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Contact: John Darcy
Tel: 03 88 41 31 56

Date: 04/11/2019

DH-DD(2019)1274

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Meeting: 1362nd meeting (December 2019) (DH)

Item reference: Action plan (30/10/2019)

Communication from the Russian Federation concerning the case of Berkovich and Others v. Russian Federation (Application No. 5871/07)

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Réunion : 1362^e réunion (décembre 2019) (DH)

Référence du point : Plan d'action

Communication de la Fédération de Russie concernant l'affaire Berkovich et autres c. Fédération de Russie (Requête n° 5871/07) (**anglais uniquement**)

DGI

30 OCT. 2019

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH



**МИНИСТЕРСТВО ЮСТИЦИИ
РОССИЙСКОЙ ФЕДЕРАЦИИ
(МИНЮСТ РОССИИ)**

Житная ул., д. 14, Москва, 119991
тел. (495) 955-59-99, факс (495) 955-57-79
E-mail: info@minjust.ru

**DEPARTMENT FOR THE
EXECUTION OF JUDGMENTS
OF THE EUROPEAN COURT
OF HUMAN RIGHTS**

Mr Fredrik Sundberg

30.10.2019 № 10-2051-19

На № _____ от _____

Dear Sir,

Please find enclosed the Action Plan of the Russian authorities with regard to the judgment of the ECHR in case no. 5871/07 *Berkovich and Others v. Russia*.

Yours faithfully,

Head of the Office of Representative
of the Russian Federation at
the European Court of Human Rights

Andrey Fedorov

Enc: on 9 pages.

30 OCT. 2019

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH**ACTION PLAN****on execution of the judgment of the European Court of Human Rights
in application no. 5871/07 "*Berkovich and Others v. Russia*" (judgment
of 27 March 2018, final on 27 June 2018)****Violation**

In its judgment in the case of *Berkovich and Others v. Russia* the Court found violation by the Russian authorities of Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms in connection with refusal to provide valid or new travel passports to the applicants, who have been state servants with access to information constituting state secrets, after their retirement.

Individual Measures**1. Just satisfaction**

No.	Full name of the applicant, case no.	Pecuniary damage	Non-pecuniary damage	Legal Costs and Expenses	Payment
1	Igor Borisovich BOLDYREV 61948/08	<i>Not awarded</i>			-
2	Vladimir Vitalyevich LITAVRIN 19971/12.	-	5,000	850	The payment was made in full on 15.08.2018 in roubles at the exchange rate at the date of payment (payment order no. 404973, RUB 445,960.13).
3	Roman Aleksandrovich LYTIN 46965/12	-	5,000	106	The payment was made in full on 16.08.2018 in roubles at the exchange rate at the date of payment (payment order no. 407372 in the amount of RUB 384,100.38).
4	Aleksey Gennadyevich KHIL 75561/12	<i>Not awarded</i>			-
5	Aleksandr Aleksandrovich YENIN 73574/13	-	5,000	137	The payment was made in full on 22.08.2018 in roubles at the exchange rate at the date of payment (payment order no. 420420 in the amount of RUB 397,342.33).
6	Gennadiy Mikhailovich BERKOVICH 5871/07	-	5,000		The payment was made in full on 28.09.2018 in roubles at the exchange rate at the date of

					<p>payment (payment order no. 525104 in the amount of RUB 285,238.17). The delay of the payment for one day is insignificant and the applicant did not request to pay the interest.</p>
7	<p>Aleksandr Aleksandrovich GARKUSHA 504/14</p>	-	5,000	2,500	<p>The payment was made in full on 25.12.2018 in roubles at the exchange rate at the date of payment (payment order no. 420420 in the amount of RUB 584,164.50). At the applicant's request the payment was made to the bank account of his representative A.A. Yenin. The default interest was not paid due to late (30 November 2018) provision by the applicant of the bank details and other necessary documents in connection with the payment mode chosen by him - to the bank account of his authorised person.</p>
8	<p>Aleksandr Nikolayevich ILCHENKO 25025/10</p>	-	5,000	5,000	<p>The payment was made in full on 28.09.2018 in roubles at the exchange rate at the date of payment (payment order no. 395916 in the amount of RUB 766,760). The delay of the payment for one day is insignificant and the applicant did not ask to pay the interest.</p>
9	<p>Aleksandr Aleksandrovich BURNAYEV 31941/14</p>	-	3,538	64	<p>The payment was made in full on 28.08.2018 in roubles at the exchange rate at the date of payment (payment order no. 435580 in the amount of RUB 269,648.12).</p>
10	<p>Sergey Viktorovich SAMASADKIN</p>	-	4,000	42	<p>The payment was made in full on 25.12.2018 in roubles at the exchange</p>

	45416/14				rate at the date of payment (payment order no. 223967 in the amount of RUB 294,488.65).
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2. All applicants are currently in possession of valid travel passports which have not expired yet, and there are no obstacles for their travelling abroad.

