputy Minister of Justice, Ukraine) discusses a lesser-known European Convention provision - Article 18 - which prohibits the authorities from applying permissible Convention restrictions for ulterior and arbitrary purposes (as may be the case in politically motivated proceedings).

Prof. Philip Leach
Director, EHRAC

Contents

Russia's New Law on Foreign Agents Raises Significant Concerns for Civil Society	1
Editorial	1
Implementation of CAT and Article 3 of the European Convention on Human Rights in Armenia: Challenges and achievements	3
What's in store for Georgia at the European Court? An analysis of recently communicated cases	4
The challenges of arguing Article 18 at the European Court	6
Running in Circles - Defamation recriminalised in Russia	7
Human Rights News	9
Human Rights Cases	10
Contact Information	16

ised governmental body responsible for administering the scheme (likely to be the Ministry of Justice) will determine these details. There is a concern that the registration procedure will create significant administrative and financial burdens for registering entities.

Public Disclosure: Materials published and/or distributed by the Foreign Agent must disclose its status as a 'foreign agent'. The Russian translation of the term 'foreign agent' carries a particular stigma, it being a synonym for the term 'foreign spy'. This disclosure obligation is therefore likely to stain the Foreign Agent's reputation and publications, and to provoke heightened governmental surveillance of the disclosing entity.

Financial Reporting: Foreign Agents are required to meet onerous financial reporting obligations. These obligations are likely to demand significant time and resources, restricting the Foreign Agent's ability to perform its day-to-day functions.

Certain types of NGOs are excluded from the scope of the Law, including state entities. However, it is anticipated that most human rights NGOs operating within Russia will require registration as Foreign Agents under this new regime. The deputy head of Russia's Central Election Commission, Leonid Ivlev, has reportedly stated that election observers from non-governmental organisations registered as Foreign Agents must openly declare their registered status.¹ Due to the ambiguous definitions of 'foreign sources' and 'political activities', the status of NGOs performing a hybrid of political and non-political activities is not clear.

The sanctions for failing to comply with the regime are extremely onerous, and prone to arbitrary implementation. An authorised government official has the power to suspend the activities of an NGO which (s)he considers to be a Foreign Agent, and which has failed to apply for registration. The risk of arbitrary suspension

is compounded by the ambiguous definition of Foreign Agent, which is likely to result in disputes between the government and NGO over the nature of the NGO's activities. The legal consequences of the suspension are unclear. In addition, the Law introduces criminal sanctions in respect of the regime, which can result in fines or imprisonment.

The debilitating effects of the Law have already started to emerge. Representatives of many human rights NGOs operating in Russia have reported that they will refuse to register themselves as Foreign Agents, with some admitting that they will need to cut back their activities and staff as a result.²

Recent Deterioration of Human Rights Standards in Russia

Several international bodies have expressed their concern over the Law, as well as the recent erosion of human rights standards in Russia more generally. The United Nations High Commissioner for Human Rights, Navanethem Pillay, recently urged the Russian Government *"to avoid taking further steps backwards to a more restrictive era, and to make strenuous efforts to limit the detrimental effects of the laws and amendments already passed over the last few weeks"*.³

Similarly, in a resolution adopted on 13 September 2012, the European Parliament expressed its *"concern about the deteriorating climate for the development of civil society in Russia, in particular with regard to the recent adoption of a series of laws governing demonstrations, NGOs, defamation and the internet which contain ambiguous provisions and could lead to arbitrary enforcement"*.⁴ It called on the Russian authorities to amend the Law *"to safeguard citizens' associations that receive financial support from reputable foreign funds from political persecution"*.⁵

The recent wave of draconian laws has not shown signs of breaking. In October 2012, Russia's parliament approved amendments drafted by

the Federal Security Service, which would broaden the definition of 'treason' to include financial, technical, advisory or other assistance to foreign states or international organisations which are directed at harming Russia's security. The new definition could potentially be used to criminalise legitimate civil society campaigns and political debate, resulting again in a prison sentence for the person convicted of such crime.

Next Steps

Despite the ambiguity and uncertainty surrounding the interpretation, application and enforcement of the Law on Foreign Agents, it is without doubt a potentially harmful measure which could stifle civil society activities, with disastrous consequences for, in particular, the rights to free speech and association. These concerns are already manifesting themselves in practice, as many human rights organisations refuse to comply with the law, forcing them to downsize their operations. The President is also expected to imminently sign into law the expanded definition of treason. In light of the recent deterioration of human rights standards in Russia more generally, these measures deserve close attention by the international human rights monitoring bodies and the wider international community.

1 RIA Novosti, 2012. Election Official: Observers Must Reveal NGO Status, [online]. Available at: <http://en.rian.ru/russia/20120918/176040990.html> [accessed 10 October 2012].

2 RIA Novosti, 2012. HR groups blast 'foreign agents' bill, plan to refuse outside aid, [online]. Available at: <http://rt.com/politics/foreign-agents-rights-activists-120/> [accessed 10 October 2012].

3 OHCHR Press Release, 18 July 2012. Pillay concerned about series of new laws restricting human rights in Russian Federation, [online]. Available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12366&LangID=E> [accessed 10 October 2012].

4 European Parliament, Resolution adopted 13 September 2012, 2012/2789(RSP), [online]. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0352+0+DOC+XML+V0//EN&language=EN> [accessed 10 October 2012].

5 *ibid.*

Implementation of CAT and Article 3 of the European Convention on Human Rights in Armenia: Challenges and achievements

*Siranush Sahakyan, President,
Protection of Rights without Borders*

Armenia became a full member of the Council of Europe in 2001. In accordance with opinion no. 221(2000) of the PACE, Armenia undertook a wide range of obligations, including (in 2002) ratifying the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Armenia acceded to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1993, and in 2006 ratified the Optional Protocol to the UNCAT. In 2008, within the framework of the National Preventive Mechanism for the prevention of torture, a Human Rights Defender was appointed by law.

Since ratifying these documents, steps have been taken to fulfill their international obligations, including reforms to the penitentiary system. Control over the penitentiary system was transferred from the police to the Ministry of Justice, which saw a significant reduction in incidences of torture and ill-treatment. Steps were also taken to rebuild and renovate penitentiary institutions, and, recently, cooperation was established between the police and the Chamber of Advocates to guarantee the prompt involvement of defense attorneys in criminal cases.

Despite these positive achievements, serious problems persist which prevent the full and effective implementation of the relevant treaties in Armenia, in particular with respect to compliance with the prohibition of torture.

Compliance with the UNCAT definition of torture:

The Criminal Code (CC) provides no specific provision on 'torture' as recognised and defined by Article 1(1) of the UNCAT.¹ Article 119 of the CC fails to correctly define torture, calling it any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. However, if the act intentionally inflicts life-threatening injuries, it will fall under other Articles of the CC. The corpus delicti of torture - the elements of coercive, punitive or discriminatory purpose, and the official capacity of the perpetrator, are entirely omitted. Article 119 is applicable in the context of relations between two people, without the involvement of State agents. In fact, the perpetrators of this crime frequently avoid criminal prosecution through amnesty or pardon.

Article 341(2) of the CC is more specific and provides that that a judge, prosecutor, investigator or body of inquest, who uses torture or other violence to compel a witness, suspect, accused or victim to testify or compels an expert to issue a false opinion, is punishable by three to eight years imprisonment. This article criminalises torture as instances of coercion to give testimony or bear false witness, but only when testimony is given for the purpose of a trial, and it does not cover acts of torture by public officials in other contexts, such as in penitentiary institutions or the armed forces.

