Welcome to the 28th issue of the Bulletin

In this issue, we reflect on measures taken by states in the name of security, which, as our authors argue, breach international human rights. In April this year, the European Court of Human Rights delivered its long-awaited judgment on the 2004 Beslan School Siege, finding the Russian authorities failed to prevent loss of life, and that failings in their approach contributed to casualties and fatalities amongst the hostages. In our leading article, EHRAC Litigation Director Jessica Gavron and Lawyer Jarlath Clifford discuss the judgment’s impact, and the high watermark it has set by confirming state responsibility under the European Convention on Human Rights (ECHR) when conducting counter-terrorism operations. Security issues are regularly cited as a justification for invasive surveillance practices; Joyce Man (former EHRAC intern) looks at regional practices which could raise privacy concerns, and possibly breach the human rights standards set by the ECHR.

Also examining regional practices, Rebecca Shaeffer (Fair Trials International) details plea bargaining systems in place in Russia, Ukraine and the South Caucasus, and some of the problems they pose for ensuring the guarantee of a fair trial. The importance of an independent judiciary is not to be underestimated: Professor Laurent Pech (Head of Middlesex University Law School) examines how ‘capturing the courts’ is a key component of backsliding of the rule of law in Poland and Hungary, which could lead to authoritarian rule. Since Russia’s annexation of Crimea in 2014, rule of law has been poorly protected, and this is particularly evident when it comes to the citizenship rights of Crimean residents. Sergei Zayets (Regional Centre for Human Rights, Kyiv) raises the issue of enforced citizenship on the peninsula, and the ways in which strategic litigation could be used to address the resultant forms of discrimination faced by local residents.

The theme of discrimination – on the basis of sexual orientation and gender – is developed in three further articles. The LGBT population in Chechnya has been targeted through violent and systematic abuse over the last year, and the Russian LGBT Network describes the evidence they have collected from victims. Victoria Kerr (former EHRAC Intern) summarises the first report of the UN’s Independent Expert on sexual orientation and gender identity, and some of his key concerns. Meanwhile, Gema Fernández Rodríguez de Liévana (Centre for Women, Peace and Security, LSE) analyses the much anticipated General Recommendation 35 from the UN Committee on the Elimination of Discrimination Against Women, and analyses its vision for a world free from gender-based violence against women and girls.

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Cover image: Chechen LGBT activists in London on the International Day against Homophobia, Transphobia and Biphobia, May 2017 (PA)

The views expressed in this publication are the authors’ own, and do not necessarily reflect the views of the European Human Rights Advocacy Centre or Middlesex University.
Victims placed at the centre in Beslan School Siege Judgment

A high watermark for the human rights protection of hostages

Jessica Gavron and Jarlath Clifford, EHRAC

The circumstances of the Beslan School Siege are well known, yet the scale and horror of the events remain difficult to comprehend.¹ On 1 September 2004, approximately 30 heavily armed Chechen separatists entered the schoolyard of School No. 1 in Beslan, North Ossetia, where children and their families were celebrating the first day of the new school year. They took more than 800 children and 300 adults hostage for three days in the school gymnasium, which they wired with improvised explosive devices. At 1pm on 3 September, explosions rocked the gymnasium and Russian security forces stormed the school using battlefield weapons. In the ensuing fighting 331 people died (including 186 children), of whom 116 were burnt beyond recognition in the gymnasium.

The Court’s judgment

The Court found four separate violations of the right to life under Article 2 of the European Convention on Human Rights (ECHR). It held, unanimously, that there had been violations of the positive obligation to prevent the threat to life and of the responsibility to carry out an effective investigation. It further held, by five votes to two, that the planning and control of the rescue operation were inadequate, and that the use of lethal force (flamethrowers and tanks) by the State had been disproportionate.²

The Court held the protection of life to be of the utmost importance, emphasizing the “absolute necessity” test of Article 2 in such sensitive cases (e.g. Finogenov and others v Russia (18299/03) 20.12.2011 and Isayeva v Russia (57950/00) 24.02.2005) as applying “different degrees of scrutiny, depending on whether and to what extent the authorities were in control of the situation and other relevant constraints inherent in operative decision-making” (481).

Prevention

Particularly novel in a case on this scale is the finding of a violation of the positive obligation to take preventive measures to avert or minimise the terrorist attack (as noted by Judge Pinto de Albuquerque in his separate opinion). In referring to the threshold set by Osman v the United Kingdom (23452/94) 28.10.1998, the Court reiterated its case law that the positive obligation applies not only to the protection of identifiable individuals, but can also be invoked to afford general protection to society (482). The Court distinguished this case from Finogenov (concerning the “Dubrovka” theatre siege in Moscow in 2002), in which it found no evidence of any advance warning of the attack. In Tagayeva, investigative internal directives issued by the Interior Ministry and FSB, (an unusual level of disclosure by the Government in a case concerning the North Caucasus, intended to demonstrate that preventive measures had been taken), satisfied the Court that the authorities had significant specific information including: the intended magnitude and nature of the planned attack (large scale civilian hostage taking); the target (an educational establishment); the geographical area (Molgobek area of Ingushetia near the border with North Ossetia); and the date (1 September, the Day of Knowledge). It was also relevant that the Russian authorities were familiar with the terrorists’ ruthless tactics having experienced three major terrorist attacks of a similar nature and scale in the preceding ten years. The Court held that:

“A threat of this kind indicated a real and immediate risk to the lives of the potential target population, including a vulnerable group of school children and their entourage who would be at the Day of Knowledge celebrations in the area. The authorities had a sufficient level of control over the situation and could be expected to undertake any measures within their powers that could reasonably be expected to avoid or at least mitigate this risk.” (491).

The measures taken by the Russian authorities were held to be inadequate: despite the available information, over 30 armed terrorists were able to gather, travel over 35km to Beslan and seize their target, without encountering any preventive security arrangements. The only police officer present was an unarmed youth liaison officer. It was further noted that no single high-level structure was responsible for the handling of the situation and ensuring effective containment of the threat.

Investigation

The Court examined in detail four crucial aspects of the investigation that it held to be inadequate. First, deficient forensic measures resulted in the “striking” failure to establish the cause of death of a third of the victims, constituting a major breach of an effective investigation that prevented important conclusions from being drawn (507-9). Secondly, the failure to secure, collect and record vital evidence was found to cause ‘irreparable harm’ to the investigation’s ability to carry out a thorough, objective and impartial analysis (516). Thirdly, there was a failure, in part as a consequence of the former failures, to adequately examine the use of lethal force by state agents. The Court reiterated that in security operations resulting in casualties, strict accountability for the use of lethal force by State agents is imperative and given the failings in this investigation, the Court found untenable the investigation’s conclusion that no hostage was killed or injured by lethal force used by State agents. Fourthly, there was a breach of the public
scrutiny requirement by restricting victim access to key expert reports. The Court emphasized that public scrutiny plays a special role where there are allegations against military or servicemen and an investigation basing its conclusions on confidential documents prepared by the same agencies undermines public confidence and gives the appearance of collusion in or tolerance of unlawful acts (537). These procedural findings reaffirm the Court’s position that the obligation to investigate applies even in complex scenarios resulting in large-scale deaths.

Planning and control

The Court established that in a situation involving a real and immediate risk to life, requiring a rescue operation, one of the primary tasks of the competent authorities should be to set up a clear distribution of lines of responsibility and communication within the Operational Headquarters, and with the agencies involved. Again the Court emphasized the areas it refrained from addressing such as political decisions taken by the authorities, for instance with respect to negotiation with the terrorists (heavily criticised by victims at the time) and the distribution of responsibility. Nonetheless the absence of formal leadership was found to result in serious flaws in the decision-making process and coordination between agencies that contributed to the tragic outcome (569-574).

