

# EHRAC

## Bulletin



In partnership with Memorial Human Rights Centre (MHRC), the Georgian Young Lawyers' Association (GYLA) and Article 42 of the Constitution

## Freedom of expression in Azerbaijan under test: challenges and prospects

Leyla Madatli, Lawyer, Media Rights Institute

In the recent case of *Fatullayev v Azerbaijan* (No. 40984/07) 22/4/10,<sup>1</sup> the ECtHR found violations of the applicant's rights to freedom of expression and to a fair trial. Fatullayev was the founder and chief editor of two newspapers in Azerbaijan well known for their harsh criticism of the Azerbaijani Government. This judgment is of great importance for Azerbaijan as it addresses topical issues under Art.10 ECHR (freedom of expression), as well as for

ECtHR case law in terms of Art. 46 (execution of judgments).

*Fatullayev* is the second case in which the ECtHR has found a violation of Art.10 as a result of the use of criminal defamation in Azerbaijan.<sup>2</sup> Charges of criminal defamation (under Art.147) and also other provisions of the Criminal Code (CC) against journalists who criticise the Government are common in Azerbaijan.<sup>3</sup> Fatullayev was convicted for publishing two separate articles and Internet forum postings and as a result of two sets of proceedings instituted against him on charges of defamation, the threat

of terrorism, incitement to ethnic hostility and tax evasion.

In respect of criminal defamation, the ECtHR ruled that Fatullayev's conviction for having published an article conveying the views of people living in Nagorno-Karabakh about the Khojaly tragedy<sup>4</sup> and Internet forum postings was not justifiable as they could not be considered as defamatory for having reflected views contradictory to the commonly accepted version of these tragic events.

The article did not contain any statements directly accusing the Azerbaijani

*continued on page 2*

### Editorial

This edition of the *Bulletin* has a focus on redress and implementation – considering what range of remedies should be granted by international human rights mechanisms and how state authorities should respond to findings of human rights violations.

Leyla Madatli (Media Rights Institute, Baku) discusses the ground-breaking judgment in *Fatullayev v Azerbaijan* in which the European Court ordered the immediate release of imprisoned journalist Eynulla Fatullayev, but who at the time of going to press nevertheless remained in custody.

Adam Bodnar (Helsinki Foundation for Human Rights) discusses important recent Polish judgments and how they have been followed up. Alice Donald (London Metropolitan University) provides an overview of the main issues discussed at a recent seminar held in Strasbourg to debate European Court 'pilot

judgments', which focus on systemic human rights violations. Elisabeth Lambert Abdelgawad (University of Strasbourg) critiques the latest proposals to reform the supervision process carried out by the Committee of Ministers in relation to the implementation of Strasbourg judgments. Isabelle Desrosiers (Sutyajnik) considers changes in practice as regards legal representatives' access to clients in detention in Russia, following the *Zakharkin* decision.

Finally, in relation to the Chechen jurisprudence from Strasbourg, Vladislava Generalova (Memorial HRC) discusses the use of interim measures applications in respect of cases of enforced disappearance and Sarah Giaziri (EHRAC) highlights a recent increase in the level of awards of damages in disappearance cases.

**Prof. Philip Leach**  
Director, EHRAC

### Contents

Freedom of expression in Azerbaijan under test: challenges and prospects	1
Editorial	1
Compensation in Chechen disappearance cases	3
European Court interim measures: A new tool in the fight against disappearances in the North Caucasus	4
Report reveals dire human rights situation in Chechnya	5
Human rights cases	6
Recent Polish ECtHR judgments: fewer systemic problems - more fine-tuning	10
Advancement of the right to individual petition to the ECtHR for Russian citizens detained in correctional facilities: <i>Zakharkin v Russia</i>	12
PACE: Legal remedies for human rights violations in the North Caucasus region	13
'The most creative tool in 50 years?' The ECtHR's pilot judgment procedure	13
Taking the implementation of ECtHR judgments seriously: right assessment, wrong approaches?	14

continued from page 1

### **Freedom of expression in Azerbaijan under test: challenges and prospects**

military or specific individuals of committing the massacre and deliberately killing their own civilians. The ECtHR found that the article had not directly accused the two plaintiffs (soldiers) of having committed grave war crimes and had not undermined the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors (who were Khojaly refugees). In the absence of any justification for the imposition of a severe prison sentence (two years and six months) there was a violation of Art.10 in respect of Fatullayev's first criminal conviction.<sup>5</sup>

The second set of criminal proceedings was brought by the Azerbaijani Ministry of National Security on the grounds that an article in which the applicant expressed his views on the Government's foreign policy and proposed his scenario of a US-Iranian war potentially involving Azerbaijan constituted a threat of terrorism. He also listed strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. The ECtHR deemed this article to form part of a political debate on a matter of public interest. It found that the severity of the penalties imposed on Fatullayev and the lack of relevant reasons for his conviction amounted to a violation of Art. 10.<sup>6</sup>

Furthermore, the ECtHR held that there had been a violation of Art. 6(1) ECHR (fair hearing) because the applicant had objectively justifiable fears about the judge's impartiality. The same judge heard both the civil and criminal cases based on the same claims against Fatullayev and in both cases issued the decisions against the applicant.<sup>7</sup> The presumption of innocence was also infringed due to the Prosecutor General's statement that the applicant's article contained a threat of terrorism, before he had been proven guilty according to law.<sup>8</sup>

Also of importance in the judgment is that the ECtHR ordered the applicant's immediate release, invoking Art. 46

ECHR. It is rare for the ECtHR to use this individual measure. It was first used in 2004 in two cases to order the release of persons who were being arbitrarily detained in breach of Art. 5 (right to liberty and security).<sup>9</sup>

The immediate release order sparked speculation as to whether the State was obliged to release the applicant even before the ECtHR judgment entered into force. The Azerbaijani Government did not execute this order on these grounds and several days before the judgment would have entered into force it requested that the case be referred to the Grand Chamber. The non-execution of the immediate release order was not caused by an absence of legal grounds in Azerbaijani legislation. Art. 12(2) of the Constitution of the Republic of Azerbaijan states that the human rights and fundamental freedoms stipulated in the Constitution should be applied in compliance with international conventions. Furthermore, the Code of Criminal Procedure (Arts. 455-460) contains mechanisms for the implementation of ECtHR judgments at the national level. Although this legislation does not mention immediate release it could have been used to secure the applicant's release within a few days.

The ECtHR's recourse to immediate release as an individual measure in *Fatullayev* highlights the importance of international advocacy campaigns conducted in parallel to the strategic litigation of ECtHR cases. Depending on the case, such tactics can have negative results at the national level as the national authorities may react overly defensively. However, it is very important for the ECtHR to be made aware of the international context and the wider extent of the problem at the national level. International reports, statements and appeals can therefore influence the ECtHR's decision-making (including in relation to measures of redress). Of course, in *Fatullayev* the ECtHR was also led by the case's particular circumstances and the ongoing violations against the applicant, but the advocacy campaign was also very helpful.

The *Fatullayev* judgment reflects the poor state of freedom of expression in Azerbaijan. In addition to harassment and intimidation against the media, an environment of impunity exists in Azerbaijan. In general the courts are not effective in addressing these problems, especially in respect of journalists who criticise the Government. According to the Media Rights Institute, in the last five years only three out of 350 cases relating to violations against journalists were investigated by the law enforcement bodies.<sup>10</sup> Thus, *Fatullayev* is a clear example of politically motivated abuse of the justice system. It should be noted that one of the applicant's main arguments that there had been a violation of the right to freedom of expression was the lack of independence of the courts – that political pressure was exerted on the courts by the executive authorities. However, this is a difficult point to prove in the ECtHR and was not successful in this case.

At the time of writing, Fatullayev is still in prison under both the old and new sentences. Four months prior to the delivery of the ECtHR judgment he was charged with drug possession and on 6 July 2010, was sentenced to two and a half years' imprisonment. The national and international human rights communities asserted that these new charges were fabricated to prevent the effective implementation of the ECtHR judgment. If the judgment of 6 July 2010 enters into force and is upheld by the higher courts, Fatullayev must remain in prison for a further two and a half years even if he were released from the previous sentences due to the execution of the ECtHR judgment.

However, even the legal status of Fatullayev's imprisonment is still doubtful and confusing because of the court's decision on the new charge. In the new case the first instance court found that Fatullayev had been imprisoned unlawfully under the original convictions. In so doing it made direct reference to the ECtHR's *Fatullayev* judgment, which is very unusual in domestic case law. However, the court did not rule on the con-



sequences of the unlawful imprisonment under the old charges for Fatullayev in general and for the new case. It seems that the court was merely making a declaration or a statement, which gives rise to many questions about the way the national justice system will deal with Fatullayev's past three years of unlawful imprisonment. However, the Supreme Court of Azerbaijan is obliged to review cases decided by the ECtHR and

to identify the consequences of unlawful imprisonment.

