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CONTENTS

Welcome to the Summer 2018 Bulletin!

This year marks the tenth anniversary of the tragic events in Armenia on 1 March 2008 following protests in Yerevan after the disputed Presidential election. The bereaved families still do not have answers about what happened to their loved ones, nor has anyone been held responsible for their deaths. We publish their testimonials here, highlighting the emotional reality that lies behind legal cases.

This year also marks 15 years since EHRAC was established with the aim of holding state authorities to account, primarily for the egregious human rights abuses – disappearances, murders, bombings, arbitrary arrests and detentions – occurring in the North Caucasus, particularly in Chechnya. Cornelia Klocker (PhD Candidate, Birkbeck, University of London) examines the concept and practice of collective punishment in this context, and raises the question of whether it is time for the Council of Europe to act in the wake of yet another spate of reprisals against vilified groups in Chechnya.

However, our anniversary is also an important moment to reflect on progress. In *Russia and the European Court of Human Rights: the Strasbourg Effect* (Cambridge University Press 2018, Lauri Mälksoo and Wolfgang Benedek (eds.)), the authors explore the various ways in which the European Court has had a beneficial impact in Russia, summarised in our leading article by former intern Joyce Man. Protocol No. 16 to the ECHR, which enters into force in 10 countries including Armenia, Georgia and Ukraine on 1 August 2018, represents another potentially positive development. As former intern Harriet Bland explains, the new Protocol, which allows states to request advisory opinions from the Court on the interpretation or application of the ECHR, may help resolve cases earlier nationally, thus avoiding the need for applicants to seek redress from the Strasbourg Court.

Turning to domestic matters, Emin Abbasov, one of only a handful of human rights lawyers who dares to practise in Azerbaijan following a tightening of restrictions on the legal profession, asks what lies ahead for the Azerbaijani legal profession in light of the most recent package of repressive legislative reforms. Christian De Vos (Open Society Justice Initiatives) and Roisin Pillay (International Commission of Jurists) analyse law and practice in the selection of human rights judges and commissioners for international human rights mechanisms (including the Strasbourg Court), noting the general lack of criteria in place to guide the nomination of qualified, merit-based candidates at the national level. A lack of robust and independent structures in the judicial and legal frameworks remains a systemic issue across EHRAC's target region.

As well as summaries of recent judgments and decisions from the European Court, a full list of all EHRAC's judgments to date is included at the end of this edition.

Joanne Sawyer
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Cover image: Opposition activists wave Armenian flags as they take part in a protest in central Yerevan on 1 March 2014 to commemorate the events of March 2008, when ten people, according to official estimates, died in violent post-election unrest. (Karen Minasyan/AFP/Getty Images)

Positive developments in Russia and the European Court of Human Rights: The Strasbourg Effect

A book review[1]

Joyce Man, former EHRAC intern

Given developments over the past three years, it is easy to focus on the negative in discussing Russia's membership of the Council of Europe and adherence to the European Convention on Human Rights (ECHR). In *Russia and the European Court of Human Rights: The Strasbourg Effect* (hereafter: *Russia and the ECtHR*), 15 practitioners and academics specialised in Russian human rights provide much-needed reflections on the twentieth anniversary of Russia's accession to the ECHR. The book examines whether joining the ECHR has led Russia to absorb human rights principles, and in doing so raises reasons for concern. Nevertheless, some authors point to Strasbourg's positive influence and take a more optimistic view of Russia's interaction with the European Court of Human Rights (ECtHR). Drawing on what they have observed both inside and outside the courtroom, and from sociological and historiological perspectives, they paint a picture of a relationship which, while at times strained, has also been dynamic and positive.

To be sure, there have been setbacks in recent years. In 2015, the Duma created new powers for the Russian Constitutional Court (RCC) to overrule Strasbourg judgments.[2] The following year, the RCC used these powers to find an ECtHR judgment unenforceable in *Anchugov and Gadkov*,[3] a case relating to prisoner voting rights.[4] Since then, the relationship between Russia and the ECHR system has remained tense. For this reason, *Russia and the ECtHR* provides a timely opportunity to take stock of how human rights protections have developed in Russia since its accession in 1998.

Focusing on violations in Chechnya, Prof. Philip Leach highlights cases which confirmed the practice of torture, deaths in custody, enforced disappearances, extrajudicial executions, deaths caused by aerial bombardment, artillery shelling and armed attacks in Russia (p.261). They include EHRAC's first successful cases, such as *Khashiyev and Akayeva*,[5] concerning torture and extrajudicial execution in Grozny (p. 262); *Isayeva,*[6] on the indiscriminate bombing of civilians in Katyr-Yurt in 2000 (pp. 284-5); and later, cases regarding redress for other victims in that attack in *Abuyeva* (p. 284)[7] and the need to address impunity in *Abakarova* (p. 285).[8] While ultimately compliance has been weak, these cases proved violations in an environment of impunity, and attested to the persistence of the claimants, their representatives and the Court – an achievement in itself (p. 291).

> While socialisation through the ECHR system did have an impact, it slowed after 2007, and today, *"the Strasbourg effect is dwindling"*.

The examples from EHRAC's work also reveal the development of successful case law which could have implications for future litigation. They include those relating to the indiscriminate aerial bombing in Kogi village near Dagestan (*Esmukhambetov*, pp. 268-9, 277)[9] and serious flaws in the authorities' use of weaponry in Beslan school hostage-taking of 2004 (*Tagayeva,* p. 271).[10]

A key area of success has been in property rights. As Dr. Vladislav Starzhenetskiy notes, following the disintegration of the Soviet Union, private parties were unable to enforce court orders for the State to perform obligations including provide transport services, social welfare, and state-funded accommodation. The successful case of *Burdov* at the ECtHR led the authorities to spend over a decade seeking to reform the enforcement mechanism and find a solution.[11] Similarly, ECtHR cases prompted the State to resolve the longstanding non-settlement of Soviet commodity bonds and enact federal legislation for payment in exchange (p. 307); introduce stricter rules on extraordinary review procedures, which had undermined judgment debts (p. 309); amend counter-terrorism measures involving the destruction or damage of property (p. 311); and improve property rights interferences in the course of criminal proceedings (pp. 316-7).

Strasbourg case law has been used in Russia's courts, as noted by Prof. Sergey Marochkin. The RCC has taken a confrontational stance against Strasbourg since it ruled in July 2015 that it could determine the enforceability of ECtHR judgments. However, prior to that, the RCC had regularly quoted ECtHR judgments, referenced them for justification of its own reasoning, made persistent statements in support of observing its decisions, and for the most part, recognised them (pp. 95, 99, 105, 113, 123).

Interactions with Russia have also positively impacted the Strasbourg system, as Dr. Elisabet Fura and Prof. Rait Maruste, both former ECtHR Judges, observe. Cases involving Russia led, for example, to the creation of the European Prison Rules (p. 236) and the development of case law on discrimination (p. 240). They highlighted the lack of legal assistance, a problem in many member states (p. 244), and prompted debate on the right not to be tried twice for tax breaches, under administrative and criminal law, in Finland and Sweden (p. 242).[12] Even unsuccessful cases had positive impacts, such as the rare standalone application of Article 38 in *Janowiec* regarding the Katyn massacre (p. 238).[13]

More recent developments have thrown observers' evaluations of the Russia-Strasbourg dynamic into doubt, writes Prof. Bill Bowring (pp. 211-2). The RCC's decision against the enforcement of the ECtHR judgment for just satisfaction in the amount of €1.9 billion in the Yukos case (p. 236),[14] and in *Anchugov and Gladkov*, have caused most of the writers to question Russia's future engagement with Strasbourg. Russia's record on LGBTI rights and in Chechnya have worsened, and the country has adopted an increasingly nativist approach (pp. 333, 357, 399). Dr. Anton Burkov observes pessimistically that domestic courts often do not apply Strasbourg case law, not for a lack of knowledge or a high case load, but more worryingly, a lack of motivation, political will and freedom (p. 70). Prof. Wolfgang Benedek, in summary, concludes that while socialisation through the ECHR system did have an impact, it slowed after 2007, and today, *"the Strasbourg effect is dwindling"* (p. 399).

Prof. Mikhail Antonov questions whether expectations were unrealistic to begin with; transplantation was always bound to be difficult. He is not so pessimistic about Russia's interaction with the ECHR (p.161). Likewise, Dr. Petra Roter notes that relations with the Council of Europe, while "troubled", have been "notable" (p. 47).

