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International Human Rights Advocacy

Editorial

In this edition of the Memorial-EHRAC Bulletin, we consider a number of important and developing aspects of the case law of the European Court of Human Rights: the position of children (Natasha Kravchuk); the Court's treatment of the phenomenon of 'disappearances' (Marthe Lot Vermeulen); the right of return of internally-displaced persons (Anke Stock) and the notion of a 'victim' under the European Convention (Catharina Harby). There are also summaries of recent reports on Russia by the Council of Europe Commissioner for Human Rights and the Parliamentary Assembly of the Council of Europe.

Damelya Aitkhozhina analyses the Strasbourg Court's recent far-reaching judgment in the environmental case, *Fadeyeva v Russia*, which was handled by lawyers at EHRAC and Memorial. This is a judgment, which, like the decisions in the Chechen cases from February 2005, raises important questions about the implementation of European Court decisions within Russia. The Council of Europe's Committee of Ministers first considered the implementation of the Chechen decisions in October 2005, and the Russian Government is due to respond with an 'action plan', setting out what consequential measures should be taken. EHRAC and Memorial made submissions to the Committee of Ministers on behalf of the applicants in the Chechen cases which argue that such steps should include the re-opening of the investigations into the incidents, the prosecution of those responsible and a review of relevant domestic laws, such as the military rules of engagement. It is to be hoped that civil society organisations within Russia will be consulted and will have the opportunity to engage with state bodies in considering the steps required to be taken as a consequence of any European Court judgment relating to Russia.

Philip Leach
Director, EHRAC

Far Reaching Effects of Environmental Case[1]

Damelya Aitkhozhina, LLM

Fadeyeva v Russia (No. 55723/00), 9/6/2005 (ECHR: Judgment. Merits and Just Satisfaction)

Facts

Since 1982, the applicant and her family have lived in the city of Cherepovets, a major steel-producing centre in the Russian Federation, 300 km to the north-east of Moscow, in a council flat situated within half a kilometre of a steel plant, which is now operated by Severstal PLC, Russia's largest iron-smelting company. In 2000, the authorities confirmed that the concentration of certain hazardous substances (including carbon disulphide and formaldehyde) in the atmosphere within the zone largely exceeded the 'maximum permitted limit' (MPL) established by Russian legislation. In 1995 the applicant brought an action to the local court, seeking resettlement outside the zone, as a result of which the court recognised that her flat was situated within the 'sanitary security zone', an area around the plant, which delimits areas where pollution may be excessive and was supposed to be free of residential property. The court found that, in principle, the applicant had the right to be resettled, but made no specific order for her resettlement, instead requiring the local authorities to put her on a priority housing waiting list. On 31 August 1999, the Town Court dismissed the applicant's further action against the municipality and confirmed that she had been put on a 'general waiting list'. The local courts then found that no further steps were necessary, as the original judgment had been executed.

In 1999, the applicant complained to the European Court, under Articles 2, 3 and 8 of the Convention that the operation of the Severstal steel-plant in close proximity to her home endangered her life and health and that the failure to resettle her violated those provisions. Under Article 6 of the Convention the applicant also complained that the court proceedings concerning her claims for

[1] *Based on an article by Philip Leach, forthcoming in Environmental Liability, Lawtext Publishing.*

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resettlement were unfair. In its admissibility decision of 16 October 2003, the European Court found that the applicant did not face any 'real and immediate risk' either to her physical integrity or her life, and that any issues raised under Article 2 were more appropriately dealt with under Article 8 of the Convention. The Court also considered that there was no evidence to indicate that the applicant's housing conditions amounted to treatment incompatible with Article 3. The Court therefore rejected the applicant's claims under Articles 2 and 3 at the admissibility stage.

Judgment

In its judgment of 9 June 2005, the Court unanimously found that the Russian government was in violation of Article 8 of the European Convention on Human Rights as a result of its failure to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and private life. The state was found to have failed to prevent or adequately regulate the environmental pollution from the plant, which adversely affected the quality of life at the applicant's home and made her more vulnerable to disease. The European Court awarded the applicant €6,000 in non-pecuniary damages, plus legal costs.

Commentary

Concordant with the well-established Convention doctrine of 'positive obligations' the Court found that a state's responsibility under Article 8 in environmental cases may arise not only where a public body causes the pollution, but also from a failure to regulate private industry, and the Court placed the onus on the Government to provide a clear explanation of the policies and practices it adopts in the face of environmental pollution caused by private polluters.

Since the steel plant in question had been privatised in 1993 and bought by Severstal PLC, and thus there was no 'direct' interference with the applicant's rights, the Court assessed whether the state took reasonable and appropriate measures to prevent violations of the applicant's Article 8 rights, taking into consideration the fact that the plant had originally been built by, and initially belonged to the state. However, of greater relevance was the state's continuing exercise of control over the plant after privatisation, in the form of the imposition of operating conditions, the supervision of the implementation of those conditions, inspections of the plant and the imposition of penalties on the plant's owner and management. The position of the domestic authorities was also clearly influential - the European Court noted the domestic legislation defined the zone where the applicant lived as being unfit for habitation, and that the domestic courts recognised that the pollution required her resettlement in an ecologically safer area. Accordingly, the Court was able to conclude that the authorities were well aware of the problems, and that they were both in a position to evaluate the extent of the pollution and to take steps to prevent or reduce the risks.

In applying the usual 'fair balance' test to assess proportionality as between the rights of the individual and those of the wider community, the Court made the point that whilst taking into account the question of compliance with relevant domestic laws or regulations is necessary, it should not, however, be treated as a separate and conclusive test. Previously, the basis of every Strasbourg decision, in which the Convention has been found to have been violated in the environmental context, has been a failure, of one sort or another, to comply with the domestic law. In this case the European Court accepted as reasonable the domestic courts' interpretation of the law as merely requiring that someone in the applicant's position should be placed on a housing waiting list. Nevertheless, the case was still predicated on the fact that the steel plant's emissions breached the domestic environmental and health standards.

A very important, and potentially far-reaching, aspect of the judgment is that the applicant did not have to prove that the pollution had damaged her health, as such, it was enough for her to establish that there was a serious risk to the health of people living in the area, and therefore she had a greater vulnerability to disease.

The Court's judgment significantly strengthens the obligation of governments to impose effective regulation on the private sector to prevent environmental pollution where serious potential health risks exist, although it reiterated that the Convention will not be engaged by any case of environmental deterioration – it must be such as to "directly affect" the applicant's home, family or private life.

Traditionally the European Court's approach to the provision of redress has been limited to declaratory relief, together with the possibility of the award of damages and costs under Article 41, but there have been a number of significant developments in recent years and this case demonstrates a more interventionist tendency. The Court acknowledged that resettling the applicant in an ecologically safe area would be only one of many possible solutions. It is suggested that, as the applicant still lives in the shadow of the polluting steel plant, compliance will require either providing the necessary assistance for her to move away or taking steps to prevent the pollution (or both).

At the time of writing the Government had applied to the Court for the judgment to be re-considered by the Grand Chamber of the Court (Article 43).

European Convention on Human Rights – Rights ratified by the Russian Federation

Article 1 : Obligation to respect human rights.
Article 2 : Right to life.
Article 3 : Prohibition of torture.
Article 4 : Prohibition of slavery & forced labour.
Article 5 : Right to liberty and security.
Article 6 : Right to a fair trial.
Article 7 : No punishment without law.
Article 8 : Right to respect for private & family life.
Article 9 : Freedom of thought, conscience & religion.
Article 10: Freedom of expression.
Article 11: Freedom of assembly and association.
Article 12: Right to marry.
Article 13: Right of an effective remedy.
Article 14: Prohibition of discrimination.

