

# EHRAC *Bulletin*

## Redress and implementation in the Chechen cases – the Strasbourg Court increases the pressure

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Since the ECtHR delivered its first judgments, in 2005, highlighting egregious human rights violations in Chechnya in the period from 1999, the greatest challenge has undoubtedly been the effective implementation of those decisions. The Russian Government pays the damages awarded to the families of those who were ‘disappeared’, subject to state extra-judicial execution or killed by excessive

force deployed by the armed forces, but taking other steps to prevent such incidents, to investigate what happened and provide some measure of accountability still does not seem to enjoy the requisite political will. These questions have been taken up by the Committee of Ministers (CoM), in the course of its role of supervising the implementation of Strasbourg decisions. That process still continues – six years after the first Chechen decisions were published. However, in a significant judgment in December 2010, in the case of *Abuyeva v Russia*

(No. 27065/05) 2.12.10, the ECtHR has directly confronted this problem and ratcheted up the pressure. This brief piece discusses the *Abuyeva* case and its implications.

In February 2000 the village of Katy-Yurt in Chechnya was subjected to an air and artillery attack by the Russian armed forces, after they became aware that a force of rebel fighters (numbering in their hundreds, or even thousands) had entered the village. There were considerable casualties on both sides – and, inevitably,

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civilian casualties. One villager, Zara Isayeva, subsequently complained to the ECtHR (represented by Memorial HRC and EHRAC) about the deaths of her son (aged 23) and three nieces (aged 15, 13 and 6) during the attack. They were killed when a shell fired from a Russian air force jet exploded near their minibus in which they were trying to flee from the fighting. Her case, introduced in 2000, succeeded in establishing, in February 2005, that the Russian authorities had violated their obligation to protect the right to life of Zara Isayeva, her son and three nieces (*Isayeva v Russia* (No. 57950/00) 24.2.05). In an unprecedented decision, using unprecedented language, the Russian authorities were the subject of excoriating criticism for the way they had conducted the operation at Katyr-Yurt. The Court found that the ‘massive use of indiscriminate weapons’ was in ‘flagrant contrast’ to the need to protect the civilian population.

The commanding officer had called in jets carrying (apparently by default) heavy, free-falling bombs with a damage radius of more than a kilometre. The villagers were not given sufficient time to leave or provided with safe exit routes to get away from the fighting. The senior officers in charge were named (General Shamanov and Major-General Nedobitko) and their respective roles analysed.

What is more, the Court in *Isayeva* also found a separate violation of the right to life because of the authorities’ failure to carry out an effective investigation. Although a complaint was made to the military prosecutors a few weeks after the attack, an investigation was only opened once the Strasbourg complaint was communi-

cated to the Government months later. The ECtHR also identified several ‘serious flaws’ once the investigation was under way. For example, it failed to explain the ‘serious and credible’ allegations that the villagers were in some way ‘punished’ for their failure to co-operate with the military authorities. There was also a clear failure to identify other victims and witnesses of the attack.

More than five years after the *Isayeva* judgment came the decision in *Abuyeva*, concerning the same attack on Katyr-Yurt. This second application was brought by 29 villagers (again assisted by Memorial HRC and EHRAC), complaining to the ECtHR of the killing of 24 of their relatives and that some of the applicants themselves had sustained various injuries. For example, Malika Abdulkherimova described finding eight bodies in the cellar of her neighbour’s house which had been bombed. The Vakhayev family testified that there were 150 people taking cover from the heavy shelling in their basement. Their house was destroyed by two blasts which killed eleven people and

injured others. In its judgment in *Abuyeva* the Court found violations of the right to life on the same basis as the *Isayeva* judgment. Furthermore, the investigative steps which had been carried out after the *Isayeva* judgment was delivered were found to have been subject to the same major flaws. In particular, the ECtHR could not discern any further steps taken to clarify the crucial issues of the responsibility for the safety of the villagers’ evacuation and the question of the ‘reprisal’ nature of the operation. No one has ever been charged with any crime in relation to the attack.

