# IMPLEMENTATION OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN RUSSIAN COURTS

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On 28 February 1996 the Russian Federation was allowed to accede to the Statute of the Council of Europe without meeting all of the requirements for member States. The accession followed "an extensive debate within the Council of Europe about the suitability of the applicant for membership".[1] Russia's acceptance occurred despite an unfavorable 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".[2] 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, in The 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. It was stated that "[a]t the present moment Russian legislation, with the exception of the Constitution of the Russian Federation, and law enforcement practice, do not comply to the full extent with Council of Europe standards".[3]

In the ad hoc report it was emphasized that such a political accession is troubling for the future of compliance with Strasbourg law because, inter alia, "given

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[1] M. Janis, "Russia and the 'Legality' of Strasbourg Law", *European Journal of International Law*, I (1997), p. 93. In the course of this research the web-site *We Study the European Convention* ("Изучаем Европейскую конвенцию") was created. Available at www.sutyajnik.ru/rus/echr/school It provides those who wish to apply the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian courts with (1) all national legislation on the issue, (2) translated international documents, (3) translated European Court of Human Rights case-law (major cases), (4) translations of selected judgments against the Russian Federation, (5) judgments of Russian courts of different levels and jurisdictions that have invoked the Convention for the Protection of Human Rights and Fundamental Freedoms, (6) relevant books and law journal articles on the issue, and (7) online audio and video lectures. The author is grateful to the Urals Center for Constitutional and International Protection of Human Rights (Ekaterinburg, Russia) for providing all the informational and technical support in developing the online project.

[2] 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", *Human Rights Law Journal*, XV, no. 7 (1994), p. 287.

[3] *Европейский суд по правам человека и защита свободы слова в России: прецеденты, анализ, рекомендации* [European Court for Human Rights and Defense of Freedom of Speech in Russia: Precedents, Analysis, Recommendations]. Ed. G. V. Vinokurov, A. G. Rikhter, V. V. Chernyshov (2004). (Series: Журналистика и право; Вып. 43). Accessible on: http://www.medialaw.ru/article10/7/2.htm

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".[4]

Under Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: 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". In Russia this obligation appears to be generally understood as the Russian Government's recognition of the authority of the European Court of Human Rights (hereinafter: ECHR) to adjudicate petitions alleging violations of the Convention provisions occurring under Russian jurisdiction. In other words, ratification of the Convention is perceived by Russian citizens as the right "to write to Strasbourg", as the right to complain to an international body, as a "panacea" for all human rights violations.[5] However, the main idea of international human rights law is "to bring human rights at home".[6] As far as the Convention is concerned, the core of this idea is set out in Article 1 of the Convention.

## Quality of Convention Implementation by Russian Courts

To date the impact of the Convention on the Russian legal system as measured by implementation in domestic courts is unsatisfactory. There is a manifest imbalance between normative provisions and judicial practice.

A constitutional provision (Article 15[4]) stipulates that the Convention and any other ratified international treaty is part of the law of the land; the provisions of subsidiary legislation relating to international law implementation, as well as general rules adopted by decrees of the Constitutional Court and the Supreme Court, develop monistic principles.[7]

The jurisprudence of the Supreme Court and the Supreme Arbitrazh Court to a great extent (unlike the jurisprudence of the Constitutional Court) resembles an attempt to demonstrate to the Council of Europe that the Convention is being formally applied rather than actually implemented. Otherwise, how can one characterize the situation when the highest court of a country, having issued special documents (decrees) that direct all inferior courts to apply the Convention by taking into account ECHR case-law, does not follow these documents itself in its jurisprudence?

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[4] Janis, note 1 above, p. 98.

[5] A.V. Demeneva, in *Судебная защита прав граждан в ее наиболее эффективных формах: Материалы научно-практической конференции* [Judicial Defense of the Rights of Citizens in the Most Effective Forms Thereof: Materials of Scientific-Practical Conference]. Ed. A. L. Burkov (2003), p. 36. Accessible on: www.sutyajnik.ru/rus/library/sborniki/sud_zaschita.pdf

[6] Materials presented by Professor K. Boyle in his classes on International Human Rights Law (University of Essex, LLM program, 2003-04).