Protocol No. 1

Article 1: Protection of property.
Article 2: Right to education.
Article 3: Right to free elections.

Protocol No. 4

Article 1: Prohibition of imprisonment for debt.
Article 2: Freedom of movement.
Article 3: Prohibition of expulsion of nationals.
Article 4: Prohibition of collective expulsion of aliens.

Protocol No. 7

Article 1: Procedural safeguards re: expulsion of aliens.
Article 2: Rights of appeal in criminal matters.
Article 3: Compensation for wrongful conviction.
Article 4: Right not be tried or punished twice.
Article 5: Equality between spouses.

The European Court of Human Rights and the Protection of the Rights of the Child

Natasha Kravchuk, PhD [1]

The problem of the protection of the rights of children has always been painful for Russia. Violations of rights of this particular category of the population have become especially pervasive in the last few years. The lack of effective mechanisms for the protection of children's rights, especially the right to respect for family life, accounts in part for the ever-growing number of minors sent to state establishments for children. In a situation where nothing can be done by the child or his legal representatives to protect her/his rights on a domestic level, the only other option is to apply to the supranational human rights institutions. This right is set out in part 3 of Article 46 of the Constitution of the Russian Federation, which provides for the right of each citizen to apply to international human rights bodies when all the means of legal protection available within the state have been exhausted. Hence the functioning of the legal system in the Russian Federation is based not only on principles accounted for by the domestic legislation, but also on generally recognized standards accepted by the international community[2].

One of the most effective mechanisms of human rights protection at the international level is the European Court of Human Rights whose decisions are obligatory for execution by the state in respect of which they are taken.

At first sight it may appear that there are not many articles directly pertaining to rights of children in the European Convention on Human Rights (ECHR). Nevertheless, all the provisions of the ECHR can be applied to any child as much as to any other legal subject. Both the Convention and the decisions of the European Court (ECtHR) clearly indicate that any person, including a child, can apply to the Court, provided they fall under its jurisdiction.

Articles of the Convention that are most frequently invoked in the protection of the rights of children include the following:

- Article 3: Prohibition of torture or inhuman or degrading treatment or punishment (in particular, in cases of application of corporal punishment in schools, by parents, or by a court decision);
- Article 6: The right to a fair trial (establishes special procedural rules to be used with respect to a child charged with a criminal offence);
- Article 8: The right to respect for private and family life (within the framework of which the court interprets the notion of family; the status of children born outside of marriage; determines the concept of actions in the interests of the child (choice of religion, name, etc.); transfer of the right to custody over a child to the state; cases of separation of parents from children due to the deportation of parents);
- Article 2 of Protocol 1: The right to education (for example, education in private schools; respect for the philosophical convictions of parents);

Based on these articles of the Convention, the European Court has developed certain legal standards regulating the status of children within international law and in particular, their status in the family. Nevertheless, in order to maximise the effective protection of children's rights, references to other international legal norms that regulate the rights of the child (for example the UN Convention on the Rights of the Child) are allowed and encouraged by the Court.

The Court has confirmed that the principle that children are capable of exercising the rights set out in the Convention also applies to the right of individuals to complain about a violation of their rights (Art. 34 of the Convention). For example, the applicant in the case of *Nielsen v. Denmark*[3] was only 13 years old at the time of filing his application with the European Court. In order to demonstrate the Court's logic in considering cases related to the rights of the child, it would be useful to examine this case in more detail.

The applicant's parents in *Nielsen* lived together from 1968 until 1973. They were not married and, in accordance with Danish law, only the mother had parental rights over the child. After the parents separated in 1973, the applicant remained with the mother; the father had access to him on the basis of a "gentlemen's agreement". However, the agreement did not function well and in 1974 the father obtained a specific right of access through the competent authorities. A closer relationship developed between the child and his father during the following years and in the summer of 1979 the applicant refused to return to his mother after a two-week holiday spent with his father. The social authorities were contacted and the child was placed in a children's home at the consent of all parties. However, the child ran away from there and returned to his father. On 6th August 1979 the father instituted proceedings before the courts to have the custody rights transferred to him. Then he and the child went "underground" until 8 October 1979, when the father was arrested by the police. The next day the applicant was placed in the care of the Department of Child Psychiatry in a county hospital. He ran away from there. As a result of long judicial proceedings, in the course of which the father was denied from having the custody rights transferred to him, a psychiatric examination of the child was conducted. The fact that the child did not want to live with his mother was established, and the applicant was finally placed in a psychiatric hospital.

In his application to the European Commission of Human Rights (the body responsible for the initial consideration of applications before the reforms carried out under Protocol 11 in 1998) the applicant alleged that his rights under Art. 5 of the European Convention (right to liberty and security) were violated. The Commission concluded that there had been a violation of Art. 5. The case then received wide publicity, following which the applicant was released from hospital and custody rights were transferred to the father. In its judgment, the European Court did not find a violation of the applicant's rights. Thus the case was resolved on the national level, but under the obvious influence of the European Court.

One of the recent European Court cases relating to the rights of the child is the case of *Kutzner v. Germany*[4], brought before the Court by the parents of two minor girls. In 1996, the District Youth Office applied to the Guardianship Court for an order withdrawing the applicants' parental responsibility for their two children on the ground that the applicants did not have the intellectual capacity required to bring up their children properly. The Court appointed an expert psychologist and, based on his report, made an interlocutory order withdrawing the applicants' rights to decide where their children should live or to take decisions regarding the children's health. The girls were then placed into state care. Later the Court withdrew the applicants' parental rights over their two children. The applicants appealed against this decision to several higher instances without success.

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The European Court unanimously decided that the right of the applicants to respect for their family life (Art 8 of the European Convention) was violated. In particular, the Court stated that although the reasons relied on by the domestic authorities and courts were relevant, they were insufficient to justify such a serious interference in the applicants' family life. It was noted that the children benefited from educational support while living at home; the opinions of the psychologists, from whom expert evidence was taken at various stages of the proceedings by the domestic courts, were contradictory; the psychologists instructed by the applicants, as well as the family doctors, urged that the children be returned to their family of origin. Finally, there had been no allegations that the children had been neglected or ill-treated by the applicants. The Court also found that the applicants suffered non-pecuniary damage and awarded them compensation of €15,000, plus their legal costs and expenses.

Researchers have noted an ever-growing influence of the European Court on national legislation, and especially on judicial practice[5]. Indeed the number of cases where decisions on the merits or even the resolution of procedural issues made by the European Court affect the decision-making process in Russian courts both in concrete cases and as a general approach to interpretation of the Russian law, including in the area of protection of the rights of the child, continues to grow.

It may be that the payment of 'just satisfaction' (which may include compensation for pecuniary and/or non-pecuniary damage and the reimbursement of legal costs and expenses) is often the most visible consequence of the Court's judgments, but it is not the only one. According to the practice of the interpretation of Art. 46 of the Convention by the Court and the Committee of Ministers, the establishment of the fact of a violation of the rights guaranteed by the Convention establishes an obligation on the respondent State to undertake measures to stop the violation and to eliminate its consequences, with the aim of restoring, as far as possible, the situation existing prior to the violation *(restitutio in integrum).* Thus, in practice this will mean concrete measures of an individual character with regard to the child which will not necessarily be limited to the payment of the compensation awarded by the Court. Moreover, besides the payment of the compensation and execution of the *individual* measures, the judgment creates an obligation on the State to take effective *general* measures to avoid new violations similar to those that were found in the particular judgment.

