

EHRAC

Bulletin



In partnership with Memorial Human Rights Centre (MHRC), the Slavic Centre for Law and Justice (SCLJ) and the Georgian Young Lawerys' Association (GYLA)

Editorial: adequacy of states' responses to ECtHR judgments

Statistics published recently by the European Court of Human Rights confirm that the number of cases pending before it continues to rise significantly. In 2006 50,500 new applications were lodged at the Court, which produced a total of 1,560 judgments and 28,300 other decisions. There are now 90,000 pending cases. By January 2007 there were more than 19,000 cases pending against the Russian Federation. These figures again emphasise the vital importance of improving and developing the effective implementation of human rights standards within each Council of Europe state.

This edition of the Bulletin therefore focuses on domestic implementation, by discussing, firstly, the adequacy of states'

responses to Strasbourg judgments. Beso Bokhashvili (Georgian Government agent's office) discusses the position in Georgia, in the light of the ten European Court judgments to date, arguing the need for an expansive approach by the state in order to tackle broader, systemic problems. Pavlo Pushkar (European Court Registry) analyses a new law introduced in Ukraine in 2006, which imposes specific obligations on state authorities in responding to a Strasbourg decision. He also calls for a more proactive approach by the domestic authorities in disseminating information about the Court's case-law. Kirill Koroteev (Memorial/EHRAC) discusses the differing ways in which European states have brought the

European Convention into force in their respective domestic legal systems, and the varying status of the Convention in domestic law, as a result. There is also a discussion of how the European Court has more recently shown willingness in its judgments to require states to take specific consequential steps: articles by Costas Paraskeva (London Metropolitan University), Dina Vedernikova (Interights) and Eleonora Davidyan (Memorial/EHRAC) consider, amongst other things, the Court's strategy of issuing 'pilot judgments' in cases evidencing broad, systemic human rights problems.

Philip Leach
Director, EHRAC

Enforcement and implementation of European Court judgments in Georgia

Besarion Bokhashvili, Representative of the Government of Georgia to the European Court of Human Rights

The enforcement and implementation of European Court judgments is a legally binding obligation upon contracting states.¹ To maintain standards of protection, it is essential that states fully comply with the final judgments of the European Court of Human Rights (ECtHR) in cases to which they are parties.² What measures must states take in order to achieve full compliance?

Three aspects of the term 'full compliance' can be observed: 1) payment of *just satisfaction* awarded by the Court under Art. 41 of the ECHR; 2) taking *individual measures* to ensure the violation has ceased and that the injured party, as far as is possible, is in the same situation they were prior to the violation; 3) adopting *general measures* to prevent

similar violations occurring or to put an end to continuing violations.³

Full compliance has raised numerous challenges in Georgia. Georgia has comparatively recently ratified the ECHR⁴ and the European Court has delivered only 10 judgments against it so far. Gaps in existing legislation and practice have been identified that require prompt action on behalf of state authorities. In order to be in full compliance, various measures have been carried out by Georgian authorities that address not only the individual cases, but also tackle the more general problems that underlie the judgments.

Payment of just satisfaction

Although the sums awarded to applicants in the 10 cases were substantial, the Georgian authorities have managed to pay just satisfaction on time. The procedure for awarding just

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satisfaction has been prescribed under the 'Law on Execution Proceedings of Georgia'. Under Art. 21 Para. 5 of the statute, the Minister of Justice issues an order on execution of the final judgment of the ECtHR within two weeks of a judgment becoming final. Subsequently, requests for a wire transfer are sent to the Ministry of Finance of Georgia and then applicants are invited to obtain their monetary awards.

Individual measures

Contracting states are under an obligation to ensure that the violation has ceased and that the injured party, as far as is possible, is in the same situation they were prior to the violation. In order to achieve this, the Government has prepared draft amendments to the Criminal and Civil Procedural Codes. Under the draft amendments, the findings of the Strasbourg supervisory body serve as the legal basis for reopening proceedings at a national level. However, the right to request the reopening of proceedings is not absolute; two criteria apply to the admissibility stage: 1) that the violation of the ECHR can only be fully remedied through reopening and re-examining the case at a national level; and 2) that by reopening the proceedings, the applicant will not be put in a worse situation. The competent authority to deal with admissibility is the Grand Chamber of the Supreme Court of Georgia. However, if the violation of the ECHR was directly caused by legislation in force, then the Constitutional Court of Georgia is the body to be addressed. The Constitutional Court will examine the compliance of the impugned legislation with the rights and freedoms enshrined in the second chapter of the Georgian Constitution.⁵ The time limit for submitting requests for reopening proceedings has been set at six months from the date when an ECtHR judgment becomes final.

General measures

Several ECtHR judgments against Georgia have identified both practical and legal problems. To avoid clone cases being lodged with the ECtHR, the Georgian authorities have taken action to fill legislative gaps and tackle the

practical problems.

The first case to demonstrate a legislative gap was *Shamayev and 12 Others v Georgia and the Russian Federation*.⁶ The case concerned the extradition of Chechens to the Russian Federation following their arrest in Georgia. According to legislation existing at the time, the decision on extradition was made by the Prosecutor General of Georgia who did not have any obligation to inform the detained about the decision on their extradition. Simultaneously, the Criminal Procedural Code of Georgia did not give the detainees a right to challenge the lawfulness of the decision. There was a general Article in the Criminal Procedural Code (Art. 242) but the European Court remained unpersuaded that this allowed a person to effectively challenge an extradition order. As soon as the legislative problem became apparent the Chamber of Criminal Cases of the Supreme Court of Georgia through its judgment in *Abdulhamit Aliev*⁷ established new practices to be followed in extradition cases. The Supreme Court of Georgia stated:

"Notwithstanding the absence of relevant provisions in the procedural legislation of Georgia, concerning the judicial procedure pending extradition ... relying on Article 13 of the ECHR, the Supreme Court has to grant to Mr. Aliev the possibility of defence through the judicial review of the decision on extradition.

...the Chamber considers that the complaint of Mr. Aliev, on the basis of the analogy of the law, has to be examined by the Court."

Following the delivery of the judgment of the European Court, amendments were then introduced to Criminal Procedural Legislation in Georgia. The amendments granted the right to challenge extradition decisions before the domestic courts.

The second case which required general measures concerned the failure of Georgian authorities to execute judgments delivered by its domestic courts.⁸ Following the judgment by the European Court, relevant sums were paid to the individual applicant on time. The Government is currently in the process of implementing general measures to establish an effective remedy for other

persons who were awarded sums by national courts, but who have not yet received them. What measures have been taken so far to tackle the problem?

Firstly, the relevant sums have already been included in the 2007 budget of Georgia to cover state debt. Bearing in mind the amount of debt in relation to such cases, it is obvious that all those affected will not be satisfied.

Secondly, a set of criteria has been created to establish who should receive their payment and when. The criteria include the time when the sum was awarded to a person, the amount of the sum and the circumstances of the person in question.

Thirdly, new amendments are proposed that will grant people the right to challenge the non-execution of judgments and request damages for delays. Although individually these remedies may not be satisfactory, collectively they will address the problem.

Conclusion

Proper implementation and execution of European Court judgments is one of the most important factors for the protection of human rights guaranteed under the European Convention. Despite relatively recent ratification of the ECHR and lack of extensive practice, the Georgian authorities have acknowledged that payment of just satisfaction alone is not sufficient to achieve full compliance. The more rapidly general measures are taken by Georgia to remedy the legislative or practical problems highlighted in judgments the fewer repeat applications there will be.

1 Art. 46, ECHR.

2 Parliamentary Assembly of the Council of Europe, Resolution 1226 (2000).

3 Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 10 May 2006, Rule 6(2).

4 On 20 May 1999 the instruments of ratification were deposited with the Secretary General of the Council of Europe.

5 All rights and freedoms in the ECHR are guaranteed under this Chapter.

6 (No. 36378/02), 12/4/05.

7 Judgment of 28 October 2002.

8 *Amat-G Ltd and Mebagishvili v. Georgia* (No. 2507/03), 27/9/05.

Application and implementation of the European Convention on Human Rights in Ukraine: recent developments¹

Pavlo Pushkar, Senior Lawyer, Registry of the European Court of Human Rights, PhD²

Ukraine has been a member of the Council of Europe since 1995. Two years later the Ukrainian Parliament ratified the European Convention on Human Rights (the Convention), which entered into force in respect of Ukraine on 11 September 1997.³ With ratification Ukraine recognised the compulsory jurisdiction of the European Court of Human Rights (the Court) over applications lodged against Ukraine, based on the right of individual petition.

