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Russia and the European Court of Human Rights: The Price of Non-Cooperation

by Ole Solvang*

IN THE MAJORITY OF CASES FROM CHECHNYA pending before the European Court of Human Rights (ECtHR), the Russian government has refused to provide the ECtHR with important documents. Recent cases indicate that Russia might be punished for its non-cooperation, but that there are limits to how far the ECtHR is willing to go toward enforcement.

CHECHNYA AND THE EUROPEAN COURT OF HUMAN RIGHTS

Since the collapse of the Soviet Union in 1991, Russia has struggled with a violent separatist movement in its southern republic of Chechnya. An initial military attempt to bring Chechnya back into Russia's fold met with embarrassing failure. As a result, Russia's then President Boris Yeltsin signed a peace agreement with his Chechen counterpart in 1996, giving Chechnya *de facto* independence. After a series of apartment bombings, officially attributed to Chechen terrorists and a Chechen armed incursion into the neighboring republic of Dagestan, Russia's central government launched a second military campaign in 1999.

The so-called second Chechen war was characterized by widespread grave human rights abuses. Indiscriminate use of deadly force, torture, and extra-judicial killings became regular occurrences for Chechnya's civilian population. Federal military forces regularly carried out cleansing operations (*zachistki*), during which they surrounded and isolated populated areas for several days to check the inhabitants' identity documents. During these operations civilians regularly disappeared, never to be seen again. As the military conflict has subsided, large-scale cleansing operations have been replaced by identity checks by armed, masked men at night. These checks often lead to disappearances. Human rights organizations estimate that 5,000 people may have disappeared in Chechnya since 1999 at the hands of military and security forces. Human Rights Watch calls the widespread practice of disappearances in Chechnya a crime against humanity.¹

Perpetrators of these violations have enjoyed virtual impunity. Since 1999 there have been only a handful of convictions for grave human rights violations in Chechnya. Only one individual has been convicted for a disappearance-related crime.²

While human rights violations were also widespread during the first Chechen war, Russia's 1998 ratification of the European Convention on Human Rights (the Convention) provided victims of the second war with a powerful new tool for seeking redress for human rights violations — the ECtHR. As a result of Russia's ratification, the ECtHR obtained jurisdiction to review violations of the Convention in Russia, including Chechnya, that have taken place since May 1998.



Courtesy of Mikhail Eustafiev (<http://creativecommons.org/licenses/by-sa/2.5/>)

The second Chechen War was characterized by widespread human rights abuses against the civilian population.

Consequently, several hundred victims from Chechnya have submitted applications to the ECtHR.³ Since the ECtHR handed down its first judgment in a Chechen case,⁴ Russia has lost, on some or all counts, in 24 cases concerning grave human rights abuses in Chechnya.⁵ Russia was obliged to effectively investigate the violations and hold the perpetrators accountable, pay monetary compensation to the victims, and undertake measures to prevent similar violations from recurring. However, access to documents held by Russia for criminal investigations has become a contentious issue.

FURNISHING ALL NECESSARY FACILITIES?

Although it can conduct oral hearings and fact-finding missions, the ECtHR decides the majority of its cases solely on the basis of written submissions. Through several exchanges throughout the multi-year procedure of bringing a case to the ECtHR, both the applicants and the respondent state file submissions, respond to each other's arguments and submit supporting evidence.

States' obligation to cooperate with the ECtHR is described in Article 38 of the Convention, which states that the ECtHR shall "pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall *furnish all necessary facilities*."⁶ This usually means that the state in question is under an obligation to provide the ECtHR with documents that contain information relevant to the case.

The ECtHR has previously been critical of Turkey regarding its Article 38 compliance. In several cases concerning violations in the context of security force operations, the Turkish authorities failed to disclose documents relating either to the operations themselves or to the subsequent investigation. More recently, however, Article 38 concerns have surfaced in cases against

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Russia, and particularly in cases concerning human rights violations in Chechnya.

In most cases from Chechnya pending before the ECtHR, evidence suggests that representatives of the authorities were involved in disappearances, torture, or extra-judicial executions. In some cases, Russian authorities initially admitted to detaining an individual, but later denied it after the person disappeared, or claimed that they had been released.⁷ Furthermore, accused perpetrators often travel in heavily armed military vehicles that only the authorities possess, and freely travel through heavily guarded checkpoints after curfew.

Russian authorities employ several lines of defense, often claiming there is insufficient evidence to prove government involvement. They also allege that rebel fighters disguised as federal forces perpetrate these crimes. In most cases, they argue that a criminal investigation is still ongoing and it would therefore be premature for the ECtHR to pass a judgment in the case.

