**УПОЛНОМОЧЕННЫЙ РОССИЙСКОЙ ФЕДЕРАЦИИ
ПРИ ЕВРОПЕЙСКОМ СУДЕ ПО ПРАВАМ ЧЕЛОВЕКА –
ЗАМЕСТИТЕЛЬ МИНИСТРА ЮСТИЦИИ РОССИЙСКОЙ ФЕДЕРАЦИИ**

**Representative
of the Russian Federation at
the European Court of Human Rights
– deputy Minister of Justice
of the Russian Federation**

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№ 14-4104-14

Mr Søren NIELSEN
First Section Registrar,
European Court
of Human Rights

COUNCIL OF EUROPE
STRASBOURG – FRANCE

Application no. 25501/07
Novikova v. Russia and 16 other applications
(concerning application no. 40377/10 Zakharkin v. Russia)

Dear Sir,

Please find attached a copy of the English translation of the Memorandum of the Russian Federation authorities on the above application.

Best regards,

G. Matyushkin

17 July 2014
14-3527-14

EUROPEAN COURT
OF HUMAN RIGHTS

MEMORANDUM
on application no. 40377/10
Zakharkin v. Russia
(group of applications no. 25501/07 Novikova v. Russia and 16 other applications)

On 27 March 2014 the European Court of Human Rights informed the authorities of the Russian Federation of application *Zakharkin v. Russia* lodged with the European Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Rule 54 § 2 (b) of its Rules, the European Court invited the authorities of the Russian Federation to submit their observations and answer the following questions:

1. (a) Do the circumstances of each case (for instance, the order to stop the demonstration, taking the applicant to the police station, prosecution under Articles 19.3, 20.1 or 20.2 of the Code of Administrative Offences ("CAO"), taken separately or cumulatively, disclose interference with the applicants' freedom of expression under Article 10 § 1 of the Convention, including the freedom to receive and impart information and ideas?

(b) Was this interference prescribed by law? At the time of the events and ensuing proceedings in each case (and *a fortiori* in the cases before 2012), did the domestic law and judicial practice allow a clear distinction to be drawn between simultaneous solo "pickets" and a public assembly such as a group "picket" (for instance, on account of a certain distance between demonstrators or the criterion of the events having "a common goal and organisation")? If not, was the "quality of law" adversely affected?

(c) Did the interference pursue a legitimate aim?

(d) Was the interference "necessary in a democratic society" and proportionate to the legitimate aim pursued? Were the reasons adduced by the national authorities to justify the interference "relevant and sufficient"? Did the national authorities apply standards which were in conformity with the principles embodied in Article 10 of the Convention, where appropriate, considered in the light of its Article 11? Did the authorities base their decisions on an acceptable assessment of the relevant facts, for instance when assessing the coarse language imputed to some of the applicants, the content of the leaflets distributed by some of them, or the contents and lawfulness of the police orders which some of the applicants disobeyed?

2. Assuming that certain applicants did organise or participate in a peaceful public *assembly,* did the authorities' putting an end to (their participation in) the public assembly, the taking of the applicants to the police station and, in some cases, their prosecution on the sole ground of failing to observe the notification requirement constitute a disproportionate interference with their freedom of assembly under Article 11 of the Convention? When finding the applicants guilty and when imposing penalties such as fines or administrative detention, did the courts ponder the gravity of the offence and the consequences it entailed, such as serious obstruction of traffic, damage to property or similar?

3. Were the applicants "deprived of liberty" within the meaning of Article 5 of the Convention (cf. *M.A. v. Cyprus,* no. 41872/10, §§ 185-95, ECHR 2013 (extracts), and *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, 15 October 2013)? Did such deprivation of liberty fall within the scope of one or several subparagraphs of Article 5 § 1 of the Convention?

If so, was the entire period (complained of) lawful and "in accordance with a procedure prescribed by law"? In particular:

- Was it properly recorded as "escorting to the police station" (Articles 27.1 and 27.2 of the CAO)? Was it necessary for the relevant statutory purpose (the compiling of an administrative offence record because this could not be done on the spot) and reasonable as to its duration (decision no. 149-O-O of 17 January 2012 by the Constitutional Court)?

- Was it properly recorded as administrative arrest under Article 27.3 of the CAO? Were the statutory requirement of "exceptional circumstances" and the statutory purpose (the need for a proper and expedient examination of the administrative case) (see ruling no. 9-P of 16 June 2009 by the Constitutional Court) respected?

