

EHRAC

Bulletin



ECtHR extends application of Convention beyond Council of Europe borders

Shanta Bhavnani, EHRAC Volunteer

On 7 July 2011, the Grand Chamber (GC) of the European Court of Human Rights (ECtHR) published two judgments on the application of the European Convention on Human Rights (ECHR) to the UK's activities in Iraq: *Al-Skeini & Others v United Kingdom* (No. 55721/07) GC 7.7.11 and *Al-Jedda v United Kingdom* (No. 27021/08) GC 7.7.11.

In landmark judgments, the GC held that both cases fell within the jurisdiction of the UK under Art. 1 (obligation to respect human rights) in respect of civilians killed or detained during its military operations in southern Iraq. These cases represent a significant development in the recognition of the extra-territorial application of the Convention.

Al-Skeini & Others concerned the deaths of six Iraqi civilians in Basra in 2003, when it was under UK military occupation. The applicants argued there had been a breach of the procedural aspect of Art. 2 (right to life) as a result of the UK's failure to carry out investi-

gations into the deaths. The GC rejected the UK's argument that the ECHR did not apply because the deaths had occurred outside UK territory and found in five cases that there had been a procedural violation of Art. 2. In the sixth case, that of Baha Mousa, the GC found no violation as his death was the subject of a public inquiry.

In its judgment, the GC reiterated that a state is normally required to apply the Convention only within its own territory. An extra-territorial act would fall within the state's jurisdiction under the Convention only in exceptional circumstances. Referring to previous case law, the GC defined the three categories of exceptions as follows.

First, where a state agent exercises 'authority and control'. This exception applies: a) to diplomatic and consular agents on foreign territory; b) where, with a government's consent, a Contracting State exercises all or some of the public powers normally to be exercised by that government; c) where a state's agents bring an individual under the control of a state's authorities and therefore into its

jurisdiction, normally when individuals are detained in facilities controlled by a Contracting State.¹

Significantly, the Court elaborated that para.(c) does not simply come into effect because of a Contracting State's control of premises: "What is decisive in such cases is the exercise of physical power and control over the person in question." Furthermore, where the state exercises such control, it is under an obligation to secure the rights that are "relevant to the situation of that individual." This is a departure from the ECtHR's earlier decision in *Banković & Others v Belgium & Others* (No. 522/07/99) GC dec. 12.12.01, which found that Convention rights could not be "divided

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Editorial

The extent of the application of the European Convention on Human Rights to states acting beyond their borders has long been debated, especially since the seminal *Banković & Others* case concerning the NATO bombing of Belgrade in 1999. To open this edition of the *Bulletin*, Shanta Bhavnani discusses two recent landmark judgments on this issue – *Al-Skeini & Others* and *Al-Jedda* – both of which relate to the UK's military activities in Iraq.

The effectiveness of the implementation of European Court judgments remains high on the agenda, and two articles in this edition consider the execution of judgments against Russia and Bulgaria. Lycette Nelson and Dmitri Bartenev, both of the Mental Disability Advocacy Center (Budapest), discuss the follow-up to the 2008 *Shtukaturov* judgment against Russia, concerning the rights of people held in psychiatric care. Yana Buhrer

Tavanier and Margarita Ilieva of the Bulgarian Helsinki Committee outline the principal elements of their advocacy campaign focused on police brutality in Bulgaria, which has been the subject of a series of Strasbourg judgments finding the domestic law on the use of force to violate the right to life.

Also in this issue: Prof. Bill Bowring (EHRAC) analyses prisoner voting rights in Russia; Jessica Gavron (barrister, EHRAC) considers the requirement to exhaust domestic remedies in Russia; Narine Gasparyan (Legal Guide, Yerevan) discusses the effects which the European Convention has had on Armenia; and Vafa Fati-zade provides an update on the release of journalist Eynulla Fatullayev in Azerbaijan.

Prof. Philip Leach
Director, EHRAC

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and tailored". However, the Court stopped short of stating that *Banković & Others* had been overturned.

The second exception is where, as a consequence of lawful or unlawful military action, a Contracting State exercises 'effective control of an area'. The obligation to secure Convention rights derives from the fact of such control, whether exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration. The GC stated that 'effective control' will be a question of fact, determined mainly with reference to the strength of a state's military presence in the area, although other indicators may also be relevant, such as the extent to which its military, economic and political support for the local administration provides it with influence and control over the region.

The final exception is where the 'territory of one Contracting State is occupied by the armed forces of another'. The occupying state is accountable under the ECHR for breaches of human rights within the occupied territory because to hold otherwise would be to deprive the population of that territory of their ECHR rights resulting in a 'vacuum' of protection within the 'Convention legal space'.

The GC held that following the removal from power of the Ba'ath regime and until the accession of the Iraqi Interim Government, the UK (and US) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the UK assumed authority and responsibility for the maintenance of security in south-east Iraq. In those exceptional circumstances, the GC considered that, between May 2003 and June 2004, UK soldiers exercised authority and control over individuals killed during security operations, thereby establishing a jurisdictional link between the UK and the deceased.

Despite the progress that this judgment represents, it is perhaps not as clear as it could be. In its conclusion, the GC appears to conflate the categories it identifies. The reference to the UK's "exercise of some of the public powers normally to be exercised by a sovereign government" adopts the language of para.(b) of the first exception of 'state agent authority and control', yet the consensual aspect of this exception is absent. The GC also relies on the UK's "assumed authority for the maintenance of security in South East Iraq" which appears

to fall within the second exception. The GC references the first exception again, this time para.(c), in terms of the 'authority and control' the soldiers had over the individuals concerned. Ultimately, the GC did not identify the specific category of exception it relied upon. Perhaps this is not unduly problematic given that the GC emphasised: "In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts."

In his concurring opinion, Judge Bonello criticised the GC for elaborating on the existing tests of extra-territoriality which are tailored to specific facts. He proposed a functional test of more universal application: "did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State."

This judgment is a welcome move away from the limited 'Convention legal space' definition of jurisdiction in *Banković & Others*, and expands the application of the existing extra-territorial exceptions, thereby extending the reach of the Convention.

In *Al-Jedda*, the UK relied on a different argument to deny jurisdiction under Art. 1. The applicant was interned in a detention centre in Basra between 2004 and 2007 on suspicion of facilitating acts of terrorism. The applicant denied all allegations and no criminal charges were brought against him. The UK government argued that the actions of its forces were authorised by the UN Security Council (UNSC) and were therefore attributable to the UN and not to the UK. Further, the UK argued that if the acts were attributable to its forces, its use of internment was authorised by a number of UNSC resolutions and this authorisation superseded all other treaty commitments. The GC accepted neither of these arguments and found that the applicant's internment violated Art. 5(1) (right to liberty and security).

In finding that the case fell within the jurisdiction of the UK, the GC distinguished the case from the joint decision made in the earlier cases of *Behrami & Behrami v France* (No. 71412/01) and *Saramati v France, Germany and Norway* (No. 78166/01) GC dec. 2.5.07, which found that the actions of multinational forces in Kosovo were under the effective control of the UN and were therefore not attributable to the individual Contracting States. The UN's role as regards security in

Kosovo in 1999 was quite different to its role in Iraq in 2004. The UN Mission in Kosovo was a subsidiary organ of the UN created under Chapter VII of the UN Charter and the Kosovo Force was exercising powers lawfully delegated under Chapter VII by the UNSC. By contrast, the UNSC had neither effective control nor ultimate authority over the acts and omissions of troops in Iraq. The applicant's detention was not, therefore, attributable to the UN.

In dismissing the UK's argument that the relevant UNSC resolutions conflicted with and took precedence over its international treaty obligations, the Court made three fundamental points.

