Voir Note explicative

See Explanatory Note

См. Инструкцию

(*Version russe*)

COUR EUROPÉENNE DES DROITS DE L'HOMME

EUROPEAN COURT OF HUMAN RIGHTS

ЕВРОПЕЙСКИЙ СУД ПО ПРАВАМ ЧЕЛОВЕКА

Conseil de l'Europe - *Council of Europe*

Strasbourg, France - *Страсбург, Франция*

REQUÊTE

APPLICATION

ЖАЛОБА

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme,
ainsi que des articles 45 et 47 du Règlement de la Cour

under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court

в соответствии со статьей 34 Европейской Конвенции по правам человека
и статьями 45 и 47 Регламента Суда

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I. The Parties

(1) The Applicant

X

(2) The High Contracting Party

The Russian Federation is a contracting party to the European Convention for the protection of human rights and fundamental freedoms (hereinafter: the Convention) since 5 may 1998.

II. Summary

CASE OF X V. RUSSIA

The applicant X is a citizen of the Russian Federation who had been enrolled in a course of study in the United Kingdom. He returned to Russia in April 2008 in order to deliver a course of lectures in the Ural Institute of Economics, Management, and Law. In calculating the wage for the course that he taught, a 30 percent income tax was withheld, with reference to Article 224, section 3 of the Tax Code of the Russian Federation. According to this disposition, the rate of taxation applied to all income of natural persons who are not tax residents of the Russian Federation is set at the amount of 30 percent, while the income tax rate applicable to resident citizens of the Russian Federation under section 1 of the same article is 13 percent. On October 29th 2010, the applicant filed a complaint before the Constitutional Court of the Russian Federation because of the uncertainty related to the compliance with the Constitution of the Russian Federation. On July 14th 2011, the Constitutional Court of the Russian Federation ruled in its judgement that there was no violation of the applicant's constitutional rights.

In this case, the applicant claims that:

(1) The 30 per cent tax rate applied to the income he earned in Russia amounts to an unjustified and abusive interference in his right to use of property and therefore constitutes a breach of article 1 of Protocol 1 of the Convention.

(2) This interference is discriminatory and violates article 14 of the Convention and the right to non discrimination because the difference of treatment between tax residents and non residents, both Russian citizens, is not justified and does not follow a legitimate aim.

(3) The failure of the Constitutional Court of the Russian Federation to mention the Convention and the disregarding of the allegations of violations of it in its judgment of July 14th 2011 results in a breach of Article 6(1) of the Convention, since the Constitutional Court of the Russian Federation has to give reasons and consider the arguments of the parties, in accordance with its commitment under the Convention.

III. Statement of the Facts

1. The applicant is a citizen of the Russian Federation and his place of permanent residence is Russia. From October 1st 2005 to July 18th 2009, the applicant was enrolled in a course of study in the United Kingdom of Great Britain and Northern Ireland.

2. The applicant returned to Russia in April 2008 for the purpose of delivering a course of lectures in the Ural Institute of Economics, Management, and Law. In calculating the wage for the course that he taught, a 30 percent income tax was withheld, with reference to Article 224, section 3 of the Tax Code of the Russian Federation (hereinafter: the tax measure).

> *Article 224(3) :3. The tax rate shall be fixed in the amount of 30 per cent with respect to all incomes received by natural persons who are not tax residents of the Russian Federation (...)*»

3. According to the aforementioned rule, the rate of taxation applied to all income of natural persons who are not tax residents of the Russian Federation is set at the amount of 30 percent, while the income tax rate applicable to resident citizens of the Russian Federation under section 1 of the same article is 13 percent.

4. On October 29th 2010, the applicant filed a complaint before the Constitutional Court of the Russian Federation contesting the constitutionality of the words “in the amount of 30 percent” in Article 224, section 3 of the Tax Code, as applied to non-resident citizens of the Russian Federation. The applicant submits that the tax measure as a violation of his right to use of property and discrimination on the basis of the place of residence, rights guaranteed under articles 15(1), 19, 35(2), 55 (2,3) of the Constitution of the Russian Federation.

5. The applicant also submits that the tax measure as applied to nonresident citizens of the Russian Federation constitute a violation of his right to use of property and discrimination against him on the basis of his place of residence, guaranteed under Article 1 of the Protocol 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter: the Convention) and Article 14 of the Convention. In addition to

that, the decision of the Constitutional Court violates the applicant’s right to a fair trial (Article 6 of the Convention) since the Constitutional Court of the Russian Federation omitted and/or neglected to mention the Convention and ignored his allegations of violations of it in its judgment, which deprived the applicant of the full support of the law and the Convention.

6. On 14 July 2011, the Constitutional Court of the Russian Federation ruled in its judgement that there was no violation of the applicant's constitutional rights, failing to analyse and consider the arguments of applicants regarding the Convention.

