# 2

# The Use of European Human Rights Law in Russian Courts

ANTON BURKOV

## 2.1 Introduction

This chapter gives a short history of Russia's accession to the Council of Europe and subsequent ratification of the European Convention on Human Rights (the Convention/ECHR).[1] It then provides a description and comparison of Russian legislation on the issue of direct application of the Convention in courts of different jurisdictions with judicial practice. The mismatch of statutory provisions with judicial practice on the matter of direct application of the Convention is demonstrated by three cases that passed through the entire Russian judicial system. These are examples of cases filed before the ECtHR when national courts had all that was necessary to decide matters according to the Convention. Therefore, Russia is in violation of Article 1 of the Convention, which requires the High Contracting Parties to "bring human rights home."

## 2.2 Russia's Accession to the Council of Europe as an Obligation to Bring Human Rights Home

On 6 May 1992, in a communication directed to the Secretary General of the Council of Europe, the Government of the Russian Federation expressed its wish to be invited to join the Council of Europe, declaring itself willing to respect the principles of the rule of law and of the enjoyment – by all persons within its jurisdiction – of human rights and fundamental freedoms.[2] On 28 February 1996, the Russian

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

[2] Request for an Opinion from the Committee of Ministers to the Parliamentary Assembly of the Council of Europe on the accession of the Russian Federation to the Council of Europe, 26 June 1992, Doc. 6640, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13932&lang=en.

Federation acceded[3] to the Statute of the Council of Europe[4] without meeting all of the human rights requirements for member states.

Accession occurred despite an unfavorable ad hoc Report by the Eminent Lawyers Group of 1994,[5] which concluded, "the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the Statute of the Council and developed by the organs of the European Convention on Human Rights."[6] The same evaluation of the Russian legal system was given by the Director of the Legal Department of the Russian Ministry for Foreign Affairs, Aleksandr G. Khodakov, in a January 1996 Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation.[7]

All this notwithstanding, the Convention formally entered into force in the Russian Federation on May 5, 1998.[8] Following this, those under the jurisdiction of the Russian Federation have been allowed to bring alleged violations of the Convention before the European Court of Human Rights (ECtHR) and, more importantly, to seek legal protection within the national legal system by invoking the Convention's guarantees before national courts.

The main aim of international human rights law is "to bring human rights home" – an expression embodied in Article 1 of the Convention. It is thus, under Article 1, that the Russian Federation has undertaken an obligation "to secure to everyone within [its] jurisdiction the rights and freedoms defined in Section I of [the] Convention." The terms of

[3] Federalnyi Zakon, "O prisoedinenii Rossiiskoi Federatsii k Ustavu Soveta Evropy," 23 February 1996, No. 19-FZ (Act on the Accession of the Russian Federation to the Statute of the Council of Europe).

[4] Statute of the Council of Europe, London, 5 May 1949.

[5] The Eminent Lawyers Group is made up of legal experts on human rights created by the Council of Europe in order to determine whether the Russian Federation's legal order was sufficiently in line with the Council of Europe's human rights standards for the purpose of Russia's accession to the Council of Europe.

[6] R. Bernhardt, F. Ermacora, S. Trechsel, and A. Weitzel, "Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards" (1994) 15(7) *Human Rights Law Journal*, p. 287.

[7] Anton Burkov (ed.), *Primenenie Evropeiskoi Konventsii o Zashchite Prav Cheloveka v Sudakh Rossii* (*Application of the European Convention on Human Rights in Russian Courts*) (Ekaterinburg: Izdatelstvo Uralskogo Universiteta, 2006), 157–58.

[8] Federalnyi Zakon, "O Ratifikatsii Konventsii o Zaschite Prav Cheloveka i Osnovnikh Svobod i Protokolov k Nei," 30 March 1998, No. 54-FZ (Act on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereof).

Article 1 do not merely oblige the High Contracting Parties to respect human rights and fundamental freedoms; it requires them to protect and to remedy any breach at subordinate levels.[9]

The following sections of this chapter explore how Russia adheres to this obligation under Article 1 of the Convention in its legislative and judicial practices.

## 2.3 Russian Legal Norms on Implementation of the Convention

### *2.3.1 Legislation*

Under Article 15(4) of the 1993 Constitution of the Russian Federation (RF Constitution/1993 Constitution), international treaties ratified by the Russian Federation become part of the Russian legal system. Unlike the previous Soviet or Russian Soviet Federative Socialist Republic (RSFSR) constitutions, Article 15(4) clearly affirms the domestic status of international law in the Russian Federation, stating that

> [g]enerally recognized principles and norms of international law and the international agreements of the Russian Federation are a constituent part of its legal system. If an international agreement of the Russian Federation establishes rules other than those provided for by a law, the rules of the international agreement apply.[10]

Accordingly, international obligations are given priority.

Article 15(4) of the 1993 Constitution should be read (and interpreted) in conjunction with other constitutional norms, particularly Article 46(3):

> Everyone is entitled – in accordance with the international agreements of the Russian Federation – to appeal to interstate organs for the protection of rights and freedoms of man if all available means of judicial protection inside the country have been exhausted.

The logic of Article 46(3) is that, when the Russian authorities fail to comply with international guarantees operating within the Russian legal system, those who allege that they are victims of such action (or inaction) have a right to bring this to the attention of an international tribunal. Therefore, Article 46(3) indirectly requires that international human

[9] *Ireland v. UK*, 18 January 1978, No. 5310/71, 2 EHRR No. 25, para. 239.

[10] In 2001 and 2002, respectively, provisions similar to those contained in the second sentence of Art. 15(4) of the RF Constitution were incorporated into the new Russian Federation Criminal and Civil procedure codes.

rights principles be first respected at the national level, and only subsequently be brought to international attention if necessary.

The 1993 Constitution stands at the top of the hierarchy of national legislative acts in the Russian Federation, followed by federal constitutional statutes (*federalnye konstitutsionnye zakony*), and thereafter by regular federal statutes (*federalnye zakony*). The second sentence of Article 15(4) places norms of international law on the same level as national legislative acts, with priority given to international treaties where there may be alleged conflicts of norms between the two.

In theory, the RF Constitution accords supremacy to international law over national law. Currently, the opportunity to institute reconsideration of a domestic case owing to a judgment of the ECtHR exists in some procedural codes of the Russian Federation, including the Criminal Procedure Code, the Arbitrazh Procedure Code, the Civil Procedure Code, and the Code of Administrative Judicial Procedure.

These provisions were introduced to the Russian Civil Procedure Code after a February 2010 judgment by the Russian Constitutional Court (Russian CC),[11] obligating the Russian legislature to amend the Civil Procedure Code to allow for reconsideration of those cases and prioritize judgments rendered by the ECtHR over those rendered by the Russian Federation.

No such provision has yet been introduced to the RF Code of Administrative Offenses (CoAO), which states:

> 12. Unlike Article 413 of the Russian Code of Criminal Procedure, the Code of Administrative Offenses does not expressly provide for a possibility that the proceedings may be reopened if the Court [the ECtHR] finds a violation of the Convention.[12]

Such a provision is also missing in the Federal Constitutional Law on the Russian CC. No case can be referred to the Russian CC by an individual applicant after the ECtHR has found a violation of the Convention in a federal statute.[13] However, on 14 July 2015, the Russian CC by its own decision entitled different bodies of the Russian government, the opponent of applicants before the ECtHR, to apply to the Russian CC with a question on enforcement of a particular

[11] Russian CC Judgment, 26 February 2010, No. 4-P.
[12] *Mikhaylova v. Russia*, 19 November 2015, No. 46998/08, Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov, para. 12.
[13] Russian CC Decision, 25 October 2016, No. 2246-O.

judgment of the ECtHR if they believe an ECtHR judgment cannot be executed without violating the RF Constitution.[14]

The RF Constitution does not include a provision on the status of the practice of treaty bodies such as the ECtHR. The following legislation, as well as subordinate law and judicial practice, partially fill this gap.

The 1995 RF Law "On International Treaties"[15] (the 1995 Law) reiterates constitutional provisions regarding the domestic status of international treaties. Under Article 3 of the 1996 Law on the Russian judicial system[16] all Russian courts are mandated to apply "generally recognized principles and norms of international law and international treaties of the Russian Federation." Here again the Russian Federation emphasized the domestic status of international treaties to which Russia is a party. The main feature of the 1996 Law is that, for the first time in post-Soviet Russian legislation, judges have to apply directly norms of international law as an obligation rather than discretion.

An important step forward in developing mechanisms for domestic applicability of international law was taken by the 1998 Federal Law ratifying the Convention[17] (the 1998 Law). According to the last paragraph of Article 1 of the 1998 Law, the Russian Federation recognizes the compulsory jurisdiction of the Court regarding the interpretation and application of the Convention. This 1998 Law was the first legislative act recognizing decisions of an international tribunal as a binding authority in interpreting provisions of international treaties in Russia.

The question remains, however, whether or not the Russian Federation accepts legal principles developed by the ECtHR in cases involving other member states as legally binding on the Russian authorities. This is not a

[14] Russian CC Judgment, 14 July 2015, No. 21-P. This judgment quickly received the backing of the legislature in Russia – see Federalnyi Konstitutsionnyi Zakon, "O vnesenii izmeneniy v Federalniy konstitutsionniy zakon O Konstitutsionnom Sude Rossiyskoy Federatsii," 14 December 2015, No. 7-FKZ (Federal Constitutional Act on Amendments to the Federal Constitutional Act on the Russian CC of the Russian Federation). More details are considered below in this chapter and in other chapters of this book.