Adequacy of preventative measures (police, penitentiary system and army):

After a crime is reported to the police, they can conduct an investiga-

tion before the criminal case officially opens. In these situations, people can be summoned before the police without being designated any formal status (e.g. suspect, defendant or witness). At this stage, there is no right to notify a relative, or have access to an attorney or doctor. These rights can only be enjoyed once the protocol on arrest is drawn up. According to Article 131.1(1) of the Criminal Procedure Code (CPC), the protocol on arrest should be drawn up within three hours of bringing the suspect before the investigating authority. However, in practice, this period often significantly exceeds three hours. This 'unofficial' period of questioning is clearly open to abuse and liable to be used for eliciting confessions and/or collecting evidence before the apprehended person is formally declared a criminal suspect and informed of their rights.

Effectiveness of investigations into torture allegations:

The independence and effectiveness of investigations into allegations of torture are compromised as the police themselves lead such investigations. A Special Investigation Service was established in 2007 to investigate cases involving alleged abuse by public officials. However, in practice, they become involved only after the criminal case is officially opened. Before that, the police are responsible for verifying the grounds for instituting a criminal case. Consequently, allegations of torture rely on being investigated by the very entity to which the perpetrators of torture themselves belong. The ineffectiveness of investigations into allega-

continued on page 4

continued from page 3

Implementation of CAT and Article 3 of the European Convention on Human Rights in Armenia: Challenges and achievements

tions of ill-treatment is illustrated in the recent landmark case of *Virabyan v Armenia* (No. 40094/05) 02.10.12 in which, for the first time, Armenia was held accountable for torture in police custody under Article 3 (substantive and procedural) ECHR.

Examination of torture allegations by the courts and assessing the admissibility of 'tainted' evidence:

While international law and national legislation place a strong obligation on State authorities to investigate allegations of torture, this obligation is not always met. Judges also have an obligation to assess the admissibility of evidence. Armenian law clearly prohibits the use of evidence obtained through the use of torture, coercion or fraud, as a result of a violation of the rights of the suspect or the accused, or procedural violations.² However, in practice, judges largely ignore or deny motions of the defence to exclude evidence they claim to be inadmissible. Moreover, domestic judges are often more inclined to rely on the pre-trial testimonies of the defendants and witnesses, rather than oral testimonies given in court, especially if they contradict one another.³

Conditions of detention and treatment in custody:

Overcrowding in penitentiary institutions causing inhuman and degrading conditions is a serious problem in Armenia. The Court has held that severe overcrowding and denial of basic needs (such as beds and sufficient food) during a 10 day period in detention amounted to degrading treatment contrary to Article 3.⁴ In *Harutyunyan v Armenia* (No. 36549/03) 28.06.07, the Court found a violation of Article 3 due to inadequate medical care in the detention facility and the degrading and unnecessary use of a metal cage during the appeal hearing. Overcrowding is the result of shortsighted policies such as the usage of detention as a measure of restraint, the limited application of alternative sentences, the limited application of release on parole, and shortcomings in the system of conditional release or early release on compassionate grounds. In particular, due to the multiplicity of decision-making bodies⁵ and an absence of clear and accessible procedures, the process of decision-making in prisoners' cases suffers from undue delays and decisions on prisoners' release frequently lack justification.

Torture, particularly by the police during interrogations, remains a critical issue in Armenia. The current legislative framework which criminal-

ises torture is inadequate. A lack of prompt legal and medical assistance to victims undermines efforts to prevent torture. Serious shortcomings in investigative methods and the lack of an independent investigative body contribute to an overall environment of impunity. The excessive use of custodial measures and the malfunctioning of the system of early release on parole and compassionate release causes overcrowding in the penitentiary system, resulting in degrading conditions under Article 3. Furthermore, domestic courts are not sufficiently rigorous in conducting proper assessments into the admissibility of evidence obtained under torture.

1 "[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

2 Article 11 (7) of the CPC, Article 4 (3) of the CPC.

3 Court Monitoring Report on Military Crimes, "Protection of Rights without Borders" NGO, 2012

4 *Mkhitaryan v Armenia* (No. 22390/05); *Tadevosyan v Armenia* (No. 41698/04); *Kirakosyan v Armenia* (No.31237/03) all 02.12.08.

5 Administrative Commission, Independent Commission, the Court.

What's in store for Georgia at the European Court?

An analysis of recently communicated cases

*Kirill Koroteev, Senior lawyer,
 EHRAC-Memorial HRC*

Despite years of reforming its law-enforcement bodies, Georgia still faces serious problems in ensuring the compliance of its criminal justice system with the European Convention on Human Rights (ECHR). In particular, it suffers from a low rate of

acquittals which amount to less than 1% of contentious criminal cases (excluding the cases of plea bargain agreements). This depressing statistic makes the offer of a plea bargain hard to turn down since pleading not guilty and facing a full contentious trial, in nearly every case, leads to a conviction. Even though these sta-

tistics do not in themselves raise an issue under the ECHR, this situation affects the functioning of the criminal justice system as a whole. Among the most difficult issues are the fairness of proceedings and judicial reasoning. An analysis of recently communicated cases against Georgia¹ allows us to highlight the main areas

of concern for the country, which which ought to be addressed even before judgments at the ECtHR are passed down.

The issue of inadequate reasoning arises where the accused make allegations during trials concerning torture or police entrapment. The most serious issue is that judges either do not deal with allegations of torture during pre-trial investigations,² or do so inadequately. Thus, in dismissing the allegations of the accused, the judges rely on the testimonies of the police, but fail to explain why the latter should be given preference over the former.³

Policies of the Georgian government against drug users and organised crime do not come without issues for Strasbourg either. In drug-related cases, the alleged absence of procedural guarantees for persons subjected to searches raises an issue under Article 6 ECHR.⁴ In one case, the trial and appeal judges allegedly failed to explain why they considered buprenorphine, used for the treatment of chronic pain and classified as a psychotropic substance under the 1971 Convention on Psychotropic Substances, as an illegal drug and convicted the accused accordingly.⁵ With respect to organised crime, specific provisions punishing 'membership of the criminal world' and 'being a mafia boss' were introduced

to the Criminal Code (article 223-1). However, the absence of any meaningful definition of the elements of these new crimes inevitably raises issues under Article 7 ECHR.⁶ More generally, even the Supreme Court's reasoning in individual cases is alleged by applicants to be summary and fails to satisfy the requirements of Article 6 ECHR.⁷

Another particular problem in the Georgian legal system is the imposition of particularly long terms of administrative detention for minor ('administrative') offences, of up to 90 days imprisonment. Such offences clearly amount to 'criminal charges' under Article 6 ECHR, as is any offence punishable by deprivation of liberty. Trials of these offences also raise credible allegations of unfairness.⁸

However, the most important issue in terms of the quantity of cases is that of medical treatment for prisoners. The number and repetitive nature of these cases highlight the significance of this issue and the fact that the judgment in *Poghosyan v Georgia* (No. 9870/07) 24.02.2009 is yet to be fully implemented. In this case, the Court indicated that general measures should be undertaken by the Government in order to prevent the transmission of viral hepatitis C in prisons, to create a system of early detection and to guarantee

prompt and effective medical assistance to those infected.⁹

Following *Poghosyan v Georgia*, several cases have been communicated, and some of them decided, concerning the lack of medical treatment in prison for hepatitis C,¹⁰ AIDS,¹¹ tuberculosis,¹² mental disorders¹³ and hypertension.¹⁴ The continued reluctance of the Georgian judiciary to address these violations of Article 3 ECHR is evident in the recent case of *Baliashvili v Georgia* (No. 27842/11). The applicant in this case suffered renal failure, but the courts refused to release him pending trial, as the applicant's state of health was "not serious enough to call for release". Clearly these cases raise doubts as to the relevance and effectiveness of measures taken by the Georgian Government, and emphasise the importance of fully implementing the judgment in *Poghosyan v Georgia*.¹⁵

Given that friendly settlements are not infrequent in cases of medical treatment,¹⁶ and indeed in other cases,¹⁷ not every case will reach the stage of judgment on the merits. However, settling some cases will not prevent similar cases being brought before the Court – this can only be achieved by a thorough reform of the criminal justice system, to ensure that proceedings are of a fair and adversarial nature.