Firstly, in interpreting UNSC resolutions, "there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights", on the basis that Art. 24(2) of the UN Charter requires the UNSC, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles" of the UN, one of which is to achieve international cooperation in promoting and encouraging respect for human rights. Secondly, in the event of any ambiguity in the terms of a UNSC Resolution, the ECtHR will choose the interpretation "which is most in harmony with the requirements of the [ECHR] and which avoids any conflict of obligations." Thirdly, in light of the UN's important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used if the UNSC ever intended states to take particular measures which would conflict with their obligations under international human rights law.

The Court found that although UNSC Resolution 1546 authorised the UK to take measures to contribute to the maintenance of security and stability in Iraq, it did not specifically require preventative internment. There was, therefore, no conflict between the UK's obligations under the UN Charter and its obligations under Art. 5(1). The UK had therefore violated Art. 5.

The GC thereby made it clear that Contracting States cannot seek to rely on UNSC resolutions to escape liability for breaches of human rights obligations.

1 See *Öcalan v Turkey* (No. 46221/99) GC 12.5.05, *Issa & Others v Turkey* (No. 31821/96) 16.11.04, *Al-Saadoon & Mufelhi v United Kingdom* (No. 61498/08) dec. 30.6.09 and *Medvedyev & Others v France* (No. 3394/03) GC 29.3.10.

Ending police brutality in Bulgaria

Yana Buhner Tavanier, Campaign Director, Bulgarian Helsinki Committee (BHC) & Margarita Ilieva, Attorney-at-law; Deputy Chairwoman of the BHC

It was a brisk April night when Radoslav Bozhinov, 24, was on his way back from a concert, walking alongside a main road in Sofia, the capital of Bulgaria, trying to catch a taxi home.

When a car pulled over next to him and two men insisted to see his ID card, Radoslav refused to show it. The men did not identify themselves, and were not wearing uniforms. Later, Radoslav told the media he thought he was being abducted. In fact he was being arrested for disobeying the police.

Radoslav, a graphic designer working for Bulgarian national television, suffered broken teeth and a broken nose, as well as a badly bruised face and body. The police said he accidentally fell on his face. This incident, which happened in April 2011, is merely one illustration of the problem of police brutality in Bulgaria.

In 2011 the Bulgarian Helsinki Committee (BHC), the country's largest and most influential human rights group, launched its campaign against police brutality. The campaign – which involved simultaneous work with civil society, traditional and social media, national government and international bodies – aimed to amend the current flawed legislation which allows the police to use force and firearms even when not strictly necessary. For years the ECtHR has held that this legislation is in violation of the right to life (Art. 2). Still, the government has failed to reform the legislation and practices which have been the subject of so many negative decisions against Bulgaria in Strasbourg.

In February 2011 the BHC organised a roundtable where it presented the outcome of its research on all the ECtHR judgments issued against Bulgaria in cases of police violence. With government, parliament, the judiciary, NGOs and the media invited, the purpose of the roundtable was to open a discussion that would lead to the necessary legislative changes.

In January 2011 the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution identifying Bulgaria as a state with “major structural problems” and “extremely worrying delays” in the implementation of ECtHR judgments. PACE emphasised that Bulgaria must “adopt outstanding measures in order to avoid [further] deaths and ill-treatment of persons placed under the responsibility of law-enforcement officials.”¹

The BHC's research showed that more than

450,000 EUR of taxpayers' money has been spent by Bulgaria in compensation to victims of police brutality in the last 12 years (1998-2010). The ECtHR has heard 27 cases against Bulgaria on police brutality and has issued 26 judgments in favour of the applicants. In two of these the Court held that even though the actual perpetration of violence by the police could not be established with certainty, there was nevertheless a procedural violation of Art. 3 as the authorities had failed to investigate the assaults.² In another case the Court found a violation because, even though the applicant's injuries did not meet the minimum level of severity to fall within the scope of Art. 3, the State failed in its responsibility to investigate.³ The remainder of the decisions against Bulgaria demonstrated sufficient evidence of police brutality and a lack of effective investigation or prosecution.

In nine of the cases, death resulted from police action – in total, 10 people were killed. In one case the victim survived after a potentially lethal shooting by the police. 16 cases included inhuman or degrading treatment of 20 victims. In three of these the police refused the victims life-saving medical assistance. Most of the victims were young: three of them were children aged between 14 and 17; 16 of the victims were between the ages of 19 and 29. The number of Roma victims was also disproportionately large – one third of all the victims. In 24 of the 26 cases the ECtHR found the investigation to be inadequate.

None of the police officers involved in these cases was ever effectively punished – none are known to have been given disciplinary punishment, none are known to have been dismissed, and some of them actually received promotions.

In the past 12 years the ECtHR has held that the flawed Bulgarian legislation not only results in disproportionate use of force by the police, but also leads to bad planning and control of police operations, and produces ineffective investigations – prosecutors fail to address the question of the necessity of force, as the law allows the police to use force and firearms even when not absolutely necessary.

After hearing the conclusions of the BHC's research, the participants at the roundtable agreed that urgent legislative changes were necessary to ensure that the law-enforcement agencies use force and firearms *only* when absolutely necessary. The outcome of the roundtable was widely reported, with more than a hundred news reports in Bulgarian print, TV, radio and online media. The shared links on social media

were in the thousands. The BHC also launched a special website (policebrutality.bghelsinki.org) to provide information about the campaign, which thousands of people have visited. Two days after the roundtable, the BHC distributed 8,000 free cards for direct mailing to the prime minister, insisting on urgent legislative changes, at key spots in the three largest Bulgarian cities. Hundreds of the cards were sent by citizens.

As part of the campaign, the BHC sent letters to all European human rights institutions, including the Council of Europe Human Rights Commissioner Thomas Hammarberg, PACE's Committee on Legal Affairs and Human Rights and the Venice Commission. In its communication, the BHC called for support in pressuring the government to amend the current flawed legislation. In his reply to the BHC, Thomas Hammarberg welcomed the initiative. The letter was featured in the additional information section for two cases scheduled for review by the Committee of Ministers – *Velikova v Bulgaria* (No. 42488/98) 18.5.00 and *Nachova & Others v Bulgaria* (Nos. 43577/98 and 43579/98) GC 6.7.05, in both of which excessive police force caused death.

The BHC invited the Bulgarian Deputy Minister of Interior, Vesselin Vuchkov, to a debate on the need for reform of the legislation, which was followed by several more meetings with the deputy minister. In May 2011 Mr Vuchkov organised a roundtable at the Ministry of Interior (MoI), where the BHC once again reported the conclusions of its research. The BHC's presentation of the legislative changes needed for introducing the standard of ‘strict necessity’ for police use of force and firearms was welcomed by everyone present. At the end of the roundtable, Mr Vuchkov announced the formation of a working group within the MoI to amend the current flawed legislation and ensure that all ECtHR judgments are implemented. The BHC was invited to take a key part in that group.

A draft bill, almost entirely reflecting the BHC's proposals, has already been produced by the MoI working group.

1 PACE Resolution 1787 (2011), *Implementation of judgments of the European Court of Human Rights*. Available at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm>.

2 *Assenov & Others v Bulgaria* (No. 24760/94) 28.10.98 and *Kazakova v Bulgaria* (No. 55061/00) 22.6.06.

3 *Stefan Iliev v Bulgaria* (No. 53121/99) 10.5.07.

Media freedom: update on *Fatullayev v Azerbaijan*

Vafa Fati-zade, EHRAC Intern

In 2007 Eynulla Fatullayev, the editor-in-chief of *Gundelik Azerbaijan* and *Realniy Azerbaijan* newspapers, was convicted of inciting terrorism and criminal defamation and sentenced to eight and a half years in jail. On 22 April 2010 the ECtHR ordered his immediate release, and for financial compensation of 25,000 EUR to be paid by the Azerbaijani government.¹ In December 2009, while the ECtHR was considering the application, the prison authorities allegedly discovered heroin in Mr Fatullayev's possessions and proceedings were started against him for possession of drugs. On 6 July 2010 Mr Fatullayev was sentenced to two and a half years' imprisonment, with his sentence starting in full from the date of conviction. His appeal against that decision was rejected.