As the book went to print not long after the decisions regarding the 'unenforceability' of the *Yukos* and *Anchugov* judgments, most of the writers have refrained from concluding the worst, hoping – based on the positive experiences over a period of two decades – that the relationship can yet change.

Notes

1. Russia and the European Court of Human Rights: The Strasbourg Effect (Cambridge University Press 2018), Lauri Mälksoo and Wolfgang Benedek (eds.)
2. https://goo.gl/jNz6U2
3. *Anchugov and Gadkov v Russia* (Nos. 11157/04 and 15162/05) 4.07.2013, https://goo.gl/ctLcQA
4. https://goo.gl/KUut5p
5. *Khashiyev and Akayeva v Russia* (Nos. 57942/00 and 57945/00) 24.02.2005, https://goo.gl/pAbqm7
6. *Isayeva v Russia* (No. 57950/00) 24.02.2005, https://goo.gl/yqA119
7. *Abuyeva and others v Russia* (No. 27065/05), 2.12.2010, https://goo.gl/xTErFb
8. *Abakarova v Russia* (No. 16664/07) 15.10.2015, https://goo.gl/Eqm7J1
9. *Esmukhambetov and others v Russia* (No. 23445/03) 29.03.2011, https://goo.gl/hKD8vb
10. *Tagayeva and others v Russia* (No. 26562/07 et al.) 13.04.2017, https://goo.gl/vaZJ1j
11. *Burdov v Russia* (No. 59498/00) 7.05.2002, https://goo.gl/Wx7CvP
12. Editor's note: the Grand Chamber judgment in *Zolotukhin v Russia* (No. 14939/03) 10.02.2009, brought by EHRAC and Memorial Human Rights Centre, prompted a debate on the right not to be trialled twice. https://goo.gl/zm5STP
13. *Janowiec and others v Russia* (Nos. 55508/07 and 29520/09) 21.10.2013, https://goo.gl/E7t7bY
14. https://goo.gl/3uaCp2. OAO *Neftyanaya Kompaniya Yukos v Russia* (No. 14902/04) 31.07.2014, https://goo.gl/BxaQuT

Collective punishment in Chechnya

Time to act for the Council of Europe?

Cornelia Klocker, PhD candidate, Birkbeck, University of London

After an insurgent attack in Grozny in December 2014 and statements made by Ramzan Kadyrov regarding the responsibility of family members for their relatives, 15 incidents of punitive house burning were reported.

What is collective punishment?

Collective punishment is a concept deriving from the law of armed conflicts. It describes the process of imposing sanctions on a group (for example, on the basis of their ethnicity or political affiliation) for acts allegedly committed by one or some of their members. As a concept, collective punishment represents an act contradicting the fundamental principle of individual responsibility as it deliberately targets the innocent and it is prohibited in international and non-international armed conflicts by treaty as well as customary international law.[1]

Although the major offensives of the first and second non-international armed conflict between Chechnya and Russia (1994-96 and 1999-2000 respectively) ended over 18 years ago, the imposition of collective punishment on Chechens continues.[2] This prompts the question as to whether human rights law, and in particular the European Court of Human Rights (ECtHR, the Court) and the European Convention on Human Rights (ECHR), can respond to these challenging circumstances and provide effective protection and redress for Chechens affected by collective punishment.

Collective punishment in Chechnya

One of the practices used against insurgents (or people associated with the insurgents by the local authorities) is punitive house burning, which has been carried out since the early 2000s. This tactic was increasingly employed after Ramzan Kadyrov became president of Chechnya in 2007, broadening the influence of local security agencies and law enforcement. State officials (usually members of the local Federal Security Service (FSB) and the Chechen Ministry of the Interior) would approach an alleged insurgent's family in order to gather information about his or her whereabouts. Shortly after such interrogations or after insurgent attacks close to their villages, houses of families of alleged insurgents are burned down. The highest number of house burnings per year to date – 25 – was reported in 2008. Although the Chechen government denies any responsibility, Kadyrov has made statements approving of the punishment of insurgents' relatives on several occasions.[3]

During the last few years, attacks on local governmental premises and government officials have spread across the region once again.[4] After an insurgent attack in Grozny in December 2014 and statements made by Kadyrov regarding the responsibility of family members for their relatives, 15 incidents of punitive house burning were reported.[5] In May 2016, the family homes of two insurgents were burned down after they attacked a checkpoint. The relatives of a person suspected of involvement in a shootout with security forces in December 2016, were expelled from Chechnya.[6]

Turluyeva v Russia

In *Turluyeva v Russia*, litigated before the ECtHR by EHRAC and Memorial Human Rights Centre, the applicant was the mother of a young Chechen man who had contact with insurgents via phone and internet and who disappeared after a special operation aimed at locating insurgents in 2009.

Although this case is primarily concerned with the applicant's son's disappearance, the facts point to punitive house burning as well. The day in question began with armed uniformed servicemen arriving at the applicant's home alleging that insurgents had been hiding on her estate. The applicant understood those men to be servicemen of the Chechen Ministry of the Interior. The applicant and one of her relatives were brought to the district Department of the Interior for questioning and when they returned, their houses had been burned down.[7]

Fire fighters at the scene told the applicant the houses had been burned down deliberately, contradicting the government's claims. The punitive nature of the destruction of their homes is supported by the timeline of the events. The special operation, which resulted in the killing of two insurgents took place before the applicant was questioned, and her home and the homes of her relatives were still undamaged. After the applicant returned from questioning, her house had been burned down, meaning it occurred long after the special operation took place and not as a result of it.[8]

Can the ECtHR address collective punishment?

The ECtHR did not explicitly refer to collective punishment in this case. However, the nature and sequence of events strongly indicate that house burning was used as a form of collective punishment on the applicant and her relatives. Their homes were burned down due to their ties to alleged insurgents, forcing them to bear collective responsibility for acts committed by others. Yet even if state involvement in the fire had been confirmed at the time of the judgment (an investigation into the fire was still ongoing), the Court would only be able to pursue the human rights violations occurring due to the imposition of collective punishment but not the act causing them. Depending on the way in which collective punishment is imposed, the human rights violations going with it can include violations of the right to life, the prohibition of torture, the presumption of innocence, the right to private and family life or the right to property, yet they do not account for the particular wrong done by collective punishment, the punishment of a group for acts (allegedly) committed by one or some of its members.[9]

The applicant and one of her relatives were brought to the Department of the Interior for questioning and, when they returned, their houses had been burned down.

This gap in protection is deepened by the necessarily collective nature of collective punishment, standing in contrast to the individual rights enshrined in the ECHR. The Court has dealt with almost 50 cases featuring collective punishment in various forms so far, but as long as there is no prohibition of collective punishment in the form of a right held by groups, the Court is limited to the assessment of specific individual rights violated in the course of collective punishment. [10]

Outlook

As it stands at the moment, the ECtHR cannot act upon collective punishment, as it is not explicitly prohibited under the ECHR. Ultimately, it will be up to the Council of Europe to decide whether to adopt a Protocol to the ECHR prohibiting collective punishment, and this will also depend on the political will of its member states. Yet the fact that the Court is already dealing with cases involving collective punishment, as well as the growing international support for group rights and minority rights in general (as expressed for instance in the African Charter for Human and Peoples' Rights, the European Social Charter and the European Framework Convention for the Protection of National Minorities), might encourage the start of such a debate.

Notes

1. https://goo.gl/z6BL4Z; see e.g.: Art. 33 of UN Geneva Convention (Protection of Civilian Persons in Time of War), 1949, https://goo.gl/JwEvcB; and Art. 4(2)(b) of Additional Protocol II to the Geneva Convention (Protection of Victims of Non-International Armed Conflicts), 1977, https://goo.gl/ikBUB5.

2. https://goo.gl/oBybBp .

3. Ibid. pp.19 onwards.

4. https://goo.gl/L9A46i.

5. See reports by: Memorial Human Rights Centre (2016), *Counter-terrorism in the North Caucasus: a human rights perspective,* https://goo.gl/BtxEDV; Human Rights Watch (2014), *Burning Down the House in Chechnya,* https://goo.gl/npw6Df.

