

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

Execution of the Ilaşcu judgment - further developments

Vladislav Gribincea, Programme Director,
Lawyers for Human Rights, Moldova

In its judgment in *Ilaşcu and Others v Moldova and Russia* (No. 48787) 8/7/04, concerning *inter alia* the unlawful detention of the applicants in prisons in Transnistria, the Grand Chamber of the ECtHR indicated, under Art. 46 of the ECHR, that both respondent governments were to “take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.”¹ It also found that “any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Art. 5.”²

The obligation of governments to abide by ECtHR judgments is unconditional. In the light of the findings from this judgment, it seems that the obligation of the Russian Government deriving from the above indication of the ECtHR is one of result and not one of means and that it is not altered by the fact that the Russian authorities did not exercise formal control over the territory where the applicants were detained. In respect of the Moldovan Government it seems that the obligation to secure the immediate release of the applicants is a positive one, that is, one of means.

Although the obligation to abide by the above ECtHR judgment took effect from 8 July 2004, all three applicants, who were in prison on the date of adoption of the judgment (7 May 2004), were released only after their terms of

imprisonment expired (on 2 June 2004, 2 June 2007 and 4 June 2007), despite interim resolutions of the Committee of Ministers (CoM) of the Council of Europe (CoE) (ResDH(2005)42, ResDH(2005)84, ResDH(2006)11 and ResDH(2006)26) urging the Russian Government and encouraging the Moldovan Government to ensure the immediate release of the applicants. In other words, the governments did not secure the immediate release of Mr Ivanțoc and Mr Petrov-Popa, who spent a further 35 months in detention after the ECtHR judgment had been delivered.

In the light of the failure to release the imprisoned applicants, on 10 June 2005, Mr Ivanțoc and Mr Petrov-Popa lodged another application with the ECtHR (*Ivanțoc and Others v Moldova and Russia*, No. 23678/05), complaining *inter alia* that their detention after 8 July 2004 was in breach of Art. 46 of the ECHR.

On 7 July 2005, the ECtHR granted the applicants' request for priority treatment of their application. On 22 March 2006, the case was communicated to the Moldovan and Russian Governments. The ECtHR asked the parties to deal *inter alia* with the question of whether it is competent to examine the complaint made under Art. 46.

On 12 July 2007, the CoM decided to suspend its examination of the execution of the 8 July 2004 judgment and to resume it after the final determination of the new application by the ECtHR.

On 18 September 2007, a Chamber of the fourth section decided to inform

the parties of its intention to relinquish its jurisdiction to examine the second application in favour of the Grand Chamber in accordance with Art. 30. On 12 October 2007, the Russian Government objected for the reason that the examination of this application by the Chamber “will give additional protection to the parties' rights”.³ Having regard to this objection, on 5 December 2007, the Chamber decided not to relinquish jurisdiction.

Apparently, the second application is of specific importance for the development of ECtHR jurisprudence on Art. 46. Although, under general international law, a refusal to abide by a judgment of the ECtHR would inevitably represent a violation of the ECHR, the ECtHR has previously avoided finding a separate violation of Art. 46, but has not excluded that such a ruling might be made in the future.⁴ Such a ruling may strengthen the position of the applicants and the CoE in supervising the execution of ECtHR judgments without the amendment of the ECHR. On the other hand, the acknowledgment of the jurisdiction of the ECtHR to rule on a complaint made under Art. 46 of the ECHR may amount to an overlapping of the jurisdictions of the ECtHR and of the CoM in this field.

1 Para. 490.

2 *Idem*.

3 Letter from the Agent of the Russian Government to the Registry of the ECtHR dated 12/10/07.

4 See: *Olsson v Sweden* (No. 2) (No. 13441/87) 27/11/92, para. 94; *Lyons and Others v UK* (No. 15227/03) dec. 8/7/03.