Nevertheless, the first instance court, which committed many violations of fair trial standards, held that Fatullayev should be imprisoned as a result of his conviction for drug use and that this period of imprisonment runs from the date of its judgment (6 July 2010). According to domestic legislation, Fatullayev's new term of imprisonment should begin at the very least from the date of his trans-

fer to a pre-trial detention facility under the new charges (December 2009). Fatullayev has appealed against the 6 July 2010 judgment to the Baku Appellate Court (the case was returned to the first instance court due to procedural violations) and he intends to submit further applications to the ECtHR about the drug case and the ill-treatment to which he has been subjected in prison, in order to realise the justice that was achieved in the ECtHR's first judgment.

1 The judgment entered into force on 4.10.10.

2 The first case was *Mahmudov & Agazade v Azerbaijan* (No. 35877/04), 18.12.08.

3 Over the period 2006-10, 34 journalists were imprisoned for criminal defamation in Azerbaijan. See the annual reports of the Media Rights Institute at [www.mediaryights.az](http://www.mediaryights.az) for further details.

4 *Fatullayev v Azerbaijan* (No. 40984/07) 22.4.10, paras. 59-62. The events in Khojaly of 26 February

1992, during which hundreds of Azerbaijani civilians were killed by Armenian armed forces with the reported assistance of the Russian (formerly Soviet) 366th Motorised Rifle Regiment, during the Nagorno-Karabakh conflict.

5 *Supra* note 4, para. 103.

6 *Supra* note 4, paras. 127-128.

7 *Supra* note 4, para. 140.

8 *Supra* note 4, paras. 162-163.

9 *Assanidze v Georgia* (No. 71503/01) GC 8.4.04 and *Ilaşcu & Others v Moldova & Russia* (No. 48787/99) 8.7.04.

10 Media Rights Institute, 2009. *Legal Status of the Mass Media in Azerbaijan: Annual Report 2009*. [Online]. Available at: <http://www.mediaryights.az/index.php?lngs=eng&cid=25>, page 4.

## Compensation in Chechen disappearance cases

*Sarah Giaziri, Solicitor; EHRAC intern*

On 27 July 2006, the ECtHR found Russia responsible for the 'disappearance' and presumed death of Khadzhi-Murat Yandiyev, a 25-year-old Chechen. *Bazorkina v Russia* (No. 69481/01) 11/12/06 was a landmark case not only because it was the first Chechen disappearance case to be decided by the ECtHR, but also as it provided a guide as to how much the ECtHR would grant in terms of compensation in similar cases. The €35,000 awarded in non-pecuniary damages to Khadzhi-Murat's mother became the benchmark for compensation in Chechen disappearance cases for the next few years. In early 2010 the amount of non-pecuniary damages awarded underwent its first major increase when it was almost doubled to €60,000-€65,000.

Before the increase, the ECtHR had been, to some extent, consistent in awarding €35,000-€40,000 to family members jointly for each disappeared relative about whom they had complained. The ECtHR has not provided any reasons for awarding €35,000 in some cases and €40,000 in others, or

even why it has sometimes awarded less, such as €20,000 in *Khalitova and Others v Russia* (No. 33264/04) 6/11/09.

In cases where the applicants are, for example, the parents of two brothers or a wife and mother of a husband and son who have disappeared, the ECtHR's compensation has normally reflected the fact that the applicant(s) have lost two (or more) relatives. Hence the size of the award can be €70,000 (pre-2010) or €120,000 (post-2010) or even more, as in the case of *Dolsayev and Others v Russia* (No. 10700/05) 5/6/09 in which the applicants lost four sons and were awarded €140,000.

In *Ilyasova v Russia* (No. 26966/06) 10/6/10 and *Batayev and Others v Russia* (Nos. 11354/05 & 32953/06) 17/6/10 the ECtHR recognised that some of the applicants had lost two relatives and accordingly awarded these families twice the amount awarded to those who had lost one relative. However, in *Khutsayev and Others v Russia* (No. 16622/05) 27/5/10, the ECtHR deviated from this general pattern. One of the applicants in this case was a mother who had lost two sons yet she was awarded the same damages as the other applicants in the case who had lost only one relative.

The ECtHR has held that an applicant can only claim for themselves and not on behalf of other relatives who are not party to the application. In *Ayubov v Russia* (No. 7654/02) 5/6/09, the applicant (the mother of the disappeared) tried to claim on behalf of her daughter-in-law. The ECtHR ruled that it could only consider the part of the claim that related to the mother as the daughter-in-law was not party to the application.

A further point of note concerns the amount of compensation awarded in cases where no substantive violation of Art. 2 ECHR (right to life) is found. In these cases the applicants have not proved that State officials were responsible for their relative's disappearance. However, the State is still held liable for procedural violations for not having conducted an effective investigation into the disappearance. In these circumstances, the ECtHR has awarded non-pecuniary (but not pecuniary) compensation, as it has acknowledged that the applicants still suffered from the indifference shown by the authorities towards them (see *Zakriyeva and Others v Russia* (No. 20583/04) 6/7/09 as an example).

*continued on page 4*

continued from page 3

### **Compensation in Chechen disappearance cases**

It is more difficult to ascertain a pattern for the amount of pecuniary compensation awarded, as the sums have been varied and the ECtHR has not provided reasons for all the discrepancies. However, it has provided guidance on when it will award pecuniary damages. For example, the ECtHR takes into account the relationship between the applicant and the disappeared, the applicant's age and the evidence of earnings submitted by the applicants.

In the case of *Batayev and Others*, the ECtHR held that non-pecuniary damages in relation to the loss of earnings apply to wives, dependent children and, in some instances, to elderly parents. In *Khalitova* the ECtHR was not persuaded that the applicant's brother would have supported her financially had he been alive and working. In *Gakiyev and Gakiyeva v Russia* (No. 3179/05) 6/11/09 the ECtHR did not award any pecuniary damages on the grounds that the applicants had no legal basis to claim subsistence from their son, as they had not yet reached retirement age. On the date of the judgment the father and mother were aged 57 and 49 years-old respectively.

Rule 60 of the Rules of Court provides that any claim of just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers. In *Umaltov v Russia* (No.8345/05) 8/4/10 the applicants all claimed loss of earnings on the grounds that their sons provided financially for them. However, they failed to provide any documentary evidence of earnings to this effect. As a result, no award was made.

The ECtHR does not necessarily require documentary evidence of earnings where the disappeared relative was unemployed at the time of his or her disappearance. In *Dzhambekova and Others v Russia* (Nos. 27238/03 & 35078/04) 14/9/09 the ECtHR accepted that it is reasonable to assume that the disappeared men would eventually have had some earnings resulting in financial support for their families.

Although it can be seen that there is a pattern to the level of non-pecuniary damages awarded in Chechen disappearance cases, *Varnava and Others v Turkey* (Nos. 16064-66/90 & 16068-73/90) GC 18/9/09 cautions us from assuming that a damages table can be discerned from these cases. *Varnava* involved applicants from Greek Cyprus claiming against the Turkish Government

on behalf of relatives who disappeared during the 1974 invasion of the island. Although not about Chechnya, it does nevertheless provide useful guidance for the compensation mechanism in disappearance cases. The ECtHR observed that there are no express provisions for non-pecuniary or moral damages and that its approach to awarding non-pecuniary damages has evolved on a case-by-case basis. Significantly, the ECtHR stated that disappearance cases do not lend themselves to a process of calculation or precise quantification and that it is not the ECtHR's role to function as a domestic tort mechanism. The intention of non-pecuniary awards is to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and to reflect in the broadest of terms the severity of the damage; they are not intended to give financial comfort or sympathetic enrichment to the applicants.

Despite the ECtHR's above assertion that disappearance cases do not lend themselves to precise quantification, it has nevertheless set a more or less consistent standard in the amount Chechen applicants can expect to receive in non-pecuniary damage should they be successful with their claim.

## European Court interim measures: A new tool in the fight against disappearances in the North Caucasus

*Vladislava Generalova, Memorial HRC intern*

**A**bductions and enforced disappearances remain one of the most serious forms of human rights violation in the North Caucasus. The prevalence of impunity and failings in the rule of law in this region, especially in the Chechen Republic, have compelled human rights activists to look for new legal mechanisms to prevent disappearances and murder.

In mid-2009, given the persistently high number of abductions in

the North Caucasus, the lawyers of the EHRAC-Memorial joint project began to use a new tool when lodging ECtHR applications in cases concerning recent abductions. In order to try to prevent abducted persons from subsequently disappearing without trace, the lawyers resorted to requesting that the ECtHR apply interim measures in these cases. This had not previously been done by Russian human rights activists.

The interim measures envisaged under Rules 39-41 of the Rules of Court are predominantly applied in cases concerning the extradition of an ap-

plicant to a country where he or she might be subjected to treatment that violates Arts. 2 (right to life) or 3 (prevention of torture or inhuman or degrading treatment) ECHR. However, it is argued that in instances of abduction, interim measures may be also applied with respect to a respondent state where the abduction is recent, there is strong evidence of the involvement of state agents and it is clear that the investigative bodies are unable or unwilling to effectively investigate. Thus, when lodging a complaint with the ECtHR the relatives of an abducted



person could request urgent protective measures, including a lawyer being immediately granted access to an unlawfully detained person and, if necessary, the provision of medical assistance to the victim. The ECtHR can then apply Rule 40 (urgent notification of an application), under which the respondent state would be urgently notified of the case, and requested to provide information on the involvement of state agents in the abduction. The ECtHR must then decide whether to apply Rule 39 (interim measures), providing for the application of urgent protective measures, on the basis of the information received from the respondent state.

