# European Human Rights Advocacy Centre

# Bulletin

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Contents



# Welcome to the Summer 2013 EHRAC Bulletin

The Bulletin has been newly designed to mark EHRAC's tenth anniversary year, which we will be celebrating with various events (see the website). This gives me the opportunity to express our sincere gratitude to everyone who has supported us, or worked with us, over the last ten years – including our partner NGOs and lawyers, our legal team and interns, our funders, and of course our hardworking staff (past and present).

Our feature articles in this edition focus on Russia, Georgia, Azerbaijan and Ukraine. On Russia, Vanessa Kogan (Russian Justice Initiative) analyses a recent landmark Strasbourg judgment concerning enforced disappearances in Chechnya and Jérémie Gilbert (University of East London) discusses the work of the Russian Association of Indigenous Peoples of the North (RAIPON) and its recent tussles with the Ministry of Justice. From Georgia, Tamta Mikeladze (Georgian Young Lawyers' Association) discusses the eviction of IDPs in Georgia and Lia MuKhashavria (Human Rights Priority) considers the investigation of torture. Tural Hacibeyli (Azerbaijan Lawyers Association) discusses freedom of assembly in Azerbaijan and Jane Gordon (Human Rights Consultant) analyses a recent ground-breaking judgment in one of EHRAC's cases in which the European Court ordered Ukraine to reinstate Oleksandr Volkov, following his unfair dismissal as a Supreme Court judge.

Philip Leach, Director, EHRAC


Thanks to Amy Greenbank for the front cover image, which is of the 'Motherland Monument' in Kiev, Ukraine

# Aslakhanova v Russia

## A new role for the European Court in implementing the Chechen judgments

In December 2012, in *Aslakhanova and others v Russia* (No. 2944/06) 18.12.12, the European Court of Human Rights (ECtHR) found that the non-investigation of disappearance cases in the North Caucasus constituted a *"systemic problem at the national level for which there is no domestic remedy"*. This was a welcome judgment on the phenomenon of enforced disappearances in this region, despite falling short of the speculated pilot judgment.

While the ECtHR has never explicitly referred to a pattern of enforced disappearances in Chechnya, the allowances made for applicants who make a *prima facie* case, as well as the presumption that detention in Chechnya under certain circumstances is life-threatening, has more or less defined the boundaries of the practice of the ECtHR. The *Aslakhanova* judgment does not attempt to refine this practice. Rather, the judgment is concerned with the mounting legacy of impunity in the North Caucasus, and deals in sweeping terms with the obstacles preventing the effective implementation of the over 150 so-called 'Chechen cases' on the agenda of the Committee of Ministers (CoM). While there can be no panacea for the vast complications inherent in executing the Chechen cases, the *Aslakahanova* judgment contains an array of helpful recommendations that will undoubtedly aid both the CoM in its monitoring efforts, as well as applicants who are actively pursuing their cases post-judgment.

### Broader context of the *Aslakhanova* judgment

Of the 200 or more judgments handed down by the ECtHR since mid-2005 in cases from the North Caucasus region, over 150 of them concern enforced disappearances in Chechnya between 1999 and 2006. Despite the continuing and well-documented impunity which still reigns in the region, the CoM issued its first Interim Resolution on the status of execution of the *Khashiyev* group cases only in December 2011.[1] Meanwhile, NGOs active in litigating these cases (such as EHRAC and RJI) have repeatedly raised the alarm about encroaching statutory limitation periods for prosecution, an issue which made its way onto the CoM's agenda relatively recently.

Since mid-2011, there has been a noticeable change in the way the ECtHR processes applications from the North Caucasus. In addition to speeding up the pace of communications three-fold, it also began communicating applications in 'bunches', joining up to eight applications at a time. The *Aslakhanova* case arose from the joining of five applications, submitted between 2006 and 2010 by two different representatives,[2] concerning the disappearance of eight men in and around Grozny between 2002 and 2004. It has thus far been the only case, however, in which the ECtHR communicated a range of additional questions concerning systematic non-investigation, including the role and degree of cooperation between different military and civilian agencies, as well as efforts to solve the ongoing humanitarian crisis.

The ECtHR advocates for the establishment of a single high-level body to solve disappearances in the region, empowered with access to all relevant information and in direct contact with relatives of the missing—by far the most sensible recommendation in this area.

### A specific 'Article 46' judgment

Despite its 'quasi-pilot' status, the judgment does not prescribe specific measures or a binding time frame. Nonetheless, the 'guidance' which the ECtHR gives does not leave a large margin for interpretation. The ECtHR unequivocally states that the Government is under two freestanding obligations. The first and 'most pressing' is to relieve the suffering of relatives of missing persons. The second is to conduct Convention-compliant investigations in cases of disappearance, independently of whether the 'humanitarian' aspects of the problem have been addressed. Of course, as the ECtHR implies, the two conditions are interrelated, since investigations have been woefully inadequate at providing information on the fate of the missing and their burial places, resulting in the feeling of 'acute helplessness and confusion' on the part of victims.

### Dialogue between the ECtHR and the CoM

The timing of the *Aslakhanova* judgment, delivered in mid-December 2012, clearly dovetails with the most recent decision of the CoM on the Chechen cases of September 2012, which called upon Russia to produce a 'unified coherent strategy' to address the major obstacles to implementation of the Chechen cases, including stalled efforts to locate and exhume remains, the destruction of archives, and looming prescription periods. In addition, the ECtHR's broad approach to the issue of non-investigation, which it states should not be limited to investigations launched between 1999 and 2006 in Chechnya but rather must be *"borne in mind when examining complaints arising out of similar cases occurring outside of that period and/or elsewhere in the region"*, might be a concerted effort on the ECtHR's part to encompass the entire range of cases formally included in the CoM's *Khashiyev* group.[3]

### Setting new benchmarks for implementation

In its guidance on how to address the two overarching priorities for implementation, the EctHR goes beyond the CoM's positions on these issues—a much-needed step, given the CoM's inherent limitations as an entity subject to political influence. For example, while the CoM has generally been quick to praise any new initiative by the Government, such as the creation of special investigative departments and supervisory groups, the ECtHR advocates for the establishment of a single high-level body to solve disappearances in the region, empowered with access to all relevant information and in direct contact with relatives of the missing—by far the most sensible recommendation in this area.

In the area of effective investigations, after echoing and strengthening some of the long-standing points of the CoM's agenda such as

access to military and security archives, the ECtHR directly addresses several issues that have remained somewhat ephemeral on the CoM's agenda. For example, the ECtHR advocates a strategy that addresses the adequacy of criminal law provisions vis-à-vis the specific phenomenon of disappearances. Crucially, the ECtHR also issues a clear statement regarding the issue of limitation periods for prosecutions in disappearance cases, mindful that the limitation period for the crime of kidnapping is between seven to ten years under Russian law. Citing the *"seriousness of the crimes, the large number of persons affected and the relevant legal standards applicable to such situations in modern-day democracies,"* the ECtHR finds that the termination of criminal investigations due to the expiry of limitation periods would contradict Article 2 of the ECHR. While the CoM has expressed concern over encroaching prescription periods, it has been unlikely up to now that it would take an explicit or blanket stand against their application.

## Conclusion

Despite the achievements of the *Aslakhanova* judgment, it is important also to keep in mind what the judgment does not address, for example, the emerging practice of downgrading crimes and application of amnesty legislation, especially in cases of torture and extra-judicial killing.[4] Overall, however, given the daunting reality of the spectrum of potential obstacles to effective implementation of the Chechen cases, the *Aslakhanova* judgment represents another concrete step towards holding the Russian government accountable for addressing the legacy of impunity in the North Caucasus.

Vanessa Kogan, Executive Director, Russian Justice Initiative (RJI)

## Notes

1. Interim Resolution CM/ResDH(2011)292. Available at: http://goo.gl/MOPyX .

2. The NGO Russian Justice Initiative and the lawyer Dokka Itslaev, based in Chechnya.

3. The ECtHR's willingness to extend evidential criteria in abduction cases has recently been much less evident. In its January 2012 judgment of *Suleymanov v Russia* (No. 32501/11) 22.01.13, concerning an abduction in Chechnya in May 2011, the ECtHR employs a much higher evidential threshold as compared to the established criteria.

4. In December 2011, an identified perpetrator—an alleged accessory to torture—was amnestied and relieved of criminal responsibility after having his charges downgraded in the case of Sadykov v Russia (No 41840/02) 7/10.10.

