

# EHRAC

## Bulletin



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

## Editorial:

This edition of the Bulletin includes coverage of human rights developments in four countries in the region: Azerbaijan, Georgia, Moldova and Russia. Eldar Zeynalov (Human Rights Centre of Azerbaijan) provides an overview of the European Court's consideration to date of cases against Azerbaijan, highlighting the preponderance of cases concerning political prisoners. In the light of the increasing use of lethal force by law enforcement officials in Georgia, Tamar Khidasheli (Georgian Young Lawyers' Association) considers whether Georgian domestic legislation complies with the standards of the European Convention on Human Rights as to the right to life.

As for Russia, Clare Rimmer (European Council on Refugees and Exiles) analyses the treatment of Chechen IDPs, asylum-seekers and refugees in Europe, and Roman Maranov (Slavic Centre for Law and Justice) discusses proposed changes to Russian domestic law in response to the endemic problem of excessively long legal proceedings.

Jurisdictional issues are analysed in two articles. Vakhtang Vakhtangidze (Article 42 of the Constitution, Georgia) discusses the extent of the responsibility of the Georgian and Russian governments for human rights violations which occur in the autonomous republic of Abkhazia. Vladislav Gribincea (Lawyers for Human Rights, Moldova) describes the further

steps which were taken as a result of the failure of both the Moldovan and Russian governments to implement the European Court's judgment in the Ilaşcu case, concerning the unlawful detention of politicians in the breakaway region of Transdniestria. Finally, there are articles analysing the recent work of other Council of Europe bodies: the Parliamentary Assembly (Grigor Avetisyan, Memorial – on criminal defamation) and the Commissioner for Human Rights (Sergey Golubok, Egorov, Puginsky, Afanasiev & Partners, St. Petersburg).

**Prof. Philip Leach**  
Director

## Human rights protection in breakaway regions of Georgia

*Vakhtang Vakhtangidze, LL.M. Student, University of Essex; Article 42 of the Constitution*

For more than a decade, Georgia, as a result of ethnic conflict, has ceased exercising *de facto* jurisdiction over the autonomous republic of Abkhazia. In this region, secessionist movements have attempted to found independent states, however these attempts have been unsuccessful because they do not fulfil the legal criterion of statehood set by the Montevideo Convention on the Rights and Duties of States and failed to be recognised as such internationally.

This article aims to discuss the problem of addressing human rights issues in this breakaway region of Georgia in the context of a case currently pending before the ECtHR.

### The case of Mamasakhlisi

On 7 August 2001, while on holiday in Abkhazia, a hand-made grenade exploded in the hands of Levan Mamasakhlisi, a Georgian national, causing the loss of his right hand and three fingers on his left hand. He was taken to hospital, semi-conscious and bleeding, and interrogated by *de facto* security officials who obtained a confession that he had attempted to commit a terrorist attack. After seven days of detention, he was transferred to jail in a critical condition, denied legal assistance and later sentenced to 14 years' imprisonment by the Military Tribunal of the secessionist government.

In 2004 a number of Georgian lawyers filed a complaint with the ECtHR on behalf of the applicant. On 14 February 2007, at the request of Thomas Hammerberg, the Council of Europe

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### **Human rights protection in breakaway regions of Georgia**

(CoE) Commissioner for Human Rights, the applicant who, by then, had been imprisoned for six years was released. His health had deteriorated.

The case raises complex issues of extraterritorial jurisdiction and involves the respondent states of Georgia and the Russian Federation (RF).

### **Responsibility of Georgia**

Georgia is a signatory to the ECHR. As the state responsible for the international relations of Abkhazia, Georgia automatically undertook obligations to secure ECHR rights within its jurisdiction.

Pursuant to Art. 1: *“the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”* Under ECtHR jurisprudence *“within their jurisdiction”* must be interpreted in light of the rules set out in the Vienna Convention on the Law of Treaties 1969.

From the perspective of public international law, the jurisdictional competence of a state is primarily territorial.<sup>1</sup> The state’s obligations remain even where the exercise of its authority is limited in part of its territory, so that it has a duty to take all appropriate measures within its power. In *Ilaşcu and Others v Moldova and Russia* (No. 48787/99) 8/7/04, the ECtHR held that: *“even in the absence of effective control over the Transnistrian region, Moldova still has a positive obligation under Art. 1 of the Convention to take diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicants’*

*rights guaranteed by the Convention”*.<sup>2</sup> Further, it is mentioned that where a Contracting State is prevented from exercising its authority over the whole of its territory, for example, in the case of a separatist regime, whether or not this is accompanied by military occupation by another state, it does not cease to have jurisdiction within the meaning of Art. 1 over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another state.<sup>3</sup>

Therefore a state is accountable even if the territory is run by a local administration. This is so whether or not the local administration is illegal.

### **Responsibility of RF**

In *Drozd and Janousek v France and Spain* (No. 12747/87) 26/6/92, the ECtHR reiterated that ‘jurisdiction’ within the meaning of Art. 1 is not necessarily restricted to the national territory of the high contracting party. Contracting parties are involved through the acts of their authorities, whether performed within or outside their own territory.<sup>4</sup> The obligation to secure ECHR rights and freedoms in such an area derives from the facts of such control whether it is exercised directly, through its armed forces or through a subordinate administration.<sup>5</sup> It is not necessary to determine whether the Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.<sup>6</sup>

The International Criminal Tribunal on the former Yugoslavia developed a ‘Test of Overall Control’,<sup>7</sup> which widened the guarantees for victims’ protection during armed conflicts and decreased the requirement of the ‘Test of Effective

Control’ developed by the International Court of Justice in the Nicaragua case.<sup>8</sup>

The RF has been given the role of ‘peaceful facilitator’ but, according to the numerous facts documented by the Georgian government, during military activities and after the completion of hostilities Russia supported the secessionists and provided them with military, political, economic and cultural assistance. The facts of active cooperation are widely acknowledged by the representatives of the secessionist government, certain Russian politicians representing the Kremlin<sup>9</sup> and other sources which they influence.<sup>10</sup> Russian involvement in post-conflict Abkhazia was assessed on a number of occasions by international organisations to be an interference and attempt at annexation of Georgian territories.<sup>11</sup>

Under the jurisprudence of the ECtHR, individuals, who have borne the politics and activities of a particular state, regardless of the legality of the same, are factually under the jurisdiction of this state within the meaning of Art. 1. The principle stated in *Cyprus v Turkey* (No. 25781/94) 10/5/01 is of great importance: *“where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support”*.<sup>12</sup>

### **Conclusion**

On a number of occasions the ECtHR has examined the problem of jurisdiction. However, the case of *Mamasakhlisi* is quite distinctive and has its own unique issues. Despite the legal complexity, the ECtHR faces the problem of how to deal with people who are left in legal limbo without legal protection from any state.

1 *Bankovic v Belgium* (No. 52207/99) dec. 21/12/01 para. 57.

2 Para. 331.

3 *Ibid.* paras. 59-61; *Gentilhomme and Others v France* (Nos. 48205/99, 48207/99 and 48209/99) 14/5/02, para. 20; *Assanidze v Georgia* (No. 71503/01) 8/4/04, para. 146.

4 Para. 91.

5 *Loizidou v Turkey* (No. 15318/89) 18/12/96, para. 52.

6 *Issa and Others v Turkey* (No. 31821/96) 16/11/04, para. 56.

7 *Prosecutor v Delalic et al.*, Appeals Judgment, (No. IT-96-21-A) 20/2/01, para. 26.

8 *Jurisdiction and Admissibility*, 1984 ICJ REP. 392 27/6/86.

9 Especially active in this regard is the Mayor of Moscow,

Yuri Luzhkov.

10 See: [www.apсны.ru](http://www.apсны.ru).

11 In its resolution of 18/1/01 the European Parliament held that the one-sided visa regime established by the RF on 5 December 2000 was interference within the sovereignty of Georgia and an infringement of the territorial integrity of the State.

12 Para. 77.

## Execution of the Ilaşcu judgment - further developments

Vladislav Gribincea, Programme Director,  
Lawyers for Human Rights, Moldova

In its judgment in *Ilaşcu and Others v Moldova and Russia* (No. 48787) 8/7/04, concerning *inter alia* the unlawful detention of the applicants in prisons in Transdnistria, the Grand Chamber of the ECtHR indicated, under Art. 46 of the ECHR, that both respondent governments were to “take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.”<sup>1</sup> It also found 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.”<sup>2</sup>

The obligation of governments to abide by ECtHR judgments is unconditional. In the light of the findings from this judgment, it seems that the obligation of the Russian Government deriving from the above indication of the ECtHR is one of result and not one of means and that it is not altered by the fact that the Russian authorities did not exercise formal control over the territory where the applicants were detained. In respect of the Moldovan Government it seems that the obligation to secure the immediate release of the applicants is a positive one, that is, one of means.

