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Meeting: 1419th meeting (December 2021) (DH)

Communication from an NGO (Centre Protection Internationale) (13/10/2021) in the case of MIKHEYEV v. Russian Federation (Application No. 77617/01).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419^e réunion (décembre 2021) (DH)

Communication d'une ONG (Centre Protection Internationale) (13/10/2021) relative à l'affaire MIKHEYEV c. Fédération de Russie (requête n° 77617/01) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



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SUBMISSION FROM CENTRE DE LA PROTECTION INTERNATIONALE

Under Rule 9(2) of the Committee of Ministers Regarding execution of general measures in the Mikheyev group of cases

DGI

13 OCT. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Introduction

Centre de la protection internationale (<https://cpingo.org/>) hereby presents this submission for consideration at the CM's 1419th CM-DH meeting in December 2021. It concerns the *Mikheyev* group of cases, which include instances of deaths, torture or inhuman and degrading treatment while in police custody, and the lack of effective investigations into these incidents. The *Mikheyev* group also includes cases of unlawful arrest and detention in which the applicants were subjected to torture or ill-treatment, the rulings of the Court concerning confessions under torture, and the lack of an effective remedy at the national level to guarantee compensation for ill-treatment.

There are currently 172 cases in this group. According to the Committee of Ministers **for 2019**, out of 135 resolved cases, the police officers accused of torture were convicted in only two of them, receiving suspended sentences, and only in 11 cases were the criminal proceedings against the applicants reopened following the adoption of the judgments. The cases in this group are of a repetitive nature. The low rate of enforcement of ECtHR judgments in terms of individual measures indicates that the Government have not addressed, or have addressed merely to an insignificant extent, issues that require the application of general measures. The unresolved general measures are also an indicator that more reparative applications will be reaching the ECtHR.

The last review of the *Mikheyev* group took place in December 2019. The main conclusion that emerged from the deliberations upon this group of cases reflects the obvious inadequacy of both the individual and general measures taken by the Government **since 2006**:

[...] it does not appear that significant progress has been achieved in this group of cases despite the fact that the issues covered by it were first revealed and accepted by the authorities as a problem requiring general measures already in 2006 (*Mikheyev*). The absence of major progress is corroborated by NGO submissions and applicants' complaints, as well as by findings of international bodies.¹

The Committee of Ministers emphasised that the Russian Government should take urgent steps to ensure that Russian legislation complies with the Convention, and that the Government should agree to the publication of reports by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) that address the issue of ill-treatment and torture in police custody.² A new hearing was due to take place in December 2020. It has been postponed for almost a year due to the pandemic.

¹ 1362nd meeting, 3-5 December 2019 (DH) Human rights, H46-26 Mikheyev group v. Russian Federation (Application No. 77617/01), Supervision of the execution of the European Court's judgments, DH-DD(2019)797, CM/Del/Dec(2015)1222/13, at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168098dac8

² Ibid

In this submission, we will focus on a few, relatively recent measures that the Government mentioned in the report of 12 July 2019. We will also suggest questions that may be addressed to representatives of the Russian delegation by members of the Committee when considering the implementation of general measures in this group of cases.

(I) Overview of General Measures submitted by the Government in the updated Action Plan of 12 July 2019

- **The Government indicated that in 2015, Russian criminal law was amended to allow apprehended persons to make a phone call to inform another party of their detention and place of detention.**

Our comments

Though the amendment represents an obvious improvement, the new rules do not guarantee the right to a telephone call to all persons apprehended.

The Law on the Police contains requirements on the right to one phone call within three hours of arrest to notify close relatives or significant others of the arrest and detention location (Article 14).

Under Article 46 of the Russian Criminal Procedure Code (the CPC), the investigator or inquirer must grant the right to make a telephone call to a suspect who is detained under Article 91 of the CPC, namely in the following circumstances: when or after a crime has been committed; in case of direct evidence or testimony implicating the suspect; if the suspect has tried to abscond; if the suspect has no place of residence or if the investigator has applied to the court for a preventive measure.

However, a suspect detained in custody *in pursuance of a preventive measure* (e.g. remand in custody) is not entitled to a single phone call.³ There is no legal opportunity for a suspect who is placed by court order into a medical institution, such as a mental health facility, to make a phone call and report his or her detention. There is also no right to a single phone call for the accused. Nor is a convicted person who has absconded or has evaded serving his or her sentence entitled to a phone call.