[7] Decrees adopted by the Plenum of the Supreme Court and the Plenum of the Supreme Arbitrazh Court of the Russian Federation. Decrees are explanations of judicial practice based on a survey and generalization of the judicial practice of lower courts and supreme court. They are abstract opinions, officially published and legally binding on all lower courts, which summarize judicial practice of lower courts and explain the way a particular provision of law shall be applied.

The Supreme Court simply makes reference to the Convention. This policy did not change even after the promulgation of several decrees concerning the domestic implementation of international human rights law. In these documents the Supreme Court explained, inter alia, that when applying the Convention judges shall interpret the treaty by taking into account any subsequent practice in the application of the Convention by the ECHR.

There was the jurisprudence of the Russian Supreme Court for the period from 5 May 1998[8] to 1 August 2004. The total number of decisions of the Supreme Court under scrutiny was 3911. Of the twelve which mentioned the Convention, only eight contained the Supreme Court's "assessment" of compliance with the Convention. In the other four cases the court briefly quoted the arguments of an applicant based on the Convention but did not evaluate those arguments.

The character of the Convention implementation is even more disastrous with respect to the impact of the Convention on the Russian legal system after more then eight years of Russia being a party to the Statute of the Council of Europe. The eight decisions contain not a single reference to the case-law of the ECHR. The manner in which the Convention is being implemented is brief and imprecise. Usually only the number of an article is cited. In the best instances, the Supreme Court merely reproduces verbatim the content of an article. The worst example is when it simply states that a particular governmental act is not contrary to the Convention as a whole.[9]

As far as the practice of the arbitrazh courts is concerned, the situation resembles that of the jurisprudence of the Supreme Court of Russia. The overall number of decisions under scrutiny was 38,068, including the jurisprudence of the Supreme Arbitrazh Court, the Moscow City Arbitrazh Court, the Arbitrazh Court of Moscow Region, the Moscow Federal District Arbitrazh Court (a court of cassation), the North-West Federal District Arbitrazh Court (a court of cassation). Of the total number of decisions, only twenty-three mentioned the Convention, of which only eight contained a specific reference to an article of the Convention. In the other fifteen cases the courts briefly cited the arguments of a party based on the Convention but did not evaluate those arguments. The eight decisions do not contain a single reference to the case-law of the ECHR. Usually only the number of an article is cited. In the best instances, the courts merely repeat verbatim the provi-

[8] The ratification date of the Convention by the Russian Federation.

[9] See, for example, the Decision of the Supreme Court of the Russian Federation, 5 March 2003, in the Case upon the Application of F. K. Gabidullina, G. F. Iunusova, F. M. Kabirova, G. Sh. Muratova, G. G. Gamirova, R. G. Latypova, M. Z. Kamalova, G. G. Shafigullina, G. A. Khaiuullina, and G. M. Khairullina on Contesting point 14.3 of the Instruction on the Procedure for the Issuance, Replacement, Recording, and Keeping of Passports of a Citizen of the Russian Federation, confirmed by Order of the Ministry of Internal Affairs of Russia, 15 September 1997, No. 605, in the part of the words "without headwear" (in the part excluding the right of citizens whose religious convictions do not allow them to show themselves to strangers without headwear to submit personal photographs in order to receive a passport of a citizen of the Russian Federation depicting the person strictly full face). Case No. ГКПИ 03-76. The document is not officially published. Accessible on website: www.sutyajnik.ru/rus/echr/rus_judgments/sup_court/5_03_2003_platki.html The decision was vacated by ruling of the cassational instance on 15 May 2003.

sions of an article. The worst example is when a court states that a particular act is not contrary to the Convention as a whole.