IV. Statement of the alleged violations of the Convention and/or Protocols and of relevant arguments

7. The applicant claims that:

(1) The 30 per cent tax rate applied to the income he earned in Russia amounts to an interference with his right to use of property and therefore constitutes a breach of article 1 of Protocol 1 of the Convention;

(2) This interference is discriminatory and violates article 14 of the Convention and the right to non discrimination;

(3) The failure of the Constitutional Court of the Russian Federation to consider and analyse the arguments of applicant relying on the Convention and the disregarding of the allegations of violations of it in its judgment of July 14th 2011 amount to a violation of Article 6(1) of the Convention (the right to a fair trial).

(1) ***VIOLATION OF THE RIGHT TO PROPERTY***

THE LAW

8. Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

9. In its case law, the Court has developed a methodology to evaluate whether there has been a violation of the right to property as protected by Article 1 of Protocol 1. There are six steps to follow to determine whether a violation of the right to property has occurred.

10. First, the existence of a right to property on the good in dispute must be demonstrated.

11. Second, the Court determines whether there has been interference in the right to property of an applicant.

12. Third, the Court must decide under which of the three rules provided by the case of *Sporrong and Lönnroth v. Sweden*[1] the interference has occurred:

> The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

Following the decision in *Svenskamanagementgruppen AB. v. Sweden*[2], cases related to taxation fall under the third rule and the second paragraph of article 1 that «relates to the rights of member states to control the use of property in the general interest…»

13. Fourth, the Court seeks to find out if the interference serves a legitimate objective. The legitimacy of the aim is being regarded in the light of the "general'' or public interest[3]. Regarding the second paragraph of article 1 of Protocol 1, the State has a margin of appreciation to secure the payment of taxes, but this margin is not absolute:

> The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a

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[1] Case of *Sporrong and Lönnroth v. Sweden*, application no. 7151/75; 7151/75, 23 September 1982, para 61, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695456&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[2] Case of *Svenskamanagementgruppen AB v. Sweden*, application no. 11036/84, 2 December 1985, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=792551&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[3] Case of *James and others v. United Kingdom*, application no. 8793/79, 21 February 1986, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670934&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

> wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 (P1-1) and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.[4]

14. Then, the Court looks at the proportionality of the interference by evaluating "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[5]

15. Finally, the Court observes the lawfulness and legality of the interference in the light of the principle of legal certainty.[6]

APPLICATION OF THE LAW TO THE CASE

1) Interference with the right to property

16. Following the methodology developed by the Court's case law regarding the right to property, the examination of the statement of income of the applicant contained in the attachments attests the applicant's right to property on the good in dispute; in this case, 17 per cent of the salary of 2000 roubles he earned from delivering a course of lectures at the Ural Institute of Economics in April 2008. The applicant submits that the 30 per cent tax rate applied to the 2000 roubles earned from the course of lectures he delivered constitutes an interference with his right to property, his personal income.

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[4] *Ibid*, para 46

[5] See, *mutatis mutandis*, the judgement of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, para 5, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695402&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[6] Case of *Iatridis v. Greece*, application no. 31107/96, 25 March 1999, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696104&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

2) The rule applying to the case and the requirement of legitimate objective

17. The applicant also submits that this withholding, pursuant to section 3 of article 224 of the Russian Tax Code, falls under the third rule contained in the first paragraph of article 1 of Protocol 1 to the European Convention because it relates to a restriction of the use of his duly earned salary and personal asset. The applicant submits that the taxation of an additional 17 per cent of his wage because of his stay in United Kingdom cannot be considered as falling under the second paragraph of article 1 of Protocol 1.[7] Indeed, the tax measure goes beyond the margin of appreciation of the State and has no legitimate aim related to the public interest. In its decision, the Constitutional Court did not consider nor raise any reasonable aim that could justify the tax measure in light of the public interest, therefore evidencing a lack of legitimacy of the measure. Moreover, even though the Constitutional Court mentioned that the tax measure was justified on the basis of economic characteristics, it never went further in its explanation and this reveals a definite problem of legitimacy of the tax measure.

3) Fair balance and the principle of legal certainty

18. In the light of the preceding assessments, the tax measure deprives a considerable number of people of the use of 17 per cent of their income on the sole basis of their place of residence. The Russian constitutional laws protect the right of property of Russian citizens, thus the tax measure violates a fundamental right in Russian law and certainly creates legal contradictions and uncertainty. On that sole basis there is no need to demonstrate an absence of fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

(2) *VIOLATION OF THE RIGHT TO NON-DISCRIMINATION IN CONJUNCTION WITH THE RIGHT TO PROPERTY*

THE LAW

19. Article 14 of the Convention guarantees that

"The enjoyment of the rights and freedoms set forth in this Convention shall be

[7] Case of *Svenska Managementgruppen AB v. Sweden*, aforecited.

secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

20. The applicant claims that the interference with his right to property is discriminatory. In its case law, the European Court established a methodology for assessing whether discrimination has occurred. In the *Belgian Linguistic Case*[8], the Court has developed a test and identified which criteria were necessary to prove a discrimination claim. First, the difference of treatment is a breach of article 14 when "the distinction has no objective and reasonable justification". In order to establish this, it must be determined that the aim is not legitimate. It is also necessary to prove that there is "no reasonable relationship of proportionality between the means employed and the aim sought to be realised".