6. See e.g.: OC Media, https://goo.gl/MBbvVc; OC Media, https://goo.gl/6WVMmH.

7. *Turluyeva v Russia* (No. 63638/09) 20.6.13, https://goo.gl/St5o9x, para.8 onwards.

8. Ibid, para.11, 18 onwards.

9. Ibid, para.48 onwards; see also *I.K. v Austria* (No. 2964/12) 28.3.13, https://goo.gl/rR2f15 (case regarding non-refoulment due to the risk of the applicant facing collective punishment on return to Chechnya).

10. The cases mentioning the term collective punishment deal with the treatment of prisoners, non-refoulement, references to international law standards including collective punishment and the treatment of Kurds in Turkey.

Protocol 16 to the ECHR

Harriet Bland, EHRAC Legal Intern

On 1 August 2018, Protocol No. 16 to the European Convention on Human Rights (ECHR) enters into force in ten Council of Europe member states, including Armenia, Georgia and Ukraine. The Protocol allows the highest courts of these States to request the European Court of Human Rights (ECtHR) provide non-binding advisory opinions on questions relating to the interpretation or application of the ECHR or its Protocols. Protocol No. 16 is intended to help resolve cases earlier, at the domestic level, so that they no longer need to be taken to the ECtHR. Since the Brussels Conference in March 2015, EHRAC has, as part of an NGO coalition, been calling for such changes to the ECHR system (see http://ehrac.org.uk/pPG1H).

While EHRAC cautiously welcomes the new Protocol, there remain some potential issues. For example, Article 1(3) of the Protocol requires the requesting court to provide its reasons for making the request but does not require the arguments of the parties to the domestic proceedings to be included in the request. There are some fears that this will lead to domestic courts pre-judging the cases concerned. In addition, Article 3 of the Protocol affords no right for the claimant from the domestic proceedings to participate in the Advisory Opinion procedure itself. The Council of Europe Commissioner for Human Rights and the relevant State have the right to submit written comments and take part in any hearing, but these rights do not extend to any third party, except at the discretion of the Court. This, in combination with the above measures, risks excluding the voices of victims from the process. The Protocol also generates some uncertainty: it does not clarify the Court's position on costs orders, the availability of legal aid to the parties, when the advisory opinions will be published, or whether the proceedings will be carried out in one of the Court's two official languages.

It remains to be seen how Protocol No. 16 will operate in practice, how often it will be invoked, whether the potential difficulties described above will materialise and how they will be addressed by the Court.

What now for lawyers in Azerbaijan?

Where will new reforms take the legal profession?

Emin Abbasov, Human Rights Lawyer, Baku

In autumn 2017, the Azerbaijani parliament approved amendments to the legislation governing the legal profession,[1] but did not disclose these to the public.[2] These were approved by President Ilham Aliyev on 7 November 2017, and as of 1 January 2018, lawyers must be members of the Azerbaijani Bar Association (ABA) in order to be able to represent clients in Azerbaijani courts.[3]

Further to that, on 7 December 2017, the ABA held its general assembly, elected its new chairman, re-formed its governing bodies and renewed its call for candidates for the Bar exam,[4] and adopted a controversial new code of conduct.[5] On 28 January 2018, the ABA conducted its fifth round of examinations since its establishment in 2004, and declared that Bar exams would be held continuously from 16 April 2018.[6] However, the ABA failed to issue further details or legally-binding rules about organising and conducting the Bar exams. President Aliyev issued a presidential order *"On Additional Measures for the Advancement of Advocacy in the Republic of Azerbaijan"* (dated 22 February 2018) instructing the Cabinet of Ministers to allocate funds to the ABA;[7] provide new offices for the ABA and other offices for legal consultations across Azerbaijan; and recommended that the ABA increase the number of lawyers by conducting regular exams and ensure training to advocates in order to increase the quality of legal services.

Legislating against independent litigators

The new legislative amendments, effective since 1 January 2018, and other developments under the ABA's new leadership, were ostensibly related to improving the technical and structural set-up of the legal profession. However, the growing number of disciplinary proceedings against advocates taking human rights or otherwise 'politically-sensitive' cases on the basis of complaints by the authorities raises serious concerns about the new leadership's proclaimed eagerness to ensure the independence of the legal profession. For example, well-known advocate Yalchin Imanov's disbarment lawsuit is currently being heard, following a complaint by the Penitentiary Service of the Ministry of Justice; after Mr Imanov reported to the media that his client was being regularly tortured in prison, he was accused of disseminating false information and attempting to destabilise the country.[8] Fakhraddin Mehdiyev's licence was also suspended in December 2017 upon the complaint of the same state authority: he had shared an interview with his client with the media three months earlier. On 23 April 2018, two other well-known lawyers, Nemet Kerimli and Asabali Mustafayev had their licences suspended for one year by the ABA following an appeal from the Prosecutor General's Office. They were accused of breaching the confidentiality of the investigation of cases against their clients (which had already been completed at that time) and politicising the criminal cases.[9]

> The growing number of disciplinary proceedings against advocates taking human rights or otherwise 'politically-sensitive' cases [...] raises serious concerns about the leadership's newly proclaimed eagerness to ensure the independence of the legal profession.

In Azerbaijan, only a few independent advocates dare defend victims of human rights abuses through strategic litigation – especially in politically-sensitive criminal cases – and often face pressure by the state authorities. In practice, disciplinary proceedings are often used against Azerbaijani advocates who take cases exposing the authorities' wrongdoings, for example, by publicising allegations of ill-treatment or torture of their clients while they are in detention. In 2017, the UN Special Rapporteur on the Situation on Human Rights Defenders stated: *"For those lawyers who are members of the [Azerbaijani] Bar Association (ABA) disciplinary proceedings have been one of the main means of retaliation for their human rights or professional activities. There are cases of several lawyers whose disbarment and sanctioning were unjustified and politically motivated."*[10] Rather than ensuring that the legal profession is safeguarded and lawyers are able to effectively represent their clients without any repercussions, the ABA is notorious for upholding the authorities' claims, leading to disciplinary proceedings and sanctions, such as suspension or indefinite disbarment.[11]

What is the real effect of these amendments?

The ABA's monopoly of the legal profession has also adversely affected the state of access to legal assistance in the country. Azerbaijan has a mere 10 lawyers per 100 000 people, according to the 2014 data from the European Commission for the Efficiency of Justice (CEPEJ), leaving it ranked last place amongst Council of Europe member states.[12] According to recent Bar exam results dated 6 June 2018, the number of advocates has increased to 1202, for a population of 9.8 million (or 12.3 per 100,000).[13] This number is, however, still extremely low: in comparison, according to the CEPEJ report, there are 53 and 102 lawyers per 100,000 people in neighbouring Armenia and Georgia respectively.

The International Bar Association Human Rights Institute (IBAHRI) reported in its 2016 fact-finding mission that the ABA is not an independent institution capable of protecting the interests of the legal profession in Azerbaijan.[14] In this context, a full monopoly on court representation raises serious concerns about the independence of legal representation before courts. Before the adoption of the recent legal amendments, lawyers could represent their clients before domestic courts on civil or administrative cases without ABA membership, and enjoyed greater protection from any arbitrary interferences from the ABA. The current regulations place all practising lawyers under the ABA's supervision, which, as practice shows, is often used to initiate disciplinary actions against lawyers out of favour with the authorities for exposing the state's human rights abuses.

These amendments also pose a serious threat to legal services provided by civil society to certain vulnerable groups of the population, such as victims of human trafficking and/or domestic

violence, people with disabilities and internally displaced persons. Many young lawyers have cooperated with local NGOs to support these groups, given that hiring practising advocates is often prohibitively costly. The amendments made legal representation almost impossible for such vulnerable and low-income groups.

In this context, the ABA has established a domineering and intolerant profile in the legal profession. Its harsh approach to an independent legal profession is facilitated by the new controversial Code of Conduct for advocates that contains restrictive provisions on lawyers' independence and their right to freedom of expression, as discussed below.

A new Code of Conduct: Ethical Responsibility or Duty to Refrain?

Generally, Codes of Conduct for advocates aim to ensure the independence of lawyers, including their rights and responsibilities, with a view to improving the quality of legal assistance provided and establishing a more reliable and trusting relationship between lawyers and their clients. But the ABA's new Code of Conduct (which is legally binding)[15] contains worrying provisions that could threaten the independence of lawyers, weaken their ability to effectively represent their clients' interests, and damage lawyer-client confidentiality safeguards and freedom of expression.