It would be reasonable to conclude that on the whole both the Supreme Court and Supreme Arbitrazh Court judicial practice does not invoke the Convention at all.[10]

Moreover, the implementation of the Convention on its own without reference to ECHR case-law leads to the incorrect application of the instrument. For example, in the case of Trade Union of Militiamen of Moscow v. Ministry of Internal Affairs, the Supreme Court stated that the "reassignment of internal affairs officers without their consent to a different place of service [permitted by the Order of the Ministry of Internal Affairs] came within the definition of forced labor contained in Article 4 (2) of the Convention".[11] However, it would have been sufficient to refer to the Convention, let alone ECHR case-law, to learn that the Convention does not contain any such definition. In another case (Kolotkov v. Government of the Russian Federation),[12] the Supreme Court applied Article 14 of the Convention as though it were a free-standing article.

Thus, besides the fact that it applies the Convention on rare occasions and without addressing the case-law, the Supreme Court has been known to apply the Convention when there is no justification for the Convention to be engaged and refuses to implement the Convention where there is justification.

The judicial practice which has emerged from the decisions of district courts seems to indicate a better understanding of the spirit and purpose of the Convention. This achievement cannot be ascribed to the Supreme Court or Supreme Arbitrazh Court judicial practice or their decrees. There is evidence that those rare occasions of Convention implementation by the district courts were prompted by the applicants' arguments based on the ECHR case-law rather than the courts' own initiative.

## Methods of Applying ECHR Case-Law in Russian Courts

We turn to the practice of two Russian non-governmental organizations (NGOs) – the Glasnost Defense Foundation (Фонд защиты гласности: here-

[10] For more details on the situation with domestic implementation of the Convention see: A. L. Burkov (ed.), Применение Европейской конвенции по правам человека в судах России [Application of the European Convention for Human Rights in the Courts of Russia] (2006). Accessible on: www.sutyajnik.ru/rus/library/sborniki/echr6

[11] Decision of the Supreme Court of the Russian Federation, 16 November 2000, in the Case Regarding the Appeal of the Trade Union of Personnel of the Militia of the City of Moscow on Deeming Partially Invalid (or Illegal) the "Instruction on the Procedure for the Application of the Statute on Service in Internal Affairs Agencies of the Russian Federation", confirmed by Order of the Ministry of Internal Affairs of the Russian Federation of 14 December 1999, No. 1038. Case No. ГКПИ 00-1195. The document was not officially published. Accessible on: www.sutyajnik.ru/rus/echr/rus_judgments/sup_court/16_11_2000_art_4.html

[12] Decision of the Supreme Court of the Russian Federation, 13 March 2003, in the Case Regarding the Application of M. A. Kolotkov on Deeming Invalid Certain Normative Acts of the Government of the Russian Federation, Case No. ГКПИ 03-97. The document was not officially published. Accessible on: www.sutyajnik.ru/rus/echr/rus_judgments/sup_court/13_03_2003_art14.html

inafter the Foundation)[13] and the Urals Center for Constitutional and International Protection of Human Rights of the NGO Sutiazhnik (Уральский центр конституционной и международной защиты прав человека общественного объединения «Сутяжник»: hereinafter the Center).[14] The judicial practice accessed through these NGOs is of interest because it enables one to witness the interdependence between the persistent applicants' arguments based on ECHR case-law before courts and the quality of Convention implementation by courts, as well as the development of Convention implementation.

The Foundation has organized a strategic litigation campaign with the aim to deploy Article 10 of the Convention (Rights to Freedom of Expression) in all defamation cases where its lawyers were involved. It was noted that in legal proceedings where only the Convention was cited there has been no resolution of a case based on international law principles. The Foundation lawyers changed from the simple citation of the Convention in their submissions to courts in favor of submitting comprehensive memorandums as to the direct relevance of the Convention and case-law in every case. The purpose of the memorandums was to convince the courts that the Convention has the status of a federal law and that attempts to implement the Convention without taking into account ECHR case-law would be pointless.