In the light of these repeated failings, the ECtHR then went on to apply Art. 46 of the ECHR, which

is unprecedented in the Chechen cases. In recent years, the ECtHR has increasingly been drawn to taking a more collective approach to its caseload, in some senses moving on from its traditional focus on individual cases. This undoubtedly has its root in states’ failure to tackle systemic violations of the ECHR effectively, leading to repeat findings by the ECtHR in ‘clone’ cases, in their hundreds and sometimes thousands. The ‘pilot judgment procedure’ has accordingly been developed by the ECtHR to deal with very large-scale endemic problems such as the failure to implement domestic court judgments (e.g. *Burdov v Russia* (No. 2) (No. 33509/04) 15.1.09 and *Ivanov v Ukraine* (No. 40450/04) 15.10.09) and other systemic failings caused by specific problems (such as *Broniowski v Poland* (No. 31443/96) 22.6.04 concerning the failure to compensate families who lost their homes after being repatriated following the conclusion of the Second World War). The ECtHR has applied Art. 46 to highlight legislative flaws, or gaps, and it has taken a more prescriptive

approach in defining what measures need to be taken by the state in order to remedy the problem identified. For example, the case of *Klaus & Iouri Kildze v Georgia* (No. 7975/06) 2.2.10 (discussed further in Furkat Tishaev’s article on page 3) highlighted a ‘legislative void’ which prevented victims of Soviet era political repressions from obtaining from obtaining compensation. The ECtHR invoked Art. 46 in holding that the authorities were required to act swiftly to adopt legislative, administrative and budgetary measures in order to plug the gap. In *Poghosyan v Georgia* (No. 9870/07) 24.2.09 the ECtHR identified a systemic problem concerning the failure to provide adequate medical care to prisoners infected with viral hepati-



tis C, and other diseases. In applying Art. 46, the ECtHR proposed that the authorities should take legislative and administrative steps to prevent the transmission of viral hepatitis C in prisons, to introduce screening arrangements and to ensure timely and effective treatment.

In *Abuyeva*, Art. 46 was expressly applied by the ECtHR in order to emphasise the obligation on the authorities to carry out an effective investigation into the Katyr-Yurt attack, with the ECtHR expressing its 'great dismay' at the lack of any real progress since 2005. Acknowledging the role of the CoM in assessing compliance, the ECtHR nevertheless considered it 'inevitable that a new, independent, investigation should take place'. In making this finding, the ECtHR once again declined to make a specific order (in the operative provisions of the judgment) to the effect that such an investigation must be carried out. In the course of litigating these Chechen cases, Memorial HRC and EHRAC have been seeking to secure such an order, notably as an aspect of redress for a litigant who successfully complains to the ECtHR about a 'disappearance' of a member of their family for which the state is found to be responsible. As yet the

ECtHR has declined to make such an order, although a number of dissenting judgments have agreed with this approach.<sup>1</sup> Nevertheless, *Abuyeva* represents an important step forward in exerting further pressure on the Russian authorities to implement an effective investigation.

Why this change of policy in *Abuyeva*? There were two important factors: the ECtHR's loss of patience with the Russian response and its sense that it could actually make a difference in this case. Thus, the ECtHR found that the Russian Government had 'manifestly disregarded the specific findings of a binding judgment concerning the ineffectiveness of the investigation'. Crucially, it also concluded that earlier omissions in the investigation were 'easily rectifiable'. This is significant in itself. It has frequently been argued before the ECtHR that at least some errors and omissions in flawed investigations *can* be rectified. For example, although evidence not recovered because of the failure to inspect the scene of a crime may be lost forever, key witnesses who have not been interviewed can later be traced and questioned. The ECtHR has not hitherto attempted to engage with such questions, but in *Abuyeva* it did. The outcome was

a clear signal that two particular steps would be especially important: firstly, that an independent assessment be carried out as to the proportionality and necessity of the use of lethal force, and secondly, the attribution of individual responsibility for the loss of life and the evaluation of such aspects by an independent body (preferably by a judge).

We now await the Russian authorities' compliance with this decision, in the absence of which the CoM must take further steps to ensure that the ECtHR's directions are heeded. In the absence of a speedy response, it will be time for the CoM to instigate 'infringement proceedings' – a new weapon in its armoury which was introduced by Protocol No. 14 in June 2010 and which enables the CoM to take states back to the ECtHR if they fail to comply with a judgment. For the sake of those who died at Katyr-Yurt, and for the sake of the credibility of the Strasbourg system, it is very important that there is sufficient collective European will to take these next steps.

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<sup>1</sup> See the partly dissenting opinion of Judge Spielmann in *Medova v Russia* (No. 25385/04) 15.1.09. See also the concurring opinion of Judge Spielmann, joined by Judges Ziemele and Kalaydjieva in *Vamava & Others v Turkey* (No. 16064/90) 18.9.09.