[15] Federalnyi Zakon, "O Mezhdunarodnikh Dogovorakh Rossiiskoi Federatsii" (with subsequent amendments), 15 July 1995, No. 101-FZ (Federal Act on International Treaties Ratified by the Russian Federation).

[16] Federalnyi Konstitutsionnyi Zakon, "O Sudebnoi Sisteme Rossiiskoi Federatsii," 31 December 1996, No. 1-FKZ (Federal Constitutional Act on the Judicial System of the Russian Federation).

[17] Federalnyi Zakon, "O Ratifikatsii Konventsii o Zaschite Prav Cheloveka i Osnovnikh Svobod i Protokolov k Nei," 30 March 1998, No. 54-FZ (Federal Act on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereto).

question uniquely asked in Russia. The Committee of Ministers of the Council of Europe made such a recommendation to member states back in 2004. Having recalled that, according to Article 46 (1) of the Convention, the High Contracting Parties undertake to abide by the final judgments of the ECtHR in any case to which they are parties, and considering that further efforts should be made by member states to give full effect to the Convention, in particular through continuous adaptation of national standards in accordance with those of the Convention, in the light of the case law of the ECtHR, the Committee of Ministers made a recommendation to member states to consider the case law of the ECtHR not limited to the case law to which they are parties:

> 3. The prerequisite for the Convention to protect human rights in Europe effectively is that states give effect to the Convention in their legal order, in the light of the case law of the Court. This implies, notably, that they should ensure that laws and administrative practice conform to it.[18]

### *2.3.2 Legal Positions of the Russian CC*

In its judgments, the Russian CC has given Article 15(4) a broad interpretation, so that all ECtHR case law is deemed a source of Russian law. The following are two prominent examples of this judicial interpretation:

a In the February 2007 judgment in a case involving an application to the Russian CC by the Tartarstan government, two joint-stock companies and several Russian citizens,[19] the Russian CC recognized the possibility that individuals under Russian jurisdiction are able to argue cases before national courts based on ECtHR case law. The Russian CC did not limit the binding force of ECtHR case law only to those judgments rendered against Russia and held that, in addition to the text of the Convention, judgments of the ECtHR formed an integral part of the Russian legal system (*iavliaiutsia sostavnoi chastiu Rossiiskoi pravovoi systemy*). In other words, judgments of the ECtHR are supposed to be recognized as sources of Russian law and law enforcement practices, and must be taken into account by national courts hearing domestic cases.

[18] Recommendation of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, 12 May 2004, Rec (2004)5.

[19] Russian CC judgment, 5 February 2007, No. 2-P.

b In February 2010, the Russian CC rendered a judgment[20] stating that the Russian parliament has an obligation to introduce "a mechanism of execution of final judgments of the ECtHR which would allow adequate redress for violations of rights (*adekvatnoe vosstanovlenie prav*) determined by the ECtHR."

Since October 2010, marked by the case of *Markin v. Russia*,[21] there have been more and more examples where opinions by ECtHR judges, whether sitting as a Chamber or as the Grand Chamber, do not match the legal positions of the judges of the Russian CC. For example, in *Khoroshenko v. Russia*[22] the Grand Chamber of the ECtHR disagreed with at least four Russian CC decisions delivered from 2004 to 2006 on the inadmissibility of applications from life prisoners claiming that lack of conjugal visits and rare short-term meetings violated their right to private and family life under Article 8 of the Convention.[23] Two ECtHR judges joined the majority of the Grand Chamber with concurring opinions, additionally expressing the belief that there were violations of Article 3 of the Convention: "This must be stated unequivocally: a rule that permits family visits to prisoners only once every six months is *per se* inhuman"[24]. The Russian CC judges did not find the two applications of Khoroshenko, or the applications of three other applicants, even worthy of consideration. The Russian CC declared their applications inadmissible and found that laws prohibiting conjugal visits did not breach the applicants' constitutional rights.



[20] Russian CC judgment, 26 February 2010, No. 4-P.

[21] *Konstantin Markin v. Russia*, 7 October 2010, No. 30078/06; *Konstantin Markin v. Russia*, Grand Chamber, 22 March 2012, No. 30078/06. In this case the ECtHR disagreed with the Russian CC on whether Russian legislation allows refusal to grant the applicant parental leave because he belonged to the male sex. The ECtHR ruled inter alia that the exclusion of servicemen from entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably or objectively justified, so that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex. This caused great dissatisfaction, mostly for the Chair of the Russian CC, Valeriy Zorkin.

[22] *Khoroshenko v. Russia*, 30 June 2015, No. 41418/04.

[23] Russian CC decision, 21 December 2004, No. 466-O (Applicant Gerasimov Andrey Valentinovich); Russian CC Decision, 9 June 2005, No. 248-O (Applicants Zakharkin Valeriy Alexeevich and Zakharkina Irina Nikolaevna); Russian CC Decision, 24 May 2005, No. 257-O (Applicant Andrey Anatolievich Khoroshenko); Russian CC Decision, 21 December 2006, No. 591-O (Applicant Andrey Anatolievich Khoroshenko).

[24] *Khoroshenko v. Russia*, Joint Concurring Opinion of Judges Pinto De Albuquerque and Turković, para. 13.

Another example of differences in scope of protection of the same right under the RF Constitution and by the Convention is the case of *Mikhaylova v. Russia*[25]. In this case, the ECtHR again disagreed with the position of the Russian CC. This was expressed in its decision on inadmissibility rendered on 5 February 2015,[26] regarding lack of provision of free legal assistance to those "charged with a criminal offense" under the Russian Code of Administrative Offenses.[27]

On 14 July 2015, in circumstances when individual applicants have no right to reapply to the Russian CC in order to ask it to reconsider its opinions by taking into account a ECtHR judgment, the Russian CC gave this opportunity to the other party of ECtHR cases (state bodies) if they believe that ECtHR judgments cannot be executed without violating the RF Constitution.[28] This opinion was delivered at the request of a group of deputies from the Russian State Duma asking the Russian CC to check the constitutionality of the Federal Law, "On Ratification of the Convention," and the Federal Law, "On International Treaties."

Although the Russian CC ruled the laws constitutional, by interpretation it developed a new procedural instrument and jurisdiction to rule on the impossibility of enforcing ECtHR judgments without violating the RF Constitution. Thus, the Russian CC can rule on the possibility of enforcement of a ECtHR judgment at the request of courts of general jurisdiction and *arbitrazh* (commercial) courts as well as "state agencies charged with the responsibility to ensure implementation by the Russian Federation of international treaties to which it is a party" when the authorities consider a particular ECtHR ruling is impossible to enforce without violating the RF Constitution. If the Russian CC comes to the conclusion that an ECtHR judgment is incompatible with the RF Constitution, it will not be implemented.[29] Amendments to the Federal Constitutional Law, "On the Russian Constitutional Court," regarding the Russian CC's competence to examine possible conflicts between judgments of the ECtHR and the RF Constitution, followed shortly after the

[25] *Mikhaylova v. Russia*, 19 November 2015, No. 46998/08.
[26] Russian CC Judgment, 5 February 2015, No. 236-O (Applicant Mikhaylova Valentina Nikolaevna).
[27] More details will follow in the subsequent section.
[28] Russian CC Judgment, 14 July 2015, No. 21-P.
[29] See Russian CC Judgment, 14 July 2015, No. 21-P, 33–34.

14 July 2015 ruling.[30] As of today, two judgments of the Russian CC have been delivered at the request of the authorities.[31]

### 2.3.3 *Explanations by the Plenum of the RF Supreme Court*

Since the 5 May 1998 ratification of the Convention, the Plenum of the RF Supreme Court has issued a number of regulations[32] that, in one way or another, address the issue of implementation of the Convention in national courts. For the purpose of this chapter, two major regulations will be examined: Regulation No. 5 of 10 October 2003, "On the Application by Courts of General Jurisdiction of the Generally-Recognized Principles and Norms of International Law and the International Treaties of the Russian Federation" (the 2003 Regulation)[33] and Regulation No. 21 of 27 June 2013, "On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction" (the 2013 Regulation).[34]

In this context, the following major points of these regulations are highlighted. Firstly, in the 2003 Regulation the Plenum of the Supreme Court once again stressed the constitutional principle of direct applicability of international treaties, in particular the Convention, and their priority over national laws (paragraph 1, section 2). Secondly, the RF Supreme Court explained that, according to Article 31(3)b of the Vienna

[30] Federalnyi Konstitutsionnyi Zakon, "O vnesenii izmeneniy v Federalniy Konstitutsionniy Zakon O Konstitutsionnom Sude Rossiyskoy Federatsii," 14 December 2015, No. 7-FKZ (Federal Constitutional Act on Amendments to the Federal Constitutional Act on the Russian CC of the Russian Federation).

[31] Russian CC Judgment, 19 April 2016, No. 12-P; Russian CC Judgment, 19 January 2017, No. 1-P.

