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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Contact: Clare Ovey
Tel: 03 88 41 36 45

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Meeting: 1265 meeting (20-22 September 2016) (DH)

Communication from a NGO (Centre de la protection internationale) (20/05/2016) in the cases of Vanyan and Khudobin against Russian Federation (Applications No. 53203/99, 59696/00).

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 : 1265 réunion (20-22 septembre 2016) (DH)

Communication d'une ONG (Centre de la protection internationale) (20/05/2016) dans les affaires Vanyan et Khudobin contre Fédération de Russie (Requêtes n° 53203/99, 59696/00) ***[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.

Centre de la protection internationale
22 rue de la 1 Armée, 67000 Strasbourg, France
Tél. +(33)388242144, tél./fax +(33)388361731, e-mail: cpistrasbourg@yahoo.com

Department for the Execution of Judgments of the ECHR
DGI - Directorate General of Human Rights and Rule of Law
Council of Europe
F-67075 STRASBOURG CEDEX

E-mail: dgI.Execution@coe.int

«10» May 2016

Dear Mr. President,

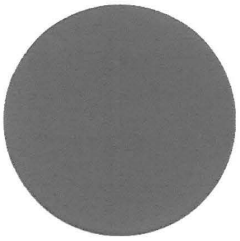
Under Rule 9.2 of the Rules of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the enclosed communication regarding the execution of the cases of *Vanyan v Russia* (no. 53203/99) and *Khudobin v Russia* (no. 59696/00) is presented to your attention.

We would be grateful for this communication to be put before the Committee of Ministers for the upcoming Committee of Ministers Human Rights meeting and to be added to the list of working documents. We also respectfully request to forward it to the Permanent Representative of the Russian Federation to the Council of Europe and the Office of the Representative of the Russian Federation at the European Court of Human Rights.

Sincerely,

Karinna Moskalenko

Anna Maralyan



Centre de la protection internationale
22 rue de la 1 Armée, 67000 Strasbourg, France
Tél. +(33)388242144, tél./fax +(33)388361731, e-mail: cpistrasbourg@yahoo.com

Execution of the Case of Vanyan v. Russia and Khudobin v. Russia – General Measures

Re: Vanyan v. Russia (no. 53203/99), 15 December 2005
Khudobin v. Russia (no. 59696/00), 26 October 2006

Centre de la protection internationale, together with Russian NGOs and human rights lawyers, seeks to provide the Committee of Ministers of the Council of Europe (hereinafter the Committee) information under Rule 9.2 of the Rules of the Committee of Ministers for supervision of the execution of judgments and of friendly settlements on the failure of the Russian Federation to take effective general measures in regard of the referred cases.

1. Background of the case

The European Court of Human Rights (hereinafter the Court) in its judgment on the cases of *Vanyan v. Russia* and *Khudobin v. Russia* found that there has been a violation of Article 6.1 of the European Convention on Human Rights (hereinafter the Convention) in relation to the conviction as a result of entrapment by the police.
The court ruled that "[w]here the activity of undercover agents appears to have instigated the offence and there is nothing to suggest that it would have been committed without their intervention, it goes beyond that of an undercover agent and may be described as incitement. Such intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined" (***Vanyan v. Russia,*** para. 47).
The Court also noted that the use of undercover agents must be restricted; the police may act undercover but not incite (**Khudobin V. Russia,** para 128)

2. Obligations of the Russian Federation to Execute the Referred Judgments.

Decisions of the Court are binding upon Contracting States. Under Article 46 decisions, in which the Court finds a violation of the Convention and/or its Protocols imposes on the respondent State a legal obligation not just to pay the amount awarded by just satisfaction, but also to choose the general and/or individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and take all necessary measures required for restitutio in integrum.[1]
The commitment to fulfil obligations set in a treaty by a contracting state is also confirmed by pacta sunt servanda principle, which is universally recognized as stated in the preamble of the Vienna Convention on the Law of Treaties (hereinafter VCLT) and constitutes a part of customary international law and even natural law[2]. This principle is defined in Article 26 of VCLT and is considered to be of "supreme importance"[3] stating that 'every treaty in force is binding upon the parties to it and must *be performed by them in good faith.*' 'Good faith' rule requires States to fulfil their obligations under the treaty to the best of their ability in conformity with the letter and purpose of the treaty.
Further, Interlaken Declaration adopted on 19 February 2010 stresses that ***full, effective*** and rapid execution of the final judgments of the Court is indispensable and requires States Parties to the Convention to ***ensure the full*** and rapid execution of judgments of the Court.

