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**PROMOCIÓN Y PROTECCIÓN DE TODOS LOS DERECHOS HUMANOS,
CIVILES, POLÍTICOS, ECONÓMICOS, SOCIALES Y CULTURALES,
INCLUIDO EL DERECHO AL DESARROLLO**

**Información presentada por la Oficina del Comisionado para los
Derechos Humanos de la Federación de Rusia***

Nota de la Secretaría

La Secretaría del Consejo de Derechos Humanos transmite adjunta la comunicación presentada por la Oficina del Comisionado para los Derechos Humanos de la Federación de Rusia**, que se reproduce a continuación de conformidad con el artículo 7 b) del reglamento que figura en el anexo de la resolución 5/1 del Consejo, según el cual la participación de las instituciones nacionales de derechos humanos se basará en las disposiciones y prácticas convenidas por la Comisión de Derechos Humanos, incluida la resolución 2005/74, de 20 de abril de 2005.

* La institución nacional de derechos humanos tiene la acreditación de la categoría "A" ante el Comité Internacional de Coordinación de las Instituciones Nacionales de Promoción y Protección de los Derechos Humanos.

** Se reproduce en el anexo como se recibió, en el idioma en que se presentó y en inglés únicamente.

Anexo

[INGLÉS Y RUSO ÚNICAMENTE]

THE RIGHT TO JUDICIAL PROTECTION AND A FAIR TRIAL

The right to judicial protection and a fair trial is one of the essential constitutional human rights. The implementation of this right requires that individuals have real access to justice to have their case tried in a court and by a judge of the appropriate jurisdiction, that the trial procedures be strictly adhered to, that the trial be conducted within a reasonable time, the necessary procedural rules and guarantees for the participants be ensured, that a possibility for appealing against and eliminating a judicial error through a court be provided, and that the state ensure that court rulings are executed.

The practical experience of the Commissioner demonstrates how relevant the right to judicial protection is for the public. People increasingly often go to court to have their problems solved, and accordingly, the Commissioner receives more and more complaints about violation of the right to a fair trial. Individuals often feel that their constitutional right have been violated by judicial bodies. It is to be expected that one of the parties to any dispute is usually unhappy with the court decision. In this sense, the right to a fair trial in itself does not guarantee an outcome that would please everyone. At the same time, this right is designed to ensure an equitable and fair procedure for all participants in a trial.

The analysis of the complaints received by the Commissioner reveals a number of problems that arise when individuals exercise their right to a fair trial.

7.1 Duration of a Trial

The most common complaints are those referring to the court's failure to meet the time limits set for trials of civil cases. The problem that unfortunately exists in all judicial institutions is so common that it is often viewed as standard judicial practice. Time limits are not observed because of the backlogs of cases faced by all branches of the court system, the shortage of personnel, and sometimes the inadequate competence of judges. Admittedly, trials also get delayed at the initiative of one of the parties wishing to complicate the litigation. Such instances are to be regarded as abuse of law by an individual, and therefore in these particular instances the protracted duration of a trial does not represent violation of the individual's right to judicial protection.

Unreasonably long trials, which sometimes last for years on end, undermine the confidence in the judiciary.¹ Notably, **even though the problem is wide-spread, the establishment of the fact that a trial exceeded any reasonable duration does not entail any legal consequences either for the judgment or for the claimant.**

¹ In the opinion of the European Court of Human Rights, judgment as to whether the duration of a trial is reasonable should be made proceeding from the specific circumstances of a particular case, with due account for the criteria established by the case law of the Court, particularly the complexity of the case, the conduct of the claimant and of the competent authorities.

It is only in exceptional cases that disciplinary measures may be taken against the judge who failed to meet the trial time limits.

7.2 Direct Participation of the Parties in Court Hearings

An equally important problem with ensuring the right to a fair trial is failure to timely notify the parties of a scheduled court hearing. The right of an individual to personally take part in a hearing is part of the fair trial concept. There are many complaints about failure to meet that important legal requirement. Individuals often learn about a trial after it has already taken place, or sometimes at the time when the judgment is executed. In his interactions with courts in connection with the protection of individuals' rights, the Commissioner himself has more than once received notices to appear in court the same day when the hearing was to be held, or even after it had been held.

The reasons why individuals do not appear in court hearings deserve special mention. In accordance with the legislation, the court has full discretion to decide whether an individual has or does not have a good reason not to appear in a court hearing, however the legislation does not specify any criteria for judging the reasons for "no-show". There have been frequent situations where an individual met the legal requirements by sending to the court a request to reschedule because he was unable to attend due to what he believed to be a valid reason, but he could not reasonably foresee the consequences of his action.

The Commissioner received a complaint from Ch. about the ruling a justice of the peace passed in an administrative case in the complainant's absence. The investigation established that Ch. was on a business trip on the day of the trial, of which he had given an advance notice to the court requesting that the hearing be rescheduled. The judge, proceeding from the reduced time limits set for trials of administrative offense cases, deemed that the reason for no-show was not good enough and held Ch. administratively liable in his absence.