Both individual and general measures undertaken by the respondent State to comply with the Court's judgments may be very varied. Here are some examples of general measures resulting from judgments where the violations of various rights of children were found:

Case of Tyrer v. the United Kingdom, judgment of 25 April 1978 (Series A no. 26)

- On 13 June 1978 the Lieutenant Governor of the Isle of Man was advised of the judgment. Subsequently the Chief Justice of the island informed the judges and courts that judicial corporal punishment was, in the future, to be considered in breach of the Convention (Resolution (78) 39 of 13 October 1978).

Case of Marckx v. Belgium, judgment of 13 June 1979 (Series A no. 31)

- An Act of 31 March 1987 amended "various legal provisions relating to affiliation", and thereby eliminated all discrimination concerning illegitimate children (Resolution DH (88) 3 of 4 March 1988).

Case of Johnston and Others v. Ireland, judgment of 18 December 1986 (Series A no. 112)

- The Status of Children Act 1987, which was enacted on 14 December 1987, came fully into operation on 14 June 1988. It ensures equal rights for all children, whether born in or out of wedlock (Resolution DH (88) 11 of 21 June 1988).

Case of Bouamar v. Belgium, judgment of 29 February 1988 (Series A nos. 129)

- An Act of 2 February 1994, which came into force on 27 September 1994, provides that the Juvenile Court may not place a child in a remand prison more than once during a single set of proceedings. The maximum length of such a placement continues to be fifteen days. The Government has established in certain institutions closed sections which are reserved for highly disturbed young people (Resolution DH (95) 16 of 7 February 1995).

As we can see, general measures may take the form of constitutional or legal reform aimed at the protection of the rights of the child which in turn will lead to changes in the implementation of the law in practice.

It is suggested that judgments of the European Court with respect to Russia will significantly affect legislative regulation and national courts' practices in relation to the protection of the rights of children in Russia. In addition, taking into account the fact that to comply with a judgment of the European Court, the state must undertake measures to prevent new violations of the rights of the child, the legislature is likely to enhance the scope of children's rights provided for by the legislation of the Russian Federation. For example, following a review of relevant applications by the European Court the legislature will have to ensure the rights of the child to have access to free legal aid in situations of conflict between the child and his/her authorized representatives and/or custody and patronage bodies.

The European Human Rights Advocacy Centre (EHRAC) is continuing to work on the development of a strategy of litigating cases concerning the violation of children's rights at the European Court of Human Rights, in order to address the main legal problems in this field in Russia. We will be glad to provide assistance to lawyers and NGOs dealing with these problems on a national level.

European Court Statistics

Russian applications formed 17.81% of all new applications made to the European Court in 2004 – a total of 7,855. This was the highest number of applications against any one state in 2004. After Russia came Poland (with 5,796 applications), then Romania (3,988), Turkey (3,930) and France (3,025). As of 1 January 2005, 78,000 applications in all procedural stages were pending at the Court. 14% of these (10,920) were from Russia.

(*Source: European Court of Human Rights Statistics 2004).*

[1]EHRAC-Memorial project lawyer.
[2] Scientific-Practical Commentary to the Constitution of the Russian Federation./ V. Lazarev, ed.– M.: Spark, 2001. P.100.
[3]Nielsen v. Denmark, judgment of 28 November 1988.
[4]Kutzner v. Germany, judgment of February 2002.
[5]Report of M. Lobov, Legal Officer of the Department for the execution of judgments of the European Court of Human Rights, at the International Conference "Russia and the Council of Europe," Moscow, 18-19 of May, 2001.

Latest Commissioner for Human Rights' Report on Russia

Alison Stuart, Lecturer in Law, Solicitor, LLB, DipLP, LLM

This article summarises the main points of the Report by the Commissioner for Human Rights of the Council of Europe on his visit, in July and September 2004, to the Russian Federation – 20th April 2005

The Russian Federation has undergone sweeping changes since the first Council of Europe report on its human rights situation nine years ago. The Report of the Commissioner aims to highlight the current human rights situation and recommend ways that the Russian Federation can ameliorate any human rights issues. The Report is not an exhaustive account of all human rights issues but concentrates on several significant human rights issues facing the Russian Federation namely, changes in the legal system, activities of the law enforcement agencies and reform of the prison system, rights of national minorities, foreigners and migrants, problems of xenophobia and racism, the situation in the Chechen Republic, respect for human rights in the armed forces, religious freedoms, freedom of the media, problems linked to the health service, vulnerable people and non-judicial means of protecting human rights. Themes of under-funding and lack of material resources, difficulties with the implementation of legislation, the need to change societal attitudes, lack of co-ordination between federal and regional authorities and disparities in standards between regions tend to be at the root of each significant issue. While the Report praises the extensive legislative reforms made in a very short period of time and the efforts of those involved in reform, it is clear that most of the current shortcomings in ensuring human rights within the region lie in the lack of implementation of such reforms. Greatly increased funding and a change in societal attitude are required to enable these reforms to come to fruition.

The Report emphasises the need for substantial renovation and physical improvement of the courts, detention centres, police stations, prisons and hospitals together with an improvement of living conditions for the armed forces, vulnerable people and particularly those within the Chechen Republic. Strengthening the independence of both the judiciary and media was proposed alongside increasing the training, salaries and prestige of the police, legal and medical personnel. Tackling corruption was also seen as a necessity across the board.

One of the major positive developments highlighted in the Report was the respect given to minorities within the Russian Federation, although the treatment of the Meskhetian Turks in Krasnodar was noted as a sad departure from the norm. While respect for minorities was apparent, problems still abounded in relation to xenophobia and racism. In order to combat such problems the Report recommended firm implementation of the relevant legislation and an increase in and enforcement of penalties, especially on politicians and the media. In relation to immigration, foreigners and refugee rights, the Report suggested that more legal and political thought was needed to be given to these issues.

The Commissioner was very firm in his recommendations regarding the situation in the Chechen Republic, particularly in relation to stopping the practice of 'disappearances', the broader need for economic and civil reconstruction of the Republic and the rehabilitation of the image of Chechens throughout the Federation. He tackled the issue of violence and ill-treatment as sub topics within many of the main issues, particularly, the ill-treatment of persons during interrogation by police, the practice of *dedovshchina* within the armed forces and domestic violence and trafficking of women. He suggested that methods to combat such practices were created and implemented alongside the imposition of severe sanctions. It was noted that a change in societal and institutional mentality is necessary in order to stop a climate of impunity and prevent such abuses. The Report also recommended that Federal and Regional authorities clear up any ambiguities between any clashing legislation and, in particular, plug the gaps between federal framework legislation and needed regional measures with regard to the care of street children (*bezprizorniki*).

The Report highlights the fact that urgent and far-reaching measures need to be taken to address the serious shortcomings of the health service and social welfare system. The general health of Russians has declined since the start of the 1990s and, due to the lack of reimbursements of medicines and long waiting times, many are effectively denied access to health services. The Commissioner strongly recommended that more reimbursements for medicines and care be made and hospitals modernised. In relation to the social welfare system, he suggested that the decline of social and economic conditions of pensioners, in particular, requires address. It is this attitude of 'more needs to be done' that pervades the Report. Praise is given for the amount achieved in such a small period of time and the recognition given that important steps have been taken, especially in relation to legislation, but much more is required to implement these measures and fulfil their promise. The difficulty in attaining such fulfilment lies in the overwhelming need for more funding across the board, for every issue is one of priority. The Commissioner's advice to the Russian Federation to consider joining the Council of Europe Development Bank may prove useful in this regard.