The obvious advantage of this strategy is that it may serve as an additional stimulus for state authorities to investigate a case, search for an abducted person and provide exhaustive information on the case. Additionally, it could provide the opportunity to obtain timely evidence before an abducted person disappears without trace, as is usually the case. Such an intervention by the ECtHR, together with other factors, may be decisive in the fate of an abducted person.

The use of this practice by Russian human rights organisations is believed to have been influential in the release of four abducted persons. Although it is

still premature to speak about the overall effectiveness of this strategy, it is presumed that the timely involvement of the ECtHR in these cases helped prevent the disappearance without trace of these four Chechens and encouraged their relatively prompt release.

In all four cases the abductions followed the typical ‘Chechen pattern’ in which unidentified armed persons detained the victims without producing any documents and took them away in an unknown direction. Immediately after the abduction their relatives applied to the local authorities and to human rights activists for help. The Prosecutor’s Office initiated criminal cases, but the subsequent steps necessary to find and release the persons were not taken. Sometimes the criminal case was initiated long after the abduction. The authorities’ inaction and the possible involvement of State agents in the abduction served as grounds for the relatives to apply to the ECtHR requesting interim measures.

To date the ECtHR has not applied Rule 39 in any of the Chechen abduction cases and even in the four ‘successful’ cases in which the victims were released, the ECtHR only partially satisfied the applicants’ requests. In most of the cases the Court applied Rules 40 and 41 (order of dealing with cases)

sending requests for information to the State and giving the cases priority. The victims in the ‘successful’ cases were released 52 days, 42 days, eight days and three months after having been abducted.<sup>1</sup>

It is possible that one reason for the non-application of Rule 39 may be the difficulty of obtaining direct evidence of the involvement of state agents in an abduction. If the ECtHR is not satisfied that state agents were involved it may be that it will not risk ordering measures that could not be fulfilled should the state not be responsible. Furthermore, the ECtHR is cautious in applying Rule 39 given that it is a mechanism that should only be applied in extraordinary cases.

Despite this, it is hoped that the North Caucasus applications to the ECtHR under Rules 39-41 can still be considered to be an important and useful new tool in the struggle against abductions and disappearances, acting as an additional stimulus for an effective investigation to be conducted, providing for the disclosure of information regarding the case to the ECtHR and, most importantly, potentially assisting in the release of an abducted person.

<sup>1</sup> In order to protect the victims and their families the names and details of the cases in question are not provided.

## Report reveals dire human rights situation in Chechnya

Following a fact-finding mission to Chechnya in February 2010, the UK’s All-Party Parliamentary Human Rights Group (PHRG) produced a report about Chechnya under President Ramzan Kadyrov. The PHRG notes that while the infrastructural reconstruction of places like Grozny is nothing short of astounding, the human rights situation as told by the people reveals something of a “post civil-war authoritarian regime”. The report makes a compelling case for international action vis-à-vis

Chechnya, including on the back of ECtHR judgments, and sets out recommendations to the Russian and Chechen authorities and to the UK, EU member states and the wider international community. Among these are:

*“Though the delegates are unsure how viable, at least for the time being, setting up an International Commission of Inquiry into the violations committed in Chechnya would be, a more feasible option may be to take action against those named in ECHR judgments as having been involved in*

*atrocities, when the Russian authorities refuse to follow up with further investigations, say by putting travel bans in place. More generally, more could be done to get Russia to take its obligations as a member of the Council of Europe more seriously, particularly in relation to the judgments handed down against it by the European Court of Human Rights.”*

The report is available at: [http://www.londonmet.ac.uk/londonmet/fms/MRSite/Research/HRSJ/EHRAC/Reports/PHRG\\_Chechnya\\_Mission\\_Report\\_JUNE\\_2010.pdf](http://www.londonmet.ac.uk/londonmet/fms/MRSite/Research/HRSJ/EHRAC/Reports/PHRG_Chechnya_Mission_Report_JUNE_2010.pdf).

## 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 cases

#### *Gulyayeva v Russia*

(No. 67413/01), 01/04/10

(ECHR: Judgment)

*Degrading treatment; right to liberty & security*

#### **Facts**

Following an external audit of the Department of Justice of the Sakhalin Region that revealed embezzlement of budgetary assets, criminal proceedings were instituted against the applicant, the head of the Department, on 25 February 2000. On 28 February 2000, the applicant retained a lawyer and shortly thereafter was arrested and taken into custody as a suspect. Her application to be released on bail was denied.

On 1 March 2000, she was remanded in custody for fear that she might abscond or obstruct investigations by influencing witnesses - her former subordinates. On several occasions between 1 March 2000 and 6 February 2001 her detention was extended and appeals against the extensions denied on the basis that she might abscond or obstruct investigations. However, between 25 October 2000 and 4 November 2000, the applicant was held without the authorisation of a judge or prosecutor simply on the basis that her criminal case had been referred to court for trial.

Challenging her continued detention, the applicant particularly stressed that she could in no way hinder investigations since the audit had been completed by 13 April 2000. She also cited the poor conditions of her detention and the consequent deterioration of her health. The latter claims were rejected as groundless and unsubstantiated. A town court judge declined a subsequent request by her counsel, on 8 August 2000, for her to be examined by an independent medical authority.

On 6 February 2001, the applicant was convicted of embezzlement, forgery and abuse of power and sentenced to six years in prison.

#### **Judgment**

The ECtHR found the applicant's deten-

tion in the remand centre had amounted to degrading treatment, violating Art. 3 ECHR. Additionally, it found that there had been no lawful basis for her detention from 25 October 2000 to 4 November 2000. This amounted to a violation of Art. 5(1)(c). Relying on Art. 5(3), the applicant complained of excessively long pre-trial detention. The ECtHR concurred finding a violation. The ECtHR observed that in prolonging the applicant's pre-trial detention in custody, the authorities had repeatedly invoked the same reasons. The courts had a duty to assess, after a time, whether the grounds relied on by the judicial authorities continued to justify the denial of liberty.

#### *Mutsolgova & Others v Russia*

(No. 2952/06), 01/04/10

*Abayeva & Others v Russia*

(No. 37542/05), 08/04/10

*Sadulayeva v Russia*

(No. 38570/05), 08/04/10

*Khatuyeva v Russia*

(No. 12463/05), 22/04/10

*Khutsayev & Others v Russia*

(No. 16622/05), 27/05/10

*Ilyasova v Russia*

(No. 26966/06), 10/06/10

(ECHR: Judgment)

*Disappearance*

#### **Facts**

In all these cases the applicants' relatives disappeared in Chechnya and Ingushetia following detention by Russian State agents and have not been seen since. The events took place between September 2000 and August 2004.

#### **Judgment**

The ECtHR stated that the applicants' relatives must be presumed dead in violation of Art. 2 (right to life) and found the following violations: a procedural violation of Art. 2 due to a failure to investigate the disappearances; Art. 3 (prohibition of inhuman and degrading treatment) on account of the applicants' moral suffering; Art. 5 (right to liberty and security) as the disappeared men were held in unacknowledged detention and Art. 13 (right to an effective remedy) in con-

junction with Art. 2. Additionally, in *Khutsayev*, Art. 3 was also violated due to ill-treatment and injuries suffered by the applicants and the detained men on arrest and a failure to investigate the same. Finally, Art. 8 and Art. 1 of Protocol 1 were violated due to the search of the applicants' homes and unlawful seizure of their property.

#### *Yuldashev v Russia;*

*Abdulazhon Isakov v Russia*

(Nos. 1248/09 & 14049/08), 08/07/10

(ECHR: Judgment)

*Extradition*

#### **Facts**

In *Yuldashev* the applicant fled to Russia fearing prosecution by the Uzbek authorities for having participated in the Andijan demonstrations in 2005. He was arrested and detained in Russia on 31 October 2007, after Uzbekistan issued an arrest warrant for him. The Uzbek authorities' request for his extradition was granted on 28 April 2008. The applicant appealed, but the decision was upheld by the Supreme Court. On 2 November 2008, the applicant initiated proceedings complaining about the length of his detention and requesting his release. He was finally released on 23 April 2010. The applicant's requests for refugee status and temporary asylum were rejected despite UNHCR finding that his fear of politically motivated ill-treatment in Uzbekistan was well-founded and justified.

In *Isakov*, the applicant moved from Uzbekistan to Russia in 1989. In 1998, criminal proceedings were opened against him by the Uzbek authorities for participating in subversive activities. On 6 March 2008, he was arrested in Russia and detained for the purposes of extradition. His appeals against the extradition were rejected by the Supreme Court. The applicant was granted temporary asylum on 17 March 2008, and his appeal against a decision rejecting an asylum claim is still pending. The applicant was released from detention on 5 March 2010.

