

EHRAC

Bulletin



What should the European Court learn from the Inter-American Court on reparation?

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For decades the European Court of Human Rights (ECtHR) set the standard to be followed by other courts on the treatment of human rights violations. Certainly, it is the oldest regional human rights court and has contributed greatly to the protection and development of international human rights law. Nevertheless, the last two decades have witnessed important changes in regional human rights adjudication. The Inter-American Court of Human Rights (IACtHR) constitutes an excellent example of what a relatively young court can achieve and of the ways in which such a body can also help in the development of

international human rights law. This is particularly true in relation to the IACtHR's approach to reparation, an area where the ECtHR faces testing legal and practical challenges. This article outlines some principles developed by the IACtHR that could be of relevance to the ECtHR.

1. The crafting of principles to award reparation

Based on Article 63.1 of the American Convention on Human Rights (ACHR), and the crafting of important procedural and substantive principles, the IACtHR has awarded the most ground-breaking reparations for human rights violations worldwide. Indeed, the IACtHR has taken very seriously the tasks of establishing

the legal framework applicable to the award of reparations and of reasoning each and every award it is asked to consider. The IACtHR is fully aware that decisions based on merits can be meaningless if they do not translate into adequate reparation for the harm suffered.

The IACtHR follows international law principles on reparation, ensuring its adequacy and aiming to restitutio in integrum; but adapts it to human rights violations. This approach contrasts with that of the ECtHR which does not usually provide proper rea-

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Editorial

In this issue of the *EHRAC Bulletin*, Dr. Clara Sandoval of the University of Essex discusses the remarkable approach to redress which has been developed by the Inter-American Court of Human Rights, and asks what the European Court could learn. There are three articles focusing on Georgia: Sophio Japaridze of Interights considers whether lesbian, gay, bisexual and transgender (LGBT) people are protected against discrimination and hate crime in Georgia; Natia Katsitadze of the Georgian Young Lawyers' Association (GYLA) analyses the extent of implementation of the European Court's judgment in *Kiladze v Georgia*; and Mariam Uberi weighs up the Georgian guardianship proce-

dure against the requirements of the European Convention on Human Rights.

Also in this edition, Olga Tseitlina (EHRAC-Memorial HRC) considers recent Article 3 judgments regarding extradition to CIS countries, Siranush Sahakyan of 'Protection of Rights without Borders' discusses a landmark judgment concerning conscientious objection (*Bayatyan v Armenia*) and there is also a feature on our case relating to the Nagorno-Karabakh conflict which was recently declared admissible by the Grand Chamber of the European Court (*Sargsyan v Azerbaijan*).

Prof. Philip Leach
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soning to the treatment given to reparations and which fails to follow international law as it applies to reparations.

2. Substantive principles

Various substantive principles have been crafted by the IACtHR, of which three are highlighted here:

2.1 Principle of due recognition of victimhood

The IACtHR has developed a significant understanding of the term 'injured party' according to Art. 63.1 of the ACHR, one which incorporates not only direct victims of human rights violations but also indirect ones such as next of kin (understood broadly and in a culturally sensitive manner), the family unit, dependents and the community if applicable.¹

2.2 Principle of the most favourable conditions

The IACtHR applies this principle to rectify situations in breach of key human rights principles such as equality and non-discrimination or the right to a dignified life. For example, the IACtHR has applied the minimum wage of the relevant state to cases where victims had a salary lower than the cost of the basic food basket.²

2.3 Principle of transformative reparations

In *Cotton Field v Mexico* the IACtHR put forward a significant redefinition of its concept of adequate reparation by highlighting that when the violations occur in a context of structural discrimination, reparation cannot simply return victims to the situation they were in prior to the violation taking place (one of discrimination); rather, reparations should aim to transform or change the pre-existing situation.³

3. Procedural principles

Adequate reparation requires the crafting of important procedural prin-

ciples so that a Court is able to gather all relevant information and evidence about the harm allegedly caused and can assess the information correctly. Only three such principles are presented:

3.1 The principle of a flexible approach to standard and burden of proof in reparation

The IACtHR has relied on presumptions and circumstantial evidence "when they lead to consistent conclusions as regards the facts of the case".⁴ Thus, for example, in relation to pecuniary damages, the IACtHR is willing to presume that adults who receive an income and have a family spend most of that income providing for the needs of its members, or that the next of kin of a deceased person will cover the funeral costs. As for the standard of proof, for example, the person who alleges the harm has to prove their identity by way of a birth certificate and/or statements before a notary public. However, the IACtHR is prepared to lower this standard when the person cannot present the required documentation because the State failed to provide the necessary means to identify the person. In such situations the IACtHR allows the person to prove his/her status through other means as established by the Court.⁵

3.2 The principle of motu proprio awards

While the general rule is that the IACtHR awards reparations by taking into account the reparation requests put forward by the victims/legal representatives and the Commission, and considering the views of the State in question, in exceptional cases the IACtHR has awarded reparations not requested by either party to guarantee that reparations are adequate.⁶

3.3 The principle of effective victim participation

The combination of hearings with the appearance in the IACtHR of some of the victims, witnesses and also expert witnesses has been significant in

securing better treatment for harm during the reparation stage. For example, in *Massacre of Plan de Sánchez v Guatemala*, where more than 268 members of the Maya indigenous peoples were massacred in 1982, two expert witnesses that appeared before the IACtHR were crucial in order to understand the collective harm suffered by the indigenous community.⁷

Conclusions

The IACtHR has put together a diverse array of principles, from international law principles to Court crafted principles (procedural and substantive) which guide it in its consideration of reparation awards. This note has simply identified some principles of relevance to the ECHR but has not exhausted their description/application. The ECtHR should look into these and other principles and consider ways to enhance its own approach to reparation. As principles, they are open to be adapted and shaped to the particular features of European litigation. This is the first lesson the ECtHR should learn from the IACtHR: without the proper identification and application of such principles (substantive and procedural), adequate reparation cannot be achieved.

1 Sandoval, C., 2010. The Concepts of Injured Party and Victim of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations. In C. Ferstman et al eds. *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and systems in the Making*. The Netherlands: Martinus Nijhoff Publishers. p. 243-282.

2 IACtHR, *Amparo v Venezuela*, reparations, 14.09.96, para. 28 and *Street Children v Guatemala*, reparations, 26.05.01, para. 79.

3 IACtHR, *Cotton Field v Mexico*, supra, admissibility, merits and reparations, 16.11.09, para. 450.

4 IACtHR, *Gangaram Panday v Suriname*, merits, 21.01.94, para. 49.

5 IACtHR, *Massacre of Plan de Sánchez v Guatemala*, reparations, 19.11.04, paras. 62 and 67.

6 IACtHR, *Rochela v Colombia*, merits, reparations and costs, 11.05.07, paras. 286-303.

7 Augusto Willemsen-Díaz, expert on indigenous rights and Nieves Gómez, psychologist, appeared before the Court. *Massacre of Plan de Sánchez*, supra, n. 5, para. 38, 84 and 106.

Does the practice of the Georgian national courts meet the requirements for the effective enforcement of the Kiladze judgment?

Natia Katsitadze, lawyer, Georgian Young Lawyers' Association (GYLA)

The 2010 judgment in the case of *Klaus and Yuri Kiladze v Georgia* (No. 7975/06) 02.02.10 at the European Court of Human Rights (ECtHR) paved the way for around 20,000 victims of Soviet-era repression in Georgia to benefit from their right to monetary compensation as guaranteed under national law – a right which had remained illusory for more than ten years.

