13. How to improve the results of a reluctant player: the case of Russia and the European Convention on Human Rights

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On 6 May 1992 the Government of the Russian Federation expressed in its letter to the Secretary General of the Council of Europe the wish to be invited to join the Council and declaring itself willing to respect the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.[1] Four years later on 28 February 1996 the Russian Federation acceded to the Statute of the Council of Europe without meeting all of the human rights requirements for member States. An unfavourable ad hoc Report by the Eminent Lawyers Group[2] concluded that 'the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the Statute of the Council and developed by the organs of the European Convention on Human Rights'.[3] The same evaluation was made by the then Director of the Legal Department of the

[1] As required in Article 3 of the Statute of the Council of Europe. Request for an Opinion from the Committee of Ministers to the Parliamentary Assembly of the Council of Europe on the accession of the Russian Federation to the Council of Europe. 26 June 1992. Doc. 6640 <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc92/EDOC6640.htm> accessed on 28 October 2012.

[2] The Eminent Lawyers Group is a group of legal experts on human rights set up by the Council of Europe in order to establish whether the Russian Federation legal order was in line with the Council of Europe's human rights standards for the purpose of Russia's accession to the Council of Europe.

[3] Rudolf Bernhardt et al., 'Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards,' (1994) Human Rights Law Journal 15, no. 7 page 287.

Russian Ministry for Foreign Affairs in an Explanatory Note on the Issue of Signing the European Convention.[4]

On 5 May 1998 the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' or 'the Convention') formally entered into force in the Russian Federation. From then on, those in the Russian Federation's jurisdiction were allowed to bring alleged violations of the Convention before the European Court of Human Rights ('ECtHR' or 'the Court') and, more importantly, to seek legal protection within the national legal system by invoking the Convention's guarantees. Under Article 1 ECHR the Russian Federation has undertaken an obligation 'to secure to everyone within [its] jurisdiction the rights and freedoms defined in Section I of [the] Convention.' This Article does not merely oblige Contracting Parties to respect human rights and fundamental freedoms, but also requires them to protect and remedy any breach at subordinate levels.[5]

LEGISLATION ON THE IMPLEMENTATION OF THE ECHR

Under Article 15(4) of the Russian Constitution the ECHR is part of the Russian legal system and has priority status in application as compared with national legislation. Article 1 of the Federal Law On Ratification of the Convention and its Protocols recognises the binding jurisdiction of the Strasbourg Court in the interpretation and application of the ECHR. Article 3 of the Federal Constitutional Law On Judicial System provides that 'Russian courts are obliged to apply international treaties ratified by Russia.' The latest piece of legislation on this matter is the Federal Law of 30 April 2010 On Compensation to Citizens for Violation of the Right to a Fair Trial within a Reasonable Time. Under Article 2(2) of that law compensation for the delay in consideration of a case or in the execution

[4] Aleksandr G. Khodakov, Director of the Legal Department (later the Ambassador of the Russian Federation in The Netherlands), *Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation* (30 January 1996). Appendix 6, in Anton Burkov (ed.), *Primenenie Evropeiskoi Konventsii o Zashchite Prav Cheloveka v Sudakh Rossii (Implementation of the European Convention for Human Rights in Russian Courts)* (Yekaterinburg Ural University Press 2006) (International Human Rights Protection series) page 157.

[5] *Ireland v. The United Kingdom* App no 5310/71 (ECHR 18 January 1978) para 239.

of a judicial act is determined, *inter alia,* by taking into account principles of reasonableness, justice and the practice of the ECtHR.

The highest courts of the Russian Federation issue binding explanations regarding the application of the Convention. For example, the Russian Supreme Court issued Regulation No. 5 of 10 October 2003 On the Application by Courts of General Jurisdiction of the Generally-Recognised Principles and Norms of International Law and the International Treaties of the Russian Federation (the '2003 Regulation').[6] In this Regulation the Supreme Court stressed that to avoid any violations of the Convention, the Convention must be understood by taking into account the practice of the ECtHR. Similarly the Constitutional Court's judgment of 5 February 2007 No. 2-P, recognises that the Convention as well as the jurisprudence of the ECtHR form part of the Russian legal system and must be taken into account by the Federal legislature and law enforcement bodies.