[32] Regulations (*postanovleniia*) – issued by the Plenum of the RF Supreme Court – are general statements of best judicial practice with no relation to the facts of particular cases; they are based on a review and analysis of lower court cases and the RF Supreme Court's own jurisprudence. They take the form of abstract norms that preside in authority over all lower courts, summarizing the judicial practice of courts and explaining how particular provisions of statutes should be applied. They allow other courts to apply provisions of legislation consistently. These decrees have their legal basis in Art. 126 of the 1993 Russian Constitution. At one point in Soviet legal history they were called "guiding" explanations. Russian law no longer defines them as "guiding"; however, this does not reduce the legal force of regulations in practice.

[33] The 2003 Regulation is available in English in (2004) 25 (1–4) *Human Rights Law Journal*, pp. 108–11. Also available at http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801.

[34] An English translation is available at http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155.

Convention on the Law of Treaties ratified by the Russian Federation, when applying the Convention, judges shall interpret the treaty by taking into account any subsequent practice in the application of the treaty that establishes the agreement between the parties regarding its interpretation (paragraph 2, section 10). In the next paragraph the 2003 Regulation specifies that implementation of the Convention by the courts shall be carried out by taking the practice of the ECtHR into account in order to avoid any violation of the Convention (paragraph 2, section 10).

This principle governing the use of ECtHR case law was further elaborated two months later in another regulation. In section 4 of Regulation No. 23 of 19 December 2003, "On Court Decisions," the Plenum stressed the obligation to point out (cite) (*dolzhen bit ukazan*), in the declaration section of the decision, the material and procedural statute applied. Later in this section the regulation provides the following: "The court shall also take into account [*sleduet uchitivat*] [. . .] judgments of the ECtHR that interpret the provisions of the Convention, which shall be invoked in a given case."

It is important to highlight that the 2003 Regulation recognized as obligatory only those ECtHR judgments delivered against Russia:

> In accordance with Part 1 of Article 46 of the Convention, final [ECtHR] *decisions with regard to the Russian Federation* shall be mandatory for all State bodies of the Russian Federation including for the courts (Section 11). (Emphasis added.)

Ten years later the 2013 Regulation (section 2, paragraph 2) further widened this principle to cover ECtHR judgments against other High Contracting Parties:

> In order to effectively protect human rights the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other states which are parties to the Convention. However this legal position is to be taken into consideration by the court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court.

Thirdly, the 2003 Regulation pointed out that non-application of an international treaty (including non-application of the treaty itself, application of a treaty that is non-applicable under particular circumstances, and the incorrect interpretation of a treaty) can bear the same consequences as non-application of domestic law – namely, quashing or amending a judgment (section 9).

As a conclusion to this section, it is possible to sum up that the 1993 Constitution was drafted under the influence of international law human rights instruments, including the Convention. It is friendly toward domestic implementation of norms of international law. The RF Constitution established the domestic status of ratified international treaties as well as their priority over national legislation. The RF Constitution did not address the status of the case law of international tribunals.

Legislation not only reiterated constitutional provisions but also went further when ratifying the Convention. It recognized ECtHR judgments as legally binding in interpreting provisions of the Convention. Apparently the list of judgments was limited to those rendered on cases in which Russia was a party.

Constitutional norms covering implementation of international treaties were further developed and interpreted by the Russian CC. The Russian CC gave interpretations of the RF Constitution and the Russian Federation's obligations in ratification of the Convention by ruling that all ECtHR case law, including against other member states, shall be taken into account when applying the Convention in national courts. On 14 July 2015, the international law-friendly Russian legislative framework was interrupted by a Russian CC judgment allowing the Russian CC to rule on the unconstitutionality of execution of a particular ECtHR judgment against Russia.

The Plenum of the RF Supreme Court's two major regulations on domestic implementations of norms of international law are as friendly toward the Convention and ECtHR case law, including against other member states, as the Russian CC's interpretation of the RF Constitution prior to its 14 July 2015 judgment.

The next section demonstrates that while there is legislation ordering judges to directly apply the Convention, and while the RF Supreme Court provided lower courts with two special regulations devoted to the application of international treaties and general recognized norms of the Convention, in practice lower-court judges as well as Russian CC judges ignore the Convention, and RF Supreme Court judges have not followed their own Plenum's regulations when ruling on particular cases. Some exceptions apply: these will be highlighted in the next section.

## 2.4 Use of the European Convention on Human Rights in Russian Courts

Varying judgments among district courts serve as examples of both positive and negative practices in applying the Convention. Professor

Anatoliy Kovler, having collected a sizeable database of Russian district court judgments over his twelve-year-long judgeship at the ECtHR, explains with a sense of humor the differences in decisions by varying geographical positions of national judges: "The further courts are from Moscow, the better they apply the Convention."[35] This "provocative phrase" offended Moscow City Court Chief Justice Olga Aleksandrovna Egorova for a long period.[36] However, Professor Kovler's observation was that judges in Moscow are overloaded with cases, which is the principal reason why judges write decisions in a hurry and as "carbon copies" (*pod kopirku*) of one another, particularly decisions on pretrial detention, while judges in other jurisdictions have more time to examine each case and make any necessary application of the Convention.[37]

In litigation practice before the lower courts carried by the nongovernmental organization (NGO) Sutyajnik (Litigator)[38], as well as in the litigation experience of others, I found an explanation for lack of application of the Convention in the absence of freedom or motivation, rather than in high case loads or inadequate knowledge of the Convention.[39]

Recent litigation experience allowed Sutyajnik to conduct "lab tests" (*laboratornaya rabota*), the results of which once again reinforced the hypothesis that when Russian courts fail to apply the Convention, they tend to do so, not because of lack of knowledge of the Convention or heavy case loads, but due to lack of motivation, political will, and/or freedom to directly apply the Convention. This freedom is restricted by the fact that judges are aware that if they apply the Convention, their decision will not be upheld on appeal or cassation despite the regulations mentioned by the Plenum of the Supreme Court.



[35] Annual speech by ECtHR judge Anatoliy Kovler, On the legal positions of the ECtHR in the light of the judgments taken in cases against the Russian Federation in 2012, delivered at the Russian Academy of Justice, 16 January 2013. An audio recording is available at http://sutyajnik.ru/audio/251.mp3.

[36] Professor Kovler, retired ECtHR judge. Interviewed by Anton Burkov on 4 January 2016.

[37] Ibid.

[38] Sutyajnik is a human rights NGO founded in Yekaterinburg, Russia, in 1994. Sutyajnik is a human rights resource center that helps citizens and organizations realize rights guaranteed in the RF Constitution and international treaties by litigating public interest cases, educating in human rights, and informing the public about mechanisms for human rights protection. http://sutyajnik.ru

[39] Anton Burkov, *Konventsia o zaschite prav cheloveka v sudakh Rossii* [*The Convention on Human Rights in Courts of Russia*] (Moskva: Wolters-Kluwer, 2010). Available at http://sutyajnik.ru/documents/4679.pdf

Throughout 2014 and 2015 the NGO Sutyajnik litigated at least three cases in all types of courts of general jurisdiction (from a peace judge to a RF Supreme Court judge) and in the Russian CC of the Russian Federation. Conclusions drawn from this litigation experience may explain the reasons behind judicial attitudes toward direct application of the Convention. Although on different issues, these cases are highly similar in the following aspects:

1. They point to a clear contradiction between Russian law and the Convention, which eases the job of a judge to choose the applicable law.
2. They, or cases with similar circumstances, have never been considered by the ECtHR in regard to Russia before.
3. They are strikingly similar to those already decided by the ECtHR against other High Contracting Parties to the Convention.
4. Resolving these cases according to the Convention rather than according to Russian law means recognizing the need to reform national legislation, judicial or other law enforcement and even non-legal (e.g., medical) practices.
5. Representatives of the applicants in these cases ensured that all judges were made fully aware of the applicable Convention guarantees as they are understood in the relevant ECtHR case law.
6. None of the judges applied the Convention in these cases despite jurisdiction to apply the relevant norms of the Convention and full awareness of the Convention guarantees of the rights of the applicants.

In selecting these cases, Sutyajnik was undertaking strategic litigation, including in the matter of domestic application of the Convention in addition to other substantive issues.

Judges decided the following cases based on national law in favor of the state authorities when the case should have been decided for the applicant based on the Convention and ECtHR case law. Judges were informed of the contradiction between applicable national law and the Convention and of the consequences of not following the Convention/ECtHR judgment. All this means that the reason for ignoring the Convention is not lack of knowledge of the Convention or caseload. The judges involved knew what was at stake but they consciously chose not to decide in a way that would have followed from previous ECtHR case law.

### *2.4.1 The Case of Alina Sablina against Secret Organ Harvesting*

After a road accident on 11 January 2014, Alina Sablina lay in a coma for six days. Her parents were with her at Moscow City Clinical Hospital

No. 1 (the hospital) from the day after the accident until the day before her death on 17 January 2014. Only a month after the funeral did her parents find out that they buried their daughter without six of her organs. While filling out paperwork in connection with the criminal case against the driver who caused the accident, her mother came across a forensic report that detailed the removal of her daughter's organs at the hospital.

