

7-1-2007

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### Recommended Citation

Musin, Valeriy A. (2007) "Recent Case Law of the European Court of Human Rights: an Overview," *International Journal of Legal Information*: Vol. 35: Iss. 2, Article 11.

Available at: <http://scholarship.law.cornell.edu/ijli/vol35/iss2/11>

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## **Recent Case Law of the European Court of Human Rights: an Overview**

VALERIY A. MUSIN\*

In 2006 the Russian Federation was chair of the Committee of Ministers of the Council of Europe. Our motto was: “Towards united Europe without dividing lines.” In order to make European countries closer to each other it is very important to insure unified interpretation and application of norms contained in international treaties. Such harmony between countries requires us to first consider the terms in the Convention for the Protection of Human Rights and Fundamental Freedoms.

Since Russia is a party to the Convention, the Convention’s norms are binding on Russia. This conclusion is based upon the rule of Article 15 (Part 4) of the Constitution of the Russian Federation, according to which generally recognized principles and norms of international law and international treaties of the Russian Federation shall be deemed an integral part of its legal system.

The Convention provides a legal mechanism – the European Court of Human Rights – for procuring unified interpretation of its rules, and whose case law is binding on the member countries and their national authorities, including courts. This principle is widely supported in Russia. For example, the Plenum of the Supreme Court of the Russian Federation issued a special Ordinance “On application of generally recognized principles and norms of international law and international treaties of the Russian Federation by Courts of general jurisdiction.”

<sup>1</sup> It is expressly stipulated there that

the Russian Federation, as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, recognizes

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<sup>1</sup> Special Ordinance No. 5, entered on the 10<sup>th</sup> of October 2003.

jurisdiction of the European Court of Human Rights as binding in issues of construction and application of the Convention and Protocols to it in case of alleged violation of these treaties by the Russian Federation when an alleged violation took place after inception thereof in relation to the Russian Federation. Therefore, application of the abovementioned Convention by courts should be performed with due consideration of the practice of the European Court of Human Rights so as to avoid any violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>2</sup>

With a reference to Article 46 ( Section 1) of the Convention stipulates that “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” The Ordinance also emphasizes that such judgment in relation to the Russian Federation shall be binding for all public agencies of the Russian Federation, including courts, who within their competence should act so as to ensure performance of obligations of the state resulting from participation of the Russian Federation in the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup>

Here one should draw attention to another Ordinance of the Supreme Court of the Russian Federation – Ordinance Number. 23 of 19<sup>th</sup> December 2003. This Ordinance deals with European Court judgments issued in relation to the Russian Federation. It contains a recommendation to courts in the course of preparation of judgments to take into consideration, *inter alia*, acts of the European Court of Human Rights “where there is an interpretation of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms which should be applied in the case.”<sup>4</sup>

It should be noted that, unlike the Ordinance Number 5, Ordinance Number 19 contains no reservation along the lines that only those acts of the European Court of Human Rights which were issued in relation to Russia should be taken in consideration. In other words, Russian courts should be mindful of the European Court’s acts construing the norms of the Convention as applied in the case in question. This is regardless whether the European Court’s acts were issued in relation to Russia or other country.

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<sup>2</sup> Section 10, paragraph 3 of the Ordinance.

<sup>3</sup> Section 11, of the Ordinance.

<sup>4</sup> Section 4 (b) of Ordinance No. 19.