IMPLEMENTATION OF THE CONVENTION AND ECtHR CASE LAW BY RUSSIAN COURTS

Russian Constitutional Court's Application of the ECHR

During the period following Russia's 1996 accession to the Council of Europe and prior to its ratification of the Convention in 1998, the Constitutional Court was the first Russian court to implement Convention norms. During this period, three Constitutional Court judgments contained references to the Convention. By August 2004, there had been 54 judgments containing references to the Convention among a total of 166 since Russia's accession to the Council of Europe, and 116 since the Convention came into force in the Russian Federation in 1998. During

[6] Regulations by the Plenum of the Supreme Court are general statements of good judicial practice with no relation to the facts of particular cases based on review and analysis of the lower courts' and the Supreme Court's jurisprudence. They take the form of abstract norms that are authoritative for all lower courts, summarising the judicial practice of courts and explaining how particular provisions of statutes should be applied. They allow other courts to apply provisions of legislation consistently. Regulations have their legal basis in Article 126 of the Russian Constitution. For more on the nature of the Supreme Court's Regulations see: Anton Burkov, 'Regulations by the Plenum of the USSR and Russian Federation supreme courts as non-judge-made law' (Russian Law, No. 1, 2011) pages 85–110 <http://sutyajnik.ru/articles/410.html> accessed on 28 October 2012.

the same period, only 12 out of the 54 judgments of the Constitutional Court contained references to ECtHR case law. The other 42 judgments only referred to Convention norms, which can hardly be considered 'implementation' taking into account that: 'States give effect to the Convention in their legal order, in the light of the case law of the European Court of Human Rights'.[7]

Since 2004 there have been some changes in the practice of implementation of the Convention by the Russian Constitutional Court. For example, from August 2004 to January 2008 the Constitutional Court referred to the Convention and ECtHR case law more than it did before 2004. Having analysed the practice of the Constitutional Court from 1998 to 2008 (the 'Moscow period'), Koroteev concluded that the Constitutional Court has capacity for more frequent reference to the practices of the European Commission and the ECtHR when it applies the Convention.[8]

Russian Supreme Court's Application of the ECHR

The Russian Supreme Court has not applied the ECHR with any degree of regularity or particular competence. While the Supreme Court provided lower courts with the 2003 Regulation on the application of international law, the Supreme Court's own jurisprudence did not change significantly. Although the Supreme Court started to invoke ECtHR case law after 2003, it has done so very rarely, with many faults and a great deal of selectivity. Often the Court has ignored Convention issues raised by applicants or has failed to provide substantial grounds for rejecting

[7] Para 3 of the Recommendation of the Committee of Ministers of the Council of Europe Rec(2004)5 to member States on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards set down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session) <https://wcd.coe.int/ViewDoc.jsp?id=743297> accessed on 28 October 2012. For the text in Russian see Anton Burkov (ed.), *Primenenie Evropeiskoi Konventsii o Zashchite Prav Cheloveka v Sudakh Rossii* (Yekaterinburg Ural University Press 2006) page 141 <http://sutyajnik.ru/rus/library/sborniki.echr6/echr6/pdf> accessed on 19 February 2013.

[8] Kirill Koroteev, 'European Convention for the Protection of Human Rights and Fundamental Freedoms in Judgments of the Constitutional Court of the Russian Federation (Moscow Period)' (Европейская Конвенция о защите прав человека и основных свобод в постановлениях Конституционного Суда Российской федерации (московский период)) (2009) Sravnitelnoe Konstitutsionnoe Obozrenie No 4 (71) page 115.

such references to the Convention. Following the analysis of 3723 judgments from 1 August 2004 to 20 December 2007, a number of features can be identified that characterise the Supreme Court's approach to applying the ECHR after promulgation of the 2003 Regulation.