The full Russian Version of the Report can be found at http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH%282005%292_Rus.pdf

The full English Version of the Report can be found at http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH%282005%292_E.pdf

NGO Register: Link up with us!

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

Through networking and sharing information and resources, it will be possible to reach more people and become yet more effective. If you are interested in our work or are involved in similar areas of activity and would like to develop links with us, please do not hesitate to contact us.

EVIDENCE REVISITED: A CASE FOR FREEDOM FROM TORTURE CLAIMS IN 'DISAPPEARANCE' CASES

Marthe Lot Vermeulen, BA, LLM

A 'disappearance'[1] begins when a person is detained by State agents, yet their whereabouts are concealed and their custody is denied by those same authorities. The secrecy and indefiniteness of duration make the cruelty of this phenomenon far beyond the scope of imagination.[2] It is difficult to conceive what is more inhuman than letting someone simply vanish with no contact to the outside world, beyond the protection of the law. In addition, the 'disappeared' is under the total control of the authorities, vulnerable to torture. At the same time, due to the secrecy, this human rights violation is one of the most complex since direct evidence of what has happened to the 'disappeared' is unlikely to be obtained. However, in the Inter-American Court of Human Rights and the European Court of Human Rights, the common standard of proof for finding a violation of the freedom from torture is that of 'beyond reasonable doubt'. Should, then, the evidentiary difficulties inherent to 'disappearance' cases impede such findings?

The Inter-American Court has compensated for the special nature of 'disappearance' cases by adopting a specific approach to evidence. First, the Inter-American Court has developed a two-pronged approach that allows for the use of presumptions and circumstantial evidence on the basis of the existence of an official practice of 'disappearances'.[3] If the applicant can prove that the State engaged in an official practice that involves torture, and that there is sufficient evidence that the individual case is linked to this practice, then the burden of proof shifts and it is for the Government to disprove the allegations.[4] If that Government fails to do so, the Court holds the State accountable for a violation of the right to humane treatment, as in cases against Honduras,[5] Peru[6] and Guatemala.[7] Second, the Inter-American Court has incorporated the obligation to 'ensure' human rights in the right to humane treatment. Accordingly, it has stated, 'subjecting a person to official, repressive bodies that practise torture and assassination with impunity is itself a breach of the duty to prevent violations of that right, even if that particular person is not tortured, or if those facts cannot be proven in a concrete case.' [8]

By contrast, the starting point of the European Court seems to be, 'where an apparent forced disappearance is characterised by total lack of information, whether the person is alive or dead or the treatment which she or he may have suffered can only be a matter of speculation.'[9] Even though the Court has recognized that 'independent, objective medical evidence or eyewitness testimony was unlikely to be forthcoming and that to require either as a prerequisite of a finding of a violation of Article 3 [freedom from torture, inhuman or degrading treatment or punishment] would undermine the protection afforded by that provision',[10] the implications of this observation are not clear in practice. So far, the European Court has found a violation of freedom from torture or other ill-treatment only when the evidence showed 'beyond reasonable doubt', through several consistent eye-witness accounts, that such a violation occurred.[11] In 'disappearance' cases against Turkey, applicants have argued a breach of Article 3 based on the existence of an official practice of 'disappearances' that includes torture.[12] Although the European Court has recognized similar conditions for the existence of an official practice as the Inter-American Court,[13] it has rejected these claims based on insufficient evidence. Interestingly, besides a clear modus operandi and the testimony of a former member of the security force, the evidence of a practice in Turkey mirrors the evidence before the Inter-American Court concerning the countries where the latter has found such practice.[14] Moreover, even though the European Court has found Turkey to be responsible for torture in detention centres,[15] it has not adopted a similar approach to the Inter-American Court of finding a violation of torture in 'disappearance' cases based on the duty to prevent.

The horrendous nature of 'disappearances' has gone unrecognised due to the inherent lack of evidence. The gravity of such acts demands that the regional Courts alter their approach to 'disappearance' cases accordingly. While the Inter-American Court has largely remedied the deficiency by adjusting the standard of proof and burden of proof, the European Court has practically failed to do so. However, there are tendencies in the Court's jurisprudence of applying a less strict standard of proof with respect to certain violations. For example, the European Court has edged away from the standard of proof 'beyond reasonable doubt' in cases of the right to life. It found a substantive violation of this right based on presumptions of death through circumstantial evidence.[16] These developments are potentially an opening for a more lenient evaluation of evidence in torture claims as well. There are a number of cases pending at the European Court against the Russian Federation concerning 'disappearances' in Chechnya. These cases are likely to provide the European Court with the opportunity to acknowledge the evidentiary difficulties inherent to 'disappearances' and to recognize them as violations of the right to freedom from torture.

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[1]The term is in quotation marks to emphasise that the victim has not simply vanished. The victim's whereabouts and fate, concealed from the outside world, are known by someone. ('Disappearances' and Political Killings: Human Rights Crisis of the 1990's: A Manual for Action (AI Index: ACT 33/01/94, p. 84).

[2]M. Nowak has highlighted as one of the gaps in the protection against 'disappearance' that it is not automatically treated as an act of torture or other ill-treatment. (Report by the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of the Commission Resolution 2001/46, E/CN.4/2002/71, 8 January 2002, par. 76).

[3]*Blake v. Guatemala* (Merits), Inter-Am. Ct HR, 24 January 1998, Series C, No. 36, par. 49.

[4]*Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), par. 125.

[5]E.g. *Juan Humberto Sánchez vs. Honduras*, Judgment of 7 June 2003, Inter-Am. Ct. H.R. (2003).

[6]E.g. *Castillo Páez Case,* Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997).

[7]E.g. *Villagrán Morales et al.*, Judgment of November 19, 1999, Inter-Am. Ct. H. R. (Ser. C) No. 63 (1999)..

[8]*Velásquez Rodríguez Case* (*supra* 4), par. 175.

[9]*Çiçek v. Turkey*, European Ct. of H.R, Judgment of 27 February 2001, Application No. 25704/94, par. 155.

[10]*Çakici v. Turkey*, European Ct. of H.R , Judgment of 8 July 1999. Application No. 3657/94, par. 91.

[11]This has only been the case in *Çakici v. Turkey* (ibid) and *Akdeniz and Others v. Turkey*, European Ct. of H.R, Judgement of 31 May 2001, Application No. 23954/94.

[12]E.g. *Kurt v. Turkey*, European Ct. of H.R, Judgment of 25 May 1998, Application No. 24276/94, par. 112 and *Çiçek v. Turkey* (supra note 9), par. 152 and 155.

[13]*Ireland v. United Kingdom,* European Ct. of H.R, Series A 25 (1978), p. 64 and *Greek Case*, 12 YB (1969), p. 195-196.

[14] *Timurtas v. Turkey* (Application No. 23531/94), Verbatim Record of the hearing held on 23 November 1999 and Written Comments of the Centre of Justice and International Law, *Timurtas v. Turkey* (Application No. 23531/94), p. 3.

[15]E.g. *Aksoy v. Turkey*, European Ct. of H.R, Judgment of 18 December 1996, Application No. 21987/93 and *Aydin v. Turkey*, European Ct. of H.R, Judgment of 25 September 1997. Application No. 23178/94.

[16] *Timurtas v. Turkey*, European Ct. of H.R, Judgment of 13 June 2000. Application No. 23531/94, par. 85 and *Nachova and Others v. Bulgaria*, European Ct. of H.R, Judgment of 26 February 2004, Applications nos. 43577/98 and 43579/98, paras 166-175.