# Oleksandr Volkov v Ukraine

In January 2013, the European Court of Human Rights gave judgment in the case of *Oleksandr Volkov v Ukraine* (No. 21722/11) 9.01.13[1]. The case involved the dismissal of a Supreme Court judge in circumstances involving a flagrant denial of natural justice and highlights the ongoing systemic constitutional crisis in Ukraine and the overwhelming level of political control over the judiciary.

EHRAC represented Mr Volkov in his application to the European Court. Phillip Leach, EHRAC Director and Jane Gordon, EHRAC's then Senior Lawyer, presented oral arguments at the Chamber hearing in Strasbourg in June 2012. The Chamber handed down a unanimous judgment in favour of the applicant on 9 January 2013. The decision is significant in a number of respects.

## Principal Facts

Mr Volkov, the applicant, is a Ukrainian national who lives in Kyiv. He was appointed as a district judge in Ukraine in 1983. In June 2003, he was elected as a judge of the Supreme Court, becoming president of the Military Chamber in March 2007.

In December 2007, Mr Volkov was elected as a member of the High Council of Justice (HCJ). He did not assume the office following the refusal of the chairman of the parliamentary committee of the judiciary, S.K.

Subsequently, S.K. and two other members of the parliamentary committee requested the HCJ to investigate allegations of professional misconduct against Mr Volkov. Following preliminary inquiries, in December 2008, a request was made to the HCJ seeking Mr Volkov's dismissal as a judge for "breach of oath" (Complaint 1). In March 2009, a further request was made for his dismissal (Complaint 2).

The HCJ invited Mr Volkov to a hearing concerning his dismissal. Mr Volkov indicated that he was unable to attend the hearing because the president of the Supreme Court had ordered him to travel elsewhere on judicial work. In his absence, the HCJ agreed to make two submissions to Parliament for his dismissal. The parliamentary committee subsequently adopted a recommendation to dismiss Mr Volkov. Mr Volkov was not present at the proceedings. The HCJ's submissions and the recommendation of the parliamentary committee were considered at a plenary meeting of Parliament where a resolution was adopted to dismiss Mr Volkov for "breach of oath".

Mr Volkov challenged his dismissal before the Higher Administrative Court (HAC). His case was allocated to a special chamber of the HAC. Mr Volkov sought the withdrawal of the chamber, claiming that it was unlawfully set up. His motion was rejected. The HAC upheld Mr Volkov's dismissal, finding (i) that the HCJ's decision in respect of Complaint 1 had been unlawful but the HAC had no power to quash it; and (ii) that the decision made by the HCJ in respect of Complaint 2 had been lawful and substantiated.

## Mr Volkov's complaints

Mr Volkov made complaints under Articles 6, 8 and 13 of the European Convention on Human Rights (ECHR) (para.83).

# Decision of the Court

## Violations of Article 6

The Court found four violations of Article 6(1), under the heads discussed below.

## Independent and impartial tribunal

The Court found that the facts of the case disclosed *"a number of serious issues pointing both to structural deficiencies in the proceedings before the HCJ and to the appearance of personal bias on the part of certain members of the HCJ determining [Mr Volkov's] case"* (para.117). As such, the proceedings before the HCJ had not been compatible with the principles of independence and impartiality required by Article 6(1).

The determination of the case by Parliament did not exclude these structural defects but rather *"only served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers"* (para.118). Further, the procedure at the plenary meeting of Parliament was *"not an appropriate forum for examining issues of fact and law"* (para.122).

Finally, the Court found that the review of the case by the HAC was insufficient and could not neutralise the defects of procedural fairness existing at the previous stages of the proceedings (para.s 124-131). The HAC's inability to formally quash the impugned decisions and the absence of rules on the further progress of the disciplinary proceedings produced substantial uncertainty regarding the consequences of the HAC's declarations.

On these grounds, there had been a violation of Article 6(1) as regards the principle of an independent and impartial tribunal.

## Principle of legal certainty as regards absence of a limitation period

The complaints against Mr Volkov dated back to 2003 and 2006 respectively. The Court noted that domestic law did not provide any time bars on proceedings for dismissal of a judge and held that *"such an open-ended approach... poses a serious threat to the principle of legal certainty"* (para.139) and found a violation of Article 6(1).

## Non-compliance of plenary meeting of Parliament with the principle of legal certainty

The Court found that the decision on Mr Volkov's dismissal was voted on in the absence of the majority of the Members of Parliament. The MPs present *"deliberately and unlawfully cast multiple votes belonging to their absent peers"* (para.145). This defect in procedural fairness was not remedied at the subsequent stage of the proceedings. The Court concluded that the vote undermined the principle of legal certainty in violation of Article 6(1).

## Tribunal established by law

The Court noted that the composition of the HAC had been defined by a judge whose five-year term as president of the HAC had expired. The relevant provisions of national law regulating the procedure for the appointment of president had been declared unconstitutional and new provisions had not yet been introduced. The Court concluded that the chamber deciding the case had not been established and composed in a legitimate manner in violation of the requirement of a 'tribunal established by law' under Article 6(1) (para. 152-156).

## Violation of Article 8

The parties agreed that that the removal of Mr Volkov from office constituted an interference with his right to respect for his private life within the meaning of Article 8. The Court found that the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of "breach of oath" and the lack of appropriate legal safeguards to protect against the arbitrary application of the relevant law *"resulted in the relevant provisions of domestic law... being unforeseeable as to their effects"* (para.185). The Court concluded that the interference with the Mr Volkov's right to respect for his private life was not lawful and constituted a violation of Article 8.

Having regard to the very exceptional circumstances of the case and the urgent need to put an end to the violations of Articles 6 and 8, the Court held that the State of Ukraine must secure Mr Volkov's reinstatement as a judge of the Supreme Court at the earliest possible date.

## Application of Article 41 (just satisfaction) and 46 (binding force and execution)

The Court noted that the case disclosed serious systemic problems as regards the functioning of the Ukrainian judiciary. The Court set out general and individual measures to be taken by the State of Ukraine.

## General measures

The Court held that the violations found in the case suggested that the system of judicial discipline in Ukraine has not been organised in a proper way, as it did not ensure the sufficient separation of the judiciary from other branches of State power. Furthermore, it failed to provide *"appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence"* (para.199). The Court concluded that the nature of the violations required the State of Ukraine to take a number of general measures to reform the system of judicial discipline, including legislative reform involving the restructuring of the institutional basis of the system (para.200).

## Individual measures

It is in the area of individual measures that the Court's decision is innovative. The Court held that the dismissal of Mr Volkov, in manifest disregard of the principles of procedural fairness enshrined in Article 6(1) and the requirements of lawfulness under Article 8, *"could be viewed as a threat to the independence of the judiciary as a whole"* (para.205). The Court concluded that the reopening of the domestic proceedings in relation to Mr Volkov's case would not constitute an appropriate form of redress as there were *"no grounds to assume that the applicant's case would be retried in accordance with the principles of the Convention in the near future"* (para.207). As such, the Court found that by its very nature, *"the situation found to exist in the instant case does not leave any real choice as to the individual measures required to remedy the violations of [Mr Volkov's] Convention rights"* (para.208). In regard to the very exceptional circumstances of the case and the urgent need to put an end to the violations of Articles 6 and 8, the Court held that the State of Ukraine must secure Mr Volkov's reinstatement as a judge of the Supreme Court at the earliest possible date.

In a concurring opinion, the Ukrainian judge, Ganna Yudkivska, expressly endorsed the operative part of the Court's judgment requiring Ukraine to reinstate Mr Volkov.

Jane Gordon, Human rights barrister, Fellow, LSE Centre for the Study of Human Rights

## Notes

1. Judgment available at http://goo.gl/TqVJr

# Legal and practical aspects of investigating torture in Georgia

As a result of Parliamentary Elections held on October 1 2012, the political coalition 'Georgian Dream' came to power and the United National Movement, the former ruling party which had dominated parliament since the so-called Rose Revolution in 2003, emerged as the opposition. This represented the first time in modern post Soviet history of Georgia when a transfer of power has taken place by means of elections.

A factor which contributed to the ruling party's loss in the elections was the broadcast by Georgian media on 18 September 2012 of shocking videos showing multiple instances of torture and ill-treatment of prisoners. These videos had a huge impact on the Georgian public, triggering mass demonstrations in protest and resulting in thousands of students marching in the streets of Tbilisi. The videos made Georgians comprehend the routine, cruel treatment of prisoners that had been inflicted on a mass and systematic scale in almost all penitentiary establishments as a result of the so-called zero tolerance policy brought in by President Saakashvili in 2006. The work of several brave journalists in highlighting this resulted in the radical change of electoral preferences and the electorate voted for the restoration of justice which 'Georgian Dream' promised.