In its 2010 judgment the ECtHR ordered the Azerbaijani authorities to release Mr Fatullayev. The Government's request for referral to the Grand Chamber was refused on 4 October 2010 and the order became final. Following the Azerbaijani Supreme Court's consideration of the case, in November 2010 Mr Fatullayev's representatives wrote to the Committee of Ministers (CoM) to request that the case be referred back to the ECtHR under Art. 46(4) (binding force and execution of judgments).²

Even though the ECtHR judgment clearly ordered the State (in its operative provisions) to "secure the applicant's immediate release", the Azerbaijani government refused to abide by the order. Instead, a criminal case was started against Mr Fatullayev for possession of drugs.

This step was denounced by the international community as a strategy to make sure that he would not be released. In his report of June 2010,³ the Commissioner for Human Rights of the Council of Europe Thomas Hammarberg stated that: "The Commissioner agrees that the new case against Mr Fatullayev lacks credibility. He shares the concerns of many who regard his imprisonment and the new charges against him as an attempt to silence his reporting." In June 2010, the Parliamentary Assembly of the Council of Europe adopted a resolution⁴ on Azerbaijan stating that: "As regards the situation of the media and journalists, the Assembly condemns the arrests, intimidation, harassment, and physical threats of journalists, as borne out by the judgment of the Court in the case *Fatullayev v Azerbaijan*."

The Supreme Court of Azerbaijan reviewed the ECtHR judgment on 11 November 2010. While it quashed the defamation charges against Mr Fatullayev, it also retrospectively extended his prison sentence for tax evasion. The ECtHR judgment had not expressly ruled on the tax evasion issue, considering it unnecessary because it had already found a violation of Art. 10 (freedom of expression). This enabled the Supreme Court to employ an extremely literal reading of the judgment, not only upholding the conviction for tax evasion but extending his sentence from the initial four months to two years and two months, equivalent to the time he had already served. By taking the above steps, the Azerbaijani authorities had assembled a set of arguments under international and domestic law for refusing to release Mr Fatullayev.

The CoM debated the Azerbaijani government's execution of the ECtHR judgment and, on 6 December 2010, issued a decision noting its concern and calling on the Azerbaijani government to "explore all possible means of ending the applicant's detention".⁵ A delegation of members of the International Partnership Group for Azerbaijan undertook a joint advocacy mission to Strasbourg to raise their concerns regarding the Azerbaijani authorities' systematic failure to comply with the judgment. The participating organisations included Article 19, the Human Rights House Foundation, Reporters without Borders and the World Association of Newspapers and News Publishers.

On 26 May 2011 the Azerbaijani president Ilham Aliyev signed a decree of pardon which released Eynulla Fatullayev, among many others. Following his release, John Dalhuisen, Amnesty International's Deputy Director for Europe and Central Asia, said: "Eynulla Fatullayev's pardon and release are cause for celebration, but we still urge the Azerbaijani authorities to quash his convictions".⁶

1 *Fatullayev v Azerbaijan* (No. 40984/07) 22.4.10.

2 See Letter to the Ministers' Deputies from a group of NGOs, 29.11.10. Available at: <http://www.article19.org/data/files/pdfs/letters/joint-letter-to-council-of-europe-on-case-of-eynulla-fatullayev.pdf>.

3 Available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1642017>.

4 Resolution 1750 (2010).

5 CM/Del/Dec(2010)1100.

6 Available at: <http://www.amnesty.org/en/news-and-updates/jailed-azerbaijani-journalist-pardoned-2011-05-26>.

The exhaustion of domestic remedies in Russia: the ECtHR's approach to Art. 125 of the Code of Criminal Procedure

Jessica Gavron, Barrister, EHRAC External Legal Team

One of the hoops through which an applicant is required to jump to bring a case before the ECtHR is the exhaustion of domestic remedies, pursuant to Art. 35(1) of the ECHR. The rationale behind this rule is to give the national authorities the opportunity to rectify alleged violations of the Convention, and it is based on the assumption that, as reflected in Art. 13, the state will provide an effective remedy.

However the rule is not, nor could it be, absolute. It is not capable of being applied automatically, and the Court has recognised that it requires a degree of flexibility in approach, given the context of protecting human rights.

Applicants are only required to exhaust domestic remedies that are available and which are effective. In assessing whether a remedy meets these criteria, regard will be had to the particular circumstances of the case, the legal and political context and the personal circumstances of the applicant.¹ It is this margin that can lead to uncertainty among practitioners about the Court's approach to a particular remedy, as seen recently with Art. 125 of the Russian Code of Criminal Procedure (CCP).

Art. 125 of the new CCP provides for judicial review of decisions by investigators and prosecutors that might infringe the constitutional rights of parties to criminal proceedings or impede access to justice. These decisions, acts or omissions can then be declared unlaw-

ful or unsubstantiated.

Although the ECtHR has found that in the Russian legal system the power of a court to annul a refusal to institute criminal proceedings and indicate the defects to be addressed appears to be a substantial safeguard against the arbitrary exercise of powers by the investigating authorities,² the Court has nonetheless, in a number of Chechen cases involving disappearances and torture, held that this remedy was ineffective in the particular circumstances.³ The Court's reasoning for this was based on the applicants' lack of access to the case file and the fact that they had not been properly informed of the progress of the investigation, therefore rendering them unable to challenge effectively the actions or omissions of the investigating au-

thorities before a court. Further, owing to the time elapsed in these cases since the events in question, certain investigative steps that ought to have been carried out would no longer be useful.

Despite these cases, the fact that the Court has held Art. 125 of the CCP to be a substantial safeguard against arbitrary power *in principle*, means that it is open for the Court to find it to be one *in practice*, as it did in the recent Chechen case of *Nasipova & Khamzatova v Russia* (No. 32382/05) dec. 2.9.10. In this case the Court noted that although the applicants lodged at least eight complaints with various law-enforcement bodies, they did not appeal against the refusal by the military prosecutor's office to initiate an investigation into the disappearance of their relatives. Further, there appeared to be some confusion about whether the applicants had been informed of the decision not to investigate. While the applicants alleged that they had not received the relevant letter, it appeared that the applicants' representatives had been informed. The Court observed that in raising the non-exhaustion plea, the Government had referred to the ECtHR's case law, according to which judicial review against a decision not to prosecute is an effective remedy. Therefore it was for the applicants to prove that the remedy was ineffective and inadequate in the particular circumstances of the case or that there were special circumstances absolving them of this requirement. The Court found that the applicants had failed to provide any explanation for their failure to appeal to a court against the refusal to investigate.

This case certainly appears to represent a departure for the ECtHR. The judgment places weight on three factors: that the applicants were represented by an NGO; that the applicants failed to appeal the decision not to prosecute despite the fact their representatives had

been informed of this decision; and that they failed to provide an explanation for their failure to appeal the decision.

Nasipova & Khamzatova is not the only case to be rejected for non-exhaustion of domestic remedies. In both *Medvedev v Russia* (No. 9487/02) 15.7.10 and *Belevitskiy v Russia* (No. 72967/01) 1.3.07, cases brought under Art. 3 of the ECHR, the Court rejected the complaints on the grounds of failure to judicially challenge the decisions not to investigate or initiate criminal proceedings. The circumstances of these cases are materially different to the Chechen cases: the applicants here were residents of Moscow who suffered ill-treatment while in detention for criminal charges. In both cases the Court noted that the applicants were legally represented and yet failed to provide explanations for their failure to challenge the decision of the investigating authorities through the appropriate courts. In *Belevitskiy v Russia*, however, the Court acknowledged that persons held in custody are often in a stressful situation and that it could be considered excessively burdensome to require them to pursue separate judicial proceedings to obtain redress, especially if they are unrepresented. Nevertheless, it could simply be that the above cases turn on their particular facts, since in more recent Chechen cases the Court seems to have reverted to its previous position of placing the burden of proof on the respondent government to prove that the remedy is practical and effective.⁴

Art. 125 of the CCP is, in reality, of questionable value as a remedy. Investigations into criminal cases are often resumed, but then halted – it appears almost randomly. If an investigation has been re-opened while an Art. 125 application is being made, the court will generally dismiss the application as unnecessary, despite the fact that this then does not allow for specific failings to be recognised as

unlawful, nor for the fact that the investigation will very likely be suspended again a number of weeks later. Furthermore, while the court can declare acts/omissions of the prosecutor unlawful and quash a decision to discontinue an investigation, it cannot order measures to be taken; therefore it provides no guarantee that particular shortcomings in an investigation will be addressed. Any additional lines of investigation are at the prosecutor's discretion and the prosecutor may repeat their failure to act or terminate the investigation again, requiring another round of Art. 125 challenges. Equally, as noted above in the Chechen cases, it is frequently not possible to challenge effectively the acts or omissions of the investigators due to a lack of access to the case file and to relevant information.

