SUBMISSION FROM THE RUSSIAN JUSTICE INITIATIVE

TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE CONCERNING THE CASES OF

***ISRAILOVA AND OTHERS v RUSSIA* (no. 4571/04)**

***ASLAKHANOVA AND OTHERS v RUSSIA* (no. 2944/06)**

25 August 2015

(1) INTRODUCTION

1. This submission is made under Rule 9 (1) of the Committee of Minister's Rules.

2. The present submission aims to draw the Committee's attention to the execution of general measures by the Russian Federation of the judgment in the case of *Aslakhanova v Russia,* in the area of domestic remedies for disappearances in the North Caucasus. Following the entry into force of the *Aslakhanova* judgment, Russian Justice Initiative (RJI) brought the question of domestic remedies for disappearances in the North Caucasus to the Constitutional Court of the Russian Federation. The European Court found in the *Aslakhanova* judgment that the non-investigation of disappearances in the North Caucasus resulted from "systemic problems at the national level, for which there is no domestic remedy."[1]

3. The submission also concerns individual measures in the case of *Israilova and others v Russia,* insofar as the applicant in this case, Tabarik Israilova, served as the petitioner before the Constitutional Court concerning the question of domestic remedies available to investigate the disappearance of her son in December 2002. The application to the Constitutional Court was submitted in November 2014.[2]

4. RJI has already reported to the Committee on Ministers on individual measures in the applicant's case on 25 August 2010 (paras. 45-47) and 10 January 2014 (paras. 52-60).[3] In these submissions, the applicant reported on her attempts to compel the authorities to continue investigating the disappearance of her son, including by establishing the identity of the FSB servicemen from

[1] *Aslakhanova and others v Russia,* Judgment of 18 December 2011, Para. 217.

[2] The submission was prepared jointly by the Institute for Law and Public Policy (www.ilpp.ru), a Russian NGO with expertise in constitutional issues, and the Russian Justice Initiative, on the basis of materials provided by the applicant.

[3] These submissions can be accessed at:
http://www.srji.org/files/implementation/7%20CoM_Ind_Measures_25%20Aug_2010%20SUBMITTED.pdf and
http://www.srji.org/upload/medialibrary/ad3/2014-01-classification-rji-and-memo.pdf

Sverdlovsk who had taken part in the special operation during which her son was detained, and also on her requests to provide full access to the case materials. On 29 December 2012 the applicant was denied access to the case materials on the grounds that the investigation in her case had not yet been completed. Subsequently, she was unable to challenge this decision on the merits, or to challenge the decisions made by on the conduct of the investigation, despite resorting to the judicial review procedure provided for under Article 125 of the Criminal Code.

(2) SUMMARY OF SUBMISSION and MAIN CONCERNS

5. The present submission aims to outline the essence of the applicant's complaint to the Constitutional Court (Section 3), which in the applicant's view was the last instance at domestic level capable of addressing the issue of ineffective domestic remedies following the European Court's judgment in *Israilova v Russia.* Section 3 lays out the background for the submission to the Court (i), the rationale for the submission (ii) and summarizes all the key points contained in the complaint (iii).

6. Although the applicant's complaint passed the Court's registry and was submitted to the judges for a determination, the Court declined to examine the applicant's complaints on the merits. In section (4) we assert that this decision has implications for the issue of domestic remedies in all cases concerning disappearances in the *Khashiyev* group.

(3) APPLICATION TO THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION (CCRF)

(i) *Background for submission to the CCRF on behalf of the applicant in* Israilova v Russia

7. As stated above, RJI has already reported to the Committee on the applicant's attempts to utilize the Article 125 CCP remedy to challenge the investigator's decision to provide only 52 pages of the case file, as well as to challenge decisions concerning the conduct of the investigation in her case. Like many other applicants in cases from the North Caucasus, the applicant could not obtain a hearing on the merits of her claim, due to various prevailing factors that combine to make this remedy ineffective in practice.[4] Thus the applicant was left with no effective domestic remedy to compel the authorities to rectify the shortcomings in the investigation identified by the European Court of Human Rights and also by the domestic investigative authorities.

