

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

ROUND TABLE THE SETTING UP OF EFFECTIVE DOMESTIC REMEDIES TO CHALLENGE CONDITIONS OF DETENTION

organised in the framework of the Human Rights Trust Fund (HRTF)

**Council of Europe,
Strasbourg, 8-9 July 2014**

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Preventive remedies and the Russian experience

On 10 of January 2012 European Court of Human Rights (the European Court) adopted the pilot judgment in the case *Ananyev and Others v. Russian Federation* (*Ananyev case*). The judgment inter alia establishes the obligation of the Russian Federation to set up in its legal system effective preventive and compensatory remedies to protect the right to proper conditions while being detained at remand prisons. The seventh paragraph of the operative part of the judgment provides that «the respondent State must produce, in co-operation with the Committee of Ministers, within six months from the date on which this judgment becomes final, a binding time frame in which to make available a combination of effective remedies having preventive and compensatory effects and complying with the requirements set out in the present judgment».

At the moment of consideration of *Ananyev case* there have been two main legal avenues to protect the right to proper conditions while being detained in remand prisons. The first one concerned the appeal of administration remand prison's actions (omission). This procedure has been regulated in the Chapter 25 of the Code of Civil Procedure of the Russian Federation (CCP). The second one is to produce an action on the compensation for pecuniary and non-pecuniary damages.

The European Court has analyzed these two remedies inter alia in terms of operativeness; possibility to declare an action (omission) illegal and unjustified and to award pecuniary and non-pecuniary compensation in the framework of single judicial procedure; enforceability of adopted judgments; the possible remedial actions a court may order. The European Court declared them ineffective.

It should be stressed that the two abovementioned main remedies continue to function until a new legislation is adopted. In the framework of our meeting I'd like to present you some figures.

During 2013 the courts have considered 604 complaints in order of Chapter 25 of CCP with respect to allegedly improper conditions in temporary detention centre (IVS), remand prisons, correctional colonies. For the same period the courts considered 2 805 cases with respect to the actions on the compensation of pecuniary and non-pecuniary damages resulted from improper conditions in temporary detention centre, remand prisons, correctional colonies. It has been awarded 36 879 752 rub. (about 800 000 euro).

Within the complex and coordinated approach to execution of the pilot judgment an interagency working group was created. It is formed from representatives of the competent state authorities including the Supreme Court of the Russian Federation, the General Prosecutor's Office of the Russian Federation, the Investigative Committee of the Russian Federation, the Ministry of Justice of the Russian Federation, the Ministry of Finance of the Russian Federation, the Ministry of Interior of the Russian Federation, the Federal Penal Service, the Federal Bailiff Service.

The execution of the pilot judgment is carried out with regard to provisions of the Conception of the Penal System Development till the Year 2020 elaborated by decree of the President of the Russian Federation and approved by the Russian Government.

The work is carried out in close cooperation with the Department of the Council of Europe for the Execution of Judgments of the European Court with a wide use of opportunities provided by the Project HRTF 18.

The main efforts of Russian authorities are focused on the following key issues allowing successful implementing the complex strategy:

- implementation the Convention requirements into the legislative system of the Russian Federation;
- introduction of new and improvement of the existing relevant domestic remedies;
- ensuring a balanced approach to imposition of a detention as a measure of restraint or extending such a measure as well as wider use of the alternative measures of restraint;
- ensuring the conditions of detention to be adequate and compatible with international standards;
- close cooperation with civil society institutions.

Russian authorities report on a regular basis of the measures taken and planned. There Reports are accessible and published on the website of the Council of Europe.

For the proper implementation the judgment on Ananyev case the Russian Federation has adopted a number of necessary measures including the Draft Code of Administrative Procedure (the Draft Code) which has been approved by the State Duma at first reading.