- Was it properly recorded as "escorting" (i.e. to the police station or other) under section 11 of the old Police Act (Federal Law no. 1036-I of 18 April 1991) or section 13 of the current Police Act (Federal Law no. 3-FZ of 7 February 2011)? Was the deprivation of liberty effected in order to decide whether the applicants should be arrested, since such decision could not be taken on the spot?

Alternatively, do the circumstances of the cases disclose restrictions on the applicants' freedom of movement, in breach of Article 2 of Protocol No. 4?

4. Assuming Article 6 of the Convention was applicable to the proceedings under the CAO:

- Was the impartiality requirement respected in this case, in particular on account of the absence of any prosecuting authority and the role of the judge in these circumstances (see, by way of comparison, *Ozerov v. Russia*, no. 64962/01, §§ 52-57, 18 May 2010, and *Blum v. Austria*, no. 31655/02, §§ 36-38, 3 February 2005)? Did the same situation obtain on appeal? Were the principle of equality of arms and the requirement of adversarial procedure applicable and actually respected in the present case? If yes, how? What was the procedural role of the authority and public official who compiled the administrative offence record under the CAO?

- Was the applicant afforded an adequate opportunity to defend himself in person and to receive legal assistance at any stage of the proceedings? Having regard to various relevant factors (for instance, the seriousness of the offence, the severity of the possible sentences, the complexity of the case and the personal situation of the accused), did the interests of justice require that legal assistance be provided free of charge? If so, was there a violation of Article 6 of the Convention?

5. Noting the applicant's conviction under Article 20.2 of the CAO, does he have standing to raise a complaint under Article 10 of the Convention, as well as its Article 11?

The circumstances of the case

1. On 12 December 2009 A.V. Zakharkin, the leader of Primary Trade Union Organisation Independent Trade Union "Profsvoboda" of OJSC (OAO) "Surgutneftegas", organised a picket in the prefectural-level city of Surgut. After gathering five persons willing to take part in the picket at 33/1 Mira Prospect, he

instructed them on how to conduct the picket and later accompanied them to the venue of the event. At about 1.00 p.m. on 12 December 2009 A.V. Zakharkin, having accompanied them to the crossing of Bakhilova and Dekabristov Streets and Lenina Prospect, defined every participant where to stand and led them to these places.

According to letter no. 10-23/719 of the Office for Coordination of External and Public Relations of the Surgut Administration of 14 December 2009, no notifications related to holding a public event in Surgut on 12 December 2009 were provided.

2. The police brought 6 participants of the event, including A.V. Zakharkin, to police station no. 1 of the Surgut Department of the Interior and drew up administrative offence record no. 714017147 under Article 20.2 § 1 of the Code of Administrative Offences ("CAO") in accordance with Article 28.3 of the CAO.

The material collected in respect of A.V. Zakharkin was sent to court circuit no. 10 of Surgut for taking a decision.

3. By the judgement of 18 December 2009 the Justice of the Peace of court circuit no. 10 of Surgut found A.V. Zakharkin guilty of committing an administrative offence under Article 20.2 § 1 of the CAO and fined him of RUB 1,500.

On 28 December 2009 A.V. Zakharkin lodged an appeal against the judgement of the Justice of the Peace of court circuit no. 10 of Surgut with the Surgut City Court referring to the fact that he did not participate in the picket, but rather was an organiser of several solo pickets near various buildings, and this fact was not contrary to the law. Based on the above, A.V. Zakharkin asked the court to quash the said judgement and to terminate the administrative proceedings by issuing a judgment of acquittal.

By his judgment of 22 January 2010 a judge of the Surgut City Court upheld the judgement of the Justice of the Peace of court circuit no. 10 of Surgut and dismissed A.V. Zakharkin's appeal.

Answer to questions nos. 1, 2, 5

4. Article 10 of the Convention establishes freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorders or crime, for the protection of health or morals, for the protection of the reputation or rights of

others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Interference with the right to freedom of expression interpreted with regard to the right to freedom of assembly is a violation of Article 10 § 1 of the Convention, if it is not prescribed by law, does not pursue one or more legitimate aims under the present Article and is not necessary in a democratic society for the achievement of those aims (*Malofeyeva v. Russia*, 30 May 2013; *Christian Democratic People's Party v. The Republic of Moldova*, 14 February 2006).