8. In addition to the applicant being allowed to access only 52 pages of the case file, her representatives also challenged the following shortcomings in the investigation:

- The authorities failed to identify and question members of the FSB who participated in the kidnapping of the applicant's son, despite a series of conclusions of the investigating authorities that members of the Sverdlovsk region FSB took part in the operation which resulted in her son's disappearance. No one from the territorial department of the Sverdlovsk FSB had been interrogated by the investigating authorities.
- The investigation requested documents stored in the Central Archive of the Ministry of Internal Affairs, but this request was ignored by the Archive.
- The identity of particular FSB officers was established as a result of the interrogation of key witnesses, but none of these officers were ever questioned by investigators.

[4] Which had been specifically described in a series of our previous submissions to the CoM: Submission of 3 November 2010 by Russian Justice Initiative on individual measures in 3 cases from the North Caucasus, available at http://www.srji.org/upload/medialibrary/ada/11-03-2010-submission-125-to-com.pdf, last accessed on 21 August 2015; Submission of April 2013 by Russian Justice Initiative concerning the effectiveness of Article 125 of the Criminal Procedure Code as a remedy for investigative shortcomings in the Chechen cases, available at: http://www.srji.org/upload/medialibrary/ea8/2013-04-art-125-rji.pdf, last accessed on 21 August 2015.

- The applicant never received the results of DNA tests conducted at various intervals.

9. The domestic court refused to examine the applicant's complaints on the merits because of the interpretation of article 125 (5) CCP and para. 8 of the Ruling Directive of the Supreme Court of Russia, which allows the judge to discontinue the examination of a judicial review request if the decision being appealed against is overturned before the date of the court hearing.[5] The denial of a hearing on the merits was upheld on appeal.

(ii) Rationale for the Applicant's Complaint to the Constitutional Court

10. The applicant's inability, over a period of more than three years, to successfully obtain a hearing on the merits in order to challenge lack of access to the case materials as well as investigative shortcomings, is representative of the experience of a large number of applicants from other cases decided by the ECtHR concerning grave human rights abuses in the North Caucasus. As a result, a variety of procedural and substantial issues, review of which should in theory be provided for by Article 125 CCP, have remained unaddressed, and as a result the Russian authorities have made little progress in implementing the Court's judgments in the *Khashiyev* group. The Committee of Ministers noted this lack of progress in its Interim Resolution of December 2011.

11. As a result of the Russian authorities' failure to implement judgments from the *Khashiyev* group, and in particular in cases of disappearances, in December 2011 the European Court in its quasi-pilot *Aslakhanova* judgment characterized the non-investigation of disappearances as a systemic problem that triggered Russia's responsibility under Article 46 of the European Convention. The majority of cases in the *Khashiyev* group concern disappearances.

12. The applicant in *Israilova and others v Russia* thus applied to the Constitutional Court of the Russian Federation (hereinafter CCRF), arguing that the operation of Article 125 CCP *in the specific context of the actions of security forces in the North Caucasus that led to disappearances* proved illusory, thus violating her Constitutional rights.

(iii) *Summary of the complaint to the Constitutional Court*

13. On 30 October 2014 the applicant's representatives submitted an application to the Constitutional Court of Russia,[6] arguing that the mechanism of judicial control as set out in Article 125 CCP *de facto* excludes the possibility of implementation of the ECtHR's judgments through domestic courts in the context of disappearances in the North Caucasus.

14. Because of the strictly formal approach of the domestic courts to examination of complaints within the scope of Article 125, applicants find themselves in a vicious circle without an opportunity to have their arguments concerning shortcomings and defects of the investigation examined by the domestic court. The investigative authorities always "rectify" the impugned decision before the date of the court hearing, and the court discontinues examination of their complaints. However, a short time later, the investigation again stagnates, usually without substantially rectifying those shortcomings which the applicant wished to bring to the court's attention.

15. The complaint referred to the similar pattern of suspension and re-opening of investigations in a series of cases following the ECtHR judgment, and also referred to the judgment of *Aslakhanova and Others v Russia* in which the Court pointed to the existence of a systemic problem in investigation of

[5] See our detailed submission on this subkect of 3 November 2010 in paras 52-62.

[6] Attachment 1: Applicant's complaint to the Constitutional Court of 30 October 2014.

disappearances in the North Caucasus.

16. The applicant asked the Constitutional Court to declare the provisions of Parts 1 and 5 of Article 125 CCP incompatible with the Constitution of the Russian Federation, in particular Articles 15 (4)[7], 17 (1)[8], 19[9], 46[10], 52[11], 53[12] and 55 (3)[13], to the extent that they—as currently interpreted by domestic courts—exclude the possibility of review of victims' complaints on the merits by a court of general jurisdiction concerning the effectiveness of the preliminary investigation pursuant to judgments of the European Court of Human Rights. In addition, the application of Article 125 CCP, as currently applied and interpreted by domestic courts, undermines the applicant's right to judicial protection.

