

# RESOLUTION OF THE PLENARY OF THE SUPREME COURT OF THE RUSSIAN FEDERATION

No. 21

Moscow

27 June 2013

## Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols by the courts of general jurisdiction

In line with the principle of subsidiarity, which is one of the foundations of the work of the European Court of Human Rights, the protection of human rights and freedoms, as set out in the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols (hereinafter - the Convention and its Protocols), is first and foremost the obligation of the authorities of the State – Parties, including [national] courts.

Aiming at a uniformed application by the courts of general jurisdiction of the Convention and its Protocols, as ratified by the Russian Federation, the Plenary of the Supreme Court of the Russian Federation, under Article 126 of the Constitution of Russia, Articles 9 and 14 of the Federal Constitutional Law of 7 February 2011 No. 1-FKZ "On the courts of general jurisdiction in the Russian Federation", deems it necessary to issue the following explanations to the courts:

1. The Convention and its Protocols are international treaties of the Russian Federation and in their application, the courts of general jurisdiction (hereinafter – the courts) should take into account the explanations contained in the Resolution of the Plenary of the Supreme Court of the Russian Federation of 31 October 1995 No. 8 "On some issues of application by the courts of the Constitution of the Russian Federation", and also in the Resolution of the Plenary of the Supreme Court of the Russian Federation of 10 October 2003 No. 5 "On the application by the judges of the courts of general jurisdiction of the commonly recognised principles and norms of international law and international treaties of the Russian Federation".

2. As it follows from Article 46 of the Constitution, Article 1 of the Federal Law of 30 March 1998 No. 54-FZ "On ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols" (hereinafter – the Federal Law on Ratification), the legal positions of the European Court of Human Rights (hereinafter – the European Court, or Court), contained in its final judgments adopted against the Russian Federation, must be applied by the courts.

In order to ensure effective protection of human rights and freedoms, the courts should take into account legal positions of the European Court, as stated in the final judgments adopted against other states – members of the Convention. Legal positions should be taken into account by the courts so

long as the circumstances of the case under consideration are similar to the circumstances of the case examined by the European Court.

3. The legal positions of the European Court should be taken into account when applying the Russian legislation. In particular, the contents of the rights and freedoms as set out by the Russian legislation should be determined in the light of the contents of similar rights and freedoms, as interpreted by the European Court in application of the Convention and its Protocols.

The courts' attention is drawn to the situations where the Russian legislation guarantees a higher level of protection of human rights and freedoms than the standards set up by the Convention and its Protocols in the Court's interpretation. In such case, in line with Article 53 of the Constitution, the legislation of the Russian Federation should be applied.

4. In order to prevent violations of human rights and freedoms, including unnecessary restrictions [on rights], legal positions of the European Court should be taken into account not only in the interpretation of the European Convention and its Protocols, but also of other international agreements of the Russian Federation (Article 31 § 3 (c) of the Vienna Convention on the law of treaties of 23 May 1969, thereafter – the Vienna Convention).

5. As it follows from the provisions of the Convention and its Protocols as interpreted by the European Court, limitations of human rights and freedoms (interference with rights and freedoms) can arise from any decisions, actions (failure to act) of the state authorities, local self-government, officials, state and municipal employees, and other persons, that result in hindrance to the realisation of rights and freedoms of the person raising such complaint. For example, as the practice of the European Court indicates, use of a person's image without his consent constitutes interference with his rights under the Convention.

At the same time, in line with Article 55 § 3 of the Constitution of the Russian Federation, the provisions of the Convention and its Protocols, any limitation of human rights and freedoms should be based on a federal law; it should pursue socially meaningful and lawful aim (for example, ensuring public safety, protection of morals, ethics, rights and lawful interests of others) must be necessary in a democratic society (proportionate to the socially meaningful, lawful aim pursued).

Failure to comply with any of these criteria for limitations would result in a violation of human rights and freedoms which are subject to judicial protection as prescribed by law.

Some human rights and freedoms, guaranteed by the Convention and its Protocols, could not be limited under any circumstances (the right not to be subjected to torture, etc).

6. The grounds for limitations of human rights and freedoms could be contained not only in a federal law, but also in an international treaty of the Russian Federation (extradition of a person to another state for criminal prosecution in line with the provisions of an international treaty, etc).

7. The Convention and its Protocols have as its aim effective recognition and protection of the human rights and freedoms wherever they are infringed, and the provisions of these international treaties could not be construed to constitute grounds for their restrictions.

8. The courts should always reason the necessity of applying limitations of human rights and freedoms by reference to the established factual circumstances of the case. The attention of the judges is drawn to the fact that human rights and freedoms can be limited only where there are relevant and sufficient grounds for such limitations, and also that a balance is maintained between lawful interests of the person whose rights and freedoms are affected, and the lawful interests of other persons, state and society.

For instance, if a court in a civil case allows the debtor's motion to grant a short and limited extension for the payment of judgment debt, this does not necessarily disclose a breach of the claimant's right to have judicial decision executed within reasonable time, in the meaning of Article 6 § 1 of the Convention.