APPLICATION OF THE LAW TO THE CASE

1) The difference of treatment between tax residents and non residents

21. The applicant alleges that the tax measure creates a difference of treatment between tax residents and non residents that amounts to discrimination on the basis of the place of residence. The list of grounds for discrimination enumerated in article 14 of the Convention is not exhaustive. This is particularly apparent from the words "or other status." Discrimination on the basis of place of residence amounts to discrimination on the basis of such "other status." (See *Carson and others v. The United Kingdom* and *Darby v. Sweden*[9]).

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[8] *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 9 February 1967, para. 10, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695402&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[9] *Case of Carson and others v. The United Kingdom*, Application no. 42184/05, 16 march 2010, para. 70; *Case Darby v. Sweden*, Application no. 11581/85, 23 october 1990, para. 31-34, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=864611&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

22. Furthermore, the notion of discrimination within the meaning of Article 14 (art. 14) generally implies cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*[10]).

23. In this case, the difference of treatment is not justified because both residents and non residents can be regarded as being in an analogous situation. Indeed, they are all citizens of the Russian Federation, who have to pay taxes when they work in their country. There is no denying that States have a right to taxation, as guaranteed by article 1 paragraph 2 of Protocol 1 and that they enjoy a margin of appreciation in this matter (see *Gasus v. the Netherlands*[11]). However, this margin of appreciation is not unlimited. Discretion is applicable only for the purpose of ensuring that taxpayers comply with their obligations. In particular, the legislature cannot establish discriminatory conditions (e.g. permanent residence in the Russian Federation) that impinge upon taxpayers' constitutional rights (e.g. property rights). Without reasonable and proper justification, this discrimination is arbitrary.

2) Aim of the measure

24. As it was submitted above, an acceptable difference of treatment must be objective, justified and must pursue a legitimate aim. In this case, the difference of treatment between tax residents and non residents is based on the fact that the latter spend more than 183 days outside of the Russian Federation. The Constitutional Court provided no further explanation as to why the tax rate is doubled for non residents taxpayers. The Constitutional Court only stated that the tax measure is justified and based on an objective criterion "characterizing a natural person's connection with the tax jurisdiction of the Russian Federation". According to the applicant, this argument is not sufficient to justify

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[10] *Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application no. 9214/80; 9473/81; 9474/81, 23 May 1985, para. 82. online: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695293&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[11] *Case of Gasus Dosier- Und Fördertechnik GmbH v. the Netherlands*, Application no. 15375/89, 23 February 1995, para. 60. Online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695795&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

the difference of treatment. The criterion of differentiation is based on the place of residence, and not on an economic criterion. It seems that this is an arbitrary determination of the tax rates that does not take into consideration the financial situation of each individual. The applicant also submits that public interest demands effective tax administration for which the enactment of unjust laws is unacceptable.

3) No proportionality between the aim sought and the means employed

25. As the Court established in the *Belgian Linguistic Case*, "Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised[12]". As it has been established above, there is no legitimate aim or reasonable justification to such a major difference of treatment between Russian nationals who are tax residents and those who are non residents according the tax measure. The State failed to support and justify a measure that inflicts an additional financial strain on non residents. Besides, even if the impugned legislation followed a legitimate aim, which it does not, a law that disproportionately restricts the basic rights of the individual and property rights on the basis of temporary place of residence should be considered unjust. Given all these considerations, it cannot be stated that the means employed by the State meet the principle of proportionality.

(3) *VIOLATION OF THE RIGHT TO A FAIR TRIAL*

THE LAW

26. Article 6 of the Convention guarantees that

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing […]"* (emphasis added)

1) Notion of "criminal charge" in the case law of the European Court

[12] *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, cited, para.10.

27. Article 6(1) of the Convention guarantees the right to a fair trial for everyone charged with a criminal offense. In its case law, the European Court has defined the terms of "criminal offense" and "criminal charge" in a broader approach than the proceedings defined as "criminal" in the Contracting States. Thus, "the indications furnished by the domestic law of the respondent State have only a relative value,"[13] when determining whether or not an offence should be considered as criminal in its nature, since it is an autonomous concept under the Convention.

