EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE

EHRAC

WINTER 2010
ISSUE 14

In partnership with Memorial Human Rights Centre (MHRC), the Georgian Young Lawyers' Association (GYLA) and Article 42 of the Constitution

'The most creative tool in 50 years'? The ECtHR's pilot judgment procedure

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Pilot judgments that call on states to resolve widespread, systemic human rights violations promise to be 'the most creative tool the ECtHR has developed in its first 50 years'. This was one view expressed at a seminar held at the ECtHR in June 2010 to launch a report on pilot judgments and their impact within national systems. More than 100 people, including representatives of the ECtHR and the Council of Europe, debated the research findings presented by a team from the Human Rights and Social Justice Research Institute at London Metropolitan University (see *EHRAC Bulletin* Issue 13, Summer 2010 for a summary of the research).

New departure

Judge Françoise Tulkens noted that pilot judgments mark a substantial departure from the 'declaratory approach' previously taken by the ECtHR. Pilot judgments aim to prevent an accumulation of violations that have the same root cause: in this sense, they are the start, not the end of the process of achieving justice. Judge Tulkens suggested that pilot judgments do not only apply in cases where there are repetitive applications: once a problem has been identified as systemic, the ECtHR's preventive function may require a pilot judgment even where there are few pending applications.

Erik Fribergh, ECtHR Registrar, described how the ECtHR's approach has changed since the procedure was created in 2004. Key changes include the move to allow sections and chambers to issue pilot judgments and not just the Grand Chamber, and a shift away from the 'first in, first out' practice according to which states generating fewer cases were dealt with more quickly than those producing a large number. Under the new system, cases are ranked into seven categories: priority one cases are those where life is in danger, while pilot judgment procedures rank second.

Individual justice

Much debate centred on the risk that individuals might be denied justice if, following a pilot judgment, their cases are frozen or repatriated and the judgment is subsequently not implemented. Erik Fribergh argued that it was unsustainable for the ECtHR to keep large numbers of follow-up applications on its docket: the emphasis had to be on supervision and execution of pilot judgments at domestic level and to this end the Committee of Ministers is made aware of systemic problems even before judgment is given. If redress is not made, the option remains for the ECtHR to review cases speedily to ensure that valid applications are not terminated. Several participants emphasised that it is global solutions, rather than individual consideration of numerous applications, that will accelerate justice for individuals. Moreover, no case is adjourned when there is a present risk to an individual, as in detention cases.

Execution of judgments

Geneviève Mayer, who heads the Department for the Execution of Judgments, examined whether pilot judgments have enhanced the supervision of the execution

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of judgments. She noted that the supervision process has not changed substantively, partly because the ECtHR has been cautious in specifying remedial actions. She added that it is vital that pilot judgments give clear and precise reasoning to determine the scope of the execution. To date, the Committee of Ministers has given pilot judgments a high priority. However, there are dilemmas in how priority is accorded: cases concerning grave violations must remain a priority and, of the 9,000 cases that the Committee is currently handling, there are many that highlight systemic problems.

National responses

Jakub Wołąsiewicz, Government Agent for Poland before the ECtHR, argued that negotiation between the Court Registry, the respondent state and the applicant was 'the most important aspect of the pilot judgment'. In the cases of *Broniowski v Poland* and *Hutten-Czapska v Poland,* both concerning property rights, tripartite solutions were negotiated: these involved lower compensation than the applicants originally envisaged, but granted for all similar applicants and within a reasonable time.

Murray Hunt, Legal Advisor to the UK Parliament Joint Select Committee on Human Rights, argued that national parliaments should be at the heart of the execution process for the purposes both of implementation and legitimation. He said the ECtHR should not be overly prescriptive in identifying general measures because parliaments need scope to debate the appropriate remedies within a timetable determined by the ECtHR. Parliaments can give effect to judgments by, among other measures, scrutinising the adequacy and swiftness of government responses and ensuring that information about the execution of judgments is brought into the public domain.

Olga Shepeleva of the Public Interest Law Institute in Moscow discussed the experience of Russian NGOs in the execution process. She suggested that NGOs prioritise the submission of new cases in Strasbourg over the execution of judgments. Problems include a lack of legal and policy expertise among civil society; official secrecy and obstructiveness, and the fact that judgments are not routinely translated into vernacular languages.

Legal basis

There was debate about whether the definition and legal basis of the pilot judgment procedure are sufficiently clear. When the procedure was outlined in 2004, it contained several distinctive features: the existence of systematic or structural problems at domestic level; the existence (or potential generation) of similar violations; the obligation of the state to eliminate the root cause of the violation and to give redress to other victims; and the practice of adjourning similar cases while remedial action is taken, with the option of their being reopened at a later date. However, there have been variations in practice, suggesting that pilot judgments should be viewed as a continuum, with some (like *Broniowski*) exhibiting all the features while others may not. The ECtHR does not see the need for reform of the ECHR machinery to provide a legal basis for pilot judgments. However, the Interkalen Declaration on the future of the ECtHR called on it to develop clear and predictable standards for pilot judgments; the ECtHR is consulting governments and civil society representatives on their possible content.

The future

Judge Lech Garlicki of the ECtHR described the pilot judgment procedure as dynamic and evolving. A definitive typology requires clarity on two broader questions. The first is the very nature of the ECHR as a living instrument, the scope of which has transformed in the last decade. The second is the identity of the ECtHR: is it primarily an international court dealing with individual applications or, rather, a (quasi) constitutional court providing general answers to systemic problems? These questions frame the dilemma for the ECtHR in developing its identity and machinery, made more urgent by the burden of some 130,000 pending applications. Above all, Judge Garlicki suggested, the procedure should be judged by its impact at national level. Where (as in *Broniowski* and *Hutten-Czapska*) domestic authorities have the political will to cooperate and domestic judges are sympathetic to Strasbourg judgments, a pilot judgment can 'tip the balance' to enable the domestic courts to get the desired result. If the respondent state is unwilling to cooperate, the procedure may be less effective.

Responding to Systemic Human Rights Violations: an analysis of pilot judgments of the European Court of Human Rights and their impact at national level is published by Intersentia. For information on the project see: http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm. The seminar report is available at: http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/reports/Pilot%20Seminar%20Report_php.pdf.