5. Pursuant to Article 11 of the Convention everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

6. The European Court has reiterated that the protection of personal opinion guaranteed by Article 10 of the Convention is one of the objectives of freedom of peaceful assembly as enshrined in Article 11. Accordingly, the issue of freedom of expression cannot be separated from that of freedom of assembly and it is not necessary to consider each provision separately. Article 11 of the Convention takes precedence as the lex spesialis for assemblies, and the Court will deal with the case principally under this provision, whilst interpreting it in the light of Article 10 (see *Galstyan v. Armenia*, application no. 26986/03, § 95 - 96; *Ezelin v. France*, Series A no. 202, § 35, 37; *Pendragon v. United Kingdom,* application no. 31416/96).

7. The essential object of Article 11 of the Convention is to protect the individual against arbitrary interference of public authorities with the exercise of the rights protected (see judgement in *Wilson, National Union of Journalists and Others v. United Kingdom*, applications nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V).

Alongside with that, the European Court has noted that the right to freedom of assembly, as the fundamental right in a democratic society, may, nevertheless, be subject to such restrictions, by virtue of Article 11 § 2 of the Convention, as are prescribed by law and are necessary in a democratic society for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others (judgement of 26 July 2007 in *Makhmudov v. Russia*, application no. 35082/04; of 20 February 2003 in *Djavit An v. Turkey*, application no. 20652/92).

8. When analyzing the interference, the European Court has to ascertain whether the respondent State exercised its discretion reasonably, carefully and in good faith. It must also look at the interference complained of in the light of the

case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Articles 10 and 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (*Christian Democratic People's Party v. Moldova*, § 70).

9. The European Court repeatedly held that, despite the fact that holding public events at public places may lead to some interference with everyday life, including interference with traffic, it is important for the respect of the nature of the right on the freedom of assembly guaranteed by Article 11 of the Convention that public authorities demonstrate a certain degree of tolerance towards peaceful gatherings (*Galstyan v. Armenia*, mentioned above, § 116 and 117, 15 November 2007; *Oya Ataman v. Turkey*, mentioned above, § 38–42, ECHR 2006-XIII; *Akgöl and Göl v. Turkey*, applications nos. 28495/06 and 28516/06, § 43, 17 May 2011).

The European Court stated that the Contracting States have a margin of appreciation when assessing the proportionality, in accordance with § 2 of Article 10 or 11. However, such margin of appreciation is closely linked to the European control embracing both the legislation and the decisions to apply it; whereas it is the Court that is authorised to make its final decision whether the "restriction" is compatible with the rights guaranteed by the Convention. The expression "necessary in a democratic society" in Article 10 § 2 or 11 § 2 of the Convention implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate aim pursued. The Court also notes in this juncture that, whilst the objective "necessary", within the meaning of Article 10 § 2 or Article 11 §2, is not synonymous with "indispensible", it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessary" in the context (judgement of 7 December 1976 in *Handyside v. the United Kingdom*, application no. 5493/72, § 48).

10. In order to enable the domestic authorities to take the necessary preventive security measures associations and others organizing demonstrations, as actors in the democratic process, should respect the rules governing that process by complying with the regulations in force (judgement of 27 January 2009 in *Samüt Karabulut v. Turkey*, application no. 16999/04, § 35).

Prior notification serves not only the aim of reconciling, on the one hand, the right to assembly and, on the other hand, the rights and lawful interests of others, but also the prevention of disorder or crime. In order to balance these conflicting interests, the institution of the preliminary administrative procedures is common

practice in Member States when public demonstration is to be organized (*Éva Molnár v. Hungary*, § 37).

Since States have the right to require authorization, they must be able to apply sanctions to those who participate in demonstrations that do not comply with the requirement. The impossibility to impose such sanctions would render illusory the powers of the State to require authorisation (decision of the European Court of 4 May 2004 as to the admissibility of application no. 61821/00 *Ziliberberg v. Moldova*).

11. The authorities of the Russian Federation consider that the interference with the rights of the applicant in this case, taking into account the above mentioned criteria, was reasonable and not amounted to violation of the provisions of Articles 10 and 11 of the Convention due to the following reasons.

12. Article 31 of the Constitution of the Russian Federation guarantees to citizens of the Russian Federation the right to assemble peacefully, without weapons, and to hold assemblies, meetings, demonstrations, marches and picketing. This right is one of the fundamental and integral elements of the personal legal status in the Russian Federation as a democratic and legal State which is obliged to ensure protection, including judicial protection, of rights and freedoms of human and citizen.