It is nonetheless worth noting that the ECtHR's position on Art. 125 is such that it can be interpreted as a 'substantial safeguard', and therefore an effective remedy, and that it is the particular circumstances of each case that are decisive. Given this, it would seem advisable for practitioners, where possible, to pursue Art. 125 challenges, and if not, to provide a cogent explanation of the reasons why it is an ineffective remedy not capable of providing a reasonable prospect of success.

1 *Selmouni v France* (No. 25863/94) GC 28.8.99, paras. 74-77.

2 *Trubnikov v Russia* (No. 49790/99) 30.11.05.

3 See, for example: *Isigova & Others v Russia* (No. 6844/02) 1.12.08, *Betayev & Betayeva v Russia* (No. 37315/03) 29.5.08, *Musayeva v Russia* (No. 12703/02) 3.7.08, *Chitayev & Chitayev v Russia* (No. 59334/00) 18.4.07 and *Gelayev v Russia* (No. 20216/07) 15.8.10.

4 *Makharbiyeva & Others v Russia* (No. 26595/08) 21.6.11, *Mosayev v Russia* (No. 20303/07) 14.6.11, *Nakayev v Russia* (No. 29846/05) 21.6.11 and *Isayev & Others v Russia* (No. 43368/04) 21.6.11.

Prisoners' voting rights: UN Human Rights Committee asks Russia to amend its Constitution

Prof. Bill Bowring, Chair, EHRAC
International Steering Committee

On 21 March 2011 the Human Rights Committee of the United Nations (HRC), the treaty body for the International Covenant on Civil and Political Rights (ICCPR), adopted, by thirteen votes to two, its Views concerning the communication submitted by two prisoners, Denis Yevdokimov and Artiom Rezanov, against the Russian Federation.¹

The authors of the communication complained that Art. 32(3) of the 1993 Russian Constitution, which restricts the right of per-

sons deprived of liberty to vote, contradicts Art. 25 of the ICCPR, which provides that every citizen shall have the right and the opportunity, without unreasonable restrictions, to vote. They also complained under Art. 2(3) of the ICCPR that there was no effective domestic remedy in Russia.

The complaint to the HRC was possible because Russia is bound by the First Optional Protocol to the ICCPR (OP1) – the UK is not. The USSR ratified the ICCPR in 1973. It ratified OP1, which enables individual complaint to the HRC, at the request of the USSR's Committee for Constitutional Supervision (CCS),

the predecessor of the Russian Constitutional Court, in the *Ratification of the Optional Protocol Case* (4 April 1991).² On 5 July 1991 the USSR Supreme Soviet adopted two Resolutions acceding to OP1 and recognising the jurisdiction of the HRC.³ The Optional Protocol entered into force for the Russian Federation on 1 January 1992, very shortly after the collapse of the USSR. Russia did not ratify the ECHR until 1998.

In the *Yevdokimov & Rezanov* ICCPR case, the Russian government referred in its observations to a number of Strasbourg judgments, but

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not to *Hirst v United Kingdom* (No. 74025/01) 6.10.05, in which the ECtHR affirmed that the principle of proportionality requires a sufficient link between deprivation of the right to vote and the conduct and circumstances of the individual concerned. The HRC explicitly cited *Hirst* and noted that Russian legislation provided a blanket deprivation of the right to vote to anyone sentenced to a term of imprisonment. The HRC noted that Russia had not provided any arguments as to how the restrictions in the case of the two prisoners would meet the criterion of reasonableness required by the ICCPR.

The HRC recalled its General Comment No. 25,⁴ which states that the right to vote and to be elected is not an absolute right, and that restrictions may be imposed on it provided they are not discriminatory or unreasonable. It also states that if conviction for an offence is a basis for suspending the right to vote, the period for such suspension should be proportionate to the offence and the sentence.

The HRC found that Russia had violated Art. 25 of the ICCPR, alone and in conjunction with Article 2(3), and that, in accordance with Art. 2(3)(a), Russia was under obligation to: amend its legislation to comply with the Covenant; provide the authors of the complaint with an effective remedy; and prevent

similar violations in the future. The majority of the HRC included the UK's Prof. Sir Nigel Rodley.

In a concurring opinion, Gerald Neuman (US) and Iulia Motoc (Romania) noted that non-European States Parties to the ICCPR where some categories of convicted prisoners have the right to vote include Bangladesh, Belize, Canada, Ghana, Papua New Guinea, and Trinidad and Tobago, as well as the US states of Maine and Vermont. They also noted the more recent ECHR cases *Frodl v Austria* (No. 20201/04) 8.4.10, regarding convicted prisoners, and *Alajos Kiss v Hungary* (No. 38832/06) 20.5.10, regarding persons with mental disabilities.

The dissenting members of the HRC were Michael O'Flaherty (Ireland) and Krister Thelin (Sweden). They considered that in the circumstances of this case (where the authors were found guilty of abuse of power and of organising a criminal group dealing with drugs, kidnapping and racketeering), the restriction, limited only to the duration of the prison sentence, could not be considered unreasonable or disproportionate.

Although the HRC's Views are not a judgment, Russia was informed unambiguously of its obligation to amend its Constitution and to provide the authors with an effective remedy. The HRC reminded Russia of the fact that, as a State Party to OP1, it has recognised the competence of the HRC to determine whether there has been a violation, and has also under-

taken to ensure to all within its jurisdiction the rights recognised in the ICCPR. The HRC indicated that it wished to receive from Russia, within 180 days, information about the measures taken to give effect to its Views.

In his Russian language blog, Sergey Golubok submits that even though the Views of the HRC are not legally binding, Article 17 of the Russian Constitution requires Russia to protect rights and freedoms "in accordance with" the ICCPR as interpreted by the HRC.⁵

However, Russia's track record is not good. In its 2009 Concluding Observations on Russia's Sixth Report under the ICCPR,⁶ the HRC expressed once again its concern at Russia's "restrictive interpretation of, and continuing failure to implement the Views" adopted by it. Such failure "would call into question the State party's commitment to the Optional Protocol."

1 *Yevdokimov & Rezanov v Russian Federation*, CCPR/C/101/D/1410/2005, date of communication 20.03.04.

2 *VSND SSSR*, 1991 No.17, p.502; see also *Sovyet-skaya Iustitsiya* I 23.12.91, 17.

3 *Vedomosti SSSR*, 1991 No.29, pp. 842, 843.

4 General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12.7.96. CCPR/C/21/Rev.1/Add.7.

5 Sergey Golubok, 26.6.11. *Zaklyuchennym pazreshili golosovat* (Prisoners have been permitted to vote). Available at: <http://zakon.ru/Blogs/OneBlog/722>.

6 CCPR/C/RUS/CO/6, 24.11.09.

Rights in psychiatric care: implementation of *Shtukaturov v Russia*

Lycette Nelson, Litigation Director, Mental Disability Advocacy Center (MDAC) & Dr. Dmitri Bartenev, MDAC Legal Monitor for Russia

In March 2008, the ECtHR issued a judgment in the case of *Shtukaturov v Russia* (No. 44009/05) 27.3.08, finding violations of Arts. 5, 6 and 8. The judgment broke new ground for the rights of persons with psycho-social (mental health) disabilities in respect to both guardianship and detention in a psychiatric hospital.