A limitation of the individual's procedural rights, such as removal from the courtroom, can be carried out only after explaining the consequences of such limitation to the individual (Article 6 § 1 of the Convention as interpreted by the European Court).

Wherever the courts establish the circumstances which justify an interference with the rights and freedoms, they should clearly explain them in judicial acts.

9. In line with the universally recognized principles and norms of international law, provisions of Articles 1 and 34 of the Convention as interpreted by the European Court, in order to redress the violations of human rights and freedoms, the court should establish that such violation has taken place and clearly state so in the judicial act. Pecuniary and (or) non-pecuniary damages caused by such violation are subject to compensation in the order provided for by law.

When determining the amount of financial compensation for non-pecuniary damages, the courts can take into account the amounts of non-pecuniary damages awarded by the European Court for similar violations.

The courts should bear in mind that in some circumstances the quashing (change) of the judicial act which had been found to be in breach of the Convention or its Protocols can in itself be sufficient for restoring of the infringed rights, without an additional financial compensation of non-pecuniary damages. For instance, the quashing of a judgment which has been adopted as a result of proceedings held in camera in breach of Article 10 of the Civil Procedural Code or Article 241 of the Criminal Procedural Code, and the holding of a new public trial by an appellate court can lead to restoration of the right to a public hearing.

10. Further to Article 17 § 2 of the Constitution of the Russian Federation, basic rights and freedoms of man are inalienable and belong to everyone from the moment of birth. At the same time, a person can forfeit some of the rights and freedoms, including certain procedural rights. Such waiver should be clearly stated, be voluntary and should not be in contradiction to the Russian legislation, generally recognized principles and norms of international law and international treaties of the Russian Federation.

The individual's will to waive his rights and freedoms can be expressed in a written statement, minutes, other documents of the case and should unequivocally confirm such waiver.

As it follows from the provisions of Article 389 § 1.2 of the Criminal Procedural Code and Article 6 § 1 of the Convention, as interpreted by the European Court, an appellate court cannot review a criminal case in the absence of the person sentenced [in the first instance] to a prison sentence, unless such person has clearly stated his wish not to be present during the appeal hearing.

The person's will in relation to waiver of his rights could also be attested by that person's inaction, if the law provides such possibility (see, for instance, Article 222 § 8 of the Civil Procedural Code).

11. The courts should bear in mind that the decisions and actions (inaction) of the State bodies, local self-government, civil servants, including inquiry officers, investigators, heads of the investigative bodies and prosecutors, state and municipal officials, should be consistent not only with the Russian

legislation, but also with the universally accepted principles and norms of international law, international treaties of the Russian Federation, including the Convention and its Protocols as interpreted by the European Court (Article 15 § 4 of the Russian Constitution, Articles 1 § 2 and 11 § 4 of the Civil Procedural Code, Article 1 § 3 of the Criminal Procedural Code, Article 1.1 § 2 of the Administrative Offences Code of the Russian Federation). For example, evidence could be ruled inadmissible if it has been obtained in breach of the provisions of the Russian procedural legislation and if it has been obtained in breach of the Convention or its Protocols as interpreted by the European Court.

12. The provisions of the Convention and its Protocols, under Article 31 § 1 of the Vienna Convention, are subject to a systemic interpretation. Therefore the need to comply with the requirement of reasonable time in judicial proceedings cannot justify limitations of other rights stipulated by Article 6 of the Convention (for example, the equality of arms, the right of the accused to question witnesses testifying against him). That's why the court should not, under the pretext of complying with the reasonable time requirement, refuse to examine evidence necessary for a complete and objective consideration of the case and for the procedural equality of the parties.

13. Article 1 of the Convention, as interpreted by the European Court, obliges states, through its bodies, to take the necessary steps in order to ensure effective protection of rights and freedoms of persons under their jurisdiction. For instance, if, while adjudicating a case concerning paternity the court concludes that the genetic expert report is incomplete or insufficiently clear, in order to ensure effective protection of the child's rights it can order an additional expert report, in line with Article 87 of the Civil Procedural Code.

Further to the provisions of Article 6 § 3 (c) as interpreted by the European Court, an accused has the right to effectively defend himself in person or through legal assistance of his own choosing. The courts of the first, appellate, cassation and supervisory instances should take steps in order to fully explain the meaning of this right, as well as to ensure its implementation in line with the Russian legislation.

14. Article 5 § 4 of the Convention in the interpretation of the European Court provides for everyone's right to have the lawfulness of his detention to be determined speedily by a court and his prompt release if the detention is not lawful. In this respect, once the courts receive the complaint or [the prosecutor's] submission against the decision to order pre-trial detention, they should immediately transfer such materials to the appeal court. The appeal courts should ensure consideration of such complaints and (or) submissions within time-limits established by Article 108 § 11 of the Criminal Procedural Code.