Although the obligation to abide by the above ECtHR judgment took effect from 8 July 2004, all three applicants, who were in prison on the date of adoption of the judgment (7 May 2004), were released only after their terms of

imprisonment expired (on 2 June 2004, 2 June 2007 and 4 June 2007), despite interim resolutions of the Committee of Ministers (CoM) of the Council of Europe (CoE) (ResDH(2005)42, ResDH(2005)84, ResDH(2006)11 and ResDH(2006)26) urging the Russian Government and encouraging the Moldovan Government to ensure the immediate release of the applicants. In other words, the governments did not secure the immediate release of Mr Ivanţoc and Mr Petrov-Popa, who spent a further 35 months in detention after the ECtHR judgment had been delivered.

In the light of the failure to release the imprisoned applicants, on 10 June 2005, Mr Ivanţoc and Mr Petrov-Popa lodged another application with the ECtHR (*Ivanţoc and Others v Moldova and Russia*, No. 23678/05), complaining *inter alia* that their detention after 8 July 2004 was in breach of Art. 46 of the ECHR.

On 7 July 2005, the ECtHR granted the applicants’ request for priority treatment of their application. On 22 March 2006, the case was communicated to the Moldovan and Russian Governments. The ECtHR asked the parties to deal *inter alia* with the question of whether it is competent to examine the complaint made under Art. 46.

On 12 July 2007, the CoM decided to suspend its examination of the execution of the 8 July 2004 judgment and to resume it after the final determination of the new application by the ECtHR.

On 18 September 2007, a Chamber of the fourth section decided to inform

the parties of its intention to relinquish its jurisdiction to examine the second application in favour of the Grand Chamber in accordance with Art. 30. On 12 October 2007, the Russian Government objected for the reason that the examination of this application by the Chamber “will give additional protection to the parties’ rights”.<sup>3</sup> Having regard to this objection, on 5 December 2007, the Chamber decided not to relinquish jurisdiction.

Apparently, the second application is of specific importance for the development of ECtHR jurisprudence on Art. 46. Although, under general international law, a refusal to abide by a judgment of the ECtHR would inevitably represent a violation of the ECHR, the ECtHR has previously avoided finding a separate violation of Art. 46, but has not excluded that such a ruling might be made in the future.<sup>4</sup> Such a ruling may strengthen the position of the applicants and the CoE in supervising the execution of ECtHR judgments without the amendment of the ECHR. On the other hand, the acknowledgment of the jurisdiction of the ECtHR to rule on a complaint made under Art. 46 of the ECHR may amount to an overlapping of the jurisdictions of the ECtHR and of the CoM in this field.

1 Para. 490.

2 *Idem*.

3 Letter from the Agent of the Russian Government to the Registry of the ECtHR dated 12/10/07.

4 See: *Olsson v Sweden* (No. 2) (No. 13441/87) 27/11/92, para. 94; *Lyons and Others v UK* (No. 15227/03) dec. 8/7/03.

## APT guide to ‘National Preventive Mechanisms’ against torture

The UN Convention Against Torture (CAT) was adopted in December 1984 to provide a systematic framework for the prevention of torture. However, inadequacies in this framework were identified, including an absence of

practical instruments for state parties to fulfil their obligations under CAT. For this reason the Optional Protocol to CAT (OPCAT), adopted in December 2002, introduced ‘National Preventive Mechanisms’ (NPMs): national bodies

that provide external oversight of places of custody.

Since the adoption of OPCAT, the Association for the Prevention of Torture (APT) has regularly received questions

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### **APT guide to 'National Preventive Mechanisms' against torture**

on the functioning of NPMs and it has used this experience to compile a guide to the establishment and designation of NPMs. In particular, it hopes to provide assistance to all those involved in the creation of NPMs, be they governments or civil society organisations.

The overarching principle that lies behind the work of an NPM is its independence. In particular, Chapter 4 of the guide states that the NPM should not be subject to executive control either in its composition or in its work: the selection of its members and areas of work should be left entirely to the NPM.

The source and nature of its financing should also be set out in law in order to ensure full openness and transparency.

Visits by NPMs to places of detention are a crucial part of their practical activity and the guide devotes particular attention to this. In Chapter 3 it recommends that visits are carried out on a regular basis and should include both lengthy visits and shorter ad hoc ones. Privacy of discussions with detainees is clearly important to the effective functioning of the visits and is discussed in Chapter 6.

Of course, the work of NPMs must have some practical consequences and Chapter 7 considers the implementation of their recommendations. It advises, for example, that the Executive be required

to respond to such recommendations and to do so within a specific time frame. Chapter 3 also recommends that NPMs should have the power to propose draft legislation to deal with matters arising from their work.

Evidently, the guide deals with many important issues. However, its authors emphasise that it will work best if understood as the first step in an ongoing dialogue with all those involved in the work of NPMs around the world. The guide can be downloaded from the APT website in several languages, including English and Russian: [http://www.apt.ch/component/option,com\\_docman/task,catalog\\_view/gid,117/Itemid,59/lang,en/](http://www.apt.ch/component/option,com_docman/task,catalog_view/gid,117/Itemid,59/lang,en/).

## Decriminalisation of defamation

*Grigor Avetisyan, Lawyer, EHRAC-Memorial*

On 4 October 2007, the Parliamentary Assembly of the Council of Europe (PACE) called for states to apply defamation laws "with the utmost restraint" and to abolish prison sentences for defamation and set reasonable limits to damages awards.<sup>1</sup>

Freedom of expression is regarded as a fundamental right in a democratic society. However it is often said that individuals whose reputations have been harmed as a result of false and damaging statements, should have the right to redress through civil courts. Criminal libel, by contrast, seems a legacy of autocratic or colonial states, which often serves the purpose of providing officials with the power to suppress and discourage the expression of critical views.<sup>2</sup>

While a 2005 resolution of the

Russian Supreme Court<sup>3</sup> was regarded as an attempt to bring Russian practice into line with ECHR standards,<sup>4</sup> according to the NGO, ARTICLE 19, defamation in Russia has emerged in recent years as one of the most serious constraints on freedom of expression.

In accordance with Art. 10(2), of the ECHR, state interference can be justified if it is lawful and in the public interest. On several occasions the ECtHR has effectively overturned criminal libel convictions stating that politicians, who open themselves to scrutiny by journalists and the public, must accept harsher criticism,<sup>5</sup> and accepting that the limits of permissible criticism would be even wider for the government than for politicians.<sup>6</sup>

However, the ECtHR does not invariably rule that all criminal libel

convictions violate Art. 10. Other decisions have indicated that judges do not have to tolerate the same degree of criticism as the government or political figures.<sup>7</sup> This may be explained by the nature of the ECHR, and in turn the ECtHR, which struggles to balance legitimate national interests with establishing uniform and universal human rights standards for all signatories. It should be noted that the ECtHR on many occasions has reiterated the duty of the press to provide accurate and reliable information.<sup>8</sup>

Nevertheless, the rulings of the ECtHR have cemented the principle that journalists have wider scope to report on public officials and matters of public concern and the recent PACE resolution has given this even stronger political impetus.

1 PACE Resolution 1577(2007) [Online]. Available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>.

2 According to ARTICLE 19, Albanian defamation laws act as a serious deterrent to independent journalism. See: ARTICLE 19, 2004. *Memorandum on Albanian Defamation Law* [Online]. Available at: <http://www.article19.org/pdfs/analysis/albania-defamation-law-sept-2004.pdf>.

3 Resolution of the Plenary of the Supreme Court of the Russian Federation 'On Judicial Practice in Cases on Protection of Honour and Dignity and Business Reputation of Natural and Legal Persons' of 24 February 2005.

4 ARTICLE 19, 2007. *The cost of reputation: Defamation Law and practice in Russia*. [Online]. Available at: <http://www.article19.org/pdfs/publications/russia-defamation-rpt.pdf>.

5 *Lingens v Austria* (No. 9815/82) 8/7/86.

6 *Castells v Spain* (No. 11798/85) 23/4/92.

7 See e.g. *Barford v Denmark* (No. 11508/85) 22/1/89.

8 *Lambardo v Malta* (No. 7333/06) 24/4/07, para. 53 and PACE Resolution 1003(1993).

## Azerbaijan under scrutiny from the European Court of Human Rights

*Eldar Zeynalov, Director, Human Rights Centre of Azerbaijan*

The release or retrial of political prisoners according to universally recognised standards was an obligation undertaken by the Government of Azerbaijan upon accession to the Council of Europe (CoE) in January 2001. In the autumn of the same year, however, it became clear that there would be no political amnesty for convicted opponents of the Government. After retrials in 2003-2005 it became apparent that justice had still not been achieved, and was unlikely in the future. In 2005 a new initiative was started, reflected in several resolutions of the Parliamentary Assembly of the Council of Europe (PACE) – the referral of the problem to the ECtHR.