Another shock came with the news that only two – the heart and kidneys – of the six organs removed were actually recorded in the list of organs removed. Four organs – part of her aorta and inferior vena cava, her adrenal gland, and a piece of the lower lobe of her right lung – were missing from the body and from the list of organs removed.

Alina never expressed her consent to donate her organs.[40] Alina's parents were never informed about planned organ transplantation and were not asked for their consent. This is despite their constant physical presence at the hospital and numerous discussions with the hospital's doctors during six long days at the intensive therapy unit.

The Federal Act "On Transplantation of Human Organs and/or Tissues," dated 22 December 1992 (the 1992 law), is a poorly written, three-page text. Article 8 of the 1992 law establishes an artificial presumption of consent on the part of an individual or close relatives to the postmortem removal of the deceased's organs for transplantation. The consent is artificial because it is presumed even when close relatives are present at a hospital and resuscitators can approach and ask relatives for consent. Yet while doctors approach relatives to inform them of the condition of the patient, they do not inform relatives of organ removals already planned for transplantation and therefore do not ask for consent.

Article 8 provides that

> [t]he removal of organs and (or) tissues from a corpse is not allowed if the health care institution at the time of removal was informed that this person during his life or his close relatives or legal representative stated their disagreement to removal of his organs and (or) tissues after death for transplantation to a recipient.

The key provision in this article is that relatives must inform the medical institution about any disagreement regarding removal of organs from a corpse. The medical institution plays a passive role and will not inform a

[40] The system does not provide a mechanism for expressing such consent and documenting it. Today the only opportunity to establish consent is to ask close relatives when the worst is already happening or has happened. However, doctors ignore relatives and keep them uninformed regarding organ removal.

patient's close relatives of plans for organ removal, which would allow the relatives the opportunity to freely make or express their decision. Rather, as a rule, the close relatives of the patient must act and inform the medical institution of their objection to organ removal without any prior knowledge of the institution's plans.

The problem, therefore, is not presumed consent as such but lack of an obligation to actually inform close relatives of a planned transplantation. This unawareness subsequently turns into severe moral suffering for the relatives. According to the Convention, ignorance of relatives' feelings (i.e., approaching them with information on deteriorating health conditions but failing to inform them of organ removal already planned) and of their decision-making power regarding organ removal violates the right to private and family life (*Petrova v. Latvia*[41]) and even amounts to inhuman and degrading treatment (*Elberte v. Latvia*[42]).

In Alina's case, medical personnel had not informed her parents of the planned organ removal during any of their twice-daily visits to the hospital over the six-day period that Alina spent in intensive care. During this time the head of the intensive care unit of the hospital did inform the Moscow Coordination Centre of Organ Donation[43] about a "potential donor," Alina Sabina. According to the testimony of the head of the intensive care unit recorded in the court's minutes, this occurred on the second day after Alina's arrival at the hospital, four days before her death. On all four days doctors spoke to Alina's parents about the declining health condition of their daughter but did not mention the planned organ removal. Therefore the parents did not and could not make any decision and inform the hospital of their decision on organ donation. Consent could not be presumed in such a situation. The ability of doctors to approach the parents, but failure to do so, makes presumed consent artificial (implied).

Russian doctors openly confirm this practice. Testimonials by doctors involved in the process of organ removal confirm that ignoring the wishes of close relatives is not an isolated incident but rather part of a general practice following the 1992 law on transplantation.[44] On

[41] *Petrova v. Latvia*, 24 June 2014, No. 4605/05.
[42] *Elberte v. Latvia*, 13 January 2015, No. 61243/08.
[43] The only medical institution authorized to carry out organ removal for further transplantation. Second defendant in the Sablina case.
[44] Olga Karaeva, *Donorstvo organov: problemy i perspektivy razvitiya v Rossii* [*Organ Donation: Problems and Prospects Development in Russia*] (Moskva: Levada-Tsenter,

6 October 2014 the TV channel RUSSIA 1 aired a documentary *Transplantology: The Challenge to Death* (*Transplantologia: Vyzov Smerti*). In this film, one of the leading transplantologists in Russia, Igor Loginov, anesthesiologist-resuscitator at the Center for Organ and Tissue Donation of St. Petersburg, speaks about the current practice of removing organs: "We are not required to actively ask for the consent of the relatives." As was evident in Alina's case, a lack of obligation to seek consent is interpreted so widely as to liberate doctors from the need to ask permission from parents.

Over two decades of the existence of artificial presumed consent and organ removal without the knowledge of family members, no doctors have ever been brought to justice for secret organ transplantation in Russia. This is partially due to the interpretation of the 1992 law and partially due to the fact that only a small number of people are eventually made aware that the organs of their deceased loved ones were removed, as removal is kept secret from relatives. The failure of prosecutors to initiate criminal investigations is caused by inconsistencies in legislation. In 2003, in "Replies to the Questionnaire for Member States on Organ Trafficking," Russia informed the Steering Committee on Bioethics and European Health Committee of the Council of Europe that there had been no criminal investigations resulting in criminal conviction due to contradictions in legislation. In its reply Russia explains that Article 5 of Federal Act No. 8-FZ "On Burial and the Funeral Business," of 12 January 1996, contradicts Article 8 of the 1992 law. Specifically, Article 5 states that each individual can express their will with regard to the treatment of their body after death, which includes permission for, or opposition to, organ removal.[45] No criminal investigation was started in Alina Sablina's case.

Moreover, in the 2003 case of *Zhitinsky* the Russian CC ruled on the constitutionality of presumed consent in Article 8 of the 1992 law, concluding that it is "inhumane to put the question of harvesting organs or tissues to a person's relatives at practically the same time as they are notified of his death, or immediately before an operation or other type of

2013), 40–2. Available at http://www.levada.ru/old/sites/default/files/otchet_donorstvo_organov_v_rossii_levada-centr.pdf.

[45] Replies to Questionnaire for Member States on Organ Trafficking (Council of Europe, Steering Committee on Bioethics and European Health Committee, CDBI/INF (2003) 11 rev. 2, 2 June 2004), pp. 60–2. Available at http://www.coe.int/t/dg3/health/Source/CDBI_INF(2003)11_en.pdf.

medical treatment."[46] There is no evidence that the Convention's guarantees of family life and freedom from inhumane treatment were considered. The *Zhitinsky* case is strikingly similar to that of Alina Sablina.

Alina Sablina's relatives sued the hospital and two associated transplantology medical institutions as they believed they had been subjected to inhumane and degrading treatment and that their right to family life was violated, a twofold violation of the Convention. Elena Sablina, mother of Alina, told TV channels about her sufferings: "I feel that I buried Alina twice: once when I heard about Alina's death and the second time when I learned that her organs were removed in secret."[47]

Judge Shemiakina of Zamoskvoretskiy district court in Moscow faced a clear dilemma: whether to rule based on Article 8 of the Federal Law on transplantation as interpreted in the 2003 decision of the Russian CC, or based on Articles 3 and 8 of the Convention as interpreted in the ECtHR cases of *Petrova v. Latvia* and *Elberte v. Latvia,* both strikingly similar to the *Sablina* case.

Judge Shemiakina was made fully aware of this fact by a representative of the Sablina family who made sure that the judge became aware of the Convention guarantees applicable to Alina Sablina's case. By the time the district judge was ready to give a ruling, both Latvian cases had been decided by the ECtHR.[48] *Petrova v. Latvia* was even translated into Russian and published in the *Bulletin of the ECtHR* (Russian edition). *Elberte v. Russia* was published in Russian by the Journal of Case Law of the European Court of Human Rights before the appeal and was submitted to the appeal instance court. A memorandum explaining the applicability of *Petrova* and *Elberte* to *Sablina* with annexed copies of the translation of the ECtHR judgment in *Petrova*[49] was provided to the judge and to parties to the case. The Russian language texts of *Petrova* and *Elberte*[50] were attached to the case file by judge Shemiakina and by the appeal judges respectively at the request of the representative of the applicants. From the point of view of the latter, *Petrova* and *Elberte* were

[46] Russian CC Decision, 4 December 2003, No. 459-O.

[47] Elena Sablina, interviewed by Anton Burkov on 14 January 2016.

[48] Only *Elberte v. Latvia* entered into force on 15 April 2015, after a decision by Zamoskvoretskiy district court of Moscow but before the appeal decision in the Alina Sablina case.

[49] The ECtHR judgment in the case of *Petrova v. Latvia* was published in (2015) No. 2 (152) *Bulletin of the European Court of Human Rights. Russian Edition*, p. 105–23.

[50] The ECtHR judgment in the case of *Elberte v. Latvia* was published in (2015) No. 3 (15) *Precedents of the European Court of Human Rights*, p. 75–113.

intended to be for all the upper courts to review this case later, as well as to draw the attention of the ECtHR to the would-be *Sablina* case in the future.

On 7 April 2015, Judge Shemiakina, having applied Article 8 of the 1992 law on transplantation as it is understood in the 2003 decision of the Russian CC, ruled in favor of the state medical institutions involved in carrying out secret organ removal. The fact that Judge Shemiakina was fully informed of the Convention shows that this judge simply has no judicial, political, or civic autonomy to rule based on the Convention. As to the priority of the Convention over the 1992 law on transplantation, in the *Sablina* decision, Judge Shemiakina reasoned against the Convention and the relevant ECtHR case law by simply stating that the Latvian cases were not directed against Russia, therefore not binding on Russia.[51] This directly contradicts explanations given to lower judges by the Plenum of the RF Supreme Court in the 2013 Regulation mentioned previously.