Human Rights Cases

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

Nachova and Others v Bulgaria (Nos. 43577/98 and 43579/98)
6/7/2005 ECHR Grand Chamber Judgment
Police Discrimination

Facts

The Chamber judgment in this case, handed down on 26 February 2004, was reported in Issue 1 (Summer 2004) of the Bulletin. The case was subsequently referred to a Grand Chamber, which published its judgment on 6 July 2005. The case concerned the killing, on 19 July 1996, of two Roma men, Mr. Angelov and Mr. Petkov, by a military police officer who was attempting to arrest them.

The two men, who had been convicted of non-violent offences, had escaped from a penal work site to the home of Mr. Angelov's grandmother, in Lesura's Roma district. Five military police, at least two of whom knew of the men, went to the house to make an arrest. When they arrived they saw the two fugitives escaping, unarmed, from the back of the house. Major G., the senior officer, ran round to the back and was heard to have shouted for the men to stop and fired shots, first into the air and then directly at the two men, with an automatic rifle. They died on the way to hospital. The applicants alleged that the victims' ethnic origin was a decisive factor in the events, that the senior officer would not have fired an automatic rifle in a populated area had he not been in the Roma part of the village, and that his attitude towards the Roma community was confirmed by the offensive words he had used when addressing one of the neighbours. The criminal investigation concluded that the senior officer had acted in accordance with Bulgarian military police regulations.

Judgment

The Chamber of the Court had found in 2004 that the applicants' relatives right to life (Article 2) had been violated, both because of the use of lethal force to effect an arrest of unarmed men, and also because of the failings in the authorities' investigation into the incident. That decision was endorsed by the Grand Chamber, as was the award of damages.

The Chamber had also found that the deaths were the result of discriminatory attitudes by the security forces towards people of Roma origin, which violated the substantive provisions of the prohibition of discrimination (Article 14). The Chamber had shifted the burden of proof to the respondent Government. The inability of the Government to satisfy the Chamber that the events complained of were *not* shaped by racism resulted in its finding a substantive violation of Article 14 of the Convention, taken together with Article 2.

The Grand Chamber, however, did not agree and by a majority, declined to find a violation of the substantive provisions of Article 14. The Grand Chamber, departing from the Chamber's approach, did not consider that the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the burden of proof to the respondent Government. Having assessed all relevant elements, the Grand Chamber did not consider that it had been established that racist attitudes played a role in Mr Angelov's and Mr Petkov's deaths.

The Grand Chamber did, however, find that the authorities had failed in their duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the events. It followed therefore that there had been a violation of Article 14 of Convention, taken together with Article 2, in its procedural aspect.

Imakayeva v Russia (no. 7615/02)
20/1/2005 ECHR: Admissibility
Disappearance

Summary

The case concerns the disappearance of the applicant's son, Said-Khuseyn and husband, Said-Magomed, following their alleged detention by Russian servicemen. She alleges violations of Articles 2, 3, 5, 6, 8, 13 and 14 regarding the disappearances and subsequent investigations. She submits the circumstances indicate federal forces killed her son, that no proper investigation has occurred and the distress caused amounts to inhuman treatment. Further, she alleges the search of her house was unlawful and that domestic remedies were ineffective.

Facts

According to the applicant, on 17th December 2000, Said-Khuseyn drove from Novye Atagi to the market at Starye Atagi. Witnesses saw him being detained at a roadblock. One saw him at the market and offered him a lift, which he refused. Others saw a car similar to the one he was driving, surrounded by masked military personnel.

Subsequently, the applicant and her husband applied to various prosecutors and administrative authorities and visited detention centres in Chechnya and beyond, but received little information. On 5th January 2001, the Shali district prosecutor's office initiated criminal proceedings regarding the kidnapping.

On 21st April 2001 a criminal investigation was opened, but adjourned almost immediately. On 26th February 2002, the prosecutor stated that Said-Khuseyn had been taken away by unknown masked persons and his location remained unknown. On 5th July 2002, the first deputy prosecutor of the Chechen Republic ordered the investigation be resumed, but this was again unsuccessful. The applicant and her husband filed a complaint with the European Court on 12th February 2002.

On 2nd June 2002, servicemen in camouflage allegedly searched their house without a warrant, seizing belongings of relatives who had fled Grozny. The senior officer, telling the applicant that his name was Aleksandr Grigoryevich, aka "Boomerang", said that they would take her husband to Shali. Four other men were also detained. 30 witness statements were collected by the applicant regarding these events. At Shali, she was reassured all was well with her husband.

Potential ECHR Applicants:

If you think your human rights have been violated or if you are advising someone in such a position, and you would like advice about bringing a case before the European Court of Human Rights, EHRAC may be able to assist.

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Case Report

During her subsequent search, military personnel at Starye Atagi indicated that they knew "Boomerang", but her requests to meet him were hindered. The Chechnya Justice Initiative and Human Rights Watch wrote letters to the deputy Representative of the Russian President on Human rights in the Chechen Republic and to the prosecutor of the Chechen Republic requesting urgent measures.

On 2nd July 2002, the applicant was informed her husband had been detained by a terrorist organisation that commits crimes disguised as Federal Forces in order to discredit them. In August 2002, the applicant and relatives of the other disappeared persons visited Shali commandatura. Servicemen there accepted they had been to Novye Atagi, but did not recall the exact date. The commandant allegedly told them 27 people had been detained in June and 15 of them were "eliminated". Further, the applicant was questioned by the commandant regarding the financing of her application to the European Court. When she denied paying any fees he allegedly stated that her husband had been detained because of his involvement with financing the rebel activities. The applicant concluded from the conversation that her husband's detention was linked to her application, because both had financial implications.

Decision

Regarding Article 2, the Government contested that it was not proven that Said-Khuseyn was dead or that there had been a violation of Article 3. In respect of Article 5, the Government denied the involvement of State agents. The Court considered these issues required an examination on the merits. Regarding Article 6, the applicant stated that it was not possible to have a hearing where no one has been found responsible for a crime, and that she would only have the right of appeal at a stage of proceedings which have not yet been reached. Regarding Article 8, she underlines that the Government refer to the conclusion of the investigating authorities "that [she] has suffered moral damage and there has been a violation of [her] rights and freedoms". She further alleges a violation of Article 13 regarding the inadequacy of the investigation and lack of effective remedies.

The Court found these issues required an examination of the merits and declared the application admissible.

Implementation of the first European Court Judgments concerning Chechnya

On 6 July 2005 a panel of five judges rejected a request by the Russian government to refer the first three Chechen judgments (of 24 February 2005) to the Grand Chamber. Consequently these three judgments became final on 6 July. At the Committee of Ministers' Deputies' meeting on 11-12 October 2005 the question of the enforcement of these judgments (under Article 46(2) of the European Convention) was first discussed. A Decision was adopted on 26 October which notes that the Russian Government intends to present an 'action plan' for the implementation of the judgments. The Ministers' Deputies also took note of written submissions lodged on behalf of the applicants, as to the steps which ought to follow in the light of these judgments. In addition to the question of compensation, the Committee of Ministers will be considering what other measures should be taken as a consequence of these judgments (which may include the re-opening of the investigations into the incidents, the prosecution of those responsible and a review of relevant domestic laws, such as the military rules of engagement). At the time of writing the Committee of Ministers was due to consider these cases again at the end of November 2005.

