



**MEMORIAL - EHRAC**  
BULLETIN:

EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE  
**EHRAC**

International Human Rights Advocacy

## The Right To A Defence At The Discretion Of Judges

*Anna Demeneva*

*Legal specialist at the Ural Centre for the Constitutional and International Defence of Human Rights, Yekaterinburg*

At first glance, it would seem that Russian legislation on securing the right to defend oneself during criminal proceedings conforms to international standards, because the Criminal Procedure Code (CPC) of the Constitution of the Russian Federation contains the right of access to qualified legal assistance, which may be at no cost to the defendant. However, obstacles do arise in asserting the right to a defence in criminal proceedings in Russia, often related to the failure of Russian laws or developing jurisprudence to conform to international norms. One such area of serious discrepancy is the way in which Article 48 of the Russian Constitution and Article 49 of the Criminal Procedure Code are interpreted and applied.

In criminal proceedings, the right to a defence should be seen as inseparable from the right to collaboration in such legal defence, which means the right to the assistance of a defence lawyer or representative.

Article 48 of the Constitution provides that 'each person is guaranteed the right to receive qualified legal assistance'. In the cases provided by the law, legal assistance is rendered without charge. Each person who has been detained, taken into custody or accused of a crime has the right to seek the assistance of an attorney (a defence lawyer) from the moment of such detention, taking into custody or accusation.

Part I of Article 49 of the Criminal Procedure Code establishes that: 'A defence lawyer is a person who carries out, in the manner established by this Code, the defence of the rights and interests of a suspect or defendant, and affords them legal assistance during the criminal process.'

As a general rule, the interests of a defendant in criminal proceedings are represented by a lawyer. But according to para 2 of Article 49 of the CPC, another type of person can be permitted alongside the lawyer, in the capacity of a defender: 'Lawyers are admitted as defenders. By determination or order

of the judge, alongside the lawyer can be admitted one of the defendant's close relatives or any other person for whom the defendant petitions. In the work of a Justice of the Peace, such a person can be admitted instead of a lawyer.'

'Another defender', for example, could in practice be a legal expert who is fully competent and familiar with the matter at hand, but who does not have the status of a lawyer; or a legal expert with specialist knowledge and experience – such as in the field of the international defence of human rights.

An accused could consider that a lawyer's assistance is inadequate, for example, where the lawyer has no training in the field of international human rights, and the accused submits a motion to the judge for the admission of another person as his defender, one who has no status as a lawyer, but who has such specialised knowledge. "Insofar as none of my lawyers have specialised knowledge in the field of international defence of human rights, and the government is not able to provide me with such a lawyer, I ask you to admit as one of my defenders the legal expert D., to collaborate with me in securing my right to qualified legal assistance and the right to approach international legal bodies." – this is how one of my clients addressed a motion to the court.

It is understandable that Article 49 of the CPC envisages the admission of another defender in the criminal process only alongside a lawyer. The state is required to guarantee the provision of qualified legal assistance, and the only system in existence – while somewhat reminiscent of the system of control by government bodies over the qualifying of practising legal experts – is membership of the legal bar, with its legally prescribed procedure for taking exams. The same law defines the activity of lawyers as 'qualified legal assistance, afforded on a professional basis by persons who have attained the status of lawyers.'

Another defender appears as a supplementary means of defence, and the right of a defendant to this supplementary means of defence is provided by the Criminal Procedure Code. Now we will turn our attention to the wording of Part 2 of Article 49 of the CPC: other persons ' . . . may be admitted', which literally means 'or may not be admitted.'

If the judge grants the defendant's motion and admits another person as a defender, by issuing an order, no questions arise, the defender is availed of rights provided for him in the Russian Criminal Procedure Code. But what about the situation where a judge refuses to admit such a defender?

We note that the procedure for admitting a defender is defined in the Criminal Procedure Code: by order of the judge. But the Code does not oblige the judge to issue an opinion explaining an order to refuse admission of a defender. Judges happily take advantage of this, writing 'denied' on an application for a defender to be admitted; or, if the motion for admission of another person as defender is filed during court proceedings, they state that "the Court, having deliberated the matter in open session, has decided to deny the motion", thus issuing their decision on the record. This means that the refusal to admit someone as a defender cannot be appealed.

In addition, the Article gives the judge unlimited discretionary powers to refuse to admit another person as a defender: firstly, because the Article contains no examples, criteria or guidance as to when it is appropriate or inappropriate to deny such a request; and secondly, because the Article does not oblige

judges to explain their denial. This is a very serious omission, making the Article into nothing more than a licence for arbitrary actions by judges. 'Other persons may be admitted or may not be admitted, but anyway what is the difference, after all, there is the right to a lawyer, and at no cost', this was how it was calmly expressed to me by one of the highest officials of the provincial court. What was most alarming is that his statement did not violate the standard of the CPC. Article 49 of the CPC allows him to use this kind of reasoning. I don't want to accuse judges of maliciously refusing to admit to the judicial process all legal experts other than lawyers. However, based on the content of Part 2 of Article 49 of the CPC, a judge decides a question regarding a person's right to a defence, using his own subjective evaluation of the reasonableness of such an admission. As has already been noted, the Article does not contain even the most formal guidelines – such as whether the judge should assess the qualifications of another defender and draw conclusions correspondingly; whether the judge should consider such factors as the category of the crime of which the defendant has been accused; whether it is a private or public lawyer who is providing his defence, and so on. Unfortunately, when judges are deciding such questions, they are more often guided by the popular understanding of law: 'you already have a lawyer, why should you need a legal expert from a voluntary organisation?', 'why do you need an international legal expert in the court of first instance? When you apply to the European Court, that will be the time to ask for such a legal expert to be admitted . . .'