For the purposes of the proper implementation of the ECtHR's findings in this case, the Georgian Parliament adopted legislative amendments to the Law of 11 December 1997 on the Recognition of Status as a Victim of Political Repression for Georgian Citizens and Social Protection for the Oppressed and to the Administrative Procedure Code of Georgia. The legislative amendments allow victims of political repression, as envisaged under Article 9 of the Law of 11 December 1997, or, in the event of their death, their heirs, to apply for pecuniary compensation through the Tbilisi City Court.¹ The Tbilisi City Court is to determine the amount of compensation on examination of the factual circumstances of each case, taking into account the gravity of different forms of coercion, as well as the age and health of the repressed person (or his/her heir), among other objective factors.² During the discussions at the Parliamentary Legal Committee, the legislators argued that the judiciary would be best placed to evaluate the individual circumstances of each and every case and consequently to define the amount of monetary compensation. Subsequently, the relevant amendments entered into force in May 2011.

In the five months after the amendments entered into force more than

3,000 applications for monetary compensation were lodged with the Tbilisi City Court. The minimum amount of compensation awarded in individual cases is less than GEL 100 (€46), while the maximum award of compensation is GEL 400 (€186), which is only provided to first generation heirs of victims of repression who were sentenced to death and shot. The practice of national courts has caused huge frustration among the beneficiaries of the minimum level of compensation.

In this regard, it is important once again to reiterate the Court's comments in the *Kiladze* judgment, that there is no specific obligation on the Contracting State to redress injustice or damage caused by its predecessors.³ In the judgment of *Wolkenberg and Others v Poland* (No. 50003/99) 04.12.07, following the pilot judgment in the *Broniowski v Poland* (No. 31443/96) 22.06.04, the ECtHR reiterated that the State has a wide margin of appreciation when passing laws in the context of a change of political and economic regime and that in such contexts situations may even arise where the lack of any compensation would be found compatible with the requirements of Article 1 of Protocol 1.⁴ In *Broniowski* the Grand Chamber had held that not only was there a violation of Art. 1(1), but that Poland should take steps to ensure that the 'Bug River' claimants, who had been forced to abandon their properties between 1944-53, were properly compensated. In response, the Polish Government passed a national Act setting the compensation at 20% of the original value of the property. Despite complaints from the applicants that the amount of compensation was low, the ECtHR was satisfied with the scheme of compensation introduced by the national Act and held that the Act effectively secured "the implemen-

tation of the property right in question in respect of the remaining Bug River claimants".⁵

Taking into account the established ECtHR case law, doubts nonetheless arise in the present case as to whether the national court practice meets the rationale of the new law and whether the Committee of Ministers (CoM) and the ECtHR will be satisfied with the implementation of the law adopted to ensure the effective enforcement of the *Kiladze* judgment.

Although determining the amount of pecuniary compensation to be awarded to victims of Soviet-era repressions is at the State's discretion and, in this particular instance, at the discretion of the national courts (as provided by domestic legislation), one can argue that the minimal levels of compensation set by the Tbilisi City Court do not conform with the intention or the procedural requirements of national law.

Analysis of the judgments of the Tbilisi City Court reveals that, contrary to the requirements of the relevant law, the majority of the court's decisions are standardised, citing provisions of relevant laws and paragraphs of the *Kiladze* judgment, with only two or three lines given to the individual circumstances of the applicant. The majority of the Court's rulings fail to make any reference to health issues or other individual circumstances of an applicant. Instead, a standard statement is issued to the effect that the applicant and/or their heir was a victim of Soviet repression.

In essence, the content of every decision delivered by the Tbilisi City Court follows a standard template. For example, it is clear that without any consideration of individual circumstances the Tbilisi City Court grants a uniform award of GEL 400 (€186) in

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compensation to first generation heirs of victims of repression who were sentenced to death and shot. The Court's approach directly contradicts the intention of the amendment adopted in May 2011 that each case should be considered on an individual basis.

By any objective standard, the levels of compensation set by the Court are minimal and in no way commensurate with the violations suffered by the victims. Furthermore, the standardisation of the Court's awards undermines the intention of the legislation; to acknowledge the harm suffered and provide a level of reparation which takes into consideration the individual circumstances of the victims and their heirs.

If the intention behind the legisla-

tion had been to grant predetermined and standard amounts of compensation to every applicant, filing claims in court would not have been required but rather one of the agencies within the executive branch of the Government would have been given the authority to make the compensation payments. This would have prevented over-burdening the court and avoided delay in awarding payment.

The current approach of the national courts aims to discourage victims of repression or their first generation heirs to realise their lawful rights. As the majority of the beneficiaries are elderly, they frequently find it difficult to obtain all the necessary documents required for the court proceedings; often, they do not even have the financial resources to pay to obtain the necessary documents. This is compounded by unreasonably small awards of compensation by the courts

which, in practical terms, renders the right to compensation meaningless.

In light of the approach taken by the ECtHR in the 'Bug River' property cases following the *Broniowski* pilot judgment, and the practice exercised by the Georgian national courts in the present case, it will be fully incumbent upon the CoM and the ECtHR to judge whether this practice constitutes the effective enforcement of the *Kiladze* judgment.

1 Para 2, Article 9 of the Law of 11 December 1997 and para 2, Article 21²⁶ of the Administrative Procedure Code of Georgia.

2 Para 4, Article 9 of the Law of 11 December 1997 and para 2, Article 21²⁹ of the Administrative Procedure Code of Georgia.

3 Para 53, *Kiladze v Georgia* (No. 7975/06) 02.02.10.

4 Para 60, *Wolkenberg & Others v Poland* (No. 50003/99) 04.12.07.

5 Ibid. para 174.

Recent Article 3 judgments regarding extradition to CIS countries

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The European Court of Human Rights (ECtHR) view on the extradition of applicants varies according to a number of factors, including: the destination country and the general human rights situation there, the accessibility of the country to international observers and its detention conditions. However, primarily it depends on the applicant's individual circumstances, as well as on the nature of the charges against them, the circumstances in which they left the country and their belonging to a persecuted group, if applicable. These factors were all taken into consideration by the ECtHR when judging the following cases of extradition to countries in the former Soviet Union.

Turkmenistan – no objective information on prison conditions, lack of accessibility, vulnerability

In *Kolesnik v Russia* (No. 26876/08) 17.6.10, the ECtHR confirmed its ear-

lier conclusions in *Ryabikin v Russia* (No. 8320/04) 19.6.08 and *Soldatenko v Ukraine* (No. 2440/07) 23.10.08, declaring extradition to Turkmenistan to be in breach of Art. 3 due to "very poor conditions of detention; discrimination against persons of non-Turkmen ethnicity, which made them particularly vulnerable to abuses; [...] and] systematic refusal of the Turkmen authorities to allow any monitoring of the places of detention by international or non-government observers" (para. 68). The ECtHR also noted that the latest reports by observers did not demonstrate any improvement in the situation in Turkmenistan - in particular that "international observers, including the ICRC, have continued to be denied access to the places of detention" (para. 69).

Tajikistan – ratification of key instruments does not eliminate risk of ill-treatment and vulnerability: Hizb ut-Tahrir and ethnic Uzbeks

The applicant in *Khodzhaev v Russia* (No. 52466/08) 12.05.10 was ac-

cused of being a member of the illegal group, Hizb ut-Tahrir. The ECtHR found sufficient grounds to suggest that there was persecution of members and supporters of Hizb ut-Tahrir and ruled that the applicant's extradition would be in violation of Art. 3.

In *Gafarov v Russia* (No. 25404/09), 21.10.10, the ECtHR additionally noted evidence of discrimination in Tajikistan on the basis of national origin. However, this case once more turned on the applicant's status as a member of Hizb ut-Tahrir. He had also alleged that he had been tortured previously; he had escaped custody and his relatives had been approached and threatened by law enforcement officials. These were factors taken into consideration by the ECtHR and they ruled against extradition.