Besides mass social protest, civil society representatives and human rights defenders raised the issue of the positive obligation of the State to carry out effective investigations into the alleged instances of torture in prisons. Unfortunately, their voices were not heard and it seems that it will take longer than anticipated to investigate and bring offenders to justice in order to combat torture and restore the reputation of the country. Civil society representatives have repeatedly addressed this issue in vain in an attempt to clarify the investigative procedure.

Taking into consideration the high level of public interest in the mass offences committed by the previous political elite, on 12 January 2013, under pressure from human rights activists, the newly elected Parliament of Georgia passed a resolution on political prisoners and political refugees based on PACE #1900 Resolution. The resolution recognised 190 individuals as political prisoners and 25 individuals as Political refugees. Despite the fact that the Resolution required the adoption of legal mechanisms for acquittal from criminal responsibility and/or enjoyment of the right to fair trial by creating prompt legal mechanisms for recognised political prisoners and political refugees, no such measures have been put in place. Nor have any practical or legal steps been taken to rehabilitate these prisoners, such as addressing health-related problems on release when they have no health insurance and cannot afford medical treatment. Moreover, the public is not being informed of whether investigations have been initiated to identify state officials responsible for the politically motivated trials of those now recognised as political prisoners.

The videos of torture proved how wide-spread, systematic and ongoing it has been in recent years. Incidences of torture were even kept secret from defense lawyers because of the shame of sexual abuse experienced by victims. Many of the torture scenes, particularly those of a sexual nature, had been videotaped and victims did not raise allegations of torture from shame and fear of exposure of the video evidence and of making their identity public. It is imperative that the State fulfills its positive obligation to carry out an effective investigation into incidences of torture, despite how challenging this kind of investigation can be in a country with little experience and knowledge of the methodology of investigating the specific crime of torture. The Istanbul Protocol[2] sets out the criteria for documenting and investigating incidences of torture and can be used as an effective legal mechanism in Georgia.

Georgia, as one of the former Soviet republics, has had a longstanding history of mass political repression that included the use of torture and ill treatment. The law on victim status for persons subjected to political repression was only passed in 1997. In 2010 the European Court of Human Rights found Georgia responsible for failing to provide applicants with the compensation to which they were legally entitled as victims of Soviet political repression in *Kiladze v Georgia* (No. 7975/06) 02.02.10. The judgment required Georgia to rapidly introduce the necessary legislative and budgetary measures to make the applicants' existing rights under Georgian law effective.[2]

Any political will for combating torture shown by the new political coalition must be based on proper and sufficient legal mechanisms and should explicitly refer to the Istanbul Protocol Procedures, both in substantive and procedural provisions of the domestic law, with the support and assistance of civil society and in collaboration with victims. In accordance with international law and international treaties ratified by Georgia, the State is obliged to investigate and document incidents of torture and other forms of ill-treatment, and to punish those responsible in a comprehensive, effective, prompt and impartial manner.

Lia Mukhashavria, Executive Director, NGO Human Rights Priority

## Notes

1. The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly known as the Istanbul Protocol, is the first set of international guidelines for documentation of torture and its consequences. It became an official United Nations document in 1999.

2. The Istanbul Protocol is intended to serve as a set of international guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body.

3. The applicants are Georgian nationals who were born in 1926 and 1928 respectively and live in Tbilisi. Having been the victims of political repression during the Soviet era, in 2006 EHRAC and GYLA helped them bring a case to the European Court on the basis of the Law on victim status for persons subjected to political repression.

# The eviction of IDPs in Georgia

## Compatibility of domestic regulations with European Court standards

This article analyses the lack of conformity of domestic regulations on the eviction of Internally Displaced Persons (IDPs) in Georgia with standards established by the European Court of Human Rights (ECtHR), and focuses in particular on the inadequacy of the mechanisms available to challenge decisions relating to the eviction of IDPs.

### ECtHR case-law standards

The ECtHR clarified the legal principles governing the legality of evictions of IDPs in the recent case of *Yordanova and Others v Bulgaria* (No. 25446/06) 24.04.12, which concerned

the attempted eviction of a community of Roma origin from their illegally constructed houses on municipal land. Firstly, the ECtHR reiterated that under Article 8 of the European Convention on Human Rights (ECHR), whether a person can claim to enjoy the right to a home is a factual question and should be considered independently of whether or not they legally own the residence. The eviction of a person from their home by the state represents an interference with the right to a home as guaranteed under Article 8 ECHR. In this case, as it involved a community, the ECtHR held that the eviction would also have had repercussions on their social and family life, constituting an interference with their right to family and private life. The ECtHR also indicated that in the process of eviction, the procedural safeguards available to the individual will be particularly material in determining whether the respondent state has remained within its margin of appreciation. In particular, the ECtHR must examine whether the decision-making process leading to measures of interference was fair and paid due respect to the interests safeguarded by Article 8 ECHR. In *Saghinadze and others v Georgia* (No 18768/05) 27.05.10 the ECtHR found a violation of Article 1 of Protocol 1 ECHR because the applicant's eviction did not take place in accordance with domestic law. Specifically, it failed to comply with the provisions of the domestic IDP Act which entitled the applicant to fair, adversarial proceedings rather than an 'oral order' issued by the Minister of Interior.[1]

In *Yordanova and Others v Bulgaria* the ECtHR declared that in exceptional cases, there is an obligation to provide shelter to particularly vulnerable individuals under Article 8 ECHR. The ECtHR considered that under specific circumstances, the principle of proportionality required that due consideration be given to the consequences of their removal and the risk of becoming homeless. In the case of *M.S.S v Belgium and Greece* (No. 30696/09) 21.01.11 the ECtHR also emphasised the importance of protecting underprivileged and vulnerable population groups and providing them with shelter.

Moreover, General comment no.4 of the Committee on Economic, Social and Cultural Rights specifies that cases of forceful eviction are *prima facie* incompatible with the demands of the Covenant and can be justified only under special circumstances in accordance with international guidelines.[2]

## Practice in Georgia

Analysis of the practice of evicting IDPs in Georgia shows that this process does not provide a chance for IDPs to initiate legal proceedings against the decision to evict.[3] In spite of the fact that in 2010 the Government developed Standard Operating Procedures for Vacation and Re-allocation of IDPs for Durable Housing Solutions, which establishes the obligation of a relevant government agency to deliver a notice of warning 10 days before an eviction, these standards are often ignored (including by domestic courts) because they are not enforced by the law.

There is a strong argument that the lack of such guaranties in the legislation of Georgia conflicts with the requirements of the ECHR.

As a consequence of failing to specify in domestic legislation a reasonable period that police must observe between delivering a notice of warning of eviction and the execution of the eviction, IDPs can be evicted the day after receiving a notice of warning. Under such conditions, the temporary restrictive legal mechanism, provided by Article 29 of Administrative Procedural Code of Georgia (APC), which makes it possible to suspend a challenged administrative act, is rendered useless. Moreover, although Articles 29(1) and (2) of the APC specify that in cases of administrative appeal, the force of the act appealed against is suspended unless the law directly provides for the impossibility of suspension, this is nonetheless undermined by Article 9(1)(U) of the Law on Police which provides that an appeal against a warning of eviction does not suspend the implementation of measures preventing encroachment on immoveable property and the force of written warnings. Evidently, under such legislation, IDPs do not have even a theoretical opportunity to appeal against the decision on eviction and to appeal for the eviction notice to be suspended.

According to Order #747 of the Ministry of Internal Affairs of Georgia on *'Approval of the Code for Prevention of Encroachment on Immovable Property or Different Kind of Interference'* dated 24 May 2007, an eviction being executed by the police can be suspended on two possible grounds: firstly, the Ministry of Internally Displaced Persons From the Occupied Territories, Accommodation and Refugees can make a decision on the inappropriateness of eviction; and secondly in circumstances where a document certifying legal ownership (an IDP certificate) is produced. Article 2(b) of the Order specifies that an IDP certificate is considered as a document certifying legal ownership only in cases when the address indicated in the certificate and the address of the unit of compact resettlement are identical. However, the Order does not provide a mechanism to regulate potential conflicts between the two grounds, for instance in cases where the Ministry considers that an IDP has been provided with an adequate alternative living unit and makes a decision on the appropriateness of eviction, but the IDP does not agree with the Ministry and challenges the decision on the basis of an IDP certificate. Evidently, in terms of the unfairness of eviction, *prima facie* preference should be given to an IDP certificate, however, as the court practice shows, domestic courts give priority to decisions made by the Ministry.