In all Chechen cases, the ECtHR requests that the Russian authorities submit a copy of the criminal case file. Access to these documents assists the ECtHR in establishing the facts in the case and allows the ECtHR to properly assess whether the investigation has been effective. Such access is particularly important in certain types of cases. In cases regarding allegations of unacknowledged detention and/or enforced disappearances, often only the respondent state has access to information capable of corroborating or refuting applicants' allegations that their rights have been violated.

The Russian government consistently refuses to provide the ECtHR with the requested documents. Referring to Article 161 of the Russian Code of Criminal Procedure, Russian authorities often argue that disclosure of documents from the case file would compromise the federal investigation and could violate the rights and legitimate interests of the participants in the criminal proceedings.⁸ They also argue that the requested documents contain state and military secrets, and that the authorities do not trust the applicants and their representatives to keep the information confidential.⁹ The authorities usually invite the ECtHR to review documents not containing military or state secrets in Russia, without rights to make copies.¹⁰

Several times the ECtHR has rejected Russian authorities' arguments against the disclosure of documents. The ECtHR has noted that Russian authorities can invoke the ECtHR's Rule 33, which would prevent the documents from being public, if they believe that disclosure of information would be to the detriment of the investigation. In addition, the ECtHR has noted that Russian authorities have been inconsistent in their use of Article 161. In several cases, authorities have submitted documents from the criminal case file.¹¹

Faced with the government's refusal to provide the necessary documents, the ECtHR has several options to apply pressure. The ECtHR has, in several cases, drawn inferences as to the validity of applicants' allegations. In the case *Imakayeva v. Russia*, the ECtHR drew inferences from the Russian authorities' refusal to provide the necessary documents to hold that the authorities were responsible for the illegal detention and disappearance of Marzet Imakayeva's son.¹²

Another option is to hold that the Russian authorities have not "furnished all necessary facilities," and have thereby violated Article 38 of the Convention. Finding a violation of Article 38 can sometimes generate additional negative publicity for the

respondent state, and at least one ECtHR judge believes that repeated Article 38 violations should lead to higher monetary awards for the applicants.

The ECtHR generally employs one of these options, but the Russian authorities have not suffered significant negative consequences from their refusal to provide case files. Recent ECtHR judgments in two Chechen cases, however, show that the ECtHR is willing to increase pressure on the Russian government, but only to a certain point.

PUTTING ON THE PRESSURE

On January 1, 2000, after a period of heavy shelling, Russian special police forces (OMON) moved into the area where Zaynap Abdul-Vagapovna Tangiyeva and her relatives lived in the Staropromyslovskiy district of Grozny, Chechnya. Relations between civilians and police forces soon became tense as police forces regularly carried out identity checks, ordered civilians to collect dead bodies, and selected men for "exchange" with the fighters. On one specific occasion, a drunk OMON officer threatened to open fire on all civilians.

On January 11, 2000, during a daily check on her relatives, Tangiyeva discovered that her father's house was burning. She

“At least one judge believes that repeated Article 38 violations — refusing to provide the Court with documents containing relevant information — should lead to higher monetary awards for the applicants.”

found her father's and a neighbor's dead bodies in the kitchen, both with gunshot wounds to the head. The charred remains of her mother and uncle were later found in the basement. Frustrated by the authorities' unwillingness to investigate the killings, Tangiyeva lodged an application with the ECtHR in April 2000, arguing that federal servicemen had killed her relatives.

Tangiyeva's application referred to several additional violations in the same region and time period. In previous cases, the ECtHR held that Russian federal forces controlled the area and had committed grave human rights violations.¹³ The *Tangiyeva* case, however, contained less concrete evidence that Russian



The Russian government has blocked European Court requests for documents sought in connection with Chechens' claims.

federal forces were responsible for the violations, and there were no direct eyewitnesses to the killings.