A distinctive feature of the district court judgments obtained by the Foundation is that these courts indeed have been citing precedents of the ECHR. The references to case-law have been prompted by the comprehensive memorandums submitted by the applicants' lawyers. We noted a positive shift in district court judicial practice towards implementation of ECHR case-law. Vladislav Bykov spoke of the positive changes:

Today the situation is different. There is no point in submitting a memorandum [on the domestic status of the Convention] anymore. Judges themselves deliver lectures and are familiar with the Convention. For this reason I cite the right guaranteed in the Convention and the relevant case-law [without paying attention to the domestic status of the Convention]. However, if there is a 'willingness' [to rule against the defendant] the judges simply do not take notice of the case-law deliberately and implement those exceptions contained in Article 10(2) of the Convention. The fact that the true meaning of those exceptions may be obtained only from the case-law and that one must not apply the Convention without taking into account ECHR case-law is not confusing to judges, who keep applying the Convention on its own.[15]

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[13] The Foundation provides legal support and advocacy to mass media in Russia. Founded in Moscow in 1991, the Foundation has established and supported ten regional legal defence centers around Russia. There is also a monitoring network in all CIS republics. Staffed by lawyers and other professionals, the centers conduct day-to-day monitoring of media rights abuses in Russia and the CIS. The Foundation's web-site: http://www.gdf.ru

[14] The Center was founded in 2000 as a joint project of the Russian NGO Sutiazhnik (Ekaterinburg) and Interrights (London). Since then, besides engaging in the litigation, the Center lawyers have published a number of papers in different law journals, and four books on Convention implementation. In 2004 it had a successful case before the ECHR, *Rakevich v. Russia* [28 October 2003] No. 58973/00. The Centre's web-site: http://www.sutyajnik.ru

[15] Interview with Vladislav Bykov, staff attorney for the Glasnost Defence Foundation, 20 August 2004.

A similar situation can be observed when studying the experience of the Center. The Center has not been seeking to maximize the number of cases brought before the ECHR. The main task of the Center was to engage the Convention in every domestic legal proceeding possible in order to avoid an appeal to the ECHR alleging non-compliance of the Russian Federation with the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention (Article 1). According to the Center local rules, lawyers were obliged to invoke the Convention and ECHR case-law in particular by submitting memorandums containing comprehensive explanations as to the status of the Convention and case-law in the Russian legal system as well as the duty of judges to employ the provisions of this instrument in their decisions. The Center has been following this policy since 2000. The results are as follows.

There was not a single case where a judge engaged the Convention, let alone ECHR case-law, on his own initiative. There has been strong resistance on the part of judges against invoking the Convention. Usually the Convention is applied by those judges who constantly have been facing arguments of applicants based on the Convention. Those who encounter such arguments for the first time try to avoid mentioning them in their decisions, even when the case-law principles support the applicant and the decisions support the applicants. They adjudicate cases based on domestic law only. In the best instance, judges cite an article of the Convention without referring to the case-law analysis submitted by the applicant.

However, as time goes by, those judges are regularly placed by an applicant into a situation where they have to consider the Convention and the case-law, begin to apply the Convention and, even more valuable, look into the case-law. There are examples where judges cite principles expressed in the case-law as well as the titles of the decisions referred to in a case. When the applicant relies on the Convention, the reasoning of the decision is limited to mentioning the Convention in general or a specific article; there is no reference to the case law.[16]

In general, there are four possible reasons for not considering international law arguments by courts: (1) the judge lacked knowledge and experience in the application of international law. However, as more judges encounter arguments based on ECHR case-law, the more likely they will apply it; (2) an incorrect understanding of the phenomenon of precedent; (3) a bias during the consideration of a case by courts (the inability – lack of political will – to adjudicate according to the case-law principles); (4)

