The Legal Order of the Russian Federation and the Council of Europe Standards*

Abstract

This article surveys the decisions of the European Court of Human Rights on the merits of cases involving the Russian Federation, as well as decisions on admissibility of cases for which a decision is pending, during the entire period during which Russia has submitted to the Court's jurisdiction. The cases are grouped by the Articles of the European Convention on Human Rights claimed to have been violated: the right to a fair and speedy trial; the right to finality of judgments, freedom from degrading treatment, the right to liberty; and right to respect for private life. An analysis of 12 judgments and over 50 preliminary decisions on admissibility indicates a fundamental misunderstanding by the Russian Federation of its obligation to reform its judicial system and provide for the domestic protection of human rights. The article concludes that the Russian Federation's laissez-faire attitude towards Human Rights reform resulting in its continued failure to provide fair and speedy justice, protect political and property rights, and fairly resolve ethnic and national conflicts, will not be remedied unless Russia actively internalises the decisions of the Court.

1. Introduction

It has been over six years since the Russian Federation has acceded to the jurisdiction of the ECtHR. There have been a dozen decisions on the merits and approximately fifty cases that have been held to raise admissible issues that await decision in which Russia is the defendant. This article will discuss representative judgments and cases awaiting decision. The article concludes with an analysis of the response of the Russian Federation to the obligations it has undertaken by subscribing to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and concludes that the Russian Federation misunderstands its obligations.

2. Judgments of the ECtHR: Flaws in the Legal Order of the Russian Federation

As of 1 October 1 2004, there were 13 judgments of the ECtHR on the merits of cases involving the Russian Federation as a party. Approximately two thirds of these cases concern civil cases, and about one third concern criminal cases, in particular issues of preliminary custody and its procedure.

2.1 The Right to a Fair Trial

A significant proportion of the ECtHR judgments against Russia concern violations of Article 6 of the Convention.

The first judgment against the Russian Federation came in the case of *Burdov v. Russia*.[1] The applicant had been awarded compensation for taking part in emergency operations at the site of the Chernobyl nuclear plant disaster. But the State, referring to lack of money in the budget for such compensations, refused to satisfy the judgment. The applicant successfully alleged that the failure to execute final judgments in his favour was incompatible with Article 6 of the Convention and Article 1 of the Protocol 1 to the Convention. The ECtHR reiterated its position on the execution of national courts' judgments that:

> Execution of a judgment given by any court must be regarded as an integral part of the 'trial' for the purposes of Article 6… It is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6 § 1… In the instant case, the applicant should not have been prevented from benefiting from the success of the litigation, which concerned compensation for damage to his health caused by obligatory participation in an emergency operation, on the ground of alleged financial difficulties experienced by the State.[2]

But the structural problem of executing judgments against State entities continues. The ineffectiveness of the national system of control in executing final court judgments is reflected by other cases such as *Timofeev v. Russia*.[3] In this case the ECtHR also found the violation of Article 6 and Article 1 of Protocol 1 in connection with failure to enforce compensation for damages caused by unlawful confiscation of property. Other cases raising the same issue of execution of national judgments are pending before the ECtHR.[4]

The right to be tried before a court structured in conformity with the law was considered by the ECtHR in the case *Posokhov v. Russia*.[5] The applicant complained under Article 6 § 1 of the

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[1] *Burdov v. Russia* (59498/00), 7 May 2002 (Reports of Judgments and Decisions 2002-III).

[2] *Ibid*, paras. 34-35.

[3] *Timofeev v. Russia* (58263/00), 23 October 2003.

[4] See below.

[5] *Posokhov v. Russia* (63486/00), 4 March 2003 (Reports of Judgments and Decisions 2003-IV).

Convention that the court that had convicted him on 22 May 2000 could not be considered to have been a 'tribunal established by law' because its judges were not qualified under relevant national rules.

The 2000 Federal law on Lay Judges provided for one professional judge and two lay judges to participate in Russian courts for most cases.[6] It provided for a new procedure for selecting lay judges and limited their service either to 14 days a year or for as long as a specific case lasted. Previously, lay judges were appointed by the former Soviet bodies and some of them administered justice in the same courts for more than 15 years. Corruption resulted from the old procedure. Despite the new law coming into force, the new selection system and terms of service of lay judges was not implemented in practice. In some regions legislative bodies failed to adopt new lists of lay judges or failed to send these lists to courts, or courts failed to implement the procedure of selection of new lay judges from these lists. Lay judges previously not appointed in accordance with national law continued to administer justice until 01 January 2003 in civil procedures and 01 January 2004 in criminal procedures. Thereafter the institution of lay judges was finally eliminated. But no voluntary review of decisions taken by improperly constituted courts occurred.

In *Posokhov* the ECtHR found a violation of Article 6 § 1 – the right to a tribunal established by law. It is instructive that the only general 'remedy' that the Russian Federation provided for this situation was the abolition of the use of lay judges, not a review of convictions by improperly constituted courts.[7] The unwillingness of the Russian Federation to admit a violation of the right to a fair trial and the lack of the impact of the Convention at the domestic level in this regard has required the ECtHR to admit a similar case, *Fedotova v. Russia*.[8]

Delay in resolving civil cases was addressed in several cases.[9] The Russian Federation offered several unacceptable justifications for these delays.

The complexity of the case. A case is considered to be complicated if several parties appear as plaintiffs or defendants, if many witnesses must be interrogated, if voluminous materials must be examined, or if several expert examinations must be conducted. But in *Kormacheva v. Russia* the ECtHR rejected the complexity justification, noting that the applicant's action concerned an ordinary

[6] Lay judges were persons authorised to sit in Russian civil and criminal cases as non-professional judges.