Under such circumstances, an IDP is deprived of the right to challenge the adequacy of an alternative living space offered to him/her by the Ministry prior to an eviction taking place, and subsequently, in cases where the Ministry approves eviction and on which it has exclusive competence, he/she becomes subject to eviction by the police, without access to legal proceedings and in an expedited manner.

The non-existence of a legally determined reasonable period between delivering a warning notice of eviction and executing the eviction deprives IDPs of the chance to legally challenge or suspend the decision. The absence of such procedural guaranties leaves the IDPs at risk of having to endure inadequate housing or, ultimately, being made homeless. There is a strong argument that the lack of such guaranties in the legislation of Georgia conflicts with the requirements of the ECHR, and it is disappointing that the Government has not taken steps following *Saghinadze v Georgia* to improve its legislation and ensure compliance with the relevant international standards.

## Notes

1. *Saghinadze and Others v Georgia* (No 18768/05) 27/5/2010, paras 110-118

2. The right to adequate housing (Art.11(1)), 12/13/1991, CESCR General comment 4. Available at: http://goo.gl/g3k7h

3. Amnesty International, report *"Uprooted Again – Forced Eviction of the Internally Displaced Persons in Georgia"*, 2010, available at: http://goo.gl/bQFaj. See also, Special report of the Public Defender of Georgia on the *"Human rights situation of internally displaced persons and conflict affected individuals in Georgia"*, 2010, available at: http://goo.gl/SwfBo

# Freedom of assembly in Azerbaijan

## Theory and Practice

In Azerbaijan, freedom of assembly is guaranteed by Art. 49 of the Constitution of the Republic of Azerbaijan (adopted on 12 November 1995) and by the Law On Freedom of Assembly (passed on 13 November 1998).

However, Article 5 of the Law On Freedom of Assembly contains a controversial provision which is often violated in practice. The substance of this provision relies on and is in compliance with Art 49 of the Constitution, yet its implementation contradicts the spirit and letter of the law.

**Article 5 reads:**
*"…A person, or persons, organising any assembly, must give notice of the assembly to a relevant executive body in writing and in advance. Such notice must be given, as a rule, 5 days before the planned assembly."*

The law merely stipulates that the local government must be given notice of the assembly, not that permission is required. Under Article 11 of the European Convention on Human Rights (ECHR), positive obligations are imposed on States party to the ECHR with respect to the protection of participants of public assemblies and public order considerations, and therefore deem notification a legitimate requirement. Despite these obligations, governments often use public order laws to obstruct the activities of their political opponents. The government of Azerbaijan is no exception, and widely abuses its powers in the name of 'public interest' such as the protection of public order.

The case of a civic organisation of retired military officers provides an illustration. On 18 January 2013, the organisation gave notice to the Baku city authorities of a rally, which was planned for 5 February 2013. At the rally, the organisers intended to use the following slogans: "No to the deaths of soldiers!", "End all corruption and bribery in the military!", "Free Nadjmeddin Sadygov!", "Safar Abiyev must go!" The city authorities responded in a letter (no. c-13) on 1 February 2013:

*"Your notice of 18 January 2013 has been considered by the executive authorities of the city of Baku.*

*We hereby inform you that since it is not advisable to hold the rally planned for 5 February 2013, your application has been forwarded to the Ministry of Defence of the Republic of Azerbaijan for further consideration of the issues raised in it.*

*In our opinion, it would be more productive to discuss your concerns with the officials of the relevant bodies, rather than use them as a reason for public assemblies."*

Such interpretation and blatant breach of the law is widespread. Rather than taking measures to facilitate peaceful assemblies, the authorities prohibit them on spurious grounds, thus interfering with the rights to freedom of assembly. The domestic law does not provide mechanisms for an authorisation procedure. However, in practice, the authorities interpret its provisions in order to withhold permission to hold an assembly, and unauthorised peaceful assemblies are dispersed by the police.

**Article 4 of the Law provides**
*"… Peaceful assemblies held in places that are privately owned, rented or otherwise lawfully used, or in indoor areas specially intended for the public assemblies, do not fall under the scope of this Law."*

In practice, this provision is also violated on a grand scale. District and municipal authorities regularly ban political meetings on private property and use police force to disperse them. The same tactic applies to NGO-organised roundtables and training sessions on legal and civil society issues. To justify their unlawful actions, the authorities refer to the lack of prior authorisation, lack of permission from the President's Administration, and in some instances even claim to be acting on the instruction of the President's Administration.

### Changes in the law: increased fines for participation in public assemblies

Until 1 January 2013, according to Article 298 of the Code of Administrative Offences, persons who broke the rules regulating the organisation and holding of public meetings, pickets, rallies, or demonstrations were either cautioned or fined between 7 - 13 manats (£6 - £11).

Under Article 169 of the Criminal Code, if organising or participating in prohibited public assemblies resulted in a significant infringement of the rights and lawful interests of other people, this was punished by either a fine of 300 manats (£250), imprisonment for up to two years, or 'corrective labour' for up to two years[1].

On 2 November 2012, these sanctions were amended, and fines increased by up to 25 times. Article 298 of the Code of Administrative Offences was amended and changes brought into force from 1 January 2013. A new subsection (298.2) introduced severe sanctions for the organisation of and participation in unauthorised assemblies. For participation, sanctions include; fines ranging from 1500-3000 manats (£1250 to £2500); 140 to 200 hours of community work; or up to 15 days under administrative arrest. Those held responsible for organising the assembly can be fined from 15,000-30,000 manats (£12500 to £25000).

For breaching the amended Article 169 of the Criminal Code (in force as of 1 January 2013) for organising or participating in assemblies (if infringing on the rights and interests of others) fines increased by 20-25 times.

Given that in Azerbaijan the minimum monthly wage is 125 manats (£104), the average monthly wage is about 400 manats (£332) and the average old age pension is 168 manats (£140), these exorbitant fines give rise to yet another unlawful practice - bailiffs unlawfully seizing property or items of those who are unable to pay the fines.

In circumstances where the fines for organising and participating in public assemblies are 20-80 times higher than the average monthly income, the intention behind these draconian changes to the criminal and administrative codes become starkly obvious: to make the right to freedom of assembly an illusory one.

### ECtHR's Article 11 case-law in relation to Azerbaijan and the domestic situation

So far, the ECtHR has not ruled on any Article 11 cases from Azerbaijan, as such cases have only recently been submitted to the ECtHR and are still awaiting consideration.

Despite the domestic situation, an increase in the number of public assemblies has been seen over the past year, in particular, due to the upcoming presidential elections and the deaths of soldiers in the military.

Some present at those assemblies called for further Article 11 applications to the ECtHR on the basis of the violations of the right to freedom of assembly, the governmental ban on assemblies, the unlawful interference of the security forces with peaceful assemblies, and the unlawful arrests of organisers and participants either before or after the assemblies.

It is difficult to predict whether judgments from the ECtHR will have a significant impact on the situation in Azerbaijan, particularly in view of the fact that previous judgments against Azerbaijan, which found violations of other articles of the ECHR, have yet to have a real impact on the domestic governance and judicial system.

**Tural Hajibeyli, lawyer, Azerbaijan Lawyers' Association**

# The Closure of RAIPON

## Indigenous Peoples of Russia are losing their Voice

Over the last few months an administrative dispute between the Russian Ministry of Justice and the Russian Association of Indigenous Peoples of the North (RAIPON) is indicative of the pressure put by the government on civil society organisations. While RAIPON was allowed to finally reopen last month following strong international pressure and a revision of its statutes, the indigenous peoples' support organisation has been placed under tremendous pressure by the authorities which ordered its closure. In November 2012, the Russian Ministry of Justice adopted a resolution to put an end to the work of RAIPON. The closure of the Association by the federal Ministry of Justice was based on an *"alleged lack of correspondence between the association's statutes and federal law."* As a result, all the activities of RAIPON were suspended on the 1st of November 2012. The closure of RAIPON, a Russia wide public non-governmental organisation (NGO), was a serious setback for many indigenous peoples of Russia.