1 Cases communicated before a certain date (late 2011) were removed from the Court's website after the HUDOC database was redesigned. Consequently, it is not possible to provide all the necessary details about these cases.

2 *Tchanturia v Georgia* (No. 2225/08) (not available on HUDOC at the time of writing).

3 See *Tabagari v Georgia* (No. 60870/11), communicated 26.01.12; *Kobakhidze and Ninua v Georgia* (No. 14929/09) (not available on HUDOC at the time of writing).

4 *Tchanturia v Georgia*, *ibid*; *Saria v Georgia* (No. 44987/07), communicated 19.01.12.

5 *Tsitsivadze v Georgia* (No. 49098/10) (not available on HUDOC at the time of writing).

6 *Ashlarba v Georgia* (No. 45554/08), communicated 03.01.12.

7 *Oboladze and Lobzhanidze v Georgia* (No. 31197/06), communicated 10.04.12. In this case the applicants complain that the impartiality of the trial judge in their case was compromised by him retiring to the deliberations' room together with the prosecutor.

8 See *Tuskia v Georgia* (No. 14237/07) (not available on HUDOC at the time of writing).

9 *Poghosyan v Georgia* (No. 9870/07) 24.02.2009, para 70.

10 See *Kakoulia and Bouliskeria v Georgia* (No. 3486/06), communicated 24.05.12.

11 Two cases were settled, but no reference to any general measures has been made in the agreements between the parties: *Archaia v Georgia* (No. 6643/10), (dec) 14.12.2010; *Kotchlamazashvili v Georgia*, (No. 42270/10) (dec) 03.04.2012.

12 *Kikalishvili v Georgia* (No. 51772/08), communicated 24.05.12.

13 *Bakradze v Georgia* (No. 3568/10), communicated 03.01.12.

14 *Tchanturia v Georgia* (No. 50817/06), communicated 21.05.12.

15 See the Action Plan of the Georgian Authorities, CoE doc. no. DH-DD(2010)74F, 12.02.2010.

16 See *Kobakhidze and Ninua v Georgia* (No. 14929/09) (dec) 11.10.2011.

17 *Tchanturia v Georgia* (No. 2225/08) (dec) 18.10.2011. In this case and in the above-mentioned *Kobakhidze and Ninua* the Government undertook to affect an early release of the applicants.

The challenges of arguing Article 18 at the European Court

Dmytro Kotlyar, Lawyer, Ukraine

Article 18 of the European Convention on Human Rights (ECHR) is not a provision often invoked by applicants, and violations under this article have only been found by the European Court of Human Rights (ECtHR) in a handful of cases. Article 18 provides that “[the] restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” It follows that this Article, like Article 14, is not autonomous and can only be applied in conjunction with another Article of the ECHR which permits restrictions to certain rights and freedoms.¹ The purpose of Article 18 is to prevent the misuse for ulterior motives of legal instruments allowing a restriction on human rights.

The ECtHR has established a very high evidential barrier for finding a violation under Article 18. It proceeds from the general assumption that public authorities act in good faith and it is for the applicant who alleges an improper motive to rebut this presumption by showing “convincingly that the real aim of the authorities was not the same as that proclaimed (or as could be reasonably inferred from the context).”² Even if the applicant adduces prima facie evidence of improper motives, the burden of proof does not shift to the Government and remains with the applicant.³

In *Gusinskiy v Russia* (No. 70276/01) 19.05.04 the ECtHR was able to find a violation under Article 18 because the Government had signed an agreement with the applicant, linking the termination of a criminal investigation against him with the sale of the applicant’s media company to Gazprom. Having such direct proof, the ECtHR concluded that the applicant’s prosecution was used to intimidate him and that the restriction of the applicant’s liberty permitted under Article 5 § 1 (c) was applied not only for the pur-

pose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons.⁴ One rare example of a case where inferences were drawn from the context in the absence of direct evidence is *Cebotari v Moldova* (No. 35615/06) 13.11.07. In this case, based on its finding that there was no reasonable suspicion that the applicant had committed an offence to justify his arrest and detention, and analysing the timing when the criminal case against the applicant was opened, the ECtHR deduced that the real aim of the criminal proceedings and of the applicant’s arrest and detention was to put pressure on him to hinder his company from pursuing its application before the ECtHR in another case.⁵

In contrast, in *Khodorkovskiy v Russia* (No. 5829/04) 28.11.11, the facts surrounding the applicant’s prosecution, resolutions of political institutions, statements of NGOs and various public figures, and even the decisions of several European courts were not found by the ECtHR to be sufficient to infer a violation of Article 18 in conjunction with Article 5. The ECtHR admitted that the applicant’s case may raise certain suspicions as to the real intent of the authorities, which might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against Russia, make pecuniary awards, etc. However, these were not sufficient for the ECtHR “to conclude that the whole legal machinery of the respondent State in the present case was *ab initio* misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. This is a very serious claim which requires an incontrovertible and direct proof.”⁶ Similarly in *OAO Neftyanaya Kompaniya Yukos v Russia* (No. 14902/04) 08.03.12, the ECtHR found no indication of any issues or defects in the proceedings against the applicant’s company to enable it to con-

clude that there had been a breach of Article 18 on account of the applicant’s company’s claim that the State had misused the proceedings with a view to destroying the company and taking control of its assets.⁷ A similar conclusion can also be expected in the case of *Lebedev v Russia* (No. 13772/05) dec. 27.5.10 (No. 2), in which the ECtHR has agreed to examine the merits of the allegation of a violation of Article 18.⁸

In this regard, the recent ECtHR judgment in *Lutsenko v Ukraine* (No. 6492/11) 3.7.2012 merits attention. In this case, the ECtHR found a violation of Article 18 in conjunction with Article 5. The applicant – a former government member and one of the opposition leaders – complained that the proceedings against him and his arrest were used by the authorities to exclude him from political life and from participating in upcoming parliamentary elections. The ECtHR, however, did not make a finding on the allegation of political motivation behind the prosecution as a whole, but instead found that in this particular case, the applicant’s arrest and detention had distinguishable features which allowed the ECtHR to consider them separately. In particular, it was noted that the applicant’s detention was ordered after the investigation against him had been completed. When finding the violation, the ECtHR relied inter alia on the fact that prosecuting authorities had explicitly pointed to the applicant’s communication with the media as one of the grounds for his arrest, accusing him of distorting public opinion about crimes committed by him. In the ECtHR’s opinion, such reasoning by the prosecuting authorities clearly demonstrated their attempt to punish the applicant for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do.⁹ Furthermore, in this case, the ECtHR recognised the importance of inferences which can be drawn from the general factual context in a case when

determining an alleged violation under Article 18. In particular, it noted that soon after the change of power, the applicant, who was the leader of a popular political party and a former Government minister, had been accused of abuse of power and prosecuted, and that, according to external observers, the context was the politically motivated prosecution of opposition leaders.¹⁰

There are several pending cases where the ECtHR may look into this issue again. In the high-profile case of *Tymoshenko v Ukraine* (No. 49872/11), the former Prime Minister and leader of the opposition party, who is cur-

rently serving a prison term for abuse of office, claims that the criminal prosecution brought against her is politically motivated. In *Navalnyy and Yashin v Russia* (No. 76204/11), the applicants claim that their liberty was restricted for the purpose of undermining their rights to freedom of assembly and expression. It remains to be seen whether the ECtHR will continue to rely mainly on direct evidence when considering violations of Article 18, or whether it will allow reasonable inferences from the context as in *Cebotari v Moldova*.