[7] Council of Europe, Committee of Ministers, *Resolution* ResDH (2004) 46 concerning the judgment of the ECtHR of 4 March 2003 (final on 4 June 2003) in the case of *Posokhov v. Russia*.

[8] *Fedotova v. Russia* (73225/01), 01 April 2004.

[9] Relatively little time is provided by Russian legislation for consideration of cases. The Civil Procedural Code provides that cases must be decided in 2 months following the date of filing a complaint with the court and cases concerning labor issues – in a month. Because of the backload of the cases in district courts these terms are seldom followed. It is appropriate to note that the terms set in the national legislation do not play a great role for the ECtHR. However, the ECtHR determines the reasonableness of lengthy proceedings in light of the circumstances of the case, not national legislation.

employment dispute.[10] Hence, in case *Plaksin v. Russia* the ECtHR considered that an overall period of more than five and a half years could not be deemed to satisfy the 'reasonable time' requirement.[11] The ECtHR noted in the case *Smirnova v. Russia* that the investigation of the charges the applicants faced – credit fraud and misappropriation of other's property – if carried out diligently, should not have taken years.[12]

The applicant's conduct and actions. Kormacheva also established that delays for which the State is responsible do not excuse the State from ensuring that proceedings are dealt with in a reasonable time.[13] In this case the ECtHR confirmed that 'it is for the Contracting States to organize their legal systems in such a way that their courts can guarantee the right to a final decision in the determination of civil rights and obligations within a reasonable time.'[14]

The conduct of the judicial authorities. In the opinion of the ECtHR, the national courts are responsible for controlling observance of procedural terms by all the parties, and it is for the State to decide how to organize their legal systems to avoid delays by, for example, increasing the number of judges, or by automatic time-limits, etc.[15] In *Kormacheva* the ECtHR did not consider the lack of staff, poor technical condition of its building and geographical remoteness, as objective difficulties.[16]

The effects of delay on the applicant. The issue at stake in the dispute also matters. The ECtHR singled out several categories of disputes, especially where the proceedings are critical to the applicant, for special concern, for example, employment and pension disputes, personal injury cases, persons infected due to blood transfusion, etc. In *Kormacheva* the ECtHR said that the applicant's case concerned the formalization of her dismissal without which she was seriously disadvantaged in finding new employment and the ECtHR found that the delays in the proceedings were especially prejudicial to the applicant.[17]

The legal certainty principle as an integral part of Article 6 of the Convention was considered by the ECtHR in *Ryabyh v. Russia*[18] and *Nikitin v. Russia.*[19] *Ryabyh* is what the ECtHR calls a 'Brumarescu-type case.'[20] *Brumarescu* involved the discretion of the Romanian Prosecutor-General to

[10] *Kormacheva v. Russia* (53084/99), 29 January 2004, para. 52.

[11] *Plaksin v. Russia* (14949/02), 29 April 2004, para. 40.

[12] *Smirnova v. Russia* (46133/99, 48183/99), 24 October 2003, para. 85.

[13] *Kormacheva*, n. 10 above, para. 54.

[14] *Ibid*.

[15] *Ibid*.

[16] *Ibid*, para. 55.

[17] *Ibid*, para. 56.

[18] *Ryabyh v. Russia* (*52854/99*), 03 December 2003.

[19] *Nikitin v. Russia* (50178/99), 20 July 2004.

[20] See *Brumarescu v. Romania* (28342/95), 28 October 1999 (Reports of Judgments and Decisions 1999-VII).

apply at any time for annulment of final and binding court decisions. A similar system in Russia is known as 'supervisory review.'[21] In *Ryabyh* the ECtHR concluded that the exercise of this prerogative, which had taken place several times, was incompatible with the legal certainty principle.[22]

The supervisory review of the judgment can result in restarting an entire judicial process which had already concluded in a final decision that was legally binding. Prior to 2003, supervisory review was usually set in motion by officials who were not parties to the proceedings,[23] and the exercise of the official's power was not subject to any time limit.[24] The use of the procedure led to a violation of the principle of legal certainty and the right to a court hearing.

Violation of Article 6 of the Convention is often alleged along with violation of Article 13. In *Plaksin v. Russia* the ECtHR concluded under Article 13 of the Convention that there was no effective means of legal redress in Russian law to remedy lengthy proceedings.[25] And, in *Kormacheva,* the ECtHR rejected Russia's position that the applicant's numerous complaints to the Qualifications Board of Judges (Disciplinary Board) were an effective remedy for excessive delay.[26]

2.2 Freedom from Inhuman and Degrading Treatment

In *Kalashnikov v. Russia*,[27] the applicant was kept in the Magadan detention facility from 29 June 1995 to 20 October 1999 and from 9 December 1999 to 26 June 2000. The applicant complained about the conditions (under Article 3 of the Convention) and length (under Article 5) of his detention and the length of the criminal proceedings against him (under Article 6). Assessing the conditions of detention, the ECtHR found the detrimental effect on the applicant's health and well-being caused by

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[21] Under Article 389 of the Russian Code of Civil Procedure, Chief Justice and Deputy Chief Justice of the Russian Supreme Court may, at any time, on their own motion lodge with a higher court an 'extraordinary appeal against a final decision on questions of law.'

[22] *Ryabyh*, n. 18 above, para. 57.