While not possible for the Supreme Court to refer to the Convention in all 3723 decisions – as many of these cases did not involve issues covered by the ECHR – only 32 judgments cited the Convention. In reaching a conclusion as to the proper frequency of the application of the Convention we must keep in mind the jurisdiction of the Supreme Court. As a court of first instance the Supreme Court acts in a similar manner to the Constitutional Court, which exercises judicial review of government decisions. Under Article 27 of the Civil Procedure Code, the Supreme Court most often considers applications (*zaiavleniia*) by physical or legal persons against acts of state organs, such as the President of the Russian Federation, Houses of the Federal Assembly (parliament), the Government of the Russian Federation as well as other federal authorities, which allegedly violate 'rights and freedoms and legal interests of these citizens and organisations.' The Supreme Court also considers cases on the liquidation of political parties as well as Russian and international non-governmental organisations (NGOs).

As a court of second instance (court of cassation), the Supreme Court considers, *inter alia,* appeals against judgments delivered by regional courts on cases against normative acts of regional state organs.[9] In cases where one of the parties is a private or legal person and the other is a state organ, the Convention is particularly likely to be relevant. As a court of cassation and extraordinary instance, the Supreme Court reviews lower courts' decisions from the viewpoint of whether fair trial guarantees were respected and whether there was a violation of procedural norms. Keeping this in mind, 32 instances of applying the Convention out of 3723 cases does not reflect a significant application of the Convention by the Supreme Court. The situation appears worse when one considers how reluctant the Supreme Court is to consider ECtHR case law in cases where the Convention does apply.

Unlike in the previous period, after the 2003 Regulation the Supreme Court began to invoke ECtHR case law. However, this happened far too seldom and with many errors. Only in cases where a national court actually appealed to the jurisprudence of the ECtHR is it possible to say that the court applied the Convention. The Supreme Court addressed ECtHR case law in only six of the 32 cases that referred to the

[9] Article 26 of the Civil Procedure Code.

Convention. Six cases – compared with none in the period before the 2003 Regulation was implemented – can be considered a positive development, but only a beginning. The Supreme Court is still in urgent need of improving the frequency and the quality of its implementation of ECtHR case law. In general, as before the 2003 Regulation, the Supreme Court did not refer to the case law of the ECtHR with any meaningful frequency.

Nevertheless, there are some recent examples of the Supreme Court implementing the Convention in cases where a violation of the Convention had been already found by the ECtHR. Therefore, the violations were allowed or overlooked by national courts before such cases were referred to and determined by the ECtHR. In the first issue of its official *Bulletin* for 2010, the Supreme Court published a judgment of the Court's Presidium that demonstrates the application of the Convention by the Russian Supreme Court. This case is not the only example of criminal cases being reopened after a violation of the Convention was found by the ECtHR. In 2010, 90 such cases were reopened.[10]

Therefore, it can be concluded that a national supreme court, having issued a special regulation ordering all lower courts to apply the Convention by considering ECtHR case law, does not follow its own provisions and jurisprudence. As a result, there is little evidence as to the preventive application of Convention norms in Russia.

Russian District Courts' Application of the ECHR

The jurisprudence that has emerged from the decisions of the Constitutional Court and the district courts seems to indicate a better understanding of the spirit and purpose of the ECHR. This achievement cannot be ascribed to the Supreme Court's jurisprudence or to its Regulations. There is evidence that those rare but quality occasions of the Convention's implementation by the district courts were prompted by applicants' arguments based on ECtHR case law rather than on the courts' own

[10] Judge Anatoly Kovler, European Court of Human Rights, *European Convention on Human Rights and Russia (Case-law of the European Court of Human Rights: A Judge's View)*, Lecture at the 1st Martens Summer School on International law (29 July–3 August 2012) <http//sutyajnik.ru/audio/248.mp3> accessed on 19 February 2013.

initiative. The quality of the Convention's implementation by a court, therefore, also depends on the arguments made to it by the parties.[11]

OBSTACLES AND OPTIONS FOR IMPROVING THE APPLICATION OF THE ECHR IN RUSSIA

Fourteen years after Russia's ratification of the Convention around 140,000 applications are pending before the ECtHR and over 30,000 (22 per cent) of such applications relate to Russia.[12] Of these applications, 95–98 per cent will be ruled inadmissible and the rest will be considered after five to ten years. Can an applicant afford to wait so long for justice with a two to five per cent of chance of success? The ECtHR is an effective instrument when it comes to structural violations, but ineffective in the situation of separate common violations.