Finally, the current wording of Article 96 of the CPC provides for the possibility of not notifying relatives at all. This exemption from the general rule may be authorized by the prosecutor in cases of “the need to keep the detention secret for the sake of the pre-trial investigation”.⁴

- **The Government comments on the amendments to the 2017 Law on State Protection of Victims, Witnesses and Other Parties to Criminal Proceedings.**

Our comments

The potential of the “Law on State Protection of Victims, Witnesses and Other Parties to Criminal Proceedings” (the Law) could be used to protect the interests of victims of torture and inhuman treatment committed by the police. However, the conditions under which the Law can be invoked are in fact limited by the mandatory existence of *an open criminal case*. And the actual initiation of criminal proceedings against law enforcement officers is a rare practice. This is confirmed by the statistics cited by the Government as well as by the well-established practice that in cases of ill-treatment, investigators shift the range of possible, actual investigative actions to the stage of the so-called pre-investigation.

Article 2 of the Law stipulates that: “...measures of state protection may also be applied before criminal proceedings are instituted against the complainant, eyewitness or victim of a crime...” However, under Article 3(2) of the Law, state protection measures can be applied “only on the basis of a decision by the investigator [...] who has a criminal complaint (report) or a criminal case pending.” In other words, state protection measures cannot be applied before the actual criminal proceedings commence.

³ Para. 3 Part. 1 Art. 46 of CPC

⁴ Para 4. Art. 96 of CPC

Given the well-documented reluctance of the Investigative Committee to investigate cases of police violence, the obligatory existence of a formal decision by an investigator to apply state protection can be a significant obstacle to persons in need of legal assistance and may deter the application of the Law to the victims.

- **The Government referred to the 2018 Supreme Court Plenum, which obliged administrative courts to report a reasonable suspicion of ill-treatment to the investigation authorities.**

The Supreme Court's position in the 2018 decision is an important measure to guarantee both the prevention and the investigation of torture and ill-treatment by the police.

However, the mere fact that information about the crime has been conveyed to the investigating authorities by the court does not guarantee that criminal proceedings on the grounds of ill-treatment will be initiated.

The requirement of the domestic law is that the legal basis for the institution of criminal proceedings is provided by the decision taken to institute criminal proceedings. Pursuant to Article 143 of the CPC, on receipt of information on the crime from the court, a report on the discovery of signs of an offence must be drawn up by the law enforcement officer in charge. A pre-investigation is then initiated under Article 144, a practice which in the vast majority of cases does not lead to the initiation of any proceedings or, even more rarely, to the punishment of offenders.

- **The Government has indicated a set of measures related to amendments to the series of departmental orders of the Prosecutor General's Office.**

We recognise the need for effective prosecutorial oversight of the rule of law, especially with regards to the issue of police brutality. However, the action report provided by the Government shows that the main consequence of the documents developed by the Prosecutor's Office is that law enforcement officers were subjected to disciplinary action only. Indeed:

As a result of the inspection the supervising prosecutors made 761 submissions and information statements. After examination thereof, 485 guilty officers of the Interior were brought to disciplinary liability.⁵

The practice of not initiating criminal proceedings is counterproductive and is at odds with a "zero tolerance" message officially espoused by higher levels of Government vis-à-vis deaths, torture and ill-treatment, the importance of which was reiterated in the decision the Committee adopted at its 1222nd meeting (March 2015) (DH).

- **Government's comments regarding Police and Investigating Committee.**

The Government have not provided any new information and have confined itself to merely referencing previously cited statistics. The Investigative Committee (the IC) is the only body which, by virtue of domestic law, has the authority to investigate crimes of torture committed by law enforcement officials. The IC and the police form a nexus of law enforcement agencies. This is a network in which, as has been repeatedly noted, the IC is dependent on operational support from the police; and the police are, in effect, given the broad authority to judge what constitutes a credible complaint or a case of police violence. In other words, they are granted the ability to police themselves.

The statistical information provided by the Government clearly demonstrates that there is a systemic problem in the recording and investigation of incidents of torture and ill-treatment by law enforcement agencies.

⁵ Para 6.6. of the Government Action Report of 12 July 2019

For example, according to the Government report, the majority of complaints concerning torture and ill-treatment sent to the Russian Ministry of Internal Affairs in 2017 and 2018 (1,024 and 956 respectively) were sent back to the territorial departments of the Ministry of Internal Affairs, whose sub-units were themselves the subjects of the complaints⁶.

At the same time, as a result of inspections carried out by the Interior Ministry itself in 2017 and 2018, a total of 22 and 12 cases, respectively, were referred to the Investigative Committee for investigation⁷.

Despite the obvious disparity between the number of complaints concerning torture and ill-treatment and the number of cases that have actually been investigated on the merits, the Government has failed to address the concerns raised by the CM on the issue of power sharing between the police and the Investigation Committee and has ignored the topic of understaffing within the new special divisions of the Investigation Committee, which are designed to investigate crimes of police brutality.⁸

(II) (II) Some issues disregarded by the Government in the latest action plan

➤ Review of domestic courts' decisions in connection with the Court's judgments.