Use of lethal force

For the first time in a case concerning anti-terrorist operations by Russian security forces in the North Caucasus, the Court examined the legal framework governing the use of force and found it inadequate to safeguard against arbitrariness and abuse of force (599). Previously, the Court has focused on the application of the ‘absolute necessity’ test in the context of the case and not passed judgment on whether the Suppression of Terrorism Act constitutes an adequate legal framework. However, in this case, involving the use of devastating military grade conventional weapons, the Court held that the failure of the domestic legislation to set principles and constraints on the use of force in anti-terrorist operations, together with the wide-ranging immunity it afforded for harm caused in the course of such an operation, resulted in a dangerous gap regulating situations involving the deprivation of life.

“A threat of this kind indicated a real and immediate risk to the lives of ... a vulnerable group of school children and their entourage who would be at the Day of Knowledge celebrations in the area.”

In terms of the use of lethal force, the Court reinforced its competence to deal with the most serious violations of human rights law. Reiterating its findings in Isayeva (191), “the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents”, the Court similarly held in Tagayeva that “the use of such explosive and indiscriminate weapons with the attendant risk for human life, cannot be regarded as absolutely necessary in the circumstances” (609).

Finally, and significantly, the Court made recommendations under Article 46(1) ECHR that the individual and general measures draw lessons from the past, raise awareness of legal and operational standards, and deter new violations. The Court stressed that the legislative framework governing large scale security operations had to reflect international standards and, most notably, specified that in order to comply with Article 46, a new investigation should elucidate the circumstances of the use of indiscriminate weapons by State agents and ensure victims access to key documents. However, given that the Kremlin spokesperson declared the judgment to be ‘unacceptable’, it remains to be seen whether the Government will refer the case to the Russian Constitutional Court, under amendments in force since December 2015, for a determination on whether it is ‘impossible to implement’ on grounds that it is inconsistent with the Constitution.

This is a judgment that places the victims at its centre. The courage with which they have pursued truth and justice is perhaps the most remarkable aspect of this case. To applicants Ella Kesayeva, and her sister Emma Tagayeva the Court represented hope:

“The European Court of Human Rights is a benchmark of justice; it is a body that should be seen as an example to everybody ... Beslan happened, and not a single person has been found responsible. We could not find justice in our country, and this again proves that we need such a Court. If even the Strasbourg Court was not there to support us, it really would be a scary world in which to live.”

Notes

1. Tagayeva and others v Russia (26562/07 et al.) 13.04.17, https://goo.gl/MmNt5T EHRAC and Memorial Human Rights Centre (Moscow) jointly represented 300 of the 409 applicants in Tagayeva.
2. Ibid. See partly dissenting opinions of Judges Dedov and Hajiyev

Enforced citizenship and human rights in Crimea

Russia’s mass naturalisation of Crimeans

Sergei Zayets, Lawyer and expert, Regional Centre for Human Rights (RCHR) and Sevastopol Human Rights Group

Following the Russian Federation’s occupation of the Crimean peninsula in 2014, the Russian authorities have naturalised Crimeans en masse, as part of an effort to entrench themselves in the occupied territory and cement its annexation. Seemingly, such a move appears to fall within a legal ‘grey area’, poorly regulated by international law, despite raising important human right issues.

It is certainly true that some Crimeans viewed their acquisition of Russian citizenship favourably or with indifference, even if it leaves them in a vulnerable position. Their ‘Russian’ citizenship is unrecognised not only internationally, but also sometimes in Russia.2 Then there are those who identify as Ukrainians and for whom the acquisition of citizenship of the Russian Federation was a burden imposed on them: this article will primarily focus on their situation.

A choice of citizenship?

According to the Federal Constitutional Law (enacted on 21 March 2014), Crimean residents had one month to declare if they intended to retain their current Ukrainian citizenship or become stateless, though in practice this period was only 18 days. According to figures from the Russian authorities, only around 3,500 people (less than 0.2% of the population of Crimea) made declarations to retain their (Ukrainian) citizenship or become stateless.3

Citizenship was, and still is, one of a large number of legal challenges that suddenly beset Crimeans following the annexation. As stated
in the report of the Russian Human Rights Ombudsman in the Republic of Crimea in 2014, the “transition period - an allotted time for the integration of the region, with its well-established legal system and state administration, into the system of state institutions of the Russian Federation - is characterised by domestic inconsistency, non-uniformity, a sequence of phases of progressive development which are often combined with clashes in the application of laws. This is leading to a situation where the ordinary man finds himself lost in a plethora of new rules of life which are not similar to the ones that he is used to.”

The instantaneous loss of familiar reference points in day-to-day life, the lack of information about the consequences of these changes, and extremely tight deadlines to comply with new rules made it impossible to make an informed choice about whether to accept Russian citizenship. NGOs working on these issues observed that the majority of Crimeans did not even attempt to make a choice and acquired the status of Russian citizens ‘by default’ at the end of the 18-day period.3

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Obtaining and changing nationality involves breaking a bond of allegiance and establishing a new one. Naturalisation cannot be regarded merely as verbal promises.

Implications of rejecting Russian citizenship

For those identifying as Ukrainian who could refuse or accept ‘by default’ Russian citizenship, either ‘choice’ worsened their situation in equal measure. Refusal of Russian citizenship automatically led to the acquisition of foreign national status. Not having a Russian passport in Crimea today “makes it impossible to enjoy almost all of the rights and freedoms laid down in the Constitution. This includes the impossibility of taking up employment, receiving social safeguards…” As ‘foreign’ nationals, these individuals are also subjected to migration control, and a ban on participating in political activity or the management of community affairs. Essentially, Crimeans without a Russian passport became foreign nationals in their home country. Their presence in the peninsula became entirely dependent on the occupying authorities’ discretion to grant residence permits.

Becoming a Russian citizen ‘by default’

The acquisition of Russian citizenship immediately had practical consequences for Crimeans, including the duty to take up arms to defend the Russian Federation and the obligation to declare dual citizenship (i.e. if Ukrainian citizenship was retained), or face criminal prosecution for failure to do so.5 The most essential part of this ‘enforced loyalty’ to the Russian Federation is the prospect of criminal liability for providing financial, material/technical, advisory or other assistance to a ‘foreign state’ or ‘international’ or “foreign organization or representatives thereof in an activity which threatens the security of the Russian Federation” (in other words, treason).6

The International Court of Justice (ICJ) held that obtaining and changing nationality involves breaking a bond of allegiance and establishing a new bond of allegiance.7 Naturalisation cannot be regarded merely as verbal promises made by a person to the country granting citizenship. The European Court of Human Rights (ECHR) held in a Moldovan case that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided by Article 8 of the European Convention on Human Rights (ECHR) (the right to respect for private life). Under this principle, protection is given to the personal sphere of each individual, including the right to establish details of their identity.8 The ECHR ruled in 2012 in a case against Slovenia (concerning citizenship following the break-up of the former Yugoslavia) that such practices are in violation of Article 8 ECHR, and that the applicants had suffered discrimination on the basis of their national origin.9

Citizenship of children without parents

Children deprived of parental care were left in the most vulnerable position of all. In August 2014, there were 4,228 such children in Crimea.10 Institutions providing care to these children have been brought under the control of the Russian authorities since the beginning of the occupation. Purportedly “for the sake of the child’s best interests”, not a single declaration “of intent to retain their existing... citizenship”11 was submitted on their behalf. Russian citizenship imposed on children deprived of parental care is a “refined” breach in this context. In Article 8 of the UN Convention on the Rights of the Child, a child’s citizenship is directly referred to as formative part of their identity.

Children recently born in Crimea are also in a difficult situation. If their parents did not declare their refusal of Russian citizenship in April 2014, they inadvertently lost the opportunity to prevent Russian citizenship being imposed on their children. This raises the question of possible legal remedies before regional human rights bodies, such as the ECHR.

The situation of Crimean children is a convenient starting point from which to litigate citizenship issues, because it involves a minimal number of the complicating factors that arise for adults, for example, that the violation is ongoing so the 6-month time limit does not apply.