28. The European Court will first treat the charge as 'criminal' if the national law of the Contracting States defines the charge as such[14]. Since tax differentiation is part of the Russian fiscal regime, the situation does not comply with the first criterion, which is the classification as a criminal offense in national law. Thus, the European Court will examine the consequences of the procedure in question based on two alternative criteria[15]: the nature of the offense and the degree of severity of the penalty.

29. In evaluating the nature of the offense, several factors, amongst others, can be taken into account, such as:

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[13] *Kadubec v. Slovakia*, Application no. 27061/95, 2 September 1998, para 51, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696112&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Ozturk v. Germany, Application no. 22479/93, 28 September 1999, para 52, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695430&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Benham v. United Kingdom, Application no. 19380/92, 20 June 1996, para 56, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695867&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Engel and Others v. The Netherlands, Application no. 50100/71, 23 November 1976, para 82, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695356&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[14] *Engel and Others v. The Netherlands*, cited, para 82

[15] The ECtHR ruled that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*Bendenoun v. France*, Application no. 12547/86, 24 February 1994, para. 47).

- The generally binding character of the legal rule as opposed to rules addressed to a specific group[16].

- The classification of comparable procedures in other Contracting States in order to evaluate if there is a similar practice[17]

- The punitive or deterrent purpose of the legal rule[18].

30. The nature of the offense is the main criterion examined by the European Court in order to determine the "criminal" nature of a charge when the national law does not qualify it as such[19], the European Court will also examine the degree of severity of the maximum potential penalty, which depends on the circumstances of a specific case. In *Lauko v. Slovakia*[20], the European Court ruled that accusing a neighbour of causing a nuisance without justification, action punishable with a maximum fine of SKK 3,000 (approximately 90€) and with an imposed fine of 9€, was "criminal in nature" because of the general, deterrent and punitive character of the charge. In *Weber v. Switzerland*[21], the European Court ruled that a fine of 300 Swiss francs for breach of confidentiality in a judicial proceeding is a "criminal" act. Furthermore, the fact that sanctions could amount to a small amount of money does not take away their punitive character. Indeed, the Court ruled in *Ozturk v. Germany* that:

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[16] *Bendenoun v. France*, Application no. 12547/86, 24 February 1994, para. 47, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695740&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Demicoli v. Malta, Application No. 13057/87, 27 August 1991, para. 33, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695559&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Ozturk v. Germany, cited, para. 53

[17] *Ozturk v. Germany*, cited, para. 53

[18] *Ozturk v. Germany*, cited, para. 53 and *Bendenoun v. France* cited, para. 47

[19] *Jussila v. Finland*, Application no. 73053/01, 23 November 200, para 38, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=810782&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[20] *Lauko v. Slovakia*, Application no. 26138/95, 2 September 1998, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696111&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[21] *Weber v. Switzerland*, Application no. 11034/84, 22 May 1990, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695506&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

> There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. […] it would be contrary to the object and purpose of Article 6 [art. 6], which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article [art. 6] a whole category of offences merely on the ground of regarding them as petty.[22]

31. In *Kadubec v. Slovakia*, the European Court supported the *Ozturk* decision and ruled that "The relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherent criminal character"[23], which is also confirmed in *Jussila v. Finland*[24] (cited, para 32 and 35).

2) Application of the notion of 'criminal charge' to X v. Russia

32. Under the current case law, the tax differentiation imposed on the applicant based on the tax measure shall be classified as "criminal" under the Convention because of the nature of the offence and the severity of the maximum potential penalty.

33. In regards to the nature of the offence, the tax differentiation fulfills the criteria set down by the ECtHR case law for criminal charges:

34. The Tax code in general, the tax measure as applied in the applicant's case in particular are of general binding character.

35. This situation can potentially affect the whole population since all citizens going abroad for more than 183 days will have to pay 30% in taxes of the income earned in the Russian Federation. For instance, according to a UN Report[25], there are about 1-1.5 million Russians who are working abroad, which can potentially be affected by this measure. If those workers decide to come back to the Russian Federation, they will be considered as non-resident for a six-month period and they will have to pay more than the double in taxes than Russian citizens who are living on the Russian territory.

[22] *Ozturk v. Germany*, cited, para 53.
[23] *Kadubec v. Slovakia*, cited, para 52.
[24] *Jussila v. Finland*, cited, para 32 and 35.
[25] Leonid Rybakovsky and Sergey Ryazantsev, "International Migration in the Russian Federation", *United Nations Expert Group Meeting on International Migration and Development* (UN/POP/MIG/2005/11), p.16

36. The tax surcharges are intended as a punishment to deter re-offending, which has a chilling effect on the Russian citizens willing to go abroad.