Right of Return

Doğan and Others v Turkey-

Anke Stock, PhD

The conflict in the Kurdish regions of Turkey during the eighties and nineties led to an enormous number of internally displaced persons (IDPs). In a post-conflict situation the issue of IDPs raises the question of a right of return. Under present international law there is no general rule that affirms the right of IDPs to return to their original place of residence. However, the United Nations Guiding Principles on Internal Displacement[1] and now the European Court of Human Rights (ECtHR) have established principles as to how to address the needs of IDPs.

Turkish authorities claim that 350,000 people have been 'evacuated' from about 3,500 villages between 1984 and 1999.[2] Other sources estimate that over 3 million people were forcibly displaced from their homes in the rural areas of the Kurdish south-east.[3] Since the PKK (Kurdistan Workers' Party)[4] declared a ceasefire in 1999 and the state of emergency in the last provinces of the south-east was lifted in 2002, return has been possible on a limited scale, for example, under the 'Return to Village and Rehabilitation Project', a scheme to resettle villagers evicted in the context of clashes between the security forces and the PKK. However, so far no right of return has been established.

Doğan and Others v Turkey (nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29.6.2004) is a case in which IDPs were denied their right of return to their villages by Turkish authorities, and which has been taken by the victims to the ECtHR. There are about 1,500 similar cases from south-east Turkey currently registered before the ECtHR.

Doğan and Others v Turkey

The 15 applicants in this case were all Turkish nationals who until October 1994 lived in Boydaş, a village in south-east Turkey, where they or their fathers owned land and, in some cases, housing.

The applicants alleged that in October 1994 state security forces destroyed their homes with a view to forcing them to leave their village. The applicants and their families subsequently moved to safer areas in Elazığ and İstanbul.

The applicants petitioned various authorities complaining about the forced evacuation of their village by security forces; they also filed petitions requesting permission to return to their village and to use their property. Five applicants received a response[5] which stated that their petition would be considered under the 'Return to Village and Rehabilitation Project'. Other applicants received letters from the authorities stating that return to Boydaş village was forbidden for security reasons; however, that they could return and reside in other villages.

The applicants complained about their forced displacement and the Government's refusal to allow them to return. They invoked Articles 1, 6, 7, 8, 13, 14, 18 and 1 of Protocol No.1 of the European Convention on Human Rights (ECHR).

The ECtHR held that there had been a violation of Article 1 of Protocol No.1 and of Articles 8 and 13 of the ECHR. In relation to Article 1 of Protocol No.1, the Court held that, although the applicants did not have registered property, "…

Continued on page 9

these economic resources and the revenue that the applicants derived from them may qualify as 'possessions' for the purpose of Article 1"[6] of Protocol No.1. However, the Court was unable to determine the cause of displacement of the applicants due to a lack of evidence. The Court observed that in similar cases sufficient evidence had proven that security forces deliberately destroyed the homes and properties of applicants.[7] For the purpose of the instant case the Court decided to restrict its consideration to the examination of the applicants' complaints concerning the denial of access to their possessions since 1994 and ultimately the denial of their right of return.

The interference with the applicants' right to the peaceful enjoyment of their possessions had not been proportionate. The respondent Government had been compelled to take extraordinary measures to maintain security within the state of emergency. However, in the circumstances of the case the applicants "…had to bear an individual and excessive burden which has upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions". [8]

Conclusion

Dogan and Others is the first case against Turkey looking at the right of return of Kurdish people who were displaced during the conflict in the eighties and nineties. The principle that the denial of access of a landowner to his/her property amounted to a violation of the first rule of Article 1 of Protocol No.1 to the ECHR was first established in *Loizidou v Turkey* (no. 15318/89, 18.12.1996, para. 63). In *Dogan and Others* this principle has been widened to include the denial of access of applicants who did not formally own land but derived other rights from the land. Furthermore, the Court asserts that the measures taken by the Turkish Government to tackle the problems of IDPs in south-east Turkey are generally not sufficient, which led in this case to the conclusion that the interference had not been proportionate. Thus by finding a violation of Article 1 of Protocol No.1 to the ECHR the Court establishes a right of return, which is also codified in the UN Guiding Principles, and most recently, in the *Principles on housing and property restitution for refugees and displaced persons*.[9]

This case is of utmost importance for Kurdish IDPs since it reinforces the need for financial and material assistance to returnees from the Turkish Government. This has been called for by many international organisations, e.g. the Parliamentary Assembly of the Council of Europe[10], and by the United Nations, in particular by the UN Guiding Principles (Principles 28, 29 and 30).[11]

The UN Guiding Principles of 1998 approach displacement from the perspective of the needs of IDPs. They are structured around the phases of internal displacement: protection against displacement, protection during displacement, framework for humanitarian assistance, and protection during return, resettlement and reintegration.[12] The UN Guiding Principles do not constitute a binding instrument of international law, however, they identify those rights that have to be guaranteed in all situations. The right of return, including facilitating the return, of Principle 28 derives from the obligation of States not only to avoid, but to redress violations of international human rights and humanitarian law.[13]

The schemes put in place by the Turkish Government fall far short of Principles 28, 29 and 30. The 'Return to Village and Rehabilitation Project', announced in March 1999, facilitated the return of IDPs to twelve villages[14], an insignificant number compared to 3,500 destroyed villages. The impact of the Law on Compensation for Losses Arising from Terrorism and Anti-Terrorism, a law that was approved by the Grand National Assembly on 17 July 2004, has yet to be assessed. Turkey also fails to co-operate with international organisations, such as UNHCR and UNDP, as recommended in Principle 30.

Another impediment for returnees is the presence of some 60,000 mostly armed village guards. Cases of murders, beatings and disappearances of returning IDPs have been reported.[15] Furthermore, the concentration of minefields in south-east Turkey and the absence of basic infrastructure hamper the return of villagers.

Turkey has to face the problematic situation of Kurdish IDPs if it wants to proceed with its desire to accede to the European Union. As the 2004 Regular Report on Turkey's Progress towards Accession states: "On the ground, the situation of internally displaced persons remains critical."[16] This has now also been confirmed by the ECtHR.

New Publication

The Right to Liberty and Security of the Person: European Standards and Russian Practice.

In April 2005, the *NGO Sutyajnik* (Yekaterinburg, Russia) published a book entitled *The Right to Liberty and Security of the Person: European Standards and Russian Practice*. This is the third volume of the series *International Human Rights Protection* established by Sutyajnik in 2001.

The book contains a legal analysis of states' obligations under Article 5 of the European Convention on Human Rights and the European Court practice on this issue. Russian judicial practice and existing problems in the sphere of the right to liberty and security of the person are also discussed.

The book is published in Russian and is distributed for free. For more details please visit http://www/sutyajnik.ru/rus/library/sborniki/echr3/index.htm.