In *Khaydarov v Russia* (No. 21055/09) 20.5.10, the applicant (who was charged with criminal offences of banditry that were alleged to be politically motivated) was once again of Uzbek

origin and the ECtHR made reference to the discrimination on the grounds of ethnicity outlined above. The ECtHR rejected the Russian Government's argument that Tajikistan's ratification of key human rights instruments excluded the risk of ill-treatment, stating that reliable sources had reported that the authorities were tolerating practices manifestly contrary to the ECHR and even resorting to such practices themselves (para. 105).

Kazakhstan – detention not sufficient to amount to violation of Art. 3 due to improvement in detention conditions

Previously, in *Kaboulov v Ukraine* (No. 41015/04) 19.11.09, the ECtHR referred to credible reports of the torture and ill-treatment of detainees, poor prison conditions and a failure to investigate reports of torture to support a finding that the mere fact of being detained in Kazakhstan was sufficient to fear treatment contrary to Art. 3. The ECtHR came to a similar conclusion in *Baysakov and Others v Ukraine* (No. 54131/08) 18.02.10. However, in the more recent case of *Dzhaksybergenov v Ukraine* (No. 12343/10) 10.02.11, the ECtHR did not find a violation of Art. 3. Their reasons cited the recent improvements in the human rights situation, particularly with regards to detention conditions. It therefore revised its previous conclusions regarding extradition to Kazakhstan, stating that there was no indication that the human rights situation was serious enough to call for a total ban on extradition.

Uzbekistan – systematic practice of torture according to international observers insufficient to prevent extradition for ordinary criminal offences

In 2008 the ECtHR noted that the “ill-treatment of detainees is a pervasive and enduring problem in Uzbekistan”,¹ and in 2010 that “no concrete evidence has been produced to demonstrate any fundamental improvement in this area

in this country for several years. Given these circumstances, the Court considers that ill-treatment of detainees is a pervasive and enduring problem in Uzbekistan”.² However, in *Elmuratov v Russia* (No. 66317/09) 03.03.11 the ECtHR stated that, unlike in previous cases of extradition to Uzbekistan where the applicants had been members of especially vulnerable groups who were systematically subjected to the practice of ill-treatment, the applicant had been indicted solely with property-related criminal offences and did not belong to a vulnerable group. Therefore, his extradition would not be a violation of Art. 3.

However, in recent judgments concerning the same issues, the ECtHR found that there is no concrete evidence to demonstrate any real improvements to the risk of ill treatment.

In *Yakubov v Russia* (No. 7265/10) 08.11.11, the ECtHR found that to demand the applicant provide irrefutable evidence of the risk of ill treatment in the country in question would be asking them to predict future events and would put a disproportionate burden on the applicant. The ECtHR reiterated its position that, in these cases, the likely consequences of extraditing someone to a particular country must be taken into account.³

As a result, the ECtHR found violations of Art.3 in *Yakubov v Russia* and, in a further case, *Ergashev v Russia* (No. 12106/09) 20.12.11, insofar as the applicants objectively demonstrated that they were members of persecuted groups in Uzbekistan (it was alleged they were members of the organisation Hizb Ut-Tahrir).

Belarus – individual circumstances, vulnerability of certain groups, including political opposition

ECtHR practice regarding extradition to Belarus has depended on the individual circumstances of the applicant. For example, in *Kamyshev v Ukraine* (No. 3990/06) 20.5.10, the

ECtHR found no violation of Art. 3, stating that whilst international documents demonstrated serious concerns as to the human rights situation in Belarus, general problems concerning human rights observance cannot serve as a basis for refusing extradition, adding that, “there is no indication that the human rights situation in Belarus is serious enough to call for total ban on extradition to that country”. The ECtHR found that the applicant did not belong to the political opposition or to any other recognised vulnerable group, and the allegation that any criminal suspect ran the risk of ill-treatment was too general to substantiate a serious risk.

Meanwhile, in *Koktysh v Ukraine* (No. 43707/07) 10.12.09, the ECtHR held that the individual circumstances of the applicant resulted in a risk of ill-treatment, since the applicant had previously been ill-treated by the authorities. Furthermore, the ECtHR found that the potential for the applicant to face the death penalty, together with the prospect of an unfair trial (his previous final acquittal had been quashed), would generate sufficient mental suffering to fall within the ambit of Art. 3.

It is therefore evident from recent ECtHR practice on the application of Art. 3 that each case will largely turn on its own facts and the individual circumstances of the applicant, particularly in relation to membership of vulnerable groups. The human rights situation in each country is also clearly a critical prerequisite for a finding of a violation of Art. 3. However, the jurisprudence of the ECtHR demonstrates that such a finding is often not considered warranted in the absence of specific risk to the applicant.

¹ *Ismoilov & Others v Russia* (No. 2947/06) 24.4.08, para. 121.

² *Sultanov v Russia* (No. 15303/09) 4.11.10, para. 71; *Karimov v. Russia* (No. 54219/08) 29.7.10, para. 99.

³ See *Vilvarajah and Others v United Kingdom* (Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87) 30.10.91.

Bayatyan v Armenia

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This article discusses the recent landmark judgment in the case of *Bayatyan v Armenia* (No. 23459/03) 7.07.11 in which the European Court of Human Rights (ECtHR) broke with previous case law and decided to include conscientious objectors within the scope of Art. 9 of the European Convention on Human Rights (ECHR): the right to freedom of thought, conscience and religion.

Mr. Bayatyan is a Jehovah's Witness. He became eligible for military service in spring 2001. On 1 April 2001 he wrote to the relevant Armenian authorities saying that he refused to perform military service due to his religious beliefs but offered to perform civilian service instead. Later on in 2001 a criminal case was instituted against him for draft evasion. On 28 October 2002 he was found guilty as charged and sentenced to one and a half years in prison. Following an appeal by the prosecutors, the sentence was increased to two and a half years. On 22 July 2003 he was released on parole. He brought proceedings before the ECtHR claiming that his conviction for refusal to serve in the army had violated Art. 9 of the ECHR.

In its judgment of 27 October 2009 the Chamber interpreted Art. 9 in the light of Art. 4(3)(b) of the ECHR, which, when referring to conscientious objectors, uses the words "*in countries where they are recognised*". The Chamber took this to mean that the choice of recognising conscientious objectors is left to each contracting party. They therefore found that Art. 9 did not guarantee the right to refuse military service on conscientious grounds and that a contracting party which had not recognised that right could not be held to be in violation of its ECHR obligations.

Previous case law

The approach of the Chamber was in line with previous case law.

The case of *Grandrath v Germany* (No. 2299/64)¹ set out the position. It concerned a Jehovah's Witness who sought exemption from military and civilian service. The European Commission of Human Rights (the Commission) observed that while Art. 9 guaranteed the right to freedom of thought, conscience and religion in general, Art. 4 of the ECHR contained a provision, which expressly permitted compulsory service exacted in the place of military service in the case of conscientious objectors. It therefore concluded that a person is not entitled to exemption from civilian service under the ECHR, but refrained from interpretation of the term '*freedom of conscience and religion*' used in Art. 9. This approach was subsequently confirmed by the Commission in later cases,² where the Commission reiterated that Art. 9, as qualified by Art. 4(3)(b), did not impose on a State the obligation to recognise conscientious objectors and, consequently, to make special arrangements to exercise that right. Therefore, these Articles did not prevent a State, which had not recognised conscientious objectors, from punishing those who refused to do military service.

In its more recent judgments concerning conscientious objection, *Thlimmenos v. Greece* (No. 34369/97) 6.4.00 and *Ülke v Turkey* (No. 39437/98) 24.1.06, the ECtHR found it unnecessary to examine the applicability of Art. 9 as the complaints were dealt with under other provisions of the ECHR, namely Articles 14 and 3.

