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Failure to disclose and Rule 33 requests in North Caucasus ECHR cases

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Lawyers acting in ECtHR cases against the Russian Government have consistently been faced with the problem of how to counter incomplete or even a total absence of disclosure of relevant documentation on the part of the Respondent State. This problem is particularly noticeable in cases involving a domestic criminal investigation (such as disappearance cases or deaths in custody) where sight of documentation emanating from the investigating authorities could be crucial in determining the fate of a particular individual and/or whether or not an effective investigation has been conducted by the Respondent State.

In defending its actions the Russian Government has relied on Art. 161 of the Russian Code of Criminal Procedure (CCP), para. 3 of which states that: *"Information from a preliminary investigation may only be made public with the permission of the investigative and interrogating officers and only in that volume which they consider permissible, if such divulgence does not contradict the interests of the preliminary investigation and does not constitute a violation of the rights and lawful interests of the participants in criminal proceedings. The divulgence of information concerning the private life of participants in criminal proceedings without their consent is not permissible."*

The ECtHR has responded to this by stating that Art. 161 does not preclude the disclosure of documents from a pending investigation file, but rather sets out a procedure for, and limits to, such disclosure. The ECtHR has further stated that in relying solely on Art. 161 and failing to specify either the na-

ture of the documents withheld, or the grounds on which it is said they cannot be disclosed, the Government has violated Art. 38(1).[1]

However, this approach has recently been undermined by a number of decisions in cases from the North Caucasus. In these cases the ECtHR has granted requests from the Russian Government pursuant to Rule 33(1) of the Rules of Court to restrict public access to documents requested by the ECtHR.

Rule 33(1) provides that *"all documents deposited with the Registry by the parties [...] shall be accessible to the public..."* However, Rule 33(2) provides for restrictions to this access *"in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice"*. This Rule is underpinned by Art. 40(2) ECHR which states that *"documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise"*.

In several pending cases, Rule 33 requests made by the Russian Government have been granted even though the Respondent State failed to explain how its request fell within the ambit of Rule 33(2). Of even greater concern is the fact that in granting these requests the Court itself also failed to explain how, in the absence of any evidence or submissions from the Respondent State, it was able to determine that one of the stated restrictions within Rule 33(2) had indeed been made out.

In the absence of any reasoned argument by either the Respondent Government or the ECtHR justifying the application of the Rule 33 procedure in these cases, the applicants are clearly placed at a significant disadvantage in seeking to address this worrying development. This is also true in cases where the ECtHR has unilaterally granted certain Rule 33 applications by the Respondent State even before seeking representations from those acting on behalf of the applicants. Furthermore, representations submitted on behalf of the applicant following notification of the relevant decisions have subsequently been rejected without consideration. This approach would seem to significantly undermine the inter-partes nature of proceedings before the ECtHR.

In one of these cases, the Government's request merely stated that: *"the preliminary investigation is still pending and the disclosure of information contained in the case file might violate the interests of the participants of the criminal investigation"* without putting forward any evidence as to how the disclosure of information in the case file (concerning the investigation into the abduction, torture and murder of the applicant's son by State agents) could fall within the ambit of any of the restrictions listed in Rule 33(2). Furthermore, when responding to the applicant's argument that any investigation must make its findings public in order to be effective, the Russian Government simply referred in general terms to an *"investigative secret"*, which, in the particular circumstances, could not be equated with a valid claim under Rule 33(2).

It is possible that the rationale behind the ECtHR's decisions is to encourage the Russian authorities to furnish additional material (albeit on a confidential basis) which will assist it in a proper examination of the cases in question. However, the question arises as to what extent, if at all, this tactic is justified. Even in cases where the Russian Government's requests under Rule 33 have been successful, the problems of disclosure have not been solved and the Government has still provided only those documents which could be disclosed *"without bringing any harm to the interests protected by the law,"* meaning that some of the documents which might be crucial to establishing the facts of the case were not disclosed to the ECtHR.

In both the abovementioned instances, the applicants' representatives have been able to specify to the ECtHR documents which should have been enclosed with the case files in accordance with the ECtHR's requests but which were not and which were arguably important for effective investigation by the ECtHR.

In conclusion, whilst in a number of similar cases the ECtHR has reiterated that Art. 161 CCP cannot be used to limit disclosure, at the same time it seems to be willing to accede to Government requests which, as it has been shown, fail to satisfy the Rule 33(2) test. Further, as has been demonstrated above, this approach has still not led to the full disclosure of documentation in cases regarding the alleged involvement of State agents in abduction, torture and murder.

In order to prevent any further undermining of the principles of open justice (particularly in cases of the most grave human rights abuses) it is suggested that practitioners carefully monitor any applications by respondent governments designed to limit the public character of documents submitted to the ECtHR. Furthermore, practitioners should resist any such applications or decisions under Rule 33 which are not substantiated by reasoned argument and/or evidence in accordance with the provisions of the Rule itself. Finally, practitioners may also wish to rely on the overarching principles of open and public justice which, it could be argued, should be applied as rigorously by the ECtHR to its own proceedings as to the proceedings it delivers judgment upon in domestic states.

1 See among other authorities *Kukayev v Russia* (No. 29361/02), 15/11/07, para. 122 and *Mikheyev v Russia* (No. 77617/01), 26/1/06, para. 104.