From 1 November 1998 to 31 December 2006, approximately 18,860 applications against Ukraine were lodged with the Court. Of these, 8,709 applications were declared inadmissible, 953 were communicated to the respondent Government, 310 were declared admissible and 260 judgments were adopted. In comparison, in 2005 and 2006 alone the Court adopted 241 judgments against Ukraine. In 2006 there were 3,906 applications lodged against Ukraine, 1,076 applications declared inadmissible and 313 applications were communicated to the Government of Ukraine for its observations. As of 1 January 2007, there were 6,800 applications pending against Ukraine, which constituted 7.6% of the Court's workload.

Three 'blind spots' of the Ukrainian legal system account for this: the failure to enforce judicial decisions; the lack of judicial examination of cases within 'a reasonable time'; and attempts to review final and binding judgments that are in fact *res judicata*.

These three areas of concern have already been extensively examined by the Court. However, at the moment there is no indication that the situation in Ukraine is likely to change. Firstly, the judicial reforms initiated after Ukraine's declaration of independence in 1991 and the adoption of the 1996 constitution, expressly setting out the principles of the functioning of the judicial system,

have never been completed. The judicial system also still has serious structural shortcomings,⁴ and is not trusted by the public. Secondly, there is the lack of desire of the State authorities to reform the system of enforcement of judgments and there have been recent legislative attempts to create more impediments to the enforcement of judgments against State-owned/controlled entities. Thirdly, there have been recent attempts to amend procedural codes⁵ in order to revive procedural possibilities for the courts, senior judges or prosecutors to review *res judicata* which may eventually lead to unreasonably long proceedings in civil, criminal, commercial and administrative cases.

One important recent development in the application and implementation of the Convention in Ukraine has been the adoption in 2006 by the Ukrainian Parliament of the 'Law on the Enforcement of Judgments and Application of Case-Law of the European Court of Human Rights' (the Act),⁶ setting out the procedure for the enforcement of judgments. This may be criticised on a number of levels. Firstly, it declares the case-law of the Court to be a source of Ukrainian law, although the Ukrainian legal system is a classical continental legal system, which does not recognise principles of *stare decisis*. It also provides a clumsy definition of 'an enforceable judgment of the Court', which could lead to problems in enforcement of judgments or payment of compensation on the basis of a strike-out decision. The Court's case-law may be applied directly in the original or in translation, but this may not be enforceable as few judges or lawyers who apply the Convention are able to understand the official languages of the Court. However, the Act does establish a procedure for publication and dissemination of judgments, and a system of bodies responsible for the enforcement of the Court's judgments and their State funding. It also widens the scope of jurisdiction of the Government's Agent of the (European) Court and their status in the domestic executive. As a result,

regardless of the considerable criticism that the Act may attract, it can still be regarded as a significant achievement of the Ukrainian Parliament.

As regards the enforcement of judgments, the Ukrainian government generally complies with the individual measures imposed by the Court's judgments⁷ and specifically with the payment of compensation for pecuniary and non-pecuniary damage. The State has also become more flexible about compensation for violations of the Convention and reaching settlements in cases involving established case-law.⁸ However, uncertainty remains about some measures, including those involving amendments to legislation, and reform of bodies and institutions subjected to review by the Court's judgments. None of these amendments were officially recognised as emanating from the European Court's judicial activities.⁹ However, under the 2006 Act, drafting amendments to legislation is the responsibility of the Office of the Government's Agent of the Court and the Ministry of Justice.

One recent example of ignorance as to how judgments should be enforced was *Melnychenko v Ukraine*¹⁰ concerning the applicant's inclusion in the Socialist Party's list of candidates for the 2002 elections after the 2005 judgment of the European Court. The decisions of the Central Electoral Commission on this point showed lack of even a basic understanding of the Court's role in the supervision of Ukraine's compliance with the Convention and its interaction with the Ukrainian domestic legal system. It also showed problems that could arise in the enforcement of the Court's judgments. Fortunately, these mistakes have now been rectified by the administrative chamber of the Supreme Court of Ukraine, which has clearly held that Ukraine is to comply with its obligations under Art. 46(1) of the Convention and thus enforce final judgments given against it.

The procedure for the enforcement of a judgment under the 2006 Act is clear and is described in Art. 1 of the Act. However, it seems that the Act

provides for no systematic possibility for review of legislative problems or for any way of avoiding judgments on issues already found to be contrary to the Convention in other States. The Ukrainian Parliament does not seem to consider, and is not properly informed about, recent judgments against Ukraine and the problems they raise. Thus, there is still a problem of the dissemination of information concerning the Convention among decision-makers and lobbyists in Ukraine.

Currently there are too many domestic

1 P. Pushkar. *The Reform of the System of Criminal Justice in Ukraine: The Influence of the European Convention of Human Rights*. European Journal of Crime, Criminal Law and Criminal Justice, Vol. 11/ 2, 195–214, 2003.

2 The views expressed in this article are the personal views of the author and are not the official position of the Registry of the European Court of Human Rights.

3 'Law on the Ratification of the European Convention on Human Rights' - 17 July 1997.

problems to ensure compliance with the Convention at the domestic level. There is a need for systematic analytical work and political desire at this level to ensure that judgments are fully enforced and complied with. The Ukrainian authorities need to ensure that no cases like those that have already been decided appear before the Court and that effective and accessible domestic remedies exist to prevent possible violations of the Convention. This means not only payment of compensation awarded by the Court in just satisfaction claims, but also

4 See *Salov v. Ukraine*, (No. 65518/01) 6/9/05, §§ 80-86, regarding principles of independence and impartiality of the judiciary, appointment of judges etc.

5 See, for instance, Chapter 3 of the Code of Administrative Justice of Ukraine ('Review of cases in exceptional circumstances').

6 Signed by the President of Ukraine on 23 February 2006 and entered into force on 30 March 2006.

7 In cases concerning non-enforcement of judgments the Court can order the State to enforce the

serious attempts to enforce the required measures in cases examined by the Court. This can be achieved by a more proactive approach by the domestic authorities aimed at disseminating information about the Court's case-law, preventive work on the review of legislation that may not comply with the Convention, and better training of those who directly apply the Convention at the domestic level. If these goals are attained, both the domestic and international systems of human rights protection will have reached their ultimate goals.

judgment at issue. See, for instance, the operative part of the judgment in the case of *Nosal v. Ukraine* (No. 18378/03) 29/11/05.

8 See *Lee v. Ukraine* (No. 6269/02) dec. 6/11/06.

9 PACE Recommendation no. 1764 (2006) 2 October 2006 and PACE Resolution (2006) on the Implementation of judgments of the European Court of Human Rights adopted on 2 October 2006.

10 *Melnychenko v. Ukraine* (No. 17707/02) 19/10/04.

The European Court's new 'pilot judgment' procedure and the potential effects of Protocol 14

Dina Vedernikova, Lawyer, INTERIGHTS Europe Programme¹

The pilot judgment procedure is relatively new for the European Court of Human Rights (the Court). It was envisaged, along with other measures, by the Steering Committee for Human Rights of the Council of Europe in its report of 9 April 2003 'Guaranteeing the Long Term Effectiveness of the Control System of the European Convention on Human Rights', to reduce the significant workload which repetitive cases represent for the Court. The Committee proposed that where a case exposes a "structural or general shortcoming in the law or the practice of the State which may lead to a large number of complaints before the Court concerning the same State party", the Court should deliver a "pilot judgment" which would "determine the point of law involved from the angle of the Convention in a way which would give sufficient guiding elements to allow for the determination of the merits of subsequent complaints concerning the same point of law."

A year later, on 12 May 2004, when approving 'Protocol 14 to the Convention

for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention' (hereafter 'Protocol 14'), the Committee of Ministers (the CoM) also adopted a Resolution, Res (2004) 3, which invited the Court to identify in its judgments those cases which revealed the existence of structural or systemic problems in the country concerned, especially if those problems were, or could become, the source of a large number of similar applications, in order to assist that country in finding an appropriate solution to the problem as a whole and the CoM in securing the implementation of the judgment concerned.

The first pilot judgment was delivered by the Court in *Broniowski v Poland* (No. 31443/96, 22/06/04), which found that the Polish authorities had failed to respect the property rights of nearly 80,000 nationals who had been repatriated from eastern territories after the Second World War (see further the article below by Eleonora Davidyan). The Court concluded that the facts of the case disclosed the existence within the Polish legal order of a shortcoming, as a consequence of which

a whole class of individuals had been, or were still, denied the peaceful enjoyment of their possessions. It also found that the deficiencies in national law and practice identified in the applicant's individual case might give rise to numerous subsequent well-founded applications.