Since then, four out of 13 ECtHR judgments against the Republic of Azerbaijan have concerned former political prisoners and/or opposition leaders. Of the 32 admissibility decisions, seven relate to complaints by political prisoners and two applications have been lodged by political émigrés. In particular, the applicant in *Abbasov v Azerbaijan* (No. 24271/05) 17/1/08 featured in the list of alleged political prisoners submitted to the Secretary General of the CoE upon Azerbaijan's accession to the CoE and the applicant in *Hummatov v Azerbaijan* (Nos. 9852/03 and 13413/04) 29/11/07 has been recognised as a political prisoner by independent CoE experts.<sup>1</sup>

The majority of these applications alleged violations of the right to impartial investigation and fair criminal proceedings. Thus, in *Hummatov v Azerbaijan*, the ECtHR found violations of Arts. 3, 6 and 13 of the ECHR as the applicant did not (i) receive adequate medical treatment in prison; (ii) have an effective domestic remedy against this lack of adequate medical treatment; and (iii) have a fair trial. In *Mammadov (Jalaloglu) v Azerbaijan* (No. 34445/05) 11/1/07, the ECtHR established breaches of Arts. 3 and 13 as the applicant, who

was an opposition leader, was subjected to ill-treatment in police custody and there was no effective investigation into his allegations of ill-treatment. In *Hajiyev v Azerbaijan* (No. 5548/03) 16/11/06, the applicant's name appeared in the list of alleged political prisoners and the ECtHR found a violation of the applicant's right to a fair trial due to the failure of the Court of Appeal of the Republic of Azerbaijan to deal appropriately with his appeal.

In *Abbasov v Azerbaijan* the ECtHR not only found a violation of Art. 6 because the Court hearing on the applicant's appeal took place without the participation of the defendant, but also made recommendations to the domestic authorities under Art. 46. Although the case concerned appeal proceedings, the ECtHR noted that it "cannot ignore the fact that the applicant was included in the list of 'alleged political prisoners' submitted to the experts of the Secretary General upon Azerbaijan's accession to the Council of Europe, indicating that there were certain doubts as to the fairness of the applicant's conviction in 1996."<sup>2</sup> Therefore, "the Court considers that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation in the present case."<sup>3</sup>

The delays in registration of non-governmental organisations (NGOs) has also given rise to several applications against the Republic of Azerbaijan. Thus, in *Ramazanov and Others v Azerbaijan* (No. 44363/02) 1/2/07, *Ismayilov v Azerbaijan* (No. 4439/04) 17/1/08 and *Nasibova v Azerbaijan* (No. 4307/04) 18/10/07 the significant delays in the registration of NGOs were found to violate Art. 11 of the ECHR.

As to admissibility decisions concerning 'non-political' cases, these have created important precedents for future cases from and against Azerbaijan. The following cases were declared inadmissible on procedural grounds:

- applications pre-dating the entry into force of the ECHR with respect to the Republic of Azerbaijan and therefore

declared to be inadmissible or partly inadmissible *ratione temporis*: *Perchenok v Azerbaijan* (No. 34465/02) dec. 30/1/03; *Kazimova v Azerbaijan* (No. 40368/02); dec. 6/3/03; *Humbetov v Azerbaijan* (No. 9852/03) dec. 11/09/03; *Guliyev and Ramazanov v Azerbaijan* (No. 34553/02) dec. 9/9/04; *Abbasov v Azerbaijan* (No. 24271/05) dec. 24/10/06; *Gaziyev v Azerbaijan* (No. 2758/05) dec. 8/2/07; and *Fatullayev v Azerbaijan* (No. 33875/02) dec. 28/9/06.

- applications declared inadmissible or partly inadmissible due to the non-exhaustion of domestic remedies: *Hamidov v Azerbaijan* (No. 283/03) dec. 8/1/04; *Hajiyeva v Azerbaijan* (No. 20700/03) dec. 22/9/05; *Kunqurova* (No. 5117/03) dec. 23/6/05; *Guliyev v Azerbaijan* (No. 35584/02) dec. 27/5/04; and *Ivanov v Azerbaijan* (No. 34070/03) dec. 15/2/07.

In addition, the complaints of political émigrés in *Mutalibov v Azerbaijan* (No. 31799/03) dec. 19/2/04 and *Guliyev v Azerbaijan*, who had sought the right to participate in national elections, were declared inadmissible *ratione materiae*. It was noted that the examination of disputes concerning presidential elections related to political rights, and not civil rights or criminal affairs, and therefore did not fall within the remit of Art. 6 or Art. 3 of Prot. 1 to the ECHR, as the institution of 'president' was not a 'legislative power' for the purposes of the ECHR.

In *Bayramov v Azerbaijan* (No. 23055/03) dec. 14/2/06 the issue of admissibility *ratione personae* was broached. In view of the fact that the applicant was a member of an association which founded the private corporation, and its executive director, he was not accorded victim status in the context of Art. 34 of the ECHR as he was not a shareholder.

It should be noted that in 2006 the Azerbaijani authorities introduced several measures aimed at ensuring the

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application of ECHR caselaw in the practice of national courts. Thus, on 19 January 2006, the President of the Republic of Azerbaijan issued an edict according to which higher instance courts were instructed to study and use ECHR caselaw. The Plenum of the Supreme Court took a similar decision on 30 March 2006. Furthermore, an amendment was introduced into the Criminal Procedure Code, in accordance with which an ECtHR judgment against the Republic of Azerbaijan on a specific case requires its review by the Plenum of the Supreme Court. Using these statutory provisions, the former political prisoner, Sardar Mammadov (Jalaloglu), having won his case at the ECtHR, is currently demanding a review of his case and the punishment of those responsible for his ill-treatment. In September 2007, the Plenum of the Supreme Court quashed the court decisions of 2004 and returned the case to a trial court to investigate the allegations of torture.

It is reassuring that, in some instances the Azerbaijani authorities are seeking 'friendly settlements' with applicants in order not to take complaints to trial, including registering organisations and releasing people from detention early. For these reasons, the applicants in

Shirinov v Azerbaijan (No. 35608/02) dec. 19/1/06, Mustafayev v Azerbaijan (No. 14712/05) dec. 9/11/06 and Asadov and Others v Azerbaijan (No. 138/03) 26/10/06 withdrew their complaints.

However, the authorities are undertaking other measures to withdraw certain complaints from trial. For example, after communication of some complaints to the Azeri authorities, the Plenum of the Supreme Court quickly reversed the last decision in the case and referred the case back to a lower authority. Following this a statement was made that the applicant had not exhausted domestic remedies. It stands to reason that such steps are not conducive to eliminating human rights violations. This happened in the case of Guliyev and Ramazanov v Azerbaijan - the case was returned to the Court of Appeal by the Plenum, and the attempts at negotiating a friendly settlement ended unsuccessfully due to missed deadlines. During the proceedings in Fatullayev, the Plenum twice returned the case to the Court of Appeal and then delayed procedures (by up to 15 months) in the local courts until the ECtHR found the application inadmissible due to the non-exhaustion of domestic remedies.

The applicant in the case of Ismayilov (No. 6285/03) dec. 7/6/07 died four years after the case was lodged with ECtHR and while it was still pending

an admissibility decision. The case was struck out of the list.

To date only 3% of admissibility decisions in cases against Azerbaijan have been positive.<sup>4</sup> On 31 December 2007, 979 cases against Azerbaijan were pending before a decision body of the ECtHR.<sup>5</sup> Hopes for the speeding up of appeals to the ECtHR were raised by the ratification by the Azerbaijani Parliament of Protocol 14 to the ECHR on 4 April 2006. However, its entry into force is still postponed because of Russia's position. Therefore, the ECtHR has not yet taken the critical quantity of decisions regarding Azerbaijan that might substantially influence judicial practice and the situation concerning the observance of human rights in the country.

1 Council of Europe, 2001. Document SG/Inf(2001)34 / 24 October 2001, Cases of alleged political prisoners in Armenia and Azerbaijan, [Online]. Available at: [http://www.coe.int/t/e/SG/Secretary-General/Information/Documents/Numerical/2001/SGInf\(2001\)34E.asp#TopOfPage](http://www.coe.int/t/e/SG/Secretary-General/Information/Documents/Numerical/2001/SGInf(2001)34E.asp#TopOfPage) [accessed 13 March 2008].