Conclusion

A potentially strategic and effective approach could be to file a series of complaints on behalf of applicants in different situations: children, their parents, prisoners, individuals who declared their “intent to retain their existing citizenship” and those who have unsuccessfully tried to renounce Russian citizenship. In line with this multi-faceted approach, the Regional Human Rights Centre and the Sevastopol Human Rights Group are jointly preparing and litigating cases before the ECHR and the UN Human Rights Committee.

Notes

1. For more information about the context of this issue, please see: https://goo.gl/3zlKtY
2. https://goo.gl/k4HuHb
4. https://goo.gl/5wDuFy
5. RCHR data indicates a large number of people in Crimea, and those who left the peninsula, did not submit declarations of their intention not to acquire Russian citizenship and did not apply for Russian passports. According to Russian law, they are also regarded as citizens of the Russian Federation despite their lack of documents.
11. Ciubotaru v Moldova (No. 27138/04) 27.04.10, paras. 49
12. Kuric and others v Slovenia, (No.26826/06), 26.06.12, https://goo.gl/4MWqgN
13. https://goo.gl/KXmShV
14. https://goo.gl/UA5ImV

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President Trump, during his visit to Poland, said that Poland and the United States shared the same commitment to safeguarding values such as the rule of law. To the Polish ruling party, the right-wing Law and Justice Party, this appeared to be the right moment to mount a coordinated set of legislative attacks against its judiciary having previously successfully captured the Polish Constitutional Tribunal and key media outlets. Acting without any prior consultation and following what may be only described as a simulacrum of democratic law-making, the Polish ruling party was able to rush the adoption of four pieces of legislation in the name of ‘judicial reform’: (i) the law on the Supreme Court; (ii) the law on the National Council for the Judiciary; (iii) the law on the Ordinary Courts’ Organisation; and (iv) the Law on the National School of Judiciary. Together, these laws allowed the Government to fire all judges of the Supreme Court and to replace the leadership of the lower courts, as well as to take over the system of judicial appointments. While the first two laws were unexpectedly vetoed on 24 July 2017 by the Polish President under massive pressure from street demonstrations, Kaczyński, Poland’s de facto ruler and chair of the Law and Justice Party, announced that he would not take no for an answer and vowed to introduce the laws again.

This (finally) led the European Commission to threaten the activation of Article 7 of the Treaty on the European Union, the provision which inter alia empowers the Council of the Union to adopt sanctions against any ‘rogue state’ in case of a serious and persistent breach of the fundamental values on which the EU is based. As the saying goes, better late than never. Indeed, with the constitutionality of Polish laws no longer effectively guaranteed following the unconstitutional capture of the Polish Constitutional Tribunal, the Commission correctly concluded that the four Polish laws designed to capture the ordinary judiciary pushed through in July 2017 had the potential of structurally undermining “the independence of the judiciary in Poland”. The Polish ruling party’s game plan is not exactly difficult to guess: with the judiciary under its total control, it would not only be able to act in total impunity but also to legally contest any elections as these would no longer be free and fair in any meaningful way. Sadly, this strategy has largely worked, with the European Commission failing for the most part to comprehend what was happening, while the Council was simply missing in action. The European People’s Party also has a lot to answer for in this respect as it has done its best to protect Orban from EU scrutiny and sanctions for party politics reasons.

The cases of Hungary and Poland, to mention only the EU examples of a broader international trend, suggest a new worrying pattern in the fate of constitutional democracies. One may go as far as to speak of a recipe for constitutional capture being followed in one state after another, a process which tends to result in a systemic undermining of the key components of the rule of law such as independent and impartial courts. This process follows a well-organised script and tends to begin with disgruntled citizens voting to break the system by electing a leader who promises radical change. They will then often refer to the ‘will of the people’ while trashing the pre-existing constitutional framework with cleverly crafted legalistic blueprints borrowed from other ‘successful’ autocrats. The new autocrats act quickly to shut down the key offices that might resist their consolidation of power, which includes targeting the independent judiciary and the media.

In a recent article co-authored with Professor Schepple, we used the concept of “rule of law backsliding” to describe “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party”. Key EU actors have been in denial for too long about the clear and present danger this process represents. It is also not often understood that rule of law backsliding is a decisive issue for the whole EU. It not only affects the citizens of the country where EU values are violated in a systemic manner, but it also affects other EU citizens residing in any such ‘illiberal regime’ as well as, indirectly, all residents in the EU: these regimes participate in the EU’s decision-making processes and in the adoption of norms that bind all in the EU. In addition, given that implementation of EU law occurs primarily within Member States, a rogue government that no longer feels bound by the basic principles of the EU can create black holes within the EU where EU law is no longer sacrosanct. More fundamentally, the proliferation inside the EU of governments that no longer share basic European values undermines the reason for existence of the EU in the first place and threatens the functioning of its legal framework. The ‘values crisis’ may not seem as urgent as the other crises on European plates, but it has the most far-reaching implications for the European project. Europe therefore fails to act at its peril. And it needs to act before rogue governments bent on establishing authoritarian regimes become even more entrenched.

EHRAc is representing Anatoliy Denisov in a recent case against Ukraine at the ECtHR, concerning his dismissal from the position of president of Kyiv Administrative Court of Appeal. Whilst Mr. Denisov was on annual leave, unable to be informed of the date of the hearing that would consider his dismissal, the High Council of Justice (HCJ) dismissed him from the post of president of the court. Moreover, the Higher Administrative Court later dismissed his appeal. The dismissal of a president of a court by a predominantly Government-controlled body, such as the HCJ, is a prime example of a threat to the independence of the judiciary and consequent systemic undermining of a key component of the rule of law: In this respect, EHRAc argues before the ECtHR that such allowances provide the Government with decisive control over the president, who has substantial influence over, inter alia, which judges hear particular cases and how court decisions and legislation are implemented. This is particularly true for the removal and replacement of a president of an appellate administrative court which, by its very function, scrutinises the decisions of the Government. A hearing before the Grand Chamber took place on 18 October 2017.

Notes
1. https://goo.gl/WFxkdx
3. https://goo.gl/7Nhj9x
4. Anatoliy Oleksiyovych Denisov v Ukraine (App. 76639/11)
During the Soviet era, wiretapping extended the watchful gaze of the State into the private lives of many. Though countries reformed their laws after the USSR’s collapse, surveillance remains commonplace in the region (and indeed across the world); cases such as Zakharov v Russia have developed legal principles at the European Court of Human Rights (ECHR), which should limit indiscriminate surveillance in Russia and beyond.

However more recently, Russia – like the UK and USA – has legislated increasingly intrusive phone interception laws, ostensibly in response to terrorist threats, raising fears of a return to an Orwellian surveillance system regionally. With surveillance measures in the surrounding countries historically based on Soviet law and practice, and Russia wielding political influence in the region, changes in Russia’s surveillance legislation could lead neighbouring states to emulate it.

**Soviet-era roots of surveillance**

Wiretapping formed one of the ‘special investigative techniques’ supposedly aimed at crime prevention – for national security and to find opponents of the state – during the Soviet era. By contrast to wiretapping conducted by the police during pre-trial criminal investigations, which fell within the Code of Criminal Procedure, it required no judicial or prosecutorial approval and was not legally regulated. Soviet laws contained no right to privacy.

The 1990s saw many former Soviet states – including Russia, Ukraine, Georgia, Armenia and Azerbaijan – bring the requirement for judicial authorisation for wiretapping into their Constitutions or codes of criminal procedure, such that it became a requirement for both criminal and non-criminal investigations. They enacted laws to define the techniques and purposes for which they may be used.

However, it has been a slow road to compliance with these laws and the fundamental human right to privacy under Article 8 of the European Convention on Human Rights (ECHR) and Article 17 of the International Covenant on Civil and Political Rights. National legal provisions on operational search activities remained broad and vague. Phone privacy infringements persist. In Azerbaijan, mobile phones and SIM cards must be registered – registration undermines anonymity and allows governments to monitor users. Currently, Ukraine’s State Service for Special Communication and Information Protection is considering compulsory mobile phone registration.