As has been mentioned, as of 2019, only 11 cases have been reopened for applicants due to a violation of Article 11 of the Convention, as found by the Court⁹. In only one case was the applicant acquitted as a result of a new jury trial. In the remaining cases, despite the ECtHR finding that the evidence against the applicants had been obtained through torture, the sentences against them were either not altered at all or altered in a minor way (for example, by excluding offences for which the limitation period had expired)¹⁰. We note with dismay that despite providing extensive information on the Supreme Court's activities, the Government did not address in any way the question of the standards for the retrial of the applicants before the Supreme Court of Russia. The Government did not explain the Russian Supreme Court's and lower courts' obvious confrontation with the ECtHR judgments and refusal to acknowledge the applicants' torture.

Publication of CPT reports

We noted with interest the information provided by the Government concerning the dissemination of materials relating to the application of international standards bearing upon the prevention and combatting of torture and ill-treatment by the police. We are therefore surprised that, to date, the Government has not given its consent for the publication of the reports prepared by the CPT.

We are confident that publishing this information and communicating it to the professional and general public, along with the information on international standards already disseminated by the Supreme Court, the Interior Ministry and other bodies, would be the most comprehensive measure in the fight against and prevention of torture.

(III) Summary, questions and recommendations.

As mentioned above, cases within this group were interrupted by the coronavirus pandemic, during which the problem of police torture in Russia has clearly gotten worse. According to the annual measurement of the OSCE Prohibition of Torture Index, as of summer 2021 Russia was the only country whose score had dropped by 30 points compared to the previous year (2019), thus ranking penultimate, with Belarus in last place¹¹.

⁶ Para 8.2. of the Government Action Report of 12 July 2019

⁷ Ibid.

⁸ See in general: <http://hudoc.exec.coe.int/eng?i=004-14082>

⁹ Ibid.

¹⁰ Ibid.

¹¹ See: RBK «Human rights activists calculated a "torture prohibition index" for post-Soviet countries », 2 July 2021 года, <https://www.rbc.ru/society/03/07/2020/5efe0a9a9a79473e8905dedc> , Public Verdict "The second annual

Given the systemic problems with torture in police and detention facilities, it is safe to declare that the Russian police violence prevention system is not capable of coping with this additional strain, and is not equipped to deal with other potential challenges comparable to the pandemic. This raises serious concerns both at the level of individual security and protection, and in relation to a potential increase in the number of complaints to the ECtHR by Russian nationals.

Our review of the measures proposed by the Government in the action plan is intended to encourage an early return to the discussion on the topic of the enforcement of court orders related to police violence, in the full format proposed by the Committee of Ministers, namely:

- Preventing and combatting ill-treatment in police custody
- Ensuring the effectiveness of investigations into allegations of ill-treatment in police custody
- Use of confessions obtained under duress during trial

Unfortunately, at present, the information submitted by the Russian side is ad hoc, overwhelmingly fails to take into account new data, and ignores the issues raised by the Committee of Ministers as well as by the applicants' representatives.

(A) Questions.

1. Regarding the right of detainees to a telephone call:

- **What is the implication of the removal of the right to make a telephone call when an apprehended person is admitted to a medical institution, including a psychiatric hospital? What safeguards do apprehended persons have against ill-treatment in such cases?**
- **What safeguards against ill-treatment exist for apprehended persons who have been deprived of their right to make a telephone call by decision of the prosecutor under Article 96 of the CCP?**

2. Regarding information from the Government on the Law on State Protection:

What appeal mechanisms exist if an investigator refuses to grant state protection?

3. Regarding Government information on the 2018 Supreme Court Plenum:

- **Are there mechanisms for appealing against a judge's refusal to refer materials documenting abuse to the investigating authorities?**
- **Can the investigator decide not to institute criminal proceedings on the basis of the materials referred by the court? If so, what appeal mechanisms are in place and is the court, which referred the case to the investigative authority, also involved in the process of appealing the investigator's decision?**

4. Regarding the Government's information on the powers of the prosecutor's office:

Can the investigating authority decide not to institute criminal proceedings as a result of a request from the prosecutor's office?

5. In relation to information concerning the IC and the police:

- **What measures ensure the de facto independence of investigators investigating cases against members of law enforcement agencies?**

- **What measures had been undertaken to address the understaffing of departments of the Investigative Committee which investigate cases of ill-treatment by law enforcement officials?**
6. In relation to the review of convictions, in cases where the ECtHR has found that the evidence against the applicants was obtained through torture:
- **What are the standards of re-examination of cases decided by the ECtHR?**
 - **Why the facts of torture established by the ECtHR do not lead to actual review of sentences by Russian courts?**

(B) Recommendations.

Russian authorities should agree to the publication of the reports of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT).

In view of the Supreme Court's 2018 decision, the Russian authorities should develop an effective mechanism by which courts could cooperate with investigative authorities in order to ensure that criminal proceedings are initiated in cases where ill-treatment is found to have occurred.

Sincerely,



Karinna Moskalenko