2 Para. 40.

3 Para. 41.

4 Registry of the European Court of Human Rights, 2008. Survey of Activities 2007, [Online]. Available at: <http://www.echr.coe.int/NR/rdonlyres/D0122525-0D26-4E21-B9D4-43AEA0E7A1F5/0/SurveyofActivities2007.pdf> [accessed 7 February 2008].

5 Ibid.

## Report: freedom of assembly in today's Russia

This report<sup>1</sup> compiled by a number of Russian NGOs (Youth Human Rights Movement, Legal Team, GROZA and the Interregional Human Rights Group) reviews procedures and legislative initiatives with regard to the status of the right to freedom of peaceful assembly and association in Russia during the first half of 2007. It provides an overview and makes recommendations for improvement. Many examples of the violation of this right are cited and although 2007 showed an improvement over the previous two years, it is evident that this right to fight for freedom of assembly in Russia is just beginning.

Progress is dependent upon activists and civil and human rights supporters working together. The aim of the review is to prevent further infringement of human rights.

The situation in Russia was brought to international attention in the first half of 2007, when demonstrations of dissent in various Russian cities were banned. Attempts to amend Federal Law No. 54 to increase restrictions and prohibit peaceful assembly have become more frequent. Issues relating to terminology, permission and authorisation have made the organisation and enactment of public demonstrations extremely complex; an

impression of illegality and criminalisation pervades, resulting in infringements of the right to freedom of assembly, reducing the number of meetings and demonstrations and the numbers of participants. Public assembly in Russia is one of the few means of political activity accessible to the majority.

Direct and indirect obstruction by the authorities accompanied an increased use of force and violence. The widespread deployment of OMON (special police forces) was a trend in 2007. The review gives examples where the use of format, location or theme was a means of obstructing the right to freedom of

assembly and details rallies and protest marches which were prevented or disrupted. The onus on activists to prove innocence and then to prove violation of rights by the authorities and make them answerable is almost impossible, and undertaken by very few. Various forms of pressure are put on activists and organisations; discrimination and improper investigation are indicated.

The prosecution process, limited access to defence, and the difficulty of appeal all have their impact. Included in the review are indications of failures to follow procedure under Federal Law No. 54 and references to defeats suffered by Russia in the ECtHR in relation to this.

More positively, the Ombudsman of the Russian Federation released a special report covering the subject of observing

the right to freedom of assembly<sup>2</sup> and there is some indication that the efforts of various human rights organisations and others are beginning to take effect.

1 Available online in Russian at: [http://www.library.cjes.ru/online/?b\\_id=788](http://www.library.cjes.ru/online/?b_id=788).

2 Lukin, V., 2007. *Special Report of the Human Rights Ombudsman on the Observance of the Constitutional Right to Peaceful Assembly in the Russian Federation* [Online]. Available at: <http://www.rg.ru/printable/2007/06/28/sobrania-doklad-dok.html> [accessed 17 March 2008].

## The Council of Europe Commissioner for Human Rights: strengths and weaknesses

*Sergey Golubok, Egorov, Puginsky, Afanasiev & Partners, St. Petersburg*

The Commissioner for Human Rights is one of the newest Council of Europe (CoE) institutions. Unlike many other CoE bodies it does not have an international treaty as the legal basis for its existence and functioning. It was established in 1999 by a resolution of the Committee of Ministers (CoM)<sup>1</sup>, although the notion of this institution emerged as early as 1972.

The Commissioner is elected by the Parliamentary Assembly of the Council of Europe (PACE)<sup>2</sup> for a non-renewable six-year term.<sup>3</sup> In fact, it is the only CoE institution which is embodied by one person. Currently this office is occupied by Thomas Hammarberg (from Sweden), former Secretary General of Amnesty International and member of the UN Committee on the Rights of the Child, who, in 2006, replaced the first Commissioner – Alvaro Gil-Robles (from Spain).

The Commissioner's principal activity is issuing recommendations, opinions and reports,<sup>4</sup> which are addressed to both CoE institutions and to the authorities of the member states.

Normally the Commissioner's reports follow on from visits to member states. The Commissioner aims to visit all member states at least once during his term of office. In the course of a visit the Commissioner meets with the highest representatives of Government, national

human rights organisations and NGO representatives, and also visits institutions such as places of detention and psychiatric hospitals. The visit is followed by the publication of a comprehensive report on the human rights situation in the country concerned. Such a report is addressed to the CoM and PACE, and then discussed within these bodies, leading to a response by the authorities of the country concerned and sometimes subsequent reaction of the Commissioner regarding the implementation of the recommendations contained in the report. Aside from these country reports, the Commissioner from time to time issues thematic reports on important Europe-wide human rights matters; for example, the first Commissioner issued two reports on the human rights situation of the Roma, Sinti and Travellers in Europe.<sup>5</sup> Other priorities include juvenile justice, and the rights of vulnerable groups such as migrants, refugees, disabled people and LGBT people.

The Commissioner also participates in various conferences and seminars. It is important to note, that his mandate is not exhaustive, which is a necessary consequence of its independence.<sup>6</sup> One initiative of Commissioner Hammarberg is to publish biweekly viewpoints on topical human rights issues.<sup>7</sup> All the activities of the Office of the Commissioner are summarised in its annual report.<sup>8</sup>

The founders of the Office of the Commissioner were concerned not

to duplicate the activities of other CoE bodies, especially in the field of human rights protection. This has been reflected in the special provision of the Commissioner's mandate, requiring him not to perform those functions which are performed by the supervisory bodies set up under the ECHR and other human rights instruments of the CoE.<sup>9</sup> The most important of such bodies is of course the ECtHR, whose main function is to consider individual complaints alleging violations of the ECHR by CoE member states; therefore, it is expressly prohibited for the Commissioner to take up individual complaints.<sup>10</sup> Unfortunately, this significant limitation of the Commissioner's mandate is not always known and many Europeans still address their individual problems and concerns to the Commissioner, whose Office responds to several hundred such communications annually. However, sometimes such communications may be taken into consideration, especially during the preparation of a visit to a certain country; they may be used as a good source of valuable information in this regard.

Protocol 14 to the ECHR,<sup>11</sup> if ratified by the Russian Federation, will transform the Commissioner into a conventional institution: the Commissioner will have a right to intervene in the Court's proceedings as a third party.<sup>12</sup> It is still

*continued on page 8*

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**The Council of Europe Commissioner for Human Rights: strengths and weaknesses**

an issue for discussion: whether such interventions should primarily concern matters of fact or of law. However, even without the proposed changes to the control system of the ECHR, there is currently nothing to prevent the Commissioner from participating in the ECtHR's proceedings as a third-party, subject to receiving permission from the ECtHR.<sup>13</sup> Indeed, he has been invited by the President of the Court to intervene in one case currently pending before the ECtHR. Another important avenue for fruitful co-operation between the ECtHR

and the Commissioner is the reliance of the former on the valuable factual information contained in the latter's reports.

Other means of strengthening the Commissioner's role further are being investigated. One of the issues currently under discussion is the participation of the Commissioner in the process of execution of ECtHR judgments, as recommended by PACE.<sup>14</sup> However, although the Commissioner has expressed his willingness to be involved in the relevant procedure,<sup>15</sup> in accordance with the rules for the supervision of the execution of judgments and of the

terms of friendly settlements,<sup>16</sup> the CoM has an express discretion to consider communications from injured parties, NGOs and national institutions for the promotion and protection of human rights,<sup>17</sup> but not from the Commissioner. Alternatively, it has been suggested that the Commissioner intensify co-operation with national human rights structures in this respect.<sup>18</sup> This exercise has indeed recently been launched by the Commissioner's Office.<sup>19</sup>

To conclude, the exact scope of the Commissioner's activities, and especially within the framework of the ECHR, remains to be defined.

1 Resolution (99)50 on the CoE Commissioner for Human Rights, adopted on 7 May 1999, at the 104<sup>th</sup> session of the CoM.  
 2 Ibid. Art.9 §1.  
 3 Ibid. Art.11.  
 4 Ibid. Art.8 §1.  
 5 CommDH (2005)4, CommDH (2006)1.  
 6 Resolution (99)50, supra note 2, Art.2.  
 7 Published in English, French and Russian at: [http://www.coe.int/t/commissioner/Viewpoints/Default\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/Default_en.asp).

8 Resolution (99)50, supra note 2, Art.3 (h).  
 9 Ibid. Art.1 §2, first sentence.  
 10 Ibid. Art.1 §2, second sentence.  
 11 Protocol no.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS no.194.  
 12 Ibid. Art.13.  
 13 Rules of Court, Rule 44.  
 14 PACE Resolution 1581 (2007), §13.  
 15 Comments by the Commissioner on the interim

report of the Group of Wise Persons to the Committee of Ministers, CommDH (2006)18 rev., §14.  
 16 Adopted on 10 May 2006, at the 964<sup>th</sup> meeting of the Ministers' Deputies.  
 17 Ibid. Rule 9.  
 18 Report of the Group of Wise Persons to the CoM, CM (2006)203, §§111-113.  
 19 The first meeting of focal points of national human rights structures was organised in Strasbourg in November 2007.