Such an approach is wise since it makes it possible for Russian courts to resolve disputes with due consideration of the European Court's case law, even if a European case occurred prior to the European Court's jurisdiction in matters arising with the Russian Federation. It is worthwhile to recollect in this connection that the Constitutional Court of the Russian Federation, when discussing a problem of protection of human rights, refers to the European Court's acts issued not only in relation to Russia but in relation to other countries as well. For example, in the course of analysis of Article 3 of the Convention,<sup>5</sup> the Constitutional Court made reference to the European Court's judgments in the cases of *Mathieu-Mohin and Clerfayt v. Belgium* (2<sup>nd</sup> March 1987) and *Gitonas and others V. Greece* (1<sup>st</sup> July 1997).<sup>6</sup>

Likewise when dealing with the principle of legal certainty resulting in stability (i.e. final and binding character) of judicial acts which became effective, the Constitutional Court mentioned not only the European Court's judgment in the case of *Ryabych v. the Russian Federation* (24<sup>th</sup> July 2003), but also the judgment in the case *Brumaresky v. Romania* (28<sup>th</sup> October 1999).<sup>7</sup>

Quite recently, the Constitutional Court of the Russian Federation emphasized that both the Convention and the European Court's judgments are an integral part of the Russian legal system and therefore they should be taken into consideration by the federal lawmaker in course of regulation of social relations and by law-applying bodies – upon application of relevant norms of law.<sup>8</sup> These judgments are integral to the Russian system to the extent that

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<sup>5</sup> It reads: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

<sup>6</sup> See the Ruling of the Constitutional Court of the Russian Federation of 21<sup>st</sup> December 2005 № 13-II, which states that "On the case of examination of constitutionality of some provisions of the Federal Law "On General Principles of Organization of Legislative (Representative) and Executive Bodies of State Powers of Subjects of the Russian Federation in connection with complaints of a number of citizens", Section 2, paragraph 8).

<sup>7</sup> See the Ruling of the Constitutional Court of the Russian Federation of 20<sup>th</sup> February 2006 № 1-II, stating that "On the case of examination of constitutionality of provisions of Article 226 of the Civil Procedure Code of the Russian Federation in connection with complaints of citizens K.A. Ineshin, N.S. Nikonov and open joint stock company "Nizhnekamskneftehim", Section 2, paragraph 8).

<sup>8</sup> See Section 2.1, paragraph 2 of the Ruling of the Constitutional Court of the Russian Federation of 5<sup>th</sup> March 2007 № 2-II in the case on examination of constitutionality of provisions of Articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedure Code of the Russian Federation in

they interpret the extent of rights and freedoms fixed in the Convention, including the right of access to courts and to fair justice. This principle exists on the basis of generally recognized principles and norms of international law. These illustrations show quite clearly that a clear understanding of the European Court's case law containing interpretation of the Convention's norms is vitally important.

The necessity of providing easy access to the text of the Convention and to the European Court's case law in each member State of the Council of Europe is emphasized in documents of the Committee of Ministers. For example, in its Recommendation REC (2002) 13 "On the publication and dissemination in the member States of the text of the European Convention on Human Rights and of the case law of the European Court of Human Rights" (adopted by the Committee of Ministers on 18 December 2002 at the 82<sup>nd</sup> meeting of the Ministers' Deputies).<sup>9</sup>

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connection with application of the Cabinet of Ministers of the Tatarstan Republic, complaints of open joint stock companies "Nizhnekamskneftehim" and "Khakasenergo" as well as complaints of number of citizens."

<sup>9</sup> It reads, *inter alia*, that the Committee of Ministers,

"Considering the importance of the European Convention of Human Rights ... as a constitutional instrument for safeguarding public order in Europe, and in particular of the case-law of the European Court of Human Rights...;

Considering that easy access to the Court case-law is essential for the effective implementation of the Convention at national level, as it enables to ensure the conformity of national decisions with this case-law and to prevent violations;

Recommends that the governments of the member States review their practice as regards the publication and dissemination of:

- the text of the Convention in the language(s) of the country;
- the Court judgments and decisions,

in the light of the following considerations.

It is important that the governments of member states:

- i. ensure that the text of the Convention, in the language(s) of the Country, is published and disseminated in such a manner that it can be effectively known and that the national authorities, notably the courts, can apply it;
- ii. ensure that judgments and decisions which constitute relevant case-law developments, or which require special implementation measures on their part as respondent States are rapidly and widely published, through state or private initiative, in their entirety or at least in the form of substantial summaries or excerpts (together with appropriate references to the original texts) in the language(s) of the country, in particular in official gazettes, information bulletins from competent ministries, law journals and other media generally used by the legal community, including, where appropriate, the Internet sites..."