As demonstrated above, appeal to the Convention is an additional remedy rarely used by the parties in legal disputes in Russia. It is not necessary to invoke arguments based on the Convention before national courts to apply to the ECHR, but such arguments can be used as a tool to persuade a judge. ECHR member States must be given an opportunity to identify and remedy a violation at the national level, which could be achieved by better explaining ECHR standards. Such explanations could also educate judges – as well as the opposing party (usually representatives of government bodies) – about the Convention.[13] To date, however, graduates of law schools in Russia do not have any obligatory coursework relating to the Convention.

The value of direct application of the ECHR is not that such application provides greater guarantees than Russian legislation. Legal practice, though, in Russia is the major source of violations of the

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[11] For more details on district courts' practice see: Leonard Hammer and Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Utrecht Eleven International Publishing 2012) pages 459–461 (in English); and Anton Burkov, *Convention for the Protection of Human Rights in Russian Courts* (Moscow Wolters Kluwer 2010) pages 172–222 (in Russian).

[12] European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation* (30 September 2012).

[13] The Brighton Declaration encourages member States to provide training on the Convention to national judges, lawyers, prosecutors and other relevant public officials. European Court of Human Rights, *High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration* (20 April 2012) para 9(c)(v) and (vi).

Convention. The application of national law must be in compliance with an understanding of the scope of human rights guarantees in the Convention as set forth in the ECtHR's case law. Under Article 1 ECHR a State is obliged to secure human rights of physical and legal persons in its national legal system. The ECtHR cannot cancel national decisions, legislation or make orders to do something, but it may consider particular violations of the Convention and award compensation to the applicant.

The major 'burden' to provide a remedy for violations is on national courts – they are required to take into account the guarantees of the Convention as interpreted by the ECtHR. Often, it is faster and more effective to defend rights in national courts than before the ECtHR. Before sealing the application addressed to the Strasbourg Court, one should do their utmost to defend one's 'European' rights before Russian courts. Judgments of the ECtHR contain conclusions on particular cases but also analysis of different types of violations and lacunas in legislation. There is, however, no need to draw the attention of a State to a particular violation 'via Strasbourg' as this could be achieved by applications to national courts. In Russia this is increasingly being done with the help of the parties.

Domestic application of the Convention (or the lack thereof) could also be used in the preparation of an application to the ECtHR after national remedies have been exhausted. Applications to the ECtHR will be more compelling and substantiated if one can demonstrate that the national courts ignored the ECtHR's case law.

There are several key barriers to the correct application of the Convention in Russian courts. Among these are that the Convention is applied without reference to the case law of the ECtHR; the misunderstanding that the Convention does not provide additional guarantees compared to national law; and the lack of 'official' translations of ECtHR judgments. However, the most important barrier is the attitude of national litigators and judges, who often lack awareness of the Convention as well as a lack of motivation for learning about and applying it.

Lack of Awareness of and Motivation to Apply the ECHR

The lack of awareness of the Convention and lack of motivation for studying and applying the Convention are interrelated. The lack of awareness of ECtHR case law is often explained by a lack of motivation

on the part of advocates to employ ECtHR case law in their arguments.[14] Lawyers are reluctant to argue ECtHR case law as often, from their point of view, judges do not take such arguments into consideration. On the other hand, judges claim that they do not apply the Convention because advocates do not raise such arguments in cases before them. Thus, staff attorneys of NGOs are particularly important for furthering the application of the Convention nationally as the purpose of their litigation is often to solve larger legal issues rather than just to help a particular client.