The Moscow City Court, as an appeal court, refused the appeal on the ground, inter alia, that the "judgment of the ECtHR was issued in regard to a different state therefore has no legal obligatory power for the Russian Federation."[52] The judge of the Moscow City Court refused first cassation on the same ground stating that "courts are bound only by the ECtHR's legal positions contained in its final judgments taken in regard to the Russian Federation."[53]

On 27 November 2015, Supreme Court Judge Frolkina, acting as a final court of cassation, reasoned in direct contrast to the 2013 Regulation by the Plenum of the RF Supreme Court:

> Arguments of the cassation that legal positions from the cases of *Petrova v. Latvia* and *Elberte v. Latvia* were not taken into account cannot serve as a basis for quashing the appealed judicial decisions, as according to Article 46 of the Convention and point 2 of the Regulation by the Plenum of the Russian Supreme Court dated 27 June 2013 courts are bound by legal

[51] Zamoskvoretskiiy District Court of Moscow Judgment, *Sablina and Others v. Moscow City Hospital and Others*, 7 April 2015, No. 2–557/2015, p. 5. Available at http://sutyajnik.ru/documents/4801.pdf.

[52] Appeal decision by Moscow City Court, *Sablina and Others v. Moscow City Hospital and Others*, p. 5. Available at http://www.sutyajnik.ru/documents/4846.pdf.

[53] Decision by Judge Kurtines of Moscow City Court on refusal to pass cassation for consideration of the Presidium of Moscow City Court, *Sablina and Others v. Moscow City Hospital and Others*, 15 October 2015, p. 3. Available at http://www.sutyajnik.ru/documents/4889.pdf.

> positions of the ECtHR contained in the final judgments of the ECtHR delivered in respect of the Russian Federation.[54]

This wording was clearly borrowed from paragraph 1 of section 2 of the 2013 Regulation, although not cited or marked with any note or reference or otherwise admitted. Judge Frolkina only partially borrowed this legal reasoning from section 2 of the 2013 Regulation, failing to mention paragraph 2 of section 2, being of no lesser importance, on the applicability of legal positions contained in judgments against other High Contracting Parties:

> In order to effectively protect human rights the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other States which are parties to the Convention. However this legal position is to be taken into consideration by the court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court.[55]

One would think that the Plenum of the RF Supreme Court's advice to lower courts to "take into consideration" does not mean a legal obligation to apply the Convention and ECHR case law, not to mention automatically determine the outcome. What this means is that judges could consider applying the Convention and the relevant case law but may reason and conclude that other interests or circumstances outweigh application of the Convention to the facts of the case in question. However, judges never go into any legal test of balance of interest. Reasoning starts and ends at the conclusion, unsupported by law, that a particular ECtHR judgment is not applicable (the attitude of Judge Shemiakina as noted earlier) or by simply omitting a legal provision that supports the applicability of an ECtHR case (the attitude of Judge Frolkina as noted previously).

In July 2015 when submitting an application to the Russian CC, the applicants asked for a ruling on the constitutionality of "presumed consent" as phrased in Article 8 of the 1992 law and interpreted in medical and judicial practice. The applicants asked the Russian CC to

[54] Decision by Judge Frolkina of the RF Supreme Court on refusal to pass cassation for consideration of the RF Supreme Court, *Sablina and Others v. Moscow City Hospital and Others*, 27 November 2015, pp. 2–3. Available at http://sutyajnik.ru/documents/4905.pdf.

[55] Paragraph 2 of Section 2 of the Regulation No. 21 of 27 June 2013, "On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction."

reconsider its 2003 decision, which defined as "humane" not putting to a person's relatives the question of harvesting organs or tissues at practically the same time as they are notified of that relative's death, or immediately before an operation or other type of medical treatment. On 10 February 2016, the Russian CC ruled that the application would not be considered on the merits as it is clear that "presumed consent" is constitutional. All seventeen judges of the Russian CC present unanimously ruled that the practice of removing organs without informing the deceased donor's parents, who can easily be accessed, corresponds to constitutional guarantees of private and family life as well as of prohibition of inhumane and degrading treatment. The judges also concluded that *Petrova v. Latvia* and *Elberte v. Latvia* are not applicable.

As this outcome was considered to be most likely, having exhausted all other so-called effective remedies, Sablina's family applied to the ECtHR on 25 December 2015.[56] Surprisingly fast, it took just over eight months for the ECtHR to communicate the Alina Sablina case[57] to the Russian government on 21 September 2016. The ECtHR asked three groups of questions on account of the removal of Alina Sablina's organs without her prior consent or that of the applicants and on account of judicial proceedings: (1) whether there was "necessary" interference in private and family life "in accordance with the law" pursuing a legitimate aim; (2) whether the applicants had been subjected to inhuman and/or degrading treatment; (3) Whether the applicants had a fair and public hearing.

### *2.4.2 Case of Korolevs on the Right to Conjugal Meetings*

On 15 May 2008, Nikolay Korolev (Nikolay) was sentenced to life imprisonment for terrorist acts and aggravated murders to be served in a correctional colony under a "special regime" with "strict conditions." Although he was first taken into custody in 2006, Nikolay began to serve the special regime sentence in April 2009. He is serving his sentence at a prison in the village of Harp in the Yamalo-Nenets Autonomous Okrug (YaNAO), situated above the Arctic Circle in Russia, 2900 kilometers from Moscow.

[56] The text of the application is available at http://www.sutyajnik.ru/documents/4918.pdf.
[57] *Yelena Vladimirovna Sablina and Others against Russia*, Statement of Facts, communicated 21 September 2016, No. 4460/16.

Veronika Korolev (Veronika) is the wife of Nikolay. They met in autumn 2004 in Moscow, long before Nikolay committed the crime. Their marriage was registered with the state authorities on 9 September 2009 at the correctional colony in Harp. Both Nikolay and Veronika are now aged thirty-five. Veronika lives in Moscow.

Nikolay, subject to the "life term special regime" with "strict conditions" under Articles 125 and 127 of the Correctional Code of the Russian Federation (Correctional Code), is allowed two visits per year, each no longer than four hours. Prisoners subject to a Correctional Code regime, other than one with strict conditions, are allowed two longer visits (extended or conjugal visits) of three days per year. Nikolay will be permitted two long visits per year after he has served a minimum of ten years under strict conditions and if he is then moved to ordinary conditions of detention. Therefore, Nikolay will first be eligible for long visits in 2019 or later when both he and Veronika will be aged thirty-eight or older.

Nikolay and Veronika wish to conceive a child. Since conjugal visits are not permitted; the couple sought to arrange for Veronika to conceive using assisted reproductive technology (ART).

ART is the technology used to achieve pregnancy through procedures such as artificial insemination, in vitro fertilization, and surrogacy. In the case of Nikolay and Veronika, it is envisaged that sperm would be taken from Nikolay and used to try to fertilize Veronika's eggs via artificial insemination. Veronika was medically screened and no contraindications for ART were found. Veronika was prepared to arrange and pay for the screening and the collection of sperm from Nikolay.

Nikolay and Veronika applied to the Federal System of Execution of Sentences (FSIN) on 5 May 2014 seeking permission for Nikolay to be similarly screened and for biological material to be removed from Nikolay by a qualified employee of a clinic for transfer to the clinic for the ART procedure. Between May and July 2014 Veronika corresponded with FSIN, the Division of FSIN in YaNAO, and the YaNAO Department of Health with regard to the application.

These bodies rejected Veronika's application on various grounds, stating that medical institutions in YaNAO were not equipped for ART and that the medical institutions of the FSIN did not have facilities or a license for ART.

Having looked for an alternative way to conduct ART, Nikolay and Veronika turned to a specialist clinic in Yekaterinburg, Sverdlovsk region, which also claimed not to have a license or suitable equipment

or personnel to attend the prison in YaNAO to collect sperm from Nikolay and transfer it to the clinic sperm bank in Yekaterinburg.

In circumstances that sperm are collected at the colony and transported elsewhere, ART needs to take place within an hour for the sperm to remain viable. Without the use of special equipment, which is unavailable, the only opportunity for ART to take place is to transfer Nikolay to a detention center in Yekaterinburg so that the sperm can be transferred to the Yekaterinburg specialist clinic in a tube container within an hour from collection for cryopreservation[58] at the clinic.

In September and October 2014 FSIN refused a request to transfer Nikolay from Harp to Yekaterinburg for screening/ART on the following grounds: Nikolay's situation did not fall within the grounds justifying prisoner transfer (being illness, personal security, or other extraordinary circumstances); and Nikolay would be eligible for long visits after serving ten years of his prison term.

Thus, due to the conditions of Nikolay's imprisonment, it is effectively impossible for him and Veronika to conceive a child. The authorities say that sperm can be collected at the correctional colony for the purposes of ART. However, neither the colony nor any external medical provider has the necessary equipment or licenses to perform ART in this way. The only remaining method is for Nikolay to be transferred to a facility closer to a specialist clinic that is duly licensed and has the necessary equipment. The authorities state that a temporary transfer away from YaNAO cannot take place.[59] Therefore the possibility of using ART has effectively been denied to Nikolay and Veronika.