RAIPON is the largest NGO for indigenous peoples in Russia; it is a national umbrella organisation representing 41 small groups of indigenous peoples of the North, Siberia and the Far East. Indigenous peoples who live in remote places over the vast areas between Murmansk and Kamchatka tend to lack access to political, administrative and legal representation, and RAIPON is one of the central forums representing their interests at regional, federal and international levels. In recent years the indigenous communities have witnessed serious threats to their way of life and access to their sources of livelihoods, due to the increase in the exploitation of natural resources such as timber, oil and gas in the northern regions. This has resulted in the large-scale alienation of indigenous homelands, and licences being granted to private corporations for the exploitation of natural resources. With the increased demand for these resources, RAIPON has been a central actor in the ongoing negotiations taking place at the international level over the exploitation of resources on traditionally indigenous territories. RAIPON notably plays a central role in international and intergovernmental co-operation across the Arctic region. For example, last year, RAIPON signed an official agreement on cooperation with the Norwegian Barents Secretariat, an institution which supports bilateral cooperation between Norway and Russia.

The closure of RAIPON, a Russia wide public non-governmental organisation (NGO), was a serious setback for many indigenous peoples of Russia.

RAIPON also plays a critical role in the development and monitoring of legislation and executive actions with regard to the rights of indigenous communities. RAIPON has existed for over 20 years; it was established in 1990 at the First Congress of Indigenous Peoples of the North. The Association was then re-registered in 1999 at the Russian Federal Ministry of Justice as a public organisation, receiving an official registration number. It was then awarded the status of an All-Russian Non-Governmental Organisation by the Russian Ministry of Justice, which made its representatives eligible to be appointed to the Public Chamber of Russia. The Association addressed the Federal parliament several times on the issue of non-implementation of the Federal statute on the traditional territories used by small groups of indigenous of the North, Siberia and the Far East of the Russian Federation.

The closure of RAIPON took place at a moment when a new Russian Law on the Arctic, which is currently being drafted, is expected to highlight the importance of the indigenous peoples of the region. The forced closure of such a Russia-wide organisation meant that the Association was not able to make proposals for legislation to the federal authorities in Moscow, be a member of public councils in federal ministries, or be a candidate in the elections for the Public Chamber of Russia. The Association had twice gone to court to dispute the Ministry's decision to close it down, however these attempts have failed. As highlighted by Dmitry Berezhkov, Vice President of the Association, the closure was the decision of the Ministry, despite the fact that the Ministry of Justice itself thoroughly checked the charter of the Association to ensure its compliance with federal legislation and, as the responsible federal agency, approved it in 1999. Since then, Federal legislation on public organisations has not changed.

RAIPON is well-know in the international human rights circle, having been the voice for indigenous peoples' human rights at the United Nations over the last decade. RAIPON also plays a central role in catalysing cooperation among the indigenous peoples of the Russian Arctic and other Arctic states. It is a non-governmental organisation that has special Consultative Status with ECOSOC and is one of the six indigenous Permanent Participants of the Arctic Council. The former Vice-President of the Association, Pavel Sulyandziga, is a well known indigenous rights activist nationally, as well as internationally. He was a member of the United Nations Permanent Forum on Indigenous Issues from 2005-2007, and is currently a member of the Public Chamber of Russia and the UN Working Group on the issue of human rights and transnational corporations and other business enterprises. Sulyandziga argues that the closure of RAIPON came at a time when the federal authorities increasingly saw indigenous peoples as a troublesome element in Russia's development goals. As expressed in the newspaper *Novaya Gazeta* "There is an extensive hike in the level of industrialization in the north, and the indigenous peoples are among the last barriers against the companies' and state's development of the resources. The authorities strongly dislike RAIPON's extensive international engagement."

While it seems that RAIPON is now able to resume its work, the closure of the association came at time when the federal authorities are generally trying to clamp down on the activities civil society organisations.

Jeremie Gilbert, Reader in Law, University of East London

### Notes

1. Novaya Gazeta, 2012, "The people are a nuisance, government openly admits for the first time" (Narod tol'ko meshaet: vpervye ob jetom zajavleno otkryto) http://www.novayagazeta.ru/economy/55433.html

# Suleymanov v Russia

## Prohibition of Torture, Inhuman or Degrading Treatment

**(No. 32501/11) 22.01.2013 (ECHR Judgment)**

### Facts

The applicant was the father of Tamerlan Suleymanov, and lived in Grozny, Chechnya. At around 11.30 am on 9 May 2011, a group of eight armed men in black uniforms arrived in two civilian cars at the son's place of work. On identifying Tamerlan, the armed men beat him with rifle butts until he was unconscious, before driving him away. The incident took place 20 metres from a police station, and in front of several witnesses, including, according to the applicant, policemen who failed to intervene. The applicant complained to the authorities that the perpetrators were the same State officials who had ill-treated his son two days before, and that he had information that his son was being held by the authorities in the village of Yalkhoy-Mokhk. He added that his son had been subject to ill-treatment in detention on several occasions prior to his abduction. The applicant had received no reliable news of his son. He complained to the ECtHR under Articles 3, 5 and 13 that Tamerlan had been ill-treated and unlawfully detained by law-enforcement officers, and that the authorities had failed to effectively investigate the matter. The applicant had also made a Rule 39 request for Interim Measures that was granted by the ECtHR, requiring full access by investigators to the Kurchaloy ROVD and for all measures to be taken in order to establish whether Tamerlan was being detained there. The steps taken by the Russian Government established that Tamerlan was not being held at the Korchaloy ROVD.

### Judgment

The ECtHR found no violation of Article 3 on account of Tamerlan's ill-treatment. Although the witness statements proved beyond reasonable doubt that Tamerlan had been ill-treated, it could not be proven that State officials were the sole possible perpetrators. The evidence provided only a general description of the culprits and there was no evidence of insignia or other features which could identify the State's involvement. In particular, there were no curfews, or other similar restrictions on the movement of civilian vehicles, in place at the material time. The ECtHR accordingly also found no violation of Article 5.

However, a violation of Article 3 was found on account of the authorities' failure to conduct an effective investigation into the circumstances of Tamerlan's ill-treatment. Although the authorities had taken a significant number of investigative steps in the space of a year, the investigation had not been diligent, thorough or effective. In particular, there had been *"inexplicable delays"* in taking key investigative measures, which included the following: the officers accused by the applicant were questioned one month after the incident; police witnesses were not questioned at all; and an examination of the alleged place of detention took place only after a request by the ECtHR on 29 July 2011 under Rule 39 (*Interim Measures*). Furthermore, the officers who were questioned at the place of detention were the same officers allegedly responsible for Tamerlan's unlawful detention. The ECtHR dismissed the Government's objection that national remedies (namely, judicial review of the investigators' decisions) had not been exhausted by the applicant, as it doubted that this could have redressed the defects of the investigation.

The ECtHR considered that no separate issue arose under Article 13 and awarded the applicant €12,500 in non-pecuniary damages.

### Comments

This judgment follows a line of cases which highlight significant failures by State authorities in investigating alleged human rights violations in Chechnya. The case is also a significant reminder of the importance of detail in proving the involvement of state-agents. However, it may seem odd that in one of the rare cases where the ECtHR has granted interim measures and ordered investigation of a state-run detention facility in order to ascertain whether the applicant's son was being held there, it then found insufficient evidence to establish that the perpetrators were State agents.

# UN Rights Experts Advise Russia to Scrap Bill on Homosexuality Propaganda

On 1 February 2013 a group of United Nations human rights experts issued a statement urging the Russian state legislature not to pass a draft bill that would seek to impose administrative sanctions on those spreading so-called 'homosexual propaganda' among minors. The bill passed its first reading in the lower house of the Russian parliament, the Duma, on 25 January 2013 by a vote of 388-1 with one abstention.

The UN group of experts was made up of individual Special Rapporteurs on issues of freedom of expression, human rights defenders, cultural rights and rights to health. In its statement, the group expressed particular concern over what it called the draft bill's lack of reasonable and objective criteria for restricting freedom of expression as well as the ambiguous wording of the proposed legislation. Such ambiguity, they stated, had the potential to penalise not only those who would seek to promote sexual and reproductive health among the LGBT community; but that it would also undermine the rights of children to access health related information and would reinforce existing stigmas.

The Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, stated that if enacted the bill would *"contribute to the already difficult environment in which these defenders operate, stigmatizing their work and making them the target of acts of intimidation and violence, as has recently happened in Moscow."*

The draft bill seeks to ban the holding of events to promote gay rights across the Russian Federation and would impose fines on individual participants and organisers who infringe the measures. In order to be enacted as law, the bill has to pass a further two readings in the Duma and then be approved by the Federation Council before finally being signed into law by President Putin.

# Asadbeyli and Others v Azerbaijan

## Right to Fair Trial

**(Nos. 3653/05 etc.) 11.12.2012 (ECHR Judgment)**

### Facts

The eleven applicants were participants in, or were alleged to be organisers of, an unauthorised demonstration in Baku on 16 October 2003 against the 2003 presidential election results. According to reports, as the crowd of protestors had marched towards the main city square, they had damaged cars, buildings and other urban property, and had attacked police officers. A large number of riot police and military personnel had then arrived in the square, equipped with helmets, shields and truncheons. Violent clashes followed between the crowds and police. Hundreds of people were consequently arrested, including the applicants, who were charged and convicted with "organising or participating in public disorder" and the "use of violence against public officials" under the Criminal Code. One of these applicants, Mr Ilgar Ibrahim oglu Allahverdiyev (No. 36083/05) was represented by Prof. Bill Bowring with the support of EHRAC. He was the chairman of several NGOs, a magazine editor, and the Imam of the Juma Mosque, which was closed by the Azerbaijani authorities. He maintained that he had left the demonstration before the violence erupted, and had observed the events from a distance. He was nevertheless held in custody for three months before being convicted of the crimes above, and given a suspended sentence of five years' imprisonment. The conviction was upheld on appeal in hearings which allegedly lasted only a few minutes. The applicants complained of breaches of the right to fair trial under Articles 6(1), 6(3)(b) to (d).

### Judgment

The ECtHR found breaches of the right to a fair trial under Article 6(1) taken together with Article 6(3)(b) to (d). It was particularly concerned about various shortcomings regarding the admission and examination of evidence in the trials of each of the applicants, and the insufficient reasons given by the domestic courts for their convictions. In particular, each conviction had been mainly based on statements from a few police officers or military personnel. Several prosecution witnesses had also unjustifiably failed to attend the hearings. The ECtHR was not convinced that the domestic courts had made a reasonable effort to bring those prosecution witnesses to court, nor was there any other way in which the reliability of those statements could have been assessed. Although the applicants' convictions might not have been based solely and decisively on the statements of those non-appearing witnesses, in light of the various defects in the proceedings, the ECtHR considered that the above failures had affected the applicants' defence rights. There also had been restrictions on the applicants' – other than Mr Allahverdiyev's - initial access to legal assistance which had affected their defence rights.

The ECtHR noted that there had been many allegations by witnesses and defendants that they had been forced to give incriminating statements, and that the domestic courts had accepted those statements without further scrutiny. Furthermore, none of the procedural defects had been remedied by the appeal courts. Although the above violations may have affected the applicants to varying degrees, the ECtHR considered that each of the applicants had been affected by at least some of those defects.

The ECtHR also found a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice) in respect of the applicant, Mr Mammadov because he had been convicted both of an administrative offence and a criminal offence in respect of the same of facts.

The applicants were awarded between €10,000 and €12,000 in non-pecuniary damages. Mr Allahverdiyev himself was awarded €10,000 in non-pecuniary damages.

# Avkhadova and Others v Russia

## Right to life

**(No. 47215/07) 14.03.13 (ECHR: Judgment)**

### Facts

The applicants are the mother and sisters of Mr Avkhadov, and are residents of Urus-Martan, Chechnya. In the early morning of the 24th April 2001 Mr Avkhadov and his family were at home when several armed men in camouflaged uniforms entered and searched the building, without identifying themselves. The men led Mr Avkhadov away and he was seen being driven off in one of a number of military vehicles parked outside. He has not been seen since. Several young Chechen men were also apprehended on the same night by similarly described men driving military vehicles, some of whom, on release, described being taken to a military zone. The applicants immediately reported the incident and subsequently made numerous appeals, complaining of the abduction of their son and brother. Despite this an investigator did not visit their home until 2 months after the abduction.

The applicants alleged violations of Article 2 (right to life), Article 3 (prohibition of torture, inhuman or degrading treatment), Article 5 (deprivation of liberty) and Article 13 (right to an effective remedy).

### Judgment

The ECtHR held that there had been a substantial violation of Article 2, in respect of Mr Avkhadov. The applicants had made a prima facie case that state agents were responsible for his disappearance based in particular on the descriptions of the men involved, the vehicles they drove, at a time of curfew, and the evidence that other men were also apprehended that night in similar circumstances. The Government failed to discharge the burden of proof by providing a convincing alternative explanation. A separate, procedural violation of Article 2 was found on account of the ineffectiveness of the investigation. Although a criminal investigation was not opened until more than three months after the abduction, the Court was unable to attribute responsibility for this between the period 24 April to 25 May 2001, since the applicants did not present documentary evidence to the Court of their complaints (both oral and written) during this period. Nonetheless, from 25 May 2001 there was still a delay of over 2 months in opening a criminal investigation. Furthermore, among other investigative failures, key witnesses were not questioned, there was no attempt to identify the military vehicles or servicemen involved or to investigate the military zone to which it was alleged the abducted men were taken. The ECtHR also held that the psychological distress endured by the applicants as a result of the lack of information about their relative's fate constituted a violation of Article 3 and that Mr Avkhadov's unacknowledged detention was a particularly grave violation of Article 5. A violation of Article 13 was also found.

The ECtHR awarded the first applicant – the mother – 45,000 EUR and the second to the fifth applicants – the sisters – jointly, 15,000 EUR in non-pecuniary damages.

# Rights litigation in the Russian Constitutional Court

## Memorial defeats the FSB and Supreme Court on access to secret information

The International NGO 'Memorial' and its Human Rights Centre, works in partnership with EHRAC in taking cases to the European Court of Human Rights (ECtHR). Memorial HRC started taking cases in 1999, when Vladimir Putin launched the Second Chechen War, one year after Russia had ratified the ECHR.

Memorial itself started life in January 1989, when several hundred delegates founded the All-Union Voluntary Historical-Educational Society 'Memorial', which became a union of regional organisations across Russia. Only in 1992 were the words 'human rights protection' added to 'historical-educational'. To this day Memorial's board consists of historians, natural scientists and philosophers – not lawyers. Its first Chair was the nuclear physicist and human rights pioneer Andrey Sakharov. Its primary task was to preserve an exact record of repression in the USSR, and of its individual victims.[1] It has continued this work especially with regard to Chechnya and the North Caucasus.

In Russia, as in Britain, the State tries to preserve its dirty secrets, however Article 13 of the Law of the Russian Federation of 21 July 1993 'On State Secrets' provides that secret information must be declassified after 30 years, as in Britain Any extension is only possible in exceptional circumstances.

In spring 2012 the Federal Security Service (FSB) refused to allow the Deputy Chair of the Memorial Centre for Research and Education, the well known historian Nikita Petrov,[2] access to three decrees issued by the Ministry of State Security (MGB) of the USSR, which he needed for his research into the activities of agents authorised by the NKVD-MGB in Germany in 1945-1953. The FSB insisted, with support from the Moscow City Court and the Supreme Court of the Russian Federation to which Mr Petrov appealed, that the 30 year period started in September 1993 when the Federal law came into force, and therefore that the documents would be accessible only in 2023. **Article continues on p13 >**

# Kasymakhunov & Saybatalov v Russia

## Article 7: No punishment without law

**(Nos. 26261/05 and 26377/06) 14.03.13 (ECHR: Judgment)**

The applicants complained that their criminal convictions for membership of Hizb ut-Tahrir, a transnational Islamic political organisation, violated Articles 7 and 9-11 of the ECHR.

### Facts

The first applicant was convicted of aiding and abetting terrorism, and founding a criminal organisation (under Articles 205.1, as in force at the time, and 210 of the Russian Criminal Code (CC)), following the discovery of Hizb ut-Tahrir literature at his home. The second applicant was found guilty under Article 205.1 CC, and also under Article 282.2 CC, for founding and being a member of an extremist organisation which had been banned by a judicial decision. The convictions were pronounced after a judgment by the Russian Supreme Court during a closed trial on 14 February 2003 which banned a number of organisations, including Hizb ut-Tahrir, and declared them to be illegal and of a terrorist nature. The Supreme Court's judgment was not published at the time and a list of banned organisations was only officially released in 2006.