15. The principle of presumption of innocence, provided for by Article 49 § 1 of the Russian Constitution, Article 14 of the Criminal Procedural Code of the Russian Federation and Article 6 § 2 of the Convention, is one aspect of a fair criminal trial. Accordingly, no document produced by a court should contain expressions which could create an impression that the person had committed a crime before a final judicial act found him guilty or the criminal proceedings against him were closed under non-rehabilitating reasons.

16. In application of Article 6 § 1 of the Convention as interpreted by the European Court, an individual deprived of his liberty may take part in the consideration of a civil case.

17. In line with the provisions of Article 46 of the Convention, interpreted in the light of the Recommendation of the Committee of Ministers of the Council of Europe R(2000) 2 of 19 January 2000 on the re-examination or reopening of certain cases at domestic level

following judgments of the European Court of Human Rights (thereafter – the Recommendation on re-examination), not every violation of the Convention or its protocols established by the European Court in respect of the Russian Federation calls for review of the domestic judicial acts under newly discovered circumstances.

The courts should bear in mind that a judicial act should be reviewed if the applicant continues to suffer from negative consequences of such act ([for instance,] if the person remains in prison in violation of the Convention provisions), and the compensation awarded to the applicant under Article 41 of the Convention, or measures other than re-examination, do not ensure restitution of the rights and freedoms infringed.

At the same time, the violation established by the European Court allows to make at least one of the following conclusions:

- that the judicial act directly contravenes the Convention on the merits (for example, where the decision about administrative deportation of a person from the Russian Federation has been found by the European Court to be in breach of Article 8 of the Convention);
- that the violation of the Convention or its Protocols of a procedural nature puts in question the outcome of the proceedings (for example, the court's refusal to call a witness whose statements could have been decisive for the outcome of the case (Article 6 of the Convention)).

When deciding about re-examination, the courts should check the existence of causal link between the violations established by the European Court and the negative consequences from which the applicant continues to suffer.

18. Under the provisions of Article 392 § 1 and § 4.4 of the Civil Procedural Code, following the finding by the European Court of a violation of the Convention or its Protocols it can be necessary to review decisions or other judicial acts.

19. Following the finding of the European Court about a violation of the Convention or its Protocols, the time limit for the person to apply to a court in order to have a final judicial act reviewed should be calculated from the day following the day when the judgment of the European Court has become final, in line with Articles 28, 42 and 44 of the Convention.

If the three months term stipulated by Article 394 of the Civil Procedural Code has been exceeded for a valid reason, it could be restored (for instance, if the applicant or his representative had not timely received the European Court's judgment).

20. Article 1 of the Federal Law on Ratification, read in conjunction with Article 46 of the Convention, demands that when reviewing a judicial act which had triggered an application to the European Court, the courts should take into account the legal positions of the European Court as stated in the relevant judgment and the violations of the Convention and its Protocols found by the Court.

21. If the European Court establishes a procedural violation of the rights of the persons who have taken part in the proceedings, or who have been unjustifiably excluded from such proceedings, the court may, when reviewing the judicial decision in question, upon ensuring - if possible in the circumstances of the case - the reparation of the violations of the Convention or its Protocols which have occurred previously, adopt a judicial act which would be similar to the previous one (Article 46 of the Convention, as interpreted in accordance with the Recommendation on re-examination).

22. If the judicial act in question had been enforced by the time of entry into force of the European Court's judgment which found violations of the Convention and its Protocols by that act, the re-

examination of that act under the newly discovered circumstances in view of the said judgment of the European Court should prevail over the principle of legal certainty (Article 46 of the Convention, interpreted in the light of the Recommendation on re-examination). If, after the quashing of the executed judicial act, a new decision is adopted, rejecting the claims in total or in part, or if the court refuses to consider the claim on its merits, the execution of the judicial act should be reversed, with the exception of cases falling under Article 445 of the Civil Procedural Code.

23. If the applicant seeks to obtain compensation for damages caused by the violations of human rights as established by the European Court, the courts should take into account the awards already made under Article 41 of the Convention. For example, a claim seeking financial compensation for damages caused by inhuman treatment during a certain period should not be granted if the European Court has already made an award under the same heading.

At the same time, such claims should not be dismissed solely because the European Court has refused to award a compensation for the violations found, unless the Court has considered that the fact of finding of a violation was sufficient for the compensation of non-pecuniary damage.

24. The European Court does not establish individual liability for actions (inaction) which result in breaches of the Convention and its Protocols. Therefore, wherever recourse action is brought under Article 1081 § 3 of the Civil Procedural Code, the courts should establish guilt of the individuals in question, unless the law establishes that the damage should be reimbursed in the absence of guilt (Article 1064 § 2 of the Civil Code of Russia).

25. In order to acquaint themselves with the texts in Russian of the judgments adopted by the European Court in respect of Russia and other countries – members of the Convention, the courts are advised to rely on the data system “International Law”, developed by the Supreme Court and available within the State automated system “Justice”, as well as the European Court’s data system HUDOC at <http://hudoc.echr.coe.int/sites/eng>

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