These recommendations are complied with in the Russian Federation. First of all, the Russian version of the Convention for the Protection of Human Rights and Fundamental Freedoms is repeatedly published in our country, it is also available in Russian legal databases such as *Garant*, *Consultant plus*, and *Codex*. Second, there is a Russian edition of the *Bulletin of the European Court of Human Rights*, a monthly magazine specifically designated for publishing the European Court's case-law. There is also a special Russian publication – *Human Rights: Practice of the European Courts of Human Rights* – with a similar function. Third, there are monographs written by eminent foreign authors and containing interpretations of the Convention's rules in the European Court case law; these have been translated into Russian and published in Russia.<sup>10</sup>

The significance of the European Court's case law results from the fact that the European Court makes legal assessments of acute problems existing in the modern world. It does this while purporting to maintain a fair balance between private and public interests.

A very clear example is the case of *Refah Partisi (the Welfare Party) and others v. Turkey* (Judgment of 13<sup>th</sup> February 2003). In the *Partisi* case, the Constitutional Court of Turkey dissolved the welfare party whose aim was to introduce sharia law and theocratic regime in the country. In the course of considering the party's complaint alleging a violation of Article 11 of the Convention<sup>11</sup> by Turkish authorities, the European Court analyzed the Convention's norms of freedom of thought, conscience and religion, freedom of assembly and association and their correlation with democracy and state institutions which are designated to ensure it. The Court concluded that one cannot declare his devotion to democracy and at the same time support a

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<sup>10</sup> See, for example, Michele de Salvia. *European Convention on Human Rights*. St. Petersburg. 2004; Michele de Salvia. *Precedents of the European Court of Human Rights*.

<sup>11</sup> It reads:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”.

regime based upon sharia law which clearly deviates from the rights fixed in the Convention, especially as it concerns criminal law and criminal procedure, legal status of women and so on. The Court unanimously decided that when dissolving the party in question, Turkish authorities did not violate Article 11 of the Convention.

When construing Article 6 of the Convention the European Court repeatedly emphasizes that one of the substantial conditions for effectiveness of a court's judgment is whether there has been a reasonable time for court proceedings.<sup>12</sup> In order to clarify whether proceedings in a case complied with this requirement the following aspects should be taken into consideration:

- complexity of the case,
- actions of the claimant, on the one hand, and
- relevant state authorities, on the other, and
- the importance of the issue being considered in the case (or, in other words, "what is at stake") for the claimant.

The European Court is of the opinion that delay in legal proceedings may only be deemed unreasonable if it resulted from inefficient activities of public agencies. In the course of dealing with this problem where the time between the date of filing a statement of claim and a court's issuance of a final judgment amounted to almost ten years, the European Court noted that the hearing was adjourned numerous times upon the motions of the claimant who repeatedly challenged the judges, changed his counsel (and any new counsel naturally needed additional time to review the materials of the case); these circumstances inevitably resulted in delay with resolution of the dispute. Meanwhile, public authorities (including courts) acted within time limits as provided by law and, *inter alia*, each motion of the claimant was considered on the same day it was submitted.

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<sup>12</sup> Its Section 1 reads:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

The European Court indicated that the delay in legal proceedings was effectively initiated by the claimant who appeared to be the architect of his own hardships. Given these facts, the European Court concluded that the requirement of reasonable time of court proceeding was complied with in this case.<sup>13</sup>

Here is another very interesting case where the European Court's approach was substantially different. Some plots of land belonging to applicants had been expropriated for public needs and compensation was paid by state authorities. The applicants required additional compensation and their claims were satisfied by the trial court. The state authorities challenged the judgment which was upheld by the Court of Cassation on 12<sup>th</sup> March 1996. The additional amount was paid to the plaintiff on 7<sup>th</sup> November 1997.