Article 2, paragraph 5 of the Code contains provisions that restrict lawyers' ability to function and carry out their mission. It requires that advocates must be objective in their speeches and correspondence. It is unclear how this requirement can be met when lawyers' primary aim is to represent their clients' (subjective) interests. Further, Article 2.11 contains a worrying provision that advocates should not use their profession for political and religious purposes. In the Azerbaijani context, human rights lawyers representing members of political or religious groups in domestic courts are often systematically subjected to reprisals purely for their association with their clients and their views. In such an environment, this new regulation jeopardises lawyers' ability to effectively represent their clients and will have a strong chilling effect on lawyers who would otherwise be willing to defend the rights of the respective groups. Further, there are no safeguards or reassurances that such a provision will not be applied arbitrarily against those who represent and defend political parties or religious group members publicly or in court rooms.

Article 2, paragraph 13 requires advocates to refrain from actions and statements that may misrepresent the ABA and its bodies in the media, on social networks, and in public places. Such a requirement seriously hinders the ability of lawyers to effectively defend their clients, as well as limits their freedom of expression. It also restricts the capacity of the legal profession, in the context of principles of equality of arms and litigation, by requiring advocates to refrain from publicly sharing allegedly unsubstantiated information about state authorities and their officials. Further, Article 2, paragraph 14 fails to introduce a clear definition of the requirement for advocates to refrain from *"activity that is incompatible with advocacy activities"*. These provisions are very vague and broad, are open to wide interpretation and could be arbitrarily applied.

> The ABA must ensure that it is a credible professional body, providing a strong voice to and support for lawyers.

The role of lawyers is to advance their clients' cases, and seek the best possible outcome for them: they will inevitably be partisan in advocating for their clients. For example, in the case of *Morice v France*, the European Court of Human Rights scrutinised the status of lawyers, finding that they occupy a *"central position in the administration of justice as intermediaries between the public and the courts and [lawyers] cannot therefore be equated with external witnesses whose task it is to inform the public"*.[16]

What next?

Legislative amendments prohibiting non-ABA members, including human rights lawyers, from representing people before all courts (in the context of a government-controlled Bar association), combined with the low number of advocates, severely restricts access to legal representation and independent legal services, especially in cases against the state. For this reason, this restrictive regulatory framework – which was not debated transparently or publicly – must be reformed.

Further, the ABA must ensure that it is a *credible* professional body, providing a strong voice to and support for lawyers. To this end, it should unequivocally demonstrate that it is capable of defending lawyers' rights and the independence of the legal profession. In order to seek accreditation and membership to well-respected international and regional networks, it should take measures to discontinue pending politically-motivated lawsuits against lawyers, and collaborate closely with the relevant international organisations, including the Special Rapporteur on the Independence of Judges and Lawyers, the Council of Bars and Law Societies of Europe and the International Bar Association to bring its practices and internal rules into line with international standards and practices.

Notes

1. These included a new Draft Bill of Procedural Legislation, the Bar Act, the Code of Civil Procedure and the Code of Administrative Court Procedure.
2. https://goo.gl/ZP7yjz
3. https://goo.gl/jCxaw8
4. https://goo.gl/SSmYcN
5. https://goo.gl/HFdGUB
6. https://goo.gl/vAhjcj
7. https://goo.gl/ifbTdj
8. http://ehrac.org.uk/kZHx0
9. https://goo.gl/7XMmRZ
10. https://goo.gl/UWhZDU
11. https://goo.gl/qt1y8h
12. https://goo.gl/8oSaML
13. https://goo.gl/jt86Cx
14. https://goo.gl/keAaa3
15. Article 6.4 of the Regulation of the Code of Conduct for Lawyers (December, 2017).
16. *Morice v France* (No. 29369/19) 23.04.2015, para. 148, https://goo.gl/mivG9e

Ten years on, families of those killed during 1 March protests in Yerevan need answers

Witness statements from the victims' families show how little progress has been made

Compiled by the EHRAC team

This year, 1 March marked ten years since peaceful protests in the Armenian capital against alleged fraud during the 2008 presidential election culminated in their violent dispersal. Ten people died, either during the protests or in the coming days as a result of their injuries, and Armenia was plunged into a state of emergency. The families of nine of those killed argue that their relatives died as a result of the excessive and disproportionate use of lethal force by state authorities, which the Government disputes. To this day, there remain many unanswered questions about the events of 1 March and no one has been held responsible for the men's deaths.

So what happened? And how has it affected the lives of the victims' families? Extracts from the witness statements of the parents and spouses of those who died attest to the ongoing pain and suffering of not knowing what happened to their loved ones and who is responsible for their deaths.

Liliya Minasyan's husband – and Gayane Hovhannisyan's father – Hovhannes was shot dead during the dispersal of the protest.

At around 9pm, I was on the balcony at our home and I could see and hear tracer bullets. They looked like fireworks. They were red in the sky and I could hear what I thought was machine gun fire. I tried to telephone Hovhannes but he didn't pick up. I stood on the balcony for no more than five minutes before I left the house with Gayane. I knew that the main protest was by then near the Municipality building near the Myasnikyan statue, but there were many people at Shahumyan Square too, so we went there first to see if we could find Hovhannes. For about ten minutes, Gayane and I stood by the statue in Shahumyan Square to look for Hovhannes. We didn't want to join the protest. We just wanted to find Hovhannes. I didn't want to lose him.

Once we were home, and Gayane was safe, I wanted to return to the area of the children's park to look for Hovhannes, but I heard from a neighbour that people were leaving the area as they were being beaten with truncheons, so I stayed home … I heard on the television that some people had been injured and so I started calling hospitals … the longer I couldn't find him, the more I thought that something must have happened to him. I also started to look for Hovhannes amongst those arrested. Hovhannes didn't have any identification on him.

I kept calling the hospitals for two days … On 3 March 2008, I heard Hovhannes' name on the television as being one of the deceased.

Gayane was only 17 years old when her father died. She really misses him. … Initially, she found it really hard to get work as she was known as the daughter of one of the people who was killed on 1 March. When he died, Gayane effectively took over her father's role and responsibilities. When we cross the road, she holds my hand because Hovhannes would hold my hand.

Sargis Kloyan's son Gor died from his injuries on 2 March 2008:

"Our son was a young and engaged person. That's why he took part in the protests on Freedom Square following the 2008 Presidential elections in Armenia. I went with him. The rallies were peaceful. We listened to speeches.

Gor and I were not in Freedom Square when the protesters were forcibly dispersed on the morning of 1 March 2008. Later that evening, around 8.30-9pm I was with Gor in the rally near the French Embassy. The armed police troops were positioned in the area and tried to provoke the protesters by banging their shields with their batons. They made an explosion with a sound grenade. Protesters moved to where the sound came from. The opposition leaders told us to gather together in the square around the Myasnikyan statue. The armed forces of police approached us and surrounded us in a blockade. I saw and heard tracer bullets. They were shooting for about ten minutes. I estimate and felt that the police forces were shooting about five metres above our heads.

Ruzanna Harutunyan's son Tigran, a police conscript, died over a month later, on his nineteenth birthday, from his injuries, which the investigation failed to link with the protests.

I have been given different stories about what happened to the bullet that shot Tigran. It's all very confusing. When I first found Tigran in the hospital, I was told that he had been shot, but that they couldn't find the bullet. Other doctors also told me that they hadn't been able to remove the bullet from Tigran's body. At the Parliamentary Commission, I was told that the bullet was fired by either a sniper or a machine gun, but they didn't tell me which one it was. I don't know what to believe.

Vachagan Farmanyan's son Armen was killed during the dispersal of the 1 March 2008 protest. The post-mortem revealed he had two pieces of shrapnel in his skull from a gas grenade.

"After Armen's death, we planted two trees for him in the garden - they are big now … and we still don't know what really happened to Armen and why. I would like the Court to help us to find out whose fault it was that Armen died."

The families of the victims, represented by EHRAC, took their search for justice to the European Court of Human Rights in 2011.[1] The case is currently pending judgment. We argue that the authorities used disproportionate force to disperse the protest – which had been peaceful since it started – resulting in the deaths of their nine relatives, in breach of Article 2 of the European Convention on Human Rights (ECHR). We also argue that the authorities failed to conduct an effective investigation into their relatives' deaths, and that they had no access to an effective remedy (Article 13 ECHR).

