



Department for the Execution of Judgments of the ECHR
Directorate General of Human Rights and Rule of Law

By E-mail: dgi-execution@coe.int

22 February 2021

Submission under Rule 9.2 on implementation of the ECHR's judgment № 101/15 "Navalnyye v. Russia" prepared by the NGO "Human Rights Center "Memorial""

Introduction

1. Human Rights Center "Memorial"¹ is a Russian NGO working on protection of the civil and political rights in Russia. This submission is made in accordance with the Rule 9.2 of the Rules of the Committee of Ministers. In this submission HRC "Memorial" will provide an assessment of the situation with the implementation of the ECHR's judgment № 101/15 "Navalnyye v. Russia"² and of the information provided in the Government's Action report of 17 February 2021³. HRC "Memorial" will also provide recommendations on the implementation of the individual and general measures deriving from the above mentioned judgment.

Main findings of the ECHR in the judgment № 101/15 "Navalnyye v. Russia"

2. The ECHR established in this case the violations of the Articles 6 and 7 of the European Convention on Human Rights. The Court reiterated that the Article 7 (No punishment without law) is an essential element of the rule of law which should provide effective safeguards against arbitrary prosecution, conviction and punishment. It embodies the principle that only the law can define the crime and prescribe a penalty and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. This requirement is satisfied where the individual can know what acts and omissions will make him criminally liable (par. 54 of the judgment).

¹ <https://memohrc.org/>

² <http://hudoc.echr.coe.int/eng?i=001-177665>

³

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a177f5&fbclid=IwAR2ukb9xArXsC5BXo8Lpil_mal_gynmn_hC7by1KkoCVn6b5kCVJ02WxPD14A

Правозащитный центр «Мемориал» внесен Минюстом в реестр, предусмотренный п. 10

ст. 13.1 ФЗ "Об НКО"

3. The ECHR found that the charges formulated against the applicants did not distinguish fraudulent conduct in the performance of contractual obligations between commercial entities from inherently lawful conduct. The domestic courts established non-compliance with contractual obligations, but did not clarify what conduct had constituted such non-compliance, or indeed which contractual obligations had not been complied with. As a matter of fact, there was no dispute between the parties about the execution of the agreements in question prior to the fraud case (par. 63-64 of the judgment). The ECHR concluded that in the determination of the criminal charges against the applicants the offence set out in Article 159.4 of the Criminal Code, in force at the time of their conviction, was extensively and unforeseeably construed to their detriment (par 68 of the judgment).

4. The ECHR also stated that when an applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of proceedings, if requested. The Court considered it appropriate to refer to the general principle relating to the re-opening of a criminal case following the Court's judgment, namely that the courts acting in the new proceedings should be under an obligation to remedy the violations of the Convention found by the Court in its judgment (par. 95 of the judgment).

HRC "Memorial"'s assessment of the situation with the implementation of the ECHR's judgment

5. On 25 April 2018 the Supreme Court of the Russian Federation had a hearing on the case with the goal to decide whether there were grounds for quashing or changing the judgment of Zamoskvoretskiy District Court of Moscow of 30 December 2014 by which the applicants had been convicted. According to the Russian authorities the fact that such a hearing had been held means that the Supreme Court resumed the proceedings in the applicant's criminal case. However this was just a formal resuming which has not lead in practice to the restoration of the applicants' rights and to the elimination of the violations found by the ECHR.

6. As the result of the hearing of 25 April 2018 the Supreme Court made its own assessment of the judgment of Zamoskvoretskiy District Court of 30 December 2014. The Supreme Court concluded that the conviction of the applicants had been conducted in compliance with all procedural requirements and in accordance with the law and that the acts of the applicants can not be considered as legal commercial activities. However, these findings of the Supreme Court contradict the conclusions of the ECHR. The ECHR already examined the judgment of Zamoskvoretskiy District Court of 30 December 2014 and came to the opposite conclusion that charges formulated against the applicants did not distinguish fraudulent conduct from inherently lawful conduct in violation of Article 7 of the Convention.