Grand Chamber judgment

When the Grand Chamber (GC) came to consider the Bayatyan case, it ruled that the interpretation of Art. 4(3)(b), given by the Commission and the ECtHR, did not reflect the true purpose and meaning of that provision. It concluded "*The Travaux préparatoires confirm that the sole purpose of sub-paragraph (b) of Article 4 § 3 is to provide a further elucidation*

of the notion 'forced or compulsory labour'. In itself it neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9". The ECtHR took the view that Art. 9 should no longer be read in conjunction with Art. 4(3)(b) and that complaints must be considered solely under Art. 9. In making its decision, the GC emphasised the ECHR's status as a living instrument and the need to take a "*dynamic and evolutive approach*".

The GC also took into consideration Armenia's changing attitude towards conscientious objection. Although Armenian law did not provide for conscientious objectors at the time of the applicant's conviction, shortly afterwards, a law on alternative service was introduced and therefore "*Mr Bayatyan's conviction for conscientious objection was in direct conflict with the official policy of reform*".

The ECtHR has now set out a clear test for the applicability of Art. 9 to conscientious objection: "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Art. 9."

In its judgment, the GC gave weight to the fact that at the material time there was an almost total consensus among Member States recognising the right to conscientious objection. The case therefore represented a timely opportunity for the ECtHR to harmonise its approach with the domestic laws and social policy of Member States.

Venice Commission

After publication of the GC judgment, the Armenian Government sought the opinion of the European Commission for Democracy through

Law (the Venice Commission) on its draft Law on Amendments and Additions to the Law on Alternative Service. The Venice Commission's opinion, published on 20 December 2011, welcomes the Law as a step in the right direction towards ensuring Armenia's conformity with international standards relating to conscientious objection to military service. How-

ever, it makes several recommendations as to how the proposed amendment and the law in force could be improved. In particular, it notes that according to Art. 3 of the existing law, alternative service is available to a citizen for whom military service is "contrary to his religious belief or convictions." Noting the application of Art. 9 of the ECHR to conscientious

objection following the Bayatyan judgment, the opinion states that this wording appears restrictive and recommends that Art. 3 be amended in order to match more closely the wording of Art. 9 of the ECHR.

1 *Grandrath v Germany* (No. 2299/64), Commission report of 12.12.66, Yearbook, vol. 10, p. 626.

2 *A v Switzerland* (No. 10640/83), Commission decision of 09.05.84, DR 38, p. 219.

Georgian Guardianship Procedure and the European Court of Human Rights

Mariam Uberi, lawyer

Under the European Convention on Human Rights (ECHR), there is a positive duty to establish substantial and procedural guarantees to prevent abuse of guardianship arrangements.¹ However, it would seem that Georgian legislation does not comply with ECHR standards.

Provisions on guardianship

According to the Georgian Civil Code, the rights of an adult declared incapable due to 'mental retardation or mental illness' are vested in the guardian,² who is their statutory representative.³ There are four levels of incapacity: slight, moderate, significant and high. The level of incapacity must be deemed to be in the latter three categories to allow for the deprivation of legal capacity.⁴ The law determines legal capacity by assessing clinical, social, professional and psychological states, yet provides no guidance as to how and by whom these assessments should be conducted - it can even take place without the adult in question being examined (e.g. where the adult cannot travel).⁵ The law remains ambiguous as to whether the adult in question has the right to legal representation.⁶ Similarly, it makes no indication as to whether s/he has the right to be present and heard in the legal process. Finally, there is no provision for an adult to invite an independent expert to challenge forensic expertise.

The legislation differentiates between capacity assessment periods depending on the degree of incompetency; an adult with a moderate to sig-

nificant level of incompetency is entitled to a yearly assessment, whilst those with the highest degree are entitled to assessment twice a year.⁷ However, an incapacitated adult who shows no improvements after five years has no right to further assessments.⁸ An adult deprived of legal capacity has recourse to a judicial review, but legal capacity will only be restored upon a finding of 'recovery or significant improvement in [...] health'.⁹ The legislation allows for an appeal by an interested person,¹⁰ but, in practice, the incapacitated adult may not have been informed of the decision.

Incapacity assessment

In *Shtukurov v Russia* (No. 44009/05) 04.03.10, the European Court of Human Rights (ECtHR) held that the existence of a mental disorder, including a serious one, cannot alone justify full incapacitation - the mental disorder must be 'of a kind or degree warranting such a measure'.¹¹ Georgian legislation fails to address the 'kind' or 'degree' of disability in sufficient detail.

Legal Representation

The ECtHR stated that, as mental illness may require restricting or modifying the manner of the exercise of the right of access to a court under Art. 6, special procedural safeguards may be called for to protect the interests of persons who are not fully capable of acting themselves.¹² Proceedings which determine civil rights without the participation of the party are in violation of Art. 6 (1).¹³ The ECtHR has interpreted that

particular diligence is required during the determination of 'civil status and capacity'¹⁴ where legal representation shall be 'effective'.¹⁵

Georgian law provides no judicial review of an adult who is deemed permanently incapacitated where there is no change in status after five years. The ECtHR reasons that when there is no 'automatic periodic review' of a judicial character, the law shall provide for 'reviewing a declaration of incapacity'.¹⁶ The principles of proportionality and flexibility require that any measures involving the restriction of a person's legal capacity are applied only as long as justified by the condition of the person concerned.¹⁷ The Memorandum to Recommendation No R(99)4 further emphasises that an indefinite incapacity order should be exceptionally rare.¹⁸ The ECtHR asserts that the right to ask a court to review a declaration is one of the 'most important rights for the person concerned'.¹⁹ Despite this, it is evident that Georgian legislation is neither proportionate nor flexible in its response.

The ECtHR further specifies that the law must provide for the possibility for the adult in question to bring a request for restoration of legal capacity.²⁰

Appeal

Georgian legislation is vague about the procedural guarantees for the adult to be present and heard during proceedings, to have evidence considered and to have an effective right to ap-

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Georgian Guardianship Procedure and the European Court of Human Rights

peal. However, the ECtHR highlights the importance of these safeguards and insists on the right to be heard in person.²¹ The ECtHR submits that any reports contracted on behalf of the person whose capacity is in question should be considered in the same way as other experts' opinions.²² Contrary to these requirements, Georgian law does not allow for any independent expert opinion. Similarly, the lack of guarantee to be informed of a court decision renders the right to appeal illusory. The ECtHR asserts that 'persons amenable to the law' shall enjoy before the appeal courts the fundamental guarantees contained within Art. 6.²³ The ECtHR further asserts that unduly restricting the prospect of an appeal, even with the assistance of the guardian, is a violation of fair trial.²⁴

Concluding remarks

Analysis of Georgian law on guardianship suggests that legal capacity proceedings do not guarantee the

requisite and fundamental procedural safeguards of participation, representation and effective appeal and that substantial revision is in order to ensure compliance with the ECHR.

1 Under Art. 6 and 8 ECHR as well as COM Recommendations No. R (99) 4 on the Principles Concerning the Legal Protection of Incapable Adults.

2 The Civil Code of Georgia, Art 12 (5).

3 Ibid, Art. 1293.

4 Ibid, Art. 10 (3).

5 The law on Medical Examination, Art. 51(2).

6 The Civil Code of Georgia, Art. 325 (2)

7 The Law on Medical Examination, Art. 12.

8 Ibid, Art. 14.

9 The Civil Code of Georgia, Art. 12 (6).

10 The Civil Code of Georgia, Art. 1305.

11 *Shtukatur v Russia* (No. 44009/05), 27.03.08, para 95, see also the principle 3 (1) of the Recommendation No. R (99) 4 of the COM concerning the legal protection of incapable adults.

12 *Winterwerp v the Netherlands* (No. 6301/73) 24.10.79 supra note 14, para 60.

13 Art. 6 (1) ECHR. In the criminal law context the Court asserted that a person can waive the right to be present at the court hearing only if sufficient notice has been served. See *Poitrimol v France* (No. 14032/88), 26.10.93, para 31.

