

Advancement of the right to individual petition to the ECtHR for Russian citizens detained in correctional facilities: *Zakharkin v Russia*

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In its judgment in the case of *Zakharkin v Russia* (No. 1555/04) 10/6/10 the ECtHR found violations of Art. 3 ECHR (substantive and procedural) on account of detention conditions which amounted to inhuman and degrading treatment, Art. 6(1) ECHR, on the grounds that the tribunal had not been 'established by law', and also that Russia had violated the applicant's right to individual petition under Art. 34 ECHR. As regards the latter, more specifically the ECtHR found a violation of a detainee's right to apply to the ECtHR and to establish and maintain contact with non-advocate representatives (NGO lawyers) under the same conditions as if they were professional advocates.

The applicant's representative before the ECtHR, Ms. Demeneva, was not a professional advocate, but an NGO lawyer. Despite numerous requests and attempts she was not allowed to visit the applicant whilst he was detained in remand centre IZ-66/1 in Yekaterinburg to discuss crucial issues relating to his application to the ECtHR.

As stated in para. 155 of the judgment in *Zakharkin*: "should the Government's action make it more difficult for the individual to exercise his right of petition, this amounts to 'hindering' his rights under Art. 34." Furthermore, the ECtHR underlined the fact that the refusal to grant access to Ms. Demeneva was not due to any security risk or a risk of collusion or perversion of the course of justice, but to a gap in the law.

Section 18 of the Russian Detention Act provides that a non-advocate may visit a detainee in a remand centre only if they possess a judicial decision by which they have been admitted to act as counsel in the domestic criminal proceedings. Such admittance lies within the discretionary powers of the trial or

appeal judge. "No exceptions to that rule are possible. Accordingly, non-advocate representatives before the ECtHR are faced with difficulties in obtaining permission to visit their clients" observed the ECtHR at para. 157 of its judgment in *Zakharkin*. It should be emphasised that this was not an isolated case, but is in fact a common obstacle faced by Russian NGO lawyers. Consequently, *Zakharkin* is an important victory and a significant step for non-advocate NGO lawyers and their beneficiaries in their efforts to promote and protect human rights in Russia.

As reported by Dr. Anton Burkov,¹ NGO lawyers are already benefitting from changes to the authorities' approach following *Zakharkin*. By referring to *Zakharkin* and another local case where the judge himself referred to ECtHR case law, Dr. Burkov, who is not an advocate, was recently able to meet with a client detained in a pre-trial detention centre to discuss his ECtHR case (*Borisov v Russia*, No. 12543/09) within only three days of his initial request, a significant improvement from Ms. Demeneva's previous experience.

Another dimension of the right to petition the ECtHR that has been the subject of much discussion in recent months has also won a great victory with the ratification of Protocol 14 to the ECHR by the Russian Federation on 15 January 2010. Indeed, it could be argued that by enabling the long-awaited reform of the ECtHR, it represents, at the European level, an important step towards the protection of the individual right to petition jeopardised by the huge number of pending cases, more than a quarter of which are against Russia (28.1% by 31 May 2010²). *Zakharkin* also shone more light on this dimension of Art. 34:

As reported by Ms. Demeneva: "Acting as Mr *Zakharkin's* representative, I made persistent attempts to give the State a chance to improve the situation at the na-

tional level. We referred to the ECHR and the ECtHR's practice in documents drafted by advocates to domestic courts and other State bodies at every stage of the domestic proceedings. These arguments were never taken into account."³

Despite Ms. Demeneva's efforts to allow the State to provide an effective domestic remedy in compliance with its obligations under the ECHR, she and Mr *Zakharkin* were forced to take yet another case against Russia before the ECtHR. The Art. 6 violation in *Zakharkin* (on the grounds that the domestic tribunal that considered the applicant's case was not established by law), perfectly illustrates the issue says Ms Demeneva: "The problem with the appointment of lay judges in Russia at that time was already criticised by the ECtHR in *Posokhov v Russia* (No. 63486/00) 4/3/03. We referred to this case in cassation and when applying for supervisory review, but the Russian Supreme Court did not pay attention to these arguments. If it had done the violation could have been avoided at the national level."⁴

Even if the ratification of Protocol 14 to the ECHR does not provide a long-term solution to the lack of effective implementation of ECHR guarantees and ECtHR case-law in Russia domestic courts, *Zakharkin* nevertheless provides NGO lawyers with greater means to promote and protect the human rights and fundamental freedoms of Russian citizens detained in correctional facilities.

1 Burkov, A., 2010. Comments on the ECtHR judgment in *Zakharkin v Russia* [Email] (Personal communication, 11 July 2010).

2 European Court of Human Rights, ECtHR, 2010. *Pending cases (pie chart)*, [online]. Available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/> [accessed 20 June 2010].

3 Demeneva, A., 2010. Comments on the ECtHR judgment in *Zakharkin v Russia* [Email] (Personal communication, 18 June 2010).

4 Ibid.