**The Special Rapporteur on the right to privacy singled out the USA, UK, Germany and France for their intrusive, xenophobic, 19th century, terrorism focused approach to surveillance laws.**

The judgment outlined principles for best practice in regulating surveillance, which are applicable across the Council of Europe Member States.

**Challenging surveillance at the ECHR**

Individuals who have been subjected to unlawful surveillance have sought recourse at the ECHR. In Zakharov, the applicant contested Russia’s System of Operative Investigative Measures (SORM). He argued that the domestic laws on the secret monitoring of mobile phones violated the right to respect for his private and family life (Article 8 ECHR), parts of these laws had never been publicised, and that there were insufficient safeguards against unauthorised monitoring. He alleged that he had no effective domestic remedy for his complaint (Article 13). The ECHR found that even though Mr Zakharov was unable to claim that he himself had been the subject of surveillance, the existence of the legislation amounted to an interference with his rights. It concluded that Russian legislation did not “provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance, and which is particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile telephone communications.”

The judgment outlined principles for best practice in regulating surveillance, which are applicable across the Council of Europe Member States.

**Privacy vs security?**

Despite these encouraging developments in the law, in recent years Russia has propagated data governance laws and broadened wiretapping powers. In 2016, the State Duma enacted the ‘Yarovaya laws’, including one which requires telecommunications companies to retain voice data, texts and images for six months. The authorities have also adopted increasingly stringent SORMs – the systems for mass communications surveillance – which its Supreme Court has upheld.

Russia is not alone in intensifying surveillance, using counterterrorism as a justification, as noted in January 2017 by the new UN Special Rapporteur on the right to privacy in his first report.
The Special Rapporteur singled out the USA, the UK, Germany and France for their intrusive, xenophobic, 19th century, terrorism-focused approach to surveillance laws as he called for fewer “state-sponsored shenanigans”. He further called for international law to be developed to regulate mass data storage in September, stating that even in the context of state security, check and balances were needed.

What next?

More worryingly, other former Soviet states may follow Russia’s lead. Ukraine has adopted its own SORM, which one security services expert suggests was modelled on the Russian version.26 Whether countries, such as Georgia and Armenia, which have made bigger strides towards balancing individual privacy with state security, can resist will be revealed in coming years.

Notes

1. Zakharov v Russia [GC] (47143/06) 04.12.15, brought by EHRAC and Memorial Human Rights Centre https://goo.gl/54k4fs
2. Nikolai Kovalev and Stephen C. Thaman, ‘Special investigative techniques in post-Soviet states: the divide between preventive policing and criminal investigation’ in Comparative Criminal Procedure (Elgar 2016) 454
3. Ibid.
6. Kovalev and Thaman, p.462
7. See Kovalev and Thaman (in 2) 462 regarding Russia and Georgia; regarding Ukraine, https://goo.gl/7WCn
9. https://goo.gl/KBk4Gc
10. https://goo.gl/3k5ZD
11. https://goo.gl/93ehNC
12. FSB surveillance is regulated by: the Communications Act of 7 July 2003, the Operational-Search Articles Act of 12 August 1995, the Federal Security Service Act of 3 April 1995 and various orders issued by the Ministry of Communications; and Order No. 70, issued by the Ministry of Communications on 20 April 1999. The addendums to Order No. 70 have never been published. https://goo.gl/9A6oc
14. Sarîbayan v Armenia (No. 22491/08), 02.01.2013, https://goo.gl/7YBUU
15. https://goo.gl/U2Q4EE
17. https://goo.gl/HgcFC
19. https://goo.gl/3Gk0Xn
23. https://goo.gl/HyYJi
24. https://goo.gl/3h6Ci

Plea bargaining in Georgia was heavily associated with corruption, as highly resourced defendants were perceived to be ‘buying’ their way out of justice by the payment of fines as part of agreements struck behind closed doors. The face of criminal justice, in countries all around the world and in all kinds of different legal systems, has been undergoing a quiet revolution in the past 25 years. No longer are convictions won solely through judicial deliberation after a public airing of evidence. Instead, plea bargaining, incentive structures for guilty pleas, abbreviated trials, cooperation agreements, and other forms of ‘trial waiver systems’ have come to supplement and in some cases, to all but replace trials in many jurisdictions. Fair Trials has recently conducted research into the use of trial waiver systems in 90 jurisdictions worldwide, and has documented a 300% growth in the existence of such systems across the globe since 1990. It also demonstrated a wide variety in procedure, incidence and consequence of these systems. Some offer sufficient procedural protections for defendants, and provide promising opportunities to improve the efficiency and effectiveness of justice systems and to reduce human rights violations related to excessive case processing times and pre-trial detention. Unfortunately, the avoidance of the full procedural guarantees of trial may also undermine key protections for human rights and the rule of law, in ways that have not always been fully appreciated.

Georgia provides an object lesson in both the risks and possibility for reforms of plea bargaining, as it features a largely unregulated system with greater similarities to that of the USA than the more restrained versions found within the EU. Plea bargaining was first adopted as part of wholesale reforms to the criminal procedure code following the Rose Revolution, in the form of cooperation agreements. It was heavily associated with corruption, as highly resourced defendants were perceived to be ‘buying’ their way out of justice by the payment of fines as part of agreements struck behind closed doors. As plea bargaining expanded to apply to all kinds of criminal cases, its operation was tainted by the use of torture and excessive pre-trial detention to secure confessions – abuses exacerbated by the lack of open trials at which tainted evidence might be uncovered and excluded from use. Monitoring and reforms to the system in 2012 have resulted in a lower incidence of grave human rights abuses in the context of criminal prosecutions, and greater transparency and public trust in the justice system.6

The Russian Criminal Procedure Code provides two different procedures that conform to the definition of trial waiver systems: the abbreviated trial, and the cooperation agreement (called a pre-trial agreement in Russian law).

1. Abbreviated Trial: Applicable for crimes carrying sentences of up to ten years imprisonment. Requires consent of all parties and avoids judicial review of evidence. Minimum of one third sentence discount applied; final sentence may be suspended or be reduced below statutory minimum. In 2014, 64% of all criminal proceedings were concluded in an abbreviated trial.

2. Pre-Trial Agreement: Prosecutor and defendant draft an agreement laying out steps the accused will take to aid the investigation. This can result in a substantial sentence discount (half maximum sentence) or even diversion from criminal conviction in some cases. These agreements are often used in the context of prosecutions of organised crime and gang activity.

The Ukrainian trial waiver system, introduced in 2012, is infrequently used. As with other
countries in the region there is international support for plea bargaining via cooperation agreements to be expanded to assist in corruption prosecutions and the practice has been embraced by many policy makers within Ukraine. However, greater uptake of the procedure has been met with some hesitation by the legal community due to fears that it may facilitate human rights abuses. Nonetheless, there are recent reports of its use in terrorism prosecutions in relation to separatists in the conflict zones in eastern Ukraine.

In Armenia, trial waivers take the form of accelerated proceedings (‘speedy trial’), which proceed from plea to sentencing without in-depth examination of evidence. The speedy trial is triggered by a defendant’s guilty plea following the conclusion of the investigative period, in cases where the maximum possible penalty does not exceed ten years. The prosecutor may object to the application of speedy trial provisions, but the judge retains discretion over its application and the implementation of the sentence discount, which should be at least a third of the otherwise applicable sentence. Judicial statistics are not yet publically available as to the extent of the application of speedy trials, but some research suggests that the process makes up between 30-35% of all criminal cases. Observers have criticised the current speedy trial procedure on the grounds that in practice, defendants cannot be assured of the sentence that will ultimately be imposed following the speedy trial. Many defendants have complained that assurances of sentence discounts by prosecutors are not always later respected by judges.