The European Court recognized violation of Article 1 of Protocol 1 to the Convention.<sup>14</sup> When addressing the problem of length of proceedings, the European Court stipulated that "the delay in paying for the additional compensation awarded by the domestic courts was attributable to the expropriating authority and caused the owner to sustain loss additional to that of the expropriated land."<sup>15</sup> It appears from this text that such a delay was assessed by the European Court as unreasonable. In spite of the fact that the delay in question (8 months) was not too long (especially as compared with the several-year delay in the previous case) it cannot be deemed justified since it resulted from state authorities inefficient activity.

These illustrations show that, as concerns a problem of a reasonable length of legal proceedings, the European Court's position is based upon some criteria which are quite definite, on the one hand, and quite flexible, on the other.

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<sup>13</sup> See, Konstantin Antonov v. the Russian Federation, the judgment of 3<sup>rd</sup> November 2005.

<sup>14</sup> This Article reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The previous provisions shall not, however, in any way impair the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

<sup>15</sup> Kayihan and others v. Turkey, judgment of 8<sup>th</sup> April 2004.



It should be noted that the issue how to expedite legal proceedings in national courts attracted the attention of the European Commission for Democracy through Law (Venice Commission) who recommended, *inter alia*, that each State-party to the European Convention on Human Rights should provide compensatory remedies for breaches of the reasonable time requirement which may have already occurred.<sup>16</sup> The Venice Commission emphasized that

acceleratory remedies in the form of a request to take the procedural step to avoid unreasonable delay are to be seen as *preventive*, not compensatory. They do not amount to a *restitutio in integrum*. When an undue delay has taken place in a certain phase of the proceedings, the possibility of putting an end to such delay to avoid an unreasonably delayed trial as a whole does not represent a reparation in kind. The individual's entitlement not to suffer from an excessive delay derives from Article 6 § 1 as such, not from the finding of a breach of that provision.<sup>17</sup>

It is further indicated in the Study that if an undue delay has taken place in the proceedings as a whole, *restitutio in integrum* will be possible in the following forms:

*if the proceedings are still pending:* (a) if the proceedings are criminal, by way of mitigation of the sentence or similar remedies. If the proceedings are civil, administrative or criminal, by way of *fast-tracking the case* to the extent possible. This means that threshold of reasonableness in the remainder of the proceedings will be reduced, the case will be dealt with more quickly than an ordinary one; in this manner, the undue delay will be caught up (of course not arithmetically) and the global length of the proceedings will be "reasonable" within the meaning of Article 6 § 1. In this case, no pecuniary reparation will be necessary.

*If the proceedings are terminated,* will of course be pecuniary reparation.<sup>18</sup>

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<sup>16</sup> European Commission for Democracy through Law (Venice Commission). Study on the effectiveness of national remedies in respect of excessive length of proceedings. Adopted by the Venice Commission at its 69<sup>th</sup> Plenary Session (Venice, 15-16 December 2006), Section 173.

<sup>17</sup> Ibid, Section 178.

<sup>18</sup> Ibid., Section 179.

One more issue that is very often under consideration in the European Court of Human Rights results from claims under violation of Article 1 of Protocol 1 to the Convention. In these cases, it is necessary to interpret paragraph 1 of this Article and, in particular, to ascertain the meaning of the term “possessions.”

As it appears from numerous precedents of the European Court, it is of the opinion that the notion “possessions” embraces both the ownership title to some existing tangible assets and other rights creating a “lawful expectation” for the claimant to receive a right of effective use of some property.<sup>19</sup>

Quite recently, such an approach was reconfirmed in the case “Interslav v. Ukraine.”<sup>20</sup> The background of the complaint was a long term dispute between a Ukrainian-Spanish joint venture “Interslav” and the Ukrainian tax authorities concerning refund of value added tax (VAT).