The next pilot judgment was given in *Xenides-Arestis v Turkey* (No. 46347/99, 22/12/05), where the Court found violations of Art. 8 (respect for private and family life) and Art. 1 of Protocol 1 (protection of property) in respect of persons (mainly Greek Cypriots) who have been denied access to their homes located in northern Cyprus since the Turkish military occupation of 1974. The Court noted that 1,400 similar cases were pending before it.

The most recent example of the Court's application of this procedure is its judgment in *Hutten-Czapska v Poland* (No. 35014/97, 19/06/06), where Poland was found in violation of Art. 1 of Protocol 1 due to the malfunctioning of Polish housing legislation which imposed on individual landlords restrictions on increases in rent for their dwellings, making it impossible for them to receive

rent reasonably commensurate with the general costs of property maintenance. It was established that such a defective rent-control scheme might potentially affect 100,000 landlords and from 600,000 to 900,000 tenants.

In all these above-mentioned judgments the Court adjourned its consideration of current and future applications which raise the same issues as were decided in these cases.

Although Protocol 14 does not contain an express concept of the pilot judgment procedure, it is considered to be in line with the reforms introduced by this Protocol and there are indications of the Court's willingness and ability to apply it more extensively in the future. Furthermore, the Court was urged to do so. As indicated in the report of the Group of Wise Persons² to the CoM of 10 November 2006: "the Group encourages the Court to make the fullest possible use of the 'pilot judgment' procedure."

One of the most pressing questions that arises with the introduction of this new mechanism is how to effectively implement such judgments. Unlike the Court's common practice, in the above cases it did require, albeit in very general terms, the Governments to take general measures in addition to compensation awarded to the applicants. In *Broniowski v Poland*, the Court stated that "the respondent State must, through appropriate legal measures and administrative practice, secure the implementation of the property right in question in respect of the remaining [...] claimants or provide them with equivalent

redress in lieu, in accordance with the principles of protection of property rights under Art. 1 of Protocol No. 1". The concluding parts of the *Xenides-Arestis v Turkey* and *Hutten-Czapska v Poland* judgments contain similar wording, requiring the corresponding States to introduce certain corresponding measures. In the former, the Court also laid down a three-month time limit for such compliance.

Some may argue that this new practice of the Court giving fairly detailed indications of the general measures to be taken, runs the risk of contradicting the principle that States should be free to choose the means of executing judgments and also lacks a clear legal basis. Obviously, by applying the pilot judgment procedure, the Court is making a step forward in interpreting Art. 46 of the Convention, which until recently had been understood as granting an exclusive right to the state to choose the requisite general measures, subject to supervision by the Committee of Ministers. It may well be the case that in future, as the practice of the pilot judgment procedure develops, it should be laid down in the Rules of the Court.

In accordance with the newly revised 'Rules for the Supervision of the Execution of Judgments' of 10 May 2006 [CM (2006) 90], the CoM will give priority to the supervision of judgments in which the Court has identified a systemic problem (Rule 4, paragraph 1). Undoubtedly, it is an absolutely justified measure, given the great number of persons whose interests

are affected by each pilot judgment. It is of paramount importance to provide those applicants whose cases (raising the same problems as decided in the pilot judgment) have been adjourned by the Court, with procedural guarantees as to the State's prompt and diligent compliance with the general measures indicated. Such guarantees could include establishing appropriate time limits for implementing the pilot judgments, and a requirement for the respondent State to produce a comprehensive plan of action and timetable for the corresponding reforms. This will also require comprehensive monitoring by the Council of Europe of the impact of the pilot judgments, as well as of the steps taken by the CoM and by the respondent State towards their implementation.

To conclude, it is difficult to say, at the moment, if the pilot judgment procedure will contribute significantly towards resolving the Court's workload crisis and, more importantly, not at the expense of the individual applicants. Its success very much depends on the overall implementation of the new mechanisms, introduced by Protocol 14 and developed in the relevant CoM Resolutions.

¹ The views expressed in this article do not necessarily reflect those of INTERIGHTS.

² The Group of Wise Persons was set up by the heads of the Council of Europe member states at the meeting in Warsaw on 16 and 17 May 2005 to consider the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol 14. Report of the Group of Wise Persons to the Committee of Ministers (2006) CM(2006)203, para. 140.

Specific orders given by the European Court of Human Rights to states on how to execute its judgments

Costas Paraskeva, LL.M., Advocate (Cyprus), Ph.D Candidate at the Human Rights & Social Justice Research Institute, London Metropolitan University

Judgments of the European Court of Human Rights (the Court) are "essentially declaratory in nature, and leave to the state concerned the choice of the means to be used in its domestic legal system for performance of its obligation" to abide by the judgment.¹ The Court has not considered itself competent to make recommendations as to which

steps should be taken to remedy the consequences of a violation of the European Convention on Human Rights (the Convention)² and had always abstained from making any consequential orders or declaratory statements, arguing that it falls to the Committee of Ministers to supervise the execution of its judgments.³

The Court did not have the power to order the respondent State to take specific measures in order to remedy the violation, unlike the Inter-American Court of Human Rights which, pursuant to Art. 63§1 of the American Convention on

Human Rights, "may rule, if appropriate, that the consequences of the measure or situation that constituted the breach of [a provision of the American Convention] be remedied".

In numerous cases successful applicants have asked the Court to direct the respondent state to introduce arguably necessary legislative amendments so as to bring into conformity with the Convention the national law which was found to have been at the source of a violation.⁴ Each time the Court categorically replied that the Convention

did not empower it to order the respondent state to alter its legislation.⁵ In *Soering v the United Kingdom*, the applicant submitted that just satisfaction of his claims would be achieved by effective enforcement of the Court's ruling and he invited the Court to give directions in relation to the operation of its judgment to the respondent government. The Court responded that it was not empowered under the Convention to give directions of the kind requested by the applicant: "By virtue of Article 54 [now Article 46], the responsibility for supervising execution of the Court's judgments rests with the Committee of Ministers of the Council of Europe."⁶

The absence of an injunctive power on the part of the Court has often been criticised by academics⁷ and by the Parliamentary Assembly of the Council of Europe as not being conducive to the proper and rapid execution of judgments.⁸ Gradually the Court has itself assumed more responsibility for the proper execution of its judgments, by giving indications as to what the best remedy would be, or by clearly giving orders for reparation.

There were some indications of developments in the Court's approach in earlier judgments such as *Iatridis v Greece*, concerning the withdrawal of a cinema license, where the Court recommended that the best course of action would be to give the applicant a new cinema license.⁹ However, the Court has never directly pronounced such an order in the operative part of the judgment.¹⁰ In the case of *Papamichalopoulos and others v Greece* the Court for the first time offered the respondent Government an

alternative: either to make *restitutio in integrum* or to pay compensation for the pecuniary damage, within six months. This was a "first serious assault on the doctrine that the [Court] has no power to issue directions to the states in respect of the execution of its judgments".¹¹

Subsequently, the Court has, in a number of property cases, held that the respondent state was to return to the applicant within a period from three to six months, the property concerned.¹² However, it almost always left open an alternative for the state in that it ordered that, failing restitution, a fixed sum in respect of pecuniary damage was to be paid to the applicant by way of just satisfaction.

Since 23 October 2003, the Court has indicated in more than 60 cases against Turkey¹³ (in which the applicants had been convicted by a security court, which was found not to be independent and impartial within the meaning of Art. 6 of the Convention) what the respondent state must do in order to comply with the judgment. For example, in *Alfatli v Turkey* the Court stated, in relation to Art. 41 that "in principle, the most appropriate form of relief would be to ensure the applicant in due course a retrial by an independent and impartial tribunal".¹⁴

More precise indications were recently given in the case of *Assanidze v Georgia* where the Grand Chamber of the Court ordered for the first time an applicant's release at the earliest possible date, in addition to the payment of just satisfaction for pecuniary damage. The Court held that, by its very nature, the violation found (the continued deprivation of liberty despite the existence

of a court order for release) did not leave any real choice as to the measures required to remedy it, in contrast to the usual discretion a State enjoys in these matters.¹⁵ In *Ilascu and others v Moldova and Russia*, the Court ordered the release of the arbitrarily detained applicants and held that "any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Art. 5 found by the Court and a breach of the respondent States' obligation under Art. 46 §1 of the Convention to abide by the Court's judgment".¹⁶ Moreover, the Court stated that "the respondent States are to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release".¹⁷

Judge Ress is convinced that the Court rightly considers that it has the inherent power to give such precise orders when the respondent state clearly has no discretion in the relevant case.¹⁸ According to Steven Greer there are three particular advantages to the Court being more specific about the kind of systemic action required by national authorities: compliance with the judgment is less open to political negotiation in the Committee of Ministers; it is easier to monitor objectively both by the Committee and by other bodies such as NGOs and other domestic human rights agencies; and a failure by relevant domestic public authorities to comply effectively is, in principle, easier to enforce by both the original litigant, and others, through the national legal process as an authoritatively confirmed Convention violation.¹⁹

1 *Marckx v Belgium* (No. 6833/74), 13/6/79, Para. 58.