14 *Matter v Slovakia* (No. 31534/96), 05.07.99, para 54.

15 *Czekalla v Portugal* (No. 38830/97), 10.01.03, para 60.

16 *Stanev v Bulgaria* (No. 13770/88) 17.01.12, para 241.

17 Recommendation No R (99) 4, Principle 14.

18 According to the explanatory Memorandum to Recommendation No R (99), an indefinite incapacity order should be the exception and happen only in cases where the individual has dementia or Alzheimer's disease, para 54.

19 *Stanev v Bulgaria* (No. 36760/06) 17.01.12, supra note 16, para 241. The Court also refers to the United Nations Convention on the Rights of Persons with Disabilities which recommends adequate procedural safeguards to be put in place to protect legally incapacitated persons and ensure periodic reviews of their status and provide appropriate remedies, para 244.

20 Ibid, para 245.

21 *Botten v. Norway* (No. 16206/90) 19.02.96, para 53. See also Recommendation No R (994), Principle 14.

22 *Kutzner v Germany* (No. 46544/99) 10.06.02, para 73.

23 *Delcourt v Belgium* (No. 2689/65) 17.01.70, 1 EHRR 355, para 25.

24 *Salontaji-Drobnjak v Serbia* (No. 36500/05) 13.10.09, para 134-135.

Are Lesbian, Gay, Bisexual and Transgender (LGBT) persons protected against discrimination and hate crime in Georgia?

Sophio Japaridze, Lawyer, Interights

Georgia is dominated by deeply rooted traditions, history and religion which promote stigmatisation and enhance existing negative stereotypes of the LGBT community. This is aggravated by state practice and poor legislation which fail to ensure adequate protection of LGBT individuals against discrimination and hate crime.¹ Even though homosexuality was de-criminalised in Georgia in 2000, hostility towards sexual minorities still prevails at most levels of Georgian society, prompting LGBT individuals to remain invisible.²

i. Law

Article 14 of the Georgian Constitution aims to ensure equality before the law.³ In contrast to the ECHR, the Constitution provides an exhaustive list of prohibited grounds of discrimination. The list does not include sexual orientation

or gender identity. In theory, 'sex' may be interpreted as encompassing 'sexual orientation',⁴ but, as of yet, no guidance has been provided by the Constitutional Court.⁵ Article 142 of the Penal Code of Georgia⁶ criminalises the failure to treat people equally, including on account of their sex. Again, sexual orientation or gender identity are not expressly prohibited.

Georgian legislation does not define hate crime, although hate motive is considered an aggravating circumstance and results in heavier sanctions for certain crimes (e.g. crimes committed on religious or ethnic grounds).⁷ However, sexual orientation and gender identity are not expressly mentioned. Furthermore, hate speech is not criminalised in Georgia. It is mainly regulated through the charters of ethics and codes of conduct.⁸

ii. State practice

Hate crimes against LGBT persons usually go unreported. In addition to the absence of hate crime legislation, reasons for not reporting hate crimes include a fear of an individual's sexual orientation being disclosed to the public and a lack of confidence in the law-enforcement system.⁹ Hate crimes against LGBT persons are usually labelled under other provisions of the Criminal Code and is consequently there is no indication as to whether or not a particular crime was motivated by hate.¹⁰

Homophobic public statements are not unusual. For example, on 30 July 2009, during a meeting with civil society representatives, one of the two candidates for the Ombudsperson's position stated that homosexuality should be re-criminalised in Georgia.¹¹ In contrast, however, a TV journalist was recently

held responsible under the Charter of Journalists' Ethics for failing to prevent homophobic statements from being made by a programme guest.¹²

A negative reaction towards LGBT activities in Georgia is often pre-emptive. A recent example of this was a rumoured gay pride event which was due to take place in Batumi, Georgia, in August 2010, which the religious authorities sought to prevent.¹³ Similarly, in 2007, organisers were forced to cancel a Council of Europe campaign 'All Different, All Equal', which promoted tolerance and cultural dialogue, and was not specifically focussed on LGBT rights. False rumours about the campaign being a disguised gay pride event gave rise to protests and condemnation from the Orthodox Church and television stations, causing fear of attacks.¹⁴

iii. Pending ECHR challenge

To date, the ECtHR has not had the opportunity to consider instances of

discrimination and homophobic ill-treatment towards LGBT persons in Georgia. However, the recently lodged case of *Aghdgomelashvili and Japaridze v Georgia* (No. 7224/11), concerning a police search of the premises of the LGBT organisation 'Inclusive Foundation', presents the ECtHR with such an opportunity. In this case, the applicants allege that extreme homophobic behaviour was displayed towards them by the police on the basis of their actual or perceived sexual orientation. This behaviour included multiple insults, rough treatment and unlawful strip searches. Despite numerous public statements made by both national and international NGOs condemning the police's behaviour and the applicants' petitions to commence a pre-trial investigation, there has been no effective investigation into the case and none of the police officers have been held accountable.¹⁵

This case illustrates suppression of LGBT activism in the former Soviet

Union. Other examples include banning gay pride marches,¹⁶ use of hate speech¹⁷ and refusing to register LGBT NGOs.¹⁸ It is significant not only as the first Georgian case concerning homophobic ill-treatment but also, given the absence of similar judgments against other states, for its potential ramifications for the protection of LGBT rights more broadly in the Council of Europe. Possible outcomes of a positive judgment include the introduction of hate crime legislation in Georgia or of homophobic intent as an aggravating factor for common crimes.

In summary, whilst Georgian human rights legislation and practice has improved since the country joined the Council of Europe, further efforts are needed to ensure that the rights of LGBT individuals to equality and non-discrimination are secured and that they are protected against hate crime.

1 ECtHR case-law suggests that difference in treatment on grounds of sexual orientation requires particularly weighty reasons to be justified under the Convention and that States are afforded a narrow margin of appreciation. See *E.B. v France* (No. 43546/02), 22.01.08 § 91; *Schalk and Kopf v Austria* (No. 30141/04), 24.06.10 § 97; *Kiyutin v Russia* (No. 2700/10) 10.03.11 § 63.

2 See *H.J. (Iran) & H.T. (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31.

3 "Everyone is free by birth and is equal before the law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence."

4 See *Toonen v Australia*, UNHRC, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4.04.94, para. 8.7.

5 See an "Overview of Georgian Legislation in relationship to LGBT human rights": <http://inclusivefoundation.org/home/?page=publications&lang=en>.

6 "Breaching equality of humans due to their race, skin colour, language, sex, religion, political and other opinion, national, ethnic and social belonging, origin, place of residence or material condition that has substantially violated human rights."

7 See Article 109. 2 (d) of the Penal Code

8 See the Charter of Journalists' Ethics and the Code of Conduct of Public Broadcasters

9 See 'Forced Out: LGBT People in Georgia', a report on ILGA-Europe /COC fact-finding mission, Sheila Quinn, August 2007, p.35: http://www.ilga-europe.org/home/publications/reports_and_other_materials/%28offset%29/15

10 Ibid, p.58.

11 Dimitri Lortkipanidze, an incumbent deputy chairman of the Human Rights and Civil Integration Committee of the Georgian Parliament. See <http://www.civil.ge/eng/article.php?id=21309>.

12 See <http://www.media.ge/en/node/37242>.

13 See statement of the Patriarchate of Georgia: http://www.patriarchate.ge/?action=news_show&mode=news&id=565.

14 See "Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Georgia" http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GRPJ_Georgia.pdf, p.11-12.

15 The case was submitted by INTERIGHTS and Article 42 of the Constitution. See: <http://www.interights.org/aghgomelashvili/index.htm>.

16 See *Alekseyev v Russia*, (No. 4916/07, 25924/08 and 14599/09) 21.10.10; also statement of facts in *Genderdoc-M v Moldova* (No. 9106/06).