[16] Decision of the Lower Saldinsk City Court, Sverdlovsk Region, 25 April 2001 with Regard to the Appeal of N. A. Topiro Against the Action of the Ministry of Justice of the Russian Federation and Trade Union Committee of OAO "Saldinsk Metallurgical Plant" and the Provision of the Charter of the Mining-Metallurgical Trade Union of Russia, according to which "members of the trade union ... may not be recorded in other trade unions". The document was not officially published. Accessible on: www.sutyajnik.ru/rus/echr/rus_judgments/distr/topiro_25_04_2001.htm Ruling of the Sverdlovsk Regional Court, 12 July 2001, to vacate the decision of the Lower Saldinsk City Court, Sverdlovsk Region, of 25 April 2001 with Regard to the Appeal of N. A. Topiro against the action of the Ministry of Justice of the Russian Federation and Trade Union Committee of OAO "Saldinsk Metallurgical Plant" and Provision of the Charter of the Mining-Metallurgical Trade Union of Russia. The document has not been published. Accessible on: www.sutyajnik.ru/rus/echr/rus_judgments/obl/topiro_obl_12_07_01.htm. Both courts, having ruled on the basis of Article 11 of the Convention only, came to opposite conclusions.

a possible ruling on a particular right could entail far reaching consequences for a state agency or official of the Russian Federation as to the lawfulness of their action.

During the years 2000 to 2004, the Center has carried on a strategic litigation campaign with respect to the problem of the legality of people's assessors. In a number of cases (civil and criminal) the applicants complained about a violation of their right to a fair trial by arguing that their cases could not be considered by any of the district courts of Sverdlovsk Region on the grounds that they were not "tribunals established by law" because they had been constituted in violation of the 2000 Federal Law on People's Assessors of Federal Courts of General Jurisdiction in the Russian Federation (hereinafter: Federal Law].[17] The violation of the Federal Law was the failure to provide the district courts with the list of people's assessors on the part of the Sverdlovsk State Duma and the Judicial Department attached to the Supreme Court of the Russian Federation. For this reason, people's assessors were usually serving for years instead of fourteen days as was provided by the Federal Law. In all these cases the courts held that there were no breaches of the applicants' rights because, even though there was no list of people's assessors available for the district courts, the cases were considered in accordance with the Edict of the President of the Russian Federation, 25 January 2000, "On Extension of the Term of Powers of People's Assessors of Federal Courts of General Jurisdiction in the Russian Federation",[18] which extended the statutory term of office of the current people's assessors until new lists had been established under the Federal Law.[19]

First, the Center lawyers filed suits in the Supreme Court to challenge the Presidential Edict of 25 January 2000. The action was dismissed without consideration on the merits due to the Court's conclusion that edicts are not subject to judicial review. Second, in every court proceeding (civil and criminal), the lawyers challenged the people's assessors on the grounds of a violation of the Article 6(1) right to a fair hearing by a tribunal established by law. Third, all the decisions delivered by an unlawfully composed bench of people's assessors were appealed to a high court on the same ground. Fourth, the applicants petitioned the Sverdlovsk Region Duma and the Judicial Department attached to the Supreme Court of the Russian Federation, which were responsible for drafting the list of people's assessors, without any success. Fifth, already after the Posokhov v. Russia case,[20] the strategic litigation campaign has culminated in the proceedings of Beliaev v. Sverdlovsk Region Duma and the Judicial Department attached to the Supreme Court of the Russian Federation.[21]

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[17] *СЗ РФ* (2000), no. 2, item 158.

[18] *СЗ РФ* (2000), no. 5, item 473.

[19] Under Article 55(3) of the 1993 Russian Constitution human and civil rights and liberties may be restricted by a federal law only; a Presidential edict cannot amend a federal law.

[20] *Posokhov v. Russia* [4 March 2003] No. 63486/00. This case challenged the legality of the described situation.