General Measures

3. A number of measures were taken for wide-scale dissemination of the European Court's judgment in question and studying the legal positions expressed therein.

3.1. The Russian translation of the judgment was sent to the Constitutional Court of the Russian Federation and to the Russian competent state authorities – the Supreme Court, the courts of constituent entities of the Russian Federation (where the violations were committed), the Prosecutor General's Office, the Ministry of Defence ("the Ministry of Defence of Russia"), the Ministry of the Interior ("the MVD of Russia"), the Federal Security Service ("the FSB"), the Ministry of Foreign Affairs ("the MFA of Russia") for consideration of the legal positions of the European Court in their practical activity and taking measures within their competencies aimed at prevention of further similar violations.

These competent state authorities have forwarded copies of the Court's judgment to their respective departments and territorial bodies along with the implementing guidance for consideration of the Court's legal positions.

3.2. Discussions of the judgment in the case of *Berkovich and Others v. Russia* were held in the courts of the constituent entities of the Russian Federation, which committed the violations, found by the European Court, accompanied by provision of necessary recommendations for examination of the respective cases.

Thus, according to the information from the Supreme Court of the Republic of Komi, it was suggested to the lower courts' judges, when assessing lawfulness of decisions on temporary restriction of Russian nationals' right to leave the Russian Federation, taken by authorised bodies and officials, not to limit themselves merely to the formal criterion of a person's clearance for top secret information constituting and state secrets but rather to check all particular factual circumstances.

3.3. The text of the unofficial Russian translation of the judgment in question was published:

- on the Intranet of the Supreme Court in the "Departmental Contour" Section, accessible for all courts;
- in the automated information and search system "Judicial Practices" of the special wide-area network "Legal Professional" of the MVD of Russia;
- in "Consultant Plus" legal reference system.

3.4. The information about the said judgment is reflected in the regular "Overview of Practice of Inter-State Bodies for Protection of Human Rights and Fundamental Freedoms" no. 3 (2019) prepared by the Supreme Court.

4. The violation found in the judgment in the case of *Berkovich and Others v. Russia* concerned restriction of the right to freedom of movement in respect of the

applicants who had access to information constituting state secret during the period of their state service, in view of refusal to issue to them valid or new travel passports after their retirement, as well as in view of improper consideration by the Russian courts of the applicants' complaints against the respective decisions.

The European Court took into consideration that the restrictions imposed on the applicants and the respective decisions of the Russian courts were prescribed by law and pursued a legitimate aim of protection of state security; however, it was found that the restrictions were not proportionate to this aim and "necessary in a democratic society". In this connection, it was pointed out that the Russian Government, in cooperation with the Committee of Ministers, within the framework of execution of the judgment, had to take the necessary measures to eliminate the violations found by the Court.

In this context the Russian Government hereby provide the following information.

5. Pursuant to the Constitution of the Russian Federation¹, everyone who legally stays in the territory of Russia shall have the right to freedom of movement and choice of place of stay or residence. Everyone can also freely travel outside the Russian Federation and return to the Russian Federation unimpeded.

In accordance with the Constitution, these rights may be restricted only on the basis of the federal law and only to the extent to which it is necessary for the purpose of protection of constitutional order, morality, health, rights and legal interests of other persons, for national defence and security.

Pursuant to law of the Russian Federation no. 5485-1 of 21 July 1993² and Federal Law no. 114-FZ of 15 August 1996³ the right to leave the Russian Federation may be restricted in cases when a person has concluded an employment agreement (contract) providing for temporary restriction on the right to leave the Russian Federation, subject to the condition that the term of restriction does not exceed five years from the date when the person most recently had access to top secret information or especially important information until the date of expiry of the restriction term established by the employment agreement (contract) or in compliance with the federal law.