"The families of the deceased are relying on the European Court to establish what happened on 1 March 2008, and who is responsible for the deaths of their sons, fathers, and husbands. These cases are of crucial importance for Armenian society as a whole; unlawful use of force by the law enforcement authorities against peaceful protesters is a recurrent issue, which the new Government must take action to address. On a larger scale, this case is about a direct attack on peaceful protests by the ruling regime by using lethal force against protesters, who were standing in defence of their civil and political rights".

Vahe Grigoryan, EHRAC Legal Consultant and the families' representative

Notes

1. *Farmanyan and others v Armenia* (No. 15998/11), comm. 1.09.15, https://goo.gl/zqe7ST

Strengthening from Within

Law and Practice in the Selection of Human Rights Judges and Commissioners

Christian De Vos, Advocacy Officer, Open Society Justice Initiative
Roisin Pillay, Director of the Europe Regional Programme, International Commission of Jurists

In national systems, the standards and procedures for the appointment of judges are among the cornerstones on which judicial independence is built; indeed, public confidence in the judiciary depends on this independence. International law and jurisprudence affirm similar requirements for regional human rights courts like the European Court of Human Rights (ECtHR), yet as a recent report released by the Open Society Justice Initiative and the International Commission of Jurists illustrates, these bodies have often not had the benefit of rigorous standards, or of the transparency that such procedures should demand.

Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners (November 2017) focuses on nominations at the national level as a critical point of entry for improving the selection process for regional human rights judges and commissioners.[1] Based on a wide range of interviews with state representatives, civil society advocates, and former or serving human rights regional judges and commissioners, the report is the first to consider judicial appointments from a trans-regional perspective and the first to document the nomination practices of 22 countries in Africa (Algeria, Ethiopia, Ivory Coast, Mozambique, South Africa, Uganda); the Americas (Argentina, Brazil, Chile, Costa Rica, Jamaica, Panama, United States of America, Uruguay); and the Council of Europe (Armenia, Austria, Greece, Liechtenstein, Moldova, Norway, Slovak Republic, United Kingdom).

The report makes a number of findings based on these country studies. Of greatest concern is that there is a lack of criteria to guide the nomination of qualified, merit-based candidates at the national level. While European states have more consistently elaborated such criteria, following earlier directives from the Parliamentary Assembly[2] and guidelines issued by the Committee of Ministers,[3] almost none of the states in the African or Inter-American systems do so. Furthermore, to date, neither the African Union nor the Organization of American States has issued directives or guidelines on the nomination of candidates to their regional commissions and courts. The country profiles detailed in the report also confirm another troubling practice: outside of the ECtHR (where states are required to nominate three candidates), states almost never nominate more than one candidate to a commission or court, leading to a paucity of nominees for regional election.

Improvements to the ECtHR elections process are commendable; indeed, one former judge characterised the process as having "improved beyond recognition". Problems continue to bedevil the European system, however, as well as its regional counterparts: chief amongst these is the lack of a national legal framework for nominating commissioners and judges. While several European countries reviewed in this report had established processes for nominations, these were largely *ad hoc:* only one, the Slovak Republic, has an actual legal framework in place.[4] Transparency in the process was also an issue of great concern, ranging from a lack of public notice about vacancies to insufficient (or non-existent) consultation with civil society stakeholders, including bar associations. For instance, the report documents that while many ECtHR countries have a practice of publicly circulating calls for applications, the degree to which they ensure effective, timely dissemination of such calls varied widely. Several interlocutors noted that this lack of transparency is because international judicial appointments are too often treated as opportunities to reward political connections.

Another concern with respect to transparency is the lack of an independent national body in the nomination process to help ensure that the selection process is impartial, free from discrimination, and based on merit. While most European states have such a body, the vast majority of them were created on an *ad hoc* basis, and the sufficiency of its members' independence from the executive was not always clear. Another concerning practice mentioned by several interviewees were efforts by some European states (Armenia amongst them) to "stack" their nomination lists in favor of one individual, in order to raise the likelihood of the state's preferred candidate being elected.

What can be done to improve these procedures?

The report makes five principal recommendations:

1. States should designate an independent body to conduct their national selection procedure. In more than half of the states highlighted in the report, judicial candidates appeared to have been nominated as a result of being personally approached by their governments, rather than through a transparent and competitive process.

2. States should develop and publish reasoned criteria to ensure that all candidates meet the minimum qualifications to be nominated. As the report illustrates, many states do not perform this basic step.

3. Take affirmative steps to ensure gender parity among national decision-makers in the nominations process—for instance on national nominating bodies or review panels. The lack of equitable gender representation at the national level likely correlates with the under-representation of women in almost all international bodies.[5]

4. The importance of engaging civil society – NGOs, bar and civic associations, academic institutions – to help ensure that calls for applications are widely circulated and that the nominations process itself is well publicised. Such constructive consultation does not take place nearly enough.

5. Within each regional human rights system, an independent advisory committee/group of experts should exist to evaluate the suitability of nominated candidates for office, to assess the national selection procedure undertaken, and to reject where necessary candidates who are unqualified or unsuitable for service.

While there is no perfect national model, the report confirms that, in almost all cases, the standards for nominations that have been set out in a growing body of international norms and jurisprudence have yet to be met. There is much work to do.

Notes

1. *Strengthening from Within* is available in English, French and Spanish: https://goo.gl/qU5qrB For hard copies, contact christian.devos@opensocietyfoundations.org.
2. https://goo.gl/r8Jgwp
3. https://goo.gl/WsxEMV
4. Amongst surveyed countries in the African and Inter-American regions, almost none issue open calls for applications and none have a written procedure to guide the nomination process.
5. https://goo.gl/kb7tgS

Merabishvili v Georgia

ECHR: Judgment (Grand Chamber)
Pre-trial detention; Improper purpose

(No. 72508/13), 28.11.2017

Facts

On 21 May 2013, Ivane Merabishvili, former Prime Minister and, at the time, the leader of the main opposition party (United National Movement), was arrested and detained for abuse of power and other offences. On 14 December 2013, he was removed from his prison cell, driven to an unknown destination with his head covered, and questioned by the Chief Prosecutor and the Head of the Georgian Prison Service about the death of a former Prime Minister and the bank accounts of the former Georgian President. He was told that if he provided the requested information he would be released and allowed to leave the country with his family, but he refused.

In its judgment of 14 June 2016, a Chamber of the Court held a violation of Art. 18 in conjunction with Art. 5(1) ECHR as the applicant's pre-trial detention was treated as an additional opportunity to obtain leverage over issues unconnected with the offences with which he had been charged. It also found a violation of Art. 5(3) ECHR as regards the judicial decision of 25 September 2013 concerning Mr Merabishvili's pre-trial detention. The Georgian Government's request that the case be referred to the Grand Chamber was accepted on 17 October 2016. Mr Merabishvili was represented by EHRAC and Georgian lawyer Otar Kakhidze, including during a Grand Chamber hearing on 8 March 2017.

Judgment

The Grand Chamber held that there was no violation of Art. 5(1) concerning the reasonableness of Mr Merabishvili's original arrest and detention, but found a violation of Art. 18 in conjunction with Art. 5(1) regarding the incident of 14 December 2013. It found that there was not sufficient evidence that the predominant purpose of Mr Merabishvili's pre-trial detention was to hinder his participation in Georgian politics. However, the Court found sufficiently convincing the applicant's depiction of the December 2013 incident and his allegations that the authorities tried to use his detention as leverage to obtain information from him about two other opposition politicians. The Grand Chamber noted that, during his pre-trial detention, the predominant reason for the applicant's deprivation of liberty changed and was no longer legitimate, as it aimed to obtain information from the applicant. The Grand Chamber also found a violation of Art. 5(3) from 25 September 2013 onwards when the applicant's pre-trial detention was no longer based on sufficient grounds.

> The Court introduced a predominant purpose test to determine whether an illegitimate reason was the predominant purpose of the applicant's detention.