13. The procedure for organization and conduction of peaceful public events is regulated by Federal Law of 19 June 2004 no. 54-FZ *On Assemblies, Meetings, Demonstrations, Marches and Picketing*, which enables the given right to be exercised and, coincidently, - respect proper public order and safety without damage for the health and morals of the citizens on the basis of the balance of interests of the organizers and participants of public events, on the one hand, and third parties - on the other, proceeding from the need to safeguard state protection to the rights and freedoms of all the citizens (both participating and not participating in a public event), including that through the introduction of appropriate measures to avoid and prevent breaches of public order and safety, human rights and freedoms, as well as the establishment of public and legal responsibility for the actions violating or threatening them.

In accordance with Article 2 § 1 of Federal Law no. 54-FZ a public event means an open and peaceful action accessible by everyone, held in the form of an assembly, meeting, demonstration, march or picketing or in different combinations of the aforementioned forms and carried out at the initiative of Russian citizens, political parties, other public or religious associations. The purpose of a public event is free expression and formation of opinions, as well as channelling demands on various aspects of political, economic, social and cultural life of the country and foreign policy issues.

One of the forms of a public event is picketing, which is defined as a form of public expression and conducted by one or more citizens with posters, banners and other means of visual propaganda near the picketed facility without carrying or using sound-amplifying equipment (Article 2 § 6 of the Federal Law no. 54-FZ).

In the interests of public order and national security Article 7 of the Federal Law no. 54-FZ establishes a notification procedure for conducting public events that provides the need to obtain approval from the executive authority of a constituent entity of the Russian Federation or a local authority as to the place and time to hold them.

14. Article 20.2 of the Code of Administrative Offences of the Russian Federation establishes responsibility for the violation of the established procedure for conducting a public event.

15. Considering A.V. Zakharkin's case on administrative offence, the Justice of the Peace found that on 12 December 2009 A.V. Zakharkin organized a picket, and, after gathering five persons willing to take part in it, instructed them on how to conduct the picket and later accompanied them to the venue of the event. At about 1.00 p.m. on 12 December 2009 A.V. Zakharkin, having accompanied them to the crossing of Bakhilova and Dekabristov Streets and Lenina Prospect, told every participant where to stand and led them to these places. Some of the participants held banners which had the emblems of "Trade Union ", "FREEDOM" and read "Say no to legal nihilism!", "Say YES to the Constitution!", "Say no to the discrimination of the Russian Trade Union of Railway Locomotive Crews!". A.V. Zakharkin did not submit a notification on holding a picket to the executive authority of the constituent entity of the Russian Federation or the local authority.

The above actions of A.V. Zakharkin violated the requirements of the Federal Law no. 54-FZ from 19 June, 2004 and were qualified under Article 20.2 § 1 of the CAO.

16. Justifying the finding as to the proof of A.V. Zakharkin's guilt in committing the administrative offence described above, the Justice of the Peace referred to the totality of evidence collected in the case, including: administrative offence record no. 714017147; on-site investigation record of 12 December 2009 and reports of police officers of 12 December 2009.

17. The applicant states that he did not violate the requirements of Federal Law of 19 June 2004 no. 54-FZ , as each of the picketers was a participant of a solo picket. He also claims that he did not organize the picket, but merely ensured that the picketers observed the Federal Law no. 54-FZ, and therefore he was not required to submit any notification of conducting the picket, and that he did not know and did not try to find out whether the other participations of the picket submitted such notifications, as he treated all of them as participants of their respective solo pickets.

Such an allegation forwarded by the applicant cannot be accepted, since it is refuted by a set of evidence collected in the case.

18. Article 28.1 § 1 of the CAO provides that one of the reasons for the institution of a case on administrative offence may be materials received from law-enforcement agencies, as well as from other government agencies, local authorities, public associations, which contain data indicative of occurrence of an administrative offence.

19. As it follows from the reports in the case files by the police officers, at about 1.00 p.m. on 12 December 2009 they saw a picket being held near the crossing of Bakhilova and Dekabristov Streets and Lenina Prospect, Surgut by N.V. Dermenzhi, S.D. Luzhanskiy, V.A. Didenko, Z.M. Aliyev, R.R. Gaitov. This fact is confirmed by the participants of the picket. Some of the participants held banners which had the emblems of "Trade" UNION " FREEDOM" and read "Say no to legal nihilism!", "Say YES to the Constitution!", "Say no to the discrimination of the Russian Trade Union of Railway Locomotive Crews!". Thereafter, when the participants were proceeding to the next picketing spot indicated by A.V. Zakharkin at 50 Lenina Prospect, 6 people, including A.V. Zakharkin, were stopped by police officers and escorted to police station no. 1 of the Surgut Department of the Interior.