## Third CPT report on Georgia

Little is seen of what goes on behind the closed doors of prisons, police stations and mental health institutions. For this reason the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the Convention) was adopted in 1987. The Convention supplements the protection available under the ECHR by establishing a European Committee for the Prevention of Torture (CPT).

The Georgian Parliament ratified the Convention, which entered into force on 1 October 2000. On 25 October 2007, the CPT published a report on its third visit to Georgia, which took place from 21 March to 2 April 2007.<sup>1</sup>

The CPT delegation observed that although the treatment of detainees by Georgian police had improved considerably since its last visit, conditions remain unacceptable in many facilities. The most problematic issues remain the insufferable conditions at temporary

detention facilities, including unventilated, dirty and overcrowded cells and appalling sanitation.

The delegation made observations about conditions in two temporary detention isolators in Zugdidi and requested that the Georgian authorities provide immediate proposals to remedy the situation, including a timetable for implementation.

The overcrowding of penitentiaries remains a significant problem. The delegation witnessed extraordinary overcrowding at the main pre-trial facility, Prison No.5, where the number of prisoners exceeded the acceptable limit by 400% and living space was frequently below 0.5m<sup>2</sup>. The CPT called on the authorities to redouble their efforts to combat overcrowding, in particular adopting policies designed to moderate the prison population.

At Prison No. 6 in Rustavi, the delegation received allegations of prisoner abuse, including ongoing beatings from the point

of admission. The CPT recommended that the prison reinforce the message to staff that physical and verbal abuse, together with disrespectful or provocative behaviour, is unacceptable and will be dealt with severely.

The CPT reported that healthcare provision for prisoners remains problematic due to shortages of staff, facilities and resources. The CPT recommended the introduction of additional measures to eliminate the abuse of power during detention; including improvements in conditions for juveniles, for persons placed in psychiatric institutions and improvements to the State legal aid system.

Following the delegation's observations, the Georgian authorities have closed the Hauptvacht military detention facility in Tbilisi, which provided totally inadequate conditions of detention.

1 The first visit took place in 2001, the second in 2003/2004. CPT reports are available at [www.cpt.coe.int](http://www.cpt.coe.int).

## 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

#### *Kukayev v Russia*

(No. 29361/02), 15/11/07

(ECHR: Judgment)

*Right to life*

#### *Facts*

The applicant's son, B, was a policeman in a special police unit (OMON) of the Chechen Department of Interior Affairs. B was detained by federal military servicemen in Grozny on 26 November 2000. He was taken by vehicle, together with a number of other detainees, to another site, where he and one other detainee were ordered to leave the vehicle and led away by servicemen. The other detainees reported that they heard gunshots shortly afterwards. The following day, the applicant heard that his son had been detained. He immediately made enquiries with the Department of the Interior and was told that his son had not appeared for work. An investigation was opened on 12 December 2000. B's body was found by federal forces on 22 April 2001.

The applicant complained to the ECtHR on the basis of Arts. 2, 3 and 13.

#### *Judgment*

The ECtHR concluded that:

- Russia had not demonstrated that a court order directing B's release from detention would have been capable of providing redress to the applicant's situation and that as a result the preliminary objection based on non-exhaustion of domestic remedies must fail;
- when an individual in State custody is injured, the burden of proof rests on the authorities to provide a satisfactory explanation. In the absence of any plausible

explanation from Russia there had been a violation of Art. 2;

- the investigation into B's disappearance "was plagued with inexplicable shortcomings"; including the failure to investigate military involvement, examine the site, carry out expert tests, pursue the investigation promptly and afford victim status to the applicant. Accordingly, the failure to conduct an effective investigation constituted a further breach of Art. 2;
- the failures detailed above also constituted a breach of Art. 13, by way of failure to provide an effective remedy; and
- Russia had failed to provide information pertaining to the application as required under Art. 38(1).

Accordingly, the ECtHR awarded €7,000 to the applicant in respect of pecuniary damages and €35,000 in respect of non-pecuniary damages.

#### *Comment*

The ECtHR again reiterated the burden on the State to provide satisfactory explanations for injuries or death occurring to victims within the control of State agents. In assessing the effectiveness of the investigation under Art. 2, the ECtHR drew inferences from the State's behaviour – Russia provided only limited documents from the criminal investigation file.

#### *Tangiyeva v Russia*

(No. 57935/00), 29/11/07

(ECHR: Judgment)

*Right to life*

#### *Facts*

The applicant and her family were living in the Staropromyslovskiy district of Grozny during 1999-2000. From 26

December 1999, the area was occupied by Russian forces. On 11 January 2000, having decided to leave the conflict zone, the applicant and her sister called at the family home to say goodbye to their parents. They discovered the house on fire and the dead bodies of her father and neighbour, both with gunshot wounds. On 6 March 2000, the charred remains of the applicant's mother and uncle were discovered in the cellar.

#### *Judgment*

The ECtHR found the following violations:

- in failing to provide all of the case files concerning the application, Russia was in breach of its obligations under Art. 38(1). Where there are conflicting factual accounts concerning the application, a failure by the State to provide the ECtHR with the information it possesses will lead to the drawing of inferences as to the validity of the applicant's claims;
- while the ECtHR reiterated its 'beyond reasonable doubt' standard in cases where the parties disagree as to facts, this requirement may be met by sufficiently compelling presumptions or inferences;
- where the applicant makes out a *prima facie* case and the ECtHR is precluded from reaching factual conclusions due to a failure of the State to provide documents, the burden shifts to the State to prove the applicant's allegations are unfounded. In the absence of a satisfactory explanation by Russia, there had been a breach of Art. 2; and
- inaction and extensive delay on the part of the investigating authorities resulted in a further breach of Art. 2 due to the failure to conduct an

effective investigation and this also constituted a breach of Art. 13.

The ECtHR awarded €60,000 in non-pecuniary damages.

### *Comment*

The earlier cases of Khashiyev and Akayeva v Russia (Nos. 57942/00 & 57945/00) 24/2/05 – arose out of similar facts (the activities of Russian forces in the Staropromyslovskiy district of Grozny). The partly dissenting opinion of Judges Kovler and Hajiyev rejected the majority view that the State's failure to provide the relevant documentation should lead to the burden of proof being shifted entirely onto the State. They concluded that, in contrast to the earlier case, the applicant's version of events was not supported by sufficient evidence and therefore that there was no breach of Art. 2.

#### *Goncharuk v Russia*

(No. 58643/00), 4/10/07

(ECHR: Judgment)

#### *Right to life*

The applicant was the victim of an attempted murder by Russian servicemen in the Staropromyslovskiy district of Grozny on 19 January 2000. The ECtHR found a violation of Art. 2 based on the State's failure to provide a satisfactory explanation for the injuries suffered in an area controlled by State agents. The ECtHR found additional violations of Arts. 2 and 13 due to a number of manifest inadequacies in the subsequent investigation. The applicant was awarded €50,000 in damages.

#### *Makhauri v Russia*

(No. 58701/00), 4/10/07

(ECHR: Judgment)

#### *Right to life*

The applicant was the victim of an abduction and attempted murder by Russian servicemen in the

Staropromyslovskiy district of Grozny on 21 January 2000. She escaped by feigning death after being seriously wounded by gunshots.

The ECtHR found violations of Art. 2, based on the State's failure to provide a satisfactory explanation for the injuries suffered in an area controlled by State agents. The ECtHR found additional violations of Arts. 2 and 13 due to a number of manifest inadequacies in the subsequent investigation. The applicant was awarded €55,000 in damages.

#### *Medova v Russia*

(No. 25385/04), 4/10/07

(ECHR: Admissibility)

#### *Disappearance*

The applicant's husband was discovered by police on 17 June 2004 in the boot of a car at a checkpoint in Ingushetia. He told the police that he had been apprehended and held for two days by FSB agents at their headquarters in Magas, Ingushetia. He was then detained by police but driven to Chechnya. Despite investigation, he has not been seen since; the FSB deny any knowledge of his kidnappers. The applicant complained that her husband had been killed contrary to Art. 2 and suffered treatment in breach of Art. 3. She also complained of breaches of Arts. 5, 13 and 34.

The Court declared the application admissible.

#### *Ryabikin v Russia*

(No. 8230/04), 10/4/07

(ECHR: Admissibility)

#### *Extradition/Unlawful Detention*

The ECtHR declared the application admissible, joining Russia's objection concerning exhaustion of domestic remedies to the consideration of the merits of the application.