The ECtHR granted interim measures to suspend the applicants' extradition in both cases.



### Judgment

In both cases the ECtHR found that should the applicants be extradited there would be a violation of Art. 3 (inhuman and degrading treatment) due to a serious risk of their ill-treatment in Uzbekistan. The systemic nature of torture in detention meant that assurances provided by the Uzbek authorities did not offer a reliable guarantee against the risk of ill-treatment.

The ECtHR reiterated that the ill-treatment of detainees in Uzbekistan is a “*per-vasive and enduring problem*” and that no concrete evidence had been provided to demonstrate any meaningful improvement for several years. Furthermore, as both applicants were charged with politically motivated crimes and an arrest warrant had been issued for them, it was likely that each would be directly placed in custody after extradition and therefore face a serious risk of ill-treatment.

The ECtHR also found a violation of Art. 5(1)(f) (lawful detention) due to the lack of clear provisions establishing the procedure for ordering and extending detention and because no time limit was set for their detention. Art. 5(4) (speedy review of the legality of detention) was also violated in both cases.

#### *Lopata v Russia*

(No. 72250/01), 13/07/10

(ECHR: Judgment)

#### *Forced confession*

### Facts

Lopata alleged he was beaten by police officers and forced into confessing to a murder in the absence of his lawyer. The district prosecutor refused to initiate criminal proceedings. During his murder trial Lopata’s lawyer argued that his confession was obtained under duress and in his lawyer’s absence. The trial and appeal courts, in dismissing Lopata’s applications, did not address the issue of legal representation during the confession.

### Judgment

The ECtHR was unable to find beyond all reasonable doubt that the applicant was subjected to treatment contrary to Art. 3 (prohibition of torture and inhuman treatment) due in large part to the domestic authorities’ failure to react effectively to the applicant’s complaints at the relevant time.

The ECtHR noted that Art. 6 (right to a fair trial) is silent about rules on the admis-

sibility of evidence, which should be regulated by national law. Instead it considered whether the proceedings as a whole, including the way in which the evidence was obtained, were fair and examined whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. The ECtHR stated that where the reliability of evidence was in dispute the existence of fair procedures to examine the admissibility of evidence takes on an even greater importance.

Russia argued that a lawyer’s presence was not mandatory under domestic law. The ECtHR responded that it was not its role to assess whether domestic law was compatible with the ECHR. Its obligation was to consider whether all the requirements of Art. 6 had been complied with and in this particular case whether Art. 6(3)(c) (the right to defend oneself through legal assistance) had been observed.

The ECtHR noted that the domestic courts did not utilise fair procedures when assessing the admissibility of the confession, as the absence of a lawyer was not mentioned in their rulings. The ECtHR held that the use of the applicant’s confession statement, which was obtained in circumstances that raised doubts as to its voluntary character, and in the absence of legal assistance, together with the apparent lack of appropriate safeguards at the trial, rendered the applicant’s trial unfair and in violation of Art. 6.

### Comment

In this case the ECtHR applied fair trial principles to a situation where the admissibility of evidence is contested. *Lopata* followed the precedent set in *Panovits v Cyprus* (No. 4268/04) 11/12/08, which provided that the ECtHR would not rule on admissibility of evidence but would rule on whether there were appropriate safeguards for the applicants to challenge or oppose the admissibility of evidence during proceedings. In *Lopata*, the domestic courts dealt with his submissions concerning duress in their rulings, but did not rule on the question of the absence of legal assistance during the confession. It was on this narrow point that the ECtHR held that Lopata did not have the opportunity to challenge admissibility and on this basis it found a violation of Art. 6.

### Other ECHR cases

#### *Saghinadze & Others v Georgia*

(No. 18768/05), 27/05/10

(ECHR: Judgment)

#### *Right to property & right to liberty*

### Facts

Following the war in Abkhazia in 1992-93, the applicant and his family became internally displaced persons who relocated to Tbilisi where the applicant was offered employment and accommodation (the cottage) from the Ministry of the Interior. The applicant remained in the cottage following his retirement and the Ministry confirmed by letter in 2000 that he and his family had legitimate possession of the property for an unspecified period of time. In 2003 the applicant was recalled from retirement to investigate a high-profile criminal case. In October 2004 the applicant reported on evidence of abuses of power committed by the Minister of Interior and others. Within weeks the applicant and his family were forcibly evicted from their home on the oral instruction of the Minister of the Interior. The applicant brought domestic proceedings and lost. In 2006 police searched the applicant’s cottage and discovered evidence which allegedly implicated the applicant in a range of offences. Criminal proceedings followed and the applicant was sentenced to seven years’ imprisonment. He complained of violations of Arts. 3, 8 and Art. 1 of Protocol 1 in respect of his eviction and Arts. 5(3) & (4) in respect of his detention in criminal proceedings.

### Judgment

The ECtHR held that the applicant’s dispossession had not been authorised by a court of law, and that the domestic courts had failed to afford him the protection provided for by domestic legislation. The applicant had been unlawfully deprived of the right to use the cottage in violation of Art. 1 of Protocol 1 and Art. 8. The ECtHR rejected the majority of the applicant’s complaints in respect of the criminal proceedings against him but did find a violation of Art. 5(3) & (4) in respect of an insufficiently reasoned decision authorising his detention on one occasion and a failure to hear oral arguments from the applicant in response to those of the prosecutor on another. The ECtHR held that the most appropriate form of redress in relation to the property claims would be to

return the property to the applicant or to provide other reasonable accommodation or compensation.

#### **Comment**

The applicant made a number of additional complaints on behalf of other members of his family. Although no formal legal authority was provided to the applicant in this regard, the family relied informally upon his capacity as 'head of the family'. The ECtHR made it plain that such an arrangement did not enable the applicant to exhaust domestic remedies on behalf of the remaining members of his family. Consequently their claims were found inadmissible.

#### ***Alajos Kiss v Hungary***

(No. 38832/06), 20/05/10

(ECHR: Judgment)

***Right to free elections***

#### **Facts**

The applicant was diagnosed with manic depression in 1991 and in May 2005 was placed under partial guardianship. Art. 70(5) of the Hungarian Constitution provides that when a person is placed under total or partial guardianship they *inter alia* lose the right to vote.

On 13 February 2006, the applicant discovered he had been omitted from the electoral register and, unsuccessfully, complained to the Electoral Office. Upon further complaint to the Pest Central District Court (PCDC) the PCDC concluded that persons placed under guardianship could not participate in elections.

The applicant complained that his disenfranchisement was discriminatory and in violation of Art. 3 of Protocol 1 ECHR (right to free elections) which requires Member States to ensure that all persons have the freedom to express their opinion in the choice of legislature.

The Hungarian Government contested his complaint on the grounds that the applicant had failed to exhaust domestic remedies available to him, notably, that he had failed to appeal against his placement under guardianship. The applicant accepted that his placement under guardianship was necessary, but contended that the automatic exclusion of his participation in public affairs following his placement was discriminatory.

The applicant contended: "*If one were to*

*accept that a blanket and automatic prohibition on the right to vote of people under guardianship was justified because they were, based on their legal status, unable to make conscious and judicious decisions and were unfit to vote, then a large class of citizens would be deprived of the protection provided by Article 3 of Protocol No. 1, without due consideration given to their individual circumstances. This was incompatible with the Court's case-law on the matter."*

In consideration of the applicable law the ECtHR explained their acceptance of the margin of appreciation awarded to Member States in determining when restrictions on the right to vote are appropriate. The ECtHR however, did not accept that an absolute bar on voting by any person placed under partial guardianship fell within the acceptable margin of appreciation.

#### **Judgment**

The ECtHR concluded that the indiscriminate removal of a person's voting rights, without a judicial evaluation of that person's individual mental capacity, was incompatible with the legitimate grounds for restricting the right to vote in violation of Art. 3 of Protocol 1. The applicant was awarded €3,000 in damages.

#### ***Namat Aliyev v Azerbaijan***

(No. 18705/06), 08/04/10

(ECHR: Judgment)

***Right to free elections***

#### **Facts**

The applicant, Mr Namat Faiz oglu Aliyev, an Azerbaijani national, stood in the parliamentary elections of 6 November 2005 as a candidate for the opposition block, Azadliq. According to the Constituency Electoral Commission, he received 14.19% of the votes and came second after a candidate from the Motherland Party associated with the ruling Yeni Azerbaijan Party. Shortly after, the applicant complained to the relevant authorities about irregularities at his constituency during election day documented with evidence. The national authorities dismissed the complaint without due consideration.