2 Barkhuysen, T. & Van Emmerik, M., L., "Improving the Implementation of Strasbourg and Geneva Decisions in the Dutch Legal Order: Reopening of Closed Cases or Claims of Damages Against the State" in, T., Christou & J., Raymond (eds) *Court Remedies and Execution of Judgments*, The British Institute of International and Comparative Law, 2005, p.7.

3 Polakiewicz, J., "The Execution of Judgments of the Court", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.57.

4 Rysdsal, R., "The Enforcement System Set Up Under the Convention", eds Bulterman, M., K., & Kuijter, M., "Compliance With Judgments of International Courts", The Hague-Boston-London: Nijhoff, 1996, p. 50.

5 See *Pelladoah v The Netherlands* (No. 16737/90) 22/9/94.

6 *Soering v The United Kingdom* (No. 14038/88) 7/7/89 para.25.

7 See Cassese, A., *International Law* (Oxford University Press, 2002), pp.366-367; Clayton, R., and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, 2000), p.1554.

8 Lambert-Abdelgawad, E., "The Execution of Judgments of the Court", Human Rights Files No.19, 2003, p.7.

9 *Iatridis v Greece* (No. 31107/96) 19/10/00, para.35.

10 Ress, G., "The Effect of Decisions and Judgments of the Court in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.372.

11 Lambert-Abdelgawad, E., "The Execution of Judgments of the Court", Human Rights Files No.19, 2003, p.27.

12 See *Brumarescu v Romania* (No. 28342/95) 28/10/99.

13 Vandenhole, W., "Execution of Judgments" in Lemmens, P., & Vandenhole, W., (eds) "*Protocol No.14 and the Reform of the Court*", Intersentia, 2005, p.109.

14 See *Alfatli v Turkey* (No. 32984/96) 30/10/03, Para. 52.

15 *Assanidze v Georgia* (No. 71503/01) 8/4/04, Para. 202-204 and operative Para. 14(a).

16 *Ilascu and others v Moldova and Russia* (No. 48787/99) 8/7/04, Para. 490.

17 *Ibid*, operative Para. 22.

18 Ress, G., "The Effect of Decisions and Judgments of the Court in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.373.

19 Greer, S., "The Convention, Achievements, Problems and Prospects", Cambridge University Press, 2006, p.160.

Violations of the ECHR in the Chechen Republic: Russia's compliance with the European Court's judgments

The above memorandum was prepared by the Committee of Ministers' secretariat to assist the Committee of Ministers' supervision of the execution of three cases against the Russian Federation- *Isayeva v Russia* (57950/00, 24/2/05), *Isayeva, Yusupova and Bazayeva v Russia* (57947/00, 24/2/05) and *Khashiyev and Akayeva v Russia* (57942/00, 24/2/05). Judgments were handed down in 2005. The memorandum was issued in June 2006, but only declassified in October 2006.

While the memorandum welcomes several of the steps taken by the Russian authorities, the Committee raises a number of general measures that need to be satisfied. The Committee welcomed orders for new investigations to be conducted into all three cases and expects further information on progress to be provided as the investigations develop, noting that the progress and results of the investigations would provide useful indications of the effectiveness of newly introduced domestic procedures (such as

the new Code of Criminal Procedure of 2002 and subsequent rules).

As regards general measures, there were three areas of specific concern. Firstly, the Committee has encouraged the Russian Federation to improve the legal and regulatory framework governing the activities of the security services. The Committee welcomed information regarding the legal framework provided by the authorities, but required further information on the scope and effectiveness of these laws. Furthermore, the Committee recommended that measures be taken to ensure full respect for the European Convention in the context of security operations.

Secondly, the Russian Federation was required to conduct awareness-raising and training activities for members of the security forces. The authorities stated that European Court judgments were being widely disseminated and a new training manual on human rights and international humanitarian law

was being prepared. The Committee requested that it be provided with copies of these materials. Similarly, the Committee required further details on the training courses to be provided in order to assess their usefulness.

Finally, the authorities were required to improve domestic remedies in cases of abuse. While the Committee noted that action had been taken to amend existing legal remedies, including the establishment of inter-agency working groups to investigate abuses and the development of a register of kidnapped or 'disappeared' persons, it was felt that not enough had been done to provide compensation to the victims or, more importantly, to ensure that investigations were sufficient to identify and punish those responsible for violations. The Committee requested further information on both of these issues as well as statistics detailing the numbers of criminal cases brought against officials.

A full copy of the memorandum is available at www.coe.int/t/cm.

The interpretation of Constitutional Rights in accordance with the European Convention on Human Rights

Kirill Koroteev, EHRAC-Memorial Case Consultant

In the course of the Warsaw Summit the Heads of State and Government of the Member States of the Council of Europe undertook to ensure that at the national level there are appropriate and effective mechanisms in all member states for verifying the compatibility of legislation and administrative practice with the European Convention on Human Rights (the Convention).¹

The two preconditions to the implementation of this obligation are the interpretation of national legislation (including the Constitution, if there is one in the domestic legal system concerned²) in accordance with the Convention, as well as the interpretation of the Convention by the national courts in accordance with the interpretation

given by the European Court of Human Rights.

The Convention itself does not oblige the contracting parties to make it part of their legal systems and, *a fortiori*, does not provide for a specific place for itself in the hierarchy of domestic norms. As the method in which each state party to the Convention has incorporated it into their domestic legal system has differed, the status of the Convention in domestic law varies from state to state, which accordingly influences its interpretation by the national courts.

In Austria the Convention is a part of the Federal Constitution and Art. 10(2) of the Spanish Constitution imposes an obligation to interpret constitutional rights in accordance with international agreements on the matter.

However, in other countries the

situation is more complicated and interpreting constitutional rights in conformity with the Convention requires specific justification. Thus, in Germany, where the Convention is an ordinary federal law, the Federal Constitutional Court has held that in interpreting the Basic Law, the content and state of development of the Convention are also to be taken into consideration, insofar as this does not lead to a restriction or derogation of basic-rights protection under the Basic Law, an effect that even the Convention itself seeks to rule out.³

In France the Convention has a place above ordinary laws, but below the Constitution in the domestic hierarchy of norms. Consequently, the Constitutional Council has held that it is not bound by the Convention and will not verify the conformity of laws

with it.⁴ However, on several occasions it has read the *Declaration of the Rights of Man and of the Citizen* of 1789 (which is a French constitutional instrument) in the same terms as the Strasbourg Court reads the relevant Convention articles. In particular, the French Constitutional Council has developed the constitutional principle of legal certainty with references to the Declaration of 1789, but the substance of the principle is the same as that found, for example, in the *Sunday Times* or *Kruslin* judgments.⁵

In Russia, where the Convention has the same status as in France, although the Constitutional Court often makes reference to the Convention, the question whether it is bound by the European Court's interpretation of the Convention, when interpreting constitutional rights, remains open. Article 17 of the Constitution, which provides that human rights should be guaranteed in accordance with the Constitution and universally accepted principles and norms of international law,⁶ makes no reference to international treaties. In *I.V. Bogdanov and others*⁷ the Constitutional Court reaffirmed that legislative provisions should be interpreted in accordance with the Convention and that judicial decisions must comply with it. Since the Constitutional Court made no reservations as to the types of judicial decisions that should comply with the Convention, it is possible to conclude that it is bound by the interpretation

of the Convention by the European Court. However, this does not prevent the Constitutional Court from handing down decisions manifestly incompatible with the Convention.⁸

It is the Supreme Court of the Russian Federation which has been more exigent in interpreting constitutional rights in conformity with the Convention. In its judgment in the case of *Trade Union of Police of Moscow*⁹ it read the constitutional prohibition of forced labour in the same sense as in Art. 4 of the Convention.

In the author's opinion the interpretation of constitutional rights in conformity with the Convention, which is now a matter of national judges' will and the 'dialogue of judges' for the most part, should be grounded on the legal basis that since Constitutional and Convention rights are expressed in the same way, they should have the same interpretation.