17 See statement of facts in *Alekseyev et al v Russia* (No 39954/09).

18 See statements of facts in *Zhdanov & Rainbow House v Russia* (No 12200/08).

In Brief... The Chechen Archive

Archives preserve not only historical memory but also accountability, and in Chechnya - where a protracted war characterised by systematic abuses has largely been forgotten - safeguarding documentation could provide a crucial entry-point.

The Chechen Archive was created by human rights activist Zainap Gashaeva, whose organisation filmed hundreds of hours of footage

since the first Chechen War began in 1994. When the so-called "counter-terrorist operation" was launched in 1999, these resources were secretly transferred to the Society for Threatened Peoples in Switzerland where the Archive is housed.

The Archive now contains over 400 videos which are being digitised and systemised in a customised database with additional contributions

from well-known journalists. The archived information can help bring justice by safe-guarding the collective memory and seeking punishment for perpetrators.

The Chechen Archive can be used by students, lawyers, journalists, NGOs and Chechen and Russian citizens.

Contact shoma.chatterjee@gfbv.ch for further information.

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

Yakubov v Russia

(No. 7265/10) 08.11.11

Ergashev v Russia

(No. 12106/09) 20.12.11

ECHR: Judgment

Extradition to Uzbekistan

Facts

In both cases, the applicants were Uzbek nationals facing expulsion from Russia to Uzbekistan where criminal proceedings were underway, accusing them of membership of banned extremist organisations. Both applicants alleged that they would be at risk of torture and/or ill-treatment in Uzbek detention facilities, and that therefore their deportation would be in violation of Art. 3 (torture and/or degrading or ill treatment). Yakubov also averred a violation of Art. 13 (effective remedy). Ergashev additionally complained that the conditions of his detention in Russia amounted to a breach of Art. 3. Furthermore, he submitted complaints under Art. 5 (deprivation of liberty), alleging that his detention was unlawful and under Art. 6 (right to a fair trial) on the basis that news broadcasts, relying on information from state officials, had described him as a terrorist and an extremist, thereby breaching the presumption of innocence.

Judgment

In respect of both extraditions, the ECtHR found that the deportations would be in violation of Art. 3. The ECtHR found that torture and ill treatment of detainees continues to be widespread and systematic in Uzbekistan, particu-

larly in respect of political or religious extremists, and therefore there was a real risk of treatment contrary to Art. 3, should the applicants be returned to Uzbekistan. In *Yakubov*, the ECtHR found a violation of Art. 13, stating that the Russian courts had not “*rigorously scrutinised*” the applicant’s claims of treatment he would suffer, should he not be granted asylum. In *Ergashev*, the ECtHR held that the conditions of the applicant’s detention in Russia were inhuman and degrading and, therefore, found a further violation of Art. 3. The applicant had spent four days in a small cell designed for administrative detention with no basic amenities (toilet or sink) and then a further five months in a cell where the number of inmates exceeded the number of bunks. Art. 5(1) had also been violated since time limits for his detention had not been set and consequently, his detention was not circumscribed by adequate safeguards against arbitrariness. The ECtHR also found a violation of Art. 6(2). State law enforcement officials should have exercised more caution when describing Ergashev to the media and had breached the presumption of innocence on this occasion.

The ECtHR awarded Ergashev €15,000 in respect of non-pecuniary damages and awarded costs and expenses to both applicants.

Comment

In contrast to *Elmuratov v Russia* (No. 66317/09) 03.03.11, the ECtHR held that those kept in detention in Uzbekistan were at risk of ill-treatment. The fact

that both Yakubov and Ergashev were suspected of being part of an extremist group increased the likelihood of their prospective ill-treatment, given reported persecution of such groups by the Uzbek authorities. In *Yakubov* the ECtHR was also influenced by the applicant’s detailed account of repeated instances of previous detention and ill treatment by the Uzbek authorities and the finding by the UN Human Rights Council (HRC) that the applicant warranted international protection under its mandate. In both cases the ECtHR held that diplomatic assurances from Uzbekistan were not a reliable guarantee since the practices complained of were endemic there.

Velkhiyev and Others v Russia

(No. 34085/06), 05.07.11

(ECHR: Judgment)

Right to life

Facts

The applicants were Mr Bekhan Velkhiyev and the wife and five children of Mr Bashir Velkhiyev, Bekhan’s brother. They are all Russian nationals. Bekhan lives in Malgobek and the other applicants live in the village of Barsuki, Ingushetia. On 20 July 2004 a group of armed servicemen took the brothers to the Organised Crime Unit (OCU) at the Ministry of the Interior of Ingushetia. Over the following 24 hours both men were tortured. Bekhan was handcuffed, blindfolded, beaten with truncheons and electrocuted. Bashir did not survive the torture. The next day an investigation was instituted including a

forensic examination of Bashir's body, and whilst officers from the OCU confirmed the ill-treatment, none of the perpetrators was identified. In April 2005 the Nazran Prosecutor's Office confirmed that unidentified officers from the Ministry of Interior had unlawfully apprehended the brothers and had beaten them violently on the premises of the OCU. The premises were not inspected during the investigation.

Judgment

The ECtHR held that there had been two violations of Art. 2 on account of both the death of Bashir and the failure to conduct an effective investigation into the death. The ECtHR found two violations of Art. 3 due to the permanent state of physical pain and anxiety in which the brothers were kept and the failure to conduct an effective investigation into their ill-treatment. It also held that there had been a violation of Art. 5 on account of both brothers being held in unacknowledged detention. The ECtHR awarded Mr Bekhan 55,000 EUR in non-pecuniary damages and Bashir's wife and children 75,000 EUR in damages.

Comment

The ECtHR held by six votes to one that there had been no violation of Art. 3 in respect of Bashir Velikhiyev's wife and children. Whether a family member of a 'disappeared person' is a victim of ill-treatment contrary to Article 3 depends on the existence of factors giving the suffering a distinct emotional character and dimension. Judge Kovler, the Russian judge, dissented, saying "*it is difficult to imagine that the ... tragic circumstances of this case cannot form the basis for finding a*

separate violation of Article 3 of the Convention". The majority found, however, that as Mr Bashir Velikhiyev was not missing for more than 24 hours, he could not be considered a disappeared person, nor could the suffering endured by his wife be considered sufficiently distinct to find a separate violation under Art. 3.

Isayev v Russia

(No. 43368/04), 21.06.11

(ECHR: Judgment)

Right to life

Facts

The applicants are relatives of Zelimkhan Isayev. On the evening of 9 May 2004 a group of masked armed men burst into Zelimkhan Isayev's house in Goichu, Chechnya. Despite finding nothing incriminating, they handcuffed him and took him to the Department of the Interior's detention facility. On 12 May 2004 he was transferred to hospital, where his brothers visited him. He told them that during his detention he had been burned with cigarettes, beaten with truncheons and had an electric current passed through his genitals. Medical records dated 12 May 2004 showed that he had suffered severe injuries consistent with his account. He died on 16 May 2004. The Russian Government claimed that Isayev had been involved in blowing up the vehicles of Russian armed forces. They also claimed that his injuries were sustained when officers were forced to restrain him as a result of his attempts to resist arrest.

Judgment

The ECtHR rejected the Government's claim that Isayev had resisted arrest and found that it had failed to provide a plausible

or satisfactory explanation for his death. There was therefore a violation of Art. 2. The ECtHR also found a breach of Art. 2 as a result of the failure to carry out an effective investigation into the death. The ECtHR specifically deplored the fact that no post-mortem examination had been conducted, that the Federal Security Bureau (FSB) officers who participated in Isayev's arrest had not been interviewed and that three years passed before there was a decision to investigate the death.

The ECtHR found a violation of Art. 3 and considered that "*the ill-treatment inflicted upon Zelimkhan Isayev was particularly cruel and severe*". The ECtHR also held that there was a breach of Art.13 as no remedies were available to the applicants capable of leading to the identification and punishment of those responsible or to an award of compensation. The applicants were awarded 78,000 EUR in non-pecuniary damages.