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1. United Nations Guiding Principles on Internal Displacement, E/CN.4/1998/53/Ass.2, 11.2.1998. See also the *Final report of the Special Rapporteur, Paulo Sergio Pinheiro – Principles on housing and property restitution for refugees and displaced persons*, E/CN.4/Sub.2/2005/17, 28 June 2005.
2. Human Rights Foundation of Turkey, August 2001.
3. http://www.db.idpproject.org/Sites/idpSurvey.nsf/wCountries/Turkey, Global IDP Project, consulted on 11.1.2005; Kurdish Human Rights Project, Internally Displaced Persons, The Kurds in Turkey, September 2003, p.24.
4. The PKK is proscribed as a terrorist organisation under Turkish law. Political violence partly resumed after Kongra-Gel (the successor of PKK) called off its ceasefire in June 2004.
5. No response was given to the other applicants within the 60-day period prescribed by Law No. 2577, the Law on Administrative Procedures.
6. See *Dogan and Others v Turkey*, op. cit., para. 139.
7. E.g. *Yöyler v Turkey*, no. 26973/95, 24.7.2003, paras. 77 et seqq. and *İpek v Turkey*, no. 25760/94, 17.2.2004, paras. 192 et seqq.
8. *Dogan and Others v Turkey*, op. cit., para. 155.
9. E/CN.4/Sub.2/2005/17, 28 June 2005.
10. See PACE Recommendation 1563 (2002) of 29.5.2002, paras. 6, 8, 11, 12.
11. United Nations Guiding Principles on Internal Displacement, E/CN.4/1998/53/Ass.2, 11.2.1998).
12. Walter Kalin, Annotations to Guiding Principles on Internal Displacement, in: Studies in Transnational Legal Policy, No 32 (The American Society of International Law and The Brookings Institution Project on Internal Displacement, 2000) p 2.
13. Op. cit., n. 11, p. 70.
14. Jonathan Sugden, Human Rights Watch, Hearing: Internally Displaced Persons in the Caucasus Region and Southeastern Anatolia, Commission on Security and Cooperation in Europe, 10.6.2003.
15. See US Department of State, Country Report 2002, March 2003, p.2/3, Annex B; Application in *Ünal and Others v Turkey*, no. 7556/03.
16. 2004 Regular Report on Turkey's Progress towards Accession, COM(2004)656 final, 6.10.2004, p.19.

Claiming to be a 'victim' under the European Convention – the case of Vatan v. Russia

Catharina Harby, legal consultant at the AIRE Centre, London

(No. 47978/99) 7/10/2004 (ECHR: Judgment)

Facts

The applicant, a political party, "Vatan", was founded in 1994 with the purpose of supporting the renaissance of the "Tartar nation" and to protect the Tartars' political, socio-economic and cultural rights.

In 1994, the Simbirsk regional organization of Vatan (the "Regional Organization") was registered with the regional department of justice. Vatan claimed that this was a branch of its party. In 1997 the Regional Organization made an appeal containing a number of statements including a call for "all oppressed people of the Empire" to strive for decolonisation. In July, the prosecutor of the Ulyanovsk region applied to the regional court to have the activities of the regional organisation suspended on the grounds that it had called for violence contrary to the federal legislation and the constitution. The regional court found that the statements made, including calls for the "Sember peoples" to join the Tartar Muslims in the national liberation fight, to decolonise Russia and to form military forces, were incompatible with the Constitution. The court suspended the Regional Organisation's activities for a period of six months. The decision was upheld on appeal by the Supreme Court.

In January 2000 the Ulyanovsk Regional Court allowed a claim by the Department of Justice to dissolve the Regional Organisation on account of its failure to bring its Charter into compliance with new legislation. This decision had not been appealed against.

Vatan brought an application to the European Court of Human Rights alleging that the suspension of the activities of the Regional Organisation violated Vatan's freedom to hold opinions and to impart information and ideas. It also alleged violations of its members right to freedom of association and their right to manifest their religion. Vatan invoked Articles 9, 10, 11 and 14 of the Convention

The Decision

The Court declared the application inadmissible on the basis that it was the Regional Organisation, and not Vatan, which was the victim of any potential Convention violation, according to Article 34 of the European Convention.

Comment

In the judgment of *Vatan v. Russia* the Court has highlighted the importance of the "victim" concept in Article 34 of the European Convention on Human Rights. According to Article 34, "*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation…*". If an applicant does not fulfil these criteria, the application will be declared inadmissible and the Court will not consider the merits of the case. At present, more than 90 % of all applications submitted to the Court are declared inadmissible.

In the case of *Vatan v. Russia* the Court took a slightly different approach and decided in its admissibility decision to join the question of whether the applicant fulfilled the criteria in Article 34 to the merits of the case rather than examining it at admissibility stage. This might have been because the issue was considered to be rather complex, or so closely linked to the merits of the case that it was more rational to examine them together.

It is clear from the Court's case law that both natural and legal persons can claim to be victims of violations of the Convention and fulfil the criteria in Article 34. Political parties have also been held to have standing before the European Court (see, inter alia, *Freedom and Democracy Party (Özdep) v. Turkey*, judgment of 8 December 1999). However, there are some rights for which legal persons cannot be considered victims, e.g. the prohibition of torture in Article 3.

In the present case, the Court firstly examined the Government's objection that Vatan was a separate legal entity from the Regional Organisation, which had been prohibited from holding meetings, demonstrations and other public actions, taking part in elections and disposing of its bank accounts. According to the Government, this meant that Vatan did not have standing before the Court. The Court considered whether Vatan and the Regional Organisation could be conceived as one and the same party, and therefore bring the applicant within the criteria of Article 34. The Court found that there was nothing to indicate that the Regional Organisation was structurally dependent on Vatan in its decision-making and that there was nothing in the constituent documents that prevented it from pursuing political goals other than those of Vatan. Therefore the Court held that the two could not constitute one political party. Important here was also that Vatan's president had taken part in the domestic proceedings not as the head of the entire party but on the basis of a power of attorney issued by the Regional Organisation.

The Court then moved on to consider whether Vatan itself could claim to be a victim of the suspension applied against the Regional Organisation. The Court has established in its case law that there are three kinds of victims under Article 34: actual, potential and indirect victims.

An **actual** victim is someone who had already been personally affected by the alleged violation. A simple example is a person who has been tortured, or a company that has been involved in unfair civil proceedings. However, if applicants have received adequate redress at national level, they will no longer be considered to be a victim for the purposes of Article 34. Adequate redress means that the national authorities must have recognised that the action/non-action/measure complained about was contrary to the Convention or unlawful, and if appropriate must have provided compensation or other redress.

A **potential** victim is someone who is at risk of being directly affected by a law or administrative act. An example here is individuals who are under threat of being deported and who would face inhuman or degrading treatment in the country to which they are being deported, although the deportation has not yet been carried out.

Finally, an **indirect** victim is someone who is immediately affected by a violation which directly affects someone else. This could, for example, be a family member of someone killed or deported.

In the present case, the Court considered whether Vatan could be an indirect victim for the purposes of Article 34. Finding that there was nothing in the injunction against the Regional Organisation which imposed any limitations on Vatan itself, and that there was nothing to stop Vatan pursuing activities in its own name in the Ulyanovsk region, it was not possible for Vatan to claim it had been a victim of a violation.

For this case to have been successful at the admissibility stage, the Regional Organisation should have instituted proceedings in the domestic courts, and then applied to the European Court

Continued on page 11

under its own name. As the Regional Organisation constituted a legal entity of its own under domestic law, it would have standing before the European Court. In theory, the Regional Organisation could still pursue this action and the case could come before the Court again. According to the facts of the judgment, the Regional Organisation was dissolved by a decision of the Ulyanovsk Regional Court on 12 January 2000, but the Court's case law makes it clears that dissolved parties may be considered victims (see inter alia previously mentioned *Freedom and Democracy Party (Özdep) v. Turkey)*. The party would obviously have to abide by any domestic time limits that might apply.

When submitting a complaint to the European Court on behalf of a group it is generally advisable, if appropriate, to include an individual as a complainant as well. As the case of *Vatan* shows, it is of utmost importance to put forward the right person, legal or natural, as the applicant. If a political party alleges that its rights have not been respected, it might be that individual members of that party have also been affected. In the case of *Sunday Times v. the United Kingdom* (judgment of 26 April 1979), the application was made on behalf of the company (a newspaper), the editor and a group of journalists. They were all held to have standing before the Court.

