



MEMORIAL - EHRAC
BULLETIN:

EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE
EHRAC

International Human Rights Advocacy

**The European Court of Human Rights and the
Protection of the Rights of the Child**

Natasha Kravchuk, PhD¹

The problem of the protection of the rights of children has always been painful for Russia. Violations of rights of this particular category of the population have become especially pervasive in the last few years. The lack of effective mechanisms for the protection of children's rights, especially the right to respect for family life, accounts in part for the ever-growing number of minors sent to state establishments for children. In a situation where nothing can be done by the child or his legal representatives to protect her/his rights on a domestic level, the only other option is to apply to the supranational human rights institutions. This right is set out in part 3 of Article 46 of the Constitution of the Russian Federation, which provides for the right of each citizen to apply to international human rights bodies when all the means of legal protection available within the state have been exhausted. Hence the functioning of the legal system in the Russian Federation is based not only on principles accounted for by the domestic legislation, but also on generally recognized standards accepted by the international community². One of the most effective mechanisms of human rights protection at the international level is the European Court of Human Rights whose decisions are obligatory for execution by the state in respect of which they are taken.

At first sight it may appear that there are not many articles directly pertaining to rights of children in the European Convention on Human Rights (ECHR). Nevertheless, all the provisions of the ECHR can be applied to any child as much as to any other legal subject. Both the Convention and the decisions of the European Court (ECtHR) clearly indicate that any person, including a child, can apply to the Court, provided they fall under its jurisdiction.

Articles of the Convention that are most frequently invoked in the protection of the rights of children include the following:

- Article 3: Prohibition of torture or inhuman or degrading treatment or punishment (in particular, in cases of application of corporal punishment in schools, by parents, or by a court decision);
- Article 6: The right to a fair trial (establishes special procedural rules to be used with respect to a child charged with a criminal offence);

- Article 8: The right to respect for private and family life (within the framework of which the court interprets the notion of family; the status of children born outside of marriage; determines the concept of actions in the interests of the child (choice of religion, name, etc.); transfer of the right to custody over a child to the state; cases of separation of parents from children due to the deportation of parents);

- Article 2 of Protocol 1: The right to education (for example, education in private schools; respect for the philosophical convictions of parents);

Based on these articles of the Convention, the European Court has developed certain legal standards regulating the status of children within international law and in particular, their status in the family. Nevertheless, in order to maximise the effective protection of children's rights, references to other international legal norms that regulate the rights of the child (for example the UN Convention on the Rights of the Child) are allowed and encouraged by the Court.

The Court has confirmed that the principle that children are capable of exercising the rights set out in the Convention also applies to the right of individuals to complain about a violation of their rights (Art. 34 of the Convention). For example, the applicant in the case of *Nielsen v. Denmark* was only 13 years old at the time of filing his application with the European Court. In order to demonstrate the Court's logic in considering cases related to the rights of the child, it would be useful to examine this case in more detail.

The applicant's parents in *Nielsen* lived together from 1968 until 1973. They were not married and, in accordance with Danish law, only the mother had parental rights over the child. After the parents separated in 1973, the applicant remained with the mother; the father had access to him on the basis of a "gentlemen's agreement". However, the agreement did not function well and in 1974 the father obtained a specific right of access through the competent authorities. A closer relationship developed between the child and his father during the following years and in the summer of 1979 the applicant refused to return to his mother after a two-week holiday spent with his father. The social authorities were contacted and the child was placed in a children's home at the consent of all parties. However, the child ran away from there and returned to his father. On 6th August 1979 the father instituted proceedings before the courts to have the custody rights transferred to him. Then he and the child went "underground" until 8 October 1979, when the father was arrested by the police. The next day the applicant was placed in the care of the Department of Child Psychiatry in a county hospital. He ran away from there. As a result of long judicial proceedings, in the course of which the father was denied from having the custody rights transferred to him, a psychiatric examination of the child was conducted. The fact that the child did not want to live with his mother was established, and the applicant was finally placed in a psychiatric hospital.

In his application to the European Commission of Human Rights (the body responsible for the initial consideration of applications before the reforms carried out under Protocol 11 in 1998) the applicant alleged that his rights under Art. 5 of the European Convention (right to liberty and security) were violated. The Commission concluded that there had been a violation of Art. 5. The case then received wide publicity, following which the

applicant was released from hospital and custody rights were transferred to the father. In its judgment, the European Court did not find a violation of the applicant's rights. Thus the case was resolved on the national level, but under the obvious influence of the European Court.

One of the recent European Court cases relating to the rights of the child is the case of *Kutzner v. Germany*⁴, brought before the Court by the parents of two minor girls. In 1996, the District Youth Office applied to the Guardianship Court for an order withdrawing the applicants' parental responsibility for their two children on the ground that the applicants did not have the intellectual capacity required to bring up their children properly. The Court appointed an expert psychologist and, based on his report, made an interlocutory order withdrawing the applicants' rights to decide where their children should live or to take decisions regarding the children's health. The girls were then placed into state care. Later the Court withdrew the applicants' parental rights over their two children. The applicants appealed against this decision to several higher instances without success.