Due to the practice of the Committee Ministers of the Council of Europe, European Court, the criteria of effective legal remedies have been elaborated. I would like to view these criteria in terms of the provisions of the Draft Code.

the criterion	relevant provisions of the Draft Code of Administrative Procedure	other relevant materials
accessibility of legal remedy	<p>Any person irrespective of his/her citizenship has a right to apply to the court to protect his/her rights (art. 4).</p> <p>The court has a right to exempt a person wishing to apply to the court from judicial fees or to reduce their amount taking into consideration a property status of the person. In these cases all costs are being covered by the state budget (art. 111).</p> <p>The court also has a right to postpone the payment of judicial fees (art. 106).</p> <p>According to the legislation a person can have a reduction in respect of payment of fees while applying to the court (art. 106).</p>	<p>If a person applies to the court with the complaint concerning an action (omission) of official state, municipal persons, the amount of judicial fees is 200 rub. (about – 3,5 Euro) (art. 333.19 of the Tax Code of the Russian Federation (Chapter II).</p> <p>The same amount of judicial fees is being paid if a person lodges an action on compensation non-pecuniary damages (art. 333.19 of the Tax Code of the Russian Federation (Chapter II).</p>
operativeness of considering an administrative case	<p>An administrative case is being viewed in a reasonable time (art.11)</p> <p>The reasonableness of the length of the administrative proceedings is to be assessed in the light of particular circumstances of the case in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (art. 11).</p> <p>An administrative case is being viewed no more than 2 months (art. 143). If a case is being viewed by the Supreme Court of the Russian Federation the period of time should be no more than 3 months (art. 143).</p>	
independence and impartiality	<p>A judge is independent and obeys only the Constitution of the Russian Federation and federal laws (art. 8).</p> <p>The guaranties of independence are being provided by the Constitution of the Russian Federation and federal laws</p>	

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<p>publicity of administrative court proceedings</p>	<p>Administrative court proceedings in all courts are open (art. 12).</p> <p>Administrative court proceedings are closed in the case for example the necessity to protect the right to family or private life, other human rights freedoms, state or commercial secrecy (art. 12).</p>	
<p>the distribution of the burden of proof</p>	<p>The obligation to prove the legality of actions (omission) accomplished by state, municipal officials (bodies) is imposed on them (art. 64).</p> <p>An administrative claimant is obliged to show a prima facie case of actions (omission) and produce such evidence as is readily accessible to him or her (art. 64).</p> <p>A court has a right to obtain necessary evidence proprio motu (art. 65). If an administrative defendant refuses to produce evidence according to the court decision it is to be fined (art. 228).</p> <p>Applying to the court an administrative claimant should prove that his/her right or freedom has been violated. In its turn an administrative defender (state or municipal officials (bodies) should prove that the provisions of legislation has been met, in particular the competence of the officials (bodies), the order of adoption of decision, the legal foundations of the decision, action (omission), and the correspondence of decision, action (omission) in substance to the appropriate legislation (art. 228).</p>	<p>The obligation to prove the legality of actions (omission) accomplished by state, municipal bodies (officials) is imposed on these bodies (officials) (art. 249 of CCP).</p>
<p>participation of a person allegedly subject to the ill-treatment in administrative court proceedings</p>	<p>If an administrative claimant cannot objectively take part in person in the court proceedings a court has a right on its own motion or on the motion of persons participating in the proceedings to make a decision about the use of video-conference system for the proper viewing the administrative case (art. 144).</p>	<p>The claimant staying in the remand prison or on the correctional colony can participate in court proceedings through video-conference system (art. 155.1 of CCP).</p>
<p>possibility to declare an action (omission) illegal and to award the compensation pecuniary and non-pecuniary damages in the framework of single court proceedings</p>	<p>Viewing administrative cases a court has a right to resolve simultaneously a claim on the compensation pecuniary and non-pecuniary damages (art. 5).</p>	<p>«When establishing the amount of the monetary compensation of non-pecuniary damage the courts can take into consideration the amount of just compensation in the part concerning reimbursement of non-pecuniary damage, awarded by the European Court in case of similar violations (par. 9 of the Resolution of the Plenum of the Supreme Court of the Russian</p>

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		Federation № 21, 27 June 2013 «On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction».
adoption of interim measures	<p>On the motion of claimant a court can adopt interim measures. These measures should be proportional to the demands (art. 87).</p> <p>Interim measures are adopted if there is a real threat to the rights and freedoms and if it is difficult to protect rights and freedoms without adoption of interim measures (art. 87).</p> <p>The court decision on adoption of interim measures is to be implemented immediately (art. 90).</p> <p>The persons who do not fulfill the interim measures are fined (art. 90).</p> <p>A court has a right to suspend the appealed decisions and actions (art. 225).</p>	
possible measures to redress the situation	<p>A court should indicate in the judgment the rights and obligations of the claimant and defender (art. 180).</p> <p>An operative part of the judgment should provide inter alia the order and the time to implement this judgment, the possibility of immediate implementation of the judgment (art. 182).</p> <p>In the judgment there should be provided the obligation of administrative defendant to remove the violation of rights, freedoms (art. 229).</p> <p>In the judgment there should be indication what specific action (omission) to be accomplished to redress violated rights and freedoms (art. 229).</p> <p>An administrative defendant must inform the court and the administrative claimant about the implementation of the judgment within one month since the judgment takes a power (art. 229).</p>	
enforceability of judgment	<p>The enforceability of the judgment, its obligatory force is one of the principles of administrative proceedings (art. 7).</p> <p>Judgments which come into force are obligatory for all state and municipal persons on the territory of the Russian Federation (art. 17).</p> <p>Taking into consideration of dispute subject a court can indicate the period of time for the implementation of the judgment (art. 189).</p>	