In April 2011, three years after the judgment, legislative amendments to the Code of Civil Procedure and the Psychiatric Care Act implemented some aspects of the judgment. These amendments came about as a result not only of the ECtHR judgment, but also of a Russian Constitutional Court judgment that addressed many of the same issues. However, the most ground-breaking and substantive aspect of the ECtHR judgment relating to Russian guardianship law was not addressed by the Constitutional Court and has yet to be implemented.

The ECtHR judgment found that Mr Shtukaturov had been stripped of his legal capacity and placed under guardianship in judicial proceedings from which he was deliberately excluded. He learned about the court decision declaring him legally incapable only after it came into force. Having been found legally incapable, he was a non-person in the eyes of the Russian courts and had no standing before them; he could not even appeal against the decision that took away his rights. Later, despite his unequivocal objections, he was detained in a psychiatric hospital with no judicial review because, under Russian law, placement in a psychiatric hospital by a guardian was considered voluntary.

The judgment found that Mr Shtukaturov's treatment violated Art. 6 (right to a fair trial), Art. 8 (right to respect for private and family life) and Arts. 5(1) and 5(4) (right to liberty and security). For the first time the Court looked into the substance of guardianship rather than only examining the procedural safeguards attending its imposition, criticising total guardianship as a disproportionately intrusive measure which was not adjusted to a person's individual needs.

Russian law allowed no alternative to plenary guardianship—if a person was judged to lack capacity in any area of decision-making (managing finances, for example), they were stripped of their right to make or even be included in any decisions, including decisions regarding such fundamental matters as place of residence, medical treatment and marriage. The Court recognised that the violations of the applicant's rights did not arise merely from flawed practice but were actuated by Russia's legal capacity laws. Thus it was clear that the Russian government was required to go beyond individual measures and implement amendments to a number of legislative acts including the Civil Code, the Code of Civil Procedure and the Psychiatric Care Act. While it did not provide a blueprint for legislative change, it laid down some general principles, such as proportionality and a tailor-made approach to guardianship measures, and gave some guidance on other relevant issues. The task of developing those principles into effective legislation is clearly that of the Russian law-makers.

MDAC followed up its application to the

ECtHR with a complaint to the Russian Constitutional Court on behalf of the same client and in respect of the same facts, with the aim of achieving an explicit finding striking out the impugned provisions of the law head-on. The arguments were similar but somewhat narrower in scope as they did not raise the issue of the proportionality of legal incapacity per se. In February 2009, almost a year after the ECtHR decision, the Russian Constitutional Court gave its judgment.¹

The Constitutional Court judgment had a direct legal effect insofar as it struck down a number of legislative provisions that had already been criticised in the ECtHR's decision. The Russian legislature was left with no choice but to take steps to introduce new legislation to fill in the resulting gaps in the law. Politically, too, this judgment demonstrated that the guardianship system not only did not comply with international law, but failed to comply even with Russia's own Constitution. Finally, the Constitutional Court decision generated considerable media interest in Russia which led to increased awareness of the abuses characteristic of the legal incapacitation system and the vulnerability of persons placed under guardianship. The Constitutional Court decision resulted in two legislative proposals that were introduced in the Russian parliament to address two discrete points: the right to be heard in person in legal incapacitation proceedings and the procedure of hospitalisation of persons under guardianship.

Advocacy for implementation of the *Shtukaturov* judgment presented particular challenges. First, mental disability is very low on the list of government priorities (this is by no means exclusive to Russia). Secondly, the mental disability rights movement is still relatively weak, as is public interest in the rights of persons with

mental disabilities. As a result, there is hardly any pressure on the authorities to reform mental disability laws, or policies emanating from civil society in general. Thirdly, the relevant policy-makers do not necessarily have a grasp of the human rights aspects of legal capacity and guardianship, let alone technical expertise.

MDAC, the organisation that represented Mr Shtukaturov, and its Russian legal monitor, Dr. Dmitri Bartenev, who litigated the case, have been directly involved in advocating for law reform to implement the ECtHR judgment. MDAC actively sought allies and provided capacity building to other NGOs. Dr. Bartenev held meetings with members of parliament and wrote policy papers to bring attention to the issue and provide an international human rights focus for law-makers and other policy-makers.² MDAC also organised roundtables which brought together a wide range of stakeholders, including State officials, parliamentary representatives, lawyers, psychiatrists, human rights NGOs and disability activists. As a result of these activities, a strong coalition of Russian human rights and disability NGOs was formed. The coalition has gained the support of the Russian ombudsman and the Inter-Party Parliamentary Group on Disability Issues.

The advocacy was successful in that the law amending the Code of Civil Procedure and the Psychiatric Care Act which came into force in April 2011 considerably broadened the rights of persons under guardianship, thus paving the way for future advocacy to change the very substance of guardianship in Russia. The amendments introduced the right of the person concerned to take part in guardianship proceedings, a requirement for judicial review of involuntary placement of persons under guardianship in psychiatric hospitals, the right of the person under guardianship to consent to or refuse any

mental health intervention, the right to refuse placement in a social care home,³ the right of the court to summon a person deprived of legal capacity to any type of civil proceeding and the right of the person concerned to apply to the court for restoration of their legal capacity.

These amendments represent significant advances in procedural protections for persons with intellectual and psycho-social disabilities. However, as long as deprivation of legal capacity is the only alternative in cases where persons with disabilities may require some assistance with decision-making, procedural measures cannot serve as safeguards to violations of rights. In the same year that the ECtHR decided the *Shtukaturov* case, the UN Convention on the Rights of Persons with Disabilities (CRPD) came into effect, which sets a new international standard for protection of the rights of persons with disabilities. Referring to the CRPD, the ECtHR has recognised a universal and European consensus on the need to protect persons with disabilities from discrimination.⁴ Russia has signed but not ratified the CRPD. Therefore, while continued advocacy for full implementation of the *Shtukaturov* judgment is still necessary, advocacy for legal capacity law reform must also include advocacy for ratification of the CRPD and full compliance with current international law.

1 Constitutional Court judgment No. 4-P of 27.02.09.

2 MDAC also advocated at the international level by submitting a report to the United Nations Human Rights Committee for its review of Russia in 2009. The Committee's Concluding Observations called on the Russian government to reform its guardianship laws. CCPR/C/RUS/CO/6, 24.11.09.

3 Constitutional Court judgment No. 114-O-P of 19.1.11.

4 See *Glor v Switzerland* (No. 13444/04) 30.4.09.

What has been the effect of the ECHR on Armenia?

Narine Gasparyan, Advocate; President of Legal Guide

Armenia became a member of the Council of Europe (CoE) in 2001 and ratified the ECHR in 2002.¹ The ECtHR passed its first judgment against Armenia in January 2007 (*Mkertchyan v Armenia* (No. 6562/03) 11.1.07) and, as of July 2011, had found violations in 25 cases.

Analysis of these judgments shows that the majority (13) included a violation of Art. 6 (right to a fair trial), which is the most frequently violated article not only by Armenia, but also by other member states, with 8,019 of 13,697 judgments in 1959-2010 including a violation of Art. 6 (nearly 59%).²

The second largest group of violations was of Art. 2 of Protocol 7 (right of appeal in crimi-

nal matters – seven cases), all in cases lodged in the aftermath of the 2003 presidential election. In the first of these (*Galstyan v Armenia* (No. 26986/03) 15.11.07), the ECtHR noted that there was no “clear and accessible right to appeal” in the procedure for review by a higher court, and that it “lacks any clearly defined procedure or time-limits and consistent application in practice” (para. 126). The Court took the same approach in the other six cases, four³ of which had specific regard to the right to adequate time and facilities for the preparation of a defence, since the applicants were convicted a few hours after their arrest without any contact with the outside world. Violations of Art. 3 were also found in these cases.

