



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

Tackling systemic human rights violations: the ECtHR's pilot judgment procedure

Helen Hardman, Primary Researcher, Pilot Judgments Project, HRSJ, London Metropolitan University

In recent years the ECtHR has attempted to tackle the growing backlog of 'clone cases' coming before it.¹ To this end, since 2004, the ECtHR has been applying a 'pilot judgment' procedure which highlights wide-scale, systemic human rights violations and calls on states to take adequate measures to solve such problems. In 2009-2010 the Human Rights and Social Justice Research Institute (HRSJ) at London Metropolitan University carried out research (funded by the Leverhulme Trust) into ECtHR 'pilot

judgments' and their impact within national systems.

Since the pilot judgment procedure has been applied 'flexibly'² by the ECtHR, and has not yet been codified in the Rules of Court, there is still some confusion as to what constitutes a pilot judgment. All the ECtHR and Council of Europe officials interviewed during the course of the research agreed that *Broniowski v Poland*,³ *Hutten-Czapska v Poland*⁴ and *Burdov v Russia (No. 2)*⁵ were pilot judgments *per se*. What these cases all share in common is:

(i) the explicit application by the ECtHR of the pilot judgment procedure;

(ii) the identification by the ECtHR of a systemic violation of the ECHR;

(iii) that general measures are stipulated in the operative part of the judgment so that the respondent state resolves the systemic issue (which may be subject to specific time limits).

Additionally, in a pilot judgment, the ECtHR *may* also adjourn all other cases arising from the same systemic issue, either for a particular period of time or, more generally, pending the resolution of the issue by the state. Since *Broniowski*, *Hutten-Czapska* and *Burdov (No. 2)*, the ECtHR has issued three other 'full' pilot judgments which share

all these features: *Olaru & Others v Moldova*,⁶ *Yuriy Nikolaevich Ivanov v Ukraine*⁷ and *Suljagić v Bosnia & Herzegovina*.⁸

However, pilot judgments are not issued in every case where the ECtHR has identified a systemic violation of the ECHR and the research examines in what circumstances the ECtHR has issued pilot judgments, assesses the procedure from the ECtHR's perspective and evaluates how states have responded to this new approach.

In all six cases violations were a significant source, or estimated source, of applications to the ECtHR from the respective state. The most striking example concerns the Bosnian Government's failure to provide adequate compensation to people for the loss of their 'hard-currency' savings that had been frozen since Yugoslavia's financial crisis of the 1980s. The ECtHR noted in its judgment that there were already 1,350 similar applications, that the potential number of affected persons could reach one million and that the violation therefore constituted "a serious threat to the future effectiveness of the Convention machinery."⁹ The cases against Russia, Ukraine and Moldova all concerned the failure by state authorities to execute domestic court judgments. The number of cases pending at the ECtHR concerning these violations has been estimated as the most significant source of admissible applications to the ECtHR.¹⁰ Both *Broniowski v Poland* and *Hutten-Czapska v Poland* concerned the violation of property rights. *Broniowski* was estimated to potentially affect 80,000 people who have the right to claim compensation for property in eastern Poland, in the Bug River Region, lost following boundary changes during the Second World War.¹¹ The ECtHR's judgment

in *Hutten-Czapska* identified that the same violation, regarding landlords' rights to raise rent, could affect up to 100,000 landlords and 600,000-900,000 tenants.¹²

The research also examines the roles of the executive, legislature and judiciary of states in implementing Strasbourg judgments within the domestic context. A number of patterns emerge, indicating that domestic legislatures and executives are generally unresponsive to constitutional court judgments. The research shows how the ECtHR adopts a stance which often mirrors that of judgments given by national constitutional courts, either before or after the case has gone to the ECtHR. The problem arises because of a failure by the legislature and executive to implement the guidance provided in constitutional court judgments. The ECtHR's subsequent issue of a pilot judgment making a repeat finding of the same violation exerts greater pressure on the executive and legislature to respond. This, consequently, lends greater authority to constitutional courts in forcing a legislative response from government and parliament. Apparently, therefore, through the pilot judgment procedure, the ECtHR is strengthening constitutional courts vis-à-vis the other branches of the state, confirming Wojciech Sadurski's findings with respect to Poland.¹³