7. HRC "Memorial" stresses that Russian Supreme Court does not have the right to contradict the findings of the ECHR which would be in breach of the State's obligation under Article 46 of

the Convention. Instead of this the Supreme Court should define the most appropriate remedy for the restoration of the applicants' rights. Taking into consideration the nature of the violations established by the ECHR in this case, particularly under Article 7, which made the whole prosecution, conviction and punishment of the applicants arbitrary and unfair, the only way to restore the applicants' rights in this case is to change the sentence of the domestic court or to quash it and to send the criminal case for a new consideration of the domestic court with the obligation to eliminate the violations established by the ECHR. In addition to this the ECHR directly indicated the reopening of the proceedings as the most appropriate way to implement the judgment. The hearing of the Supreme Court of 25 April 2018 has not led to a proper reopening of the proceedings and adequate reconsideration of the case.

8. Due to the arbitrary and unfair nature of the conviction and punishment of the applicants in breach of Article 7 and 6 of the Convention, HRC "Memorial" considers that all restrictions of the applicants rights based on the judgment of Zamoskvoretskiy District Court of Moscow of 30 December 2014 contradict the State's obligations under Article 46 of the Convention. This includes the restrictions and obligations to which the applicant Aleksey Navalny was initially exposed due to the suspended sentence. On 2 February 2021 the Simonovskiy District Court of Moscow argued that the applicant had violated these obligations and adopted a decision to change the suspended sentence to a real conviction in prison⁴. In this decision, the domestic court did not give proper attention to the fact that the initial conviction of the applicant and all obligations deriving from it were in contradiction with the judgment of the ECHR. This decision aggravated the situation in regard to the non-implementation of the ECHR's judgment.

9. In the Action Report of 17 February 2021, the Russian authorities support the decision of the Supreme Court of 25 April 2018 to not change or quash the previous judgment of the domestic court. The authorities are not proposing any other ways of implementing the ECHR's judgment. HRC "Memorial" considers that this shows that the authorities are not able to define the proper way to implement the ECHR's judgment or do not wish to implement this judgment. In this situation, HRC "Memorial" suggests that the Committee of Ministers indicates to the authorities the individual measures of implementation of this case.

10. HRC "Memorial" also notes the position of the authorities that they do not have an obligation to automatically quash the decisions of the domestic courts on the basis of the ECHR's judgments. HRC "Memorial" considers that this position is inappropriate in relation to the judgments of the ECHR establishing the violations of Article 7 (No punishment without law) of the Convention. The nature of the violations under this article affects the whole fairness of the criminal proceeding and makes the whole proceedings and punishment arbitrary. The fact that the current Russian legal system allows the non elimination of such violations makes necessary the adoption of the general measures which would guarantee the proper reconsideration of the criminal cases in such situations.

⁴ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a17afe

Правозащитный центр «Мемориал» внесен Минюстом в реестр, предусмотренный п. 10 ст. 13.1 ФЗ "Об НКО"

HRC “Memorial”’s proposals on individual and general measures of implementation of the ECHR’s judgment

11. HRC “Memorial” asks the Committee of Ministers to adopt a resolution recognising that the Russian authorities failed to implement the ECHR’s judgment № 101/15 “Navalnyy v. Russia”.

12. HRC “Memorial” asks the Committee of Ministers to indicate to the authorities as an individual measure of implementation the necessity to quash the judgment of Zamoskvoretskiy District Court of 30 December 2014 by which the applicants have been arbitrarily convicted and the decision of Simonovskiy District Court of 2 February 2021 by which the suspended sentence of Aleksey Navalny was changed to a real term in prison. After the quashing of these decisions the ideal solution would be to stop the criminal proceedings against the applicants, due to the findings of the ECHR that the applicants’ actions were not distinguishable from ordinary commercial activities. If the Committee of Ministers does not consider it possible to request the end of the criminal proceedings, we suggest a new consideration of the criminal case by the first-instance court as a possible remedy, if it includes the necessity to implement the findings of the ECHR.

13. HRC “Memorial” also asks the Committee of Ministers to indicate as a general measure of implementation the necessity to change the Russian law and to prescribe the legal obligation to quash the judgments of the domestic courts and to reconsider the criminal cases in situations where the ECHR established violations of the Article 7 of the Convention.

Yours faithfully,



Tatiana Chernikova
Lawyer at Human Rights Center “Memorial”