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Exhaustion of remedies as a criterion for admissibility of an application to the European Court of Human Rights: the Russian legal system

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According to Article 35 of the European Convention on Human Rights, an individual application may be submitted to the European Court of Human Rights once effective remedies at the national level have been exhausted. This article considers the effectiveness of the various remedies available in the legal system of the Russian Federation, through the courts of constitutional, general and commercial jurisdiction. It also considers two exceptions from the requirement to exhaust remedies: an infringement of the duty not to hinder the effective exercise of the right of individual petition to the Court (Article 34), and a request for interim measures under Rule 39 of the Rules of Court.

In Russian legal literature it is said that recourse to the Constitutional Court of the Russian Federation is not compulsory for the purpose of exhausting domestic remedies¹. This conclusion was apparently reached on the basis of the decision on admissibility in the case of *Tumilovich v.*

*Russia*². In that case the Court found that a refusal by the Constitutional Court of the Russian Federation to consider the merits of the complaint of an applicant as being outside its jurisdiction was not among the questions which the Court had to resolve. However, in the decision on admissibility in the application of *Grišankova and Grišankovs v. Latvia*³ the Court stated that in cases where national law itself is being challenged (and not specific measures adopted in connection with it or in breach

of it), and when the national legal system allows for these rules to be challenged in the Constitutional Court, a constitutional complaint is an effective remedy.

On the other hand, if the applicant is challenging specific actions (or inaction) which violate the Convention, even if they have been adopted in accordance with national law⁴, s/he must first instigate civil or administrative proceedings in general or commercial courts before applying to the European Court.

Russian procedural law provides for four judicial phases of a case in the courts of general jurisdiction: first instance, appeal and/or cassation, and supervisory review. It is compulsory to appeal the decision, either by way of cassation or, where possible, by way of appellate proceedings.

Before the adoption of the Codes of Civil and Criminal Procedure of the Russian Federation, supervisory review proceedings

were not an effective remedy, because an application for review could only be submitted at the discretion of certain officials designated by law⁶. In its decision on the admissibility of the application of *Berdzenishvili*

*v. Russia*⁷ the Court found that the new criminal supervisory review proceedings were not an effective remedy either, because the right to submit a supervisory complaint is unlimited in time, which infringes the principle of legal certainty. The reformed procedure of supervisory review in civil cases has been found ineffective in the decision of *Denisov v. Russia* (decision No 33408/03, 6.5.04): the Court noted that the new supervisory proceedings may last indefinitely because of too many instances authorised to conduct supervisory review.

In cases where the applicant is complaining of non-execution of a court decision, it is not compulsory to appeal against the actions of the judicial organ which is supposed to execute the decision if it is not responsible for the non-executions.

In its decision on the admissibility of the case of *Trubnikov v. Russia*⁹, the Court found that in criminal proceedings, an appeal against the decisions of an investigator from the prosecutor's office was ineffective. However, it noted that although the courts of general jurisdiction had no power to institute a criminal case, the possibility of judicial review of a decision not to take criminal proceedings was an effective remedy.

The European Court also makes a distinction between the exhaustion of domestic remedies under Articles 5 and 6 of the Convention¹⁰. If, for the purpose of a complaint

concerning alleged breaches of the procedural guarantees in Article 6 of the Convention, an appeal against the decision on the merits is obligatory, in order to submit a case under Article 5 it is only necessary to appeal against the procedural decisions on detention in custody (Article 5(1)) and the extension of periods of detention in custody (Articles 5(3) and (or) (4)). Appeal against the decision on the merits as a whole (although all the previous rulings are appealed together with such decision, including detention in custody and prolongation of periods of detention in custody) is not an effective remedy for the purpose of a complaint under Article 5 of the Convention. Recourse to a court of arbitration for the protection of one's rights is an effective remedy. For example, in its decision on the case of *Kozlov v. Russia*¹¹ the Court found that domestic remedies were not exhausted because the applicant had not applied to the court of arbitration, although the court of general jurisdiction had held that it was necessary to apply there.

A commercial court decision on the merits may be challenged by way of appeal, cassation and supervisory review. The first and the second of those are treated as being effective. The new provisions concerning supervisory proceedings have not been considered by the Court, but in its decision on admissibility in *AO "Uralmash" v. Russia*¹², transitional provisions for supervisory review¹³ were found extraordinary, and therefore not an effective remedy.