On 8 December 2014, Nikolay and Veronika applied to the Babushkin District Court of Moscow for a declaration that the failure of FSIN, the Division of FSIN in YaNAO, and the correctional colony to transfer Nikolay to enable the ART procedure was illegal. They requested that the state organs (FSIN) be ordered to facilitate ART procedures and to carry out the transfer. On 25 December 2014, the Babushkin District Court of Moscow refused the applicants' claims.[60]



[58] Cryopreservation or cryoconservation is a process in which cells, whole tissues, or any other substances susceptible to damage caused by chemical reactivity or time are preserved by cooling to sub-zero temperatures.

[59] Although earlier in 2009 a temporary transfer of NikolayNikolay to Moscow once took place for the purpose of his participation in a trial in the Moscow City Court for his second conviction.

[60] Babushkin District Court of Moscow Judgment, *Korolevs v. FSIN and Others*, 25 December 2014, No. 2–7779/14. Available at http://sutyajnik.ru/documents/4775.pdf.

As in the Alina Sablina case, the representatives of Nikolay and Veronika ensured that Judge Nevzorova of Babuskin District Court was aware of Article 8 of the Convention as interpreted in the judgment by the Grand Chamber of the ECtHR in the case of *Dickson v. the United Kingdom*. By the time the district judge was ready to deliver her ruling, the 2007 judgment of *Dickson v. UK* had been translated into Russian and published.[61] Copies of the text were provided to the judge and all parties to the case as well as attached to the case file for the future attention of the higher courts and the ECtHR.

The UK case is similar to the *Korolev* case in the same way as the *Sablina* case is similar to *Petrova* and *Elberte*. The ECtHR Grand Chamber conclusion by twelve votes to five was that refusal to grant artificial insemination facilities to enable a serving prisoner to father a child is a violation; any restriction of a prisoner's rights had to be justified, either on the grounds that it was a necessary and inevitable consequence of imprisonment or that there was an adequate link between the restriction and the prisoner's circumstances. A restriction could not be based solely on what would offend public opinion. No analysis of the balance between conflicting interests was carried out by any of the courts involved in the Korolevs' case.

There is no Russian law allowing long-term meetings for such prisoners as Nikolay. There is no sub-law which allows transfer of prisoners for ART. The only argument that the applicants in the *Korolev* case had was their right to ART as part of the right to family life under Article 8 of the Convention, as interpreted in *Dickson v. UK*. The entire case before the Babushkinskiy District Court was built on the interpretation of Article 8 as well as the 2013 Regulation by the Plenum of the Russian Supreme Court instructing district court judges to follow ECtHR judgments even against High Contracting Parties other than Russia.

Judge Nevzorova had only one phrase to write down regarding the main argument of the applicants: "The facts of *Dickson v. the United Kingdom* were different from this case and therefore there were no grounds for this claim."[62] No explanations followed regarding the differences. If this was a case on civil rights and obligations, this judge's reasoning would have qualified as unmotivated and amounted to a

[61] Available in (2008) 9 *Human Rights: Practice of the European Court of Human Rights*, pp. 268–86.

[62] Judgment of the Babushkinskiy District Court of Moscow in the case of *Korolevs v. FSIN*, the Division of FSIN in YaNAO, IK-18, 25 December 2014.

separate violation of the right to a fair trial under Article 6 of the Convention. The trial could not be fair if the judge left without paying any attention to the applicants' main argument. However, this is not the only evidence of deliberately ignoring the Convention.

In her reasoning to justify denial of the right to conjugal meetings and ART to the Korolevs family, Judge Nevzorova stated that when committing a crime, Nikolay should have been aware that he would be imprisoned and would forfeit certain individual rights: "A person who intends to commit such crimes must assume that, in consequence, he or she may be deprived of freedom and that his or her rights and freedoms may be restricted, including the right to privacy, personal and family secrecy and, as a result, the possibility of having a child. In committing a crime, a person consciously condemns himself or herself, and members of his or her family, to such limitations."[63] This is a carbon copy of the reasoning of the Russian CC's decision, albeit the judge did not make a proper reference to the Russian CC.[64] The district court's judgment also stated: "Taking into account the seriousness of the crimes committed by [Nikolay] ... the punishment given to [Nikolay] and the limitations connected to it are proportionate to the crime committed and [the punishment] is just vengeance ('kara') for crimes committed by him."[65] The word used in Russian (*kara*) means "vengeance" or "retribution" rather than "just punishment." In the opinion of the representatives of Nikolay and Veronika in the language of Article 3 of the Convention, punishment in the form of "vengeance" translates to "inhuman and degrading punishment."

A court of appeal and two cassation courts had a chance to save Russia from the ECtHR case of *Korolevy v. Russia* (47668/15, filed 18 September 2015), a clone of *Dickson v. UK*. On 20 January 2015, Nikolay and Veronika appealed to the Moscow City Court to set aside the lower court's decision and to grant the relief sought by them. The grounds of the appeal were as follows:

1. The Babushkin District Court should have decided the case by reference to Article 8 of the Convention, which has priority over Russian legislation in the event of a conflict between them, but did not do so and instead applied Russian laws that restrict access to ART and to a prison transfer if there are no medical grounds for such.

[63] Ibid. [64] Russian CC Decision, 9 June 2005, No. 248-O. [65] See Note 62.

2. The authorities' refusals were a breach of the Article 8 right to respect for private and family life.
3. The Babushkin District Court had violated the applicants' right to a fair trial in breach of Article 6 of the Convention and of the RF Constitution by: (i) deciding that the *Dickson* case was not relevant for this case without giving any reasons for that conclusion; and (ii) failing to give proper consideration to and a fully reasoned decision in respect of the sole argument submitted by the applicants.

On 26 March 2015, the Moscow City Court refused the appeal[66] by inter alia trying to distinguish *Dickson* from *Korolev*. The Moscow City Court reasoned that, unlike the *Dickson* case, Nikolay's request would have violated the prison regime and complying with the appellant's requested remedy would have necessitated his removal to a non-correctional institution[67] in a different region. No analysis of the balance of interests was made.

On 13 May 2015, Judge Lukianenko of the Moscow City Court refused to pass the Korolevs' cassation for consideration by the Presidium of the Moscow City Court by completely ignoring the applicants' only argument, based on Article 8 of the Convention.[68]

On 31 July 2015, Supreme Court Judge Nikolaeva refused to pass the Korolevs' cassation for consideration by the Supreme Court.[69] The refusal was based on ECtHR case law created prior to 2007 ECtHR and the *Dickson v. UK* judgment. There is strong evidence in this case of adequate judicial knowledge of the case law but lack of motivation to apply it correctly (or malicious intent not to apply the case law correctly). Judge Nikolaeva, as the district court judge, also referred to the Decision of the Russian CC no. 248-O on 9 June 2005[70] in which the Russian CC did not find a violation of the right to family life. The Korolevs' argument

[66] Moscow City Court Appeal decision, *Korolevs v. FSIN and Others*, 26 March 2015. Available at http://sutyajnik.ru/documents/4804.pdf.

[67] Meaning pretrial detention center. The Moscow City Court failed to mention that Nikolay was transferred to a similar pretrial detention center in 2009 for the purpose of facing his second trial at the Moscow City Court.

[68] Decision by Judge Lukianenko of Moscow City Court on refusal to pass cassation for consideration of the Presidium of Moscow Court, *Korolevs v. FSIN and Others*, 13 May 2015. Available at http://sutyajnik.ru/documents/4821.pdf.

[69] Decision by Judge Nikolaeva of the Russian Supreme Court on refusal to pass cassation for consideration of the Supreme Court, *Korolevs v. FSIN and Others*, 31 July 2015. Available at http://sutyajnik.ru/documents/4856.pdf.

[70] See Note 23.

in regard to "just vengeance" as inhuman and degrading punishment under Article 3 went unnoticed and unremarked.

Meanwhile on 30 June 2015, one month before the RF Supreme Court decision on the Korolevs' cassation, the Grand Chamber of the ECtHR considered the case of *Khoroshenko v. Russia*. The Chamber relinquished its jurisdiction over this case to the Grand Chamber. Andrey Khoroshenko, a prisoner for life, complained of a violation of his right to private and family life due to the complete restriction on conjugal meetings for a minimum ten years of imprisonment. After this judgment was translated into Russian and published,[71] the Korolevs, using the Grand Chamber arguments from *Khoroshenko v. Russia*, applied to the Russian CC on 21 October 2015.

When applying to the Russian CC, the plan was to put the Russian CC into a position that, by refusing the Korolevs' application, the court was showing an absolute disregard of the ECtHR Grand Chamber's position expressed in the *Khoroshenko v. Russia* judgment. To rule in favor of the Korolevs, the Russian CC had to reconsider its decisions of 2004–2005 in regard to Khoroshenko, Zakharkin, and other lifers. In those cases, the applications concerning violation of family life due to lack of conjugal visits were rejected by the Russian CC.[72] To rule the relevant provisions of the Correctional Code constitutional, the Russian CC had to ignore the arguments of the Grand Chamber of the ECtHR. Instead, the Russian CC ruled the Korolevs' application inadmissible.[73] The reason was that two months after their application to the Russian CC, the Korolevs applied to the Babushkin District Court of Moscow for the second time – this time challenging the head of the correctional colony's refusal to grant the Korolevs a conjugal meeting that they requested based on *Khoroshenko v. Russia*. On 10 February 2016, the day after the Babushkin District Court of Moscow Judge Romantsova partially ruled for the applicants, the Russian CC rejected the application as inadmissible on the basis that the Babushkin District Court of Moscow was considering the Korolevs' case at the moment and the Korolevs had yet to exhaust the remedies offered by courts of general jurisdiction.