The applicant lived in Turkmenistan and was head of a construction business. From 1997-99 he worked on government contracts which officials refused to

honour without bribes. He reported this to the authorities and took part in a 'sting' operation involving marked notes which led to court proceedings. After receiving threats and intimidation from officials to change his testimony, he successfully applied for repatriation to Russia where he arrived in June 2001. After fruitless attempts to secure Russian citizenship between 2001-03, during which time he was placed on the international wanted list, he applied for refugee status. This was rejected on suspicion that his real reason for fleeing was to avoid prosecution for embezzlement.

In February 2004, on the pretext of clarifying citizenship issues, he was arrested and detained by Russian officials for the purposes of extradition. A hearing *in absentia* authorised his detention pending an extradition decision. This decision was appealed but was upheld at a later hearing when the applicant participated via a video-link. The courts refused numerous appeals on, *inter alia*, jurisdictional grounds and because the Prosecutor's Office maintained that the applicant's detention was lawful. In March 2005 he was released by a District Court on the application of international and domestic law. However, in January 2006, the General Prosecutor's Office revisited the applicant's extradition and took steps to apprehend him.

The applicant complained that extradition exposed him to a real threat of treatment contrary to Art. 3. He complained of breaches of Art. 5(1)(f) - unlawful detention – and of Art 5(2): that he was not properly informed of the reasons for his arrest. He also invoked Art. 5(4) on the basis of the lack of evidence justifying his detention, the hearing *in absentia* and the lack of opportunity to challenge the lawfulness of his detention.

The ECtHR declared the complaints under Arts. 3, 5(1)(f) and 5(4) admissible, the remainder being inadmissible.

## Other ECHR cases

*Patsuria v Georgia*  
(No. 30779/04), 6/11/07  
(ECHR: Judgment)  
*Unlawful detention*

### Facts

The applicant, Gia Patsuria, a Georgian national, was born in 1961 and is currently in prison in Rustavi (Georgia). Under a contract of 18 January 2001, the Georgian Ministry of State Property Management undertook to transfer to the applicant 90% of the shares of the Georgian State Insurance Joint Stock Company on condition that he increase the Company's initial capital to 480,000 Georgian Lari (€218,000), within a month of signing the contract. In response to requests by the Ministry in March and May 2001, the applicant submitted documents which evidenced the transfer of US\$250,000 (€207,000) to the Company's Georgian bank account.

Following the recommendation of the Georgian National Bank (a State agency) the Prosecutor General's Office examined the applicant's financial operations. On 26 January 2004 the senior prosecutor, having established the authenticity of the bank records, refused to institute criminal proceedings for an alleged falsification of those documents.

On 28 April 2004, the Prosecutor General personally opened a criminal case regarding misappropriation of 90% of the State's shares by fraud and the falsification of bank documents. The applicant was charged and taken into custody in May 2004. His detention on remand was ordered, upheld and extended by court decisions of 8 and 13 May and 6 December 2004. He was finally convicted of attempted fraud on 11 February 2005, and sentenced to three years' imprisonment, a decision upheld on appeal.

The applicant complained that detention on remand had been unreasonable within the meaning of Article 5(3) because the authorities had merely relied on the gravity of the charges and an alleged reasonable suspicion he had committed a crime.

### Judgment

The ECtHR noted that the detention period of nine months and 12 days was not obviously excessive. However, the Georgian courts had relied on the sole ground of the gravity of the charges and failed to address other factors relating to his case or consider pre-trial alternatives. The ECtHR was particularly concerned that the Georgian court decision of 6 December 2004, contained "pre-printed and standard" reasoning. The ECtHR concluded that the grounds for detention were not "relevant" or "sufficient" and unanimously found a violation of Article 5(3). The remainder of the application was declared inadmissible.

The applicant was awarded €1,500 for non-pecuniary damages and €2,170 for costs and expenses.

*Dzhavadov v Russia*  
(No. 30160/04), 27/9/07  
(ECHR: Judgment)  
*Freedom of expression*

### Facts

In July 2003 the applicant, a resident of Belgorod, was refused permission from the Ministry for Press, Television and Radio Broadcasting and Mass Communications to register his newspaper entitled 'Letters to the President'. The grounds of refusal were that the application was "inconsistent with the real state of affairs" because the newspaper purported to cover a broader range of subjects than its title suggested and only the Presidential Administration could consent to the publication of letters to the President or set up a newspaper with such a title.

The District Court upheld the refusal, stating that the title of a newspaper "denotes its specialisation which could be perceived by the readership as an official publication founded by a competent State body...". The court indicated that this could give rise to the specialist publication being incompatible with the current legislation. The same reasoning was later endorsed by the City Court and the judgment upheld.

The applicant complained that the refusal to register his newspaper under the title 'Letters to the President' had violated his right to freedom of expression under Art. 10.

### Judgment

The ECtHR held that there had been a violation of Art. 10. It stressed that the title of the periodical is not a statement as such, since its function is essentially to identify the given periodical in the market for its readers (See *Gawęda v Poland* (No. 26229/95) 14/3/02).

Furthermore, the requirement that the title of a newspaper reflect the "real state of affairs" should be based on a clear legislative provision. The ECtHR considered that an extensive interpretation of the phrase "the real state of affairs" in favour of the registering authority to refuse registration was not founded on any legal provision clearly authorising it and that this was not reasonably foreseeable for the applicant.

Therefore, the manner in which the "formalities" for registration were interpreted and applied to the applicant's exercise of his freedom of expression did not meet the "quality of law" standard under the ECHR. The ECtHR found that the interference with the applicant's rights was not "prescribed by law" within the meaning of Art. 10(2). The applicant was awarded non-pecuniary damages of €1,500.

## The right to be tried within a reasonable time – developments in Russia

*Roman Maranov, Lawyer, Slavic Centre for Law and Justice*

The Supreme Court of the Russian Federation (RF) has come up with a legislative initiative – to pass a Federal Constitutional Law ‘On compensation for harm caused by a violation of the right to be tried within a reasonable time and of the right to timely execution of court judgments that have taken legal effect.’<sup>1</sup>

At a meeting with President Putin, V.M. Lebedev, President of the Supreme Court of the RF, presented a proposal for this law accompanied by the following argument: we must help our colleagues at the ECtHR, or they will be unable to keep up with the flood of complaints. At the end of 2007, 103,850 cases were pending before the ECtHR, of which 26% were against Russia.<sup>2</sup>

It would be possible to considerably accelerate the review of these appeals if Protocol 14 to the ECHR were ratified, leading to a significant improvement in the mechanics of Court proceedings, and also the introduction of new procedures for verifying that ECtHR decisions are executed by respondent states. The only state that has yet to ratify Protocol 14 is Russia.

In the proposal of the Supreme Court of the RF, instead of eradicating the reasons themselves for judicial delay, a supplementary procedure would be established (to be implemented by the same judges), which would allow a citizen the possibility of initiating further proceedings, but in this case against the courts themselves on account of delays

caused by the courts. As the proposed law states:

“The burden of proving that there has been a violation of a reasonable period for trial and that such violation has caused harm is imposed on the individual who has filed the claim in court (Art. 10(1)).”

The ECtHR is flooded with complaints against Russia for its failure to execute domestic court judgments regarding such issues as the payment of pensions, teachers’ allowances and other financial obligations of the State. More than half of these are cases of failure to execute judgments regarding negligible sums – between three and ten thousand roubles (60 – 200 GBP). Furthermore, this is where a court has held a citizen entitled to receive such a sum, but where the court bailiffs have not been able to collect it, being given such excuses as “this sum has not been provided for in the federal/regional/local budget.”

The ECtHR has held such appeals to be admissible (starting with *Kalashnikov v Russia* (No. 47095/99) 15/7/02), and awarded compensation for moral harm.

Para 2, Art. 14 of the proposed law states:

“When a court has found a violation of a reasonable time-period, along with liability on the part of State agencies for such a violation, it may, while taking account of the demands of the person bringing the complaint, limit itself to declaring that there has been a violation of that person’s right to a trial within a reasonable time and/or the right to execution of a court judgment within a reasonable time.”

Moreover, the Supreme Court apparently does not want to take notice of the simple fact that in present-day Russia, the

judicial authorities cannot make the State fulfil its obligations if the State itself does not want to do so, whereas the ECtHR can do so.

The proposed law also provides for the possibility of exacting monetary sums in compensation for harm (if a court finds a violation of the right to be tried within a reasonable time, or of the right to the execution of a court judgment within a reasonable time, along with liability on the part of State agencies for such a violation). Certainly, the amount of compensation for harm will be determined by the court, taking account of the particular circumstances and the requirements of justice. In such a case, a pensioner should not count on being awarded thousand-euro sums (or their equivalent in roubles).