- 1 *Kamma v the Netherlands* (No. 4771/71), 14.7.74, page 9.
- 2 *Khodorkovskiy v Russia* (No. 5829/04), 31.5.11, para. 255.
- 3 *Khodorkovskiy v Russia*, *ibid*, para. 256.
- 4 *Gusinskiy v Russia* (No. 70276/01), 19.5.04, paras. 75-77.
- 5 *Cebotari v Moldova* (No. 35615/06), 13.11.07, paras. 51-53.
- 6 *Khodorkovskiy v. Russia*, *ibid*, para. 260.
- 7 *OAO Neftyanaya Kompaniya Yukos v Russia* (No. 14902/04), 20.9.2011, paras. 665-666.
- 8 *Lebedev v Russia* (No. 2) (No. 13772/05), dec. 27.5.2010, paras. 310-314.
- 9 *Lutsenko v Ukraine* (No. 6492/11), 3.7.2012, paras. 108-109.
- 10 *Ibid*, para. 104.

Running in Circles - Defamation recriminalised in Russia

Galina Arapova, Director and Lead Lawyer, Mass Media Defence Centre

Over the last six months, the Russian law on defamation has been reformed twice. Sadly, the overall result of these reforms cannot be regarded as an improvement. In December 2011, parliamentarians made the long expected move of decriminalising defamation (more specifically, 'slander' and 'insult').¹ A 'softer' administrative liability for these acts was introduced instead, and the Russian Code of Administrative Offences amended accordingly.² Human rights organisations had been fighting an arduous and protracted battle for the decriminalisation of defamation. Several international and intergovernmental organisations issued public statements expressing support for the reforms, which they believed constituted an important step towards respect for the freedom of expression in Russia.³ However, the pendulum soon swung back.

On 13 June 2012, the new State Duma of Russia reinstated criminal liability for slander.⁴ At the same time, a special provision on slander against judges, prosecutors, investigators and bailiffs was introduced.⁵ Many commentators believe that this new incarnation will be used against jour-

nalists and civic activists. Although supporters of the move insist that the new criminal provision is less harsh than its original form (it no longer includes an imprisonment sanction which, whilst encouraging, was rarely used over the last few years), it is difficult to agree with them. Financial sanctions for the offences were drastically increased from 180,000 roubles to an astronomical 5,000,000 roubles,⁶ which will most likely result in severe self-censorship.

It is believed that this reform was politically motivated. The amendments were scarcely debated in parliament, and barely a week passed between the first reading and the signing of the law by the President.⁷ These amendments were part of a series of measures (discussed further below) aimed at tightening control over civil society and freedom of expression and peaceful assembly following the protests after the December 2011 parliamentary election, and the ensuing serious public discussion over the possibility of election rigging. Sanctions for breaching the regulations on public gatherings were increased and control over the Internet tightened.⁸ Draconian amendments were made to the notorious Law on Non-Profit Organisations 2006, which provide for a special status of "for-

eign agents" for NGOs which receive funds from abroad and engage in political activities.⁹ The precise impact of these laws, however, depends on their implementation and enforcement by the authorities.

An overwhelming majority of defamation claims in Russia over the past decade have been in civil cases concerning the protection of honour and dignity. Over 4000 such cases are heard every year. However, between 2009 and 2011, the number of criminal defamation cases increased and 800 people were convicted under Article 129 of the Criminal Code (the old criminal defamation provision) within this period.¹⁰ Most of those convicted were journalists working for the regional media or bloggers. Many of the criminal proceedings were instigated by civil servants and public authorities.

The new crime of slander includes a wider range of measures to curtail criticism and expressions of public opinion than its predecessor, and is drafted ambiguously. For example, Article 128.1(4) of the Criminal Code states that "*Slandorous assertions that a person is suffering from an illness which represents danger to others, and slanderous statements combined with*

continued on page 8

continued from page 7

**Running in Circles - Defamation
 recriminalised in Russia**

allegations that this person has committed crimes of a sexual nature, are punishable by fines up to 3,000,000 roubles, or 3 years' worth of wages or other income of the convicted person, or by up to 400 hours of compulsory labour." Commentators have expressed concern about this vague provision, and believe that it was only included to intimidate those who criticise the government, and to express doubts as to the sanity of the people who take controversial government decisions. The sanction for the crime also appears disproportionate to the gravity of the offence.

The offence of 'insult' has not been re-criminalised. This is likely to be because what the authorities consider dangerous are not mere value judgments, but any factual information about the abuse of power, corruption, or unlawful enrichment of government officials, which can be easily classified as 'slander'. The administrative offence of slander¹¹ has been abolished since its re-criminalisation,¹² but this too has produced some alarming results. It soon became clear that its decriminalisation had occurred in name, but not in substance. The administrative provision carried much higher fines than the previous crime of slander.¹³ It also included the following ambiguous and peculiar grounds for liability: *"not taking measures to prevent slander in a publicly displayed work or in the media."*¹⁴ This provision was most likely aimed at editors-in-chief, since Article 2 of the Russian law on mass media stipulates that the editor-in-chief is the person who is *"in charge of the editorial staff (regardless of what exactly his or her position is called) and takes final decisions concerning production and publication of the medium."*¹⁵ The administrative offence of slander is likely to have a serious chilling effect by causing self-censorship amongst editors. The mere hint of a potential conflict could cause an edi-

tor to back-pedal and refuse publication of controversial material.

The first case involving an administrative offence of slander was against Milrad Fatullayev, the editor-in-chief of the newspaper 'Nastoyashcheye vremya' ('Present time') in Makhachkala, Dagestan. He was charged after his newspaper published an article entitled "Kavkaz lidiruyet" ("Caucasus in the lead"), which the court deemed to offend the honour and dignity of the President of Dagestan, Mr Magomed-salam Magomedov. The President of Dagestan was represented by the director of his own administration's legal department, and engaged a prosecutor when he did not have to. The case was heard rapidly – taking only 2 months with appeal. The editor was convicted on 28 April 2012 and fined. Although the fine was not a major sum (10,000 roubles, or £200), the case demonstrates the debilitating potential that the administrative offence of slander has on the right to freedom of expression, despite its decriminalisation.

In reaching its decision against Mr Fatullayev, the court skipped the crucial stage of establishing whether defamation had actually taken place. Instead, it moved swiftly on to consider the grounds for "failing to take measures in order to prevent" the 'slander'. The court appeared to rely solely on the President's word, and a presumption that the article was defamatory. Its author, Nadira Isayeva (a well-respected journalist and former editor-in-chief of the newspaper 'Chernovik') was not questioned. Any questions as to what exactly had constituted 'defamation' in the text and whether the facts complained of were true were addressed tangentially. Mr Fatullayev appealed to the Supreme Court of Russia, but to no avail. He is currently preparing an application to the ECtHR under Article 10 ECHR.

Mr Fatullayev's case clearly demonstrates how the law can be used to suppress freedom of expression, even after seemingly encouraging reforms such as the decriminalisation of slan-

der. Even though this particular administrative provision has since been abolished, it is still vital to debate such cases, as an identical sanction for the 'failure to prevent publication' is applicable within the administrative offence of 'insult'.¹⁶ There is a high risk that, following the precedent in Dagestan, this provision will also be used against editors-in-chief to stifle political debate in other regions.

The sanction for this reinstated criminal offence of defamation represents a grave financial risk for the Russian press and journalists, who may face bankruptcy should it be used against them. No journalist, regional publication, blogger or civic activist is likely to be able to afford a fine of 5,000,000 roubles. Journalists who work for glossy magazines are unlikely to be affected, however - this is all a bit too political.

1 Federal Law № 420-FZ "On Amendments to the Criminal Code and Certain Legislative Acts of the Russian Federation" (enacted 07.12.2011)

2 See Articles 5.60 (now abolished) and 5.61.

3 OSCE welcomes Russian decriminalization reform <http://www.osce.org/fom/85154>

4 Article 128.1 of the Russian Criminal Code.

5 Article 298 of the Russian Criminal Code.

6 Article 128.1 of the Russian Criminal Code.

7 <http://www.rg.ru/2012/07/30/kleveta-anons.html>

8 http://ria.ru/law_meeting/20120608/668743782.html

9 http://www.bbc.co.uk/russian/russia/2012/07/120706_ngo_law_duma_hearings.shtml

10 <http://www.change.org/ru/петиции/государственная-дума-отклонение-законопроекта-о-введении-в-ук-статьи-клевета>

11 (Former) Article 5.60 of the Code of Administrative Offences.