[23] In a new Arbitrazh [Commercial] Procedural Code (dated 24 July 2002) and Civil Procedural Code (dated 14 November 2002) parties to the proceedings and persons whose rights and legal interests are violated by judicial decisions, and also officials of the prosecutor's offices, if a case is considered with participation of a prosecutor, have the right to lodge an application for supervisory review.

[24] Under Article 376 of Civil Procedure Code parties to the proceedings and persons whose rights and legal interests are violated by judicial decisions and senior procuratura officers can bring such appeal within 1 year after the final judgment. However, this reform was undermined by the exemption in regard to Chief Justice and Deputy Chief Justice of the Russian Supreme Court (see n. 21 above) and an amendment in July 2004 permitting the extension of the time to seek supervisory review where the one year period was missed 'for valid reasons.' (Federal Law 94-FZ, 28 July, 2004). In the Law there is no explanation as to what those 'valid reasons' are. It is doubtful that this rule meets the "quality of law" requirement of Article 6 § 1.

[25] *Plaksin*, n. 11 above, para. 49.

[26] *Kormacheva*, n. 10 above, para. 62.

[27] *Kalashnikov v. Russia* (47095/99), 15 July 2002 (Reports of Judgments and Decisions 2002-VI).

the severe overcrowding and unsanitary environment, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment in violation of Article 3 of the Convention.

Sadly, it is likely that the ECtHR's findings of a breach of Article 3 in *Kalashnikov* will not result in any improvements in prison conditions, though it should encourage other detainees in Russian prisons to bring similar complaints to Strasbourg.[28] Russia did not even propose that its domestic courts offered a potential source of relief in this situation. It is hardly possible to suggest that in cases similar to *Kalashnikov* there is an effective remedy available, bearing in mind the Government's admissions that 'the conditions of the applicant's detention were no worse than those of most detainees in Russia,' '[o]vercrowding was a problem in pre-trial detention facilities in general' and that, 'because of economic difficulties, the very unsatisfactory conditions in Russian penal institutions were below the requirements of the Council of Europe.'[29] This means that although almost every Russian detainee is entitled to improved conditions and compensation for current conditions, it is unlikely they will find any relief in domestic courts.

2.3 Right to Liberty

Violations of Article 5 § 3 of the Convention were ruled upon by the ECtHR. In *Kalashnikov* the ECtHR noted the applicant's length of detention. Though the ECtHR can only consider violations occurring after Russian ratification of the Convention (5 May 1998), the ECtHR held it may also consider the overall period during which the applicant was detained, including the period prior to then. The ECtHR found that the period spent by the applicant in detention pending trial had exceeded a 'reasonable time' in violation of Article 5 § 3 of the Convention. Considering the characteristics of the investigation and the substantial delays in the court proceedings, the ECtHR stated that the authorities did not act with all due expedition.[30]

In the notorious *Gusinskiy v. Russia*[31] case, the chairman of the Board and majority shareholder of Media Most had the misfortune to get into a dispute with the state controlled natural gas monopoly Gazprom. Rather than resolve the dispute through the normal channels, in 1999 the State directed its General Prosecutors Office to raid the offices of Media Most and criminal proceedings were instituted against Gusinskiy. He was interrogated in 1999, and a second interview was sought in 2000 while Guisinskiy was abroad. He promptly returned to Russia, where he was arrested, jailed, and placed, against putative orders, in a prison notorious for its poor conditions. While Gusinskiy was in prison he

[28] Alastair R. Mowbray, 'European Convention on Human Rights: Developments in Tackling the Workload Crisis and Recent Cases,' (2004) 3:1 *Human Rights Law Review*, 135 at 138.

[29] *Ibid*; *Kalashnikov*, n. 27 above, para. 93.

[30] *Kalashnikov*, n. 27 above, para. 120.

[31] *Gusinskiy v. Russia* (70276/01), 19 May 2004.

was repeatedly interrogated, but was also told by the Minister for Press and Mass Communications, Mr Lesin, that all criminal charges against the applicant arising out of the Russian Video matter would be dropped if the applicant sold Media Most to Gazprom at a price to be unilaterally determined by Gazprom. Guisinskiy finally signed such an agreement, the criminal prosecution was promptly stopped, and all restraints were lifted against Gusinskiy. He immediately left Russia and Media Most repudiated the agreement as having been coerced.

Gusinskiy's attorneys commenced efforts to secure his release as soon as he was arrested. After his release they continued their efforts to secure redress for his jailing, but were rebuffed based on the Russian rule that once a person is released he can no longer complain about his illegal detention. The Government continued efforts to prosecute Gusinskiy, going so far as to get an international arrest warrant issued that resulted in imprisonment in Spain, until a Spanish court ruled in Gusinskiy's favour.

Gusinskiy's efforts in Russia to redress the manner in which the Government had and continued to proceed proved predictably fruitless. His attorneys turned to the ECtHR under Article 5 of the Convention.

In the present case, the applicant was remanded in custody before being charged. The detention of a person before being charged is an exclusion permitted by Article 90 of the Russian Code of Criminal Procedure (the CCrP) in 'exceptional circumstances.' It was agreed by the parties that the CCrP did not define what constituted 'exceptional circumstances.' Therefore the ECtHR ruled that the 'exceptional circumstances' provision did not meet the 'quality of law' requirement of Article 5.[32]

In addition, the ECtHR was of the opinion that the applicant's prosecution was used to intimidate him. For this reason the ECtHR found a violation of Article 18 in conjunction with Article 5 of the Convention since the detention was applied for a purpose other than that provided for in Article 5 § 1 (c).[33]

In this case the ECtHR reviewed the Government's justifications for the arrest and detention of Gusinskiy, demonstrating a healthy cynicism for the claims put forward by Russia, undoubtedly coloured by the transparent abuse of the criminal process to further the economic and political goals of the Government of silencing a media voice of opposition.