Nevertheless, national courts should go further to establish what is the correct manner of interpretation of the Convention. The rules to that effect provided by Section 2 of the Human Rights Act 1998 are extremely helpful for domestic judges (not necessarily just in the United Kingdom, as they reflect the functioning of the Convention in general) in establishing the actual meaning of the Convention in the light of the Strasbourg Court's case-law. According to section 2, judges should

take into account any relevant judgment, decision or opinion of the European Court, report and admissibility decision of the former European Commission of Human Rights or decision of the Committee of Ministers on the merits of cases not referred to the Court under former Art. 46 of the Convention. This provision establishes a hierarchy of sources: thus, the judgments of the European Court carry greater weight than the decisions of the Commission. It also calls the domestic judges to take into account, that is, examine, case by case, the relevance of the Convention case-law as the Strasbourg judgments may be given on different facts or indeed whether the domestic courts should go further than the European Court in human rights protection relying on the 'living instrument' doctrine.¹⁰

In sum, it is submitted that the Convention may be effective in domestic legal orders when the courts interpret constitutional rights in accordance with the Convention and give the Convention the same sense as the European Court of Human Rights. If in finding a solution to the first issue every court should find the justification for the interpretation at issue from within its own constitutional system, the second issue is the same for every national court, so the rules on dealing with the Strasbourg case-law set out in the Human Rights Act 1998 may prove relevant outside the British Isles.

1 Action Plan, CM(2005)80, 17 May 2005.

2 For this formal reason the British incorporation of the Convention rights by the Human Rights Act 1998 is not considered in this article dealing with the justification of the possibility of the interpretation of constitutional rights in conformity with the Convention.

3 BverfG, 2 BvR 1226/83 et al., 25.12.1987, *EuGRZ* 1987.449-455.

4 Cons. const. français, n° 75-54 DC, 15.01.1975, *Journal officiel de la République française* 16.01.1975.

5 Cons. const. français, n° 99-421 DC, 16.12.1999, *Journal officiel de la République française* 22.12.1999.

6 Of which Common Article 3 to the Geneva Convention is perhaps the only provision dealing with human rights.

7 25.01.2001, no. 1-P, (2001) 7 SZRF 700.

8 See, e.g., *Commissioner for Human Rights, PTK "Sodeystvie", AO "Kareliya"*, 11.05.2005, no. 5-P, (2005) 22 SZRF 2194.

9 No. GKPI 00-1195, 16.11.2000, *Bulletin VS RF* 2001-7. However, the application of prohibition

of forced labour by the Russian Supreme Court in the present case was manifestly incorrect: it struck down the ministerial instruction permitting to move a policeman from one place of work to another without his consent.

10 For a detailed discussion of the original meaning of the 'take into account clause' see *Human Rights Law and Practice*, eds. Lord LESTER OF HERNE HILL QC and D. PANNICK QC, L., 2003, pp. 31-32; for a critical review of recent British case-law see R. CLAYTON, "Human Rights Act Six Years On: Where Are We Now", (2007) 1 *EHRLR* 16-20.

Potential ECHR Applicants:

If you think your human rights have been violated or if you are advising someone in such a position, and you would like advice about bringing a case before

the European Court of Human Rights, EHRAC may be able to assist. Please email or write to us; our contact information is on the last page.

HUMAN RIGHTS CASES

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

EHRAC-Memorial cases

Kaplanova v Russia
 (No. 7653/02), 24/10/2006
 (ECHR: Admissibility)
Disappearance

The applicant and her family lived in Grozny.

On 12 May 2001 the applicant's son Isa Kaplanov and his wife, the applicant's son-in-law, Ruslan Sadulayev, the applicant's daughter and their neighbour Movsar Musitov, who had come to visit them, were at home.

At about 10am a group of approximately 20 federal servicemen arrived at the house, all wearing masks except for the two officers in command.

The servicemen broke down the door and searched the house, without presenting any documents to justify their actions. They said to the applicant's daughter that they would check the identities of Kaplanov, Sadulayev and Musitov and then release them. The servicemen then put the three men in their vehicles and drove off in the direction of the centre of Grozny.

According to Musitov, the three men were taken to the Department of the Interior of Grozny Staropromyslovskiy VOVD and interrogated. The interrogators did not disclose which public bodies they represented. The men were told that they had been detained for insulting federal servicemen.

On 13 May 2001, Musitov was released, and returned home. Kaplanov and Sadulayev remain missing.

Complaints

The applicant complained under Art. 2 of the Convention of the violation of the right to life of her son, Kaplanov, and her son-in-law, Sadulayev. The applicant also claimed that the provisions of Art. 5 of the Convention, relating to the lawfulness of detention, were violated. The applicant further alleged that there were no effective remedies in respect of the above violations of her rights, contrary to Art. 13 of the Convention and that the Government's refusal to disclose the file from the domestic criminal proceedings was in breach of Arts. 34 and 38(1) of the Convention.

The Court unanimously declared the case admissible on 24 October 2006.

Kukayev v Russia
 (No. 29361/02), 23/04/02
 (ECHR: Admissibility)
Right to Life

The applicant is the father of Aslanbek Kukayev, born in 1976, who was a police officer living in Grozny.

On the morning of 26 November 2000 the applicant's son, along with another police officer, D., left home to report for duty at the headquarters of the Chechen OMON in the town of Gudermes. They were both wearing camouflage uniforms and had their OMON officers' identification cards.

At around 12 noon the applicant's son and D. were passing through Grozny central market in D's car. At the same time federal servicemen were carrying out a special 'mopping-up' operation in the vicinity of the marketplace.

The servicemen took Kukayev and D.

away in the direction of the headquarters of the federal military detachment Don-100.

Later, the applicant's son, D. and several other police officers detained during the operation, were put into a truck and driven away. When the truck reached Ordzhonikidze Avenue in the centre of Grozny, the officer in charge ordered that Aslanbek Kukayev and D. be taken out of the truck. They were then escorted by six federal servicemen towards the former Grozny Educational College building.

On 22 April 2001, a new mobile detachment assigned to the area found two corpses bearing signs of a violent death in the basement of Grozny Educational College. The bodies were identified by relatives as those of Kukayev and D.

Complaints

The applicant complained, under Art. 2 of the Convention, of the violation of the right to life of his son. He claimed that the circumstances of his son's apprehension clearly indicated that Kukayev had been detained and then murdered by federal servicemen. The applicant also complained that no proper investigation had been carried out into his son's death.

The applicant also complained under Art. 3 of the Convention, stating that he had suffered severe mental distress and anguish as a result of the disappearance and killing of his son and on account of the State's failure to conduct a thorough investigation.

The applicant further alleged that there were no effective remedies in respect of the above violations of his rights,

contrary to Art. 13 of the Convention.

Also, the applicant claimed that the Government's refusal to disclose the file in the domestic criminal proceedings was in breach of the State's obligations under Arts. 34 and 38(1) of the Convention.

The court declared the application admissible on 23 October 2006.

Mezhdidov v Russia
(No. 67326/01), 21/09/2006
(ECHR: Admissibility)
Right to Life

The applicant is a Russian national and lives in the village of Nadterechnoye, Chechnya. At the material time the applicant and his family lived in the village of Znamenskoye, in the Nadterechny District of Chechnya.

According to the applicant, on 5 October 1999, between 7 and 9pm, the village of Znamenskoye was shelled with artillery cannons from the Terskiy mountain range, where Russian troops were stationed. It appears that the applicant was absent from home at that moment. His parents, brother and sisters tried to escape but were killed by a shell explosion in the courtyard of the building at 19 Shosseynaya Street.

Complaint

The applicant complained under Art. 2 of the Convention of a breach of the right to life in respect of his relatives. He further claimed that no proper investigation into their deaths had been conducted and that he had been deprived of any effective remedies on that account, in violation of Art. 13. In his original application the applicant also referred to Arts. 5, 7 and 8 in connection with the other complaints. In his observations of 15 July 2005 the applicant gave further details of his complaint under Art. 8, stating that his flat had been severely damaged as a result of the shelling of 5 October 1999.

On 21 September 2006 the Court declared the case admissible under Arts. 2 and 13, but rejected the other complaints.

Musayeva v Russia
(No. 12703/02), 18/01/2007
(ECHR: Admissibility)
Disappearance

The applicant is the mother of Yakub Iznaurov, who was captured by Russian servicemen from the St Petersburg OMON on 5 February 2000 during a 'mopping-up' operation.

During the 'mopping-up' operation, Iznaurov and several other men were driven to the tramline at Novye Aldi, where they were forced to kneel with their hands up. They were kept in this position for two hours before being driven to Staraya Sunzha for questioning. Iznaurov has not been seen since.