The third largest group of violations, under Art. 11 (freedom of assembly and association

– six cases), again concern developments following the 2003 election, with the exception of *Mkertchyan*, in which the applicant had participated in a demonstration in 2002. What unites all these cases is the fact that the applicants were members of opposition parties whose right to peaceful assembly was violated.

There is one more group which is worth mentioning: judgments in four cases against Armenia regarding violations of Art. 1 of Protocol No. 1 (protection of property). Three of these concern the expropriation of property for State purposes. The applicants⁴ all had properties on the same street in Yerevan and their rights to peaceful enjoyment of their property were found to have been infringed by the Government.

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What has been the effect of the ECHR on Armenia?

The remaining judgments against Armenia found one more violation of Art. 3 and one violation each regarding Arts. 5, 9, 10 and Art. 3 of Protocol 1. This classification of violations by Article shows that they may be attributable to different factors, such as deficiencies in legislation (for example, the *Mkrtchyan* case, the cases regarding Art. 2 of Protocol 7), poor administrative practice (for example, the Art. 3 violations) and lack of sufficient funds.

What has been the effect of these judgments on Armenia, and on its human rights protection system? As of July 2011 the Committee of Ministers (CoM) had 21 judgments pending execution with respect to Armenia.⁵ Eight of these are under the 'enhanced supervision' system, including four with violations of Art. 3, Art. 6 and Art. 2 of Protocol 7 and three concerning the violation of Art. 1 of Protocol 1. The others are being supervised under the 'standard supervision' system.

As of July 2011 the CoM has adopted resolutions to close examination of three cases against Armenia: *Harutyunyan v Armenia* (No. 36549/03) 28.6.07, *Meltex Ltd and Mesrop Mousesyan v Armenia* (No. 32283/04) 17.6.08 and *Mkrtchyan*.⁶

In *Mkrtchyan*, the ECtHR found a violation of the right to freedom of assembly after the applicant was convicted on the basis of a law – Article 180.1 of the Code of Administrative Offences – which was insufficiently precise for the applicant to foresee, to a reasonable degree, the consequences of his actions. The CoM considered that no individual measures were required by the judgment. As for general measures, the CoM took into account that since this case the Armenian Parliament had adopted a law regulating the procedure for holding assemblies, rallies, street processions and demonstrations, in 2004. It should be mentioned that this act was annulled on 14 April 2011 with the adoption of a new law on freedom of assembly.

Did the law of 2004 provide better protection for freedom of assembly in Armenia? The international community raised concerns over the fact that "some legislative provisions placing restrictions on freedom of assembly remained."⁷ A number of recommendations were made to Armenia in the course of the UN's Universal Periodic Review to ensure that no arbitrary restrictions are imposed on freedom of assembly, in legal acts or in practice.⁸ A report from Armenia's own Human Rights Defender⁹ states that the situation as of 2009 regarding the right to peaceful assembly was in a number of ways incompatible with applicable international standards. The report highlights the deficiencies of the 2004 law, as well as domestic cases of alleged violations.

As for the case of *Harutyunyan*, this concerned a violation of Art. 6(1) regarding the use of statements during the applicant's trial that were obtained from him and two witnesses under duress. The CoM resolution noted that in 2007 the applicant lodged a request to reopen the case at the cassation level. In this process, the applicant's lawyer had to challenge, before the Constitutional Court, the constitutionality of the provisions of the Code of Criminal Procedure concerning the reopening of proceedings. As a result these provisions were amended in 2008. The applicant also lodged a new application with the court of general jurisdiction to reopen the case. The case was re-examined; however, Mr Harutyunyan was not acquitted.

Did Mr Harutyunyan get redress for his violated rights in practice? Although he and his advocate did not make any official statements following the CoM's resolution, his advocate Mr Alumyan has stated that they are preparing an application to the ECtHR with further claims, specifically that the reopening of the case and the examination was done only 'formally' and that the court of general jurisdiction of Syunik Marz was not competent to examine the case. Mr Alumyan said that he raised these issues before the domestic courts and sent letters regarding these alleged violations and concerns to the CoM before it adopted its resolution.¹⁰

Finally, in the case of *Meltex Ltd and Mesrop Mousesyan*, the ECtHR found that Art. 10 (freedom of expression) had been violated since the National Television and Radio Commission (NTRC) had refused on seven occasions to grant Meltex Ltd a broadcasting licence, without giving reasons for its decisions. The CoM reported that a call for new licensing tenders had been announced in 2010, with the company taking part in one of these. With respect to general measures, amendments and additions to the Television and Radio Broadcasting Act were adopted in 2010. The provision in the legislation concerning the reasoning of NTRC decisions was amended and now requires it to substantiate its decisions.

It should be noted that Meltex Ltd again failed to obtain a licence as a result of the 2010 tender. A report from Thomas Hammarberg, Commissioner for Human Rights of the CoE, following his visit to Armenia in January 2011, states that: "Pluralism within the audiovisual media spectrum is the hallmark of a healthy democracy which attaches importance to the principle of freedom of expression. In this context, the Commissioner regrets to note that the last tender for broadcasting licenses did not contribute to the promotion of this principle." He also found that "the methodology used to assess the bids was problematic and that it affected the credibility of the tender."¹¹ The tender's credibility was also questioned by Human Rights Watch and other international organisations.¹² On 27 June 2011,

15 Armenian NGOs issued a statement regarding the CoM resolution in the case, in which they expressed their dissatisfaction and deep concern.¹³ Meltex Ltd is currently challenging the NTRC's decision in the domestic courts.¹⁴

What has been the impact of these ECtHR judgments on Armenia in practice? Are human rights better protected at the domestic level? The above assessment leaves the reader with several questions as to the extent of the effect of ECtHR judgments on national human rights protection.

1 European Court of Human Rights, 2011. *Country Fact Sheets 1959-2010*. Available at: http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf.

2 European Court of Human Rights, 31.12.10. *Violation by article and by country 1959-2010*. Available at: http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf.

3 *Kirakosyan v Armenia* (No. 31237/03) 2.12.08, *Mkhitaryan v Armenia* (No. 22390/05) 2.12.08, *Karapetyan v Armenia* (No. 22387/05) 27.10.09 and *Tadevosyan v Armenia* (No. 41698/04) 2.12.08.

4 *Minasyan & Semerjyan v Armenia* (No. 27651/05) 23.6.09, *Yeranosyan & Others v Armenia* (No. 13916/06) 20.7.10 and *Hovhannisyanyan & Shiroyan v Armenia* (No. 5065/06) 20.7.10.

5 Council of Europe, updated 16.9.11. *Execution of judgments of the European Court of Human Rights*. Available at: http://www.coe.int/t/dghl/monitoring/execution/Default_en.asp.

6 See CoM resolutions CM/ResDH(2011)40, CM/ResDH(2011)39 and CM/ResDH(2008)2.

7 UN Human Rights Council, 6.7.10. *Report of the Working Group on the Universal Periodic Review, Armenia*, para. 41. Available at: http://www.upr-info.org/IMG/pdf/A_HRC_15_9_E.pdf.

8 Ibid. para. 94.26.

9 Human Rights Defender of the Republic of Armenia, 25.5.10. *Human Rights Defender Ad Hoc Report on the Right to Peaceful Assembly in the Republic of Armenia*. Available at: <http://www.ombuds.am/main/en/10/31/0/4/>.

10 Information provided by Mr Hayk Alumyan, advocate of Mr Misha Harutyunyan, during a telephone interview with the author of this article held on 3.8.11.

11 Available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1784273&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLodged=FFC679>.

12 See, for example: Human Rights Watch, 16.12.10. *Armenia: New Rebuff to Broadcaster*. Available at: <http://www.hrw.org/news/2010/12/16/armenia-new-rebuff-broadcaster>.