A similar situation was faced by B. who had submitted to the court a medical certificate confirming that he was ill and asked for the hearing on the merits of the case to be postponed. The justice of the peace who was in charge of the case decided that the reason was not sound and tried the case in B.'s absence.

It should be noted that the reasons for not appearing in court cited above are usually accepted by courts as valid for the purpose of civil proceedings and lead to rescheduling of the hearing.

Apparently, the implementation of the constitutional right to judicial protection and a fair trial should not depend on the discretionary opinion of judges to such a considerable extent.

It appears expedient, therefore, to formulate clear criteria for making a judgment about reasons for not appearing in court.

7.3 Impartiality of Justice

An important guarantee of a fair trial is the court's impartiality which is usually defined as lack of prejudice or bias.²

Therefore, a provision allowing a judge to take part in the re-trial of the same criminal case in a court of higher instance seems to be controversial.

The investigation into a complaint filed by T. who alleged that his case had been tried by a court of illegal composition, which violated his constitutional right to judicial protection and a fair trial, revealed that T. had been found guilty of a number of grave crimes on October 30, 1995.

Following a series of appeals against the sentence (that was upheld), the criminal case was submitted for consideration by the Presidium of the Supreme Court of the Russian Federation that also upheld the sentence on September 14, 2005. Taking part in the Presidium meeting were four of the judges who had earlier made decisions to reject T.'s appeals for cassation and supervisory appeals.

In his reply to the Commissioner's inquiry about the legitimacy of the reviewing court that included judges who had earlier taken part in the hearings on the merits of the case, the deputy chairman of the Supreme Court of the Russian Federation explained that in accordance with Part 2, Article 63 of the RF Code of Criminal Procedure, a judge cannot take part in the trial of a criminal case only after a sentence, ruling or determination passed with his participation has been revoked.

It is to be noted that in T.'s case the ruling earlier passed with regard to that case with the participation of one of the said judges was later revoked. **Allowing judges to take part in a re-trial of a case only because their earlier judgments have not been revoked is questionable. In this connection, the Commissioner filed a complaint with the RF Constitutional Court about the unconstitutionality of the law applied to this particular case.** The complaint has been accepted by the Constitutional Court for consideration.

7.4 Departmental Subordination of Judges and the Procedure for Subjecting Them to Disciplinary Measures

The independence of judges is instrumental in ensuring the right to a fair trial. Any forms of influence on the judge are inadmissible. This maxim is also indisputable as applied to cases of institutional or official influence brought to bear on a judge by the chairman of a court. Court chairmen currently have a wide range of powers regarding the appointment of judges. They are also in a virtually unchallenged position to take disciplinary measures against judges. **Given this,**

² In accordance with the Basic Principles on the Independence of the Judiciary (approved by UN General Assembly Resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985), the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

the proposals to reassign a number of functions from court chairmen to the Judicial Department under the RF Supreme Court and to take distribution of cases among judges off the list of powers enjoyed by court chairmen seem quite reasonable.

It should be noted that the very procedure for appointing court chairmen based on the submissions made by the Chairman of the Supreme Court of the Russian Federation is not exactly in the spirit of democracy. It would be worth considering **the adoption of a procedure whereby court chairmen would be popularly elected from among the existing judges.**

The special procedure defined in the legislation whereby only members of the judicial community can take disciplinary measures against judges is due to the special legal status of judges. Disciplinary offenses by judges reported to the Commissioner by the complainants may be considered by the Qualifications Panel of judges if the chairman of the same court where the judge sits or a court of higher instance makes the relevant submission.

At the same time, there have been cases where individuals trying to have measures taken against a judge who acts tactlessly or sometimes even rudely during the proceedings run up against the impenetrable wall of corporate "solidarity". Besides, individuals cannot appeal against actions (omission) of the Qualifications Panel, because only the judge whose case is considered by the panel enjoys the right of appeal.

7.5 Compensation for Damages Caused by Judges' Actions

There is an obvious need for a legally regulated procedure whereby the state would compensate the damages caused by illegal actions of a court (a judge) in cases where the dispute does not get resolved on the merits. These issues are more or less regimented with regard to criminal proceedings (with the exception of compensating persons exonerated at a pre-trial stage), but there is clearly a legal void in the area of civil and administrative proceedings.

N. complained to the Commissioner about the actions of a justice of the peace. The investigation established that the justice of the peace who was in charge of an administrative case against N. sent to the traffic police department an execution writ that had not taken legal effect. Acting on that order, the traffic police banned N. from driving a car, seized his temporary driving permit, impounded his car and drew up administrative offense reports provided for in Articles 12.15 (part 3) and 12.3 (part 1) of the RF Code of Administrative Offenses.

The actions of the justice of the peace were later overruled as illegal. N. tried to seek compensation for moral and material damages by filing the relevant statements of claim with the traffic police and the justice of the peace. The actions of the traffic police were recognized to have been lawful. **It proved to be impossible to obtain compensation for damages simply because the lawmakers did not specify legal grounds for such claims or a procedure for dealing with them.**

In 2001, the Constitutional Court of the Russian Federation adopted Resolution No. 1-P instructing the Federal Assembly of the Russian Federation to adopt a legal provision specifying legal grounds and a procedure for the state to compensate damages caused through illegal actions

or omission by a court (a judge), and assigning the responsibility for and the jurisdiction over such cases.

