



In partnership with Memorial Human Rights Centre (MHRC), the Slavic Centre for Law and Justice (SCLJ) and the Georgian Young Lawyers' Association (GYLA)



Is the European Court of Human Rights satisfied with the Russian criminal justice system?

About a third of the complaints against Russia that are filed at the European Court of Human Rights (ECtHR) relate to violations of rights, both of the accused and the victims in the context of the criminal procedural system. One can identify several categories of the most typical complaints: protracted court proceedings; unjustified and unlawful confinement in custody; the use of torture during the preliminary investigation; conditions of incarceration for prisoners; and violations of the rights of victims during initial confinement. All these matters have already been considered many times at the Court, but it is quite some time since the Court addressed violations in the Russian criminal process in respect of the requirements of 'justice' under Art. 6 of the Convention.

In 2005-2006, some long-awaited decisions were issued, where the ECtHR addressed issues of compliance with the requirements of justice for court proceedings in criminal cases. Although it cannot be said that the Court passed very harsh judgments on the Russian criminal process, three issues can be singled out on which the Court's position became clearer: the right of the defence to call witnesses; the issuing of decisions in the absence of a defendant whose mental capacity is in question; and the use of evidence obtained by means of incitement.

From the point of view of Russian defenders of human rights, the weakest area of Russian judicial proceedings in criminal cases is the inequality of opportunities for the defence and prosecution to present their witnesses. This issue was the subject of review in four decisions: *Popov v Russia*,¹ *Andandonskiy v Russia*,² *Klimentyev v Russia*³ and *Zaytsev v Russia*.⁴ In these decisions, the Court consistently maintained its well-established position that neither party to the process should be essentially at a disadvantage in relation to the other party. At the same time, in three of the four decisions, the Court did not hold that there had been any violations of the

rights of the applicants to call witnesses.⁵ The Court analysed this question in most detail in the case of *Klimentyev v Russia*: there, the applicant claimed that during a second court procedure, five witnesses were not heard, in addition to the 35 witnesses who were heard.⁵ The applicant had indeed asked for these witnesses to be called, but two of them lived in Norway and had been questioned there at the request of the Russian law enforcement authorities. A third witness lived in Germany, and his place of residence could not be established, despite enquiries. It was also impossible to locate the place of residence of two other Russian witnesses, and they were not questioned. In the view of the Court, it could not be claimed that there was a violation of the right to a fair hearing, because the witnesses had all been examined during the first court proceedings,⁶ the defence had had the opportunity to cross-examine them then and foreign citizens could not be forced to appear in court. In that particular case, according to the Court, the failure to call those witnesses had in no way affected the conclusions of the national court on the guilt of the applicant.⁷

In the case of *Andandonskiy v Russia*, the applicant considered that his rights had been violated because there was no examination of a witness who had seen the incident in person, although at the court hearing he had not insisted that she be called. However, the verdict was based on the testimony of the wife of the victim and of a witness who knew of the

incident only from what others had said. The Court considered that the applicant's rights had not been violated in that case either.⁸

However, the Court took a fundamentally different position in *Popov v Russia*. In that case, the defence had asked that some witnesses be called, who could have corroborated the applicant's alibi, but these witnesses were not questioned when they appeared in court, nor were they called on another day despite the defence's request. The ECtHR considered this to be impermissible, because the evidence concerning the applicant's participation in the crime was inconsistent, and most of the evidence

did not provide corroboration of his participation in the crime. In this case, the Court indicated that where the prosecution is based on the premise that a person was in a particular place at a particular time, the principle of equality of the parties requires that the accused be afforded the opportunity to refute this premise.⁹

In other words, the Court has once again affirmed its position that national courts are not obliged to examine all the witnesses that the defence has asked to call while the defence, for its part, must call its witnesses in good time, file a timely appeal of a refusal to call such witnesses, and must explain precisely what the witnesses can corroborate. National courts are obliged to hear witnesses only if the evidence gathered by the prosecution is contradictory and does not prove unambiguously that the defendant was involved, in order that the parties can put their cases on an equal footing.

It could be said that the position expressed by the Court in its decision in *Romanov v Russia* was unexpected for Russian lawyers, because the European Court held it impermissible for national courts to rely on the conclusion of an expert analysis as to the defendant's mental capacity, and for them to issue decisions in the absence of the defendant.¹⁰ In the view of the ECtHR, this is a violation of the guarantees that a defendant should be present during court proceedings, even if his lawyer was present during the consideration of the case. This practice is

widely accepted, and almost no Russian lawyer considers the practice to be a violation of the rights of a defendant who has been found to be innocent. However, the ECtHR's position means that this approach must be changed.

On the other hand, the position articulated by the ECtHR in its decisions, *Vanyan v Russia*¹¹ and *Khudobin v Russia*,¹² was an expected one: the ECtHR concluded unequivocally that a verdict of guilt, issued on the basis of evidence that was obtained through entrapment, is not a just one.¹³ In both cases, the defendants obtained drugs at the request of police agents, using their money, and

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they handed them over to the police; in other words, the crime would not have been committed if the police agents had not taken steps to organise the crimes. Furthermore, the ECtHR indicated that it cannot be sufficient for national courts to accept bare assertions from the police that information that the defendant was involved in selling drugs was the basis for conducting an operation - they must show proof of this to the court. This approach compels a change in national practice; but the problem is that the law on investigative activity formulates the

provisions on such activity in very general terms, and every enforcement agency has its own set of instructions to guide it; in other words, it will be necessary to carry out complex, painstaking work that will need time and a certain political will, to implement these decisions of the Court.

It can be said that hopes that the ECtHR would "not leave a stone unturned" in relation to the Russian criminal justice system have not been realised; but these decisions have shown up those aspects of the Russian criminal justice system which the Court considers impermissible. This makes it possible to direct our efforts inside Russia to bringing legislation and judicial practice into compliance with the Court's standards.

1 (No. 26853/04) 13.7.06, paras. 175-189.

2 (No. 24015/02) 28.9.06, paras. 50-51.

3 (No. 46503/99) 16.11.06, paras. 125-126.

4 (No. 22644/02) 16.11.06, paras. 25-26.

5 Para. 22.

6 Para. 126.

7 Ibid.

8 Para. 53.

9 European Court of Human Rights (2006) "Information Note 88 on the Case-Law of the Court: July - August 2006."

10 (No. 63993/00) 20.10.05, paras. 111-112.

11 (No. 53203/99) 15.12.05, para. 49.

12 (No. 59696/00) 26.10.06.

13 European Court of Human Rights (2006) "Information Note no. 90 on the Case Law of the Court: October 2006."