To establish the facts of the case, the ECtHR judges considered the documents from the criminal case crucial, and twice requested that the Russian authorities submit them. Although Russian authorities submitted a number of procedural documents, they refused to submit any of the collected witness statements or other important procedural documents, such as descriptions of the sites or results of the ballistic expert reports, arguing that disclosure would be detrimental to the ongoing federal investigation.¹⁴

In response, the ECtHR found that the Russian authorities had violated Article 38 of the Convention. In addition, it drew affirmative inferences as to the validity of Tangiyeva's allegations from the authorities' refusal. The ECtHR determined that the applicant had made a *prima facie* case that federal military forces killed her relatives. The ECtHR further noted that when the government prevents the ECtHR from reaching factual conclusions by failing to submit requested documents, the burden falls on the government to argue conclusively why the documents in question would not corroborate the applicants' allegations. In the alternative it may provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the government, and if it fails, issues will arise concerning the substance of the complaint. As the Russian government, in the ECtHR's opinion, failed to provide such an explanation, the ECtHR held that the applicant's relatives' deaths could be attributed to the State.¹⁵

On November 29, 2007, the ECtHR held that the Russian authorities were responsible for the killing of the applicant's relatives; that they had not conducted an effective investigation; that the indifference that they showed towards Tangiyeva constitutes inhuman treatment; that Tangiyeva had had no effective remedies for these violations; and that the Russian authorities had failed to "furnish all necessary facilities." The ECtHR awarded EUR 60,000 to Tangiyeva.¹⁶

Though the compensation did not differ substantially from previous Chechen cases, criticism of the authorities' non-cooperation seemed stronger and the ECtHR seemed more willing to draw inferences in the *Tangiyeva* case. This increased willingness to draw inferences prompted, for the first time in a Chechen

case, a dissenting opinion from two judges. The Russian and Azerbaijani judges argued that the majority had gone too far, and that there was not enough evidence to hold Russian authorities responsible for the killings. Beyond the *Tangiyeva* case, the most recent judgment in a Chechen case demonstrates that there are limits to how far the majority is willing to go in this direction.

TAKING THE PRESSURE OFF?

On September 17, 2000, loud screams woke the Zubayrayev family. According to the testimony of Malika Zubayrayeva, a large group of men in camouflage uniforms and, in some instances, masks, wearing the Russian army's insignia and speaking Russian without an accent, entered the house and forced everyone outside. When the soldiers left, they took Mailka's husband with them. Shortly thereafter he was found dead with a gunshot wound to the back of the head. Investigators arrived at the scene several hours later, but according to the family, they were rude and did not interview anyone about the incident. The family did not subsequently report the incident, reasoning it would probably receive the same treatment. Several months later the family left Russia out of concern for their security and lodged an application with the ECtHR.

In the course of the ECtHR proceedings, the Russian government claimed that illegal armed groups committed the killing, referring to several other killings that night, including that of a local police officer. One person was charged with the crime, but was later released because he had confessed under duress. The authorities refused to provide the ECtHR with the entire criminal case file. They eventually submitted approximately 50 of 300 documents.

In its judgment of January 10, 2008, the ECtHR again held that it could both draw inferences from the authorities' refusal to provide the entire case file and that the authorities had violated Article 38 by not providing the necessary documents.¹⁷

Unlike in *Tangiyeva*, however, the ECtHR did not find that it could hold the authorities responsible for the killing. Attempting to distinguish the *Zubayrayev* case from other Chechen cases, the judges referred to two elements. First, the judges considered that there was less evidence in *Zubayrayev* to implicate government forces. Second, the judges emphasized that the applicants had never communicated their version of the events to the authorities. The ECtHR also noted that from the outset the Russian criminal investigation had operated under the idea that illegal insurgents committed the crime.

Again the judgment prompted dissenting opinions, this time from the judges from Cyprus and Luxemburg. Judges Loucaides and Spielmann argued that the applicants had made a *prima facie* case, and they took issue with the majority's reference to an investigation that the ECtHR had already found to be ineffective.

THE PRICE OF NON-COOPERATION

ACCESS TO DOCUMENTS FROM DOMESTIC CRIMINAL INVESTIGATIONS has been a contentious issue in all cases from Chechnya, and unless Russian authorities change their position, this issue will continue to cause friction between the ECtHR and the Russian authorities in future cases.

Both the *Tangiyeva* judgment and the *Zubayrayev* judgment are not yet final. It is likely that the Russian authorities will try

to appeal the *Tangiyeva* judgment, and it is possible that the applicant might appeal the *Zubayrayev* judgment. If these judgments are not overturned, they provide an indication of how the ECtHR will deal with this issue in the future. The *Tangiyeva* judgment demonstrates that the Russian authorities will pay a price for non-cooperation with the ECtHR: if applicants present a *prima facie* case, and the authorities refuse to provide requested documents without a proper explanation, the Russian authorities will likely lose the case.

The *Zubayrayev* judgment, however, shows that there is a limit as to how far the ECtHR is willing to go in this direction. The judges seem to agree that the burden of proof shifts if the applicants make a *prima facie* case and the government has information that might corroborate or refute the allegations. If the *Zubayrayev* judgment becomes final, key issues in future cases will be determining what constitutes a *prima facie* case, and what is needed for the burden of proof to shift to the respondent state.