#### **Judgment**

In line with the principle of subsidiarity the ECtHR stressed that it was not in a position to assess the evidence of electoral irregularities submitted by the applicant. However, it did suggest that the evidence was such as

to require effective investigation and that the allegations concerned irregularities capable of thwarting the democratic nature of the elections. The ECtHR reiterated that where complaints of election irregularities had been addressed at the domestic level its role should be limited to verifying whether domestic court procedure and decisions had been arbitrary or not (*Babenko v Ukraine* (No. 43476/98) dec. 4/5/99). However, in this instance, the applicant's complaints were not effectively addressed at the domestic level. Finding a violation of Art. 3 of Protocol 1, the ECtHR emphasised that the State's positive obligation under that article to ensure free elections required it to take reasonable steps to investigate the alleged irregularities without imposing unreasonable and unnecessarily strict procedural barriers on the individual complainant. In light of this finding, the ECtHR did not consider it necessary to examine the applicant's Art. 14 discrimination argument on the basis of his membership of the opposition. The ECtHR further rejected his complaint under Art. 6 on the basis that the proceedings in question involved the applicant's political rights and had no bearing on his "*civil rights and obligations*".

#### **Comment**

One argument put forward by the Government was that due to the difference in the number of votes cast for the applicant and the winning candidate, the applicant could not have won even if irregularities had not occurred. Unsurprisingly, the ECtHR did not accept this argument and noted that "*what is at stake in the present case is not the applicant's right to win the election...but his right to stand freely and effectively for it*".

#### ***Demopoulos & Others v Turkey***

(Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 & 21819/04), dec. 01/03/10  
(ECHR: Grand Chamber admissibility decision)

***Domestic remedies; jurisdiction***

#### **Facts**

Eight Greek-Cypriot applicants claimed that since 1974 they had been deprived of their property rights because of the occupation of Northern Cyprus by Turkish military forces. Following the pilot judgment case



of *Xenides-Arestis v Turkey* (No. 46347/99) 14/3/05, the Turkish Republic of Northern Cyprus enacted new compensation legislation in 2005 to examine Greek-Cypriot property claims by the Immovable Property Commission (IPC).

### Decision

The applicants submitted that they should not be expected to exhaust a remedy that only became available several years after the introduction of their complaints. The ECtHR acknowledged that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged. However, it had previously departed from this general rule in cases where there had been excessively long proceedings and new remedy legislation had become available in the meantime.

The ECtHR held that the IPC provided an accessible and effective framework of redress in respect of complaints about interference with property owned by Greek-Cypriots. It stated that Contracting States were in the best position to assess the practicalities, priorities and conflicting interests on a domestic level. The ECtHR noted that since it was established, the IPC had concluded 85 applications, reinstated property in four cases, and exchanged property in other cases.

The applicants pointed out the burdensome evidentiary requirements of the IPC. The ECtHR dismissed their argument and observed that the requirement for individuals to prove their title beyond reasonable doubt and to provide documentation was the same burden of proof on which it often relied.

The applicants complained that claimants are required to attend numerous sessions under the IPC. The ECtHR did not find that this requirement rendered the procedure unduly onerous or inaccessible. The applicants had further contended that claimants under the IPC are not always informed of the possibility of obtaining legal representation or of which valuations they could rely on, etc. The ECtHR held that there was no general obligation in the civil context for a tribunal to ensure that any party presents his or her case in the most effective way.

The applicants claimed that only a small proportion of the property would in practice be eligible for restitution under the IPC. They argued that they were not interested in com-

penensation and they should not be required to surrender their property rights. The ECtHR did not consider that this undermined the effectiveness of the new scheme. It recognised that the passage of time must have a consequence on the nature of redress available. If restoration is not possible the ECtHR will impose an alternative requirement, such as compensation. The ECtHR emphasised that it could not impose an unconditional obligation on a Government to forcibly evict and re-house large numbers of men, women and children even if this is to vindicate the rights of others.

The Government of Cyprus repeatedly highlighted in the application that Turkey's occupation of northern Cyprus was illegal and in this regard an invader could not impose its own procedures for complaints about its own violations of human rights. The ECtHR responded that applicants are required to exhaust domestic remedies even where they did not choose voluntarily to place themselves under the jurisdiction of the respondent state. The ECtHR emphasised that the ECHR system deals with individual applications. The present application cannot be used to vindicate sovereign rights or to find breaches of international law between Contracting States.

### Comment

*Demopoulos* confirms that applicants have to exhaust domestic remedies even where the legitimacy of the respondent's jurisdiction is in dispute. The ECtHR relied on the 'Namibia Principle' which provides that where the legitimacy of the administration of a territory is not recognised by the international community, international law can still recognise the legitimacy of certain legal arrangements as not to do so would only be to the detriment of the inhabitants of the territory (Security Council Resolution 276 (1970), [1971] ICJ Reports 16 p.56, § 125).

### *Ciubotaru v Moldova*

(No. 27138/04), 27/04/10  
(ECHR: Judgment)

### *Respect for private life & ethnic identity*

### Facts

When the territory of Moldova became part of the Soviet Union, the Soviet authorities recorded each individual's ethnic identity. The ethnic identity of representatives of the main ethnic group of the Moldovan Soviet

Socialist Republic was normally registered as Moldovan. Consequently, the applicant's parents, born in Romania, and the applicant were recorded as ethnic Moldovan on their Soviet identity cards.

From 2002 the applicant repeatedly applied to the Moldovan authorities to have his Soviet identity card replaced and his ethnicity changed from Moldovan to Romanian, arguing that he did not consider himself to be Moldovan, an ethnic group he believed to be an artificial creation of the Stalinist regime.

According to national law, the applicant could change his ethnic identity only if he could show that one of his parents had been recorded as being of Romanian ethnicity. The applicant alleged a breach of his right to respect for private life as a result of the authorities' refusal to register his ethnicity as declared by him.

### Judgment

The ECtHR held that ethnic identity is an essential aspect of an individual's private life falling within the ambit of Art. 8 and that the Moldovan law had made it impossible for the applicant to adduce any evidence in support of his claim. The requirement to show that one parent had been registered as Romanian ethnicity in official records "*represented a disproportionate burden in view of the historical realities of the Republic of Moldova*". In addition, the fact that the law prevented the applicant from supporting his application with evidence establishing objectively verifiable links to the Romanian ethnic group constituted a failure on the part of the State to comply with its positive obligations under Art. 8. Moldova was ordered to pay the applicant €1,500 non-pecuniary damages.

### Comment

The ECtHR did not dispute the right of a government to require objective evidence of a claimed ethnicity and noted that an application could be justifiably rejected where based on purely subjective and unsubstantiated grounds. However, the applicant in this case was able to provide objectively verifiable links to the Romanian ethnicity, such as language, name and empathy, but that evidence was not taken into consideration in determining his application because of the restrictive powers of the domestic law.

## Recent Polish ECtHR judgments: fewer systemic problems - more fine-tuning

*Adam Bodnar, Ph.D., Board member & legal division head, Helsinki Foundation for Human Rights; Associate professor, Human Rights Chair, Faculty of Law and Administration, Warsaw University<sup>1</sup>*

For many years Poland has been known at the ECtHR for a series of clone or repetitive cases reflecting structural problems in human rights protection in Poland. However, it seems that the ECtHR has managed to cope successfully with most of these and, as a result, Poland has had to adopt a number of legislative and practical measures. While dealing with the cases the ECtHR developed its jurisprudence (especially with respect to procedural matters) reinforcing the principle of subsidiarity in relations between the national legal system and the ECtHR.

ECtHR judgments in Polish cases have concerned such important structural problems as:

- length of proceedings (*Kudła v Poland* (No. 30210/96) 26/10/00) which led to the introduction of an effective domestic remedy that is now a model for other Council of Europe countries;
- compensation for property beyond the Bug river (*Broniowski v Poland* (No. 31443/96) 22/6/04) - the first ever pilot judgment;
- a statutory limit to rent increases for private housing at the expense of landlords (*Hutten-Czapska v Poland* (No. 35014/97) 19/6/06) - the second pilot judgment;
- abuse of pre-trial detention (*Kauczor v Poland* (No. 45219/06) 3/2/09) - a quasi-pilot judgment;
- overcrowding in prisons and detention centres (*Orchowski v Poland* (No. 17885/04) 22/10/09 and *Sikorski v Poland* (No. 46004/99) 9/11/04) - quasi-pilot judgments.

It could be argued that having resolved all these serious matters, which required a number of interventions, visits to Poland and the need to deal with thousands of applications, the ECtHR may now have more time and energy to deal with the numerous applications about individual problems. The first half of 2010 illustrates this well. The ECtHR issued 56 judgments against Poland. Many of these were of a 'fine-tuning' nature. They identified a specific problem existing in legislation or practice and condemned the Polish authorities for a given violation. Most ECHR rights were considered during this period (Arts. 2, 3, 5, 6, 8, 10, 12, 13 and Art. 1 of Protocol 1) however, the majority of cases were still in some way related to an ineffective judiciary (Art. 5 and 6).

While not all Polish cases made European headlines they were, however, of extreme importance for public debate and human rights protection in Poland. Some of them were widely discussed among politicians, judges and society, and had a significant impact on changing societal attitudes. They also raise important issues as regards their enforcement.