the criterion	relevant provisions of the Draft Code of Administrative Procedure	other relevant materials
	<p>On the request of administrative claimant a court can decide the judgment to be implemented immediately. A decision on immediate implementation or on the refusal of such implementation can be appealed (art. 190).</p> <p>The implementation of the judgment is being realized in according to the legislation of enforcement proceedings. At the present time it is the competence of the Federal bailiffs service (the Ministry of justice of the Russian Federation).</p>	

It seems that the provisions of the Draft Code are formulated in such way to meet the main requirements of effective preventive and compensatory legal remedies to protect human rights and freedoms and *inter alia* to protect the right to the proper conditions in temporary detention centre, remand prisons, correctional colonies.

It is necessary to note that it is practically impossible to elaborate a law which is able to regulate all situations for the future. This thesis is supported by the relevant practice of the European Court.

During implementation of Code Administrative Procedure judges seem to face a number of issues. In this connection the Supreme Court of the Russian Federation in accordance with art. 126 of the Constitution of the Russian Federation having analyzed the judicial practice provide lower courts with interpretive explanations in the form of resolution of the Plenum of the Supreme Court of the Russian Federation.

In conclusion I would like to draw your attention to the number of explanations contained in the Resolution of the Plenum of the Supreme Court of the Russian Federation № 21, 27 June 2013 «On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction».

«The legal positions of the European Court are taken into consideration when the Russian legislation is applied. In particular, the content of the rights and freedoms provided by the laws of the Russian Federation must be defined in view of the content of similar rights and freedoms displayed by the European Court when applying the Convention and the Protocols thereto.

The courts' attention must be drawn to the fact that the Russian Federation legislation may provide a higher level of protection of human rights and freedoms as compared to the standards guaranteed by the Convention and Protocols thereto in the Court's interpretation. In such cases, the courts being guided by Article 53 of the Convention, need to apply Russian legislation provisions» (par. 3).

«In order to effectively protect human rights the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other States which are parties to the Convention. However, this legal position is to be taken into consideration by courts if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court» (par. 2).

«According to Part 3 of Article 55 of the Constitution of the Russian Federation, the provisions of the Convention and the Protocols thereto, any restriction of human rights and freedoms must be based on federal law, pursue a socially meaningful and lawful purpose (e.g. ensuring public safety, protection of ethics and morality, the rights and lawful interests of other persons), be necessary in a democratic society (proportional to the socially important and lawful objective pursued).

Non-observation of one of these restriction criteria constitutes violation of human rights and freedoms which may be subject to judicial protection under the procedure prescribed by law.

Some human rights and freedoms guaranteed by the Convention and the Protocols thereto cannot be restricted under any circumstances (the right not to be subjected to torture, etc.) » (par. 5)

«In compliance with the generally recognized principles and rules of international law, the provisions of Articles 1 and 34 of the Convention in the interpretation of the European Court, for the purposes of restoration of the violated rights and freedoms of a person a court needs to establish the fact of violation of such rights and freedoms, reflecting the said circumstance in the judicial act. The pecuniary and (or) non-pecuniary damage caused by such violation are subject to reimbursement in the procedure prescribed by law.

When establishing the amount of the monetary compensation of non-pecuniary damage the courts can take into consideration the amount of just compensation in the part concerning reimbursement of non-pecuniary damage, awarded by the European Court in case of similar violations» (par. 9).

It seems that the mentioned explanations concerning any sphere of internal relations, the Code of Administrative Procedure, other measures realized by the Russian Federation will contribute to further effective protection of the right to proper conditions in remand prisons and other appropriate places.