12 Federal Law № 420-FZ "On Amendments to the Criminal Code and Certain Legislative Acts of the Russian Federation" enacted 07.12.2011.

13 (Former) Article 5.60 of the Code of Administrative Offences.

14 Article 5.60(4) of the Code of Administrative Offences.

15 The Law of the RF «On Mass Media», № 2124-1, adopted 27.12.91.

16 Article 5.61 of the Code of Administrative Offences.

Human Rights News

Brighton Declaration

The Brighton Declaration was adopted on 20 April 2012 at the Brighton Conference - a meeting between the 47 Member States of the Council of Europe (CoE) - and contains proposals to reform the European Court of Human Rights. The Conference was the initiative of the United Kingdom, which held the Chairmanship of the Committee of Ministers (CoM) of the CoE between November 2011 and May 2012.

The preamble of the Declaration notes a "deep concern" over the growing backlog of cases before the Court. It therefore focuses on: national implementation of the Convention; the interaction between the Court and national authorities; applications to the Court; the processing of applications; judges and jurisprudence; execution of judgments; and the long-term future of the Convention system and the Court.

With regards to national implementation, the Declaration emphasises the importance of introducing both preventative and remedial measures for human rights violations. To that end, it made several recommendations, including enabling national courts to take into account relevant Convention principles having regard to the case law of the Court, and providing training and information on the Convention to law enforcement officials.

The principle of subsidiarity and the doctrine of the margin of appreciation were sources of great controversy in the run up to the Conference. Media reports suggested that the UK would propose radical changes to the system in an attempt to 'claw-back' power from the Court. However, the outcome was less radical than envisaged. With regards to the relationship between the Court and national authorities, the Conference decided, amongst other things, that "for reasons of transparency and accessibility", reference to the principle and doctrine should be

Council of Europe - Annual Report 2011

The Council of Europe's 2011 Annual Report on the 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' was published in April 2012. It recognised several positive developments, including a decline in the number of repetitive cases transmitted for supervision, which it noted was mainly due to the increased interaction between the Court, the Committee of Ministers (CoM) and national authorities in the context of the pilot judgment procedure. However, the Report notes that despite the theoretical advantages of the pilot judgment procedure, the Court remains cautious in using it. In terms of the CoM's attempts to prioritise cases and increase transparency of the supervision process, the Report notes the introduction of the 'enhanced supervision' procedure, a 'twin-track' mechanism, allowing the CoM to prioritise the most important cases. It also noted that civil society can contribute more to the process, as relevant information is more readily available.

The Report states that the main challenge facing the CoM is the increasing number of cases which have been under its supervision for more than five years. It noted that although these cases reveal mainly important structural problems

which require time to address, five years is too long. Furthermore, it noted that as many of the cases under supervision concern situations that are the subject of well-established case law, limited Court resources are being diverted from fundamental problems relating to "intangible rights" (such as the right to life and the prohibition of torture), or new issues raised by rapid developments in society and technology. In terms of developing responses, the Report notes that better publicity within States of important cases requiring rapid implementation, the development of high-level contacts, a more systematic presentation of good practices, and increased opportunities for authorities to exchange experiences on difficult issues, merit further consideration. However, it noted an increase in 2011 in the number of cooperation activities organised by the Department for the supervision of execution of Court's judgments. The importance of the Human Rights Trust Fund in assisting national execution process was also acknowledged, together with the UK's announcement in 2012 to contribute to the fund. Overall, the Report states that "significant achievements" made in 2011 and the commitment of States to "move ahead" should enable the CoM to meet the challenges raised in 2012.

included in the Preamble to the Convention. Furthermore, the power of the Court to deliver advisory opinions to consenting State Parties will be introduced in a new optional protocol to be drafted by the end of 2013.

The Declaration suggests certain changes to the application process, including shortening the application time limit from 6 to 4 months. It tightens up the admissibility criteria in a number of ways. Article 35(3)(b) is to

be amended so that applications may be declared inadmissible if an applicant has not suffered a significant disadvantage, even where the case has not been duly considered by a domestic tribunal. Furthermore, the concept of 'manifestly ill-founded' will include a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of the Court's well-

continued on page 10

continued from page 9

**Human Rights News:
Brighton Declaration**

established case law, unless the Court considers that the case raises a serious question affecting the interpretation or application of the Convention.

Prompted by concerns over the lack of transparency at the national level on the selection of judicial candidates for appointment to the Court,

the Declaration welcomes the adoption of Guidelines by the CoM on the issue, and encourages States Parties to implement them.

In respect of processing applications, the possible need for additional judges, an online application procedure, and the extension of the pilot judgment procedure, was noted. The age limit for judges will also be amended; judges must be no older than 65 at the date on which their

term of office commences, rather than being required to retire at the age of 70. The Declaration also invites the CoM to reach an interim view on the long-term future of the Convention system by 2015.

In October 2012, EHRAC and several other NGOs submitted joint comments on draft Protocols 15 and 16 to the Convention which incorporate several of the amendments outlined in the Declaration.

EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE

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

Berladir and others v Russia

(No. 34202/06) 10.07.12

(ECHR: Judgment)

***Right to freedom of assembly
and association***

Facts

The applicants were ten Russian nationals who intended to hold a march and two-hour demonstration in central Moscow in opposition to an anti-immigration rally held earlier that month. The city administration gave permission only for the demonstration, on the condition that it be relocated to Tverskaya Zastava Square and be limited to one hour. The organisers withdrew their application for authorisation, and gave notice to the district authority of their intention to hold a picket on Tverskaya Square (near the Mayor's office) in response to the city authority's decision. The district authority imposed the same conditions as the city authority, referring to the "security of the participants", and the need to avoid obstructing pedestrians and vehicles. The organisers did not challenge the conditions, but proceeded to hold their picket on Tverskaya Square as planned. A special security squad arrested

some of the protestors, allegedly without giving them the time or opportunity to disperse after a verbal warning. The applicants were arrested and later convicted of breaching the procedures for public gatherings, resulting in fines of between 500 and 1,000 RUB each.

The applicants alleged violations of Article 10 (freedom of expression) and Article 11 (freedom of assembly and association).

Judgment

The Court found no violation of Article 11, interpreted in light of Article 10 (5:2). The interference with the applicants' rights was prescribed by law, and was proportionate and necessary to prevent disorder, or to protect the rights and freedoms of others. On the issue of proportionality, the authorities' decisions were based on an acceptable assessment of the relevant facts and contained relevant and sufficient reasons which justified the interference.

Comment

The Court acknowledged that the applicants had had insufficient time to manifest their views due to the "quite prompt" dispersal by the authorities. However, this did not

prevent it from finding in favour of the State. The Court also failed to address the authorities' decision to restrict the duration of the protest. This noticeable omission was highlighted in the joint dissenting opinion of Judges Kovler (the Russian judge) and Vajić, who concluded that no proper reasons were given at the domestic level for altering the conditions of the public gathering, including the event's duration. In addition, they noted that where the location of the assembly is crucial to the participants, its relocation may constitute an interference with their right to freedom of assembly, as was the case here. Moreover, they considered the "mere reference to the security of the participants" unconvincing, especially as their planned venue was not in use on Sundays (the day of the picket), and the peaceful picket did not imply any substantial movement or disruption. The dissenting judges also stated that they could not establish if the authorities' alternative proposal would have allowed the applicants to effectively exercise their right to freedom of assembly. At the time of going to print, a request for a referral to the Grand Chamber was pending.