Based on the information reported by the police officers who were an eyewitnesses to the offence, an administrative offence record was drawn up in A.V. Zakharkin's respect under Article 20.2 § 1 of the CAO in accordance with Article 28.3 of the CAO.

On 15 December 2009 the material collected in respect of A.V. Zakharkin was sent to court circuit no. 10 of Surgut for taking a judgement.

Having examined and evaluated the evidence in their totality comprehensively, fully and objectively, the Justice of the Peace of court circuit no. 10 of Surgut found that A.V. Zakharkin, as the organizer of a public event, violated the procedure of its organization, i.e. was guilty of an administrative offence under Article 20.2 § 1 of the CAO.

On 22 January 2010 the judge of the Surgut City Court, having examined the case concerning A.V. Zakharkin's appeal in full in accordance with the requirements of Article 30.6 of the CAO, agreed with the findings of the Justice of the Peace and declared applicant's arguments about not being involved in the organization of a picket on 12 December 2009 invalid.

20. As to the circumstances taken into account by the court while imposing an administrative penalty on the applicant, in accordance with the general rules of administrative penalty based on the principles of justice, proportionality and individualization of responsibility, administrative penalty for committing an administrative offence shall be imposed within the limits established by the law which provides for the responsibility for the administrative offence specified,

pursuant to the CAO (Article 4.1 § 1 of the CAO). When imposing administrative penalty on an individual, the nature of the administrative offence that he committed, his personality, property status and the circumstances mitigating or aggravating administrative responsibility are taken into account (Article 4.1 § 2 of the CAO).

It follows from the administrative case file that, when imposing penalty on the applicant, the judge had regard to the circumstances of the case, the nature of the offence committed and the specified offence being committed deliberately, aiming at public relations in the field of public order and public safety, alongside with the absence of the circumstances mitigating or aggravating administrative responsibility.

Administrative penalty in the form of an administrative fine in the amount of RUB 1,500 (approximately 31.5 euro) was imposed on the applicant in accordance with the requirements of Articles 3.1, 3.5 and 4.1 of the CAO within the sanctions of the CAO provisions establishing liability for organisation of a public event without giving prior notice.

21. In the light of the above, there is sufficient information in the present case indicating the fact, that A.V. Zakharkin participated in organising a picket in violation of Article 7 of the Federal Law no. 54-FZ containing the requirement of a prior notification of the public authorities as to holding a public event. The conclusion of the courts that there is an administrative offence in the applicant's actions provided for by Article 20.2 § 1 of the CAO are based on a comprehensive, full and objective examination of the factual circumstances of the case and the evidence presented.

22. Thus, the interference with the applicant's rights in the present case corresponded with the criteria listed in Articles 10 § 2 and 11 § 2 of the Convention.

Answer to question no. 3

23. According to Article 5 § 1 of the Convention everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the cases listed in the present Article and in accordance with a procedure prescribed by law.

In accordance with the case-law of the European Court, any deprivation of liberty, regardless of its form, not always adequate to classical imprisonment, must not only be effected in conformity with the substantive and procedural rules of national law, but must equally be in keeping with the very purpose of Article 5 that exhaustively lists the circumstances in which an individual may be lawfully

deprived of liberty (*Quinn v. France*, judgment of 22 March 1995; *K.-F. v. Germany*, 27 November 1997; *Kurt v. Turkey*, 25 May 1998).

24. Under Article 22 of the Constitution of the Russian Federation everyone has the right to freedom and personal security. Arrest, detention and remanding in custody shall be allowed only by court judgment. Prior to a court judgment an individual may not be detained for longer than 48 hours.

According to Article 55 § 3 of the Constitution of the Russian Federation human and civil rights and freedoms may be limited by federal law only to the extent to which it is necessary for the purpose of protection of foundations of the constitutional system, morals, health, rights and legal interests of other persons, for provision of the country defense and state safety.