Serious violations of orders of detention and the procedure for challenging them resulted in the judgment in *Smirnova v. Russia*.[34] In this case the ECtHR found that the repeated detentions, following

[32] *Ibid*, para. 64.

[33] *Ibid*, paras. 76-78.

[34] *Smirnova*, n. 12 above.

releases, of the applicants in the course of one criminal investigation, all on the basis of insufficiently reasoned decisions to detain, amounted to a violation of Articles 5 § 1 and 5 § 3 of the Convention.[35]

Rakevich v. Russia[36] involved arbitrary and unlawful detention in a psychiatric hospital. In its judgment of 28 October 2003, the ECtHR ruled that the applicant had been detained in violation of the procedure prescribed by Russian law.[37] The ECtHR found a violation of Article 5 § 1 of the Convention in this respect. The ECtHR also held that the lack of a right to independently challenge the lawfulness of the psychiatric detention breaches Article 5 § 4. The Russian Psychiatric Treatment Law does not permit a mental patient to apply to the court himself/herself to test the lawfulness of his/her detention. More than a year has elapsed since the *Rakevich* judgment. However, no changes to the Law have been initiated by the Government in order to honour the judgment.[38]

2.4 Right to Respect for Private Life

It is an everyday event for a Russian citizen to be required to prove his identity and so one must carry his internal passport every day. The law also requires that a person who wishes to find employment, receive free medical care, receive mail, marry, vote, use notary public services, and to do many other things, must be able to produce a passport. Routine delays by public authorities in returning an internal passport seized in connection with an investigation cause citizens to endure many everyday inconveniences. Cumulatively, these amount to an interference with the person's right to respect for his/her private life for which there is neither a legal basis nor redress. In *Smirnova* the ECtHR held there to have been a violation of Article 8 of the Convention due to the cumulative interferences in the applicant's life arising from the failure to return the applicant's passport upon her release from remand custody, despite any basis in domestic law.[39]

3. Cases Awaiting Judgment: What Can Russia Expect From The ECtHR in the Next Few Years?

There are presently over 50 cases pending before the ECtHR for which there is no judgment, but which raise issues that the ECtHR has determined to be admissible.

What do the issues determined to be admissible by the ECtHR tell us about how Russia has treated judgments from the ECtHR and what she can expect from the ECtHR in the near future?

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[35] *Ibid*, para. 71.

[36] *Rakevich v. Russia* (58973/00), 28 October 2003.

[37] The judicial decision ordering her confinement was delivered 39 days after she was detained, instead of 5 days prescribed by law.

[38] Unfortunately, the ECtHR did not address the issue of which party – the state or the detainee – should have the burden of proof. Russian law currently requires the detainee to prove the unlawfulness of his detention.

[39] *Smirnova*, n. 12 above, para. 100.

Unlike Russia's system of 'supervisory review,'[40] the ECtHR can only rule on cases brought before it by a litigant. Furthermore, unlike the procedure of the United States Supreme Court,[41] the ECtHR does not have discretion to decline to rule on issues that are admissible. Nevertheless, the spectrum of admissible issues that have been presented by litigants who have tried (or have been forced) to use the Russian judicial system to protect their human rights reveals a system that does not reform itself in response to judgments of the ECtHR. Russia is a country where human rights are still more likely than not to be disregarded in practice.

The two most 'popular' issues accepted for admissibility by the ECtHR in cases brought against Russia still involve the failure of the judicial system to provide fair and speedy justice. These issues arise, on the civil side, out of abuses by the judicial authorities of the system of supervisory review[42] and, on the criminal side, out of long delays often involving excessive pre-trial detention, that deny fair and speedy trials.[43] It is noteworthy that far fewer cases have been presented to the ECtHR involving admissible substantive issues of human rights such as freedom of expression, petition, association, movement, religion, life, and so forth, than involve the operation of the judicial system. Is this because these basic rights are respected in most cases, or because the judicial system effectively discourages the presentation of these rights for decision?

3.1 The Denial of Human Rights through Abusive Appeal Procedures

The procedural histories recited in the cases from Russia reported by the ECtHR reveals tortuously drawn out litigation, frequently concluding after great effort, with a final judgment for the litigant, for example, a pensioner,[44] the victim of socialist property confiscation,[45] an injured worker.[46] The successful litigant attempts to enforce the judgment, again being forced to battle with the bailiff system, and finally, when success is within view, a senior court official orders supervisory review, resulting in an 'extraordinary appeal' which inevitably (in the cases presented to the ECtHR for review) results either in a return to the court of original instance or an outright reversal.[47] Without the

[40] See n. 21, 23, 24 above.

[41] Most cases involving issues of human rights get to the United States Supreme Court by a form of discretionary review, via a Writ of Certiorari. In practice only a very small percentage of litigants seeking review before the Supreme Court are granted such a Writ.

[42] The use of supervisory review, usually challenged under Articles 6 and 13 in conjunction with Article 1 of Protocol 1 under a variety of headings such as lack of finality of judgment, unfair delay, failure to respect property, and lack of effective remedy, often presents an appearance of impropriety, perhaps corruption.