17. Specifically, the application of the above provisions contradict a number of rights guaranteed by the Russian Constitution, such as the right to judicial protection of rights and freedoms (Article 46(1)), the right to appeal against the decisions and action (or inaction) of state bodies (Article 46(2)), and the right of victims to compensation for damage inflicted.

a. *Key legal position regarding the ability to challenge via judicial review the decisions and actions/inactions of the officials in charge of the preliminary investigation*

18. According to the Constitutional court's decision of 23 March 1999 No 5-П:

> […] if actions and decisions of the investigating authorities concern not only mere criminal-procedural affairs but also give an impulse to the consequences which go beyond their framework, at the same time substantially limiting constitutional rights and freedoms of an individual, the postponing of examination of the lawfulness of such actions until the stage of examination of the whole case on the merits might bring harm that is subsequently irreparable. In these cases the courts' control over the actions and decisions of the investigating authorities beyond the stage of preliminary investigation (during the actual hearing on the merits) will not be an effective remedy, therefore interested individuals [the applicants] should be guaranteed the immediate right to apply to the court during the preliminary investigation.[14]

19. According to the same decision, the *de facto* failure to act on the part of the investigating authorities, which led to the suspension of the criminal investigation, qualifies as an instance in which judicial control or interference becomes constitutionally justified, because, according to the Constitutional Court:

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[7] Article 15 (4): Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by national law, then the rules of the international agreement shall be applied.

[8] Article 17 (1): In the Russian Federation human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution.

[9] Artcle 19: 1. All persons shall be equal before the law and the court. 2. The State guarantees the equality of human and civil rights and freedoms regardless of sex, race, nationality, language, origin, material and official status, place of residence, attitude to religion, convictions, membership of public associations, or of other circumstances. All forms of limitations of human rights on social, racial, national, language or religious grounds shall be prohibited. 3. Men and women shall enjoy equal rights and freedoms and equal opportunities to exercise them.

[10] Article 46: 1. Everyone shall be guaranteed protection in court of his (her) rights and freedoms. 2. Decisions and actions (or inaction) of State government bodies, local self-government bodies, public organisations and officials may be appealed in court. 3. Everyone shall have the right in accordance with international treaties of the Russian Federation to appeal to interstate bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted.

[11] Article 52: The rights of victims of crimes and of abuses of office shall be protected by law. The State shall provide the victims with access to justice and compensation for damage sustained.

[12] Article 53: Everyone shall have the right to State compensation for damage caused by unlawful actions (inaction) of State government bodies and their officials.

[13] Article 55(3): Human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defence of the country and the security of the State.

[14] Decision of the Constitutional Court's of 23 March 1999 No 5-П.

[…] unlawful and unjustified suspension of investigation may lead to the loss of evidence and lead to a complete impossibility to rectify the rights and legal interests of the participants of the proceedings…[15]

b. *Limitation of the role of domestic courts in examination of the actions or decisions of investigating authorities and the balance of Constitutional values*

20. It was noted in the complaint that domestic law does indeed permit the restriction of the involvement of domestic courts in the preliminary investigation. However, this restriction is justified ONLY in two specific circumstances, i.e. to preserve the procedural independence of investigator or to safeguard the impartiality of the court:

(1) As far as procedural independence is concerned – the court gains the right to interfere with the investigator's activity only when his decisions cause consequences which go beyond the criminal-procedural framework and substantially limit the constitutional rights and freedoms of an individual, and when an attempt to rectify the violation may become impossible with the passage of time.[16]

(2) Concerning impartiality of the court, actions and decisions of the investigator should not predetermine issues which subsequently could be the subject of judicial investigation of the criminal case. The opposite would contradict the constitutional principle of judicial independence…[17]

21. The CCRF has found that the factors which limit judicial control in a particular case should be established on the basis of a balance of constitutional values.[18]

22. The applicant argued in her complaint that in her case, judicial review over the preliminary investigation is justified by the necessity to guarantee the constitutional right of appeal to interstate bodies for the protection of human rights (article 46(3) of the Constitution) and also to guarantee implementation of the decision of an international court, which had established a violation of an international agreement to which Russia is a party, namely – the failure of the Russian authorities to conduct an effective investigation into the applicant's allegations.