It also recalls that it is first and foremost the ***responsibility of the States Parties to guarantee the application and implementation of the Convention*** and consequently calls upon the States Parties to commit themselves ***to fully executing*** the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations. The Declaration also requires States Parties to ensure, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate[4].
In its turn, Brighton Declaration adopted in April 2012, emphasized that States Parties must respect the rights and freedoms guaranteed by the Convention, and must ***effectively*** resolve violations at the national level. It restates that the Court acts as a safeguard for violations that have not been

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1 Ilascu and others v. Moldova and Russia,(App.48787/99), 8.07.2004, para.487; Assanidze v. Georgia (App.71503/01), 08.04.2004, para.198; Maestri v. Italy,(App.39748/98), 17.02.2004, para.47, etc

2 Corten O., Klein P., The Vienna Conventions on the Law of Treaties: A Commentary (vol. I), Oxford University Press, 2011, p.661, available at:
http://books.google.co.uk/books?id=ysWc5juXAkcC&pg=PA683&lpg=PA683&dq=%22subject+to+the+provisions+of+the+present+Code,+States+are+bound+to+carry+out+in+good+faith+the+obligations%22&source=bl&ots=pRrow-WpEX&sig=cWyqtfEyPaqlLFObUjGgb8Qglug&hl=en&sa=X&ei=h7-ST4u_E4210QWH-JXZBg&ved=0CB8Q6AEwAA#v=onepage&q=%22subject%20to%20the%20provisions%20of%20the%20present%20Code%2C%20States%20are%20bound%20to%20carry%20out%20in%20good%20faith%20the%20obligations%22&f=false
3 Sir Humphrey Waldock, Sixth Report on the Law of Treaties, (doc.A/CN.4/186), YILC, (vol. II), New York 1966, p.60 from:http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf
4Council of Europe, High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration, 19 February 2010 available at: http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/interlaken_declaration_en.pdf

remedied at the national level and where the Court finds a violation, States Parties ***must abide by the final judgment of the Court***. It also highlights that all laws and policies should be formulated, and all State officials should discharge their responsibilities, ***in a way that gives full effect to the Convention***. Brighton Declaration calls upon State Parties to take practical measures to ensure that ***policies and legislation comply fully with the Convention***.[5]

Further, Brussels Declaration, adopted on 27 March 2015, whilst noting the progress achieved by States Parties with regard to the execution of judgments, emphasizes the importance of ***the full, effective and prompt execution of judgments and of a strong political commitment by the States Parties in this respect.***

Brussels Declaration states that emphasis must be placed on the current challenges, in particular the repetitive applications resulting from the non-execution of Court judgments.

The Brussels Conference recalls the ***primary responsibility of the States Parties to ensure the application and effective implementation of the Convention.***

It also stresses the importance of putting in place in a timely manner effective remedies at domestic level to address violations of the Convention found by the Court. It attached particular importance to ensuring ***full, effective and prompt follow-up to those judgments raising structural problems.***[6]

3. Effectiveness of the execution of the Cases Vanyan v Russia and Khudobin v Russia in the Part of General Measures

The NGOs welcome the efforts of the Russian Federation authorities to amend the national laws in order for them to be compatible with the Court's rulings. The organisations also highlight the importance of the decision of the highest court of the Russian Federation regarding the discussed issue that is in line with the Court's findings. Further, the national NGOs note that the judicial practices of 2007-2008 demonstrated positive trend towards delivering judgments that did not contradict the Court's findings in the referred decisions. (Attachment 1). However, it is necessary to inform the Committee of Ministers about serious violations taking place at national level, which make it clear that the respondent State has largely ignored the judgments.