One of the most important recent cases for the general development of the ECHR system was *Frasik v Poland* (No. 22933/02) 5/1/10 (and the related case *Jaremowicz v Poland* (No. 24023/03) 5/1/10). The ECtHR rarely deals with the right to marry (Art. 12). Here, two prisoners were deprived of the possibility to marry whilst in prison. In official decisions the prison authorities examined the nature of the relationship and found it unsuitable for marriage. The prisoners did not have an effective remedy to complain against the decisions. Violations

of Arts. 12 and 13 (right to an effective remedy) were found. The ECtHR underlined that whilst the authorities could base their refusals on such considerations as danger, personal assessments could not be relied upon. The right to marry is fundamental and individuals, free or not, should have great liberty in choosing their partners. They should also have an effective remedy to challenge decisions.

The case of *Wasilewska & Katucka v Poland* (Nos. 28975/04 & 33406/04) 23/2/10 was a serious blow to the Polish authorities. It is rare that an EU member state is found in breach of Art. 2 (right to life) ECHR. This case concerned an attempt to stop a suspect, who was allegedly going to flee. Police-men fired 40 bullets in 15 seconds from an automatic gun at a car driving at 20 km/h. An alleged suspect was shot several times and died just after the intervention. The whole operation was inadequately prepared (for example, there were no ambulances nearby) and the policemen showed a low level of professionalism (for example, the car tyres were not shot at first). An investigation by the prosecutor into potential abuse of power by policemen was ineffective. The prosecutor concluded that the police followed all the relevant rules. The ECtHR disagreed, finding that the degree and the manner of the use of force were not proportionate and that the operation was not properly prepared. Consequently Poland had violated the substantive limb of Art. 2. The ECtHR also condemned the inefficient investigation of the incident and highlighted that the Government, for unknown reasons, did not submit any observations on the case.

The enforcement of this case is now a serious issue. It should be a textbook example of how not to organise police



operations and should be included in police training. Secondly, it should be re-examined to find those responsible for the poor planning and implementation of the operation. Recently, the prosecutor's office stated that certain actions in this respect will be undertaken.

One of the most famous Polish cases of recent years is *Bączkowski & Others v Poland* (No. 1543/06) 3/5/07, which established standards as regards the organisation of assemblies by LGBT groups. The recent judgment in *Kozak v Poland* (No. 13102/02) 2/3/10 was the second Polish case concerning sexual minority rights. In this case, in some ways similar to *Karner v Austria* (No. 40016) 24/7/03, the ECtHR had to decide whether the Polish courts were right in preventing a homosexual partner from stepping into a lease agreement after the death of a partner. Polish law permitted this at the relevant time for persons in 'de facto marital relationships'. However, the Polish courts interpreted the law as referring to heterosexual couples and marriages and refused any rights to same-sex couples. The ECtHR disagreed, finding that states have a narrow margin of appreciation when it comes to sexual minorities' rights and here there were no convincing arguments why homosexual couples should be excluded from the succession of tenancies. Importantly, the ECtHR underlined that societal changes are taking place with respect to family issues and the perception of social, civil-status and relational issues. States should take into account that there is more than one way of leading and living one's family or private life and shape their policies accordingly.

*Kozak v Poland* was influential in leading to serious discussions about the need to pass a same-sex partnership law. LGBT groups have prepared and are campaigning for a draft law. This was also an important topic during the last presidential elections. Neverthe-

less, it will still take time to pass such a law in Parliament. In the meantime, new cases - before the Polish courts and ECtHR - are to be expected challenging different regulations or restrictions in the exercise of the rights of LGBT people.

A very important recent case was *Grzelak v Poland* (No. 7710/02) 15/6/10 in which the ECtHR found violations of Arts. 9 (freedom of religion) and 14 (prohibition of discrimination) due to the poor organisation of ethics classes in Polish schools. In principle Polish pupils have the choice of attending either religious classes (usually Catholic) or ethics classes. However, in practice, only 1% of Polish schools offer ethics classes. No ethics classes were available throughout the whole period of the applicant's schooling and his school certificate had no mark against religion/ethics. This gave the impression that he was not a member of a majority religious group for which religious classes were organised. Furthermore, recently the religion/ethics grade had begun to be included in the calculation of the grade point average (GPA) putting those who do not attend religious classes at a disadvantage. On 2 December 2009, the Polish Constitutional Court found this to be in compliance with the Constitution.

The ECtHR found these circumstances to amount to unwarranted stigmatisation and a violation of Art. 14 because of discrimination against non-believers who wanted to attend ethics classes, particularly in the light of the religion/ethics grade being included in the GPA. A violation of the freedom not to manifest one's religion or belief, as guaranteed under Art. 9 was also found due to the absence of a mark in the school leaving certificate.

The judgment in *Grzelak* was issued after the Smolensk air crash tragedy and just before the presidential elections. The Catholic Church's strong involvement in public ceremonies of

mourning and open support of one of the presidential candidates produced a backlash in society. Currently, a strong movement towards the secularisation of the State can be observed. The ECtHR's indication that the Polish State favours the Catholic Church and does not provide ethics classes for non-believers or members of minority churches is one of the issues in this wider debate on relations between the State and the Catholic Church. In this respect, many politicians, NGOs and opinion-makers refer to the enforcement of *Grzelak*. It seems, therefore, that this judgment may become a milestone in bringing the Polish constitutional principle of secularity into the reality of daily life. Up to now this has been frequently neglected and the Catholic Church has enjoyed many unjustified privileges and preferential treatment from the State.

The above cases indicate that the first half of 2010 was interesting in terms of the development of jurisprudence and resolution of some pending issues at the national level. Society tends to view the ECtHR as providing a solution to most problems that could not be resolved by the domestic authorities for various reasons or where local remedies proved to be ineffective. *Grzelak* is especially significant here. It is rare that the ECtHR indirectly criticises a constitutional court and its assessment of an existing problem. Other serious cases that 'fine-tune' the system of human rights protection in Poland should be expected over the coming months and years. Victims of human rights abuses will continue to bring their problems to the attention of the ECtHR, however these cases will be more sophisticated than the typical length of proceedings or pre-trial detention cases.

# Advancement of the right to individual petition to the ECtHR for Russian citizens detained in correctional facilities: *Zakharkin v Russia*

Isabelle Desrosiers, *Student in International Law and Human Rights; Intern, Sutyajnik*

In its judgment in the case of *Zakharkin v Russia* (No. 1555/04) 10/6/10 the ECtHR found violations of Art. 3 ECHR (substantive and procedural) on account of detention conditions which amounted to inhuman and degrading treatment, Art. 6(1) ECHR, on the grounds that the tribunal had not been 'established by law', and also that Russia had violated the applicant's right to individual petition under Art. 34 ECHR. As regards the latter, more specifically the ECtHR found a violation of a detainee's right to apply to the ECtHR and to establish and maintain contact with non-advocate representatives (NGO lawyers) under the same conditions as if they were professional advocates.

The applicant's representative before the ECtHR, Ms. Demeneva, was not a professional advocate, but an NGO lawyer. Despite numerous requests and attempts she was not allowed to visit the applicant whilst he was detained in remand centre IZ-66/1 in Yekaterinburg to discuss crucial issues relating to his application to the ECtHR.

As stated in para. 155 of the judgment in *Zakharkin*: "should the Government's action make it more difficult for the individual to exercise his right of petition, this amounts to 'hindering' his rights under Art. 34." Furthermore, the ECtHR underlined the fact that the refusal to grant access to Ms. Demeneva was not due to any security risk or a risk of collusion or perversion of the course of justice, but to a gap in the law.

Section 18 of the Russian Detention Act provides that a non-advocate may visit a detainee in a remand centre only if they possess a judicial decision by which they have been admitted to act as counsel in the domestic criminal proceedings. Such admittance lies within the discretionary powers of the trial or

appeal judge. "No exceptions to that rule are possible. Accordingly, non-advocate representatives before the ECtHR are faced with difficulties in obtaining permission to visit their clients" observed the ECtHR at para. 157 of its judgment in *Zakharkin*. It should be emphasised that this was not an isolated case, but is in fact a common obstacle faced by Russian NGO lawyers. Consequently, *Zakharkin* is an important victory and a significant step for non-advocate NGO lawyers and their beneficiaries in their efforts to promote and protect human rights in Russia.

As reported by Dr. Anton Burkov,<sup>1</sup> NGO lawyers are already benefitting from changes to the authorities' approach following *Zakharkin*. By referring to *Zakharkin* and another local case where the judge himself referred to ECtHR case law, Dr. Burkov, who is not an advocate, was recently able to meet with a client detained in a pre-trial detention centre to discuss his ECtHR case (*Borisov v Russia*, No. 12543/09) within only three days of his initial request, a significant improvement from Ms. Demeneva's previous experience.