Azerbaijan is the exception to the trend of increasing use of trial waiver systems – it is in the minority of jurisdictions that has still not adopted any such procedure into law. This is despite years of support for the use of plea bargaining in the context of corruption investigations, including from the Council of Europe and OECD.

**Recommendations**

**Domestic level advocacy:** There are opportunities for national-level advocacy in relation to trial waiver systems in a number of post-Soviet states. This work is highly context-specific, as the forms and consequences of trial waiver systems vary significantly. In Armenia, changes to the speedy trial proceedings are anticipated in the draft criminal procedure code and its implementation is likely to be impacted by the new Constitution. Greater clarity is sought so that defendants’ waivers are informed and thus truly voluntary. In Georgia, justice sector NGOs are advocating to exempt prosecutions for torture and other grave human rights abuses from the applicability of plea bargaining, to ensure that the truth-seeking function of criminal trials may be protected in key cases of public interest.

As Ukraine and Azerbaijan continue to consider the risks and opportunities presented by the expansion of plea bargaining, the experience of neighbours and jurisdictions around the world may be instructive. Data collection, including the establishment of baseline indicators prior to the adoption of trial waiver systems, is key to understanding the impact of these proceedings on the operation of the justice system.

**International standards:** Little in the way of law or policy has been produced by international legal and human rights bodies in order to guide jurisdictions implementing trial waiver systems as to how to protect fair trial and other basic rights in these proceedings. Exchange of best practices from around the world can begin to build a foundation on which international guidelines might be developed.

**Strategic litigation:** A dearth of case law from domestic and international courts is a perhaps predictable consequence of a procedure which by its nature produces little in the way of judicial review and higher appeals. The only major case which deals with plea bargaining at the European Court of Human Rights (ECtHR) is *Natsvishvili and Togonidze v Georgia*, which approved of a guilty plea proceeding despite many suspect features. Much deeper judicial exploration is needed at the ECtHR in to establish and raise the bar for necessary procedural safeguards and indicators to establish that trial waivers that are truly freely and voluntarily made.

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**Notes**

1. https://goo.gl/7BuwF
2. See also ‘Plea bargaining in Georgia’ in EHRAC Winter 2014 Bulletin: http://ehrac.org.uk/Q24aw
4. See, e.g. https://goo.gl/Qh5ninf
5. https://goo.gl/7BuwF
6. https://goo.gl/Ex1UTC
8. https://goo.gl/n4pSFR
9. https://goo.gl/qNLjra (Ukrainian only)
12. https://goo.gl/m0eZBw
13. https://goo.gl/U0smRT

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**The CEDAW Committee’s General Recommendation 35**

**A renewed vision for a world free of gender-based violence against women**

**Gema Fernández Rodríguez de Liévana, Visiting Fellow at the Centre for Women, Peace and Security, LSE**

**Introduction**

The adoption of the new landmark General Recommendation (GR) on gender-based violence against women by the UN Committee on the Elimination of Discrimination against Women (‘the Committee’), 25 years after the adoption of GR19 on violence against women in 1992, was long awaited. The objective of GR35 is to complement and update the guidance to State parties on their due diligence and other obligations to prevent and protect women from all forms of gender-based violence, as enshrined by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It fleshes out familiar standards but also goes further to include new spaces of discrimination and challenges such as cyberspace and violent extremism.

**The drafting process**

GR35 updates GR19 and was adopted by the Committee in the presence of Dubravka Šimonovic, Special Rapporteur on violence against women, its causes and consequences (SR VAW). The SR VAW’s contribution to GR35 constitutes an innovative example of good practice for the Committee and other Treaty Bodies. It is the first time the Committee directly incorporates a holder of a thematic Special Procedure of the Human Rights Council, thus recognising the importance of having other experts from the UN system on board.

The Committee engaged in a participatory drafting methodology and called for comments from “all interested parties”. It received submissions from 64 NGOs and 18 other stakeholders, including governments, national human rights institutes, individual experts, academics, UN agencies, including the Working Group on the
issue of discrimination against women in law and in practice, and the Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). The recognition of these submissions in the preamble to GR35 demonstrates the increasing willingness of international committees to consult with the ultimate beneficiaries of these instruments.2

The drafting context

The Committee’s motto was “25 years of CEDAW General Recommendation No. 19 (1992): Accelerating efforts on gender-based violence against women”. This is meaningful in terms of understanding GR35’s framework. Although women’s rights have made great advances in the last 25 years, and important standards have been set, the wording of GR35 provides a warning not to take these gains for granted as violence against women remains widespread and pervasive. The Committee refers to tradition, culture, religion and fundamentalist ideologies as arguments often used to erode women’s rights; and acknowledges a context where financial crises have served as a gateway to reduce public spending, disproportionately affecting services needed by women fleeing violence. The Committee strongly emphasises the intersectional forms of discrimination that women face, mirroring its approach in other recent GRs.

The GR serves as a reminder that the battle to eradicate violence against women is not won, and women and girls around the world, within States, crossing borders and boundaries, face the same and new challenges to live a life free from violence.

Contributions and silences

GR35 incorporates a change in terminology from ‘violence against women’ in GR19 to ‘gender-based violence against women’ (G-BVAW) in GR35; this precision makes explicit the gendered causes and impacts of violence. Importantly, GR35 states that the prohibition of G-BVAW has become a principle of customary international law and that it may amount to torture and constitute international crimes in certain cases.

GR35 also strengthens and updates GR19 in the area of sexual and reproductive rights, asserting that “criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy” among others, “are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment”3

Despite seeming comprehensive, GR35 barely mentioned trafficking in the body of the draft. Yet sex trafficking, which disproportionately affects women, could have been addressed in the section on non-State actors,4 and also potentially within the new section on the extraterritorial obligations of State parties.5 The Committee now ought to address trafficking in a specific GR defining State responsibilities and providing authoritative guidance on Article 6 of the CEDAW Convention on suppressing trafficking.6

Regardless, GR35 is a significant step forward that provides feminist lawyers, advocates and activists with a new tool to eliminate G-BVAW.7 We must now make use of GR35 to fully realise its vision of a world where women live free from violence.

**LGBT Persecution in the North Caucasus**

“They said that I’m not a human, that I am nothing. That I would be better off a terrorist, than a fag”

**Russian LGBT Network, St. Petersburg**

In late March 2017, the Russian LGBT Network received its first requests for assistance from LGBT people living in the Chechen Republic.1 Those requests contained horrific evidence that LGBT people were persecuted, unlawfully detained, prosecuted, and tortured in unofficial detention facilities in the city of Argun. Since the beginning of April 2017, more than 130 people applied for assistance from the Network. Activists have successfully evacuated more than 70 people from the epicentre of this humanitarian crisis. They have been offered temporary housing, psychological, medical, and financial support, and legal assistance. As of October 2017, activists from the Network have helped 46 people find sanctuary outside of Russia.

Persecution of LGBT people in Chechnya is not a recent phenomenon: it is a well-known fact that gay men suffer arrests, beatings, blackmail, and extortion by police authorities. However, the anti-LGBT campaign that started in 2017 is an unprecedented violation of fundamental human rights. It involved not only violations of individuals’ physical integrity based on their sexuality, but also incitement to violence by Chechen authorities, who force relatives of the detainees to kill them using the rhetoric of ‘neo-traditionalism’.

**The absolutist regime of Ramzan Kadyrov has continuously searched for an internal enemy to preserve and sustain its power.**

Based on the evidence the Network has gathered from recorded testimonies of victims of the purge, there have been at least four waves of the most campaign of persecution:

- The first lasted from late December 2016 through to the end of February 2017;
- the second from March until May 2017;
- the third wave begun as the Holy Month of Ramadan ended and went on through to the end of June 2017; and
- the fourth started with the arrest of Zelim Bakaev, a famous Chechen singer, in early August 2017.

Human rights activists have all the evidence to suggest that the arbitrary arrest, unlawful detention, and torture of gay men in Chechnya is still happening. LGBT people were not the first social group to be labelled as “other” and threatened with...
in the anti-LGBT purges.