6. After the events that became the subject of examination by the European Court in most applications in the case of *Berkovich and Others v. Russia*, the Constitutional Court delivered its Ruling no. 14-P of 7 June 2012⁴, where it provided important explanations with regard to the constitutional and legal meaning of the constitutional provisions listed in paragraph 5 of the present document, and in the context of provisions of the federal legislation. The legal positions stated in this Ruling were also confirmed by

¹ Article 27 §§ 1 and 2 of the Constitution of the Russian Federation.

² Article 24 of Law of the Russian Federation no. 5485-1 of 21 June 1993 (as amended on 29 July 2018) *On State Secrets* ("Law no. 5485-1").

³ Article 15 § 1 of Federal Law no. 114-FZ of 15 August 1996 *On the Procedure for Leaving the Russian Federation and Entry into the Russian Federation* ("Law no. 114-FZ").

⁴ Resolution of the Constitutional Court of the Russian Federation no. 14-P of 7 June 2012 "On the Case Regarding Checking of Constitutionality of the Provisions of Article 15 (1) of the Federal Law *On the Procedure for Leaving the Russian Federation and Entry into the Russian Federation* and Article 24 of the Law of the Russian Federation *On State Secrets*, in Connection with the Complaint of Citizen A.N. Ilchenko".

Ruling of the Constitutional Court no. 1272-O of 17 July 2012⁵.

In the aforementioned rulings the Constitutional Court of the Russian Federation declared the provisions of Article 24 of Law no. 5485-1 and Article 15 of Law no. 114-FZ to be in compliance with the Constitution, drawing attention to the following:

- based on the provisions of the Constitution and provisions of applicable legislation, restriction on Russian nationals' rights to leave the territory of the country due to them being familiar with information constituting state secrets is not absolute and mandatory (the right to leave "may be restricted");

- the respective restriction is of temporary nature (as a general rule, it "may not exceed 5 years" from the date of the persons' last familiarization with information constituting state secret);

- not all information constituting state secret, but only especially important information or top secret information, that is clearly classified as such in due course in accordance with the criteria determined by the law constitute grounds for possible imposition of restrictions;

- refusal to the person of a permit to leave is not final, it may be contested by such person under Article 17 of Law no. 114-FZ with the aforementioned Inter-Departmental Commission for examination of petitions of nationals of the Russian Federation in connection with restrictions on their right to leave the Russian Federation and on a judicial basis (the information about the said Commission and contesting on a judicial basis is provided below, paragraphs 8 - 10);

- adoption of a decision on temporary restriction on a person's right to leave for reasons of his or her being familiar with especially important information or top secret information constituting state secrets, as well as a decision of the Inter-Departmental Commission and a court on a complaint regarding introducing such restrictions may not be based merely on establishing of the fact of access clearance in respect of such information.

With reference to international standards and the European Court's practice, special attention was drawn to the fact that competent authorities and courts need to comply with the requirement of proportionality of restriction on the right to leave Russian Federation. As noted, this "implies assessment of all the circumstances that are of relevance for taking a respective decision". In each particular case, as indicated, "such decision should be preceded by establishing whether the persons not only has formal access clearance in respect of especially important information or top secret information classified as state secret, but also actual access thereto, as well as by evaluation of all other circumstances related thereto, which in their totality cause the need of temporary restriction of his rights for the purposes protected by the Constitution, stipulated by Article 55 (§ 3) of the Constitution of the Russian Federation" (including the nature of particular information to which the person had access, degree of its secrecy, reasons for leaving and other circumstances).

The Constitutional Court also pointed out that the constitutional and legal meaning

⁵ Ruling of the Constitutional Court of the Russian Federation no. 1272-O of 17 July 2012 "On Refusal to Accept for Examination the Complaint Lodged by Citizen Vladimir Petrovich Tatrov Regarding Violation of His Constitutional Rights by the Provisions of Article 15 (1) of the Federal Law *On the Procedure for Leaving the Russian Federation and Entry into the Russian Federation*, Articles 21 and 24 of the Law of the Russian Federation *On State Secrets*, and Sub-paragraph 24 of the Instruction for Providing the Secrecy Regime in the Russian Federation".

of the interrelated provisions of Article 24 of Law 5485-1 and Article 15 of Law no. 114-FZ is generally binding and excludes any other interpretation thereof in law enforcement practice.