Specifying the provisions of Article 22 of the Constitution of the Russian Federation in connection with Article 55 § 3 of the Constitution of the Russian Federation concerning the scope of administrative responsibility, the CAO provides that, for the purpose of terminating an administrative offence, identifying an offender, drawing up a record of administrative offence where it is impossible to do it in the place of detection of the administrative offence, securing timely and correct consideration of a case concerning an administrative offence and enforcement of the decision delivered in the case, an authorized person shall be entitled, within the scope of his authority, to take the measures provided for by the CAO, to ensure proceedings of administrative case to be conducted. As measures to ensure the conduct of administrative proceedings related to temporary forced restriction of liberty, the CAO provides for escorting, administrative detention and reconduction (Article 27.1).

25. The Constitutional Court of the Russian Federation indicated in its judgment of 16 June 2009 no. 9-P that administrative detention and escorting a person against whom an administrative prosecution has been conducted, amounts, in fact, to deprivation of liberty, although being of a short-term nature, and, therefore, the specified security measures should meet the criteria arising from Article 22 and Article 55 § 3 of the Constitution of the Russian Federation in conjunction with Article 5 § 1 (c) of the Convention, and be conditional on the nature of the offence and the need to achieve the objectives of their application.

26. In accordance with Article 27.2 § 1 of the CAO escorting is coercive forwarding of a person for the purpose of drawing up an administrative offence record when it is impossible to compile at the place where the administrative offence had been detected, if the drawing up of a record is required.

Within the meaning of the provision specified, escorting is a compulsory administrative and legal measure consisting in short-term restriction of the person's freedom of movement and his transfer from the place where the administrative offence had been committed to the authorized agency.

The main purpose of the mentioned security measure is to draw up an administrative offence record, if it is impossible to compile at the scene, as timely and accurate drawing up of an administrative offence record allows establishing and consolidating the information on the circumstances under which a competent authority or an official shall decide on the presence or absence of an administrative offence event, the person brought to administrative liability being guilty, and other legal facts relevant to the proper resolution of the case.

In its ruling of 17 January 2012 no. 149-O-O *On the complaints lodged by citizens Aleksandr Valeryevich Gudimov and Aleksandr Olegovich Shurshev against violation of their constitutional rights by paragraph 1 of Article 1070 and Article 1100 of the Civil Code of the Russian Federation* the Constitutional Court of the Russian Federation stated that, with regard to citizens' escorting to police station, the legislator does not set specific terms, because it is impossible to foresee and take into account the specific circumstances affecting its duration (territorial farness, availability and/or technical conditions of transportation facilities, traffic capacity, climatic conditions, state of health of person delivered, etc.), but points out that it should be accomplished as soon as possible (Article 27.2 § 2 of the CAO).

27. It follows from the submitted materials that the police conducted an inspection of the scene and found that the temperature on that day was -38°C.

Like the rest of the Khanty-Mansi Autonomous Okrug – Yugra, the city of Surgut is considered to be a part of the Far North regions, and in the winter period (from November to February) the temperature reaches levels dangerous to the life and health of citizens in case of their long-term exposure to outdoor conditions.

During the proceedings before the Justice of the Peace A.V. Zakharkin himself also pointed to the low temperature on that day.

The applicant was not deprived of his liberty, as he and all the picketers were taken to the police station in connection with the low temperature for an examination (clarification of the grounds and circumstances of the picket, establishment of identity, giving explanations) for subsequently deciding on whether they have committed an offence.

The applicant was sent to the office of the investigator to give explanations and was in the premises of police station no. 1 only during the examination.

The length of the applicant's stay in the police station "did not extend beyond the time strictly necessary to accomplish certain formalities" (*Guenat v. Switzerland*, no. 24722/94, Commission decision of 10 April 1995; *X v. Germany*, no. 8819/79, Commission decision of 19 March 1981).

28. Thus, the applicant's right to liberty and security of person, guaranteed by Article 5 of the Convention had not been violated. Moreover, the actions of the police officers were not appealed against in separate court proceedings.

A.V. Zakharkin did not try to file a civil action in connection with a violation of his rights to liberty and security of person, and thus has not exhausted all domestic remedies.

29. Article 2 of Protocol No. 4 to the Convention provides that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own.

The Court pointed out that, in accordance with its established case-law, the right of freedom of movement as guaranteed by §§ 1 and 2 of Article 2 of Protocol No. 4 to the Convention is intended to secure to any person a right to liberty of movement within a territory and to leave that territory, which implies a right to leave for any country of the person's choice to which he may be admitted *(Soltysyak v. Russia*, application no. 4663/05, 10 February 2011, § 37).