[43] Challenges to criminal procedure usually come under Articles 3, 5 and 6.

[44] *Pravednaya v. Russia* (69529/01), 25 September 2003.

[45] *Yemanakova v. Russia* (60408/00), 06 November 2003.

[46] *Smarygin v. Russia*, (73203/01) 02 September 2004.

[47] Though it has not been argued in any of the cases presented to the ECtHR, this sort of treatment of litigants should be challenged under Article 3 as cruel and unusual punishment. And see *Nikitin*, n. 19 above, a rare case won on the merits by

availability of a fair hearing and timely judgments resulting in reliable finality, no rights can be said to be secure.

As in *Ryabyh v. Russia*,[48] challenges to abuses of the civil appeal procedure are usually heard under Article 6 and Article 1 of Protocol 1. For example, in *Konovalov v Russia*[49] a former military man sought free housing to which he was entitled under law. His odyssey through the courts started in 1996. After refusal by the authorities he sued and, in 1996, won a judgment directing the authorities to provide housing. No appeal was taken and Konovalov started enforcement proceedings. Enforcement having proven fruitless, Konovalov started a new proceeding in 1998 and won a Pyrrhic victory – payment for a new housing unit, but only if the federal authorities allocated money for such servicemen's benefits. No appeal was taken from this judgment, nor was enforcement forthcoming. In 2000, following supervisory review, the judgment was quashed and remanded for a new trial. Later that year, Konovalov was induced to drop his case on the promise by the head of the town authority that he would be given a certificate for free housing. The application to discontinue the case was promptly granted, but the promise proved false. Konovalov may have been fooled by the town authorities, but he was wise enough to have started a third action against the Federal Government in 1999. Here too he was initially successful, winning a judgment for money to purchase a flat. Here too no appeal was taken and the judgment became final. However, at some unknown date the President of the Regional Court requested supervisory review. This judgment was also quashed and sent back for a new hearing. It was then dismissed on the grounds that Konavalov was seeking the same remedy he had sought in his previously unsuccessful efforts.

Russia argued that the judgment had been quashed and that Konavalov had not exhausted his remedies. However the ECtHR was not interested in such technicalities. It noted:

> However, [the quashing of the judgment] does not change the fact that the applicant could not obtain the enforcement of the judgment for two and a half years preceding the quashing. The ECtHR recalls that the right to a court as guaranteed by Article 6 also protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party.[50]

Furthermore, regarding the withdrawal induced by the false promise, the ECtHR stated:

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the Russia Federation where supervisory review was used (unsuccessfully) by the prosecution to seek review of a final judgment of acquittal, subjecting the defendant to the threat of being tried again even after a final verdict of acquittal. However the ECtHR ruled that this use of supervisory review did not constitute a threat of double jeopardy (see *Nikitin*, n. 19 above, para. 61).

[48] *Ryabih,* n. 18 above.

[49] *Konovalov v. Russia* (63501/00), 27 May 2004.

[50] *Ibid,* the Law para. 1.

> Based on the same considerations, the ECtHR finds irrelevant to the complaint in question and rejects the Government's submission concerning the applicant's failure to appeal against the decision… which accepted the applicant's withdrawal of his claim in the course of the new examination of the case subsequent to the quashing of the judgment on supervisory review.[51]

Applying the usual formula, the ECHR held:

> The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill founded within the meaning of Article 35 § 3 of the Convention.[52]

In *Pravednaya v Russia*[53] a pensioner had successfully challenged a determination by the Pension Agency as not providing a large enough pension. After the Pension Agency lost its final appeal the pensioner started enforcement proceedings. Almost six months after the successful pensioner started her efforts to enforce the final judgment, and over 8 months after the judgment itself had become final, the Pension Agency applied to re-open the judgment on the grounds that the courts had misapplied the law. Although the time for appeal was long past, the court reopened and, more than a year after final judgment, the pensioner's case was dismissed. Here too the ECtHR concluded that the complaint was not manifestly ill founded within the meaning of Article 35 § 3 of the Convention.

3.2 Abuses of Criminal Procedure

Complains against Russia arising from criminal proceedings raising issues held by the ECtHR to be admissible involve claims of excessive pre-trial detention, inability to challenge pre-trial detention, and disregard of procedural safeguards.[54] For example, in *Klyakhin v Russia*, the applicant was arrested on suspicion of robbery in August 1997 and was held in custody for three and a half years until February 2001, when his second conviction (the first having been quashed) resulted in a sentence for time served.[55] The ECtHR found not to be manifestly ill-founded Klyakhin's complaints that he was denied the right to be tried within a reasonable period of time or be released in violation of Article 5 § 3 of the Convention, that he had been denied the right to obtain review of his detention (Article 5 § 4),

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[51] *Ibid*.

[52] *Ibid*, the Law para. 4 (a).

[53] *Pravednaya,* n. 44.

[54] *Mayzit v. Russia* (63378/00), 29 April 2003; *Klyakhin v. Russia* (46082/99), 14 October 2003; *Panchenko v. Russia* (45100/98), 16 March 2004; *Romanov v. Russia* (63993/00), 01 April 2004; *Bordovskiy v. Russia* (49491/99), 11 May 2004; *Rokhlina v. Russia* (54071/00), 09 September 2004.

[55] *Klyakhin v. Russia* (46082/99), 14 October 2003.

and that the criminal charges against him were not determined within a reasonable time (Article 6 § 1 and Article 13 of the Convention).