Continued on page 4

Page 4

The European Court unanimously decided that the right of the applicants to respect for their family life (Art 8 of the European Convention) was violated. In particular, the Court stated that although the reasons relied on by the domestic authorities and courts were relevant, they were insufficient to justify such a serious interference in the applicants' family life. It was noted that the children benefited from educational support while living at home; the opinions of the psychologists, from whom expert evidence was taken at various stages of the proceedings by the domestic courts, were contradictory; the psychologists instructed by the applicants, as well as the family doctors, urged that the children be returned to their family of origin. Finally, there had been no allegations that the children had been neglected or ill-treated by the applicants. The Court also found that the applicants suffered non-pecuniary damage and awarded them compensation of €15,000, plus their legal costs and expenses.

Researchers have noted an ever-growing influence of the European Court on national legislation, and especially on judicial practices. Indeed the number of cases where decisions on the merits or even the resolution of procedural issues made by the European Court affect the decision-making process in Russian courts both in concrete cases and as a general approach to interpretation of the Russian law, including in the area of protection of the rights of the child, continues to grow.

It may be that the payment of 'just satisfaction' (which may include compensation for pecuniary and/or non-pecuniary damage and the reimbursement of legal costs and expenses) is often the most visible consequence of the Court's judgments, but it is not the only one. According to the practice of the interpretation of Art. 46 of the Convention by the Court and the Committee of Ministers, the establishment of the fact of a violation of the rights guaranteed by the Convention establishes an obligation on the respondent State to undertake measures to

stop the violation and to eliminate its consequences, with the aim of restoring, as far as possible, the situation existing prior to the violation (*restitutio in integrum*). Thus, in practice this will mean concrete measures of an individual character with regard to the child which will not necessarily be limited to the payment of the compensation awarded by the Court. Moreover, besides the payment of the compensation and execution of the *individual* measures, the judgment creates an obligation on the State to take effective *general* measures to avoid new violations similar to those that were found in the particular judgment. Both individual and general measures undertaken by the respondent State to comply with the Court's judgments may be very varied. Here are some examples of general measures resulting from judgments where the violations of various rights of children were found:

Case of Tyrer v. the United Kingdom, judgment of 25 April 1978 (Series A no. 26)

- On 13 June 1978 the Lieutenant Governor of the Isle of Man was advised of the judgment. Subsequently the Chief Justice of the island informed the judges and courts that judicial corporal punishment was, in the future, to be considered in breach of the Convention (Resolution (78) 39 of 13 October 1978).

Case of Marckx v. Belgium, judgment of 13 June 1979 (Series A no. 31)

- An Act of 31 March 1987 amended "various legal provisions relating to affiliation", and thereby eliminated all discrimination concerning illegitimate children (Resolution DH (88) 3 of 4 March 1988).

Case of Johnston and Others v. Ireland, judgment of 18 December 1986 (Series A no. 112)

- The Status of Children Act 1987, which was enacted on 14 December 1987, came fully into operation on 14 June 1988. It ensures equal rights for all children, whether born in or out of wedlock (Resolution DH (88) 11 of 21 June 1988).

Case of Bouamar v. Belgium, judgment of 29 February 1988 (Series A nos. 129)

- An Act of 2 February 1994, which came into force on 27 September 1994, provides that the Juvenile Court may not place a child in a remand prison more than once during a single set of proceedings. The maximum length of such a placement continues to be fifteen days. The Government has established in certain institutions closed sections which are reserved for highly disturbed young people (Resolution DH (95) 16 of 7 February 1995).

As we can see, general measures may take the form of constitutional or legal reform aimed at the protection of the rights of the child which in turn will lead to changes in the implementation of the law in practice.

It is suggested that judgments of the European Court with respect to Russia will significantly affect legislative regulation and national courts' practices in relation to the protection of the rights of children in Russia. In addition, taking into account the fact that to comply with a judgment of the European Court, the state must undertake measures to prevent new violations of the rights of the child, the legislature is likely to enhance the scope of children's rights provided for by the legislation of the Russian Federation. For example, following a review of relevant applications by the European Court the legislature will

have to ensure the rights of the child to have access to free legal aid in situations of conflict between the child and his/her authorized representatives and/or custody and patronage bodies. The European Human Rights Advocacy Centre (EHRAC) is continuing to work on the development of a strategy of litigating cases concerning the violation of children's rights at the European Court of Human Rights, in order to address the main legal problems in this field in Russia. We will be glad to provide assistance to lawyers and NGOs dealing with these problems on a national level.

¹EHRAC-Memorial project lawyer.

²Scientific-Practical Commentary to the Constitution of the Russian Federation./ V. Lazarev, ed.– M.: Spark, 2001. P.100.

³Nielsen v. Denmark, judgment of 28 November 1988.

⁴Kutzner v. Germany, judgment of February 2002.

⁵Report of M. Lobov, Legal Officer of the Department for the execution of judgments of the European Court of Human Rights, at the International Conference "Russia and the Council of Europe," Moscow, 18-19 of M