The lack of motivation to invoke the Convention is partially due to a lack of will on the part of the Supreme Court to provide lower courts with an exhaustive network of Regulations devoted to the Convention and to the method of its implementation along with the ECtHR's case law. The lack of motivation to apply the Convention creates a vicious circle and undermines attempts to raise awareness about it. There are two possible ways of breaking this cycle: pressure from below (litigators) and pressure from above (the Supreme Court of the Russian Federation). Advocates and judges will use the Convention only when the Supreme Court supports its use. While there are examples of change through the application of the Convention by staff attorneys of NGOs in various regions, in general NGOs are not powerful enough to change the situation and make it sustainable nationwide.

The Supreme Court's Regulations should be employed to educate and motivate judges as well as practising lawyers to properly refer to and implement the Convention. While the Supreme Court already does this in terms of raising awareness about the domestic status of the Convention, more should be done. Regulations should be more comprehensive, covering each essential ECtHR judgment against the Russian Federation and each principle expressed in the case law. Moreover, Regulations must be enforced by reviewing appeal cases. However, as mentioned above, this happens only after the ECtHR has recognised a violation of the Convention. This could motivate judges as well as practising lawyers to apply the Convention. It could also influence the way law schools teach European human rights law and the ECHR. At the same time, the Council of Europe could make use of such regulations as a criterion for

[14] For more detailed analysis of the issue of motivation see: Leonard Hammer and Frank Emmert (eds), supra n 11, pages 436–443. The Brighton Declaration encouraged all national courts and tribunals to consider the Convention and the ECtHR's case law in order to reduce both the number of human rights violations as well as the workload of the Court. *Brighton Declaration* (20 April 2012) supra n 13, paras 7 and 9(c)(iv).

assessing the Russian Government's compliance with judgments in terms of enforcing general measures.

CONCLUSIONS: IMPROVING THE IMPLEMENTATION OF THE ECHR IN RUSSIAN COURTS

The impact of the Convention on the Russian legal system in terms of its implementation by domestic courts is hardly in the state that one would expect 15 years after Russia's ratification of the Convention. There is a visible imbalance between the normative provisions, the jurisprudence and the motivation to apply them nationally. There are, however, also positive aspects, such as the existence of a Constitutional provision stipulating that the ECHR (as well as any other ratified international treaty) is part of the law of the land; provisions of subsidiary legislation for the implementation of international law; and general rules adopted by the Constitutional and Supreme Courts that develop monistic principles.

The jurisprudence of the Russian Supreme Court, to a greater or lesser extent, resembles an attempt to *demonstrate* to the Council of Europe that the Convention is being applied rather than to in fact *implement* the Convention. Otherwise, how can it be explained that a national supreme court, having issued a document that orders all the lower courts to apply the Convention by taking into account ECtHR case law, does not follow this document in its own jurisprudence? It would be fair to say that the Supreme Court's jurisprudence does not invoke the Convention or the ECtHR's jurisprudence at all. The implementation of the Convention without reference to the ECtHR's case law leads to the incorrect application of the instrument. The Convention is for the protection of rights at the national level in the first place, and only thereafter before the ECtHR. As a tool for the protection of fundamental rights, litigating violations of the Convention before national courts is often more timely and effective than litigating the same before the ECtHR.

The Convention provides additional guarantees, particularly as regards judicial and law enforcement practice, the scope of which is only fully determined by incorporating the ECtHR's judgments. Indeed, Russian legislation and judicial practice provide a legal framework for the direct application of the Convention as it is understood in the ECtHR case law. Thus, litigators possess all the necessary tools and methods for overcoming the artificially created barriers for direct application of the Convention in Russia. Hence, the Convention should not just be used as an additional tool of human rights protection in particular cases. Arguments based on the Convention and raised regularly before national

courts educate the judges about the proper application of ratified international treaties on human rights in Russia. This is of utmost importance given the lack of dedicated law school education in Russia on the European Convention on Human Rights.