Damayev v Russia

(No. 36150/04) 29.05.2012

(ECHR: Judgment)

Right to life**Facts**

The applicant alleged that on 8 April 2004, two Russian military aircraft bombed the village of Rigakhoy in the Chechen Republic, destroying his house and causing the deaths of his wife and five of his children. The Government argued that it was targeting insurgents in the vicinity of the village, and that the applicant's house had been destroyed by an exploded artillery shell kept there, rather than by the aerial bombardment itself.

The applicant alleged violations of Article 2 (right to life), Article 3 (inhuman and degrading treatment), Article 8 (respect for private and family life), Article 13 (right to an effective remedy) and Article 1 of Protocol 1 (right to protection of property).

Judgment

The Court found a violation of Article 2 in respect of the deaths of the applicant's wife and five children. On the issue of state responsibility, the Court rejected the Government's argument regarding the cause of the explosion. Furthermore, the failure of the Government to provide key documents and information allowed the Court to draw inferences from such conduct. The deaths were therefore imputable to the State.

The Court did not consider it necessary to establish whether the use of lethal force was justified. The Government's failure to provide any justification for the use of lethal force against civilians was sufficient in itself to lead the Court to conclude that the deaths were the result of the disproportionate use of lethal force by state agents, and

thus in violation of Article 2.

Additionally, the Court found a violation of the procedural limb of Article 2. The unjustifiably long delay in commencing the investigation (eight days after the incident) and in taking the necessary investigative steps, contributed to the investigation's ineffectiveness. The Court also considered that the applicant was not properly informed of the investigation's progress (including its termination) and could not therefore challenge the authorities' actions before a court.

However, the Court rejected the applicant's arguments under Article 3, and considered it unnecessary to examine the claim under Article 13 in conjunction with Article 2, and declared the remaining claims inadmissible.

The applicant was awarded 300,000 EUR in non-pecuniary damages. The Court refused to order an investigation into the deaths however, stating that it was the responsibility of the Government to choose how best to discharge its obligation under Article 46 (binding force and execution of judgments).

Comments

Note that Russia had not declared a state of emergency, and made no derogations under Article 15, such that the Court was required to consider the case against the "normal legal background". At the time of going to print, a request for a referral to the Grand Chamber was pending.

Kotov v Russia

(No. 54522/00), 03.04.12

(ECHR: Grand Chamber Admissibility/Judgment)

Right to protection of property**Facts**

In August 1994, a commercial bank was unable to repay the ap-

plicant, a Russian national, money he had deposited earlier that year, due to a lack of funds. The applicant brought proceedings against the bank and was awarded RUB 17,983. In the meantime, the bank was declared insolvent, and put into liquidation.

Under the law governing the order of distribution of assets, the applicant belonged to the first class of creditors. However, after the declaration of insolvency, the creditors' body of the bank created a special group of "privileged" creditors within the first class who would receive full satisfaction of their claims before other creditors belonging to the same class. Consequently, the applicant received only RUB 140. In 1998, the applicant successfully complained to the commercial courts that he was entitled to the remainder of the sum owed to him, but it remained unenforced due to the bank's lack of assets. In 1999, before termination of the liquidation procedure, the applicant commenced proceedings in the commercial courts for reimbursement out of the liquidator's own funds. However, his claim was unsuccessful due to, amongst other things, the risk of double recovery by the applicant. Later that year, the liquidation procedure was terminated for lack of any further assets to distribute, and the bank was formally liquidated.

The applicant complained under Article 1 of Protocol No. 1 (1-P1).

Judgment

After holding that it had jurisdiction *ratione temporis* to hear the applicant's claims in so far as they related to the two proceedings in 1998 and 1999 (16:1), the Court found no violation of 1-P1 (12:5).

First, the liquidator could not be considered a 'State agent' due to the degree of its "operational and institutional independence". Sec-

ond, the State had complied with its positive obligations under 1-P1. The law provided the applicant with a “deferred compensatory remedy” whereby, after termination of the liquidation procedure, he could have sued the liquidator in tort in the courts of general jurisdiction. He only had to wait eight days from when his claim against the liquidator was rejected by the commercial courts before he was able to pursue this remedy. In the absence of any arguments as to why this period might have been excessive in the circumstances, it did not affect the essence of the applicant’s rights under 1-P1, and remained within the State’s margin of appreciation.

Comment

This judgment reversed the decision of the lower Chamber, which had found in favour of the applicant. The 12:5 split between the Grand Chamber judges further demonstrates the controversial nature of the case. The five dissenting judges argued that Russia had failed to fulfill its positive obligations under 1-P1. Even though the applicant could theoretically have sued the liquidator in the courts of general jurisdiction, the legal situation was so unclear that it deprived him of any practical redress.

Umarov v Russia; Shafiyeva v Russia

(No. 2546/08) 12.06.2012; (No. 49379/09) 03.05.2012
(ECHR: Judgment)

Right to life

Facts

The applicants in *Umarov* were the sister and father of Mr Umarov who, along with two other men, was arrested following a search of his flat. The two other men were taken away for questioning and charged with illegal possession of firearms, but Mr Umarov was taken away in a separate vehicle. His whereabouts remain un-

known. The applicants alleged that the authorities were responsible for his death. The Government argued that Mr Umarov was a member of a radical religious movement, and that they had not received any reliable information concerning his arrest. They suggested that he could be in hiding.

The authorities started an investigation into Mr Umarov’s disappearance 9 days after the applicants complained of his disappearance. The case was subsequently suspended on six occasions. The applicants were not informed about the progress of the case.

In *Shafiyeva*, the applicant alleged that her husband had been kidnapped whilst on his way back from dropping off his children at kindergarten. His car was allegedly blocked by two vehicles without official registration numbers, from which a group of masked men in camouflage uniforms emerged, hit him on the head with a bludgeon, and took him away in his own car. The abduction was witnessed by several local residents, one of whom managed to photograph the incident. Mr Shafiyev’s whereabouts also remain unknown. The Government argued that State involvement had not been proved, and that the disappearance had most likely been staged.

The authorities opened a criminal investigation two days after the applicant complained about the disappearance. The authorities suspended the investigation on several occasions, sometimes without informing the applicant. At the time of the hearing, the investigation was still pending.

Both applicants alleged violations of Article 2 (right to life), Article 3 (prohibition of torture, inhuman or degrading treatment), Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) in conjunction with the foregoing.

Judgments

In *Umarov*, the Court found a substantive breach of Article 2. The evidence permitted the Court to establish ‘beyond reasonable doubt’ that Mr Umarov should be presumed dead following his unacknowledged detention by State agents. The Court noted that when a person is detained by unidentified policemen without any subsequent acknowledgment of the detention and is then missing for several years, that situation can be regarded as life-threatening. Mr Umarov’s four-year absence supported this assumption. In the absence of any justification by the Government, and by drawing inferences from the Government’s failure to submit documents which were in its exclusive possession, the death could be attributed to the State.

The Court also found a procedural breach of Article 2, as the authorities had failed to demonstrate diligence and promptness in dealing with such a serious matter. In addition, the Court found that Mr Umarov had been held in unacknowledged detention without any of the safeguards contained in Article 5, which constituted a particularly grave breach of his right to liberty and security under that provision.

In contrast, in *Shafiyeva*, the Court did not find a violation of the substantive limb of Article 2. Unlike in *Umarov*, it was not established ‘beyond reasonable doubt’ that State agents were implicated in Mr Shafiyev’s disappearance, nor could the burden of proof be entirely shifted to the Government, having regard in particular to the fact that it had submitted to the Court copies of relevant documents from the investigation file. The Court noted that Mr Shafiyev’s disappearance had occurred not in

Chechnya but in Dagestan, where there were no curfews in place restricting civilian movement. In particular the applicant based her allegations on statements from her relatives who had not witnessed the abduction; it was not clear whether her relatives had video footage of the abduction as claimed; whether the abductors had been in camouflage uniforms or black t-shirts, and whether their vehicles had had official registration numbers. The Court did, however, find a procedural breach of Article 2. The authorities failed to carry out an effective criminal investigation into the circumstances surrounding Mr Shafiyev's disappearance, omitting crucial, timely, investigative steps which led to unnecessary delays.