37. Indeed, tax surcharges are falling within the context of a general tendency of the Russian Federation to control its citizens' migration that goes back to the *propiska* system in place during the Soviet regime[26]. This *propiska* has been settled in order to plan "the economic development of the country [and to shape] migration flows''[27]. Therefore, migration management in the Soviet period was coordinated with the State interests and contributed to the limitation of the mobility of the citizens of the USSR[28]. In addition to the limitation of internal migration, it is important to mention that "international migration was an exception rather than a rule in the Soviet Union. For decades of the Soviet regime the USSR was a 'closed' country where international migration was strictly limited by the State"[29].

38. Despite the fact that the *propiska* was officially abolished in 1993 with the Federal Law "On the right of citizens of the Russian Federation to freedom of movement and choice of domicile on the Territory of the Russian Federation", it is still part of the system, which has notable effects in terms of enjoyment of human rights and basic freedoms.

39. The fact that citizens who are going abroad are paying more than the double in taxes than citizens who are living in Russia inevitably causes a chilling effect on the Russian citizens willing to go abroad. Therefore, the Tax Code has the effect of deterring re-offending, which complies with the criterion of the penal nature of the measure.

40. In this respect, this case is very similar to *Lauko v. Slovakia* in which the ECtHR analyzed the criminal nature of minor offences under Slovakian law (in that particular case, the minor offence of unjustified accusation). In *Lauko*, the Court concluded that the general character of the legal provision taken together with the deterrent purpose of the penalty

[26]The *propiska* system is "a compulsory registration of the passport holder at a specific address. [This measure] was introduced by a Government Decree'' in 1932, *in* Irina Ivakhnyuk, "The Russian Migration Policy and its Impact on Human Development: the Historical Perspective", *Human Development Research Paper*, UNDP (2009/14), p.5
[27] *Ibid*., p.9
[28] *Ibid*., p.8
[29]*Ibid*., p.10

imposed on the applicant showed that the offence was criminal in nature[30].

41. In regards to the severity of the penalty, there is a 17% tax surcharge imposed on citizens who are not considered as residents in light of the Tax code, no matter what their income is. Therefore, there is no specified maximum potential penalty. This combined with the fact that this situation is potentially applicable to all Russian citizens, is triggering the severity threshold[31].

APPLICATION OF THE LAW TO THE CASE

1) The requirement to give reasons and consider the arguments of the parties under Article 6 of the Convention

42. The lack of examination of the argument of the defendant regarding the Convention is a violation of the right to a fair trial, ensured by Article 6(1). This guarantee is implied in Article 6(1), as it has been recognised by the Court on many occasions.

43. Indeed, it has been recognized that "Article 6 para. 1 (art. 6-1) obliges the courts to give reasons for their judgments"[32]. Furthermore, the European Court ruled in *Kraska v. Switzerland*[33], that the court was under a duty to "conduct a proper examination of the submission, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision". The same reasoning has been

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[30] *Lauko v. Slovakia*, cited, para. 58.

[31] The case law on the 'severity of the maximum penalty' seems to combine also elements from the second criterion ('nature of the offence'), in particular the general character of the offence. In a number of cases where the ECtHR ruled that a charge would be criminal because of the severity of the maximum penalty, it was because the offence was in fact of general character (*Demicoli v. Malta*, cited, *Weber v. Switzerland*, cited). See also footnote 4 above on cumulative approach.

[32] *Hiro Balani v. Spain*, Application no. 303-B, 09 December 1994, para 27, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695787&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[33] *Kraska v. Switzerland*, Application no. 13942/88, 19 April 1993, para 30, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695705&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

reaffirmed in paragraph 59 of the case of *Van de Hurk v. Netherlands*[34].

44. However, the courts have some discretion when considering arguments and evidence, since Article 6(1) does not require the court to give a detailed answer to every argument raised[35]. Nevertheless, the court must justify its activities by giving reasons for its decisions[36]. This interpretation in confirmed in *Hadjianastassiou v. Greece*, in which the European Court declares that although states enjoy considerable freedom in the workings of their judiciary system: "the national courts must indicate with sufficient clarity the grounds on which they based their decision"[37] in order to demonstrate that the parties have been heard[38].

45. In addition to that, the European Court mentions that the right to a fair trial as guaranteed by Article 6(1) of the Convention includes the parties' right to raise observations they judge relevant and that this right is not solely theoretical:

> La Convention ne visant pas à garantir des droits théoriques ou illusoires mais des droits concrets et effectifs. Ce droit ne peut passer pour effectif que si ces observations sont vraiment

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[34] *Van de Hurk v. The Netherlands*, Application no 16034/90, 19 April 1994, para 59, online: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695755&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[35] *Van de Hurk v. the Netherlands*, cited, para 61; *Ruiz Torija v. Spain*, Application no. 303-A , 9 December 1994, para 29, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695786&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[36] *Suominen v. Finland*, Application no 37801/97, 1 July 2003, para 36, online: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699055&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[37] *Hadjianastassiou v. Greece*, Application no. 252, 16 December 1992, para 33, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695656&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[38] *Kuznetsov and Others v. Russia*, Application no. 184/02, 11 January 2007, para 83 to 85, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=812677&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