Comment

In assessing this issue, the Grand Chamber took the opportunity to give an overview of its case law on Art. 18 and clarify its approach. The Court introduced a predominant purpose test to determine whether an illegitimate reason was the predominant purpose of the applicant's detention. In March 2018, the ECtHR published the first edition of a Guide on Art. 18, citing *Merabishvili v Georgia [GC]*, as well as *Ilgar Mammadov No. 2 v Azerbaijan and Navalnyye v Russia* (see case summaries below, and the Guide here: https://goo.gl/A35UC7).

In January 2018, EHRAC and Mr Kakhidze wrote to the Council of Europe's Committee of Ministers, requesting that they call on the Georgian authorities to conduct an independent investigation into the applicant's covert removal from his cell in December 2013 and his interrogation; to re-open the criminal proceedings against Mr Merabishvili (which could justify quashing his conviction); and to release him pending the outcome of these proceedings (see http://ehrac.org.uk/gX4mg).

MM v Russia

ECHR: Judgment
Prohibition of inhuman and degrading treatment; respect for private life

(No. 7653/06), 12.12.2017

Facts

The applicant was arrested in January 2005 on charges of murder, to which he confessed following alleged death threats and threats of ill-treatment by police officers. While in pre-trial detention, he was held in overcrowded, insanitary and degrading cells, with less than 4m^2 of space. Three months after his arrest he tested positive for HIV, and this information was included in his case file. The deputy district prosecutor granted the murder victim's sister victim status and access to the applicant's criminal file. She shared the applicant's HIV status with third parties without his consent and, the applicant argued, with defamatory intent. The applicant attempted unsuccessfully to file complaints against his prison conditions and initiate proceedings against the unauthorised release of his private information. He was represented by EHRAC and Memorial Human Rights Centre before the ECtHR.

Judgment

The Court considered two issues related to the disclosure of the applicant's HIV status, finding a violation of Art. 8 ECHR (the right to respect for private life). Firstly, the Russian Government did not comply with its positive obligation under Art. 8 when it included information on the applicant's HIV status in his case file, and allowed a private individual to have access to it without the applicant's consent. Further, there was no reasonable prospect of the applicant successfully being able to enforce respect for this right as there is no provision in criminal law requiring officials to exercise diligence when granting access to the criminal case file to a third party. Secondly,

the applicant had no remedies against the private individual who disclosed information about his HIV status to others. The Court noted that the pre-investigation inquiry into the applicant's criminal complaint lasted more than three years and that the time limit for prosecution therefore expired. As a result, criminal proceedings could not be brought. Further, the Government had failed to show that any civil law or other remedy existed or stood any chance of success.

With regards to the applicant's claims of inadequate conditions of detention, the Russian Government issued a unilateral declaration admitting a breach of the prohibition of inhuman and degrading treatment (Art. 3 ECHR), and offering to pay him €9,500 in compensation. Unsatisfied with these terms, the applicant also argued before the ECtHR that he had no access to an effective domestic remedy, an issue which the Government failed to address in its unilateral declaration. The ECtHR therefore found a violation of the right to an effective remedy (Art. 13 ECHR). The applicant was awarded €2,850 in non-pecuniary damages.

The ECtHR highlighted the importance of the context in this case, given the stigma surrounding HIV and AIDS in Russia.

Comment

This case, one of the few decided by the Court in respect of people living with HIV/AIDS, emphasises states' positive obligations under Art. 8. States must protect the confidentiality of HIV status, as this is of "fundamental importance" to the enjoyment of the rights guaranteed by Art. 8. The ECtHR highlighted the importance of the context in this case, given the stigma surrounding HIV and AIDS in Russia; other *"unpleasant or otherwise adverse interaction between private individuals"* would not necessarily give rise to an Art. 8 claim. Russia did not demonstrate a legitimate aim when including information on the applicant's HIV status in his case file, nor in making it accessible to a third party. The Court stressed the worrying absence in Russian legislation of due diligence provisions applicable to officials granting third-party access to detainees' case files. This absence renders void the provision of Art. 137 of the Russian Criminal Code, which punishes those who collect or disseminate private information without consent.

Sargsyan v Azerbaijan

ECHR: Judgment (Grand Chamber) – Just Satisfaction
Protection of property; right to respect for family life

(No. 40167/06), 12.12.2017

Facts

Minas Sargsyan, an ethnic Armenian, lived in Gulistan village, Azerbaijan, until 1992, when he and his family were forced to flee to Armenia as refugees, following heavy bombing by Azerbaijani forces during the Nagorno-Karabakh conflict. He applied to the ECtHR for redress in 2006. On 16 June 2015, the Grand Chamber of the ECtHR held that the family's rights under Art. 1 of Protocol 1 of the ECHR (protection of property), Art. 8 ECHR (right to respect for private and family life, and home) and Art. 13 ECHR (right to an effective remedy) had been violated. After Minas' death, the case was pursued by his wife, and then their children (see http://ehrac.org.uk/U3Afz for more on the decision on the merits).

In just satisfaction proceedings, the applicants claimed non-pecuniary damages for the anguish of being unable to return to their property or visit relatives' graves, and pecuniary damage for the loss of their property and land.

The Grand Chamber's decisions on both the merits (in 2015) and the just satisfaction claim (in 2017) of this case have run parallel with the case of *Chiragov and others v Armenia* (No. 13216/05) 16.06.2015 & 12.12.2017, which concerns similar issues arising in relation to an Azerbaijani family from an Armenian-controlled area of Nagorno-Karabakh.

Judgment

The ECtHR noted that the applicants were just a few of an estimated 1 million people – both Armenian and Azerbaijani – who fled their homes during the ongoing Nagorno-Karabakh conflict. The Grand Chamber urged the States to find a political solution, as well as a domestic mechanism to deal with the large volume of similar property claims.

No award was made for loss of property: the Court found that the applicants have merely lost the use of their property in Gulistan, not their rights to it. No award was made for property damage, given this occurred in 1992 before the ECHR entered into force in Azerbaijan (or Armenia).

The Grand Chamber urged the States to find a political solution, as well as a domestic mechanism to deal with the large volume of similar property claims.

Noting the difficulty of calculating pecuniary losses precisely, given the lack of documentation and passage of time (over 25 years), the ECtHR held that it had a discretion to award the sum it deemed equitable. Pending a solution on the political level, the ECtHR awarded an aggregate sum of €5,000 for pecuniary and non-pecuniary damages.

Since the judgments on the merits in 2015, EHRAC has briefed the Council of Europe's Committee of Ministers on the international standards of post-conflict property restitution with a view to taking concrete steps towards implementing the judgments effectively (see http://ehrac.org.uk/CUxz4).

Volkov v Ukraine

ECHR: Friendly settlement
Right to a fair trial

(No. 21722/11), 06.02.2018

Background

Oleksandr Volkov was elected to the Supreme Court of Ukraine in 2003. In May 2010, he was dismissed from his post due to an alleged "breach of oath". On 9 January 2013, the ECtHR found multiple violations of his right to a fair trial (Art. 6 ECHR) and respect for private life (Art. 8 ECHR) and ordered Ukraine to reinstate him immediately as a Supreme Court Judge, the first time the Court has made such an order. The ECtHR also found

systemic issues with judicial independence and ordered legislative reform (see http://ehrac.org.uk/kOuKC for the decision on the merits).

Mr Volkov was reinstated on 2 February 2015, and Ukraine has undertaken constitutional and legislative reforms to improve judicial impartiality (see http://ehrac.org.uk/EaPck). The Court awarded the applicant €6,000 in non-pecuniary damages, but reserved the question of pecuniary damages, inviting the parties to submit observations on this issue.

Judgment

The parties submitted declarations noting that the Government undertook to pay Mr Volkov 1,430,212.32 UAH (approx. €41,000) for pecuniary damage, plus any tax chargeable to him. Mr Volkov agreed to waive any further claims against Ukraine in respect of this case. On 6 February 2018, the ECtHR noted this friendly settlement and struck out the remainder of the application.

OTHER RECENT HUMAN RIGHTS CASES

Navalnyye v Russia

ECHR: Judgment
Right to a fair trial; no punishment without law; improper purpose

(No. 101/15), 17.10.2017

Facts

Political activist Alexei Navalny, and his brother, Oleg Navalny, an entrepreneur, were convicted of fraud and money laundering by a Russian court on 30 December 2014. Alexei received a suspended sentence of three and a half years, while his brother received a prison sentence of the same length, to be served in a correctional colony. They were ordered to pay a fine of RUB 500,000 each, as well as joint damages of RUB 4,498,546.