The Court may make a finding of a breach not only of the substantive rights enshrined in Section I of the European Convention (Articles 2-18), but also of Article 34 *in fine* (states' undertaking not to hinder in any way the effective exercise of the right of application to the Court). Such an obligation confers upon the applicant a right distinguishable from the rights set out in Section I of the Convention or its Protocols. In view of the nature of this right, the requirement to exhaust domestic remedies does not apply to it. Given the importance attached to the right of individual petition, the Court has held that it would be unreasonable to require the applicant to make recourse to a normal judicial procedure within the domestic jurisdiction in every event, for example, where prison authorities interfere with an applicant's correspondence with the Court¹⁴. Accordingly, the requirement to exhaust domestic remedies does not apply to complaints under Article 34 of the Convention.

Moreover, Rule 39 of the Rules of Court provides that “the Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it”. Usually, a decision on interim measures is taken in cases where the applicant is at risk of extradition or deportation, and will amount to a direction to the respondent State that it should not extradite or deport the applicant¹⁵. Resort to interim measures will normally require the Court to make an immediate decision. Thus the Practice Direction¹⁶ issued by the President of the Court provides that an application and supporting documents may be submitted before a final decision in the national courts, when the applicant and (or) his representative assume that the decision will be unfavourable and may be executed within a very short period; this is done in order to give the Court time to consider a request for interim measures. For Russia, this is highly relevant in cases concerning the administrative deportation from the Russian Federation of foreign citizens, where a decision may be acted upon within a few days of coming into effect. Thus the Court has resolved most of the problems relating to the exhaustion of remedies in the Russian legal system (besides the issue of effectiveness of supervisory review in the proceedings before the commercial court). However, a significant number of cases fail to meet the criteria for admissibility, which are clearly defined in the Convention and in the jurisprudence of the Court. Either the applicants are not using available remedies, or they pursue ineffective ones, and in so doing they miss the six-month time limit. Mistakes like these significantly increase the number of ill-founded cases which are then rejected by the Court¹⁷.

Footnotes

¹ *Mezhdunarodnaia zaschita prav cheloveka s ispolzovniyem nekotorykh mezhdunarodno-pravovykh mekhanizmov*. (International human rights protection through international legal machinery), 2nd edition, edited by *K.A. Moskalenko*. M., 2001, p. 20 (the author of the relevant chapter is M.R. Voskobitova); *V. G. Bessarabov: Evropeyski Sud po pravam cheloveka* (The European Court of Human Rights), M., 2003, p. 74.

² *Tumilovich v. Russia* (decision), no. 47033/99, 22.6.99.

³ *Griřankova and Griřankovs v. Latvia* (decision), no. 36117/02, 13.2.03.

⁴ For instance, decisions on the merits of complaints in which the Court found that Russian law did not comply with the Convention (*Ryabykh v. Russia*, judgment of 24 July 2003; *Rakevich v. Russia*, judgment of 28 October 2003).

⁵ *Burdov v. Russia*, judgment of 7 May 2002, s. 17.

⁶ *Tumilovich v. Russia* (decision), cited above. Strictly speaking, the decision in the *Tumilovich* case only applies to civil

proceedings, but there were similar procedures in the Code of Civil Procedure of the RSFSR, and these were recognised as ineffective in a similar case against Ukraine (*Kucherenko v. Ukraine* (decision), no. 41974/98, 4.5.99), to which the Court referred in its judgment on inadmissibility in the *Tumilovich* case.

7 *Berdzenishvili v. Russia* (decision), 31697/03, 29.1.04.

8 *Burdov v. Russia*, judgment of 7 May 2002, s. 17.

9 *Trubnikov v. Russia* (decision), no. 49790/99, 14.10.2003.

10 See, for instance: *Kalashnikov v. Russia* (decision), no. 47095/99, 18.9.01.

11 *Kozlov v. Russia* (decision), no. 55129/00, 18.4.02.

12 *AO "Uralmash" v. Russia* (decision), no. 13338/03, 4.9.03.

13 Article 10 of the Federal law of 24.07.2002, no. 96-F3 "On the introduction of the Code of Arbitration Procedure of the Russian Federation"// *Collected laws of the Russian Federation*, 2002, no. 30, p. 3013.

14 *Klyakhin v. Russia* (decision), no. 46082/99, 14.10.03.

15 However, in the case of *Ocalan v. Turkey*, the measure consisted of requesting the respondent State not to execute the applicant before the Court had finished dealing with the case (*Ocalan v. Turkey*, judgment of 3 March 2003, para. 5).

While the case was before the Court Turkey abolished the death sentence, and the applicant was pardoned.

16 Requests for Interim Measures under Rule 39 of Rules of court, Practice Direction issued by the President of the Court on 5 March 2003.

17 For instance, in 2003 the Court considered for admissibility 3222 complaints against Russia, but only 15 were ruled admissible (about 0.4%), which is 10 times lower than the average level of 4% of cases being found admissible in 2003 (753 out of 18033). (Survey of the Court's Activities 2003, p.35).