Interestingly, two of the judges in the case of *Vatan* submitted a separate opinion stating that even though they agreed with the conclusion reached in the judgment, they would have preferred to have seen it declared inadmissible on the grounds that it was manifestly ill-founded, an inadmissibility ground found in Article 35(3). According to the separate opinion, Vatan should have standing as it represented the "party as a whole". However as the Regional Organisation had openly called for violent challenges to the foundations of constitutional governance and for a brigade of courageous and resistant people to fight for national liberation, the conclusions by the regional court were neither exaggerated nor unfounded. The statements clearly overstepped the boundaries of permissible freedom of expression and the application should be declared manifestly ill-founded.

Hence, it is far from clear that the application would ultimately have been successful even if it had been pursued by the Regional Organisation itself.

PACE Russia Report

Anood Taqui, BA, BSc

This article draws together selected key themes from the report: 'Honouring of Obligations and Commitments by the Russian Federation', Document 10568, Parliamentary Assembly of the Council of Europe (PACE), 3 June 2005. This report assesses the progress made by the Russian Federation with regard to the nation's obligations and commitments under the Council of Europe Statute, the European Convention on Human Rights (ECHR), and all other Council of Europe Conventions to which it is a party.

Since the last monitoring report in April 2002, the Russian authorities have made efforts to address the issues that represented, and in some cases continue to represent, a threat to the political stability, economic progress and normal functioning of democratic institutions in the country. The report noted with satisfaction that in the past three years, the Russian Federation has adopted a new criminal procedure code and a law on alternative military service, substantially decreased the number of inmates in penitentiary institutions, and signed the European Convention on the Transfer of Sentenced Persons.

During the same period, however, there has been very little progress regarding other outstanding commitments, including those related to the formal abolition of the death penalty, the obligation to bring to justice those found responsible for human rights violations, notably in relation to events in Chechnya, and to ensure the effective exercise of the rights, especially by minorities, enshrined in the Russian Constitution and the ECHR. According to the Federal Ombudsman, Mr. Lukin, the right to life and personal integrity is not guaranteed in practice, the abuse of refugees and displaced persons' rights continues, the number of citizens' rights violations by police and other law enforcement bodies is increasing, a difficult situation still exists in the penitentiary system, the rights of conscripts are systematically impinged, and there are cases of extremism and xenophobia. Also, the trend of restricting federal and, especially, regional mass media activity persists and the intimidation of journalists is not rare.

The report specifically examined the Russian response to PACE Resolution 1403 (2004) which condemned all criminal acts constituting serious human rights violations committed by all sides of the conflict in the Chechen Republic and called for the end of the climate of impunity in the region. The report concluded that the human rights situation in Chechnya has not improved and that Russia has not secured the adherence to the rule of law and the enjoyment within its jurisdiction in Chechnya of human rights and fundamental freedoms.

In light of the current human rights situation in the Russian Federation, it was recommended that the Russian authorities take the following measures with regard to the rule of law and the protection of human rights:

(a) To ratify Protocol No. 6 to the ECHR prohibiting the death penalty;

(b) With regard to the conflict in the Chechen Republic, comply with the recommendations of Resolution 140(2004) and notably to bring to justice those found responsible for human rights violations, strictly respect the provisions of international humanitarian law, and prosecute any attempt to intimidate and harass human rights activists and applicants to the ECtHR;

(c) Unconditionally co-operate with the ECtHR, refrain from hindering in any was the effective exercise of the right of individual petition to the Court and speedily and comprehensively execute its judgments, notably the judgment of *Ilascu and Others*;

(d) Apply a zero tolerance approach to the continuously endemic problem of 'hazing' in the armed forces by implementing an educational programme for officers and provide for the systematic, credible and transparent investigation and prosecution of abuses;

(e) Revise the recently adopted law on alternative military service to change its disproportionate character and bring it into line with European practice;

(f) Increase efforts to fight religiously, ethnically and racially motivated violence and discrimination and investigate and punish all proven cases of harassment and discrimination;

(g) Pursue judiciary reforms in strict compliance with Council of Europe standards to ensure the fairness and independence of the Russian justice system;

(h) Reform the Prokuratura in line with relevant European standards and withdraw the reservation made to Article 5 of the ECHR;

(i) To ratify the European Social Charter and the European Convention on the transfer of sentenced persons.

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About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University. Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) within the Russian Federation to take cases to the European Court of Human Rights, whilst working to transfer skills and build the capacity of the Russian human rights community.

EHRAC works in close partnership with *Memorial*, one of Russia's oldest and most respected human rights organisations, as well as with other Russian NGOs and lawyers and the Bar Human Rights Committee of England and Wales (BHRC). EHRAC is currently working on over 75 cases involving more than 450 primary victims and their immediate family members. For more information see: www.londonmet.ac.uk/ehrac.

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EHRAC CONTACT INFORMATION

MOSCOW
101990, Moscow, Room 18a, Milyutinsky pereulok , Building 1, 3rd Floor, 36C
Mailing Address:
Memorial Human Rights Centre
102705, Maly Karetny pereulok 12
Russia, Moscow
http://ehracmos.memo.ru/index.html
Tel.: +7 095 924 20 25

Tatiana Kasatkina, Director of HRC "Memorial"
E-mail: memhrc@memo.ru

Elena Ryzhova, Project Co-ordinator
E-mail: admin@ehrac.memo.ru

Kirill Koroteev, Lawyer
E-mail: koroteev@ehrac.memo.ru

Dina Vedernikova, Lawyer
E-mail: vedernikova@ehrac.memo.ru

Natasha Kravchuk, Lawyer
E-mail: kravchuk@ehrac.memo.ru

Olga Tseitlina (Saint Petersburg Office)
191187, Saint Petersburg, 12 Gagarinskaya street, 42 apt.
Tel: + 7 812 327 35 09 Fax: + 7 812 279 03 71
E-mail: oosipova@hotmail.com

Irina Ananyeva (Ryazan Office)
390000 Ryazan, Kostjushko Square, 3, room "A"
Tel: +7 (0912) 25 51 17 Fax: +7 (0912) 25 51 17
E-mail: Ananas77@mail.ru

Marina Dubrovina (Novorossiysk Office)
353900, Novorossiysk, Mira Street, 14/4
Tel: +7 (8617) 61 10 70 Fax: +7 (8617) 25 47 36
Email: almad@mail.kubtelecom.ru

Isa Gandarov (Nazran Office)
386100 Ingushetia, Nazran
Motalieva Street 46
Tel: +7 (8732) 22 23 49 Fax: +7 (8732) 22 23 49
E-mail: isa@southnet.ru

Dokka Itslaev (Urus-Martan Office)
1A Lenina street, Urus-Martan, Chechen Republic
Tel: +7 87145 2 22 26
E-mail: dokka@mail.ru

LONDON
London Metropolitan University
LH 222, Ladbroke House
62-66 Highbury Grove
London N5 2AD
Tel: + 44 (0)20 7133 5087
Fax: + 44 (0)20 7133 5173
EHRAC@londonmet.ac.uk
www.londonmet.ac.uk/ehrac

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

Professor Bill Bowring, Academic Co-ordinator
Direct Tel: + 44 (0)20 7133 5132
Mobile: + 44 7810483439
E-mail: b.bowring@londonmet.ac.uk

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

Elena Volkova, Administrator
Direct Tel: + 44 (0)20 7133 5090
E-mail: e.volkova@londonmet.ac.uk

Kirsty Stuart, Public Relations and Development Officer
Direct Tel: +44 (0)20 7133 5156
E-mail: k.stuart@londonmet.ac.uk