The NGOs state that after a short period of time mentioned above, the mal-practices of entrapment by the police recommenced. The NGOs submit a list of 57 cases that are similar to the referred cases and where the authorities of the Russian Federation made similar violations as in

[5] Council of Europe, High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, 19 and 20 April 2012, available at:
https://wcd.coe.int/ViewDoc.jsp?Ref=BrightonDeclaration&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

[6] Council of Europe, High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility": Brussels Declaration, 27 March 2015 available at:
http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Declaration_Bruxelles_EN.pdf

the referred cases (Attachment 2). It should be noted that throughout Russia the authorities of the State resort regularly to undercover agents, who incite the commission of crimes in cases similar to those referred, which demonstrates the existence of a systemic problem in this regard.

We bring to the attention of the Committee that the systemic nature of the problem is emphasized by the Court as well. In a number of cases, including *Lagutin and Others v Russia* (nos. 6228/09, 19123/09, 19678/07, 52340/08 para. 134) *Sergey Lebedev and others v Russia* (nos. 2500/07, 43089/07, 48809/07, 52271/07 and 54706/07, para. 19), *Veselov and Others v Russia (nos. 23200/10, 24009/07 and 556/10, para. 126),* where the Court found violations identical to those in *Vanyan v Russia* and *Khudobin v Russia* cases, the Court ruled that "the absence in the Russian legal system of clear and foreseeable procedure for authorising test purchases remains a structural problem, which exposes the applicants to arbitrary action by the police and prevents the domestic courts from conducting an effective judicial review of their entrapment pleas."
Further, in the case of *Lagutin and Others v Russia* the Court explicitly noted that "the failure to conduct an effective judicial review of the entrapment plea which gave rise to the finding of a violation in this case was intrinsically linked to the structural failure of the Russian legal system to provide for safeguards against abuse in the conduct of test purchases. The Court has already highlighted the structural nature of the problem, indicating that in the absence of a clear and foreseeable procedure for authorising test purchases and operational experiments the system was in principle inadequate and prone to abuse […]. **This situation in principle calls for the adoption of general measures by the respondent State**, which remains, subject to monitoring by the Committee of Ministers, free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, **provided that such means are compatible with the conclusions set out in the Court's judgment**." *(Lagutin and Others,* cited above, para. 134)
The table attached to this communication (Attachment 2) demonstrates that due to the failure of the Russian Government to take effective general measures, that are compatible with the findings of the Court in the aforementioned cases, resulted in violation of rights of dozens and dozens of persons.

4. Conclusions and Requests to the Committee of Ministers

Based on the aforementioned, it should be concluded that the violation of the right to fair trial guaranteed by Article 6 of the Convention continues because the respondent State failed to effectively execute the referred judgments in the part of general measures. As a result numerous persons are convicted based on the entrapment by undercover agents of the police, who incite the commission of offences, which was repeatedly held to be incompatible with the Conventions by the Court. Hence, none of the taken measures of general character could be regarded as effective, because they do not prevent further similar violations.
It is noteworthy that the lack of effective general measures will result in the numerous applications to the Court, which will be added to the Court's backlog, while it could have been prevented if the Russian Government had taken effective general measures in the referred cases.

Taking into consideration the fact that that the respondent State is reluctant to take effective general measures that would eliminate further similar violations and the fact that this is a systemic problem in the Russian Federation, we respectfully request the Committee:

1. To invite the High Contracting Party to inform of the general measures which it has taken or intends to take in consequence of the transmitted judgment;
2. To request the respondent State to effectively abide by the conclusions and spirit of judgments of the Court;
3. To examine the referred cases under enhanced procedure as set by point 8 of the Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action plan – Modalities for a twin-track supervision system, as the referred judgments raise structural problems as identified by the Court;
4. To adopt an interim resolution on non-execution of the referred judgments in the part of general measures.

We urge the Committee to exercise any and all available options exert any necessary pressure on the Government of the Russian Federation for the purposes of ensuring the due execution of the judgments in question.

We thank you in advance for your cooperation and remain at your disposal for any clarifications and assistance you may require.

Sincerely,

Karinna Moskalenko

Anna Maralyan