The applicant was told that her son had been taken to Khankala military base, but she was unable to gain access to the base. Since then, the applicant and other family members have written to prosecutors at various levels of the judicial structure, to the federal Ministry of the Interior and to the administrative authorities in Chechnya. When they received replies, these said that their requests had been forwarded to different prosecutors' offices. Three separate investigations have been opened.

Complaint

The applicant claims a violation of Art. 2 of the Convention (right to life) in respect of her son, whom she believes has been killed. The applicant also claims violations of Art. 3 (prohibition of torture) on the grounds that, firstly, she believes that her son was subjected to cruel treatment following his arrest and, secondly, that she has suffered severe mental anguish and distress in connection with Iznaurov's detention and enforced disappearance. She also claims a violation of Art. 5 (right to

liberty and security of person) as well as Art. 13 (right to an effective remedy) in respect of the alleged violations of Arts. 2, 3 and 5.

The Russian government argued that the application should be declared inadmissible for non-exhaustion of domestic remedies as the investigations had not been completed.

On 18 January 2007 the Court unanimously declared the application admissible and decided to join the government's objections to the merits of the case.

Umarov v Russia
(No. 12712/02), 08/02/2007
(ECHR: Admissibility)
Disappearance

The applicant lived with his family in Grozny. On 27 May 2000, a group of about 15 soldiers broke into their house, threatening the applicant's wife and daughters with weapons and beating the applicant. The applicant's son demanded to know why the soldiers were beating his father. He was seized, beaten and thrown into the back of a truck. The soldiers then left, taking the applicant's son with them.

The applicant was examined in hospital, where he was diagnosed with concussion, injuries to his face, chest and feet and two fractured ribs. On his release from hospital, the applicant met with the town prosecutor and submitted a written complaint regarding the attack on his house and the detention of his son. The prosecutor visited the district military commander's office, after which he assured the applicant that the matter would be resolved.

The applicant later learned that three men who had been released by the authorities had reported being detained in a pit with his son at the Khankala military base. He has received no further news of his son since that time.

The applicant has written numerous

letters to the authorities and has organised a petition to the military commanders. A criminal investigation was opened in September 2000.

Complaint

The applicant complains of violations of Arts. 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy).

The government objected to the complaint on the grounds that domestic remedies had not been exhausted. On 8 February 2007 the Court declared the case admissible under Arts. 2, 3, 5, and 13, but declared the claim under Art. 8 inadmissible because of a failure to observe the six months rule.

Gusev v Russia

(No. 67542/01), 09/11/2006

(ECHR: Admissibility)

Prison Conditions

The applicant was taken into custody during a preliminary investigation into a charge of committing the theft of approximately €7.

Before his trial, the applicant was held in custody for a period of 18 months. He was kept in various cells, each accommodating 10-13 people in an area of no more than 8m². There were not enough beds in the cells and the prisoners took turns to sleep. Windows in the cells were covered with special iron grills made of fine wire netting, and they were practically impenetrable to daylight. It was impossible to read or work with daytime lighting and there was no fresh air. The lavatory was just screened off by a sheet and was 40cm from where food was provided.

In his cell the applicant slept on the top bunk, which he shared with another prisoner. He could only get down from

the bunk for food or water with the permission of the unofficial cell leader. In another cell he was not allowed to sleep on a bed, but was forced to sleep on the bare metal floor. No bedding was supplied. He was the subject of beatings.

The applicant claimed that the cumulative effect of the overcrowded cells, the lack of ventilation, the high temperature and the lack of privacy violated Art. 3 of the Convention. The applicant also complained that he was subjected to inhuman treatment by officers in the police unit, on 27 May 1998, and on 15 April 2000, and he alleged ill-treatment at the hands of other inmates.

The applicant also complained of a violation of Art. 5 of the Convention, in that his confinement in custody for petty theft was unlawful and of excessive duration.

Decision

The Court found admissible the applicant's complaints regarding the conditions of his detention in the remand centre and concerning the protracted length of his detention. However, the Court found that there was insufficient evidence of ill-treatment by either the police or other inmates and declared that part of the application inadmissible.

Ledyayeva, Dobrokhotova, Zolotareva

& Romashina v Russia

(Nos. 53157/99, 53249/99,

53695/00 & 56850/00),

26/10/2006

(ECHR: Judgment)

Environmental Pollution

The applicants in these cases live in the same city as the applicant in *Fadeyeva v Russia* (No. 55723/00, 09/06/2005) in which the Court found that the location of the applicant's home, within the boundary of a sanitary security zone (SSZ) around the Cherepovets steel

plant, exposed her to unsafe levels of pollution and other nuisance.

The applicants in these cases were able to produce evidence that the pollution levels in Cherepovets exceeded the maximum permissible limits (MPL) as established by Russian legislation. The Chief Health Inspector noted, in 2000, that atmospheric pollution in the SSZ increased the risk of cancer, respiratory and cardiac disease.

The Cherepovets Court ordered the municipality to place the applicants on waiting lists for new housing. The applicants' appeals, on grounds that being placed on a waiting list did not specifically enable them to live in a healthy environment, were overturned in all cases save for that of Mrs Ledyayeva.

Judgment

The Court, drawing on the *Fadeyeva* judgment, found that there had been a violation of Article 8.

The Court ordered the Government to pay the following amounts to the applicants in non-pecuniary damages under Article 41 of the Convention:

- (i) €7,000 to the first applicant,
- (ii) €8,000 to the second and third applicants,
- (iii) €1,500 to the fourth applicant.

The Court denied the applicants' requests for resettlement under Article 41, noting that the fourth applicant had already been resettled (hence the smaller financial award). Furthermore, the Court was not willing to depart from the judgment made in the *Fadeyeva* case, which had not ordered the resettlement of the applicant.

Other ECHR cases

Chitayev and Chitayev v Russia
(No. 59334/00), 18/01/2007
(ECHR: Judgment)
Unlawful detention and torture

According to the applicants (two brothers), on 15 January 2000 and 12 April 2000 officers from the Temporary District Office of the Interior searched their house in Achkhoy-Martan, Chechnya, without producing warrants. Several items of electronic equipment belonging to the applicants and personal documents were seized. The applicants were then arrested and detained. When questioned about the activities of Chechen rebel fighters and about kidnappings, the applicants denied their involvement in any crimes.

Between 12 and 28 April 2000 the applicants were interrogated and subjected to various forms of torture and ill-treatment. They alleged enduring beatings, electric shocks, standing for a long time in a stretched position and having dogs set on them. When the second applicant refused to sign a confession he was handcuffed, his mouth was covered with adhesive tape and one of the interrogators started beating him on his back and genitals.

On 28 April 2000 the applicants were transferred to Chernokozovo Detention Centre where they were

beaten on arrival. The applicants alleged further ill-treatment as well as being forced to sign confessions. Their lawyer was only given access to them once during the entire period of their detention.

The men were charged on 19 September 2000 with kidnapping and participation in an unlawful armed group. They were subsequently released on 5 October 2006 and medically examined the following day. The applicants were found to have numerous injuries to their heads and bodies and to be suffering from post-traumatic stress disorder. The doctors concluded that these medical conditions had apparently been sustained whilst on remand.

Judgment

The Court made a number of findings:

- It could not consider the applicants' complaint concerning the conditions of their detention since it had been lodged out of time.
- The treatment suffered by the applicants amounted to torture, and the absence of an effective investigation into the applicants' allegations constituted a separate violation of Article 3 (inhuman and degrading treatment).
- There was a violation of Article 5

on account of the applicants' unacknowledged detention from 12 to 16 April 2000.

- There was a violation of Article 5(1)(c) on account of the applicants' detention on remand between 19 June and 4 October 2000.
- There was a violation of Article 5(3) as regards the applicants' right to release pending trial during their detention on remand between 17 April and 4 October 2000.
- Since the Chechen courts had been inoperative until November 2000, the applicants were unable to take proceedings to challenge the lawfulness of their detention in custody between 19 June and 4 October 2000 in violation of Article 5(4).
- There had been a violation of Article 5(5) as regards the applicants' right to compensation for their detention.
- The applicants had been denied an effective domestic remedy in respect of their ill-treatment by the police in breach of Article 13, but this did not extend to their Article 5 complaint.
- Each applicant was awarded €35,000 as non-pecuniary damages.

NGO Register: link up with us!

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

Through networking and sharing information and

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

European Commission for the Efficiency of Justice (CEPEJ) reports on Russia

Nearly 50% of Russian court decisions imposing compensation on the government are not executed within a reasonable time, if at all, and nearly 40% of cases concerning Russia declared admissible by the European Court of Human Rights are related to the non-execution of court decisions against the state or state authorities. Execution of domestic judgments is guaranteed by Article 6 of the European Convention on Human Rights (ECHR) and the Council of Europe's Committee of Ministers has provided guidelines for enforcement in a 2003 Recommendation: (Rec(2003)16).