7. Pursuant to Law no. 5485-1, the Inter-Departmental Commission for Protection of State Secrets has been established and is functioning in the Russian Federation.

This Inter-Departmental Commission acts based on a Regulation thereon, approved by Decree of the President of the Russian Federation⁶. Its functions include, inter alia, coordination of activities of state authorities, local self-government bodies and organisations in issues related to implementation of the federal laws in the sphere of state secrets, as well as examination and submission to the President of the Russian Federation and the Government of the Russian Federation of proposals on legal regulation of issues related to protection of state secrets.

In compliance with the said powers, and by way of development of resolution of the Constitutional Court no. 14-P of 7 June 2012 and ruling of the same Court no. 1272-O of 17 July 2012 the Inter-Departmental Commission for Protection of State Secrets, with participation of competent state authorities, in December 2012 prepared and approved the “Methodological Recommendations for Taking Decision on Temporary Restriction on the Right of a National of the Russian Federation being Familiar with Especially Important Information and/or Top Secret Information to Leave the Russian Federation or to Possibility of Obtaining a Passport and Leaving the Russian Federation, as well as for Determination of the Time Period for Temporary Restriction of this Right” (“the Methodological Recommendations”).

The Methodological Recommendations, in the light of the legal position of the Constitutional Court, directly list the criteria to be guided by when restricting a person’s right to leave Russia. They include the activity and regularity of the person’s familiarizing with especially important data and/or top secret data; the scope and importance of the data the person has been familiarized with; maintaining the degree of secrecy of the information as of the moment of taking the decision on restriction of leaving, or examination of a complaint against such decision; possible time periods for declassification of the information to which the person had access; the date of the person’s last familiarizing with especially important information and top secret information, confirmed by his own signature; indicative damage in case of disclosure of the relevant data; the familiarized person’s personal qualities; the purpose of his or her going abroad; humanitarian factors (grave state of health of the person, death of a close relative, need to undergo treatment, etc.); indicative time of leaving; situation in the country of destination and risks related to the person’s travelling, etc. Recommendations were also provided with regard to weighted approach to determining the term of the introduced restriction, taking into account the listed circumstances to be clarified.

Therefore the Methodological Recommendations provided by the Inter-Departmental Commission for Protection of State Secrets envisage a differentiated approach to taking decisions on restrictions on traveling abroad.

⁶ Decree of the President of the Russian Federation no. 1286 of 6 October 2004 (as amended on 3 August 2018).

8. In June 2013 the Plenum of the Supreme Court delivered a resolution⁷ that has utmost significance in the context of proportionality of the taken decisions on prohibition to leave the territory of the Russian Federation due to being familiar with information constituting state secret.

In this resolution, it inter alia drew the attention of the courts to the requirement that every restriction of human rights and freedoms should be based on the federal law, pursue a legitimate aim and be necessary in a democratic society, i.e. be proportionate to the legitimate aim. It was noted that non-compliance with any of those criteria of restriction represents a violation of human rights and freedoms, which are subject to protection in a court.

9. Pursuant to Article 17 of Law no. 114-FZ and the Standard Operating Procedure of Cooperation of Federal Executive Authorities⁸, there was restored the activity of the Inter-Departmental Commission for examination of petitions lodged by Russian nationals in connection with restriction on their right to leave the Russian Federation (“the IDC for examination of petitions”), formed by the joint Order of the MFA of Russia, the Ministry of Defence of Russia, the FSB of Russia and Foreign Intelligence Service⁹.

- The Order of 14 December 2017¹⁰ introduced amendments into the Regulation on the IDC for examination of petitions, aimed at improvement of its work.

- Activities of the IDC for examination of petitions are supported by the MFA of Russia. The Commission’s Secretariat makes part of the Humanitarian Cooperation Department. At the present moment the chairman of the said Commission is Deputy Minister of Foreign Affairs.

- The IDC for examination of petitions works on a permanent basis and conducts monthly meetings at which petitions of individuals who disagree with the decision on establishing temporary restrictions on their right to leave the territory of the Russian Federation due to their being familiar with information constituting state secrets.

Petitions shall be examined within a three-month period after taking the decision about relevancy or non-relevancy of the complaint.