Consider the situation when the hearing in the court of first instance is over, the verdict has been pronounced. The client is in investigative solitary confinement, and is preparing to submit a cassation appeal against the verdict. Once again, along with the assistance of the lawyer, the convicted person would like another defender. This may be for many reasons: he may not be happy with the quality of the lawyer's work, or he may be planning to approach international bodies in the future defence of his rights. In the latter case, it is essential at the appellate stage to indicate competently those violations of the person's rights that are guaranteed by international instruments, so as to observe the principle of exhaustion of domestic legal remedies, as established by both the European Convention on Human Rights and by the International Covenant on Civil and Political Rights.

Once again, the same problem arises. 'Another defender' has no opportunity to meet with his or her client and discuss the process of writing the cassation appeal and other procedural documents, since he is not admitted into the isolation cell. In that case, the convicted person and the potential defender are obliged to turn to the Court that issued the verdict, to ask it to admit the desired person as a defender. At this point a wide range of obstacles can be produced against the admission of another defender. One judge, carefully reading Article 49 of the CPC, will announce that it applies only to judicial hearing processes, and that it is impossible to admit a defender when they are not in progress. My client and I were told to approach the cassation court with a motion to be admitted. The cassation appeals court indicated that I should bring this motion in the course of the cassation appeal hearing.

In another case, the court admits another person as a defender, but does not issue a ruling on it, indicating again that a ruling is issued only in connection with admission to a hearing; at the current stage, the court issues a pass into the isolation cell. It is

then the turn of the staff of the isolation block to glance at the CPC, and use Article 49 to refuse the defender access to the person in custody. The reasons given are (a) that a pass from the Sverdlovsk provincial court is not binding on the SIZO (institution of confinement pending sentencing); (b) there is no written ruling from the judge, without which admission of another person as a defender is not possible, within the meaning of Article 49 of the CPC.

Apart from anything else, someone who is under investigation or who has been convicted, having no access to a particular legal expert that he has specially chosen for the purpose, is deprived of the possibility effectively to defend his rights in international forums. It is no secret that the procedure for applying to international bodies is quite complex. For the complaint to be acceptable, a person may need to consult with a specialist. As already indicated, such a specialist does not have to be a lawyer. He or she could be a legal expert from a voluntary organisation or a teacher of law. But in this case, how is a person in custody to obtain such a consultation or a specialist to provide it (so that a competent and effective document can be prepared), if access to the person in custody is denied? It is clear that such impediments also constitute a violation of the right to a legal defence in international forums – after all, Article 34 of the European Convention on Human Rights directly provides that ‘The High Contracting Parties undertake not to hinder in any way with the effective exercise of this right.’

It is important to note that, in practice, judges and SIZO staff, along with prosecutor’s offices charged with monitoring the observance of laws in places of custody, are extending the application of Article 49 of the CPC (restricting freedom of access to suspects and convicted criminals to lawyers only) to those cases emanating from a suspect or a convicted criminal in civil courts as well. In other words, a person who is not in prison has the right to authorise anyone to represent his interests in a civil matter, but the possibility for a suspect or someone who has been convicted to choose a defender is once again limited to lawyers. Of course, a form of authority will be accepted for a non-lawyer in a civil court, but the legal specialist will have no opportunity to discuss the case with the client, nor to report on his conduct of the case, because his form of authority in a civil matter will still not gain him access to the SIZO. This is a serious obstacle to realising one’s right of access to justice in civil matters, remembering that part of a civil court’s work includes the consideration of complaints by inmates of SIZOs concerning violations of their rights by the institution management, and complaints about the conditions of their custody.

As strange as it may seem, the source of the problem in the situation described above is the non-compliance of Article 48 of the Russian Constitution with international norms. Both Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention provide the right for persons to defend themselves by means of ‘a defender of their choosing.’ The Russian Constitution contains no reference to a defender of choice, resulting in a corresponding interpretation of the Article by agencies applying the law. The Secretariat of the Russian Constitutional Court, in response to a complaint to the Russian Constitutional Court indicated that “. . . Part 2 of Article 49 of the Russian CPC does not restrict a citizen’s right to receive qualified legal assistance. The right of independent choice of a lawyer (defender) does not mean the right to choose as a defender

any person at all at the discretion of the suspect or accused . . .”.

However, remembering the content of part 4 of Article 15 of the Russian Constitution; of the Federal Law ‘On Ratification of the Convention on Human Rights and Fundamental Freedoms’; of the Resolution of the Plenum of the Russian Supreme Court of 10<sup>th</sup> October 2003 ‘On the Application by Judges of the general jurisdiction of universally recognised principles and of norms of international law and international treaties of the Russian Federation’, it is necessary to draw a different conclusion. The right to a defender of one’s choice is guaranteed by international instruments, and it is submitted that Article 48 of the Russian Constitution should be interpreted in the light of international obligations of the Russian Federation for the defence of human rights.