The applicant is an industrial enterprise manufacturing goods from recycled scrap metal purchased in Ukraine and subject to VAT upon the rate of 20%. The production is mainly exported from Ukraine at a zero VAT rate. The applicant is therefore entitled to a refund of the VAT due to the price of such raw materials as scrap metal. According to the Ukrainian Law on VAT, a refund should be executed within an one-month period from the date when the applicant submitted the relevant calculations to the local tax agency.

The VAT refund should be effected by the State Treasury of Ukraine on the basis of a confirmation by the tax agency or a court judgment. Since 1998 the tax agency had refrained from such a confirmation, so the applicant sued both the tax agency and the State Treasury Department. In May 2004 the court issued a judgment in favor of the applicant and ordered the respondents to make relevant payments. The European Court noted that

having met the criteria and requirements established by the domestic legislation, the applicant could reasonably expect the refund of the VAT it had paid in the course of its business activities, as well as compensation for any delay. Even though a particular claim for a VAT refund may be subject to checks and objections from the

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<sup>19</sup> See, Michele de Salvia. *Precedents of the European Court of Human Rights. Leading principles of judicial practice relevant to the European Convention on Human Rights and Fundamental Freedoms*, p. 967.

<sup>20</sup> Judgment of 9<sup>th</sup> January 2007.

competent State authorities, the relevant provisions of the Law on Value-Added Tax do not require the prior judicial review of a claim to validate a company's eligibility for a refund.<sup>21</sup>

The European Court concluded that the applicant had a proprietary interest recognized by Ukrainian law, and protected by Article 1 of Protocol № 1 to the Convention.<sup>22</sup>

As it is specifically emphasized in the Ordinance of the Plenum of the Supreme Court of the Russian Federation of 10<sup>th</sup> October 2003 № 5 “On application of generally recognized principles and norms of international law and international treaties of the Russian Federation by courts of general jurisdiction,” execution of European Court judgments relating to the Russian Federation implies, when necessary, an obligation by the state to take specific measures aimed to abolish violations of human rights provided for by the Convention, and consequences of such violations for the applicant, as well as general measures so as to prevent repeats of similar violations. It is also indicated there that “courts within their competence should act so as to ensure performance of the state's obligations resulting from participation of the Russian Federation in the Convention for the Protection of Human Rights and Fundamental Freedoms.”<sup>23</sup>

A very interesting example of this principle is the case “Shofman v. the Russian Federation” (Judgement of 24<sup>th</sup> November 2005). The contents of the case may be summarized as follows: Mr. Shofman and his wife were married in 1989 in Novosibirsk, then they moved to St. Petersburg. On the 12<sup>th</sup> May 1995 his wife produced a baby boy when she visited her parents in Novosibirsk. Mr. Shofman was registered as the father of the child. At the end of September 1995, the mother and son came back to St. Petersburg. Mr. Shofman believed that he was a father of the boy whom he treated as his son.

In the end of March 1996 Mr. Shofman resettled in Germany and waited for his wife and child to join him. However, in September 1997 his wife notified him that she would divorce him and sue him for alimony to maintain the child. About that time, Mr. Shofman's relatives informed him that he was not the father of the boy. On the 16<sup>th</sup> December 1997 Mr. Shofman sued his wife to divorce her and to challenge his registration as the boy's father. On 12<sup>th</sup> April 1999 the marriage was terminated.

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<sup>21</sup> See, Section 31, paragraph 1 of the judgment.

<sup>22</sup> See, Section 32 of the judgment.

<sup>23</sup> See, Section 11, paragraph 2.

As for Mr. Shofman's claim to challenge his registration as the father of the boy, the trial Court, upon a basis of two expert witnesses, came to a conclusion that Mr. Shofman could not biologically be the father of this boy. Nevertheless the court rejected Mr. Shofman's claim to invalidate his registration as the boy's father due to the fact that the claim was time-barred.