Other cases involving the criminal system seek review of allegations of violation of the Convention arising from conditions of detention,[56] the failure to investigate a prison suicide,[57] and less serious abuses by the state of its power to deprive its citizens of liberty.[58]

3.3 Abuses of Substantive Rights

3.3.1 Political Rights:

The rights of political parties and political speech under the Convention are the subject of five cases.[59] The disturbing use of defamation actions by politicians and government officials to silence political criticism is challenged in *Dyuldin and Kislov v. Russia*,[60] and *Filatenko v. Russia*.[61]

In *Dyuldin* a trade union leader and a journalist, members of a local group called 'Civic Unity' that adopted a position paper addressed to 'the President of the Russian Federation, the Security Council of the Russian Federation, the Journalists' Union of Russia, the plenipotentiary representative of the President for the Volga Federal District Mr Kiriyenko, [and] the Minister for Press and Information of the Russian Federation Mr Lessin.' This petition was published in a local paper with a further statement that, among other allegations:

> The Penza Region is gradually transforming into a private holding controlled by the Governor V. Bochkaryov and his close circle... we openly disagree with the selfish and destructive policy of the governor and his team, we publish materials denouncing bribe-takers and officials who abuse their position... Now again, as in early 1991 when the [Communist] Party's nomenclature feared their imminent dismissal, the regional power started reprisals against the independent media.

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[56] *Novoselov v. Russia* (66460/01), 08 July 2004; *Mayzit v. Russia* (63378/00) 29 April 2003; *Romanov v. Russia* (63993/00), 01 April 2004.

[57] *Trubnikov v. Russia* (49790/99), 14 October 2003.

[58] *Menesheva v. Russia* (59261/00), 15 January 2004.

[59] *Dyuldin and Kislov v. Russia* (25968/02), 13 May 2004; *Filatenko v. Russia* (73219/01), 03 June 2004; *Vatan (People's Democratic Party) v. Russia* (47978/99), 04 September 2003); *Presidents Party of Mordova v Russia* (65659/01), 9 September 2003; *Russian Conservative Party of Entrepreneurs, Zhukov and Vasilyev v. Russia* (55066/00, 55638/00), 18 March 2004; See also *Labzov v. Russia* (62208/00), 08 January 2004 involving an individual's right of petition and expression, and *Moscow Branch of the Salvation Army v. Russia* (72881/01), 24 June 2004 involving efforts to suppress the activities of the Salvation Army.

[60] *Dyuldin and Kislov v. Russia* (25968/02), 13 May 2004.

[61] *Filatenko v. Russia* (73219/01), 03 June 2004.

> Journalists are subjected to threats and beating, our publications are banned from printing and dissemination in the region...[62]

Twenty-six members of the Penza Regional Government started a defamation action.[63] After a trial, the court held that the statements in the address were not true and that they damaged the honour and dignity of the plaintiffs, the members of the Government of the Penza Region. Damages were awarded. An appeal, as well as several requests for supervisory review, were of no avail, even though the Russian Constitution guarantees freedom of ideas and expression, freedom of the mass media (the newspaper was also held liable), and freedom of petition.[64]

The ECtHR considered the complaint under Article 10 of the Convention. The ECtHR noted that there did not appear to be any special consideration in Russian law for political statements by individuals or the media, and that the burden of proof was such that a plaintiff need merely prove publication and the defendant must then prove the truthfulness of the statement.[65] The ECHR found that the applicants' complaint under Article 10 was not manifestly ill founded.

Where defamation actions are not available, perhaps because the defamation laws have achieved their goal of silencing pointed criticism, the state can always resort to re-registration requirements to harass pesky opposition parties. The abuse of this device is challenged in *Presidents Party of Mordovia*.[66] The Party had been properly registered prior to a new enactment in 1995 requiring re-registration. Its efforts to re-register were rebuffed for failure to receive formulistic words in the application. When these omissions were corrected, the Party was informed it had missed the deadline to re-register and a liquidation proceeding was commenced by the Ministry of Justice of Mordovia. Consider the surprise of the Ministry when the local court concluded that the applicant's request for re-registration complied with the relevant law, that the refusal to allow re-registration was unlawful, and that the Republic of Mordovia was ordered to renew the applicant's registration. Though this judgment was reversed, it was restored following supervisory review. But the Ministry was not to be thwarted. It refused to comply with the judgment, stating that the law had changed in the interim. This refusal was upheld by the courts. The ECtHR considered the applicant's complaint under Article 11 of the Convention.

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[62] *Dyuldin*, n. 60 above, the facts para. 1a.

[63] One government official who was a plaintiff subsequently withdrew, stating that the lawsuit was 'an attempt to put the media under control.' He was promptly dismissed from office.

[64] Article 29 of the Russian Constitution guarantees freedom of ideas and expression, as well as freedom of mass media. Article 33 of the Russian Constitution provides that Russian citizens shall have the right to petition in person, as well as to submit individual and collective appeals to State authorities and local self-government bodies.

[65] Resolution No. 11 of the Plenary Supreme Court of the Russian Federation of 18 August 1992 (as amended on 25 April 1995).

[66] *Presidents Party of Mordova v Russia* (65659/01), 9 September 2003.