Each person’s petition shall be examined strictly individually, and as a rule in his or her presence and with participation of representatives from the organisations that have taken decision to impose temporary restrictions on leaving the Russian territory.

- In all cases where the IDC for examination of petitions finds violations in taking decisions about restriction on leaving it makes submissions to the bodies and organisations who have taken such decisions in order to take measures for elimination and prevention of further similar violations.

- The IDC for examination of petitions bases its activity on the international obligations of the Russian Federation including those emerging from its membership in the Council of Europe, and is guided by international standards, legal positions of the

⁷Resolution of the Plenum of the Supreme Court of the Russian Federation no. 21 of 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 Courts of General Jurisdiction.

⁸ Standard Operating Procedure approved by the Government of the Russian Federation no. 30 of 19 January 2005.

⁹ Order of the MFA of Russia, the Ministry of Defence of Russia, the FSB of Russia and Foreign Intelligence Service no. 4301/264/158/160/22 of 14 April 2006.

¹⁰ Order of the MFA of Russia, the Ministry of Defence of Russia, the FSB of Russia and Foreign Intelligence Service no. 24324/923/783/718/45 of 14 December 2017.

European, Constitutional and Supreme Courts, as well as by the Methodological Recommendations of the Inter-Departmental Commission for Protection of State Secrets.

Examination of such petitions is based, first of all, on undisputed establishment of the fact of the person's familiarization with especially important information or top secret information considered State secrets; on determining the degree of secrecy/classification and relevancy of such information; on availability or absence of a contract providing for the person's voluntary consent to partial temporary restriction of his or her rights including on leaving the territory of Russia, etc.

The IDC shall take into consideration the persons' specific humanitarian circumstances related to the need of undergoing medical examination or treatment abroad, joining the family that resides in another country, visiting close relatives, etc.

According to the data provided by the MFA of Russia, in a great number of cases examination of persons' petitions to the IDC resulted in lifting the imposed restrictions, and a consistent trend towards increasing the number of such decisions has been observed. Thus, in 2018, 116 petitions were received (in 2017 – 104), 40 of which were granted (in 2017 – 29), amounting to 35 % of the total number of received petitions (in 2017 – 28 %).

According to the data of the MVD of Russia, an increase in the number of travel passports issued to Russian nationals has been registered during a few years (in 2017 about 4.3 million of travel passports were issued, in 2018 - over 5 million). The number of refusals to issue them due to the citizen's being familiar with information constituting state secrets was about 0.02% in these years.

- The IDC for examination of petitions, pursuant to the aforementioned Regulations, sends annual reports about its activities to the government of Russia. The reports reflect the results of such activities as well as problematic issues in implementation of the Russian legislation, including in the context of cooperation with the Council of Europe.

The Russian Government believe that the measures taken to improve the work of the IDC for examination of petitions and the statistical results of its activity show that at the present moment it is quite an effective remedy for many Russian nationals.

10. Decisions of state authorities to restrict the right to leave due to persons' being familiar with especially important information and information constituting state secrets, as well as decisions of the IDC for examination of petitions of citizens, may be appealed against in court.

The need of further protection of this right was pointed out in the aforementioned Resolution of the Constitutional Court no. 14-P.

On 8 March 2015 the Code of Administrative Procedure of the Russian Federation ("the CAP RF") was adopted that created an effective national remedy meeting international standards and allowing individuals, within new improved procedures, to contest decisions, including decisions that restrict leaving the Russian Federation.

The CAP RF in particular envisages a more active role of the court including requesting and receiving additional materials, conducting examinations, involvement of specialists. There is envisaged redistribution of the burden of proving with imposition of this obligation on state authorities, as well as the right of courts to use procedural compulsion measures including imposing of fines for failure of such authorities to provide the necessary materials and evidence. It should not go unnoticed that the court can apply

the institute of accelerated examination of administrative cases and preventive protective measures as well as react to the found violations by way of special rulings.

The adoption of this Code and enlargement of the scope of its application by the persons, in whose respect a decision on restriction of the right to leave the Russian territory has been delivered, is expected to facilitate effective protection of the relevant persons' rights.

11. In connection with the European Court's judgment in the case of *Berkovich and Others v. Russia*, additional work on the issue regarding the need of amendments and supplements to the applicable Russian legislation has been arranged in cooperation with the competent state authorities. This work is still ongoing.