«entendues», c'est-à-dire dûment examinées par le tribunal saisi.[39]

46. Therefore, even though the obligation to state reasons will vary depending on the nature of the decision and the circumstances of the case, the European Court states that the courts silence could give rise to doubt on the scope of the examination conducted by the national court[40]. Consequently, if a court considers that certain arguments and/or evidences presented by an applicant have no merit or are irrelevant to the matter in dispute, it must state the reason why they are not considered. Moreover, it is important to note the firmness of the position of the European Court regarding the implementation of the Convention: "effective implementation of the European Convention on Human Rights at national level is crucial for the operation of the Convention system. In line with its subsidiary character the Convention is intended to be applied first and foremost by the national courts and authorities"[41]. This position has been reaffirmed by the Committee of Ministers of the Council of Europe since they deemed that "the rights and freedoms guaranteed by the Convention [must] be protected in the first place at the national level and applied by national authorities […]"[42]. Therefore, States "[must] give effect to the Convention in their legal order, in light of the case-law of the Court"[43].

2) Violation of Article 6(1) of the Convention in the present case

47. The aforementioned section presents numerous cases that confirm the right to a fair trial as stated in Article 6(1) of the Convention. Therefore, the guarantees underlying Article 6(1) must be applied before all types of courts, including the Constitutional Court of the Russian Federation.

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[39] *Dulaurans v. France*, Application no 34553/97, 21 March 2000, para 33, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=700893&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[40] *Ruiz Torija v. Spain*, cited, para 29-30

[41] Erik Fribergh, "Foreword by the Registrar on the occasion of the 100th issue of the Case-Law of the European Court of Human Rights," *Information Note of the European Court of Human Rights*, no. 100 (September 2007), p.1.

[42] Recommendations of the Committee of Ministers of the Council of Europe Rec(2004)4, Preamble, Rec(2004)5, Preamble.

[43] Recommendation of the Committee of Ministers of the Council of Europe Rec(2004)5, section 3.

48. On October 29th 2010, the applicant filed a complaint before the Constitutional Court, in which he specifically mentioned the tax measure, as applied to non resident citizens of the Russian Federation, breaches the right to property and the right to equal treatment, rights guaranteed by Article 1 of the Protocol 1 and Article 14 of the Convention.

49. Moreover, the applicant used the European Court's case law in order to validate the allegations of violation of the Convention. In regards to the right to property, the applicant has put forward the *Sporrong and Lönnroth v. Sweden* case to illustrate the principle of fair balance between the interests of society and the conditions necessary for protection of the fundamental rights of the individual. Concerning the right to equal treatment, the applicant explained the extent of the guaranteed right by referring to the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* case.

50. In its judgement of July 14th 2011, the Constitutional Court of the Russian Federation summarized the allegations of the applicant and explicitly mentioned that "according to the complainant, the tax rate of 30 percent to citizens of the Russian Federation who are not tax residents of the Russian Federation amounts to discrimination on the basis of place of residence, and causes an incommensurate restriction on property rights, and *therefore violates* […] the Constitution of the Russian Federation, *as well as article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 1 of Protocol 1 to said Convention*" (emphasis added) [44].

51. Despite the fact that the Constitutional Court of the Russian Federation was aware of the alleged violations, it neglected to mention the Convention and disregarded applicant's arguments. Therefore, the Constitutional Court failed to consider the arguments based on

[44] Paragraph 1 of the Decision of the Constitutional Court of the Russian Federation, attached as document number two in the present petition.

the Convention brought forward by the applicant, even though they contained additional material submitted in relation to the petition. This failure to address these arguments in its decision has resulted in a breach of Article 6(1) of the Convention.

52. As mentioned in the last section, the European Court has outlined in its past judgments that the right to be heard does not imply an obligation of providing a detailed response to every argument[45]. In contrast, in this particular case, the Constitutional Court simply failed to examine the questions regarding the Convention raised by the applicant even though it was aware of the demand. Hence, this is not a case where a tribunal has taken the liberty not to respond in detail to each argument, but rather a case where a tribunal has chosen to consciously ignore a valid argument and a fundamental human right violation raised by the applicant. Indeed, this omission by the Constitutional Court raises an important issue. The *Hiro Balani v. Spain* case featured a similar failure. In that case, the European Commission ruled that the fact that the Supreme Court had not addressed the petitioner's arguments was a violation of Article 6(1) of the Convention and added: "that the silence of the Supreme Court in this matter could give rise to doubts as to the scope of the examination conducted by that court[46]". Such doubts are definitely present in the present case. The legal process finds much of its legitimacy in the justification of its judgments, which is absent in the present case.