Article 27 of the Constitution of the Russian Federation secured the rights of everyone, who is lawfully staying in the territory of the Russian Federation, to freedom of movement within the country, the choice of the place to stay and residence. The right is among the basic and natural rights of human and citizen.

The right to freedom of movement as an independent personal freedom is the possibility of a person (a citizen) to move (migrate) from one place to another or the possibility to stay in the place that he choose without the threat of the State unlawfully interfering with the enjoyment of the said right, including forced displacement.

Liberty of movement includes freedom to find and choose the place to be, to stay and (or) to reside within the country and freedom to travel abroad that extends beyond the borders of the state, to expatriate and, if necessary, to return freely to the citizens' homeland.

Thus, based on the content of Article 2 of Protocol No. 4 to the Convention, the Russian Federation authorities consider that the Article specified shall not be applied to the cases when measures to ensure administrative proceedings are applied, such as escorting, since the very fact of the indicated measure being employed does not mean restriction of freedom of movement within the meaning of the said Article.

Answer to question no. 4

30. In accordance with Article 6 § 1 of the Convention, 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 within a reasonable time by an independent and impartial tribunal established by law.

31. As regards compliance with the requirement of impartiality the following should be noted.

32. The right to judicial protection of one's rights and freedoms, as defined in Article 46 of the Constitution, may not be construed as the possibility for a person to choose a judicial protection procedure at his own discretion, as its features in respect of certain types of proceedings and types of cases are defined on the basis of the Constitution and the federal law.

The federal law establishes the types and procedures of judicial protection for different types of judicial proceedings and categories of cases in order to account for the features of substantive relations defining the scope of the examination in every type of judicial proceedings, the nature of the cases, the substance and significance of sanctions and the legal consequences of their use.

33. With regard to proceedings in respect of administrative offenses committed by individuals such federal law is the Code of Administrative Offences of the Russian Federation.

The Code of Administrative Offences does not provide for mandatory participation of the prosecutor in the proceedings. Article 25.11 of the CAO establishes the right of the prosecutor to participate in the proceedings. In particular, the prosecutor within his/her authority may:

1) institute proceedings in an administrative case;

2) participate in the proceedings in an administrative case, present evidence, submit requests, give opinions on matters arising during the proceedings;

3) appeal against the decision in an administrative case, regardless of participation in the case, and perform other actions provided for by the federal law.

34. The Code of Administrative Offences of the Russian Federation defines the procedural role of the official who compiled the administrative offence record as the initiator of the offender's administrative prosecution. Compilation of an administrative offence record means institution of an administrative offence case.

In accordance with Article 28.1 of the CAO, an administrative offence case may be instituted in case of finding by officials authorised to compile administrative offence records of sufficient information indicating the occurrence of an administrative offence.

The administrative case is considered to be instituted from the moment of compiling an administrative offence record.

The official who compiled the administrative offence record shall also create the evidential base of the administrative case by means of establishing and documenting the evidence of guilt of the person against whom the case is instituted.

35. By virtue of Article 26.2 of the CAO, evidence in an administrative offence case shall be any factual data based on which the judge, authority or official conducting proceedings in the case shall decide on whether there has been

an administrative offence, whether the prosecuted person is guilty, as well as other circumstances relevant for the proper resolution of the case.

This data shall be contained in the administrative offence record, other records provided for by the CAO, the explanations of the prosecuted person, the testimony of the victim, witnesses, expert opinions and other documents, as well as readings of special technical equipment and material evidence.

36. According to the explanations given in paragraph no. 10 of judgment of the Plenum of the Supreme Court of the Russian Federation of 24 March 2005 no. 5 "On Some Issues Encountered by Courts in Applying the Code of Administrative Offences of the Russian Federation", as the officials compiling the administrative offence record, as well as the persons who rendered the decision in an administrative offence case are not parties to the proceedings in administrative cases which are listed in Chapter 25 of the CAO, they may not lodge requests or challenge judges. However, such persons may, if necessary, be summoned to the court to take part in the administrative offence proceedings (including appeal proceedings) to provide clarifications with respect to arising issues.