LGBT victims’ testimonies identify a certain pattern of persecution, namely: the police or the military officials appeared out of nowhere; they arrested people at their workplace or forced their way into the victims’ homes. The testimonies highlight the fact that officials had false pretences to justify the arrests, forcing victims into vehicles, threatening them and beating them up, even before they were brought to the facilities that served as secret prisons. All this evidence points to an organised campaign against Chechen LGBT community. In detention, officials physically and verbally abused the victims, sometimes using electric shocks to torture them. They also demanded victims reveal the names of other LGBT people residing in the Chechen Republic, and deprived victims of food and water. The Network’s evidence confirms that at least three people died while being tortured in detention. At least 15 people have been executed by their relatives having been exposed as gay. The issue of extra-judicial executions targets not only gay men: lesbians, bisexual women, and women in general are also the target of such reprisals.

At the time of writing, more than six months have passed since the evidence of a repressive campaign against LGBT people in the Chechen Republic was first published in Novaya Gazeta.1 Chechen authorities have continuously denied any wrongdoing and the Russian authorities remain inactive. Neither the Investigative Committee of the Russian Federation, nor the Prosecutor General’s Office has initiated an official investigation into these events. The Russian LGBT Network is aware of the fact that the Investigative Committee took preliminary investigative measures, but has not yet made any public statements about the outcome of these actions. The information from human rights activists and journalists directly point to the unwillingness of the Russian authorities to conduct an effective and transparent investigation of these severe human rights abuses. While the Network uses its best efforts to ensure that justice is served there is also a need for the Western democracies to step in and open their borders to people fleeing persecution in the Chechen Republic.2

Notes

1. The Russian LGBT Network’s full report into persecution of LGBT individuals in Chechnya is available in English here: https://goo.gl/DJ7qOY
2. https://goo.gl/VNFLtw
3. It is possible to donate to the Network online: https://goo.gl/S5m2S4

The first report of the Independent Expert on sexual orientation and gender identity

Setting the scene: a panorama and key concerns

Victoria Kerr, Legal Intern (2017), EHRAC

In April 2017, the first report of the United Nations Independent Expert (IE) on protection against discrimination based on sexual orientation and gender identity (‘SOGI discrimination’), Vitit Muntarbhorn, was presented to the UN Human Rights Council. The theme of the report is “diversity in humanity, humanity in diversity” and it sets the scene for the IE’s future monitoring and advocacy.

A panorama

The report provides a panorama of the situation regarding SOGI discrimination. It praises constructive practices and key developments (for example: same-sex marriage permitted in Canada and the US; courts in Botswana and Kenya declaring the refusal to register LGBT associations to be unconstitutional; and the annulment by Germany of Nazi-era homosexuality convictions). The IE notes that physical and psychological violence against LGBTI persons remains widespread and youth, women and refugees are at particular risk.2

Human rights defenders are also often persecuted for upholding LGBTI rights (p.6). The IE states that there is still a lack of awareness of the issue, and SOGI discrimination is linked to intersectional discrimination relating to race, ethnic origin, age, gender or membership of a minority ethnic or indigenous community (p.12-13). Despite a comprehensive international legal framework, challenges in ensuring protection of LGBTI rights include: criminalisation; discriminatory attitudes; harassment by police; stigma; lack of protective legislation; absence of complaints mechanisms; and lack of trust in law enforcement officials, all of which result in impunity for perpetrators and deny victims access to effective remedies.3 The IE reiterates the importance of dialogue, inter-agency cooperation and cooperation with civil society and the business sector in order to identify solutions to address these challenges (Sections C and E).

Key concerns

The IE identifies key concerns underpinning effective protection of LGBTI rights, which are central to his three-year mandate:

Decriminalisation of consensual same-sex relations

The report notes that 70 countries still criminalise same-sex relations;4 cross-dressing is also criminalised; and discriminatory religious laws continue to exist. LGBTI people have been convicted for their presumed sexual orientation, even though it is same-sex activity, rather than identifying as LGBTI, which is criminalised.5

Effective anti-discrimination measures

Patriarchal, racist or extremist views often result in discrimination and/or marginalisation of the LGBTI community. The IE highlights that many countries lack anti-discrimination laws, or fail to ensure effective implementation of
existing laws (p.16). There is often lack of access to justice and mechanisms and/or personnel that could provide some assistance and remedies, and limited transparency and accountability (p.16).

**Legal recognition of gender identity**

In some countries, transgender persons are not able to have their self-identified gender recognised by the State, even with gender reassignment surgery, and have to endure sustained abuse and discrimination. They may face psychological assessment, conversion therapy, sterilisation and divorce, with or without legal recognition of their self-identified gender, as well as bureaucratic hurdles to accessing education, housing, and employment opportunities (p.16).

**De-stigmatisation linked with de-pathologisation**

Despite practices of pathologisation (deeming SOGI as a ‘medical’ or ‘psychological’ condition) being largely eradicated internationally, the IE emphasises that it still occurs within countries, and LGBTI people are forced into conversion therapy (p.17).

**Sociocultural inclusion**

The LGBTI community are often excluded from society, bullied at school and online, and struggle to access employment opportunities, housing, and their personal safety is at risk (p.18). The IE warns that such exclusion exposes victims to other forms of discrimination, and has a social and economic cost for society as a whole (p.17).

**Promotion of education and empathy**

Lack of education or awareness causes biases and prejudices against the LGBTI community, which start at a young age. With the help of UN agencies, some countries are now integrating SOGI into the educational curriculum (p.18).

**Conclusion**

The IE emphasises that global SOGI discrimination is not homogenous and “traverses the home, educational system, community relations, national scenarios and the international setting” (p.3). It is a multi-faceted problem and it is therefore imperative to “start young” when promoting mutual respect and tolerance (p.19). The IE submitted a comprehensive follow-up report to the UN General Assembly in July 2017,” which focuses on the specific concerns outlined. It is clear that his work will be welcomed for shining a spotlight on this prominent “local-global phenomenon” (p.3), and that civil society will be able to use this report as a tool for identifying potential issues, common themes and opportunities for strategic action.

**Notes**

2. https://go.to/Wu62Hq
4. Ibid., p. 54.
5. UNHCR, “Protecting persons with diverse sexual orientations and gender identities”, p. 13, https://go.to/2dD2A
6. https://gazo.int/LXhfrk

**Orlov and others v Russia**

**ECHR: Judgment**

Prohibition of inhuman and degrading treatment

(No. 5632/10), 14.03.2017

**Facts**

Oleg Orlov, the chairman of Memorial Human Rights Centre, was abducted in Ingushetia in 2007 along with three REN-TV journalists. They were all in Nazran (Ingushetia) for their work. Mr Orlov was monitoring the human rights situation in Ingushetia and the REN-TV journalists came to cover the protests against alleged abuses by state security forces. On 23 November 2007 armed men in black balaclavas and uniforms burst into the applicants’ hotel rooms, took their personal belongings, including documents and television equipment. They forced them into a minibus outside, took them to a deserted place and beat them. Their abductors threatened to shoot them dead. However, the abductors were unable to find silencers for their guns, so ordered the applicants to stay on the ground until they had left, threatening to kill them if they ever returned to Ingushetia, and drove away. Fearing the abductors’ return, the applicants ran through the snow in the opposite direction without shoes or warm clothes for an hour.

The next day, after medical examination of the applicants, the Ingushetia Investigative Committee initiated an investigation into violation of privacy, obstruction of lawful professional activity of journalists and robbery. In subsequent years, the investigation of the criminal case was repeatedly suspended and resumed, ultimately yielding no results.

The applicants were represented by EHRAC and Memorial HRC.