During their criminal proceedings, the applicants requested the opportunity to hear live evidence from numerous witnesses, including employees of the companies concerned. Their application was refused. After their conviction, they argued that the 'verbatim' record of the court hearing was inaccurate. The majority of their corrections were rejected. Despite an appeal, the judgment against them was upheld, save for the fine and order to pay damages.

In January 2015, the brothers applied to the ECtHR, arguing violations of their right to a fair trial (Art. 6 ECHR) and the principle of legal certainty (Art. 7 ECHR), and that their convictions were politically motivated (Art. 18 ECHR).

Judgment

The ECtHR considered the interpretation of criminal law undertaken by the domestic courts. It stated that criminal offences must be clearly defined in law, so that individuals can understand which acts and omissions lead to criminal liability. The domestic court provided no distinction between the criminal offence and ordinary commercial activity. It was not, therefore, foreseeable that the brothers' conduct would constitute fraud or money laundering. In addition, the analysis was arbitrary: it had failed to consider the defence's arguments thoroughly. This was held to be a violation of Arts. 6 and 7 ECHR.

The applicants requested the opportunity to hear live evidence from numerous witnesses, including employees of the companies concerned. Their application was refused.

The ECtHR declared the complaint under Art. 18 inadmissible. It held that a violation under Art. 18 can only arise where the right concerned is subject to restrictions permitted under the ECHR. The ECtHR held that the elements of Arts. 6 and 7 which applied in this case do not contain any such restrictions.

The applicants were awarded €10,000 each in respect of non-pecuniary damages.

Comment

This case follows Alexei Navalny's previous conviction for embezzlement (which was held to violate Art. 6 ECHR in *Navalny and Ofitserov v Russia* (Nos. 46632/13 & 28671/14) 23.02.2016). This second judgment by the ECtHR once again highlights problems with legal certainty in Russian criminal proceedings. Looking ahead, the implementation of this decision is highly likely to be problematic. The Russian Federation responded to the *Ofitserov* judgment by annulling the embezzlement conviction, only to conduct a retrial that appeared to repeat the same violations. After reconsideration of the case by a Russian court, in February 2017 Navalny was again convicted and given the same sentence he had been awarded in the original trial.

Notably, in both these judgments the ECtHR decided that Art. 18 could not be applied in conjunction with Art. 6 or 7, although it is commonly applied in conjunction with restrictive measures such as Art. 5. This position has been challenged by the ECtHR's more recent judgment in *Ilgar Mammadov No. 2 v Azerbaijan* (No. 919/15) 16.11.2017 (see below), in which it held that the question of the applicability of Art. 18 in conjunction with Arts. 6 and 7 remains open. It remains to be seen whether the ECtHR will provide a more definite answer in future judgments (see *Merabishvili v Georgia* above).

Novaya Gazeta and Milashina v Russia

ECHR: Judgment
Right to freedom of expression

(No. 45083/06), 03.10.2017

Facts

In August 2000, a nuclear submarine 'Kursk' sank in the Barents Sea due to a massive explosion that ripped open its front end. Another explosion quickly followed, which was felt as far away as Alaska. Russian officials declared all 118 crew members dead. However, it soon emerged that 23 sailors survived the initial explosions and asphyxiated while waiting for help. Journalist Elena Milashina published two articles in Novaya Gazeta. The first reported that the father of one of the victims had applied to the ECtHR claiming a violation of the right to

life (Art. 2 ECHR). The article stated that the applicant's son, who was an officer, had written a note which was discovered in October 2003 and stated that 23 men had survived. The officer's father aimed to prove that State agents abused public office by failing to respond to the knocks coming from the submarine. The second article described how the officer's father was pressured into withdrawing his application. Shortly afterwards, Novaya Gazeta and Ms Milashina were sued for defamation by several State officials and the Chief Military Prosecutor's Office. The District Court decided the case in favour of the claimants, after which Novaya Gazeta and Ms Milashina sought redress from the ECtHR alleging a violation of the right to freedom of expression (Art. 10 ECHR).

Interpreting any misconduct claim against high-ranking government officials as an attempt to destroy their reputation has the potential to repress public discussion of socio-political issues.

Judgment

The ECtHR found a violation of Art. 10, rejecting the Government's argument that their conduct in relation to Novaya Gazeta and Ms Milashina had been lawful and proportionate. The Court stated that the margin of appreciation in this case was narrow and considered whether the domestic courts had struck a fair balance between the Art. 10 rights of the applicants and the Art. 8 rights of the state officials. It concluded that the claimants in the domestic proceedings should have been more accepting of scrutiny due to their senior statuses. The Court also stated that the Kursk tragedy represented a matter of general public interest across Russia, so the media had an obligation to communicate any relevant information on the event. Additionally, the articles were not found to be strongly-worded, offensive, or gratuitously attacking a particular individual. The ECtHR considered that, in its examination of the defamation claims, the domestic courts had not applied standards in conformity with the principles under Art. 10 ECHR or based them on an acceptable assessment of the relevant facts, including by failing to give reasons to justify the interference. The ECtHR awarded Novaya Gazeta €1000 and Ms Milashina €2000 in damages.

Comment

This judgment reaffirms the paramount importance of the media in upholding the values of freedom, equality and justice, particularly in matters of public interest such as a disaster of this scale. Interpreting any misconduct claim against high-ranking government officials as an attempt to destroy their reputation has the potential to repress public discussion of socio-political issues and exonerate the authorities from any responsibility. This is a particularly acute problem in Russia, with independent media increasingly being targeted by repressive legislation and a highly worrying record of journalist killings.

Tsezar and others v Ukraine

ECHR: Admissibility/Judgment
Right to a fair trial; Protection of Property

(Nos. 73590/14 et al.), 13.02.2018

Facts

The applicants currently reside in Donetsk, outside of the territory controlled by the Ukrainian authorities. They were recipients of social benefits. Due to the conflict, the domestic authorities transferred the jurisdiction of the Donetsk courts to neighbouring regions that were under government control. Subsequently, all social payments in the regions outside of state control were suspended and persons eligible for social payments and affected by the suspension were required to apply for reinstatement for such payments in the territory controlled by the Government.

Referring to Art. 6(1) (right to a fair trial) and Art. 13 (right to an effective remedy) ECHR, the applicants complained that they had not been able to challenge the suspension of their social benefits since the courts had been relocated outside of the territory in which they resided. They also invoked Art. 1 of Protocol 1 to the ECHR with regard to the above payments. Finally, they complained of discrimination based on their place of residence (Art. 14, in conjunction with Art. 6 and Art. 1 of Protocol 1).

Judgment

Having established that it was impossible (due to the conflict) for the courts located in the area where the applicants reside to deal with their claims, the Court defined its main task as examining the measures taken by the State in

To date, no breach of the ECHR (by Ukraine or Russia) has been found in the few cases concerning the conflict - now in its fifth year - to have already been decided by the Court.

order to organise the judicial system in a way that would give effect to the rights guaranteed by Art. 6 ECHR.

The Court found that the limitation on the applicants' ability to access the courts was a result of the conflict in the territories not controlled by the Government. Such actions were not disproportionate in the context of the ongoing hostilities. Furthermore, there was no evidence to prove that the applicants were unable to travel to the neighbouring areas where there were functional courts and where they could have used available domestic remedies. On the contrary, four of the applicants did travel to the territories controlled by the Government after the courts had relocated.

In addition, it held that the applicants did not challenge the decision on suspension of social benefits, thus failing to exhaust available legal remedies at domestic level. Therefore, the Court concluded that the very essence of the right of access to court had not been impaired and the respective limitations set by the Government were not disproportionate. It thus found no violation.

Comment

The Court examined the State's actions to guarantee the functionality of the judicial system in the circumstances of the ongoing conflict. The Court rightly noted that it would be artificial to examine the facts of the case without considering the general context of ongoing hostilities in the region.

Having found that the state authorities had taken all necessary measures to ensure access to the judicial system for residents of territories outside its control, the Court recalled its position in the previous conflict related case, *Khlebik v Ukraine* (No. 2945/16), 25.07.2017, where it also established that the State had done everything that could be reasonably expected of it to guarantee the applicant's rights in those circumstances. To date, no breach of the ECHR (by Ukraine or Russia) has been found in the few cases concerning the conflict – now in its fifth year – to have already been decided by the Court.