13 ePress.am Independent Journalists' Network, 28.6.11. *Armenian NGOs dispute CoE Committee of Ministers' resolution on A1+ case*. Available at: <http://www.epress.am/en/2011/06/28/armenian-ngos-dispute-coe-committee-of-ministers-resolution-on-a1-case.html>.

14 The case is pending before the Administrative Court in Yerevan. Available at: <http://www.datalex.am>.

HUMAN RIGHTS CASES

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

EHRAC-Memorial HRC cases

Elmuratov v Russia

(No. 66317/09), 03/03/11

(ECHR: Judgment)

Detention pending extradition

Facts

The applicant, an Uzbek national, arrived in Russia in February 2008. In March 2008 he was charged with theft in Uzbekistan and in April 2008 his name was placed on a wanted list. He was detained in April 2009 in Russia and in September 2009 the decision was made to extradite him. The applicant claimed, in an unsuccessful asylum application, that he had previously been ill-treated whilst imprisoned in Uzbekistan. On 24 December 2009 the Supreme Court of the Russian Federation dismissed the applicant's appeal against extradition and found the applicant's detention to be lawful. He was released in April 2010, having spent the maximum legal period in detention.

The applicant alleged violations of Art. 3 (risk of ill-treatment if extradited), Art. 5 (unlawful detention not subject to judicial supervision) and Art. 13 (no effective remedy) in conjunction with Art. 3.

Judgment

The ECtHR found no violation of Art. 3, stating that the applicant's claim that any criminal suspect in Uzbekistan is at risk of ill-treatment was too general, and that there was insufficient evidence of the applicant's previous ill-treatment in Uzbekistan.

The Court found a violation of Art. 5, as there was no judicial decision to either detain the applicant initially or extend his detention at the necessary time. Furthermore, there was no effective procedure for the lawfulness of his detention to be judicially reviewed.

The claim under Art. 13 was rejected as, although the allegations of previous ill-treatment had been raised in the asylum application, they had not been raised before the domestic courts.

The Court awarded the applicant

25,000 EUR, indicating that extradition should be suspended until the judgment became final. A request for referral to the Grand Chamber remains pending.

Comment

The Court remained critical of the situation in Uzbekistan and of Russian law on detention pending extradition. Nonetheless, it emphasised that reference to a general problem concerning human rights observance in a particular country cannot alone serve as a basis for a refusal of extradition, stressing that it remained for the applicant to provide a detailed account of the specific risks he faced. The finding of no violation of Art. 3, due to insufficient evidence, and because that particular issue had not been raised before the domestic courts in Russia, demonstrates the importance of providing the Court with detailed witness statements and complete documentary evidence. This should be a reminder to all applicants that failing to raise all arguments before domestic courts could jeopardise a subsequent application to Strasbourg.

Khambulatova v Russia

(No. 33488/04), 03/03/11

(ECHR: Judgment)

Right to life

Facts

In the early hours of 18 March 2004 around a dozen uniformed men burst into the applicant's house in the village of Saveliyevskaya, Chechnya. Having searched the house and found a bottle-shaped object wrapped in foil, the men handcuffed the applicant's son, Timur Khambulatov, and took him away. The same morning he signed a confession, written out by an interior department officer, stating that the object they found was an explosive device he had made. Later that day the applicant was told that her son had died in his cell and that she could collect his body. An autopsy carried out by order of the district prosecutor's office found evidence of blows to the head sustained in the 24 hours before death, but concluded that these were light injuries and that the cause

of death was a pre-existing heart condition. A criminal investigation was opened but failed to identify the cause of death. The applicant alleged that, in violation of the ECHR, her son had been unlawfully detained (Art. 5), ill-treated (Art. 3) and killed by State agents (Art. 2), with no effective investigation (Art. 13).

Judgment

The ECtHR found no substantive breach of Art. 2, as it could not find beyond reasonable doubt that Timur Khambulatov's death was a result of the injuries sustained in custody, as opposed to the pre-existing heart condition. However, it did find a violation of the procedural aspect of Art. 2, noting that the investigation had been repeatedly suspended and delayed, and "*has produced no tangible results.*"

The Court found a violation of the substantive limb of Art. 3, on the basis that the applicant's son was arrested in apparently good health and his body bore numerous abrasions and haematomas. The Court held that the Government had "*failed to put forward any plausible explanations*" for the injuries.

The Court declared the allegation of a violation of Art. 5 inadmissible, and found that no separate issues arose under Art. 13.

The applicant was awarded 35,000 EUR in respect of non-pecuniary damage.

Comment

The decision of no substantive violation of Art. 2 is disappointing. Whilst reiterating its well-established principle that "*strong presumptions of fact*" arise in respect of injuries and death occurring in custody, the Court felt constrained "*in the absence of any evidence to the contrary*" to rely on the autopsy report obtained by the district prosecutor's office and to conclude that the authorities were not responsible for the death of the applicant's son. The applicant had presented evidence countering the conclusions of the autopsy report that her son suffered from a pre-existing heart condition (submitting, among other evidence, witness

statements from relatives and a certificate from a medical clinic). Given her lack of access to the investigation case file and the refusal of her request for an independent autopsy, there was little more evidence the applicant could adduce. Despite the circumstances of her son's death, the Court made no reference to the applicant's evidence and drew no inferences from the fact that the request for an independent post-mortem was refused by the district prosecutor's office on multiple occasions. A request for referral to the Grand Chamber has been refused.

Matayeva & Dadayeva v Russia
(No. 49076/06), 19/04/11

Maayevy v Russia
(No. 7964/07), 24/05/11

Malika Alikhadzhiyeva v Russia
(No. 37193/08), 24/05/11
(ECHR: Judgment)

Disappearance

Facts

These three Chechen cases involved the disappearance of the applicants' relatives – Khamzat Tushayev, Isa Maayev and Ruslanbek Alikhadzhiyev (the brother of the former speaker of the Chechen parliament) – between March 2003 and June 2006, following their detention by State agents.

Judgment

The ECtHR found evidence to presume the applicants' relatives dead. It held that liability for the presumed deaths was attributable to the State and found violations of the substantive aspect of Art. 2 (right to life). The Court also found violations of the procedural aspect of Art. 2 due to the failure to carry out effective criminal investigations into the circumstances surrounding the disappearances. Further, it found violations in all three cases of Art. 3 (inhuman and degrading treatment), due to the distress suffered by the applicants as a result of the disappearance of their relatives, and of Art. 5 (right to liberty and security), due to the unacknowledged detention of the applicants' relatives. The Court additionally held that there had been violations of Art. 13 (right to an effective remedy) in conjunction with Art. 2.

EHRAC-GYLA cases

Tsintsabadze v Georgia
(No. 35403/06), 15/02/11
(ECHR: Judgment)
Right to life

Facts

The applicant's son, Zurab Tsintsabadze, was serving a three-year prison sentence for an offence committed at his former wife's home. On 30 September 2005 he was found hanged in the prison's storeroom. The official autopsy concluded that the cause of death was mechanical asphyxia by hanging.

The applicant consistently denied that her son had committed suicide. On examining the body herself, she found injuries suggesting that her son had been beaten. She claimed that he had been killed and hanged afterwards to conceal the murder. Despite the existence of evidence to support this claim, the deceased's death was treated as suicide from the outset and the investigation into the facts surrounding the death was limited. On 13 July 2006, the Public Defender requested that a public prosecution be initiated. However, the regional prosecutor dismissed the case due to lack of evidence.

Judgment

The ECtHR ruled that there has been a violation of Art. 2 (right to life), finding that the investigation into the death of the applicant's son was not independent, objective or effective, and involved serious inconsistencies, deficiencies and omissions. It concluded that Georgia had failed to satisfy the burden of proof resting on it to provide a satisfactory explanation for Zurab Tsintsabadze's death, which occurred in suspicious circumstances in prison, thus directly engaging the State's responsibility for the loss of life.

The applicant was awarded 15,000 EUR in respect of non-pecuniary damage.