[71] (2015) 9 (159) *Bulletin of the European Court of Human Rights. Russian Edition*, pp. 107–41.

[72] A full analysis of the case-law of the Russian CC is available in *Khoroshenko v. Russia*, paras. 55–57.

[73] Russian CC Decision, 10 February 2016, No. 120-O.

Meanwhile on 9 February 2016, Judge Romantsova of the Babushkin District Court of Moscow, having referred to *Khoroshenko v. Russia*, ruled that the head of the correctional colony's refusal to grant the Korolevs a conjugal meeting was unlawful. However, the judge did not grant a conjugal meeting, but rather simply ordered the head of the correctional colony to reconsider the Korolevs' application for a conjugal meeting. On July 4, 2016, Moscow City Court, as an appeal court, quashed the 9 February 2016 judgment, referring to the same reasoning in the decision by the Russian CC no. 248-O of 9 June 2005, which was referred to by the ordinary court's judges in the first *Korolev* case:

> A person who intends to commit such crimes must assume that, in consequence, he or she may be deprived of freedom and that his or her rights and freedoms may be restricted, including the right to privacy, personal and family secrecy and, as a result, the possibility of having a child. In committing a crime, a person consciously condemns himself or herself, and members of his or her family, to such limitations.[74]

For this reason, on 18 August 2016, having no hope of remedies from the remaining cassation instances, the Korolevs once again applied to the Russian CC, this time along with Andrey Khoroshenko and two other families of lifers. On 15 November 2016, without holding a hearing, the Russian CC ruled in favor of the Korolevs by stating that the provisions of articles 125 and 127 of the Correctional Code, which restrict conjugal meetings for lifers, is unconstitutional and granted one conjugal meeting per year. The court based its position on *Khoroshenko v. Russia*.[75]

This decision benefited up to 2,000 families of lifers but not fully the Korolevs. However, the end goal of Korolevs was insemination, not just conjugal meetings. Access to artificial insemination gives a greater guarantee of insemination rather than conjugal meetings once a year not

[74] Russian CC Decision, 9 June 2005, No. 248-O.

[75] Interestingly, on 25 October 25, 201,6 the Russian CC ruled inadmissible a similar application filed by Khoroshenko because "in essence [the applicant] puts before the Constitutional Court of the Russian Federation a question on execution of the judgment of the European Court of Human Rights delivered on 30 June 2015 in his case in his favour. [. . .] [I]mplementation of such a revision is not within the jurisdiction of the Constitutional Court of the Russian Federation" (Russian CC Decision, 25 October 2016, No. 2246-O [Applicant Khoroshenko Andrey Anatolevich]). This conclusion must be compared with the Russian CC Judgment of July 14, 2015, No. 21-P, in which the court ruled that it has such jurisdiction if a question comes from the state authorities, including from the Ministry of Justice, whose deputy is the Permanent Representative of the Russian Federation before the ECtHR, therefore a representative of the defendant High Contracting Party in the case of *Khoroshenko v. Russia*.

necessarily at the dates of ovulation. The Russian CC included one sentence in its judgment that may block access to ART and therefore leave Veronika Korolev childless. The court stated that reconsideration of previous decisions delivered in the cases of the applicants is not required. This creates no problem in regard to the second *Korolev* case in the matter of conjugal meetings. Indeed, the first conjugal meeting of the Korolevs took place on 27–30 January 2017. It remains a problem for the Korolevs to seek their initial and the most important remedy of ART. On March 2017, the Babushkinskiy District Court refused to reconsider its 25 December 2014 ruling due to the wording of the Russian CC. The Korolevs have only one real hope left: the speedy consideration of their application by the ECtHR.

### *2.4.3* Mikhaylova v. Russia*: Lack of Free Legal Assistance to a Person "Charged with a Criminal Offense" in Administrative Proceedings*

On 25 November 2007, while walking in the street toward the meeting point for an "Opposition March," Valentina Mikhailova was arrested, detained for three hours, and questioned by police. She was later charged with (1) participating in the march and (2) not following the orders of a police officer. These offenses are set out in the Russian Code of Administrative Offenses (CoAO) in articles 20.2 and 19.3 accordingly.

Under the CoAO, both actions are categorized as administrative, not criminal, offenses. The maximum penalty for these offenses was 1,000 rubles and fifteen days imprisonment, respectively, at the time of the arrest.

On 19 December 2007, Justice of the Peace Vasilenko of judicial area No. 201 of St. Petersburg, after considering the two offenses together in a public hearing, fined Ms. Mikhailova 500 rubles for each offense (1,000 rubles in total).

During the course of the proceedings, Ms. Mikhailova asked the peace judge that free legal representation be provided to assist her in presenting her case as she was a pensioner with insufficient income to hire a lawyer or any adequate legal training to represent herself in a complex case. She argued that she had the right to free representation under Article 6 of the Convention. This request was rejected.

On 26 December 2007, Ms. Mikhailova appealed the decision of the peace judge to the Dzerzhinskii District Court. On 19 February 2008 and 11 March 2008, Ms. Mikhailova filed applications (requests) for free legal assistance before the district court in order to be represented in the

course of consideration of the appeal. These requests were considered and refused on 19 February 2008 and 11 March 2008 by district court decisions. On 11 March 2008 Ms. Mikhailova supplemented her appeal of 26 December 2007 with an addition to the appeal for quashing the decision of the justice of the peace at first instance. The single basis for the addition to the appeal was that her case was decided by the peace judge without her being represented by a free advocate provided by the state, which constitutes a violation of Article 6(1) taken together with 6(3)(c) of the Convention. On 17 March 2008, the district court refused the appeal in its entirety.

On 19 June 2008, Deputy Chief Justice Pavluchenko of St. Petersburg City Court refused to bring an extraordinary appeal (protest) against the decisions of the peace judge and the district court judge. The argument regarding free representation by an advocate was ruled out based on national legislation. The Convention arguments were not considered.

On 31 July 2008, Deputy Chief Justice Serkov of the Supreme Court of the Russian Federation refused to bring an extraordinary appeal (protest) against the decisions of the peace judge and the district court judge. The argument regarding free representation by an advocate was ignored. The Convention arguments were not considered.

Developments since the applicant's administrative conviction and application to the ECtHR in 2008 forced the applicant to appeal to the Russian CC. On 8 June 2012, the maximum fine under Article 20.2 of the CoAO offense for which the applicant was held liable was increased from 1,000 rubles to 20,000 rubles (a twentyfold increase). Russia continues to classify the offense as administrative and provides no free legal assistance. Individuals who now find themselves in the same situation as Mikhaylova continue to be disadvantaged by Russia's behavior, and in fact, the direct financial disadvantage to people in this situation is potentially much greater. Were the maximum fine to be imposed on Mikhaylova today, it would constitute five times her monthly pension.

Unlike in the other two cases described, Mikhaylova's position requesting free legal assistance when considered by the peace judge and other courts up to the RF Supreme Court was not based on a clone case against another member state of the Council of Europe. Rather, during the time she spent before national judges of courts of general jurisdiction, Valentina Mikhaylova as a layperson relied more on her sense of fair trial.[76]

[76] The *Mikhaylova* case very much recalls the case of *Gideon v. Wainwright* brought before the U.S. Supreme Court by Clarence Earl Gideon. The trial judge denied Gideon's request for a court-appointed attorney because, under Florida law, counsel could only be

Up until the moment when all the effective and ineffective national remedies were exhausted and substantial legal analysis was laid down to make a decision to apply to the ECtHR,[77] the guarantees of Article 6 §§ 1 and 3 (c) of the Convention in regard to Mikhaylova's circumstances were clear. Rather than judicial practice, it is the CoAO that contains the structural problem of not guaranteeing the right to legal assistance free of charge if the "interests of justice" so require, regardless of whether a person charged with a criminal offense had legal skills enabling them to present a proper legal defense.

In 2014, when communication of the case to the Permanent Representative of the Russian Federation before the ECtHR was completed, the parties' positions were expressed in an exchange of memoranda, the case law was researched in detail, and the ECtHR questions were addressed, Mikhaylova and her representatives decided to apply to the Russian CC challenging the CoAO as contradicting the Convention and the relevant provision of the RF Constitution.

Previously, the courts of general jurisdiction had considered Mikhaylova's requests to retain the assistance of a lawyer free of charge. The Russian CC had before it all the documents and analysis confirming the guarantees of Article 6 §§ 1 and 3 (c) of the Convention in regard to an individual's right "to defend himself . . . through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." Mikhaylova provided her ECtHR application and other communications translated into Russian to the judges of the Russian CC, assisted by the Russian CC's Department of International Relations and Generalization of the Practice of the Constitutional Control in regard to application of the Convention. This department provides the court inter alia with information and analytical support on international and foreign law and the practice of international courts. The ECtHR case law provided by Mikhailova was clear as to what was important for defining whether the charge was criminal, therefore triggering free legal assistance



appointed for a poor defendant charged with a capital offense. On 18 March 1963, the U.S. Supreme Court held that the Sixth Amendment's guarantee of counsel is a fundamental right essential to a fair trial and, as such, applies to the states through the Due Process Clause of the Fourteenth Amendment. Clarence Gideon's story was turned into the book *Gideon's Trumpet* by *New York Times* legal reporter Anthony Lewis and later turned into a film under the same title.