A recent report by the European Commission for the Efficiency of Justice¹ considers the lack of appropriate procedures for execution of judgments involving financial payments to individuals by the state, with three key issues being identified:

Legislative: The lack of a budget line for payments to creditors and the lack of clarity on a mechanism for such payments mean that debts are not honoured.

Budgetary: There are insufficient human and financial resources within the Ministry of Finance to remedy delays and it is often not clear which State body or level of government is responsible for payment.

Judicial: Contradictory judgments can be issued on the same issue by different branches of the judiciary (i.e. by civil

and arbitration courts), and the law does not enable compulsory enforcement judgments against the state.

In making recommendations for action, the report points out that a permanent solution would require reform of both administrative and judicial organs of government.

Recommendations for administrative reforms focused on the budget. The report suggests that the federal budget should incorporate payments to creditors and that the government should consider these payments to be compulsory. Specially appointed commissioners could monitor such expenditure. It was also suggested that a fund be set up to allow payments of debts to petitioners should the budget be insufficient to permit such a payment to be made directly.

A number of recommendations were made regarding judicial remedies. General recommendations included the possibility of alternative dispute resolution mechanisms (without making suggestions as to what these might be), avoiding parallel court decisions on the same issue, either by extending the force of *res judicata* or by establishing 'grand panels' to issue final decisions. A uniform code of procedure was recommended in order to clarify proceedings and it was suggested that default interest be applied in cases of non-payment (to either the State or the citizen).

Further, specific recommendations encompassed the enforcement

mechanisms available to courts and the relationship between the Federation and its entities. The report considers whether the seizure of property belonging to public authorities may compel them to enforce judgments in future cases, as has been the case in Belgium and Greece. If adopted, this procedure would require courts to have the authority to enforce execution of judgment against public bodies. Alternatively, coercive fines could be introduced, with seizure of assets as a last resort.

It was also pointed out that claims made against the Federation would automatically be liable against the Republics of the Federation.

The report recommended that the State prioritise the establishment of the fund and the imposition of interest on delayed payments. CEPEJ is pursuing its cooperation with the Russian government and proposes to revisit this issue within 12-18 months of the report (by June 2007).

The full report can be accessed online at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2005\)8&Sector=secDG1&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2005)8&Sector=secDG1&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6).

1 "Examination of Problems Related to the Execution of Decisions by National Civil Courts Against the State and its Entities in the Russian Federation", European Commission for the Efficiency of Justice (CEPEJ), CEPEJ (2005) 8, 7-9 December 2005.

The Broniowski case and its aftermath – an overview

Eleonora Davidyan, EHRAC-Memorial Project Lawyer

The case of *Broniowski v Poland*¹ relates to the violation of the applicant's right to the peaceful enjoyment of his possessions (see also Dina Vedernikova's article on page 4). His entitlement to compensation for property abandoned in the territories beyond the Bug River (the Eastern provinces of pre-war Poland) in the aftermath of the Second World War had not been satisfied.

By adopting both the 1985 and 1997 Land Administration Acts, the Polish State reaffirmed its obligation to

compensate the 'Bug River' claimants (as they have become known), and to incorporate into domestic law obligations it had taken upon itself under international treaties concluded in 1944. However, the Polish authorities, by imposing successive limitations on the exercise of the applicant's right to compensation, and by resorting to practices which made it unenforceable in concrete terms, rendered that right illusory and destroyed its very essence. Moreover, the right was extinguished by legislation of December 2003 under which claimants in the applicant's

position who had been awarded partial compensation lost their entitlement to additional compensation. However, those who had never received any compensation were awarded an amount representing 15% of their entitlement. In the light of these considerations, the European Court concluded that the applicant had to bear a disproportionate and excessive burden which could not be justified.

The Court concluded that the violation had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused

by the failure to set up an effective mechanism to implement the 'right to credit' (according to the terminology used by the Polish Constitutional Court) of 'Bug River' claimants. It also concluded that the respondent state must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining 'Bug River' claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Art. 1 of Prot. No. 1.

The Court recalled that the violation originated in a widespread problem which resulted from deficiencies in the domestic legal order which had affected a large number of persons (nearly 80,000 people) and which might give rise in future to numerous subsequent, well-founded applications.

Referring to the Committee of Ministers' Resolution on judgments revealing an underlying systemic problem, and to the Recommendation on the improvement of domestic remedies, the Court decided to indicate the measures that the Polish State should take, under the supervision of

the Committee of Ministers and in accordance with the subsidiary character of the Convention, so as to avoid being seized of a large number of similar cases. The Court decided that all similar applications (240 at the time) - including future applications - should be adjourned pending the outcome of the leading case and the adoption of the measures to be taken at national level.

On 15 December 2004, the Polish Constitutional Court, basing itself in particular on the Court's judgment, declared several provisions of the law of December 2003 contrary to the Polish Constitution, with the result that claimants in the applicant's situation (those who had been awarded partial compensation) would no longer be prevented from obtaining at least a proportion of their entitlement on an equal footing with the remaining 'Bug River' claimants.

On 8 July 2005, the Polish Parliament passed the Law on the realisation of the right to compensation for property left beyond the present borders of the Polish State. The statutory ceiling for compensation was set at 20% instead of the previous 15% cap. According to this law the 'right to credit' may be realised in

two forms, depending on the claimant's choice: either, as previously, through an auction procedure or through cash payment to be distributed from a special compensation fund.

The Civil Code has been amended and the Supreme Court has adopted several resolutions concerning the right to compensation subject to the positions of the European Court and the Polish Constitutional Court. The authorities are in the course of adopting the measures necessary to implement the new 'Bug River' legislation of 2005. For instance, the Treasury Minister has adopted a regulation concerning the management of the compensation fund in December 2005, and in April 2006 an agreement concerning the conditions of payment of compensation was concluded between the Treasury Ministry and the Bank of National Property.

The Committee of Ministers' Deputies, having examined the progress made in ensuring execution has agreed to resume consideration of this case, on the basis of further information to be provided by the authorities of the respondent state.

1 (No. 31443/96), 22.6.04.

Fadeyeva v Russia: a year and a half after the ECtHR judgment

Natasha Prilutskaya, Lecturer in Law, Novokuznetsk branch of Kemerovo State University

On 9 June 2005, the European Court of Human Rights handed down its judgment in the case of *Fadeyeva v Russia* (No. 55723/00) – the first environmental case against Russia, in which the Court found that there had been a violation of Art. 8 of the ECHR by Russia's failure to strike a fair balance between the interests of the community and the applicant's right to respect for her home and private life. The applicant was awarded €6,000 in non-pecuniary damage.

The judgment was received enthusiastically in Russia's mass media; some even jumping to the conclusion that "Russian woman solved her housing problem via the European Court".¹ But what are the real implications of

this judgment for the applicant? Has it changed the lives of thousands of people in Cherepovets and hundreds of thousands of people in Russia living in the same heavily polluted environment? Has it influenced the Government's environmental policy and legislation?

The applicant, Mrs Nadezhda Fadeyeva and her family live in a council flat situated about 450m from the Severstal steel plant in Cherepovets. The once state-owned plant was privatised in 1993. Severstal is one of the major iron smelters as well as one of the major air polluters in Russia. The hazardous effect of the plant on the environment was recognised in various environmental reports, state and local programmes to improve the environmental situation in Cherepovets, documents of official bodies and was discussed in the mass media.

According to para. 3 of Art. 16 of

the Federal law of 04.05.1999 N 96-FZ 'On Protection of the Atmospheric Air' (as amended by the Federal law of 31.12.2005 N 199-FZ), in order to protect the atmospheric air in populated areas, sanitary security zones (SSZ) must be established around every industrial enterprise. Within this zone no housing is to be built. The size of an SSZ is defined by calculating the dispersion of emissions of pollutants in the air and in accordance with the size and type of the industrial enterprise. Currently, the size of the buffer zone around the Severstal plant must be 1,000m. Thus, Mrs Fadeyeva's flat is in fact within the boundaries of the SSZ where the level of the hazardous emissions is much higher than all the maximum permissible levels set by the Government.

In accordance with the Decree of the Council of Ministers of the RSFSR of 10 September 1974, the inhabitants

of the Severstal sanitary zone who lived in certain districts were to have been resettled by 1977. This never happened. The applicant tried to uphold her right to be resettled through the domestic courts, however the authorities merely placed her on a general waiting list which gave her no hope of resettlement in the near future.