It should be noted here that in May 1995 when the boy was born and Mr. Shofman was registered as his father, family relations were regulated by the RSFSR Code on Marriage and Family 1969. Article 49 of the Code established that a person registered as a mother or a father of a child was entitled to challenge such a registration within one year of the date when this person became or ought to become aware of this registration. Since Mr. Shofman had been registered as the father of the boy in May 1995 and had become immediately aware of that registration, the time limitation period expired in May 1996; meanwhile the claim was filed with the Court in December 1997. The Code 1969 was declared invalid as of 1<sup>st</sup> March 1996, from which date the RF Family Code 1995 was incepted. According to Article 52 (Section 1) of the Code 1995 there is no time limitation period at all for such claim.

As it was indicated in the Ordinance of the Plenum of the Supreme Court of the Russian Federation of 25<sup>th</sup> October 1996 № 9 "On application by courts of the Family Code of the Russian Federation" upon consideration of cases on the establishment of paternity and allocation of support in relation to children who were born prior to 1<sup>st</sup> March 1996, the Code 1969 had to be applied; therefore, the time for challenging the registration as a father was one year from the moment when a person became or ought to become aware of his registration as the father of the child. Given the abovementioned, in March 2001 the Cassation instance (Novosibirsk Regional Court) upheld the trial Court's judgment. Competent officials, being approached by the claimant, refused to submit a protest in course of court supervision.

Mr. Shofman was also ordered to pay support to maintain the child. In 2001 he applied to the European Court of Human Rights with a complaint on violation of Article 8 of the Convention.<sup>24</sup> He alleged that although his

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<sup>24</sup> This Article reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being

claim was aimed to cancellation of existing family links, clearance of his relationship with the child undoubtedly touched his private life.

He supported his position, *inter alia*, with reference to the European Court's judgment in the case "Rasmussen v. Denmark (21<sup>st</sup> November 1984). In that case, the European Court held that, in accordance with its case law, a situation when a legal presumption may prevail over biological and social realities contrary to established facts is inconsistent with an obligation to procure actual respect of private and family life. A fair balance between the public interest in protection of legal certainty of family relations and the claimant's right to review a legal presumption in the light of biological evidence was not maintained in such a situation.

Let us now consider both specific measures which may be taken to rectify the violation of the claimant's rights and general measures to prevent such violations in the future. As for the latter, relevant general measures had already been provided since according to the RF Family Code 1995 such claims cannot be time-barred.

The problem with individual measures is more complicated. In order to review an effective Russian Court's judgment on the basis that it is inconsistent with the European Court judgment against Russia a relevant norm of Russian procedural law is needed issued upon a complaint of the applicant who lost the case in Russian Courts. Such a norm is contained in the RF Arbitration Procedure Code 2002 (Article 311, Section 7).<sup>25</sup> This Code deals with resolution of cases related to business activities. As for disputes in a sphere of family law, they are within the competence of Courts of general jurisdiction whose activities are regulated by the RF Civil Procedure Code 2002.

There is no similar norm in this Code. However, the Code provides for analogy of *lex* and analogy of *jus*.<sup>26</sup> Therefore, it is possible to apply in

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of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others".

<sup>25</sup> According to this norm a State Arbitration Court's judgment may be reviewed upon newly-discovered circumstances on a number of reasons, one of which is a violation of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in course of consideration of a concrete case by a State Arbitration Court in connection of the judgment of which the applicant approached the European Court of Human Rights, if the abovementioned violation has been established by the European Court.

<sup>26</sup> See, Article 1, Section 4.

such cases the above mentioned norm of the Arbitration Procedure Code by analogy of *lex*. It will be a review of the Russian Court judgment upon newly-discovered circumstances that may only be initiated by a litigant's motion to be filed with the Court who issued the judgment.<sup>27</sup>

Let us now imagine that for some reason or other (e.g. because of a long-term disease) the litigant is unable either to submit the motion in person or to authorize anybody to do it for him. Then the question arises whether it would be possible to initiate a review of the judgment without his motion. Such a possibility exists in a case of application by analogy of *lex* of the norm as contained in Article 413, Section 4(2) of the RF Criminal Procedure Code.