### Judgment

The ECtHR found that the first applicant's convictions were not entirely determined by the 2003 Supreme Court's judgment. The constitutive elements of the terrorism-related crimes were defined with reference to the relevant legislation, including the Anti-Terrorism Act, and as such were sufficiently accessible and foreseeable. However, the Supreme Court judgment was found to be a direct factor in the second applicant's conviction under Article 282.2 CC, as required by the provision itself. Since this court order was not made public until after the second applicant's conviction, he could not have foreseen that his membership of Hizb ut-Tahrir would make him criminally liable under Article 282.2 CC and therefore a violation of Article 7 was found in his case.

With respect to the complaints under Articles 9-11, the ECtHR considered the activities of Hizb ut-Tahrir to be contrary to the spirit and values of the ECHR under Article 17, and therefore held that Articles 9-11 could not be invoked. In particular, the ECtHR referred to its anti-Semitic and pro-violence statements, its rejection of democratic process as a means of coming to power, and its proposals to introduce plurality of legal systems and Sharia law. It also held that leaflets seized at the applicants' homes contained statements inciting to violence.

### Comment

This is the first judgment concerning trials of Hizb ut-Tahrir members in Russia. It effectively puts an end to any further Hizb ut-Tahrir related ECHR litigation, except for those convicted for actions committed prior to August 2006, or if there are other issues related to criminal justice in Russia in general.

Mr Petrov also referred to the relevant provision of the 1993 Law, according to which the FSB has no right to extend the 30 year period. This is the prerogative of the Interagency Commission for the Protection of State Secrets, directed by the President himself. The FSB had not sought the Commission's permission.

Mr Petrov complained to the Constitutional Court of the Russian Federation. In its Determination of 22 November 2012, published on 14 January 2013, the Court rejected his complaint.[3] Despite this, in its reasoning, the Court declared that the literal meaning of Article 13(4) of the Law 'On state secrets' is that the 30 year period of classification applies in relation to information designated a state secret *both before and after* the coming into force of the Law. The Court confirmed the right of citizens to apply to the FSB and other state agencies on the expiry of the 30 year period from the date of the information.

Thus the website *Rights in Russia* was able to comment *"Constitutional Court supports Memorial Society on access to archives."*[4] The head of the Foundation for Freedom of Information,[5] the advocate Ivan Pavlov, approved the Court's position: *"The Court's decision helps to bring about the declassification of socially significant documents. Until now the maximum period for classification was not observed completely. Now one can counterpose to this the Court's position. Our guardians of secrets may well come up with some other way of keeping everything in the secret depository. But today their arsenal has been cut back."*[6] The Constitutional Court, which frequently cites and relies on the ECHR, did not need to on this occasion.

Professor Bill Bowring, Chair, EHRAC International Steering Committee

## Notes

1. http://www.memo.ru/d/24.html
2. http://www.memo.ru/d/3409.html, with his photograph
3. No. 2226-O
4. http://hro.rightsinrussia.info/archive/foi/archives/memorial
5. http://www.svobodainfo.org/ru
6. Anna Pushkarskaya "The Constitutional Court refused the extension of state secrets. The FSB and Supreme Court ignored the procedure for declassification" Kommersant No4/P (5035) 14 January 2013 at http://www.kommersant.ru/doc/2104403

# Korobov & Others v Estonia

Prohibition of torture, inhuman or degrading treatment or punishment

**(No. 10195/08) 28.03.13 (ECHR: Judgment)**

## Facts

The case was brought by seven applicants, one of whom was a minor, who reside in Estonia and were part of a Russian speaking minority. They were arrested in April 2007 whilst in the vicinity of violent, mass demonstrations against the relocation of a monument commemorating the entry of the Soviet Red Army into Tallinn during the Second World War. The demonstrations, involving up to 8000 people, took place over 4 days in late April and degenerated into riots and clashes with the police during which, according to official sources, 1,160 people were arrested. The applicants alleged that they were unlawfully arrested and detained overnight during which the first, fourth, fifth and seventh applicants were subjected to ill treatment at the hands of the police, with injuries including abrasions, haematomas and a fractured forearm. The fourth and seventh applicants were convicted of public order offences and no proceedings were taken against the other applicants. The above four applicants alleged violations of Article 3 (prohibition of ill treatment), and ineffective investigations into their complaints and all applicants alleged violations of Article 5 (deprivation of liberty).

## Judgment

The ECtHR found the force used by law-enforcement officers against the fifth applicant (resulting in a broken arm) to be 'excessive' and therefore in violation of Article 3. However it found no violation of the substantive part of Article 3 with respect to the first, fourth and seventh applicants, taking into account the context of unprecedented scale of the public disorder and, in particular, the discrepancies between their accounts of the police brutality endured and the injuries sustained as documented in the medical evidence. The ECtHR nonetheless held that there had been a violation of the procedural aspect of Article 3 with respect to all four applicants on the basis that they presented arguable complaints of ill-treatment that required investigation, and that the authorities had made no attempts to verify their complaints. In the circumstances of the mass demonstrations and disorder the ECtHR could not conclude that the arrests of the applicants were arbitrary and unlawful, and held that the applicants had not exhausted the remedies available to them, nor had they raised convincing arguments as to the inadequacy of these remedies and therefore the Article 5(1) complaint was rejected. The first, fourth and seventh applicants were awarded 11,000 EUR each and the fifth applicant was awarded 14,000 EUR in non-pecuniary damages.

## Comment

In this case, despite clear evidence of four of the applicants' having sustained injuries, the ECtHR cautiously matched the description of the injuries sustained with the medical evidence and found that the medical evidence did not always support the descriptions and that the public order charges could account for some of the more minor injuries. The ECtHR found that raising a complaint with the Chancellor of Justice or the prosecutor's office was not sufficient to exhaust domestic remedies and it required the applicants to exhaust the administrative remedies or the complaints procedure within criminal proceedings.

# Okroshidze v Georgia

## A friendly settlement

**(Dec. No. 60596/09)**

On 11 December 2012, the European Court of Human Rights (ECtHR) accepted the terms of a friendly settlement between the applicants, Maya and Giorgi Okroshidze, and the Georgian Government in the case of *Okroshidze v Georgia*. The Georgian Government acknowledged that its domestic law had prevented the applicants (mother and child) from fully enjoying their rights under Article 8 of the European Convention on Human Rights (ECHR), as it had denied them the opportunity to rely on the results of a positive DNA test between the child and father to claim child maintenance. As well as paying the applicants damages, the Government agreed that the applicants were entitled to apply to reopen their claim in the domestic courts in order to establish paternity on the basis of the DNA test, and to claim child maintenance from the date they first initiated their claim in the domestic courts.

The settlement is a significant development, not only in securing the human rights of the individual applicants, but also for improving human rights standards across Georgia more generally, as Georgia was prompted to amend its civil laws on establishing paternity to bring it in line with ECHR standards. The settlement also reflects the advantages of the friendly settlement procedure which provides applicants and Governments an opportunity to enter into a dialogue to address human rights complaints adequately, without recourse to the ECtHR's adversarial proceedings. The applicants were represented by the Georgian Young Lawyers' Association (GYLA) and EHRAC.

### Facts

The two applicants were a mother and child of Georgian nationality. On 28 January 2008, the mother brought proceedings in the domestic courts against 'G.S-shvili', a man with whom she claims to have had a relationship since 2004, in order to establish the paternity of her child and obtain child maintenance. The Tbilisi City Court ordered that a 'DNA blood test' be carried out, the results of which established a 99.99% probability of G.S-shvili being the child's father. However, under the relevant Georgian law (Article 1190(3) of the Civil Code), the primary factors for establishing civil paternity were (i) circumstances which could prove a family-like cohabitation between the respondent and the mother of the child, (ii) having jointly run a household or (iii) the respondent's participation in the upbringing of the child. On 9 June 2008, the Tbilisi City Court therefore considered that biological maternity was an immaterial consideration for determining the applicants' eligibility for child maintenance, and dismissed the mother's claim as she was unable to prove the factual circumstances required by law. The decision of the City Court was upheld on appeal.

### Complaints

The applicants complained to the ECtHR under Articles 8 (*Right to respect for private and family life*), Article 13 (*Right to an effective remedy*), Article 14 (*Prohibition of discrimination*), Article 1 of Protocol No. 1 (*Protection of property*) and Article 1 of Protocol No. 12 (*General prohibition of discrimination*) of the Convention about the refusal by the domestic courts to accept the DNA results as a grounds for establishing civil paternity, and the denial of child maintenance.