Assessing the facts of the case, the European Court pointed out some essential gaps in Russian law concerning the regulation of resettlement.² The Court found that the State did not offer the applicant any effective solution to help her move from the dangerous area, nor did it design or apply effective measures which would be capable of reducing the industrial pollution to acceptable levels.³

Although the Court did not establish the Government's direct obligation to resettle the applicant, stating in paragraph 142 of its judgment that "the resettlement of the applicant in an ecologically safe area would be only one of many possible solutions", in the same paragraph it noted, that "by finding a violation of Art. 8 in the present case, the Court has established the Government's obligation to take appropriate measures to remedy the applicant's individual situation."

Unfortunately, it seems that this part of the Court's decision remained unnoticed by the Russian authorities and that the "improvement of the applicant's situation" is limited to paying out non-pecuniary damages to her by the State. In particular, answering Mrs Fadeyeva's enquiry regarding the implementation of the Court's judgment, the Deputy Governor of the Vologda region N.V. Kostyugov in his letter of 17 August 2006 No. 07-03/1813 stated that "the findings of the European Court of Human Rights ...did not oblige the respondent State to provide you immediately with alternative housing". Mr Kostyugov

further noted that according to the Mayor of Cherepovets, M.S. Stavrovsky, the awarded funds were transferred to the applicant's personal account within the time limit and concluded that "citizens are provided with housing in accordance with the procedure prescribed by current housing legislation." Thus, Nadezhda Fadeyeva's problem is unsolved and she and the members of her family are still subjected to hazardous emissions from Severstal.

However, on 29 November 2006, on the official Cherepovets website 'Cherepovets Time' it was stated that all people living in the Severstal SSZ would be resettled before 2007 as this issue is "not so much technical as political now."⁴ According to Nikolay Arkhipov, deputy of the Legislative Assembly of Vologda region, 7,000,000 roubles were allocated in the regional budget to resettle six housing estates situated in the zone and the same amount would be planned in the budget of the next year. There are two discrepancies that strike the eye here. First of all, taking into account the cost of housing, the allocated funds are not sufficient. Secondly, if the estimated deadline for the resettlement was "before 2007", why is part of its funding planned in the 2007 budget? Nevertheless, it is a positive sign showing that the situation is slowly changing.

The State has also taken certain steps to regulate the setting up and development of sanitary zones and to control the observance of environmental legislation by industrial enterprises. On 17 April 2006, G. Onischenko, the Head of *Rospotrebnadzor* - one of the several federal services within the Ministry of Health Protection and Social Development of the RF issued a letter No. 0100/4317-06-32 'On the setting up of sanitary security zones in the territory of the Russian Federation'. In this letter Onischenko pointed out that the supervision by the regional

departments of *Rospotrebnadzor* of the development of SSZ around industrial enterprises, in particular, over the resettlement of the inhabitants of these zones was unsatisfactory. According to *Rospotrebnadzor* data, in 2005 2,671,421 people (2% of the whole population of the country) lived within sanitary security zones of industrial enterprises. Only 145,443 people, that is, 5.4% were resettled within the last 10 years. Referring to the *Fadeyeva* judgment, the Head of *Rospotrebnadzor* set out a series of measures that have to be carried out in order to improve the development of the sanitary zones and organise the resettlement of the people.⁵ The regional departments of *Rospotrebnadzor* later issued similar letters.⁶

In Cherepovets, the setting up of the sanitary zone around Severstal and its development is only scheduled to be completed by 2015. By that time hazardous emissions from Severstal and other large industrial facilities should be reduced to the permissible level.⁷

Another Federal Service – *Rosprirodnadzor* – the Federal Service for Supervision in the Field of Environmental Management – has been conducting inspections of large industrial facilities, including Severstal, concerning their observance of environmental legislation and drafting a report on the results of these inspections. Actions were brought against some major industrial enterprises after the findings of the inspection were communicated to the Public Prosecutor's Office and the Ministry of the Interior.⁸

Do all these actions mean qualitative change in the State's environmental policy or is it just another campaign done pro forma? Time will tell. It is obvious that to solve the problem of people who, like Nadezhda Fadeyeva, live in close proximity to industrial enterprises, strong political will, sufficient funding, a distinct policy and systematic action by the Government are needed.⁹

1 <http://www.seu.ru/members/ucs/eco-hr/2005/1778.htm> ; http://www.echr.ru/news/msg.asp?id_msg=690

2 See: *Fadeyeva v Russia* (No. 55723/00) 9/6/05, paras. 122 & 123.

3 Ibid, para. 133.

4 <http://news.cherinfo.ru>.

5 See: www.rospotrebnadzor.ru.

6 See, for example: Letter N11 of 15 June 2006 'On setting up of sanitary security zones on the territory of Komy republic' www.gsenrk.ru.

7 <http://newsvo.ru/rubrics/obschestvo/2004/05/12/14:38:44.html>.

8 <http://www.mnr.gov.ru/part/?act=more&cid=1913&pid=508>.

9 The Committee of Ministers is currently supervising

the execution of the *Fadeyeva* judgment. There is a list of questions communicated to the Russian authorities that has yet to be answered. The Government should also provide an "action plan" for the implementation of the judgment. See further: *Environmental Pollution – supervising the execution of the Fadeyeva judgment*, EHRAC Bulletin, Issue 6, Winter 2006, p. 15.

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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, whilst working to transfer skills and 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 also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 100 cases involving more than 550 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 co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: www.londonmet.ac.uk/ehrac.

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EHRAC-SCLJ Project

MOSCOW

115035, Moscow, 3rd Kadashevsky pereulok, 5/5
Tel: +7 (495) 645 10 44, Fax: +7 (495) 953 75 63
www.sclj.ru

Tatiana Tomaeva, Project Coordinator
Tel: +7 (926) 596 68 32
E-mail: tania.tomaeva@gmail.com

Roman Maranov, Lawyer
E-mail: maranov@yandex.ru

EHRAC-GYLA Project

TBILISI
GYLA head office
15, Krilov St. 0102
Tel: +995 (32) 93 61 01, Fax: +995 (32) 92 32 11
www.gyla.ge

Sophio Japaridze, ECHR lawyer
Direct Tel: +995 (32) 93 61 26
E-mail: sofo@gyla.ge

EHRAC-SCLJ project

EHRAC established a formal partnership with the Slavic Centre for Law and Justice (SCLJ) in May 2007. EHRAC has been assisting SCLJ with European Court cases since 2005 and a joint training seminar was held in October 2006. SCLJ focuses on religious and ethnic discrimination within Russia.

EHRAC-Memorial project

EHRAC has been working in partnership with Memorial since 2003. Memorial 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 of Human Rights and conducts training seminars in Georgia and facilitates the participation of a GYLA delegate in EHRAC's Legal Skills Development Programme in London and Strasbourg.

EHRAC Contact Details

EHRAC LONDON OFFICE

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

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

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

Oksana Popova, Administrator
Direct Tel: + 44 (0)20 7133 5090
E-mail: o.popova@londonmet.ac.uk

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

Professor Bill Bowring, Chair of
International Steering Committee
Direct Tel: + 44 (0)20 7631 6022
Mobile: + 44 (0)781 048 3439
E-mail: b.bowring@bbk.ac.uk

EHRAC-Memorial Project

MOSCOW

101990, Moscow, Room 18a, Milyutinsky
pereulok, Building 1, 3rd Floor, 36C
Mailing Address:
Memorial Human Rights Centre
102705, Maly Karetny pereulok 12
Russia, Moscow
Tel.: +7 (495) 225 3117
Fax: +7 (495) 624 2025
<http://ehracmos.memo.ru>

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

Project Coordinator, Maria Shpikalova
E-mail: admin@ehrac.memo.ru

EHRAC-MEMORIAL LAWYERS:

Grigor Avetisyan, avetisyan@ehrac.memo.ru
Eleonora Davidyan, davidyan@ehrac.memo.ru
Natasha Kravchuk, kravchuk@ehrac.memo.ru

Kirill Koroteev, Case Consultant
E-mail: kirill_koroteev@yahoo.com

Marina Dubrovina (Novorossiysk Office)
353900, Novorossiysk, Mira Street, 14/4
Tel/Fax: +7 (8617) 61 23 72
Email: almad@mail.kubtelecom.ru

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

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

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

Irina Ananyeva (Ryazan Office)
390000 Ryazan, Kostyushko Square, 3, Rm 'A'
Tel: +7 (4912) 25 51 17
Fax: +7 (4912) 39 00 35
E-mail: ananas77@mail.ru