Comment

The Government requested that the application be declared inadmissible as the applicants had failed to exhaust all domestic remedies. The ECtHR, refusing the request, emphasised that the rule of exhaustion of domestic remedies must be applied flexibly and without excessive formalism. It is essential to have regard to the circumstances of the individual case, taking realistic account not only of the existence of formal remedies but also of the personal circumstances of the applicant. It must then examine whether the applicant had done everything that could reasonably be expected of him.

Tsechoyev v Russia

(No. 39358/05), 15.03.11

(ECHR: Judgment)

Right to life

Facts

The applicant, Mr Ruslan Tsechoyev, was a Russian National. Mr Suleyman Tsechoyev, the applicant's brother, was found dead on 24 August 1999 having been taken from a pre-detention centre by four men in police uniform the previous day. Mr Tsechoyev had been charged with aiding and abetting the kidnapping of a relative of a high-profile business executive. On the day of the abduction the men identified themselves as police officers and produced a number of documents, later established to be forgeries, authorising Mr Tsechoyev's transfer to a different detention centre. After the body was found, with multiple gunshot wounds, a criminal investigation was instituted. Efforts to identify the men responsible were unsuccessful.

Judgment

The ECtHR held that there had been no substantive violation of Art. 2, only a breach in its procedural aspect. It found that the evidence submitted was not sufficient to establish the requisite standard of proof that the armed men were agents of the State, and also found that the steps taken to safeguard the life of Mr Tsechoyev were wholly appropriate for the perceived level of risk. The ECtHR did, however, find a violation of Art. 2 in respect of the failure to conduct an effective investigation into the circumstances in which Mr Tsechoyev was killed. The applicant also complained that he had been deprived of effective remedies in respect of the afore-

mentioned violations, contrary to Art. 13, but the ECtHR considered that the complaint had already been examined. Under Art. 41 the ECtHR held that Russia was to pay Ruslan Tsechoyev 15,000 EUR in respect of non-pecuniary damage and 2,500 EUR in respect of costs and expenses.

Comment

By implication, the obligation to protect the right to life under Art. 2 also requires a form of effective official investigation when an individual has been killed as the result of force. Such an investigation is required to be independent, expedient, prompt, accessible to the family and sufficiently open to public scrutiny. In this case the ECtHR found that steps were taken to investigate statements made by the applicant and his relatives about the possible involvement of a man the family primarily suspected. However the ECtHR reiterated the fact that there is *"no absolute right to obtain a prosecution or conviction and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such. The obligation is of means only"*.

Esmukhambetov and Others v Russia

(No. 23445/03), 29/03/11

(ECHR: Judgment)

Right to life

Facts

The applicants were 27 Russian nationals who lived in the village of Kogi in the Shelkovskiy District of the Chechen Republic. On 12 September 1999 a military air strike destroyed the applicants' houses and killed the family members of five of the applicants, one of whom witnessed the death of

his wife and two young sons. Following the attack the applicants repeatedly applied to multiple State bodies for redress. A criminal investigation was instituted in January 2002 but discontinued in September 2005 owing to the absence of constituent elements of a crime punishable under Russian law. The decision stated that the order to bomb the village was justified by the need to prevent terrorist attacks. In separate civil proceedings, three of the relatives were awarded compensation.

Judgment

The ECtHR held that there had been two violations of Art. 2: on account of the authorities' failure to carry out an adequate and effective investigation into the deaths of the five applicants' relatives, and the failure to protect the relatives' right to life. It also held that there had been a violation of Art. 13, the right to effective domestic remedies, taken in conjunction with Art. 2, in respect of the aforementioned applicants. In respect of all the applicants the ECtHR also found a violation of Art. 13 in conjunction with Art. 8 and Art. 1(1), and violations of Art. 8 and Art. 1(1). The ECtHR found a violation of Art. 3 on account of the mental suffering endured by the first applicant due to the death of his wife and two sons. The applicants were awarded compensation totaling 1,031,000 EUR and 467,000 EUR in pecuniary and non-pecuniary damages respectively.

Comment

The Russian Government questioned the admissibility of the alleged violation of Art. 2, submitting that the relevant applicants could not still claim to be 'victims' of the violation due to

the initial payment of compensation. The ECtHR reiterated that whilst compensation for damage flowing from a breach of Art. 2 should be available as part of the range of redress, violations of Art. 2 in cases of fatal assault by State agents cannot be remedied only by awarding damages to the relatives of victims. For *“if the authorities could confine their reaction to such incidents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, this might result in the wrongful use of lethal force by State agents who would be placed in a position of virtual impunity”*.

Other ECHR cases

Finogenov and Others v Russia

(No. 18299/03 and 27311/03),

20.12.11

(ECHR: Judgment)

Right to life

Facts

The two groups of applicants, totalling 64 individuals, were either victims or relatives of victims of the hostage crisis at a theatre in Moscow on 23 – 26 October 2002 (the ‘Nord-Ost theatre siege’). On 23 October 2002, a group of Chechen separatists took more than 900 people in the theatre hostage. On 26 October 2002, the Russian security forces pumped an unknown narcotic gas into the auditorium and proceeded to storm the building, killing most of the terrorists and releasing the majority of the hostages.

The applicants from both groups alleged that their relatives had suffered and died as a result of the actions of the Russian security forces. The group of applicants who were hostages themselves alleged that their lives had been put at risk or damaged by it. It was alleged that

the use of force by the security forces was disproportionate, the assistance provided to the survivors was inadequate and that the subsequent criminal investigation was ineffective.

Judgment

The ECtHR examined the complaints under Art. 2, finding two violations; one in respect of the inadequate planning and conduct of the rescue operation and another regarding the authorities’ failure to conduct an ‘effective’ criminal investigation into the rescue operation. The ECtHR stated that the rescue operation *“was not sufficiently prepared”* while the *“investigation into the authorities’ alleged negligence in this case was neither thorough nor independent”*.

No violation of Art. 2 was found in relation to the decision made by the authorities to resolve the hostage crisis by ending negotiations, storming the building and releasing the narcotic gas. The ECtHR stated that *“there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the “lesser evil” in the circumstances”*, while the use of gas was not in these circumstances a disproportionate measure.

Comment

The case was significant in demonstrating responsibilities States should fulfil in relation to counter-terrorism operations. Specifically, the use of lethal force by the State must be no more than is ‘absolutely necessary’. The ECtHR may depart from this rigorous standard of scrutiny where certain aspects lie beyond its expertise or the authorities were under immense time pressure and lacked control over the situation.

For a State to conduct an ‘effective’

investigation following the death of individuals as a result of force by the authorities, the investigation must be thorough, independent, and the materials and conclusions of the investigation should be sufficiently accessible to the relatives of the victims to the extent that it does not seriously undermine its efficiency.

The ECtHR tested the general principle of condemning the indiscriminate use of heavy weapons in anti-terrorist operations as stated in *Isayeva v Russia* (57950/00) 24.02.05. The ECtHR stated that although the gas used by the Russian security forces was used against a group of hostages and hostage-takers, and despite it being dangerous and potentially lethal, it was not used ‘indiscriminately’ given that the hostages still had a high chance of survival, depending on the efficiency of the authorities’ rescue effort.