53. Finally, in the *Gast and Popp v. Germany* case, this Court ruled that "a State which established a constitutional-type court was under a duty to ensure that litigants enjoyed in the proceedings before it the fundamental guarantees laid down in Article 6"[47]. The requirement to give reasons and to consider the arguments of the parties is part of the fundamental guarantees set by Article 6. In this case, the Constitutional Court has not ensured that right to the applicant since there was no examination of the allegations of

[45] *Ruiz Torija v. Spain*, cited, para 29 and *Van de Hurk v. The Netherlands*, cited, para 61.
[46] *Hiro Balani v. Spain*, cited, para 25.
[47] *Gast and Popp v. Germany*, Application no. 29357/95, 25 February 2000, para 63, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696375&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

violations of the Convention, which is leading in a breach of Article 6(1).

V. Admissibility of the case regarding Article 35, 3 B

THE LAW

54. Paragraph 3 b) of article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides as follows:

> "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> ...
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

55. Paragraph 3 of Article 35 of the Convention was recently amended by Protocol 14, which entered into force on 1st June 2010, which sets a new criterion of admissibility regarding applications in which the disadvantage suffered is not significant. This amendment aims to relieve the Court's workload considering it is facing a growing number of applications. Paragraph 3 b) of Article 35 establishes that applications in which the disadvantage suffered is not significant are inadmissible. Indeed, the Court's case law established that the violation of a right must achieve a minimum level of severity to warrant consideration by an international Court.[48] Regarding the pecuniary damages, the significant disadvantage is established in relation with the importance of the financial impact on the applicant[49] or the importance of the financial prejudice suffered and its repercussions on

[48] Case of *Korolev v. Russia*, application no. 25551/051 July 2010, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=865826&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[49] Case of *Bock v. Germany*, application no. 11118/84, 21 February 1989, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695317&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

the personal life of the applicant.[50] However, the fact that an applicant did not suffer a great pecuniary loss does not mean that the case is automatically inadmissible. Indeed, the Court considers that the pecuniary loss is not the sole criterion to determine whether the applicant suffered a significant disadvantage or not. In *Korolev v. Russia*, the Court ruled that "a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest".

56. In addition to that, in the case of *Finger v. Bulgaria*[51] which concerned the length of civil proceedings in Bulgaria, the Court did not look at the damage suffered by Mrs. Finger, but only looked at the two provisions following the element of significant disadvantage contained in article 35, 3b) and observed whether the State of Bulgaria had complied with the criteria of the respect for human rights as defined in the Convention and its Protocols and the due consideration by a domestic tribunal. Regarding Mrs. Finger's case, the Court ruled that there was no need "to determine whether she suffered a "significant disadvantage" on account of their allegedly unreasonable duration, because of the second and third elements of the new admissibility criterion. The sentences that follow the criterion of significant disadvantage in Paragraph 3) are intended to be two safeguard clauses ensuring the admissibility of applications in which «respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits» and those that have "not been duly considered by a domestic tribunal". Once the safeguard clauses apply, it is unnecessary to evaluate whether the applicant suffered a significant disadvantage and the application should be admissible.

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[50] Case of *Ionescu v. Romania*, application no. 38608/97, 2 November 2004. online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=706630&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[51] Case of *Finger c. Bulgaria*, 10 May 2011, application no. 37346/05, para 75, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=885172&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

APPLICATION OF THE LAW TO THE CASE

57. Following *Finger v. Bulgaria*, it is not necessary to determine whether the applicant suffered a significant damage resulting from the taxation of his income to the amount of 30 percent resulting from the tax measure since the two safeguard clauses contained in paragraph 3 b) of article 35 of the Convention apply.

58. Respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits. Indeed, there are three problems with the application of the rule of law and the administration of justice by the Constitutional Court regarding the present case. First, the justification given by the Court to dismiss the argument of discrimination raised by the applicant is clearly insufficient and does not address any specific justifications and aim for the differentiated tax rate applicable to non-resident taxpayers. The tax measure reveals a potential situation of systemic discrimination in the taxation of people who leave Russia for more than 183 consecutive calendar days.[52].