37. In the ruling of the Constitutional Court of the Russian Federation of 17 June 2010 no. 925-O-O "On Refusal to Accept for Examination the Application of Citizen A.A. Petrinskiy about Violation of his Constitutional Rights by Article 26.2 § 2 of the Code of Administrative Offences of the Russian Federation" observed that the administrative offence record and other records indicated in Article 26.2 § 2 of the CAO do not predetermine the issue of the prosecuted person's guilt, as, by virtue of Article 26.11 of the CAO, the judge, the members of the collegial body, the officer conducting proceedings in an administrative offence case assess the evidence according to their own beliefs based on a comprehensive, full and objective investigation of all the circumstances in their totality; no evidence may have predetermined force.

38. In accordance with Article 25.1 § 1 of the CAO, the person against whom administrative offence proceedings are conducted shall have the right to familiarise himself with all the materials of the case, give explanations, submit evidence and requests, challenge judges, use legal aid of counsel, and enjoy other procedural rights in accordance with the CAO.

This implies that this person has the opportunity to refute the information contained in the administrative offence record and other documents specified in the Article 26.2 §§ 1 and 2 of the CAO at the hearing, which allows to ensure the possibility of exercising the constitutional right to judicial protection in administrative proceedings conducted based on the adversarial principle (Article 46 § 1, Article 123 § 3 of the Constitution).

39. In addition, Article 29.4 of the CAO provides for the right of the court to render a ruling to summon (including, at the request of the parties) the persons

referred to in Articles 25.1 to 25.10 of the CAO (including the prosecutor, witnesses and others), to request additional materials in the case and to order an expert examination.

40. Therefore, proceedings in administrative offence cases in the Russian Federation have the same safeguards as criminal and civil proceedings do and conform to international norms and principles of a fair trial. No evidence submitted by the parties has predetermined force for the court.

The authorities of the Russian Federation believe that, in case of the applicant as in the case of *Blum v. Austria* (no. 31655/02, 3 February 2005), the authorities exercised their power of assessment on the basis of the evidence adduced by the parties before them and that they remained in doing so within the limits set out by Article 6 § 1 (§ 29). The mere absence of a representative of the prosecuting side does not give rise to objectively justified fears as regards the parties' impartiality (see *Weh and Weh v. Austria* (dec.), no. 38544/97, 4 July 2002; *Blum*, cited above, § 37).

Given the above, the proceedings in the applicant's case were fair and were conducted by an impartial court based on the principles of adversarial proceedings and equality of arms.

41. As regards the issue of providing free legal assistance to the applicant in view of the circumstances of the case, the authorities of the Russian Federation consider it necessary to refer to the case of *Gutfreund v. France* (no. 45681/99, admissibility decision of 25 April 2002, judgment of 12 June 2003).

In the said case the Court found that the interests of justice did not require the provision of legal assistance to the applicant bearing in mind that representation was not compulsory under the national law, that the amount of the fine imposed on the applicant was small, and that the relevant proceedings were "simple" in nature and so were accessible to the applicant, even assuming he had limited legal knowledge.

The above approach of the Court is fully applicable to the present case for the following reasons.

The national law, namely the Code of Administrative Offences, does not provide for giving legal assistance to individuals prosecuted in administrative offence proceedings. However, the applicant, in accordance with Article 25.1 of the CAO, could invite a counsel to take part in the proceedings.

The amount of the fine imposed on the applicant was insignificant, including in the light of the Court's case-law.

Administrative offence proceedings may be considered to be "simple" for the same reasons stated in *Gutfreund v. France*: "procedure ... is oral", "legal representation is not compulsory", prosecuted persons are "entitled to appear and to

make the submissions they consider appropriate in their defence at the hearing itself".

In addition, in its admissibility decision in *Mata Jara v. Spain* (4 May 2000, no. 43550/98) the Court, along with the above criteria, noted that "nothing prevented the applicant to contradict or deny the facts alleged against him ... despite the absence of counsel".

In view of the foregoing, representing the interests of the Russian Federation in accordance with the Regulation on the Representative of the Russian Federation at the European Court of Human Rights approved by Decree of the President of the Russian Federation no. 310 of 29 March 1998,

I SUBMIT:

that application of Aleksandr Vladimirovich Zakharkin alleging violation of his rights guaranteed by Articles 5, 6, 10 and 11 of the Convention is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

I ASK:

to dismiss the application of Aleksandr Vladimirovich Zakharkin alleging violation of his rights guaranteed by Articles 5, 6, 10 and 11 of the Convention in accordance with Article 35 § 4 of the Convention.

G.O. Matyushkin
(signature)