With regards to their other claims, in *Umarovy*, the Court found a breach of Article 3 on account of the applicants' mental suffering, and a breach of Article 13 in conjunction with Article 2. However, no separate issues arose in respect of the claims under Article 13 in conjunction with Articles 3 and 5. The applicants were awarded 60,000 EUR jointly for non-pecuniary damages. In *Shariyeva*, although the applicant's claim under Article 13 in conjunction with Article 2 was admissible, the Court decided that the issue had already been dealt with under Article 2, so there was no need for its separate examination. The Court declared the remainder of the application inadmissible. The applicant was awarded 30,000 EUR in respect of non-pecuniary damages.

Comments

The case of *Shafiyeva* highlights the need to provide the Court with as much direct evidence as possible to support allegations of abductions by State agents, in particular in regions where there are no

restrictions of civilian movement in place and where the Court has not found a pattern of such conduct.

EHRAC-South Siberian Human Rights Centre (SSHRC) cases

Yudina v Russia

(No. 52327/08) 10.07.2012

(ECHR: Judgment)

Prohibition of torture, inhuman or degrading treatment or punishment

Facts

The applicant alleged that on the evening of 26 December 1998, seven policemen burst into her house, one of whom immediately hit her in the face. She was then hit again by the same police officer when she asked for a search warrant and for the presence of civilian witnesses. After the men refused to leave, she ran out of the house and shouted for help. However, the men allegedly continued to assault her by, kicking her, pulling her hair and dragging her to a car where she was handcuffed, hitting her head against the car and tearing her mouth.

On the same day, the applicant was admitted to hospital and underwent numerous medical examinations, which concluded that she had been injured with a blunt object. The applicant lodged an official complaint against the police.

Between 1999 and 2003, the case was opened and closed ten times. At the time of the judgment, the case was still pending. The applicant complained under Articles 3 and 13 that she had been subjected to ill-treatment by the police and that the ensuing investigation was ineffective.

Judgment

The Court found a procedural breach of Article 3 on account of the authorities having failed to carry out an effective investigation

into the applicant's allegations of ill-treatment. The investigation was not sufficiently thorough to meet the requirements of Article 3. Its long duration could not be justified by the complexity of the case alone. Furthermore, the remittals of the case for re-examination highlighted a serious deficiency in the criminal investigation which irreparably protracted the proceedings.

The Court also found a substantive violation of Article 3, as the number and location of the applicant's injuries indicated that the beatings were sufficiently serious to constitute inhuman treatment. After attributing responsibility for the injuries to the police, the Court considered that the use of force used against the applicant was excessive and unjustified. The police had planned the operation in advance, had sufficient time to evaluate the possible risks, and to take all necessary measures to carry out the operation. Furthermore, it was obvious to the Court that the beatings were not conducive to facilitating the search, but rather were a form of reprisal or corporal punishment.

The applicant was awarded 15,000 EUR in respect of non-pecuniary damages.

EHRAC-GYLA cases

Kakabadze v Georgia

(No. 1484/07), 02.10.2012

(ECHR: Judgment)

Rights to freedom of expression and freedom of assembly

Facts

The applicants were five human rights activists, who had protested outside the Tbilisi Court of Appeal in support of the owners of a private television channel who were on trial that day. They alleged that around three minutes after the first

applicant started making a speech, several court bailiffs restrained them by force, without prior warning or explanation. They were then allegedly locked in the bailiffs' duty room for around three hours, and assured that they were not under arrest and would soon be released. However, their case file contained records of arrest for contempt of court and breach of public order. The applicants were transferred to a remand centre, where they learnt that they had been sentenced to 30 days' detention by the president of the Court of Appeal.

The applicants made complaints under Articles 5 (right to liberty and security), 6 (right to fair trial), 10 (right to freedom of expression), 11 (right to freedom of assembly), 13 (right to an effective remedy) and Article 2 of Protocol No. 7 (right of appeal in criminal matters).

Judgment

The Court found a violation of Article 5(1) in respect of both the 30-day sentences, and the three-hour detentions, on the grounds that they constituted "unlawful" deprivations of liberty for the purposes of that provision. The three-hour detentions were not based on sufficiently clear and foreseeable domestic provisions, given the major legal issue of whether the bailiffs were legally authorised to arrest the applicants outside the court building. The 30-day sentences were imposed in an arbitrary manner, without the requisite exercise of good faith on behalf of the domestic authorities.

The Court found a violation of Article 6(1) taken together with Article 6(3)(c). The manner in which the president conducted the applicants' hearings in private, on the basis of the Bailiff's notes, and without giving the applicants a chance to be heard, completely negated "the most elementary procedural

requirements of a fair trial". The Court was also concerned that the President of the Tbilisi Court of Appeal had prejudged the applicants' guilt during a press conference on their arrest.

The Court found a violation of Article 11 considered in light of Article 10. With regards to whether the interferences were prescribed by law, the Court had very serious doubts that the applicants could reasonably have foreseen that their actions were illegal. The picket constituted just 5 people, was dispersed within a few minutes of starting, during which time they voiced just a few slogans, all of which called into question the level of disruption asserted by the Government. The slogans represented critical value judgments relating to an issue of public concern – the independence of the judiciary – and did not, in the eyes of the Court, constitute contempt of court. The one offensive slogan "Lavrentiy Beria's bastard", referred to the Minister of the Interior and not a member of the judiciary. Furthermore, the Tbilisi Court of Appeal failed to justify the restrictions to the applicants' right of peaceful assembly and consequently the restriction was not based on sufficient and relevant reasons. The sanction imposed, in the absence of violent behaviour, was disproportionate in the circumstances.

The Court also found a violation of Article 2(7). The extraordinary review procedure under the domestic law, which depended on the domestic authorities' discretionary power and lacked a clearly defined procedure or time-limits, represented an ineffective remedy. The applicants were awarded 6,000 EUR each for non-pecuniary damages.

Other ECHR cases

Virabyan v Armenia

(No. 40094/05), 02.10.2012

(ECHR: Judgment)

Prohibition of torture

Facts

The applicant was a member of an opposition party during the 2003 presidential election, and participated in numerous opposition protests. He alleged that he accompanied police officers to the police station without resistance after they approached him on the afternoon of 23 April 2004. However, police records stated that the applicant had disobeyed lawful police orders and used foul language. The applicant alleged that, whilst at the police station, he was kicked and beaten by police officers until he lost consciousness. The applicant was subsequently taken to hospital where he underwent surgery for his injuries, resulting in his left testicle having to be removed. Criminal proceedings were instituted against the applicant but were terminated at the pre-trial stage by the prosecutor, as domestic law allowed the prosecutor to terminate proceedings if he believed that the accused had redeemed the offence through suffering connected with the offence.

The applicant complained under Article 3 (prohibition of torture), and Article 14 (prohibition of discrimination) in conjunction with Article 3. The applicant also made complaints under Articles 5, 6, 10 and 11.

Judgment

Having regard to the nature, degree and purpose of the ill-treatment, the Court found the Government in substantive breach of the prohibition of torture under Article 3. First, the State's explanation for the applicant's injuries

were dubious and implausible, whereas the applicant had presented a consistent and detailed account of the events, which were compatible with medical records. The injuries could therefore be attributed to the State. Second, the applicant was subjected to a particularly cruel form of ill-treatment which must have caused him severe physical and mental pain and suffering, and which had lasting consequences for his health. Furthermore, the Court was able to draw strong inferences that the ill-treatment was intended to either punish and/or intimidate the applicant.