In addition to 'full' pilot judgments, the research examined another category of decisions which also highlight systemic violations of the ECHR – variously known as 'quasi-pilot judgments' or 'Art. 46 judgments'. As with the 'full' variant, the ECtHR identifies a widespread or systemic dysfunction in legislation or practice. It then invokes Art. 46 ECHR to remind the respondent state of its obligation to remedy the violation holisti-

cally. These judgments are distinct from the 'full' variant in three ways. Firstly, the ECtHR does not explicitly apply the pilot judgment procedure. Secondly, general measures are not usually specified in the operative provisions (with the exception of *Lukenda v Slovenia*,¹⁴ *Sejdović v Italy*¹⁵ and *Xenides-Arestis v Turkey*¹⁶). Thirdly, other similar cases are not usually adjourned.¹⁷ This type of 'quasi' pilot judgment has become fairly commonplace.

Finally, the research also examined a third category of judgment in which there is no explicit application of Art. 46, but the ECtHR notes that the problem which the case raises is systemic or widespread and that holistic measures are required to resolve the problem. It is difficult to precisely define this 'third tier' of judgments and a number of such cases pre-date the pilot judgment procedure. Examples of these include *Bottazzi v Italy*¹⁸ and *Kudła v Poland*.¹⁹ More recent examples are: *Krawczak v Poland*;²⁰ *Robert Lesjak v Slovenia*;²¹ *Šitih v Slovenia*;²² *Matko v Slovenia*;²³ and *Saadi v Italy*.²⁴ However, in the latter cases, the respective governments responded as if the ECtHR had issued a quasi-pilot judgment that identified a systemic issue requiring holistic resolution.

The research was conducted by Prof. Philip Leach, Dr. Svetlana Stephenson, Prof. Brad Blitz and Dr. Helen Hardman. The full report is being published by Intersentia as: *Responding to Systemic Human Rights Violations - An analysis of pilot judgments of the European Court of Human Rights and their impact at national level*. For further information on the project see: <http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm>.

1 Clone cases are groups of similar cases where the ECtHR has found the same violation of the ECHR, which apparently stem from the same legislative defect or malfunction. These in turn indicate the repetitive and therefore systemic nature of the violation.

2 ECtHR, 2009. *The Pilot Judgment Procedure: information note issued by the Registrar* [Online]. Available at: http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf.

3 No. 31443/96, 22/6/04.

4 No. 35014/97, 19/6/06.

5 No. 33509/04, 15/1/09.

6 Nos. 476/07, 22539/05, 17911/08 & 13136/07, 28/7/09.

7 No. 40450/04, 15/10/09.

8 No. 27912/02, 3/11/09.

9 *Suljagić v Bosnia & Herzegovina* (No. 27912/02) 3/11/09, para. 63.

10 Ukraine (*Yuriy Nikolaevich Ivanov v Ukraine* (No. 40450/04) 15/10/09, para.73); Moldova (*Olaru & Others v Moldova* (Nos. 476/07, 22539/05, 17911/08 & 13136/07) 28.7.09, para.53); Russia, see: Leach, P., 2007. Strasbourg's oversight of Russia – an increasingly strained relationship. *Public Law*, Winter, pp. 640-54 (Also available online at: <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/media-and-journals/russia/strasbourgs-oversight-of-russia--an-increasingly-strained-relationship.cfm>); Trochev, A., 2009. All appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights on Russia. *Demokratizatsiya*, 17:2, pp. 145-78.

Demokratizatsiya, 17:2, pp. 145-78.

11 No. 31443/96, 22/6/04, para. 193.

12 No. 35014/97, 19/6/06, paras. 235-6.

13 Sadurski, W., 2008. Partnering with Strasbourg: Constitutionalization of the European Court of Human

Rights, the Accession of Central and East European States to the Council of Europe and the idea of Pilot Judgments. *EUJ Working Papers Law*, 2008/33.

14 No. 23032/02, 6/10/05.

15 No. 56581/00, 10/11/04; GC 1/3/06.

16 No. 46347/99, 22/12/05.

17 With the exception of *Xenides-Arestis* (No. 46347/99) 22/12/05, para.50.

18 No. 34884/97, 28/7/99.

19 No. 30210/96, 26/10/00.

20 No. 40387/06, 8/4/08.

21 No. 33946/03, 13/7/09.

22 No. 71463/01, 9/4/09.

23 No. 43393/98, 2/11/06.

24 No. 37201/06, 28/2/08.