**Judgment**

The ECtHR found the applicants’ abduction was attributable to State agents. It found that their abduction, beatings, threats and their abandonment in the cold amounted to a substantive violation of Art. 3 (Prohibition against ill-treatment) and Art. 5 ECHR (Right to liberty), and that there had been no effective investigation into the ill-treatment in breach of the procedural limb of Art 3 ECHR. The ECtHR also acknowledged that the Russian authorities were responsible for the unjustified confiscation of the applicants’ property (Art. 1 of Protocol 1).

Each applicant was awarded €19,500 in compensation.

**Comment**

The present case joins the myriad of cases regarding the Northern Caucasus and the systematic problems in the region of a lack of accountability of state authorities for gross violations of human rights, including ill-treatment and abductions. In finding a procedural violation of Art. 3, the ECtHR concluded that “[the] failure to obtain critical evidence, combined with the repeatedly criticised lack of willingness to investigate on the part of the police [shows] that the investigation…cannot be said to have been effective”, particularly in light of the “systemic failure to investigate abductions attributable to State agents between 1999 and 2006… and the re-occurrence thereof after that period”.

**RECENT EHRAC HUMAN RIGHTS CASES**
Kibalo v Russia

ECtHR: Judgment
Right to respect for family life

(No. 35845/11), 03.07.2017

Facts

In May 2007 Mr Kh. was sentenced to twenty years’ imprisonment and sent to a ‘strict-regime’ facility in Blagoveshchensk (in the far east of Russia). In February 2008, Mr Kh.’s wife, Natalya Kibalo, and their two daughters (the applicants), requested his transfer to a nearer facility, but it was rejected. Ms Kibalo argued that in practice they have been deprived of the possibility of visiting Mr Kh. as it takes at least eight days to travel to Blagoveshchensk from their home in Chechnya. Without sponsorship, the ticket price was prohibitively expensive; although Mr Kh. had the right to three four-hour visits and three three-day visits annually, his family were only able to make the journey on eight occasions over four years, and six of these trips were sponsored. Their youngest daughter, born in 2009, has never seen her father.

The applicants were represented by EHRAC and Memorial Human Rights Centre.

Yankovskiy v Russia

ECtHR: Judgment
Prohibition of inhuman and degrading treatment

(No. 24051/11), 25.07.2017

Facts

Vyacheslav Yankovskiy was detained in April 2010 on suspicion of murder and injuring two people. He is a type-one diabetic who suffers from various other illnesses, and was certified as disabled in 2008. In July 2010, a medical panel issued a report requiring specific medical care for Mr Yankovskiy if he was to remain in detention. Despite undergoing a further examination in October 2010, which found that he suffered from severe diabetes, the authorities transferred him to a detention facility that was not authorised to provide the necessary care. Mr Yankovskiy was not seen regularly by the required specialist, and his condition drastically deteriorated during detention.

By the time he lodged his application at the ECtHR, Mr Yankovskiy had been detained for one year. He alleged that Russia’s positive under Art. 3 ECHR had been breached due to a failure to provide adequate medical care during his detention. Furthermore, he argued a breach of Art. 5(3) due to his detention on remand being excessively long, and Art. 5(4) ECHR due to the examination of his appeals against custody orders taking too long. The applicant also argued a breach of Art. 13 ECHR, stating that he had no effective domestic remedies to complain about the quality of medical care in prison. In addition, Mr Yankovskiy argued a violation of his presumption of innocence under Art. 6(2) ECHR, stating that a detention order in August 2010 indicated that he had committed a criminal offence. Mr Yankovskiy was represented by EHRAC and Memorial HRC.

Decision

The ECtHR held that there was a violation of Art. 3 ECHR due to the absence of appropriate monitoring and supervision of Mr Yankovskiy’s medical treatment in detention, including the provision of adequate medical care, amounting to a serious failure on the part of the authorities. Furthermore, the Court found a violation of Art. 5(3) due to the applicant’s unreasonably long pre-trial detention, as well as Art. 5(4) due to the length of the appeal proceedings for the detention extension orders.

Jugheli and others v Georgia

ECtHR: Judgment
Right to respect for private and home life

(No. 38342/05), 13.07.2017

Facts

The three applicants lived in Tbilisi in close proximity to a thermal power plant. The plant was constructed in 1911 and started operating in 1939. Several accidents occurred during its lifetime and experts found that it had not been repaired between 1986 and 1996. It was privatised in 2000 and ceased operation the following year. Although City Hall had requested the plant install chimney filters, it never did.

The applicants had experienced problems with noise and pollution from living close to the plant as early as the 1990s, when an explosion seriously damaged their apartment building. The applicants and other residents brought action against the plant for environmental damage in 2000. Although they reached a friendly settlement, it was never enforced.

The Georgian Forensic Medical Examination Centre found that protracted exposure to sulphur dioxide, carbon monoxide, nitric oxide and nitrous oxide levels, black dust, noise and electromagnetic pollution had impacted the health of two applicants negatively (the third, for unstated reasons, had not been included in the examination).

Although the Georgian Supreme Court ordered the operators, City Hall and Ministry of the Environment to pay GEL 7,000 (€2,938) to two

Reasoning that the applicants’ suffering cannot be compensated for by a mere finding of a violation, the Court awarded Ms Kibalo and her daughters €6,000 in compensation. This was joined to three other cases taken to the ECtHR relating to Russia’s practice of sending convicts prohibitively far away from their families such that the right of prisoners to maintain family relations is unreasonably restricted.

Additionally, the Court determined there to be a breach of Art. 13 as a result of the absence of an effective remedy for the applicant to complain about the quality of medical care in detention.

The applicant was awarded €19,500 in damages.

Comment

This case is part of EHRAC’s broader litigation to protect prisoners’ rights, which are routinely violated in our target region (Russia, Ukraine and the South Caucasus). Furthermore, the ECtHR has dealt with a large number of cases dealing with serious illness as grounds for release in Russia. This judgment is the latest to emphasise the systematic nature of the issue, and the need to effectively apply Art. 110 of the Russian Criminal Procedure Code, so that detainees and convicts in Russia have their right to adequate healthcare protected in line with international standards.
of the applicants and a monthly payment to one, it rejected their complaint regarding electromagnetic and air pollution. It also did not order measures which would have reduced future harm, such as calling on the plant to install filters. The applicants were represented by EHRAC and the Georgian Young Lawyers’ Association.

Judgment

The applicants complained that the State failed to protect them from the air, noise and electromagnetic pollution, which caused severe disturbance to their environment and risk to their health. They argued that this had seriously interfered with their health and wellbeing, thereby violating their right to private life and home (Art. 8 ECHR).

The ECHR found a violation of Art. 8 ECHR on the basis that even if air pollution had not caused them quantifiable harm, it may have made them more vulnerable to disease, and it had adversely affected their quality of life. It found that the State failed to strike a balance between the community’s need for a thermal plant and the applicants’ right to respect for home and private life. The applicants were awarded €4,500 each in damages. It dismissed the applicants’ claims on noise and electromagnetic pollution.

OTHER RECENT HUMAN RIGHTS CASES

Bayev and others v Russia

ECHHR: judgment
LGBTI Discrimination
(Nos. 67667/09, 44092/12 & 56717/12), 20.06.2017

Facts

The three applicants are gay rights activists, who were fined in administrative proceedings for holding demonstrations against laws banning the ‘promotion of homosexuality’ among minors in April 2009 and January 2012. The third applicant was fined again in May 2012 for holding another demonstration in front of the St Petersburg City Administration.

The applicants challenged the ban on public statements concerning the identity, rights and social status of sexual minorities and claimed that it was discriminatory, given that no similar restrictions applied with regard to the heterosexual majority.

Judgment

The Court found violations of Art. 10 and Art. 14 ECHR, considering whether the legislative ban on the ‘promotion of homosexuality’ among minors as a general measure was based on a legitimate aim.