Comment

The judgment addresses the shortcomings of the system of investigation into deaths in Georgian prisons. The obligation on states to protect the right to life under Art. 2 requires appropriate steps to safeguard the lives of those within their jurisdiction, especially persons in custody who

are in a vulnerable position. By implication, Art. 2 also requires that there should be an effective and independent official investigation in all cases of killing and other suspicious deaths, whether the perpetrators are private persons, state agents or unknown. The investigation must be subject to a sufficient element of public scrutiny to secure accountability, and the next of kin of the deceased must be involved in the procedure to the extent necessary to safeguard their legitimate interests.

Other ECHR cases

Enukidze & Girgvliani v Georgia
(No. 25091/07), 26/04/11
(ECHR: Judgment)
Right to life

Facts

In the early morning of 28 January 2006 the applicants' only son, Sandro Girgvliani, was abducted and beaten to death by senior officers from the Ministry of Interior. Shortly before the abduction Mr Girgvliani and a male friend had visited a café patronised by State officials. Mr Girgvliani was involved in a tense discussion with a female friend who had been sitting with the officials. After leaving the café, Mr Girgvliani and his friend were forced into an unknown car. They were taken outside the city and severely beaten. Mr Girgvliani died as a result of stab wounds to the neck, but his friend survived. Criminal proceedings were instituted and the four officials were charged and convicted of premeditated false imprisonment with life-threatening violence and wilful bodily harm resulting in death. Their sentences of eight and seven years respectively were halved following a presidential pardon in November 2008, and in September 2009 they were released on parole.

Judgment

The ECtHR found a violation of Art. 2 as a result of the Georgian authorities' failure to carry out an effective investigation. It held that the Ministry of Interior's investigation lacked impartiality, the City Prosecutor's Office lacked the requisite integrity, the domestic authorities were manifestly reluctant to uncover the truth surrounding the death and that the

sentences imposed were not adequate for the crime committed. However, the Court found that the death itself was not imputable to the Georgian State, so no violation of the substantive aspect of Art. 2 was found. This was due, the Court held, to the perpetrators acting in their own personal capacity and not in their roles as officials. The Court also found a violation of Art. 38 in respect of the State's delay and failure to provide the Court with sufficient evidence in examination of the case.

The second applicant was awarded 50,000 EUR in respect of non-pecuniary damage.

Comment

The case concerned well-known public figures in Georgia who, with the Georgian Minister of Interior, played an active part in the so-called Rose Revolution that brought about the resignation of President Shevardnadze in November 2003. It is one of the most infamous criminal cases in the recent history of Georgia and resulted in heavy criticism of the government by international media and opposition Members of Parliament. Along with other high-profile murder cases, it was also a factor in the 2007 Tbilisi anti-government demonstrations which saw tens of thousands protest against the alleged corruption of President Mikheil Saakashvili and other high-ranking members of his government.

Khodorkovskiy v Russia

(No 5829/04), 31/05/11

(ECHR: Judgment)

Prohibition of torture, right to liberty and security

Facts

The applicant, formerly the richest person in Russia, was a board member and the major shareholder of Yukos, a large oil company. He was also involved in politics, providing significant funds to the opposition parties Yabloko and SPS (Union of Right Forces), as well as to the non-profit Open Russia Foundation.

In 2003 the applicant was charged with a number of crimes, including fraudulent acquisition of shares, abuse of trust, misappropriation of property, tax evasion, large-scale fraud and forgery of official documents. Several pre-trial detention orders failed to establish the period of detention,

and the authorities consistently denied independent observers the opportunity to inspect the conditions of his detention.

Judgment

The ECtHR found two violations of Art. 3, one in respect of detention conditions and one regarding conditions in the courtroom before and during the trial. The Court also found a violation of Art. 5(1)(b) (lawful arrest for non-compliance with a lawful order) in respect of the applicant's apprehension in Novosibirsk on 25 October 2003.

The Court held that there had been a violation of Art. 5(3) (length of detention) as *"the applicant's continuous detention was not justified by compelling reasons outweighing the presumption of liberty"*. Similarly, the Court found four violations of Art. 5(4) (lawfulness of detention proceedings) on account of the procedure in which the applicant's detention was extended at the hearings of 22-23 December 2003 and 20 May 2004, the Meschanskiy District Court's refusal to consider the application for the applicant's release on 16 June 2004 and the speediness of review of the detention order of 19 March 2004.

Comment

The judgment is largely a victory for the applicant, since the Court ruled in his favour on 8 out of 15 claims, most critically declaring that Russia had violated his rights in several instances. However, the Court rejected several other claims, including two additional claims under Art. 3 and a claim under Art. 18 (limitation of rights for improper purposes) that his prosecution was politically motivated.

Kiyutin v Russia

(No. 2700/10), 10/03/11

(ECHR: Judgment)

Prohibition of discrimination

Facts

The applicant, Viktor Kiyutin, is an Uzbek national. He moved to the Oryol region of Russia in 2003 and married a Russian national in July 2003. The couple had a daughter the following year. In August 2003 Viktor Kiyutin applied for a residence permit and was required to undergo a medical examination during which he tested positive for HIV. His application for residence was refused by reference to

a legal provision preventing the issue of residence permits to foreigners who are HIV positive. He challenged the refusal in court, claiming that the authorities should have taken into account his family ties in Russia. However, the court found that his application for residence had been lawfully rejected.

Judgment

The ECtHR found that Russia's refusal of a residence permit, solely on the basis of the applicant's HIV positive status, constituted unlawful discrimination and that there had therefore been a violation of Art. 14 (prohibition of discrimination) in conjunction with Art. 8 (right to private and family life).

In reaching this decision, the Court stated that although a person's health status, including conditions such as HIV, was not explicitly recognised as grounds for discrimination under Art. 14, it should be covered *"either as a disability, or alongside with it"* by the words *"other status"* in the text of Art. 14. The Court also held that people living with HIV/AIDS are a vulnerable group who have experienced *"a history of prejudice and stigmatisation"*. On this basis, Russia should be afforded only a narrow margin of appreciation in choosing measures that singled out this group for differential treatment. Finally, the Court held that Russia had failed to produce compelling and objective evidence to support its argument that the difference in treatment of the applicant could be justified on the grounds of the protection of public health.

The applicant was awarded 15,000 EUR in respect of non-pecuniary damage for the distress and frustration suffered.

Comment

This case represents a significant legal development for people living with HIV/AIDS. Firstly, because it recognises that they are a distinct group protected by Art. 14, and secondly, because it finds that they constitute a *'vulnerable group'*. This latter finding means that any Council of Europe member state that restricts human rights on the grounds of HIV positive status will be afforded only a narrow margin of appreciation. For these reasons, this case is likely to have resonance well beyond the field of immigration law.

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About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University and is part of the Faculty of Social Sciences and Humanities (FSSH). Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights. We do this by enabling the transfer of knowledge, building partnerships and enhancing the capacity of local human rights communities, as well as raising awareness of human rights violations in these countries. Launched initially to focus on Russia, EHRAC has broadened its geographical remit to the South Caucasus, and also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 290 cases involving more than 1,000 primary victims and their immediate family members. These cases concern such issues as extrajudicial execution, ethnic discrimination, disappearances, environmental pollution and criminal justice amongst others. For more information, please see: www.londonmet.ac.uk/ehrac.

Internship opportunities

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

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EHRAC partnerships

We have worked in partnership with the Russian NGO Memorial Human Rights Centre since EHRAC was founded in 2003 and our close cooperation continues on substantial and varied litigation work, and training and capacity building initiatives, as well as awareness raising about the European Court mechanism. Since 2003 we have developed other partnerships in Russia and expanded our work into Georgia in 2006 and Azerbaijan in 2010, as well as cooperating with many other NGOs, lawyers and individuals across the former Soviet Union. The main focus of our work with all our partners is on mentoring joint project lawyers to develop their professional skills and independence as litigators. In the UK we also work in partnership with the Bar Human Rights Committee and the International Human Rights Committee of the Law Society of England and Wales. The contact details of our regional partners are provided below.

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