OAo Neftyanaya Kompaniya

Yukos v Russia

(No. 14902/04), 20.09.11

(ECHR: Judgment)

Right to a fair trial

Facts

The applicant, Yukos, was a large privately-owned oil company. In 2002 the company was found guilty of repeated tax fraud. In 2004, following enforcement proceedings, the company’s assets were seized and its bank accounts partly frozen. The Moscow Commercial Court ordered the company to pay the equivalent of 2,847,497,802 EUR in taxes, interest and penalties. Yukos made several appeals complaining about procedural irregularities and lack of time to prepare a defence, but none succeeded. In September 2004, the Tax Ministry found Yukos guilty of further tax offences in the

years after 2000. The company was ordered to pay sums of a similar magnitude for the years 2001-3 as well as a bailiffs' enforcement fee of 7% of the total debt. Despite numerous requests to postpone the payment date, payment was required within very short deadlines. On 19 December 2004, 76.79% of Yukos's most valuable subsidiary was auctioned to cover Yukos's tax liability. Yukos was declared insolvent on 4 August 2006 and liquidated on 12 November 2007.

The applicant brought proceedings before the ECtHR alleging violations of Art. 6 (right to a fair hearing), Art. 1(1) (peaceful enjoyment of possessions) and Art. 14 (prohibition of discrimination).

Judgment

The ECtHR found a violation of Art. 6 on the grounds that Yukos had insufficient time to study the case file during the first set of proceedings and to prepare for appeal proceedings. It also found a breach of Art. 1(1) on the basis of the speed of proceedings and the obligation to pay the full 7% enforcement fee which, because of its rigid application, contributed very seriously to Yukos's demise. The ECtHR dismissed Yukos's claim under Art. 14 that many Russian taxpayers used similar tax arrangements to those used by Yukos and that it was therefore singled out for prosecution.

Comment

This case represents a small skirmish in a much wider struggle between the Russian state and the former owners of Yukos. With this in mind, it is arguable that the ECHR breaches found by the ECtHR are much less significant than the ECtHR's dismissal of the applicant's most potentially damaging allegation, that the prosecution was politically motivated and that the State's aim was to destroy the company and take control of its assets. Despite the high profile claims of victory made on behalf of the applicant, it is unlikely that Russia will be too troubled by the outcome of the case.

Admissibility decision by Grand Chamber

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Sargsyan v Azerbaijan

(No. 40167/06) dec 14.12.11

Facts:

The applicant, Minas Sargsyan, was an Armenian refugee forced to flee from his home in 1992 during the Armenian – Azerbaijani conflict over Nagorno-Karabakh (the NKAO). He died in 2009 and his widow and children are pursuing the application on his behalf.

Until 1992, Mr Sargsyan lived with his family in Gulistan, in the Shahumyan district of Azerbaijan, bordering the NKAO. The NKAO (in 1989) was approximately 75% ethnic Armenian and 25% ethnic Azeri. Armed hostilities in Nagorno-Karabakh began in 1988, coinciding with the Armenian demand for the NKAO to be incorporated into Armenia. In 1992 the conflict escalated into a full scale war, resulting in hundreds of thousands of internally displaced people and refugees on both sides.

In May 1994 the parties signed a cease-fire agreement, however, no final political settlement has been reached. Mr Sargsyan alleged that when the conflict escalated in 1992, Gulistan was bombed by Azerbaijani forces and the entire population of the village, including the applicant and his family, fled fearing for their lives.

Complaints:

The applicant alleged that his forced displacement from Gulistan and the continuing refusal by the Azerbaijani Government to allow him access to his property and home violates Art. 1(1) (protection of property) and Art. 8 (respect for family life) of the European Convention on Human Rights (ECHR). He also complained under Art. 13 that there were no effective remedies available to ethnic Armenians forced to leave their homes in Azerbaijan, due to the unresolved status of the Nagorno-Karabakh conflict. Further, relying again on

Art. 8 he complained of reports of vandalism of Armenian cemeteries in Azerbaijan and the distress this information caused him. Lastly, he claimed a violation of Art. 14 (non-discrimination) in that only ethnic Armenians living in Azerbaijan were the target of violence and that the Azerbaijani Government failed to investigate attacks against Armenians or to provide redress for the illegal occupation of their properties.

The Chamber relinquished jurisdiction to the Grand Chamber. The Armenian Government intervened as a third party.

Admissibility:

Territorial jurisdiction and the responsibility of Azerbaijan:

The Respondent Government argued that, although it ratified the ECHR in 2002 with effect throughout its territory, it had made a declaration that it was unable to guarantee the application of the ECHR in the territories occupied by the

Republic of Armenia. The Court held that the declaration was invalid since it was not capable of restricting the territorial application of the ECHR to only certain parts of Azerbaijan's internationally recognised territory. Further, the Court held that the declaration could not be considered a reservation because it did not comply with ECHR requirements, in that it was '*of a general character*' and was not related to a specific provision or of defined scope. The Court therefore dismissed the Governments objection.

There was also the jurisdictional issue of Azerbaijan's effective control over the area concerned. The Government contested this stating that Gulistan was a heavily mined area and therefore it had no access to or control over the village and its responsibility under Art. 1 was not engaged. The applicant and the Armenian Government asserted that Gulistan was under the effective control of Azerbaijan, and, in any event, Azerbaijan's responsibility was engaged as a result of its positive obligations under the Convention. The Court found that it did not have sufficient information to decide this question and joined it to the merits.

Temporal Jurisdiction:

The Court noted that the applicant's displacement had been an instantaneous act in 1992, before Azerbaijan ratified the ECHR (April 2002) and therefore fell outside the Court's temporal competence. However, the Court held that his subsequent lack of access to his home was a continuing situation, which it was competent to examine from 2002 onwards.

Victim status regarding the destruction of graves:

The applicant could not be a 'victim' in respect of the general situation of destruction of Armenian graves in Azerbaijan, since he would have to be directly affected by an action or inaction, and therefore the Court dismissed this part of the applicants case.

Exhaustion of domestic remedies:

The applicant alleged a general administrative practice by the Government showing unwillingness to protect abandoned property of ethnic Armenians or to provide compensation and the Court joined this issue to the merits.

Time-limit:

The Court reiterated its case law concerning the application of the six month rule in respect of continuing situations. It noted that it has qualified its previous case-law in disappearance cases by imposing a duty of diligence and initiative on applicants. Despite differences in cases of continued failure to investigate disappearances and on-going denial of access to property, the Court found general considerations of legal certainty relevant in both. It had regard to the particular features of cases concerning continuing violations in complex post-conflict situations where solutions depend upon political negotiations and the link between the progress of the negotiations and the applicant's position is more tenuous. It therefore found that once an applicant had become aware there was no realistic hope of regaining access to their property, unexplained or excessive delay might lead to a rejection as out-of-time. However there were no specific time frames which

could be applied. In this case the earliest time to apply would have been in 2002 when Azerbaijan ratified the ECHR. However, when joining the Council of Europe, both Armenia and Azerbaijan had undertaken to seek a peaceful settlement of the Nagorno-Karabakh conflict and a period of negotiation followed. The applicant could therefore for some time have had a reasonable expectation of a solution being reached. In applying in 2006 he had acted without undue delay.

Chiragov v Armenia (No. 13216/05) is another admissibility case, the mirror image of the above case, decided on the same day and arising out of the same conflict. In this case the applicants are Azerbaijani Kurds who lived in the district of Lachin, Azerbaijan, which includes a corridor between Nagorno-Karabakh and the Armenian Soviet Socialist Republic. The majority of Lachin's population were Kurds and Azeris. As a result of the conflict the applicants were forced to flee in May 1992, and have not been able to return since.

The applicants plead the same violations as **Sargsyan**, but in reverse, as ethnic Azeris against the Government of Armenia; Art. 1(1); Art. 8; and Art. 13 and 14. The Government of Azerbaijan is a third party intervener. The Government of Armenia contends the same issues as the Government of Azerbaijan in the above case, on similar grounds, disputing its territorial jurisdiction; the victim status of the applicants; the exhaustion of domestic remedies and time-limits of the Court. The Court maintains the same approach of finding the case admissible and joining these issues to the merits of the case.

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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 Social Sciences and Humanities (FSSH). 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, and cooperate 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 basic administrative duties. 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.

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