Regarding the justification for restrictions on the right to freedom of expression on the grounds of protection of morals, the Court noted that there was a European consensus about recognising the rights of any sexual minority, including promoting their own rights and freedoms. The legislation in question embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. As an example of such bias the Court noted the attempts to draw parallels between homosexuality and paedophilia. Furthermore the Court noted that it would have been incompatible with the values of the ECHR if the exercise of ECHR rights by a minority group were made conditional on its acceptance by the majority.

The Court refused to accept the Government’s argument that maintaining family values is incompatible with acknowledging the social acceptance of homosexuality.

Regarding the Government’s justification for the law on the grounds of health protection, the Court noted that not only would the legislative ban not be conducive to a reduction of health risks but also that it would be counterproductive since disseminating knowledge on sex and gender identity issues would be an indispensable part of a disease prevention campaign. The Court further noted that the Government was unable to show a mechanism by which a minor could be induced into a “homosexual lifestyle”. It highlighted the risk of exploitation and corruption of minors is not limited to same-sex relationships. Moreover, by holding the demonstrations, the applicants did not interfere with the private space of minors, nor were their messages sexually explicit or aggressive. The Court noted that in the public discussion of sex education the parental views, educational policies and the right of third parties to freedom of expression should be balanced and the authorities should refer to the criteria of objectivity, pluralism and scientific accuracy.

The Parliamentary Assembly of the Council of Europe1 and the Venice Commission2 have also stated that they consider the provisions of this legislative ban to be incompatible with the ECHR.

In contrast to the majority, Judge Dedov delivered a dissenting opinion regarding the right to freedom of expression, re-iterating the Government’s argument that there is a link between children’s access to information about homosexuality and sexual abuse, and therefore that the law pursues a legitimate aim in limiting the dissemination of such information.

Comment

The ECHR delivered a strong-worded judgment, drawing on its case law on the situation of gay and other sexual minority rights in Russia (Aleksyev v Russia (No. 4916/07 et al.) 21.10.2010), and stating that the “position of the Government has not evolved since Aleksyev and remains unsubstantiated”. It is noteworthy that before addressing the State’s margin of appreciation, the Court scrutinised the legitimate aim advanced by the Government: an important aspect of the judgment is the Court’s refusal to accept the Government’s argument that maintaining family values (as the foundation of society) is incompatible with acknowledging the social acceptance of homosexuality. By doing so, the Court noted the growing general tendency to include relationships between same-sex couples within the concept of ‘family life’, the acknowledgement of the need for their legal recognition and protection, and the fact that many persons belonging to sexual minorities are not opposed
to the concept of family and, on the contrary, manifest allegiance to the institutions of marriage, parenthood and adoption.

Finally, the judgment’s tone emphasised the Court’s direct criticism of not only the formulation of the legislation in question (which highlighted the bias of a heterosexual majority against a homosexual minority), but also its domestic interpretation and enforcement.

Notes
1. https://goes.gj/05501De
2. https://goes.gj/05501De

Carvalho Pinto de Sousa Morais v Portugal

ECHR: Judgment Freedom from Discrimination
(No. 17484/15), 25.07.17

Facts

The applicant is a Portuguese woman, who in 1995 underwent surgery at the Central Lisbon Hospital (CHCL) for a gynaecological disease causing her pain and discomfort. During the operation, a nerve was damaged in her perineum, which caused her severe pain and urinary incontinence, as a consequence of which she had difficulties walking, sitting and having sexual relations. The applicant won a civil case against CHLC, and was awarded €172,000 in damages.

The following year the CHCL appealed before the Administrative Supreme Court, which upheld the first-instance judgment on the merits, but reduced the amount of damages. The Supreme Court reasoned that as a 50-year-old woman, the impact of the surgery on the applicant’s sex life was less important than it would have been if she had been younger and had no children. The Attorney General, joined by the applicant, later appealed this decision, arguing that the judgment should be declared null and void, but this was dismissed by the Administrative Supreme Court.

Judgment

The ECtHR found that the argumentation by the Administrative Supreme Court, that sexuality was not as important a consideration for a 50-year-old woman, showed a gender-stereotyped and traditionalist view of female sexuality, prevalent in the Portuguese judiciary. The ECtHR also noted that there had been similar previous cases before the Portuguese Supreme Court of Justice, where male applicants were rewarded high damages due to the “tremendous shock” the loss of normal sexual relations had caused them.

Comment

This judgment is particularly interesting and important as this is not only a case of discrimination based on gender and age. The ECtHR particularly focused on preconceptions of middle-aged women’s sexuality belying the domestic judges’ argumentation. Their reasoning reflects an assumption that “female sexuality is essentially linked to child-bearing purposes, and thus ignores its physical and psychological relevance for the self-fulfilment of women as people”. This judgment is an important step towards combating ageism as well as sexism in Council of Europe member states, and ensuring that the rights and freedoms of women of all ages are upheld.

Bălșan v Romania

ECHR: Judgment Domestic violence
(No. 49645/09), 23.05.2017

Facts

The applicant, Angelica Bălșan, was subjected to physical assaults and threats from her husband on numerous occasions between 2007 and 2008, and obtained a forensic medical certificate following each incident. On 19 December 2007, the Prosecutor’s Office attached to Petrosani District Court found her husband guilty of bodily harm and ordered him to pay an administrative fine of €50. No further criminal sanctions were imposed upon him as the court held that his actions did not present any danger to society and that he had been provoked by the applicant. The applicant appealed the decision and requested that the court impose criminal sanctions on her husband, order him to pay non-pecuniary damages and impose a restraining order preventing him from coming near her. On 17 February 2009, the Petrosani District Court acquitted her husband of the crime of bodily harm. Between 19 February 2008 and 21 April 2008 the applicant lodged five further complaints with the police against her husband for assault or threatening behaviour. On 28 September 2008, the prosecutor’s office attached to Petrosani District Court decided not press criminal charges against her husband for these incidents and imposed a €25 administrative fine.

Judgment

The ECtHR considered whether the authorities had failed to protect the applicant from domestic violence throughout her marriage, in breach of prohibition on ill-treatment (Art. 3 ECHR). The ECtHR held that Romania had a positive obligation to take reasonable measures to prevent ill-treatment, and to conduct an effective official investigation into alleged abuse meeting this threshold. The violence to which the applicant was subjected was held to have caused her both physical injuries as well as feelings of fear and helplessness, sufficient to meet the threshold of ill-treatment. In the ECtHR’s view, the applicant had sought protective measures; however, no concrete measures were taken by the authorities. The ECtHR noted that the sanctions imposed by the domestic courts on the applicant’s husband did not have the “deterrent effect necessary to be considered as a sufficient safeguard” to prevent him from further abuses. The national courts’ reluctance to engage appropriately with the applicant’s complaints was heavily criticised by the ECtHR, which described the national legal system as “deprived of purpose” and “inconsistent with international standards with respect to violence against women and domestic violence in particular”. The ECtHR noted that the tolerance towards domestic violence in Romanian society, coupled with the failure to apply the relevant legal provisions in this case, demonstrated “that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Romania and that their actions reflected a discriminatory attitude towards the applicant as a woman”. In light of these individual and systemic failures, the ECtHR concluded that there had been the violation of Art. 14 in conjunction with Art. 3. The applicant was awarded €9,800 in compensation.

Comment

The ECtHR once again reiterated its finding in Opuz v Turkey (No. 33401/02) 9.07.09 that it is not enough for States to establish a system that punishes all forms of domestic violence: that system must be effectively implemented to provide sufficient safeguards for victims. Despite the existence of a legal framework in Romania to combat domestic violence, the ECtHR established that at the heart of the case was the impunity and failure of national authorities to take appropriate measures to punish the offender and prevent further assaults. The ECtHR’s finding that the failure to effectively implement the legal framework to prevent domestic violence builds upon the systemic issues in this context identified in E.M. v. Romania (No. 43994/05) 30.10.12, and noted by the UN CEDAW Committee in its country report on Romania. The judgment is also significant for its recognition of domestic violence as a form of discrimination against women, and its assessment of the broader framework of international standards on countering gender-based violence.
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