

EHRAC

Bulletin

The wind of change

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In the latter half of 2010 several publications¹ appeared in the Russian print media discussing the need for Russia to develop a mechanism to protect its national sovereignty from unfavourable ECtHR decisions. Such views appear regularly in Russia and these publications would not be taken seriously by the Russian intellectual elite if the initiator of the discussions were someone other than Professor of Law and Chair of the Russian Constitutional Court (CC), Valeriy Zorkin. Zorkin's publication in *Rossiyskaya Gazeta* appears to be a sudden explosion in the long-brewing conflict between Russia and Western democracies.

The trigger for Zorkin's strongly-titled article, *The Limit of Flexibility*, was the ECtHR judgment in the case of *Konstantin Markin v Russia* (No. 30078/06) 7.10.10 (see pg. 14) in which the ECtHR found that Russia had breached the prohibition on discrimination on grounds of sex (Art. 14 in conjunction with Art. 8). Zorkin complained that the ECtHR had criticised the CC's position in this case in a rude and unjust manner.² The case was about discrimination against fathers in the military. The Federal Law on the Status of Military Personnel (No. 76-FZ of 27 May 1998) provides that female military personnel are entitled to maternity and parental leave in accordance with section 11 § 13 of the Labour Code). There is no similar provision in respect of male personnel.

Unlike the CC, the ECtHR ruled that the existing legislative gap violated fathers' rights to respect for family life, and pointed out that this gap would affect a large number of people. The ECtHR deemed the CC's position to be based "*on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests of maintaining the operational effectiveness of the army, on the one hand, and of protecting servicemen against discrimination in the sphere of family life and promoting the best interests of their children, on the other*" (para. 57). It further noted that Russia's justification of the difference in treatment between men and women was based on "*the perception of women as primary child-carers and men as primary breadwinners*", and thus on

“gender prejudice”, which cannot be regarded as sufficient (para. 58).

Zorkin argued that the CC’s approach is justified by the inevitable need to protect national security and ensure the effectiveness of the military and is in compliance with Art. 38(1) of the Russian Constitution. However, the author asserts that the CC’s approach does breach these provisions, as among the objects of State protection alongside ‘maternity’ are ‘childhood’ and ‘family’. Furthermore, Art. 38(2) states that “care for children and their upbringing shall be an equal right and obligation of parents”. Additionally, it should be noted that the CC’s approach in the present case departs from a previous case about equal entitlement to a military pension. In Ruling No. 428-O of 1 December 2005, the CC found the failure to pay a social pension to the husband of a killed servicewoman on the grounds that only widows are entitled to this pension to be unconstitutional.

Zorkin also disagreed with the ECtHR judgment in *Alekseyev v Russia* (Nos. 4916/07, 25924/08 & 14599/09) 21.10.10 (see pg. 13) in which the ECtHR found the bans on the 2006, 2007 and 2008 Moscow Pride marches to be incompatible with the ECHR and discriminatory. Zorkin noted that the ECtHR’s findings in the case were based on the position previously expressed in *Smith & Grady v UK* (Nos. 3985/96 & 33986/96) 27.12.99, but he failed to understand the importance of the ECtHR’s findings in this case in its jurisprudence. In *Smith & Grady* the ECtHR found restrictions on homosexuals in the armed forces on the grounds of the possible negative attitude by heterosexual service personnel towards sexual minorities to be unreasonable (paras. 102-104). Therefore, we cannot accept Zorkin’s argument that the ban on the Pride March is justified by the possibility of mass disorder as a public reaction to the March, similar to that in Serbia.

Also, in *Alekseyev* the ECtHR directly indicated that the Russian authorities “failed to carry out an adequate assessment of the risk to the safety of the participants in the events and to public order” and did not accept the Government’s argument that “the threat was so great as to require such a drastic measure as banning the event altogether” (para. 77). It is of concern therefore, that even without such an assessment Zorkin is of the view that the safety of a relatively small group of people could not be assured by the authorities in such circumstances.

Returning to Zorkin’s position, it should be noted that prior to expressing his dissatisfaction with the above Strasbourg judgments, Zorkin provides details of successful dialogue between the ECtHR and the CC. Among his examples of successful collaboration is CC decision No. 2-P of 5 February 2007. Following numerous ECtHR judgments against Russia which have found the ‘nadzor’ (supervisory review)

proceedings under the Code of Civil Procedure to be incompatible with Art. 6(1) ECHR, the CC stated that the existing system did not fully comply with the principle of judicial clarity. However, the CC ruled that the corresponding provisions of the Code of Civil Procedure could not be declared unconstitutional as this would create a gap in the legal system and instead recommended that the law be amended (see section 9.2 paras. 4 and 5). Unfortunately, the CC’s failure to take any decisive action in this respect froze the ‘nadzor’ issue by submitting it to the slow process of amending legislation and thus shielding the authorities from harassment from the Committee of Ministers. In support of his primary argument, Zorkin also referred to the German Federal Constitutional Court’s ‘resistance’ to unfavourable Strasbourg judgments. However, Zorkin did not specify which decision he was referring to, thereby hindering any meaningful examination of German practice in this regard.

During the 8th Forum on Constitutional Justice in St. Petersburg in November 2010, Zorkin made yet more ambitious claims stating that: “If Russia wants to it may denunciate the treaty [ECHR]”. He insisted that Russia needs to develop a mechanism to protect its national sovereignty from Strasbourg judgments. This view was upheld by the majority of CC judges (among them the Vice-Chair of the CC, Sergey Mavrin, and Judge Nikolay Bondar). On 11 December 2010, after a meeting with CC judges, President Medvedev expressed views similar to those of Zorkin.³

Public statements by high-ranking officials about their attitude to the ECHR and ECtHR jurisprudence have a strong influence on Russian law enforcement officials. Russian lawyers, NGOs and public activists have gone to great efforts to destroy the culture of reluctance to implement the provisions of international law in the national legal system. Today, references to the

ECHR and ECtHR case law during hearings in district courts no longer merely amuse judges. Their response is not yet in full compliance with ECtHR practice, but at least there is partial compliance. However, these gains could easily be lost.

What should we expect next? A change in Russia’s political climate or a CC decision giving a new interpretation of the binding force of ECtHR judgments? The latter is the most likely and it will be disappointing if such a decision creates a precedent.

1 Zorkin, V.D., 2010. The limit of flexibility. *Rossiyskaya Gazeta*, 29.10.10. Available at: <http://www.rg.ru/2010/10/29/zorkin.html> [in Russian]; Pushkar-skaya, A., 2010. Valeriy Zorkin is ready to defend national legal sovereignty. *Kommersant*, 22.11.10. Available at: <http://www.kommersant.ru/Doc/1544077> <http://www.kommersant.ru/Doc/1544077> [in Russian]; *Newsru.com*, 11.12.10. Medvedev: ECtHR verdicts are secondary to Russian legislation [in Russian]. Available at: <http://www.newsru.com/russia/11dec2010/ks.html>.

2 In Ruling No.187-O-O of 15.12.09 the CC found no violation of the Constitution in this case.

3 <http://www.newsru.com/russia/11dec2010/ks.html> [in Russian].