Similar to the above mentioned rule of the Arbitration Procedure Code, this norm also admits a review of a Court sentence in a criminal case if it is inconsistent with relevant European Court judgment, but, unlike the Arbitration Procedure Code rule, the Criminal Procedure Code norm stipulates that such a review shall be performed by the Presidium of the Supreme Court of the Russian Federation upon a submission of the Chairman of the RF Supreme Court.<sup>28</sup> Therefore, one may conclude that Russian law does provide legal instruments which may be used in order to rectify violations of the Convention's norms in relation to concrete persons.

The European Court pays special attention to the principle of legal certainty emanating from the right to a fair court hearing as guaranteed by Article 6 (Section 1) of the Convention.<sup>29</sup> It means, *inter alia*, that a court's judgment, once it becomes effective, should not be reviewed on its merits. It may only be reviewed so as to correct the court's errors.<sup>30</sup> These conclusions directly relate to the institution of court supervision in Russia.

The approach of both the European Court and the Committee of Ministers of the Council of Europe to this institution is twofold. On the one hand, there is an understanding that judicial supervision in Russia is justified. The Committee of Ministers in its Interim Resolution of 8<sup>th</sup> February 2006 appreciated, *inter alia*, that Russian authorities and a substantial part of Russian legal community consider it is necessary to maintain this procedure since it is designated to be the only really available way to correct numerous

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<sup>27</sup> See, Article 394 of the Civil Procedure Code.

<sup>28</sup> See, Article 415, Section 5.

<sup>29</sup> See, e.g., the judgment in the case "Bromaresku v. Romania", (28<sup>th</sup> October 1999).

<sup>30</sup> See, e.g., the judgment in the case "Ryabykh v. Russia, (24<sup>th</sup> July 2003).

serious errors and defects of courts' judgments issued at local and regional levels. On the other hand, the Resolution invites Russian authorities to further develop the reform of civil procedure in order to ensure full observance of the principle of legal certainty as it is established by the Convention and interpreted in the European Court's judgments.

It should be noted that previously – according to the Civil Procedure Code 1964 and Arbitration Procedure Code 1995 – the procedure of review of the case in the course of court supervision could only be triggered by a protest of some highly-positioned court officials or those of the procurator's office. The European Court in a number of its judgments indicated that since review of the case in the course of court supervision depends upon discretionary powers of relevant officials, such a review cannot be deemed effective means of court protection in the meaning of the Convention.<sup>31</sup> Moreover, the fact that supervisory proceedings may be initiated by top officials of the Court in charge of reviewing the case creates doubts about the impartiality of the Court. This may lead to violations of the norm as contained in Article 6, Section 1 of the Convention. The European Court indicated in one of its judgments that

a protest of the Vice-Chairman of the Regional Court was submitted to the Presidium of the same Court. Vice-Chairman of the Regional Court considered the protest submitted by him to the Presidium, where he was a member and a Vice-Chairman, together with his colleagues-members of the Presidium. Such a practice is inconsistent with impartiality of a judge who considers a concrete case since nobody can be both the plaintiff and the judge in his own case.<sup>32</sup>

This position of the European Court did certainly influence development of Russian procedural norms governing the review of cases in the course of court supervision. According to both the Arbitration Procedure Code 2002 and the Civil Procedure Code 2002, supervisory proceedings may only be initiated by persons whose rights and obligations have been touched by the judgment. This innovation was appreciated by the Committee of Ministers of the Council of Europe in its Interim Resolution of 8<sup>th</sup> February 2006.

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<sup>31</sup> See, e.g., the judgments in the cases “Tumilovich v. Russia” (22<sup>nd</sup> June 1999), “Sovtransavto v. Ukraine” (25<sup>th</sup> July 2002), “Nikitin v. Russia” (20<sup>th</sup> July 2004).

