

EHRAC *Bulletin*

The exhaustion of domestic remedies in Russia: the ECtHR's approach to Art. 125 of the Code of Criminal Procedure

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One of the hoops through which an applicant is required to jump to bring a case before the ECtHR is the exhaustion of domestic remedies, pursuant to Art. 35(1) of the ECHR. The rationale behind this rule is to give the national authorities the opportunity to rectify alleged violations of the Convention, and it is based on the assumption that, as reflected in Art. 13, the state will provide an effective remedy.

However the rule is not, nor could it be, absolute. It is not capable of being applied automatically, and the Court has recognised that it requires a degree of flexibility in approach, given the context of protecting human rights.

Applicants are only required to exhaust domestic remedies that are available and which are effective. In assessing whether a remedy meets these criteria, regard will be had to the particular circumstances of the case, the legal and political context and the personal circumstances of the applicant.¹ It is this margin that can lead to uncertainty among practitioners about the Court's approach to a particular remedy, as seen recently with Art. 125 of the Russian Code of Criminal Procedure (CCP).

Art. 125 of the new CCP provides for judicial review of decisions by investigators and prosecutors that might infringe the constitutional rights of parties to criminal proceedings or impede access to justice. These decisions, acts or omissions can then be declared unlaw-

ful or unsubstantiated.

Although the ECtHR has found that in the Russian legal system the power of a court to annul a refusal to institute criminal proceedings and indicate the defects to be addressed appears to be a substantial safeguard against the arbitrary exercise of powers by the investigating authorities,² the Court has nonetheless, in a number of Chechen cases involving disappearances and torture, held that this remedy was ineffective in the particular circumstances.³ The Court's reasoning for this was based on the applicants' lack of access to the case file and the fact that they had not been properly informed of the progress of the investigation, therefore rendering them unable to challenge effectively the actions or omissions of the investigating au-

thorities before a court. Further, owing to the time elapsed in these cases since the events in question, certain investigative steps that ought to have been carried out would no longer be useful.

Despite these cases, the fact that the Court has held Art. 125 of the CCP to be a substantial safeguard against arbitrary power *in principle*, means that it is open for the Court to find it to be one *in practice*, as it did in the recent Chechen case of *Nasipova & Khamzatova v Russia* (No. 32382/05) dec. 2.9.10. In this case the Court noted that although the applicants lodged at least eight complaints with various law-enforcement bodies, they did not appeal against the refusal by the military prosecutor's office to initiate an investigation into the disappearance of their relatives. Further, there appeared to be some confusion about whether the applicants had been informed of the decision not to investigate. While the applicants alleged that they had not received the relevant letter, it appeared that the applicants' representatives had been informed. The Court observed that in raising the non-exhaustion plea, the Government had referred to the ECtHR's case law, according to which judicial review against a decision not to prosecute is an effective remedy. Therefore it was for the applicants to prove that the remedy was ineffective and inadequate in the particular circumstances of the case or that there were special circumstances absolving them of this requirement. The Court found that the applicants had failed to provide any explanation for their failure to appeal to a court against the refusal to investigate.

This case certainly appears to represent a departure for the ECtHR. The judgment places weight on three factors: that the applicants were represented by an NGO; that the applicants failed to appeal the decision not to prosecute despite the fact their representatives had

been informed of this decision; and that they failed to provide an explanation for their failure to appeal the decision.

Nasipova & Khamzatova is not the only case to be rejected for non-exhaustion of domestic remedies. In both *Medvedev v Russia* (No. 9487/02) 15.7.10 and *Belevitskiy v Russia* (No. 72967/01) 1.3.07, cases brought under Art. 3 of the ECHR, the Court rejected the complaints on the grounds of failure to judicially challenge the decisions not to investigate or initiate criminal proceedings. The circumstances of these cases are materially different to the Chechen cases: the applicants here were residents of Moscow who suffered ill-treatment while in detention for criminal charges. In both cases the Court noted that the applicants were legally represented and yet failed to provide explanations for their failure to challenge the decision of the investigating authorities through the appropriate courts. In *Belevitskiy v Russia*, however, the Court acknowledged that persons held in custody are often in a stressful situation and that it could be considered excessively burdensome to require them to pursue separate judicial proceedings to obtain redress, especially if they are unrepresented. Nevertheless, it could simply be that the above cases turn on their particular facts, since in more recent Chechen cases the Court seems to have reverted to its previous position of placing the burden of proof on the respondent government to prove that the remedy is practical and effective.

Art. 125 of the CCP is, in reality, of questionable value as a remedy. Investigations into criminal cases are often resumed, but then halted – it appears almost randomly. If an investigation has been re-opened while an Art. 125 application is being made, the court will generally dismiss the application as unnecessary, despite the fact that this then does not allow for specific failings to be recognised as

unlawful, nor for the fact that the investigation will very likely be suspended again a number of weeks later. Furthermore, while the court can declare acts/omissions of the prosecutor unlawful and quash a decision to discontinue an investigation, it cannot order measures to be taken; therefore it provides no guarantee that particular shortcomings in an investigation will be addressed. Any additional lines of investigation are at the prosecutor's discretion and the prosecutor may repeat their failure to act or terminate the investigation again, requiring another round of Art. 125 challenges. Equally, as noted above in the Chechen cases, it is frequently not possible to challenge effectively the acts or omissions of the investigators due to a lack of access to the case file and to relevant information.

It is nonetheless worth noting that the ECtHR's position on Art. 125 is such that it can be interpreted as a 'substantial safeguard', and therefore an effective remedy, and that it is the particular circumstances of each case that are decisive. Given this, it would seem advisable for practitioners, where possible, to pursue Art. 125 challenges, and if not, to provide a cogent explanation of the reasons why it is an ineffective remedy not capable of providing a reasonable prospect of success.

1 *Selmouni v France* (No. 25863/94) GC 28.8.99, paras. 74-77.

2 *Trubnikov v Russia* (No. 49790/99) 30.11.05.

3 See, for example: *Isigova & Others v Russia* (No. 6844/02) 1.12.08, *Betayev & Betayeva v Russia* (No. 37315/03) 29.5.08, *Musayeva v Russia* (No. 12703/02) 3.7.08, *Chitayev & Chitayev v Russia* (No. 59334/00) 18.4.07 and *Gelayev v Russia* (No. 20216/07) 15.8.10.

4 *Makharbijeva & Others v Russia* (No. 26595/08) 21.6.11, *Mosayev v Russia* (No. 20303/07) 14.6.11, *Nakayev v Russia* (No. 29846/05) 21.6.11 and *Istayev & Others v Russia* (No. 43368/04) 21.6.11.