After the commencement of this complaint and after the ECtHR had requested a response from Russia, the refusal to re-register was annulled and registration was ordered. Russia accordingly asked the ECtHR to discontinue the case. But the ECtHR refused, referring to its rule that:

> A decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention… Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application.[67]

The ECtHR concluded that the complaint was not manifestly ill founded, especially in light of the circumstances:

> Even if the ruling of the Supreme Court of the Republic of Mordovia could be said to be an acknowledgement, in substance, that the applicant's freedom of association was unjustifiably restricted, the Court considers that it did not provide adequate redress, as required by the Court's case law. Even assuming that a three-year ban can in principle be remedied by an act of registration, this did not occur in the present case. The Court notes that the conditions which formerly permitted the applicant to have itself registered as a political party ceased to exist in the meantime under new legislation and the present day permission to register is therefore a priori devoid of any practical consequences.[68]

The effort to silence criticism took other forms in *Vatan (People's Democratic Party) v. Russia*[69] and *Russian Conservative Party of Entrepreneurs, Zhukov and Vasilyev v. Russia.*[70]

Freedom of petition, expression, and conscience are also the subject of *Labzov v. Russia*[71] and *Moscow Branch of the Salvation Army v Russia*[72]. In the *Salvation Army* case, the religious organization was treated by the government much as the predecessor Soviet government treated it when its Russian branch was dissolved as an 'anti-Soviet organization.' The Moscow Branch's efforts to re-register, as required by the 1997 Law on Freedom of Conscience and Religious Associations were repeatedly rebuffed for numerous and ever-changing reasons (for example, insufficient number of

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[67] *Ibid*, the Law.

[68] *Ibid*, the Law.

[69] *Vatan (People's Democratic Party) v. Russia* (47978/99), 04 September 2003.

[70] *Russian Conservative Party of Entrepreneurs, Zhukov and Vasilyev v. Russia* (55066/00, 55638/00), 18 March 2004.

[71] *Labzov v. Russia* (62208/00), 08 January 2004.

[72] *Moscow Branch of the Salvation Army v. Russia* (72881/01), 24 June 2004.

members at the meeting adopting amendments to founding documents, failure to submit copies of visas of foreign members, Moscow Branch was agent of foreign religious organization, use of the term 'Army' in its name, the Branch's Charter requires its members to break Russian law, insufficient disclosure of purposes and objectives). Although efforts by the government to liquidate the branch ultimately failed when the case reached the Constitutional Court, the prohibition against re-registration remained in effect causing financial injury and interfering with the Branch's efforts to deliver meals to the homebound elderly. It also made it impossible for foreign workers to reside in Moscow. The Moscow Branch's complaints under Articles 9, 11, and 14 of the Convention were found to be admissible.

3.3.2 Other Substantive Rights

Rights of Privacy and the Family under the Convention are the subject of five cases pending in the ECtHR.[73] Two of the cases, *Fadeyeva v. Russia* and *Shofman v Russia* involve reliance by the state on legal fictions for a solution to real problems – the placing of a family on a waiting list for housing as the equivalent of providing new housing and the presumption of paternity. In *Fadeyeva,* the applicant attempted to enforce his rights to be given new housing when his present dwelling became part of a zone contaminated by industrial pollution (a so-called 'sanitary security zone'). There was no question as to whether the applicant lived in such a zone, but the remedy offered him was to be put on an interminable 'general waiting list' for resettlement. This was held to satisfy the legal requirement of placement in housing in a safe area. The applicant's claim of violation of Article 2, 3 and 8 of Convention (that her life and health were endangered) was rejected, as were her claim of a denial of fair hearing (Article 6). But the absurdity of the remedy actually offered the applicant led the ECtHR to determine that a claim under Article 8 involving the applicant's rights to respect for privacy, family life, and home was not manifestly ill founded.

The violation of privacy will also be reviewed in a case involving the State's incitement to violation of law (entrapment).[74]

3.3.3 Ethnic and National Conflicts

Russia's behavior in Chechnya is under scrutiny by the ECtHR in three cases[75] and plays a role in a fourth.[76] The conflict in Chechnya involves unimaginable brutality on both sides, with urban and guerilla fighting leading, perhaps inevitably, to atrocities. In *Khashiyev and Akayeva v. Russia,*

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[73] *Fadeyeva v. Russia* (55723/00), 16 October 2003; *Prokopovich v. Russia* (58255/00), 8 January 2004; *Znamenskaya v. Russia* (77785/01), 25 March 2004; *Shofman v Russia* (74826/01), 25 March 2004; *Vanyan v Russia* (53203/99), 13 May 2004.

[74] *Vanyan v Russia* (53203/99), 13 May 2004.

[75] *Khashiyev and Akayeva v. Russia* (57942/00, 57945/00), 19 December 2002, *Isayeva, Yusupova and Bazayeva v. Russia* (57947/00, 57948/00, 57949/00), 19 December 2002; *Timishev v. Russia* (55762/00, 55974/00), 30 March 2004.

[76] *Gartukayev v. Russia* (71933/01), 30 March 2004.

Isayeva, Yusupova and Bazayeva v. Russia, and *Timishev v. Russia*, the matters might more appropriately be before a court prosecuting war crimes. *Gartukayev v. Russia* involves mistreatment of nationals connected with this dispute.