<sup>32</sup> See: the judgment in the case “Naumenko v. Ukraine” (9<sup>th</sup> November 2004).

Meanwhile if the Arbitration Procedure Code 2002 established only one venue for supervisory proceedings – the Presidium of the Supreme State Arbitration Court of the Russian Federation<sup>33</sup> and expressly prohibited a repeated application of the same person on the same ground,<sup>34</sup> the Civil Procedure Code created three-stage scheme of supervisory proceedings to be performed by:

- 1) the Presidium of the Court of the relevant Subject of the Russian Federation;
- 2) the Civil Cases Collegium of the RF Supreme Court;
- 3) the Presidium of the RF Supreme Court.<sup>35</sup>

However, a scheme under which “Supervisory proceedings, being once triggered, may last during endless period, would create legal uncertainty and is therefore inconsistent with the Convention, as it appears from the European Court judgment in the case “Denisov v. Russia” (6<sup>th</sup> May 2004).

The Committee of Ministers of the Council of Europe in its Interim Resolution of 8<sup>th</sup> February 2006 specifically encouraged Russian authorities, *inter alia*, to limit, to the extent possible, a number of subsequent supervisory complaints in relation to the same case. The vital importance of this problem may be evidenced by the fact that the Constitutional Court of the Russian Federation considered it in the Ruling of 5<sup>th</sup> March 2007 № 2-II in the case “On examination of constitutionality of provisions of Article 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedure Code of the Russian Federation in connection with application of the Cabinet of Ministers of the Tatarstan Republic, complaints of open joint stock companies “Nijnekamskneftekhim” and “Khakasenergo as well as complaints of a number of a citizens.” It is expressly stipulated in this Ruling that “the right to fair consideration of the case within reasonable time by an independent and impartial court implies also finality and stability of court acts one became effective, and enforcement thereof.”<sup>36</sup> The Constitutional Court emphasized that

supervisory review of court acts which became effective is only possible as an additional guarantee of legality of such acts and envisages establishment of special grounds and procedures at this

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<sup>33</sup> See, Article 293, Section 4.

<sup>34</sup> See, Article 299, Section 9)

<sup>35</sup> See, Article 377.

<sup>36</sup> Section 3, 2, paragraph 1.



stage of proceedings, which correspond to its legal nature and designation. A court act which became already effective, may only be amended or overruled in exclusive circumstances, when as a result of an error as made in course of previous proceedings and preconditioned the outcome of the case, there were substantial violations of rights and lawful interests which are subject to court protection and which cannot be restored without quash or amendment of the erroneous court act.<sup>37</sup>

Further, the well-established approach of the European Court is manifested in its numerous judgments. Accordingly, the Constitutional Court emphasized that “procedures admitting unlimited or substantially lengthy challenges of court judgments, including the uncertainty of terms of proceedings in the supervisory instance, lead to uncertainty and instability of final judgments and are inconsistent with the principle of legal certainty.”<sup>38</sup> The Constitutional Court also noted that

the federal lawmaker should, with due consideration of legal positions of the European Court of Human Rights and the Resolution of the Committee of Ministers of the Council of Europe of 8<sup>th</sup> February 2006..., within reasonable terms to establish procedures actually ensure timely discovery and review of erroneous courts’ acts before they become effective, and put legal regulation of supervisory proceedings – upon the basis of the Constitution of the Russian Federation, and given this Ruling – in compliance with international law standards as recognized by the Russian Federation.<sup>39</sup>

The quoted provisions indicate quite clearly that the legal positions of the Constitutional Court of the Russian Federation are in line with those of the European Court of Human Rights, and we look forward to further harmonization of Russian civil procedure with the relevant norms of the Convention and interpretation thereof in the European Court case law.

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<sup>37</sup> Section 3.1, paragraph 2.

<sup>38</sup> Section 9.1, paragraph 3.

<sup>39</sup> Section 9.1, paragraph 7.