Russian authorities may have benefited from their refusal to provide the ECtHR with documents from the investigation in the

Zubayrayev case. If the ECtHR had had access to all case documents it may have found differently. In that case, the *Zubayrayev* judgment undermined the strong stance in *Tangiyeva*, and Russian authorities will be encouraged to continue to withhold documents that might implicate the government. Such a situation is obviously problematic for the ECtHR, and the dissenting opinions in both cases demonstrate that the judges themselves have not reached a consensus on how to solve this problem.

If judges are unwilling to punish the government for its non-cooperation by finding substantive violations, an alternative punishment could be to increase the compensation that the government must pay. Increasing the pressure on the Russian authorities to provide the ECtHR with important documents, however, is crucial for the effective protection of the rights enshrined in the European Convention on Human Rights. Allowing the Russian authorities to withhold vital documents from the ECtHR without any serious consequences would significantly undermine the ECtHR's legitimacy, and ultimately erode the protection of the rights of those who the ECtHR is supposed to protect, such as the Chechens. **HRB**

ENDNOTES: RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS

¹ See, e.g., reports by Human Rights Watch, for documentation of human rights abuses in Chechnya, available at <http://www.hrw.org/doc?t=chechnya> (last visited Feb/ 10, 2008).

² Sergey Lapin, a member of the special federal riot police unit (OMON) was sentenced in February 2005 to 11 years of imprisonment for the torture and disappearance of Zelimkhan Murdalov, who was detained January 2, 2001, and subsequently disappeared. Amnesty International, *Russian Federation: Russian police officer found guilty of crimes against the civilian population in the Chechen Republic*, available at <http://web.amnesty.org/library/index/engEUR460112005> (last visited Feb. 10, 2008).

³ The ECtHR does not publish statistics on cases from Chechnya pending before the Court. In December 2005 a lawyer with the Court estimated that the Court had received about 250 applications concerning grave human rights abuses in Chechnya. As of December 9, 2007, 97 cases from Chechnya had been communicated to the Russian government. See Russian Justice Initiative, *ECHR Cases from the North Caucasus*, available at <http://www.srji.org/en/legal/cases> (last visited Feb. 10, 2008).

⁴ *Isayeva, Yusupova and Bazayeva v. Russia*, case nos. 57947/00, 57948/00 and 57949/00, 41 Eur. H.R. Rep. (2005) (Eur. Ct. H.R.); see also *Isayeva v. Russia*, case no. 57950/00, 41 Eur. H.R. Rep. (2005) (Eur. Ct. H.R.); *Khashiyev and Akayeva v. Russia*, case nos. 57942/00 and 57945/00, 42 Eur. H.R. Rep (2005) (Eur. Ct. H.R.).

⁵ See *supra* note 4.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms art 38, Sept. 3, 1953, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (emphasis added) (last visited Feb. 10, 2008).

⁷ See, e.g., *Imakayeva v. Russia*, Eur. Ct. H. R. App. no. 7615/02 (2006).

⁸ See, *id.* ¶ 124.

⁹ *Id.*

¹⁰ Original documents can be viewed in Russia.

¹¹ The Russian authorities initially or eventually submitted a significant part of the documents in the following cases. See *Khashiyev and Akayeva v. Russia*, case nos. 57942/00 and 57945/00, 42 Eur. H.R. Rep (2005) (Eur. Ct. H.R.); *Magomadov and Magomadov v. Russia*, Eur. Ct. H.R. App. no. 68004/01 (2005); *Bazorkina v. Russia*, Eur. Ct. H.R. App. no. 69481/01 (2006).

¹² See *Imakayeva*, App. no. 7615/02, ¶ 124.

¹³ *Supra* note 4, *Khashiyev and Akayeva* case nos. 57942/00 and 57945/00; *Goygova v. Russia*, Eur. Ct. H.R. App. no. 74240/01 (2007); *Makhauri v. Russia*, Eur. Ct. H.R. App. no. 58701/00 (2007); *Goncharuk v. Russia*, Eur. Ct. H.R. App. no. 58643/00 (2007).

¹⁴ *Tangiyeva v. Russia*, Eur. Ct. H.R. App. no. 57935/00 (2007).

¹⁵ *Id.*, ¶ 38.

¹⁶ *Id.*

¹⁷ *Zubayrayev v. Russia*, Eur. Ct. H.R. App. no. 67797/01 (2008).