59. Second, the President of the Court, Valery Zorkin and the acting speaker of the Federation Council, Aleksandr Torshin made worrying statements about the place of the Convention in Russian justice system. Indeed, those two important Russian figures made public statements reporting a desire to limit "the right of the European Court to interfere into the area of Russian jurisdiction"[53]. In a doctrinal article, President Zorkin argued that the Constitutionnal Court, when verifying the constitutionality of a law, should only use the European Convention and its case law as an accessory *ratio*.[54] In June 2011, Torshin proposed a "draft bill stat[ing] that Russian court decisions should be reconsidered

[52] See, *mutatis mutandis*, the case of *Finger v. Bulgaria*, in regards to the potential systemic problem, 10 May 2011, application no 37346/05, para 75, online, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=885172&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[53] *RT*, «Duma considers law to limit influence of European Court on Russia's legal system», online, http://rt.com/politics/torshin-european-court-russia/ (Consulted on 1st December 2011)

[54] Kirill Koroteev, «La Russie et la Convention européenne des droits de l'homme. Bilan jurisprudentiel et institutionnel», *Droits fondamentaux*, no 5, January-December 2005, pp. 8-12.

following the European Court of Human Right rulings only if a specific law was unconstitutional."[55]

60. Third, there is a major background issue regarding Russia's attempts to reduce the applications presented before the European Court as noted by Alexei Trochev in an article presented in the Legal Research Studies Paper Series of the University of Wisconsin Law School: "The Kremlin today has made it a priority to stem the flow of potential complaints to the ECtHR and to do something about the complaints that already been received by the Court"[56]. Considering these three issues relating to the situation of human rights in Russia, the applicant submits that the first safeguard clause of article 35, paragraph 3 b) applies. Respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.

61. In addition, he present case has not been duly considered by a domestic tribunal, here the Constitutional Court, since the Constitutional Court declared it inadmissible and refused to examine it on the merits. IN its decision, the Constitutional Court sates that it "finds no grounds for accepting [the applicant's] complaint for trial" and dismissed it "on the grounds that it does not comply with the requirements of the Federal Constitutional Law". Moreover, as aforementioned, the Constitutional Court did not consider the arguments that were brought before it under the European Convention and this is one of the "check point[s] raised by the present case"[57] as the applicant submits that his right to a fair trial under article 6 of the Convention has been violated. Therefore, the second safeguard clause regarding his case applies and the present application is admissible.

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[55] *RT*, «Duma considers law to limit influence of European Court on Russia's legal system», online, http://rt.com/politics/torshin-european-court-russia/ (Consulted on 1st December 2011)

[56] Alexei Trochev, «All Appeals Lead to Strasbourg ? Unpacking the Impact of the EuropeanCourt of Human Rights on Russia», Legal Studies Research Paper Series, paper no 1082, University of Wisconsion Law School, Heldref Publications, 2009, p. 146

[57] *Finger v. Bulgaria*, aforecited, para 76

VI. Statement relative to 35 § 1 of the Convention

Final decision:

62. According to Article 125 of the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation is competent to rule upon the constitutionality of all applicable laws. Therefore, when a Russian law contravenes the Convention or the Constitution of the Russian Federation, the Constitutional Court must be seized before bringing a case to the Court. This has been stated in *Grišankova and Grišankovs v. Latvia*, in which the Court mentioned that "where the applicant calls into question a provision of (...) legislation or regulations as being contrary, as such, to the Convention, and the right relied on is among those guaranteed by the Latvian Constitution, proceedings should, in principle, be brought before the Constitutional Court prior to being brought before the European Court of Human Rights"[58].

63. In this case, all internal state means of legal protection have been exhausted since a petition has been brought before the Russian Constitutional Court in order to declare unconstitutional the words "in the amount of 30 percent" in Article 224 of the Tax code, as applied to non-resident citizens of the Russian Federation. The petition was dismissed on the basis that the disputed legal provision doesn't violate the applicant's constitutional rights.

VII. Statement of the object of the application

64. According to Article 41 of the Convention, the applicant requests that the Court:

a) declares the State Party in violation of Article 1 of the Protocol 1 to the Convention,
b) declares the State Party in violation of Article 14 of the Convention,
c) declares the State Party in violation of Article 6 of the Convention,
d) orders that the State Party refunds the applicant the fees and expenses of the lawyers in

[58] *Grišankova and Grišankovs v. Latvia*, Application no.36117/02, 13 February 2003, p.7, online : http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=671991&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

charge of this case.

VIII. Statement concerning other international proceedings

65. This case has not been examined by any other international organs.

IX. List of documents

1. The application before the Constitutional Court of the Russian Federation dated of October 29th 2010.
2. Translation into English of the application before the Constitutional Court of the Russian Federation dated of October 29th 2010.
66. The decision of the Constitutional Court of the Russian Federation dated of July 14th 2011.
67. Translation into English of the decision of the Constitutional Court of the Russian Federation dated of July 14th 2011.
68. The statement of income of natural person for 2008, from the accounting department of the Ural Institute of Economics, Management and Law, indicating the withholding of a 30 percent income tax.
69. The document confirming the presence of the applicant from October 1st 2005 to July 18th 2009 in the United Kingdom of Great Britain and Northern Ireland, period in which he was enrolled in a course of study.

X. Declaration and signature

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

Place.....

Date.....

(Signature of the applicant)