[21] Cassational Ruling of the Sverdlovsk Region Court, 23 October 2003, in a civil case with regard to the appeal of S. I. Beliaev against the failure to act of the Legislative Assembly of Sverdlovsk Region and the Administration of the Judicial Department attached to the Supreme Court of the Russian Federation in Sverdlovsk Region rendered with regard to the appeal of the representative A. V. Demeneva against the decision of the Upper Isetskii District Court, City of Ekaterinburg, 16 July 2003. The document has not been published. Accessible on: www.sutyajnik.ru/rus/echr/rus_judgments/obl/beliaev_v_obl_duma_23_10_2003.html

In the case of Beliaev the applicant complained about a violation of his right to a fair trial by arguing that all the district courts of Sverdlovsk Region could not be considered to be "tribunals established by law" because they had been composed in violation of the Federal Law. The applicant made his case inter alia on the Posokhov v. Russia case arguments that failure to comply with the requirements of the Federal Law, in particular the absence of the list of people's assessors, which should have been provided by the defendants, led to a violation of Article 6(1) of the Convention.[22]

The court of first instance and the court of cassation were completely ignoring the arguments based on the Convention.[23] The only "remedy" that the Russian Federation provided was the abolition of the institution of people's assessors in criminal cases as of 1 January 2004[24] and in civil cases from 1 February 2003.[25] Finally the lawyers of the Center harvested the fruits of the strategic litigation campaign. On 13 July 2005 the Presidium of the Sverdlovsk Region Court quashed the lower court decision in State v. P. by reason of a violation of Article 6 of the Convention comprehensively citing provisions of the Posokhov v. Russia decision.[26]

## Conclusion

Unlike the Supreme Court, there are instances where lower courts use case-law in their analysis of alleged Convention violations. However, it would be reasonable to concur with the lawyers of the Foundation based on their assessment of the judicial practice relating to Article 10 implementation, that it is difficult to apply the Convention and in particular its interpretation in ECHR case-law in Russian courts.[27] On the other hand, there are examples of good practice of analysis of the Convention based on case-law. The judicial practice of the district courts as a whole demonstrates that systematic and persistent arguments based on the Convention and case-law raised by the applicants are

[22] Ibid., at para. 41.

[23] The material on the people's assessors strategic litigation campaign was largely drawn from *Сборник судебной практики по народным заседателям «Пять шагов к законному правосудию»* [Collection of Judicial Practice Regarding People's Assessors "Five Steps to Legal Justice"]. Ed. A. V. Demeneva (2004). Accessible on: http://www.sutyajnik.ru/rus/library/sborniki/5_steps.html

[24] Council of Europe, Committee of Ministers, Resolution ResDH(2004)46 concerning the judgment of the European Court of Human Rights of 4 March 2003 (final on 4 June 2003) in the case of *Posokhov v. Russia*. Available at: http://www.sutyajnik.ru/rus/echr/res_com_of_min/posohov_v_russia_20_06_2004.htm. Accessed on 8 December 2005.

[25] Ibid.

[26] Judgment of Sinarsk District Court, City of Kamensk-Ural, Sverdlovsk Region, 20 November 2002, with regard to the accusation of P). The quashed decision was delivered by a professional judge and two people's assessors. The latter were serving for longer than it was allowed by the Federal Law.

[27] V. Bykov and D. Shishkin, "Статья 10 Европейской конвенции о защите прав человека в гражданских процессах о защите доброго имени" [Article 10 of the European Convention on the Protection of Human Rights in Civil Trials Concerning Defense of Good Name], in G. V. Vinokurov, A. G. Rikhter, and V. V. Shernyshov (eds.), *Обращения в Европейский Суд по правам человека: руководство для журналистов* [Recourse to the European Court of Human Rights: Manual for Journalists] (2004), p. 291. Accessible on: www.medialaw.ru/publications/books/book45/33.html

crucial for good practice. The lack of substantiated submissions by the applicants concerning the implementation of the Convention leads to an absence of analysis of ECHR case-law and consequently its poor application by the courts. Consistent arguments of the parties are crucial for the Convention implementation in domestic courts.