[77] By this time, Valentina Mikhailova was represented by a lawyer practicing at the NGO Sutyajnik.

guarantees. It was not the actual penalty (the amount or seriousness of the penalty) imposed (equivalent to EUR 28 in the case of Mikhaylova) but rather it was the character of the penalty (a fine or arrest was punitive and deterrent in nature) and what the applicant in fact risked or was liable to have imposed (fifteen days' imprisonment in the case of Mikhaylova).

On 5 February 2015, the Russian CC ruled on the inadmissibility of Mikhaylova's application.[78] The court arrived at the conclusion that for the majority of administrative offenders a free lawyer is not required: such a service is really needed only when a person was detained for forty-eight hours or more, or arrested for up to fifteen days, on the basis that only in such cases "a real degree of invasion of constitutional rights and freedoms is comparable with measures of criminal law impact."[79] The Russian CC did not consider that a person charged with a criminal offense needs a lawyer before the penalty of detention was imposed, not after.[80] The constitutional judges were aware of the legal position of the ECtHR in regard to this matter, yet ruled in violation of the Article 6 guarantee. Not even a single dissenting opinion followed.

The ECtHR expressed disagreement with the interpretation of Article 6 of the Convention by the Russian CC in paragraph 61 of *Mikhaylova v. Russia*. Judge Pinto De Albuquerque and Judge Dedov were more straightforward in their critiques of the Russian CC's position in their concurring opinion: "This case presented an excellent opportunity for the European Court of Human Rights (the Court) to provide much needed guidance to the Russian authorities on the general measures that should be taken to prevent similar situations, in view of the insufficient efforts made by the Russian Constitutional Court to address that systemic failure."[81]

It must be mentioned that, in its judgment, the Russian CC expressed the opinion that Mikhaylova ought to wait for an opinion of the ECtHR before referring to the Russian CC. Summarizing the chronology of Mikhaylova's proceedings before the ECtHR, the Russian CC stated: "However, without waiting for the issuance of the judgment of the ECtHR Ms. Mikhaylova filed a complaint with the Constitutional Court

[78] Russian CC Decision, 5 February 2015, No. 236-O. [79] Ibid., p. 12, point 4, para. 5.
[80] The penalty of detention is executed immediately, before the decision enters into force either after appeal was dismissed or after the time allowed for the appeal has elapsed.
[81] *Mikhaylova v. Russia*, 19 November 2015, No. 46998/08. Concurring Opinion of Judge Pinto De Albuquerque joined by Judge Dedov, paras. 1 and 8.

of the Russian Federation."[82] Mikhaylova's representative anticipated this and, in point 56 of the application to the Russian CC, explained that she applied to the Russian CC to give that court a chance to rule on the matter before the ECtHR did:

> Despite the fact that the Constitutional Court of Russia is not considered by the ECtHR as an effective remedy, V. N. Mikhailova decided to apply to the Constitutional Court of Russia, because she believes that her right is infringed by Article 25.5 of the Russian Code of Administrative Offenses. Only the Constitutional Court of Russia possesses the jurisdiction to rule on the unconstitutionality of the code. V. N. Mikhailova is convinced that a national court must stop the violation of the right to free legal assistance to citizens who have been called to account for an administrative offense, that the Russian court must have a chance to establish a violation of the right to a fair trial before consideration of the case in the ECtHR.[83]

In July 2015 the ECtHR was notified of the decision by the Russian CC.

On 19 November 2015, in its chamber judgment in the case of *Mikhaylova v. Russia*, the ECtHR held, unanimously, that there had been two violations of Article 6 §§ 1 and 3 (right to a fair trial and right to free legal assistance) of the Convention concerning administrative offense proceedings brought against the applicant, Valentina Mikhaylova: firstly, for failing to comply with a police order and, secondly, for taking part in an unlawful public gathering.

The press release issued by the Registrar of the ECtHR stated the core of the findings:

> The Court was satisfied that the administrative proceedings brought against Ms Mikhaylova could be classified as "criminal" within the meaning of Article 6 of the European Convention. In particular, the criminal sphere of Article 6 was applicable to the case against Ms Mikhaylova concerning the offense of taking part in an unlawful public gathering, even though the offense did not involve a custodial sentence but a relatively low fine. This was, in particular, because the fine imposed on Ms Mikhaylova had been punitive and deterrent in nature, which was one of the characteristics of criminal penalties. One of the fundamental features of a fair trial under the European Convention was the right of everyone charged with a criminal offense to be effectively defended by a lawyer; however, the Russian CoAO had not provided Ms Mikhaylova, a pensioner with no legal or other relevant training, with the possibility to

[82] Russian CC Decision, 5 February 2015, No. 236-O, para. 4 of point 1.

[83] The application is available at http://sutyajnik.ru/documents/4788.pdf. All the *Mikhaylova v. Russia* case materials are available at http://sutyajnik.ru/cases/487.html.

> obtain free legal assistance at any stage or in any form in the proceedings against her. Given a certain degree of complexity in the cases against Ms Mikhaylova, as well as what was at stake for her, namely 15 days' detention (for the first offense) and her right to freedom of assembly (concerning the second offense), the Court considered that she should have been provided with free legal assistance.[84]

As this chapter was submitted to the publisher, Ms. Mikhaylova filed a complaint to the Russian CC requesting reconsideration of her application decided on 5 February 2015 due to the ECtHR judgment decided in her case in her favor. She insists that reconsideration is within the jurisdiction of the Russian CC as a matter of enforcement of the ECtHR judgment. Mikhaylova asked the Russian CC to reconsider its decision of 25 October 2016 issued on the application of Khoroshenko[85] and to be consistent with regard to individuals when applying the reasoning in its judgment of 14 July 2015, No. 21-P, that it has jurisdiction to rule on the question of enforcement of ECtHR judgments if this question comes from state organs.

## 2.5 Conclusion

This chapter demonstrates that Russian legislation is progressive in regard to setting up a legal framework in the domestic legal regime for international treaties, including the Convention. The legislation – from the Constitution, to the Russian CC's legal positions, to different constitutional and regular statutes, and guiding explanations by the Plenum of the RF Supreme Court – prescribes direct application of the Convention provisions as they are understood in the case law of the ECtHR even against other High Contracting Parties. One notable exception is the 14 July 2015, judgment by the Russian CC and amendments to the Federal Constitutional Law on the Russian CC regarding its jurisdiction to overthrow decisions by the ECtHR.

However, judicial practice is quite different from legislation. From the three cases analyzed in this chapter, it is evident that often Russian courts simply do not follow the Constitution, legislation, or even relevant Supreme Court Plenum Regulations. Judges of the RF Supreme Court do not follow its own Plenum's guiding explanations, let alone having lower courts follow them. Lack of judicial will to implement international

[84] Press release, Registrar of the ECtHR (ECtHR 365 (2015) 19.11.2015).
[85] See Note 70.

human rights guarantees that Russia is obliged to abide by upon ratifying the Convention is evident in the judicial practices of numerous justices, from the justice of the peace all the way up to the judges of the Russian CC.

It is not for the author of this chapter to give a representative survey of cases in this matter due to the great number of judges and cases considered in the Russian courts. However, I believe these cases are representative for the reason that they were carefully selected according to the six criteria mentioned in Subsection 3.1. of this chapter. Moreover, all three cases were considered in both the highest courts of Russia that set national legal standards.

The jurisprudence of the Supreme Court resembles an attempt to demonstrate to the Council of Europe that the Convention is being applied rather than to implement the Convention in fact. Otherwise, how can one explain the situation wherein a national supreme court – having issued special regulations mandating all lower courts to apply the Convention by taking into account ECtHR case law – fails to follow this document in its own jurisprudence? Lack of implementation of the Convention by the justices of the RF Supreme Court and ignoring the guiding explanations of its own Plenum's Regulation of 2003 and 2013 could not be defined as unawareness of the Convention's guarantees. Non-application of the Convention can rather appear highly intentional, when taking into account the fact that representatives of the applicants in the cases described made sure the judges were fully aware of the Convention's guarantees.

In the first and the third cases analyzed in this chapter we see a clear failure by the Russian CC to initiate reform. In the second Korolev appeal to the Russian CC, it clearly had no choice left but to finally initiate the reform sixteen years after the original appeal.

In circumstances when Russian statutes clearly contradict the Convention and prioritizing the Convention means reform of Russian statutes and practice, judges intentionally ignore ECtHR case law and simply state that the Convention is not applicable without giving valid legal grounds for their conclusion. The lower court judges are either not willing or not able to take the risk of initiating much needed legal reforms, as extensive noncompliance with the Convention has shown. Judges pass this responsibility to initiate legal reforms to the higher courts, while the latter pass it to the ECtHR.