4. Russia's Misunderstanding: the Obligation to Reform Its Judicial System and to Protect Human Rights at Home

On 28 February 1996, the Russian Federation was permitted to accede to the Statute of the Council of Europe without meeting all the requirements for member States. Following 'an extensive debate within the Council of Europe about the suitability of the applicant for membership'[77] Russia was accepted despite an unfavourable ad hoc *Eminent Lawyers Report*, which 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.'[78] The same evaluation of the Russian legal system was given by the Director of the Legal Department of the Russian Ministry for Foreign Affairs A. Khodakov, who wrote that 'at the present moment Russian legislation, with the exception of the Constitution of the Russian Federation, and law enforcement practice do not comply in full extent with the Council of Europe standards.'[79]

It has been emphasised that such a political assessment is troubling for the future of compliance with Strasburg law because, *inter alia*, 'given Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that a great many violations of European human rights law will be committed there, and that they will not be remedied domestically.'[80]

Under Article 1 of the Convention, 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.' But, in Russia, this obligation is generally understood merely as the Russian Government's recognition of the authority of the ECtHR to adjudicate petitions alleging violations of the Convention's provisions occurring under Russian jurisdiction and not as any domestic undertaking by the government. In other words, it creates a right of citizens 'to write to Strasbourg,' to complain to

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[77] Mark Janis, '*Russia and the "Legality" of Strasbourg Law'* (1997) 1 European Journal of International Law 93 at 93.

[78] Council of Europe, Parliamentary Assembly, *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards Prepared by Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel, and Felix Ermacora*, 7 October 1994 (1994) 15:7 *Human Rights Law Journal* at 287; initially cited from Janis, n. 77 above 93 at 93.

[79] *Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation* dated 30 January 1996 in G. Vinokurova, A. Rihter, V. Chernishova (eds), *European Court for Human Rights and the Protection of the Freedom of Speech in Russia: Precedents, Analysis, Recommendations* Vol. 2 (Moscow: Institute of the Problems of the Informational Law, 2004); also available at http://www.medialaw.ru/article10/7/2.htm)

[80] Janis, n. 77 above at 98.

an international body, as a 'panacea' for all their human rights violations.[81] However, the main idea of international human right law is 'to bring human rights at home.'[82] As far as the Convention is concerned the core of this idea is depicted in its Article 1.

Article 1 does not merely oblige High Contracting Parties to respect human rights and fundamental freedoms, but also requires them to protect and to remedy any breach at subordinate levels.[83] The Russian Federation must adhere to the principle which prescribes that those rights shall be secured effectively, not theoretically.[84]

Unfortunately, no miracle has occurred during the eight years the Russian Federation has been in the Council of Europe. The legal order of the Russian Federation has not met the standards of the Council of Europe. To date, the impact of the Convention on the Russian legal system in terms of its implementation by domestic courts is very unsatisfactory. There is a manifest and visible imbalance between the Convention and Russian jurisprudence.

In Russian law there are Constitutional provisions stipulating that the Convention (as well as any other ratified international treaty) is part of the law of the land. The provisions of subsidiary legislation for international law implementation, as well as general rules adopted by the Constitutional and the Supreme Court, develop these principles. But the jurisprudence of the Constitutional Court, the Supreme Court, and the Supreme Commercial Court only creates the illusion that the Convention is being applied, rather than actually applying the Convention. It is otherwise in the courts of original instance, which evidence a somewhat better understanding of the spirit and purpose of the Convention on those rare occasions when the Convention is implemented due to applicants' arguments based on the ECtHR case-law, but rarely on the courts' own initiative. The quality of Convention implementation directly depends on the initiative of the parties.[85] This situation inevitably leads to a huge number of

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[81] A. Demeneva, 'ECHR: Panacea for All the Disasters?' in A. Burkov (ed). *The Most Effective Legal Methods of Legal Protection of Human Rights* (Yekaterinburg: Urals University Press, 2003) at 36. Also available at http://www.sutyajnik.ru/rus/library/sborniki/sud_zaschita.pdf (last accessed on 10 August 2004).

[82] K. Boyle, 'National Implementation of International Human Rights Commitments' in *Lectures for LW901–General Seminar 2003-2004, LLM in International Human Rights Law, the University of Essex*.

[83] *Ireland v. UK* (5310/71), 18 January 1978 (2 E.H.R.R. No. 25), para. 239.

[84] *Airey v. Ireland* (6289/73), 9 October 1979 (Series A no. 32), pp. 12-13, para 24.

[85] For more details on the domestic implementation of the ECtHR in Russian law please refer to A. Burkov, *The Impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms on Russian Law* the LLM in International Human Rights Law dissertation for the year 2003-2004 at the University of Essex. In the course of the dissertation research the web-site *Learning How to Apply the European Convention in Domestic Courts* was created (available at www.sutyajnik.ru/rus/echr/school). It provides those who wish to apply the Convention in national forums with (1) all national legislation on the issue, (2) international documents, (3) translated ECtHR case-law (major cases), (4) all judgments against Russia supplemented with lawyers' comments, (5) judgments of Russian courts of different levels and jurisdictions that have invoked the Convention, (6) relevant books and law journal articles on the issue, and (7) online-

applications from Russia to the ECtHR. As has been demonstrated above, the ECtHR has already identified a number of problems with the legal order in the Russian Federation by adjudicating cases on the merits and admitting application to be heard on the merits.

5. Conclusion

We can see that decisions from the ECtHR that involve claims against Russia over the next few years will cover some ground already covered in the past as well as a broad spectrum of public life involving intimate examinations of the manners and methods of the Russian state. Based on the treatment by the ECtHR of the various justifications offered by the Russian government in opposition to applicants' claims, it is safe to predict that the ECtHR will not accept formalities or legal fictions if they infringe human rights. Nor will it shirk from repeated chastisement of Russia's obstinate failure to reform its courts and political system to bring them into conformity with the Convention. Thus the Russian government may continue to expect disturbing criticism from the ECtHR to continue until it takes the Convention seriously at home.

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