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European Court Tackles Russian Domestic Procedure

**An analysis of selected judgments in
2003 and 2004**

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Some of the most egregious restrictions and violations of human rights in Russia are often hidden behind a veil of formality. The Russian judicial system is usually consistent in giving recognition to fundamental human rights and freedoms; indeed the 1993 Russian Constitution is a progressive document that in many instances expands on rights found in the European Convention and strengthens the standard of protection to be applied to them. Nevertheless, Russian procedural law, which remains underdeveloped in fundamental areas such as case management, rules of evidence, and interlocutory remedies, all too often leaves the judicial system open to denial of fundamental rights – not as a matter of merit, but through manipulation of procedural lacunae. One of the challenges of the Russian advocate is to lift the veil of formality by exposing these flaws.

This is particularly important in proceedings before the European Court of Human Rights, since the Court is typically concerned with the overall fairness of the proceedings, rather than with ‘mere’ procedural irregularities along the way. For this reason, a number of recent judgments issued by the European Court on issues of Russian domestic procedure are particularly welcome, in that they show the Court’s readiness to scrutinise this area of domestic law and practice. Interestingly, many of these judgments involve no separate issue of a breach of substantive rights.

In *Posokhov v. Russia*¹, the applicant, a customs officer, was convicted of abuse of

office and of being an accessory to evasion of customs duties. It appears that the applicant was not detained at any point in the proceedings, and by the time the case came before the Court for a hearing on the merits, the conviction had been quashed and the case dismissed as time-barred without any adverse finding of guilt. Nevertheless, the applicant pursued his case before the European Court under Article 6 of the Convention on the grounds that the two lay judges who had participated in consideration of his case had not yet been officially appointed at the time of the proceedings. Despite the fact that the applicant's conviction was eventually overturned, the Court found a violation of Article 6 on the basis that the composition of the convicting court was unlawful, which had never been acknowledged in the domestic proceedings.

In *Ryabykh v. Russia*², the applicant complained that a final domestic judgment awarding her compensation for savings devalued following economic reforms in 1991 had been overturned through the supervisory review procedure. She alleged violations of Article 6 of the Convention and Article 1 of Protocol 1 to the Convention. Here, the substance of the applicant's claim (the loss of savings through devaluation) was not protected under the Convention, and in any event the Government eventually granted compensation to the applicant. Nevertheless, the Court proceeded to examine the case under Article 6 as to the compatibility of the domestic supervisory review procedure with the Convention.

Whilst the Court did not declare supervisory review incompatible *per se*, it found that its exercise to quash a final decision on anything less than "substantial and compelling" grounds offended the principle of 'legal certainty' inherent in Article 6. This effectively amounts to a condemnation of the wide discretion available to a court in supervisory review proceedings under domestic law.

In *Smirnova v. Russia*³, the applicants, twin sisters convicted of fraud, were detained repeatedly as their cases proceeded to trial. The Court found a violation of Article 5(1) and 5(3) of the Convention in that the domestic courts did not offer sufficiently detailed reasons for their repeated detentions, but relied only upon the gravity of the crimes alleged. A violation of Article 6 was also found as to the length of the proceedings, despite the fact that the applicants had repeatedly sought to evade the

prosecution. The Court found that this too, was indirectly attributable to the authorities in that the “sparsely reasoned and recurring decisions to detain and release... aroused in [the applicants] a sense of insecurity and mistrust toward justice [and] thereby indirectly urg[ed] them to abscond”. Notably, the issues raised were once again essentially procedural⁴, as the applicants’ guilt was not in dispute before the Court and the periods of detention did not exceed the length of their final sentences. The case of *Timofeyev v. Russia*⁵ reaffirmed the Court’s earlier judgment in *Burdov v. Russia*⁶. These cases, which involved failure to enforce judgments in civil proceedings, are of use to the practitioner in that they demonstrate the State cannot evade its obligations under Article 6 by simply enforcing a judgment once it is evident the matter will be heard by the European Court. Belated enforcement must be accompanied by an acknowledgment of the violation and ‘just satisfaction’ commensurate to the delay. The case of *Rakevich v. Russia*⁷ concerned the compatibility of compulsory placement in a mental hospital with the protection against arbitrary deprivation of liberty under Article 5 of the Convention. The Court found that the applicant’s detention in a mental hospital was not arbitrary given that the authorities’ decision was based on psychiatric evidence that she was mentally ill, and this was later affirmed by the domestic courts. Nevertheless, a violation of Article 5(1) of the Convention was found given that her detention was reviewed by the court only thirty-nine days after her detention, as opposed to within five days as required by domestic law. A further violation of Article 5(4) was established in that the applicant had no procedural route to challenge the detention of her own accord, notwithstanding the fact that the institution itself was under a statutory duty to arrange for judicial sanction of her detention. Lack of an effective interlocutory remedy was also addressed in *Kormacheva v. Russia*. Here, proceedings in an employment dispute involving the applicant lasted over six years, five of which were post-ratification of the Convention. Despite the existence of formal time-limits for consideration of civil proceedings under domestic law, the applicant could do little more than complain to the judge’s superiors when these were not observed. As a result, the Court established not only a violation of the ‘reasonable time’ requirement in Article

6, but also a breach of Article 13 in that the applicant was unable to obtain preventative or compensatory relief for the delay.

The progression of these cases before the Court has, to a degree, guided Russian legislators in their reform of Russia's administrative, civil, commercial and criminal codes. Notably, the use of lay judges has been done away with in civil and criminal proceedings, and some of the flaws in Russia's supervisory review procedure have been removed. More reform is needed, as well as effective remedies to ensure observance of existing rules. Nevertheless, the Court's approach demonstrates that violations of domestic procedure, even ones that are relatively widespread and which may have not affected the ultimate outcome of the case, will be taken up by the European Court if they raise a legitimate issue under the Convention. In the domestic arena, these recent judgments also give Russian advocates a useful instrument to counteract attempts at manipulation of gaps in procedural rules to thwart their clients' interests.

Endnotes

¹ Judgment of 4 March 2003, Application no. 63486/00.

² Judgment of 24 July 2003, Application no. 52854/99.

³ Judgment of 24 July 2003, Application nos. 46133/99 and 48183/99.

⁴ Interestingly, the Court found an ancillary violation of Article 8 in that the retention of the first applicant's passport pending trial was not in accordance with domestic law. The Court found that this constituted an interference with her private life given that "in their everyday life Russian citizens have to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets" (at § 97).

⁵ Judgment of 23 October 2003, Application no. 58263/00.

⁶ Judgment of 7 May 2002, Application no. 589498/00.

⁷ Judgment of 28 October 2003, Application no. 58973/00.

⁸ Judgment of 29 January 2004, Application no. 53084/99.