Another dimension of the right to petition the ECtHR that has been the subject of much discussion in recent months has also won a great victory with the ratification of Protocol 14 to the ECHR by the Russian Federation on 15 January 2010. Indeed, it could be argued that by enabling the long-awaited reform of the ECtHR, it represents, at the European level, an important step towards the protection of the individual right to petition jeopardised by the huge number of pending cases, more than a quarter of which are against Russia (28.1% by 31 May 2010<sup>2</sup>). *Zakharkin* also shone more light on this dimension of Art. 34:

As reported by Ms. Demeneva: "Acting as Mr *Zakharkin's* representative, I made persistent attempts to give the State a chance to improve the situation at the na-

tional level. We referred to the ECHR and the ECtHR's practice in documents drafted by advocates to domestic courts and other State bodies at every stage of the domestic proceedings. These arguments were never taken into account."<sup>3</sup>

Despite Ms. Demeneva's efforts to allow the State to provide an effective domestic remedy in compliance with its obligations under the ECHR, she and Mr *Zakharkin* were forced to take yet another case against Russia before the ECtHR. The Art. 6 violation in *Zakharkin* (on the grounds that the domestic tribunal that considered the applicant's case was not established by law), perfectly illustrates the issue says Ms Demeneva: "The problem with the appointment of lay judges in Russia at that time was already criticised by the ECtHR in *Posokhov v Russia* (No. 63486/00) 4/3/03. We referred to this case in cassation and when applying for supervisory review, but the Russian Supreme Court did not pay attention to these arguments. If it had done the violation could have been avoided at the national level."<sup>4</sup>

Even if the ratification of Protocol 14 to the ECHR does not provide a long-term solution to the lack of effective implementation of ECHR guarantees and ECtHR case-law in Russia domestic courts, *Zakharkin* nevertheless provides NGO lawyers with greater means to promote and protect the human rights and fundamental freedoms of Russian citizens detained in correctional facilities.

1 Burkov, A., 2010. Comments on the ECtHR judgment in *Zakharkin v Russia* [Email] (Personal communication, 11 July 2010).

2 European Court of Human Rights, ECtHR, 2010. *Pending cases (pie chart)*, [online]. Available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/> [accessed 20 June 2010].

3 Demeneva, A., 2010. Comments on the ECtHR judgment in *Zakharkin v Russia* [Email] (Personal communication, 18 June 2010).

4 Ibid.



## PACE: Legal remedies for human rights violations in the North Caucasus region

This report by the Parliamentary Assembly of the Council of Europe (PACE) Committee on Legal Affairs and Human Rights highlights the serious situation as regards human rights protection and the rule of law prevalent throughout the North Caucasus region, particularly in the Chechen Republic, Ingushetia and Dagestan. The situation in this region is the most serious of all of those within the Council of Europe's ambit. The report includes a PACE draft resolution and recommendation, adopted by the Committee, and an explanatory memorandum.

The draft resolution calls on Russia to, *inter alia*, bring to trial 'the culprits of all human rights violations', enforce the judgments of the ECtHR, combat terrorism whilst respecting fundamental rights and the rule of law and cooperate more

closely with human rights organisations on the ground. It notes that the ECtHR has condemned Russia for grave and repeated violations in the region, notably in Chechnya, in over 150 judgments. The draft recommendation invites the Committee of Ministers to pay particular attention to the development of human rights in the North Caucasus. It should also emphasise the importance of education about enforcing judgments and consider creating a record-keeping system for evidence substantiating human rights violations in the region. The aim of these proposals is to put an end to the impunity enjoyed by the perpetrators of human rights violations and to restore the people's trust in the law enforcement agencies, without which it will not be possible to defeat the rise of extremism and terrorism.

The explanatory memorandum provides the background to and the purpose of the

report - to uphold and protect fundamental rights and dignity, not to reach verdicts. The findings in the memorandum are partially based on a fact-finding mission conducted by the Committee's special rapporteur. The memorandum first provides some general points that introduce the 'ills' of the Caucasus. These include the problem of disappearances, the climate of impunity and the democratic deficit. The memorandum continues by analysing relevant ECtHR judgments, including the typical nature of the violations found and the implementation of the judgments. Finally, it provides some example cases and additional considerations.

The full text of the report, which was adopted on 31 May 2010, can be found at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12276.htm>.

## 'The most creative tool in 50 years'? The ECtHR's pilot judgment procedure

*Alice Donald, Senior Research Fellow, HRSJ, London Metropolitan University*

Pilot judgments that call on states to resolve widespread, systemic human rights violations promise to be 'the most creative tool the ECtHR has developed in its first 50 years'. This was one view expressed at a seminar held at the ECtHR in June 2010 to launch a report on pilot judgments and their impact within national systems. More than 100 people, including representatives of the ECtHR and the Council of Europe, debated the research findings presented by a team from the Human Rights and Social Justice Research Institute at London Metropolitan University (see *EHRAC Bulletin* Issue 13, Summer 2010 for a summary of the research).

### New departure

Judge Françoise Tulkens noted that pilot judgments mark a substantial departure from the 'declaratory approach' previously taken by the ECtHR. Pilot judgments aim to prevent an accumulation of violations that have the same root cause: in this sense,

they are the start, not the end of the process of achieving justice. Judge Tulkens suggested that pilot judgments do not only apply in cases where there are repetitive applications: once a problem has been identified as systemic, the ECtHR's preventive function may require a pilot judgment even where there are few pending applications.

Erik Fribergh, ECtHR Registrar, described how the ECtHR's approach has changed since the procedure was created in 2004. Key changes include the move to allow sections and chambers to issue pilot judgments and not just the Grand Chamber, and a shift away from the 'first in, first out' practice according to which states generating fewer cases were dealt with more quickly than those producing a large number. Under the new system, cases are ranked into seven categories: priority one cases are those where life is in danger, while pilot judgment procedures rank second.

### Individual justice

Much debate centred on the risk that individuals might be denied justice if, following a pilot judgment, their cases are

frozen or repatriated and the judgment is subsequently not implemented. Erik Fribergh argued that it was unsustainable for the ECtHR to keep large numbers of follow-up applications on its docket: the emphasis had to be on supervision and execution of pilot judgments at domestic level and to this end the Committee of Ministers is made aware of systemic problems even before judgment is given. If redress is not made, the option remains for the ECtHR to review cases speedily to ensure that valid applications are not terminated. Several participants emphasised that it is global solutions, rather than individual consideration of numerous applications, that will accelerate justice for individuals. Moreover, no case is adjourned when there is a present risk to an individual, as in detention cases.

### Execution of judgments

Geneviève Mayer, who heads the Department for the Execution of Judgments, examined whether pilot judgments have enhanced the supervision of the execution

*continued on page 14*

continued from page 13

### **'The most creative tool in 50 years'? The ECtHR's pilot judgment procedure**

of judgments. She noted that the supervision process has not changed substantively, partly because the ECtHR has been cautious in specifying remedial actions. She added that it is vital that pilot judgments give clear and precise reasoning to determine the scope of the execution. To date, the Committee of Ministers has given pilot judgments a high priority. However, there are dilemmas in how priority is accorded: cases concerning grave violations must remain a priority and, of the 9,000 cases that the Committee is currently handling, there are many that highlight systemic problems.

#### **National responses**

Jakub Wołasiwicz, Government Agent for Poland before the ECtHR, argued that negotiation between the Court Registry, the respondent state and the applicant was 'the most important aspect of the pilot judgment'. In the cases of *Broniowski v Poland* and *Hutten-Czapska v Poland*, both concerning property rights, tripartite solutions were negotiated: these involved lower compensation than the applicants originally envisaged, but granted for all similar applicants and within a reasonable time.

Murray Hunt, Legal Advisor to the UK Parliament Joint Select Committee on Human Rights, argued that national parliaments should be at the heart of the execution process for the purposes both of implementation and legitimation. He said the ECtHR should not be overly prescriptive in identifying general measures because parliaments need scope to debate the appropriate remedies within a timetable determined by the ECtHR. Parliaments

can give effect to judgments by, among other measures, scrutinising the adequacy and swiftness of government responses and ensuring that information about the execution of judgments is brought into the public domain.

Olga Shepeleva of the Public Interest Law Institute in Moscow discussed the experience of Russian NGOs in the execution process. She suggested that NGOs prioritise the submission of new cases in Strasbourg over the execution of judgments. Problems include a lack of legal and policy expertise among civil society; official secrecy and obstructiveness, and the fact that judgments are not routinely translated into vernacular languages.

#### **Legal basis**

There was debate about whether the definition and legal basis of the pilot judgment procedure are sufficiently clear. When the procedure was outlined in 2004, it contained several distinctive features: the existence of systematic or structural problems at domestic level; the existence (or potential generation) of similar violations; the obligation of the state to eliminate the root cause of the violation and to give redress to other victims; and the practice of adjourning similar cases while remedial action is taken, with the option of their being reopened at a later date. However, there have been variations in practice, suggesting that pilot judgments should be viewed as a continuum, with some (like *Broniowski*) exhibiting all the features while others may not. The ECtHR does not see the need for reform of the ECHR machinery to provide a legal basis for pilot judgments. However, the Interkalen Declaration on the future of the ECtHR called on it to develop clear and predictable standards for pilot judgments; the ECtHR is consulting govern-

ments and civil society representatives on their possible content.