More likely than not, the amount of compensation will never exceed the amount owed, or even half that amount, where small sums are concerned (otherwise, the amount of compensation would probably be determined on the basis of the inflation index). Thus, in addition to the three thousand roubles that our pensioner has not received, he will also receive, after a couple more years of litigation, yet another judgment, for a fraction of the original sum, which cannot be executed.

1 Vremya Novostei. 4 October 2007. No. 181. *Samosud*, [Online]. Available at: <http://www.vremya.ru/print/188467.html> [accessed 13 March 2008].

2 Registry of the European Court of Human Rights, 2008. *Survey of Activities 2007*.

## Is the right to life adequately protected in Georgia?

*Tamar Khidasheli, Georgian Young Lawyers’ Association*

The frequent use of lethal force and the sharp rise in the number of suspects killed on the spot by Georgian law enforcers during so-called ‘special operations’ remains a cause of concern for human rights groups in Georgia. While speculations on the reasons and causes for such a tendency continue,<sup>1</sup> this paper will limit itself to

an examination of existing legislative safeguards concerning the right to life.

In its case-law, the ECtHR has repeatedly confirmed that the failure of the State to put in place an appropriate legal and administrative framework to deal with the lethal force used by law enforcement officials can in itself amount to a violation of the right to life.<sup>2</sup> Accordingly, bearing in mind that some cases of deprivation of life during

‘special operations’ might be successfully argued before the ECtHR, this paper will try to examine whether Georgia meets European standards in this respect.

Art. 13 of the Law on Police of Georgia regulates the issues relating to the use of firearms by law enforcement officials. The Law was adopted in 1993, before Georgia ratified the ECHR. Since then, Art. 13 has not been amended. The law provides that firearms shall be used

as a measure of last resort. However, it completely omits any reference to the requirements of ‘absolute necessity’ or ‘strict proportionality.’

The Law provides for situations where law enforcement agents are authorised to use firearms as a means of last resort. In particular, under paragraph 4:

A law enforcement official is entitled to use firearms:

- a) In self-defence or defence of others against the real threat of death or serious injury;
- b) In order to prevent the seizure of a firearm;
- c) In order to free hostages;
- d) In order to prevent the escape of a person from a place of detention or imprisonment;
- e) In order to prevent the perpetration of a grave crime, or to effect the arrest of a person who committed such a crime, if he/she resists their authority or to prevent his or her escape;
- f) In order to repel attack against private apartments, protected objects, state institutions, public organisations or against private property;
- g) In defence of citizens from attack by dangerous beasts;
- h) In order to damage a vehicle with the intent to stop it, if the action of a driver presents a real danger to the life and health of individuals and the driver does not obey the multiple warnings of law enforcement officials to stop.

Law enforcement officials are required to give a clear warning of their intent to use firearms before discharging their weapons.<sup>3</sup> In case of necessity, they are permitted to fire a warning shot. However, para. 6 of Art. 13 authorises law enforcement agents to use firearms without giving a warning in cases of:

- a) Unexpected armed attack or attack from military equipment, any type of vehicle or mechanical device;
- b) When a detained or arrested person

tries to escape using a vehicle or from a vehicle;

- c) When a person offers armed resistance during arrest or detention;
- d) Armed escape of a detainee;
- e) When a detainee escapes from a vehicle or in forests and places where it is easy to disappear from sight.<sup>4</sup>

The list of circumstances permitting the use of lethal force is obviously wider than that permitted by Art. 2 of the ECHR. For example, the law authorises the police to use firearms for repelling attack against private or public property without qualifying whether the ‘attack’ must be life-threatening or not. A second exception is when the law implicitly justifies deprivation of life in order to prevent a person seizing a firearm from a police officer. At first sight, this exception sounds logical, but only if one is assured that police actions could never be unlawful. What if an individual, lawfully trying to protect himself from unlawful violence by the law enforcer attempts to seize the latter’s gun?

Art. 2 of the ECHR explicitly provides that any action that may result in the deprivation of life must be ‘lawful’. ECtHR jurisprudence also qualifies the limited circumstances provided for in Art. 2, where it is permitted to use potentially lethal force:<sup>5</sup>

1. Self-defence or defence of others from unlawful violence;
2. Effecting arrest or preventing the escape of a person who has been lawfully detained; or
3. Quelling a riot or insurrection.

Accordingly, there can be no other circumstances in which it is permissible to kill. Thus, it might be argued that by authorising the use of potentially lethal force in circumstances not provided by the ECHR, the Law on Police contradicts the ECHR.

Moreover, Art. 13 permits law enforcement officers to use firearms in order to prevent the escape of a person from the place of detention

or imprisonment. Para. 6 of Art. 13 provides for circumstances where it is permitted to use potentially lethal force without giving a prior warning. The law fails to evaluate the nature of the offence committed by the fugitive and the threat he or she poses.<sup>6</sup> Thus, Art. 13 effectively permits lethal force to be used when arresting a person for even the most minor offence, in certain cases (when a fugitive tries to escape) without even giving prior warning.

As it was unequivocally stated in *Nachova v Bulgaria*, such a legal framework is fundamentally deficient and falls well short of the level of protection ‘by law’ of the right to life that is required by the ECHR in present-day democratic Europe.<sup>7</sup>

In addition, the law blatantly contravenes the standards reflected in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials which authorises the use of lethal force only in life-threatening circumstances.

Therefore it can be argued that the Georgian State fails to comply with its obligation under Art. 2 to secure the right to life by putting in place an appropriate legal framework on the use of firearms by law enforcement agents.<sup>8</sup> It does not seem groundless to claim that if a ‘special operation’ case were to reach the ECtHR, the Georgian Government would be held responsible for not having done “all that could be reasonably expected of them to afford citizens, and in particular to those against whom potentially lethal force was used, the level of safeguards required”<sup>9</sup> by European standards.

1 Dolidze, A., *Georgian Police Shooting to Kill*, EHRAC Bulletin, Issue 6, p. 3.

2 *Makaratzis v Greece* (No. 50385/99) GC, 20/12/2004.

3 Para. 5 of Art. 13.

4 Unofficial translation.

5 *Stewart v UK*, European Commission (No. 10044/82) dec. 10/7/84.

6 *Nachova and Others v Bulgaria* (Nos. 43577/98 & 43579/98) 6/7/05, para.96.

7 *Ibid*, para.100.

8 *Ibid*. para.102.

9 *Supra* no. 2, para.71.

## Treatment of Chechen IDPs, asylum-seekers and refugees in Europe

Clare Rimmer, *European Council on Refugees and Exiles*

In March 2007, the European Council on Refugees and Exiles (ECRE)<sup>1</sup> launched updated Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe. This article will concentrate primarily on the situation for asylum seekers and refugees from the Chechen Republic outside of the Russian Federation.<sup>2</sup>

Chechens are one of the largest groups of refugees in Europe. Despite a large fall in the number of applications by Russian nationals (the majority of whom are presumed to be of Chechen origin), they were still the third largest group of asylum seekers in Europe in 2006.

For those Chechen refugees outside the EU, the situation is extremely difficult. There are serious barriers to simply accessing asylum procedures for Chechen asylum seekers in Azerbaijan, the Republic of Belarus, Kazakhstan and Ukraine. In Ukraine the recognition rate for Chechen asylum seekers being granted refugee status has been 0% since 2005. There have been many reports of Chechens being deported from Ukraine and even in having problems entering the country, when as Russian citizens they should enjoy the benefits of a visa-free regime. In Azerbaijan, Chechen refugees are not accorded any legal status by the government and have no access to social assistance apart from that given by UNHCR. Refugee groups have also complained about the security situation for refugees in Azerbaijan. In Georgia, refugees who are not registered with citizens of Georgia are required to live in the Pankisi Gorge, a depressed area with little opportunity for finding work, meaning refugees depend on UNHCR food rations. The administration of the Republic of Chechnya has made several visits to Georgia to help facilitate returns to the Chechen Republic. NGOs have voiced concern about cases of the extradition of Chechens in need of international protection to the Russian Federation from both Georgia and Azerbaijan. Given these facts, it is ECRE's opinion that the return of refugees from these countries back to the Chechen Republic cannot be said to be voluntary.<sup>3</sup> Meanwhile, the number of Chechen refugees able to be resettled from

these countries to third countries is also decreasing.

Integration in the Republic of Belarus, Moldova and Ukraine is difficult. In Ukraine refugees from Chechnya find it hard to get any legal status that would enable them to remain in the country. The creation of the Union State between the Republic of Belarus and the Russian Federation and the Treaty on Equal Rights of its Citizens have meant in practice that no applications for asylum from Chechen refugees have been processed in Belarus. Although Moldova is one of the few countries in the region to accord refugee status to Chechens, the economic situation means that once recognised as a refugee, refugees do not get any assistance from the government.