150 judgments in 15 years

As we celebrate our 15th anniversary this year, we also celebrate the 150 cases we've won on behalf of victims of human rights abuse across Russia, Ukraine and the South Caucasus. To find out more about all of our judgments to date, please visit http://ehrac.org.uk/j2l7o, while news about our pending cases can be found here: http://ehrac.org.uk/news

1. Khashiyev v Russia	24 February 2005
2. Akayeva v Russia	24 February 2005
3. Isayeva v Russia	24 February 2005
4. Yusupova v Russia	24 February 2005
5. Bazayeva v Russia	24 February 2005
6. Isayeva v Russia	24 February 2005
7. Volkova v Russia	5 April 2005
8. Novoselov v Russia	2 June 2005
9. Fadeyeva v Russia	9 June 2005
10. Dobrokhotova v Russia	26 October 2006
11. Romashina v Russia	26 October 2006
12. Zolotaryeva v Russia	26 October 2006
13. Ledyaeva v Russia	26 October 2006
14. Zolotukhin v Russia	7 June 2007
15. Bitiyeva & X v Russia	21 June 2007
16. Alikhadzhiyeva v Russia	5 July 2007
17. Magomadov & Magomadov v Russia	12 July 2007
18. Musayev & others v Russia	26 July 2007
19. Makhauri v Russia	4 October 2007
20. Goncharuk v Russia	4 October 2007
21. Kukayev v Russia	15 November 2007
22. Tangiyeva v Russia	29 November 2007
23. Kaplanova v Russia	29 April 2008
24. Gusev v Russia	15 May 2008
25. Betayev & Betayeva v Russia	29 May 2008
26. Ryabikin v Russia	19 June 2008
27. Musayeva v Russia	3 July 2008
28. Ruslan Umarov v Russia	3 July 2008
29. Mezhidov v Russia	25 September 2008
30. Lyanova v Russia	2 October 2008
31. Albekov & others v Russia	9 October 2008
32. Itslayev v Russia	9 October 2008
33. Umayeva v Russia	4 December 2008
34. Bersunkayeva v Russia	4 December 2008
35. Y v Russia	4 December 2008
36. Abdulkadyrova & others v Russia	8 January 2009
37. Medova v Russia	15 January 2009
38. Zolotukhin v Russia (Grand Chamber)	10 February 2009
39. Ayubov v Russia	12 February 2009
40. Eminbeyli v Russia	26 February 2009
41. Khalitova v Russia	5 March 2009
42. Alaudinova v Russia	23 April 2009
43. Magomadova v Russia	18 June 2009
44. Sukhov v Russia	18 June 2009
45. Tsarkov v Russia	16 July 2009
46. Mutsayeva v Russia	23 July 2009
47. Isayev v Russia	22 October 2009
48. Kiladze v Georgia	2 February 2010
49. Dubayev v Russia	11 February 2010
50. Bersnukayeva v Russia	11 February 2010
51. Zakayev & Safanova v Russia	11 February 2010
52. Kayankin v Russia	11 February 2010
53. Gultyayeva v Russia	1 April 2010
54. Mutsolgova & others v Russia	1 April 2010
55. Abayeva & others v Russia	8 April 2010
56. Sadulayeva v Russia	8 April 2010
57. Khatuyeva v Russia	22 April 2010
58. Khutsayev & others v Russia	27 May 2010
59. Ilyasova v Russia	10 June 2010
60. Yuldashev v Russia	8 July 2010
61. Abdulazhon Isakov v Russia	8 July 2010
62. Lopata v Russia	13 July 2010
63. Sultanov v Russia	4 November 2010
64. Amuyeva & others v Russia	25 November 2010
65. Abuyeva & others v Russia	2 December 2010
66. Gisayev v Russia	20 January 2011
67. Karpacheva & Karpachev v Russia	27 January 2011
68. Tsintsabadze v Georgia	15 February 2011
69. Elmuratov v Russia	3 March 2011
70. Khambulatova v Russia	3 March 2011
71. Tsechoyev v Russia	15 March 2011
72. Esmukhambetov & others v Russia	29 March 2011
73. Matayeva & Dadayeva v Russia	19 April 2011
74. Maayevy v Russia	24 May 2011
75. Malika Alikhadzhiyeva v Russia	24 May 2011
76. Isayev & others v Russia	21 June 2011
77. Velkhiyev & others v Russia	5 July 2011
78. Yakubov v Russia	8 November 2011
79. Ergashev v Russia	20 December 2011
80. Kotov v Russia	3 April 2012
81. Shafiyeva v Russia	3 May 2012
82. Damayev v Russia	29 May 2012
83. Umarovy v Russia	12 June 2012
84. Berladir & others v Russia	10 July 2012
85. Yudina v Russia	10 July 2012
86. Kakabadze v Georgia	2 October 2012
87. Tunyan v Armenia	9 October 2012
88. Asadbeyli & others v Azerbaijan	11 December 2012
89. Volkov v Ukraine	9 January 2013
90. Suleymanov v Russia	22 January 2013
91. Avkhadova & others v Russia	14 March 2013
92. Kasymakhunov v Russia	14 March 2013
93. Korobov v Estonia	28 March 2013
94. Askhabova v Russia	18 April 2013
95. Ageyevy v Russia	18 April 2013
96. Turluyeva v Russia	20 June 2013
97. Bersanova v Russia	10 October 2013
98. Yandiyev v Russia	10 October 2013
99. Elikhanova v Russia	10 October 2013
100. Chilayev & Dzhabayev v Russia	31 October 2013
101. Dobriyeva & others v Russia	19 December 2013
102. Magomadova v Russia	9 January 2014
103. Amirova & others v Russia	9 January 2014
104. Yusupovy v Russia	9 January 2014
105. Z & Khatuyeva v Russia	30 January 2014
106. Dzhabrailov & others v Russia	27 February 2014
107. Usumovy v Russia	27 February 2014
108. Gamtsemlidze & others v Georgia	1 April 2014
109. Perevedentsevy v Russia	24 April 2014
110. Antayev & others v Russia	3 July 2014
111. Amadayev v Russia	3 July 2014
112. Makayeva v Russia	18 September 2014
113. Amerkhanova v Russia	9 October 2014
114. Islam-Ittihad Association & others v Azerbaijan	13 November 2014
115. Albakova v Russia	15 January 2015
116. Zhebrailova & others v Russia	26 March 2015
117. Kagirov v Russia	23 April 2015
118. Sargsyan v Azerbaijan	16 June 2015
119. X & Y v Georgia [CEDAW]	13 July 2015
120. Studio Maestro & others v Georgia	23 July 2015
121. Mirtskhulava v Georgia	30 July 2015
122. Abdurakhmanova & Adbulgamidova v Russia	22 September 2015
123. Bekauri & others v Georgia	8 October 2015
124. Abakarova v Russia	15 October 2015
125. Gayeva v Russia	29 October 2015
126. Menabde v Georgia	5 November 2015
127. Zakharov v Russia	4 December 2015
128. Egiazaryan v Georgia	17 December 2015
129. Tedliashvili & others v Georgia	17 December 2015
130. Frumkin v Russia	5 January 2016
131. Dalakov v Russia	16 February 2016
132. Rasul Jafarov v Azerbaijan	17 March 2016
133. Gaysanova v Russia	12 May 2016
134. Yunusov & Yunusova v Azerbaijan	2 June 2016
135. Merabishvili v Georgia [Chamber]	14 June 2016
136. Chokheli & others v Russia	20 December 2016
137. Dzidzava v Russia	20 December 2016
138. Barakhoyev v Russia	17 January 2017
139. Kulykov & others v Ukraine	19 January 2017
140. Kibalo v Russia	7 March 2017
141. Orlov & others v Russia	14 March 2017
142. Tagayeva & others v Russia (Beslan)	13 April 2017
143. Asatiani & others v Georgia	4 May 2017
144. Jugheli & others v Georgia	13 July 2017
145. Yankovskiy v Russia	25 July 2017
146. Zurashvili v Georgia	12 September 2017
147. Merabishvili v Georgia [Grand Chamber]	28 November 2017
148. M.M. v Russia	12 December 2017
149. Sargsyan v Azerbaijan [JS claim]	12 December 2017
150. Volkov v Ukraine [JS claim]	6 February 2018