### Terms of the friendly settlement

In a letter dated 26 October 2012, the Georgian Government accepted proposals by the applicants for a friendly-settlement of the matter. In particular, the Government acknowledged the deficiencies in the Civil Code which prevented the applicants from comprehensively exercising their rights under Article 8, stating that Article 1190 of the Civil Code had been amended to recognise *"the results (evidence) of a biological (genetic) or anthropological examination"* as the primary grounds for establishing civil paternity. Consequently, the applicants became entitled to apply for the reopening of the initial civil proceedings at the domestic level in order to have paternity established on the basis of the results of the DNA test, and child maintenance paid from the date of the institution of the domestic proceedings (i.e. from 28 January 2008). The applicants were awarded 3,000 EUR by the Government in damages.

The ECtHR agreed to strike out the case, but it has been transferred to the Committee of Ministers for supervision of its execution.

Awaz Raoof, lawyer

# Janowiec and Others v Russia

## An Intervention

This January EHRAC joined forces with the Russian NGO Memorial, and the Essex Transitional Justice Network as third party interveners in the Grand Chamber referral of the case of *Janowiec and Others v Russia* (Nos. 55508/07 and 29520/09) 16.04.12.[1]

This potentially groundbreaking case concerns the historic Katyn Massacre, in which over 21,000 Polish prisoners were executed without trial by Soviet forces in 1940 and buried in mass graves in the Katyn forest. The applicants are 15 relatives of 12 of the victims of the massacre. Relying in particular on Articles 2 (the right to life) and 3 (the prohibition on inhuman and degrading treatment) of the European Convention on Human Rights (ECHR) the applicants complained that the Russian authorities had failed to carry out an effective investigation into the deaths of their relatives.

EHRAC's interest was engaged because of the historic nature of the events in question, but also by the potential application of the obligation to investigate to particularly heinous crimes occurring not only prior to ratification, but to the existence of the ECHR itself.

In its Chamber Judgment of 16 April 2012, the European Court of Human Rights (ECtHR) held that it was not able to examine the merits of the applicants' complaint under Article 2, since Russia had ratified the ECHR 58 years after the event and most of the investigative steps had been taken prior to that date. The investigation began in 1990 and was discontinued in 2004 and that decision to discontinue has remained classified. The ECtHR concluded that there were no elements capable of providing a bridge between such a historical event and the recent post-ratification period. The ECtHR did however find a violation of Article 3 with respect to

10 of the applicants (as close relatives who had had personal contact with the victims) on the basis that Russia's response to the attempts by the victim's relatives to know the truth about their deaths amounted to inhuman treatment. The ECtHR noted that the reluctance of the Russian authorities to acknowledge the reality of the Katyn Massacre demonstrated a callous disregard for the applicants' concerns and a deliberate obfuscation of the circumstances of the Massacre. The ECtHR also found that Russia's continuous and unjustifiable refusal to submit a copy of its 2004 decision to discontinue the investigation breached its obligations under Article 38.

Judges Spielmann, Villiger and Nussberger, however, in a partly dissenting opinion argued that the ECtHR did have temporal jurisdiction over Article 2 in this case and that there was a procedural violation. They submitted that the gravity and magnitude of the war crimes in question, coupled with the attitude of the Russian authorities after the entry into force of the ECHR, warranted the application of exceptional circumstances in order to protect the underlying values of the ECHR, and therefore triggered a connection between the deaths and the entry into force of the ECHR in Russia.

The Grand Chamber *Intervention* by EHRAC and its partner NGOs focuses on three areas concerning the on-going obligation to investigate gross human rights violations and the right of relatives to know the truth about the circumstances of their relatives' deaths or disappearance, drawing on International Human Rights Law, International Humanitarian Law, Customary International Law and the case law of Regional Human Rights Systems. Specifically, it comprised a comparative analysis of the obligations of States under customary international law towards the victims of war crimes and/or crimes against humanity; an examination of relevant jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (both of which, as a result of the turbulent history of the region, have substantial case law on this issue); and the State practice of establishing truth commissions or similar investigative bodies in response to the commission of international crimes.

This is definitely a case to watch. In the meantime, the Grand Chamber hearing can be viewed online at: http://goo.gl/yiR8g

## Notes

1. Under Rule 44(3) of the Rules of Court

# CPT visits the North Caucasus

A delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the North Caucasus region of the Russian Federation between 27 April and 6 May 2011. The subsequent report detailing the findings of the visit was published on 24 January 2013, as requested by the Russian Government. The delegation visited the Republic of Dagestan, the Chechen Republic, and the Republic of North Ossetia-Alania and focussed on (1) the treatment of persons detained in law enforcement agencies and (2) reviewing the conditions of detention in the main pre-trial establishments.

## Law enforcement agencies

The CPT's report states that a "significant proportion" of the detained persons interviewed made allegations of ill treatment by law enforcement officers. This ill treatment was frequently of such a severity as to amount to torture. In a considerable number of cases, the medical evidence gathered was fully consistent with recent torture or other forms of severe ill treatment. The report provides individual cases of torture or severe ill treatment and includes accounts of the application of electric shock treatment, physical beatings and threats of rape.

The report highlights how investigators and judges fail to take the necessary action when they are made aware of cases of possible ill treatment, which the CPT finds "deeply disturbing" and noted that certain "high-level" individuals interviewed during the visit appeared to be in a "state of denial" over such continuing practices.

The report finds that safeguards against ill treatment (notification of custody, access to lawyer or doctor) continue to be problematic and previous recommendations remain to be implemented. Many detained persons interviewed by the delegation were represented by an *ex officio* lawyer and were prevented from accessing their own lawyers. Detained persons complained about the lack of impartiality of the *ex officio* lawyers. In the Republic of Dagestan, the delegation was further informed of cases of alleged physical ill treatment by police of female lawyers in order to prevent them from defending their clients in police custody. Access to a doctor continues to remain at the discretion of law enforcement officials despite the CPT's previous and current recommendation of guaranteeing access by law.

The report states that conditions of detention across the three regions varied from good to very poor. In particular, the delegation found the detention facilities at ORB-2 in Grozny "remained very poor" and recommended its immediate closure.

## Pre-trial establishments

The CPT delegation visited four pre-trial establishments across the three regions. The report states that the delegation did not receive any allegations of ill treatment of inmates by the staff, while staff-prisoner relations were "generally free of tension". A caveat was made in report, however, that some prisoners claimed that they had been warned beforehand by the staff not to make any complaints to the delegation. The CPT delegation noted that there were "glaring deficiencies" in relation to conditions of detention in one facility in North Ossetia-Alania, while the overall environment of another facility in the same region was described as "oppressive".

## Further steps

Appendix I of the report lists the CPT's recommendations, comments and requests for information from the Russian authorities. In particular, the CPT recommends that both the republican and federal authorities take resolute action to combat torture and other forms of ill treatment, including "delivering a clear and firm message of "zero tolerance" of ill-treatment to all members of law enforcement and security agencies". The CPT has requested that the Russian authorities respond to the report within three months, giving a full account of action taken to implement the CPT's recommendations as well as reactions to the comments and replies to the requests for information made.

Craig Hatcher, University of Zürich.

EHRAC European Human Rights Advocacy Centre

## About EHRAC

EHRAC is an independent apolitical organisation that stands alongside victims of human rights abuse in order to secure justice. Working in support of civil society organisations, we bring strategic cases to the European Court to challenge impunity for human rights violations. We raise awareness of violations and means of redress for victims. Each judgment we secure contributes to an objective account of human rights abuse that cannot be refuted.

## EHRAC Partnerships

EHRAC works in partnership with many NGOs, lawyers and individuals in Russia and the South Caucasus. Our work focuses on mentoring joint project lawyers to develop their professional skills and independence as litigators. To find out more about the organisations we work with, and how we work in partnership, visit www.mdx.ac.uk/ehrac.

## Call for new partners

EHRAC is seeking to develop partnerships with new organisations in the region. If you are litigating at the European Court and would like to discuss potential collaboration opportunities with EHRAC, please contact ehrac@mdx.ac.uk in English, Russian or Armenian.

## Internship Opportunities

EHRAC has in-house internship placements available throughout the year. To find out about the type of work our interns do, what opportunities are currently available and how to apply, please visit www.mdx.ac.uk/ehrac/intern.

## Contributions

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