23. According to the Decision of the CCRF of 26 February 2010 N 4:

[…] Protection of the rights and freedoms of man and citizen…may not be recognized to be effective once a judicial act … of a competent authority delivered for the purposes of restitution of the violated rights remains without enforcement. This includes judicial protection, a right which belongs to the fundamental inalienable human rights and freedoms and at the same time is a guarantee for all other rights and freedoms … *a State that has undertaken to execute final judgments of the European Court of Human Rights, including those which find violations of the Convention for the Protection of Human Rights and Fundamental Freedoms and require annulment of domestic judicial acts in order to rectify such violations, shall introduce a mechanism for the restoration of the interested persons' rights in domestic legislation*. This conclusion concerns cases where rights cannot be restored by awarding monetary compensation only (emphasis added).

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[15] *Ibid*
[16] Decisions of Constitutional Court of 18 October 2012 N 1888-O, of 17 June 2013 N 987-O and of 21 November 2013 N 1904-O
[17] Decisions of Constitutional Court of 23 March 1999 N 5-П, of 23 June 2009 N 889-O-O, of 27 May 2010 N 633-O-O, of 19 June 2012 N 1096-O
[18] Decision of the Constitutional Court of Russia of 22 October 2003 N 385-O, of 17 July 2007 N 602-O-O, of 23 June 2009 N 889-O-O

24. In the applicant's situation, the judicial review of investigative actions and decisions during the preliminary investigation stage is in essence *the only effective mechanism for the enforcement of judgments of the European Court of Human Rights*, because in the circumstances of the authorities' failure to conduct an effective investigation into the applicant's case during the preliminary investigation stage—a failure established by the European Court—the practice of continuing to petition the same authorities responsible for this failure loses all meaning.

25. Furthermore, if the judiciary takes a proactive role in establishing and rectifying shortcomings identified in the preliminary investigation in the context of the implementation of the ECtHR's judgments, this does not compromise the two criteria necessary for permissible judicial intervention during the preliminary investigation phase, because:

    (a) the seriousness of the limitation on the applicant's constitutional rights and freedoms follows from the decisions of the ECtHR, which specifically ruled on the ineffectiveness of investigation in the applicants' cases;

    (b) the domestic court's impartiality is not undermined if it directs the investigative authorities to rectify particular shortcomings because the court is not carrying out its own criminal investigation, but is rather "re-transmitting" the conclusions of the ECtHR on the need to carry out certain investigative steps in the case.

26. The applicant argued that the current interpretation of Article 125 CCP in fact *legitimizes the omissions of the investigating authorities and the adoption of unlawful procedural decisions*, thereby obviating the applicant's right of appeal to international bodies for the protection of human rights and freedoms, and prolonging the violation of the applicant's constitutional rights and freedoms.

(iv) Outcome of the applicant's complaint

27. On 23 December 2014 the CCRF refused to review the applicant's complaint on the merits, although the complaint was not deemed manifestly ill-founded by the CCRF registry. Thus, the decision on the refusal to hear the applicant's case on the merits was taken by the judges of the CCRF and not by the registry. In refusing to rule on the merits of the applicant's complaint, the CCRF reiterated existing practice and case-law concerning the application of Article 125 CCP. [19]

(4) IMPLICATIONS OF THE DECISION OF THE CONSTITUTIONAL COURT

28. The applicant's representatives submit to the Committee that the refusal by the CCRF to address the issue of domestic remedies in the context of investigation of enforced disappearances in the North Caucasus has profound implications for many applicants in the *Khashiyev* group. As of July 2015, there were over 170 cases in the *Khashiyev* group that concerned disappearances, for a total of 905 applicants who lost over 250 relatives to disappearances. The applicant in *Israilova v Russia* has tried for over six years to obtain an effective domestic investigation into the disappearance of her son. The *Aslakhanova* judgment found that there were no domestic remedies available in allegations of disappearances in the North Caucasus at the national level. The applicant requested the Constitutional Court of the Russian Federation to rectify this situation, i.e. by addressing the problematic functioning of the only judicial review mechanism available to applicants such as Ms Israilova. The Court's refusal to do so means that there are no mechanisms available in Russia to implement the European Court's judgments concerning enforced disappearances in the North Caucasus.

[19] Attachment 2: Decision of the Constitutional Court of 23 December 2014.