#### **The future**

Judge Lech Garlicki of the ECtHR described the pilot judgment procedure as dynamic and evolving. A definitive typology requires clarity on two broader questions. The first is the very nature of the ECHR as a living instrument, the scope of which has transformed in the last decade. The second is the identity of the ECtHR: is it primarily an international court dealing with individual applications or, rather, a (quasi) constitutional court providing general answers to systemic problems? These questions frame the dilemma for the ECtHR in developing its identity and machinery, made more urgent by the burden of some 130,000 pending applications. Above all, Judge Garlicki suggested, the procedure should be judged by its impact at national level. Where (as in *Broniowski* and *Hutten-Czapska*) domestic authorities have the political will to cooperate and domestic judges are sympathetic to Strasbourg judgments, a pilot judgment can 'tip the balance' to enable the domestic courts to get the desired result. If the respondent state is unwilling to cooperate, the procedure may be less effective.

*Responding to Systemic Human Rights Violations: an analysis of pilot judgments of the European Court of Human Rights and their impact at national level* is published by Intersentia. For information on the project see: <http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm>. The seminar report is available at: [http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/reports/Pilot%20Seminar%20Report\\_php.pdf](http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/reports/Pilot%20Seminar%20Report_php.pdf).

## **Taking the implementation of ECtHR judgments seriously: right assessment, wrong approaches?**

*Elisabeth Lambert Abdelgawad, CNRS Director of Research (PRISME, University of Strasbourg)*

**I**t is high time for State Parties to the ECHR to take the quick and full implementation of Strasbourg judgments seriously. Where political will does exist implementation has been

satisfactory, and even swift. The workload of the Committee of Ministers (CoM) is increasing dramatically (as of June 2010 more than 9,000 cases were pending) and consequently the time taken for execution is rising and furthermore "the last few years have seen a significant increase in the number of cases relating to complex

and sensitive issues".<sup>1</sup> The CoM does not have the power to sanction reluctant states to abide by judgments and interim resolutions have no concrete impact.<sup>2</sup> The entry into force of Protocol 14 will be of no help, as infringement proceedings are not coupled with daily fines, unlike the practice of the European Court of Justice.



If there is consensus that additional measures are indispensable and urgently required, which measures can tackle the right problems?

### Prioritised or cheap supervision?

As it is inundated with cases, the Parliamentary Assembly is to use new and more selective criteria when supervising the implementation of judgments: “*judgments which raise important implementation issues as identified, in part icular, by an interim resolution of the Committee of Ministers; and judgments concerning violations of a very serious nature*”.<sup>3</sup>

The CoM itself is considering how to achieve a streamlined and prioritised supervision process. The current discussions appear to emphasise “*two (simplified and enhanced) practical supervision methods*”, which should be “*parallel and interdependent*” and “*the principle of continuous supervision*” (aside from the schedule of human rights meetings). Three types of cases would have priority: “*inter-state cases, pilot judgments and other cases raising significant and/or complex structural problems that may give rise to numerous repetitive cases, and judgments requiring urgent individual measures*”.<sup>4</sup> It should be noted that the proposed approach is still of a non-coercive nature.<sup>5</sup> Under the ‘simplified’ procedure, which will be the norm, CoM supervision will be purely formal, limiting itself to “*verifying whether or not action plans or action reports have been presented by member states*”.<sup>6</sup> It should speed up the adoption of a final resolution and be less time-consuming for the Secretariat.

Nevertheless, relying on the *bona fides* of a state may not be ideal, as without the collective political pressure of the CoM,

the implementation of some judgments may be less than satisfactory. If a state does not submit an action plan or an action report within six months, a reminder will be sent to the state concerned within the next three months, and if a state still does not comply, the case may be transferred to the enhanced procedure. If states do not honour their obligations in due time, which might occur frequently - six months is very short - the simplified procedure will be a failure. At the request of some states, and despite the fact that the payment of just satisfaction has raised many problems in the past,<sup>7</sup> “*Registration would therefore become the standard procedure and supervision the exception*” in these issues;<sup>8</sup> only in cases where the applicant complains within a short period of time, will the Department for Execution involve itself in the supervision process.

Under the enhanced procedure the Secretariat will have a duty to assist states in preparing and/or implementing action plans, and the power to provide expertise as regards the type of measures envisaged. Such expertise is fundamental as states often do not know how to abide by a judgment. However, this often occurs not in the most serious cases or pilot judgments in which the ECtHR clarifies the measures to be adopted, but in all other cases, precisely the ones submitted to the standard procedure! Moreover, one important issue is missing: the involvement of civil society and/or an applicant’s representative in the implementation of judgments. In this respect the European system differs from the Inter-American.

### The responsibility of State Parties

Even if the standard supervision

mechanism may save time, it seems unlikely that it will tackle the right issues. At least two types of measures are missing: State Parties should give the Department for the Execution of Judgments greater means. Moreover, greater pressure should be put on states in order that they respect their obligation to abide by judgments. The time has now come to move towards a more coercive system. In its 2009 report, the Parliamentary Assembly envisaged considering “*suspending the voting rights of a national delegation where its national parliament does not seriously exercise parliamentary control over the executive in cases of non-implementation of Strasbourg Court judgments*”.<sup>9</sup> Punitive damages could also be a way of sanctioning serious repetitive violations.<sup>10</sup> Daily fines should also be reconsidered in the light of the deteriorating situation.

It is clear from the spirit of current reflections that too much confidence is being placed in states’ *bona fides* to abide by judgments. The existing non-coercive system is being confirmed and even reinforced, whereas it seems that the urgency of the situation requires measures of a completely different nature. The CoM and the Parliamentary Assembly, facing more issues and no extra funding, have no other choice than to focus on the most serious cases. Victims of violations of fundamental rights may have to pay the price of these reforms. Was the European system too ambitious from the outset? Certainly not! The non-respect of the ECHR and the refusal of states to fully implement judgments should be addressed by the states themselves. Right assessment, but wrong approaches!

1 CoM, 2010. *Supervision of judgments of the European Court of Human Rights: 3rd Annual Report 2009*, p. 12.

2 See, for instance, Interim Resolution CM/Res-DH(2009)43, *Execution of the judgments of the European Court of Human Rights in 145 cases against the Russian Federation*, 19.3.09.

3 Committee on Legal Affairs and Human Rights, 31 August 2009, *Implementation of judgments of the European Court of Human Rights: Progress Report*, AS/Jur (2009) 36.

4 Department for the Execution of Judgments of the ECtHR, 24 June 2010, *Supervision of the execution of the*

*judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – elements for a roadmap*, CM/Inf(2010)28 revised.

5 “*Thus, enhanced supervision by the CoM may be conducted by means other than debate, e.g. support by the Execution Department in drawing up and implementing action plans; more intensive bilateral consultations and/or enhanced technical cooperation programmes with national authorities and regular reports to the CoM on the progress of execution*”. Supra 4, para. 9.

6 Department for the Execution of Judgments of the ECtHR, 6 September 2010, *Supervision of the execution of judgments and decisions of the ECtHR: implementation of the Interlaken Action Plan – Modalities for a twin-track*

*supervision system*, CM/Inf/DH(2010)37, para.12.

7 See: Department for the Execution of Judgments of the ECtHR, 15 January 2009, *Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers’ present practice*, CM/Inf/DH(2008)7 final.

8 Supra 6, Appendix II.

9 Supra 3, para. 23.

10 Grozev, Y., 2009. How human rights protection has evolved. A critical analysis of ten years of case-law. *Ten years of the ‘new’ European Court of Human Rights 1998-2008, Situation and outlook*, p.39.

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## About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University. Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights through the means of knowledge transfer partnerships to build the capacity of the local human rights community, and raise awareness of the human rights violations in these countries. Launched initially to focus on Russia, EHRAC has broadened its geographical remit to Georgia and Azerbaijan, and also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 270 cases involving more than 900 primary victims and their immediate family members. These cases concern such issues as extrajudicial execution, ethnic discrimination, disappearances, environmental pollution and criminal justice amongst others. In addition to the formal partnerships below, EHRAC works with the Bar Human Rights Committee of England and Wales and the International Human Rights Committee of the Law Society of England and Wales and co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: [www.londonmet.ac.uk/ehrac](http://www.londonmet.ac.uk/ehrac).

## Internship opportunities

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

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### EHRAC-Memorial project

EHRAC has been working in partnership with Memorial HRC since 2003. Memorial HRC is one of Russia's oldest and most respected human rights organisations. The EHRAC-Memorial project is implemented in three main areas: human rights litigation and advocacy; human rights training; and raising awareness and dissemination of information.

### EHRAC-GYLA project

In early 2006 EHRAC formalised a partnership with the highly respected NGO, the Georgian Young Lawyers' Association (GYLA). This joint project supports litigation at the European Court, including the provision of litigation expertise in cases arising from the Russia-Georgia conflict, conducts training seminars in Georgia and facilitates the participation of a GYLA delegate in EHRAC's Legal Skills Development Programme.

### EHRAC-Article 42 project

In 2008 EHRAC formalised its cooperation with the Georgian NGO, Article 42 of the Constitution. EHRAC has been providing advice to Article 42 on European Court cases since 2006 and current litigation work includes cases arising from the 2008 Russia-Georgia conflict.

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