The Court also found a procedural breach of Article 3. It stated that the investigation into the applicant's allegations was ineffective, inadequate and fundamentally flawed, and was not capable of producing credible findings leading to the establishment of the facts of the case. Furthermore, the Court found a breach of Article 14 in conjunction with the procedural limb of Article 3, as the authorities failed in their duty to take all possible steps to investigate whether or not discrimination may have played a role in the applicant's ill-treatment. However, the Court did not find a violation of Article 14 in conjunction with Article 3, as it had not been established beyond reasonable doubt that political motives played a role in the applicant's ill-treatment. The Court additionally found a violation of Article 6(2), as the reasons for terminating the criminal case against the applicant violated the presumption of innocence. The Court declared the remainder of the application inadmissible. The applicant was awarded 25,000 EUR for non-pecuniary damages, and 6,000 EUR for costs and expenses.

Comment:

This case is of great significance, not only due to the stigma attached to a finding of torture, but also as the first time that the Court has found Armenia in breach of Article 3 on account of an applicant having been tortured.

X v Turkey

(No. 24626/09) 09.10.2012

(ECHR: Judgment)

Prohibition of torture

Facts

The applicant, a Turkish national and homosexual, was held in pre-trial detention in 2008. He was initially placed in a cell with heterosexual prisoners but, following intimidation and bullying by the prisoners, asked to be transferred to a cell with homosexual prisoners. He alleged that he was then placed in a cell which measured 7m², was dirty, poorly lit, rat infested, had no washbasin, and was normally used for solitary confinement as a disciplinary measure or for accused paedophiles or rapists. The applicant also argued that he was deprived of contact with other inmates, denied outdoor exercise, and was released only to meet his lawyer or to attend hearings. Following several formal complaints to the authorities, the applicant was moved to a psychiatric hospital, where he was diagnosed as suffering from depression, and was kept for a month. After his return to prison, another homosexual prisoner was placed in the applicant's cell. Both inmates filed complaints of homophobic insults and attacks by a prison guard, but the applicant subsequently withdrew his complaint following the resumption of his alleged solitary confinement.

The applicant complained under Article 3 (prohibition of torture) and Article 14 (prohibition

of discrimination) in conjunction with Article 3.

Judgment

The Court held that the conditions of the applicant's detention caused both mental and physical suffering, constituting inhuman or degrading treatment in violation of Article 3. The applicant had remained in solitary confinement for more than eight months. His meetings with his lawyer and his attendance at hearings took place about once a month. Certain aspects of the applicant's detention conditions were stricter than for prisoners serving life sentences in Turkey. Furthermore, even if safety measures had been necessary, they were not sufficient in themselves to justify the applicant's total exclusion from the shared areas of the prison. This treatment was aggravated by the lack of an effective remedy.

The Court also found a violation of Article 14 in conjunction with Article 3. The main reason for the applicant's total exclusion from prison life was his homosexuality. He had therefore sustained discrimination on grounds of sexual orientation. The prison authorities had not performed a sufficient assessment of the risk to the applicant's safety, but rather simply believed that he risked serious bodily harm because of his sexual orientation. The Court awarded the applicant 18,000 EUR in respect of non-pecuniary damages.

Comments

This case is significant, as findings of violations of Article 3 in conjunction with Article 14 on account of an applicant's sexual orientation are relatively uncommon in the Court's jurisprudence.

EHRAC Contact Details

EHRAC LONDON OFFICE

London Metropolitan University
TM1-66, Tower Building, 166-220 Holloway
Road, London, N7 8DB
Tel: + 44 (0)20 7133 5087
Fax: + 44 (0)20 7133 5173
Email: EHRAC@londonmet.ac.uk
www.londonmet.ac.uk/ehrac

Professor Philip Leach, Director
Direct Tel: + 44 (0)20 7133 5111
Email: p.leach@londonmet.ac.uk

Tina Devadasan, Project Manager
Direct Tel: + 44 (0)20 7133 5087
Email: v.devadasan@londonmet.ac.uk

Joanna Evans, Senior Lawyer
Direct Tel: + 44 (0)20 7133 5258
Email: joanna.evans@londonmet.ac.uk

Oksana Popova, Case & Project Support Officer
Direct Tel: + 44 (0)20 7133 5090
Email: o.popova@londonmet.ac.uk

Beth Saffer, PR & Development Officer
Direct Tel: + 44 (0)20 7133 5156
Email: b.saffer@londonmet.ac.uk

Professor Bill Bowring,
Chair of International Steering Committee
Direct Tel: + 44 (0)20 7631 6022
Email: b.bowring@bbk.ac.uk

Please note:

From January 2013 EHRAC will be based at: Middlesex University, School of Law, The Burroughs, London NW4 4BT.

Please visit www.mdx.ac.uk/ehrac from January 2013 for more contact details.

About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University and is part of the Faculty of Social Sciences and Humanities. Its primary aim is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights (ECtHR). This is achieved through transferring knowledge, building partnerships and enhancing the capacity of local human rights communities, and raising awareness of human rights violations. Initially launched to focus on Russia, EHRAC has broadened its geographical remit to the South Caucasus and from time to time also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 290 cases involving more than 1,000 primary victims and their immediate family members. These cases concern issues such as extrajudicial execution, ethnic discrimination, disappearances, environmental pollution and criminal justice amongst others. For more information please visit: www.londonmet.ac.uk/ehrac.

EHRAC Partnerships

EHRAC has worked in partnership with the Russian NGO Memorial Human Rights Centre since 2003. Our close cooperation continues in substantial and varied litigation work, and training and capacity building initiatives. We also work together to raise awareness about the European Court mechanism. As well as developing other partnerships within Russia, we expanded our work into

Georgia in 2006, Azerbaijan in 2010 and Armenia in 2012, as well as cooperating with many other NGOs, lawyers and individuals across the former Soviet Union. Our work focuses on mentoring joint project lawyers to develop their professional skills and independence as litigators. In the UK we work in partnership with, amongst others, the Bar Human Rights Committee and the International Human Rights Committee of the Law Society of England and Wales.

Internship Opportunities

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

Contributions

EHRAC would like to thank the following people for their contributions:

Galina Arapova, Sonul Badiani, Matthew Cuffe, Craig Hatcher, Wessen Jazrawi, Kirill Koroteev, Dmytro Kotlyar, Kate Morley, Awaz Raoof, Michael Redman, Anna Richards, Siranush Sahakyan and Jack Torbet. This Bulletin was produced by Joanna Evans, Tina Devadasan, Jessica Gavron, Prof. Philip Leach and Beth Saffer, designed by Tortske & Sterling Legal Marketing and translated into Russian by Tatiana Tomaeva.

The EHRAC Bulletin is published biannually. We welcome contributions of articles, information or ideas. Please write to EHRAC by email to propose an article. Material in the Bulletin can be reproduced without prior permission. However, we would request that acknowledgment is given to EHRAC in any subsequent publication and a copy sent to us.

Russia

Memorial HRC (Moscow)
127006, Moscow, ul. Karetny Ryad 5
Tel.: +7 (495) 225 3118
Elena Bondal, Project Coordinator
Email: memhrc@memo.ru
<http://ehracmos.memo.ru/>

Planet of Hopes (Ozersk)
Nadezhda Kutepova, Head
Email: planeta_zato@mail.ru
www.closedcity.ru

NIZAM (Grozny)
Aslanbek Isaev, Executive Director
Email: ngo_nizam@yahoo.com
Website: www.ngo-nizam.com

Georgia

Georgian Young Lawyers' Association
(Tbilisi)
Natia Katsitadze, Lawyer & Project
Coordinator
Email: katsitadze@gyla.ge
www.gyla.ge

Article 42 of the Constitution (Tbilisi)
Nazi Janezashvili, Executive Director
Email: office@article42.ge
www.article42.ge

Azerbaijan

Legal Education Society (Baku)
Intigam Aliyev, President
Email: legal@azeurotel.com
www.monitoring.az

Media Rights Institute (Baku)
Rashid Hajili, Director
Email: mediarightsaz@hotmail.com
www.mediariights.az

Democracy and Human Rights Public Union (Sumgait)
Asabali Mustafayev, President
Email: office@humanrights.org.az
www.humanrights.org.az