It is little wonder then that many try and head west to the EU. Those Chechen refugees who make it to the EU, however, face different problems. Despite the EU's attempts to harmonise asylum procedures and introduce common minimum standards, the treatment of Chechen refugees varies considerably across Europe. Whilst there are generally high refugee recognition rates for Chechens in Austria, Belgium and France, it is much more difficult for Chechens to be granted refugee status in Finland, Poland, Sweden and Germany. In fact in Germany, refugee recognition rates can even differ depending on the region of the country where the application has been made. There are also differences between some member states which grant a high percentage of asylum seekers from Chechnya refugee status (e.g. Austria) whilst others predominantly grant other forms of subsidiary protection (e.g. 'tolerated stay' status in Poland).

The facilities and support available for refugees also differ from country to country, with those newer EU states on the eastern border often being hardest pushed to provide psychological and other services for those refugees who suffer from trauma or who have been tortured. The Dublin II Regulation,<sup>4</sup> which allocates responsibility for processing asylum applications amongst the EU's member states, causes further suffering, distress and hardship for many refugees. Chechen refugees often arrive in the EU across land borders. As the Dublin II Regulation often allocates responsibility for the asylum claim to the state in which the asylum

seeker first entered the EU, refugees can find themselves being transferred back to Poland, where reception centres and facilities are overburdened; or to the Slovak Republic, where there is an almost 0% refugee recognition rate and reports by NGOs of chain refoulement to Russia through Ukraine. ECRE and the UNHCR have also criticised Dublin II because of an increased use of detention by some member states to ensure the effective transfer of asylum seekers, a reluctance by some to use the Humanitarian Clause to allow families to be together or to use the Sovereignty Clause to take responsibility for processing applications for asylum from individuals suffering from extreme distress and trauma. ECRE is advocating for reform of Dublin II in the short-term, and its abolition in the long-term. In the meantime, ECRE believes member states should not transfer Chechen asylum seekers to other member states under the EU's Dublin II Regulation if they will not be guaranteed access to a fair asylum procedure or will be at risk of refoulement.

You can find ECRE's Guidelines on the Treatment of Chechen IDPs, Asylum Seekers and Refugees, at: [http://www.ecre.org/files/chechen\\_guidelines.pdf](http://www.ecre.org/files/chechen_guidelines.pdf). Please contact Claire Rimmer (CRimmer@ecre.org) to receive information on EU asylum systems, Dublin II and other policy documents in English and Russian.

1 ECRE is a network of 76 refugee-assisting NGOs in 31 European countries.

2 For the latest report by *Memorial* on the situation for residents from the Chechen Republic living in the Russian Federation up to October 2007 see: [http://lcrmosc.memo.ru/C325678F00668DC3/\\$ID/6AE81AE666DB64BC32573AA00016555](http://lcrmosc.memo.ru/C325678F00668DC3/$ID/6AE81AE666DB64BC32573AA00016555).

3 For more information on what constitutes voluntary return, see: ECRE, 2003. *Position on Return*, paras. 7 & 8. Available at: <http://www.ecre.org/files/returns.pdf>.

4 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. For more information on how this regulation works, see the ECRE/ELENA Summary Report on the Application of the Dublin II Regulation in Europe. [Online]. Available at: [www.ecre.org](http://www.ecre.org)

## ‘Citizen and Army’ – a Russian civil initiative

*Andrey Kuвшinov, Rights Society and Nick Williams, LSE*

The reform of military conscription has been the subject of debate in many countries in recent times. In Russia, two decades into the post-Soviet era, military service is firmly rooted in the past. The current system is characterised by systematic intimidation, violence, torture, blackmail and unpaid labour while the officers responsible are afforded blanket immunity. Any process of reform must therefore fill the legal vacuum by establishing the rule of law and the application of international human rights standards. This involves Russia accepting its obligation to protect all its citizens, including soldiers, and guaranteeing their fundamental rights under the ECHR. Cases such as those of Mikhail Perevedentsev, reported in the *EHRAC Bulletin 5* (Summer 2006), are sadly commonplace. In this case criminal proceedings were suspended by military investigators just two months after Mikhail was found dead in February 2004. A suicide verdict was given without an apparent evidential basis and the conscript's family were forced to apply to the ECtHR due to the absence of any other effective avenue for legal redress.

‘Citizen and Army’, a Russian human rights initiative, was set up in 2006 to focus on tackling these problems by capacity-building in Russia. The initiative acts as an umbrella body combining the efforts of a network of Russian human rights organisations which include the Union of Soldiers’ Mothers’ Committees, *Memorial*, the Moscow Helsinki Group, the All-Russian Coalition for Democratic Conscientious Objection, the Siberian Association for Democratic Military Reform and the Youth Human Rights Movement. By combining the strengths and experience of these individual NGOs, Citizen and Army aims to achieve the following goals:

- (i) raising awareness of human rights among young people in Russia, in particular in relation to conscription and military service;

- (ii) promoting effective advocacy for active participation in Russian government institutions at both regional and federal level; and
- (iii) developing a broad public framework of the major human rights networks and other NGOs facilitating closer links and exchange of skills and experiences.

The main focus so far has been on developing a number of regional programmes for the co-operation of organisations from different parts of Russia to achieve concrete objectives using common methodology and techniques. Seven regional programmes have been set up for the first stage of the project. These deal with key issues such as conscientious objection, monitoring the legal enforcement of conscripts’ rights, the provision of legal assistance to conscripts and to other servicemen and monitoring the use of soldiers for unpaid labour.

There are already almost 100 organisations involved in these regional programmes. To date over 20,000 people have received different forms of legal assistance, there have been over 1,000 relevant publications in the media and a number of roundtables with governmental institutions have been organised at both federal and regional levels. Despite these positive developments, however, there are two major challenges for the initiative: developing an effective partnership with governmental bodies and ensuring that information about its work reaches the public domain.

As is well known, in recent years NGOs have had an increasingly strained relationship with the government in Russia. In the case of Citizen and Army the problem is exacerbated by the particular sensitivity of its subject matter. As a result, significant efforts have been put into establishing a relationship with the President’s Council on Civil Society Development and Human Rights (‘Pamfilova’s Council’), the

Public Chamber and the Russian Federal Ombudsman. A variety of reports have been submitted and presentations made to these bodies. In addition, a number of conferences and roundtables have taken place. This approach has yielded some success: the Public Chamber has agreed that the next monitoring report on conscription will be prepared in consultation with Citizen and Army. These bodies remain the only method of bridging the gap between NGOs and the Russian authorities, however limited their apparent ability to influence the decision-making process.

Generating publicity in the Russian media is difficult due to the reluctance of journalists to report on the work of NGOs, especially in relation to human rights issues. There are two main reasons for this. First, human rights groups are criticised for providing insufficiently reliable information. Journalists are particularly vulnerable - and frequently exposed - to libel claims where the NGOs providing the information are unable to disclose the sources used for their reports (for obvious reasons). Secondly, NGOs are vulnerable to political accusations, led by the Russian government, that they are the mouthpieces of their foreign donors. For this reason Citizen and Army recently set up the Legal Defence Programme aimed at facilitating court hearings on human rights violations in the armed forces. One of the anticipated results will be the ability to use court decisions as a basis for working with the media. Court decisions will help provide independent evidence of the information presented by human rights groups. The initiative aims to include all relevant court decisions in a publicly accessible database available on its website (<http://www.army-hr.ru>). Citizen and Army invites all organisations and lawyers whose work relates to human rights violations in the army to participate in this programme – please get in touch!<sup>1</sup>

1 E-mail: [agk505@gmail.com](mailto:agk505@gmail.com); Tel.: +7-495-771-0203; Postal address: Moscow, 119331, PO Box 41.

EHRAC receives funding from the British Foreign Office and several other grant-making institutions, but is very much in need of your assistance to support the costs of some of the project activities.

EHRAC would be most grateful for any help you are able to give. If you would like to make a donation, please complete this form and send it to us with your donation.

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## About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University. Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights, 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 130 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 the International Human Rights Committee of the Law Society of England and Wales and co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: [www.londonmet.ac.uk/ehrac](http://www.londonmet.ac.uk/ehrac).

## Internship Opportunities

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

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### 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-Article 42 project

In 2008 EHRAC formalised its cooperation with the Georgian NGO, Article 42 of the Constitution. EHRAC has been providing advice to Article 42 on European Court cases since 2006. Lawyers from Article 42 have also attended training seminars conducted by EHRAC in Georgia and participated in the EHRAC Legal Skills Development Programme.

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