By 2005, or four years after the said resolution was adopted, no relevant changes had been made to the existing legislation. In this connection, the Commissioner suggested to the Chairman of the Government of the Russian Federation that preparation of the required draft law be included in the government's law-drafting plans for 2006. Despite the instructions issued to the Ministry of Justice and the Ministry of Finance of Russia to jointly review the Commissioner's suggestion and take measures to comply with Resolution No. 1-P of the Constitutional Court, dd. January 25, 2001, no draft law has yet been prepared, and the legislation is still lacking grounds or a procedure for the state to compensate damages caused through illegal actions (omission) by a court (a judge), nor the responsibility for or the jurisdiction over such cases has been assigned. **The Commissioner deems it extremely important to find a legislative solution to these issues and would like, therefore, to draw the attention of the legislative and executive authorities to the need to strictly comply with the aforementioned Resolution of the Constitutional Court of the Russian Federation.**

7.6 Non-Execution of Judgments

Justice would have turned into a legal fiction if judicial proceedings had not provided for strict execution of judgments that have taken legal effect as a mandatory requirement. Nevertheless, court rulings often fail to be executed. About 80% of all complaints received by the European Courts of Human Rights from the Russian Federation referred to judgments that had been passed by Russian courts and yet remained unexecuted. In its turn, the European Court of Human Rights proceeds from the premise that unexecuted judgments cannot be regarded as effectively rendered, and rules that all filers of such complaints be paid cash compensations by the government.

It is of note that court judgments are routinely regarded as some kind of "unbinding recommendations" not only by the public, but, surprisingly, by the government authorities as well.

Failure to comply with judgments of the Constitutional Court of the Russian Federation is of special concern to the Commissioner. The Commissioner receives numerous complaints from individuals about violation of their rights by legislative, executive and, strangely enough, by judicial bodies that ignore Constitutional Court judgments. Many of such judgments are still not complied with despite the fact that the legislation provides for a mechanism to ensure compliance, including liability for non-compliance.

The above also refers to Resolution No. 1-P of the RF Constitutional Court mentioned above, and other decisions mandating legislative solutions to the existing problems. It will be recalled that under para 1, Article 80 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", if it follows from a Constitutional Court decision that there is a void to be filled in the existing legislation, it is the duty of the Government of Russia to prepare the requisite draft laws and submit them to the State Duma.

The commissioner received a complaint from the head of the Severomorsk Union of Military Pensioners about violation of the servicemen's rights to pension and housing

stemming from non-compliance with judgments of the RF Constitutional Court. In its Ruling No. 187-O of May 11, 2006, the Constitutional Court required that a legal mechanism be developed to guarantee that military pensioners working under employment contracts in addition to government pensions are paid the funded component of the labor pension with due account for the insurance premiums recorded in their individual accounts at the Pension Fund of Russia. The prescribed legal regulation regime was to be implemented no later than January 1, 2007.

As of the end of 2007, no amendments to the relevant legislation had been adopted. In this connection, the Commissioner asked the Chairman of the Government of the Russian Federation to expedite the submission of the requisite draft laws to the State Duma. According to a reply received from the Government of the Russian Federation, work on the draft of the proposed amendments is to be completed in 2008, while the necessary adjustments to the pension amounts will be made retroactively as of January 1, 2007.

The Constitutional Court of the Russian Federation occasionally passes its judgments in the form of a "ruling", which may set forth legal positions that substantively determine the outcome of a legal dispute. In his practice, the Commissioner has come across situations where the Supreme Court of the Russian Federation acting in its supervisory capacity and reviewing judgments at the Commissioner's request failed to take into account Constitutional Court rulings.

Thus, in his 2006 report the Commissioner describes a case where the Constitutional Court of the Russian Federation issued Ruling No. 444-O of November 2, 2006, "Regarding the Complaint Filed by the Commissioner for Human Rights in the Russian Federation about Violation of the Constitutional Rights of Irina Alexandrovna Astakhova by sub-para 1, para 1, Article 220 of the Tax Code of the Russian Federation".

The Constitutional Court pointed out in its ruling that the law enforcement decisions made in the I.A. Astakhova case on the basis of sub-para 1, para 1, Article 220 of the RF Tax Code interpreted differently from what the legal position of the Constitutional Court implies are to be reviewed in accordance with the established procedure, unless there are other obstacles to doing so.

Based on that Constitutional Court ruling, the Commissioner submitted a request to the Chairman of the Supreme Court of the Russian Federation on February 13, 2007 asking for the legally effective court orders issued in the case of I.A. Astakhova to be reviewed in order to ensure the uniformity of court practices and legality.

The Commissioner's request was denied, and the reply from the Chairman of the Supreme Court stated that the alleged inconsistency between the legal position of the Constitutional Court and the interpretation of the provisions applied in the case of I.A. Astakhova by the courts of general jurisdiction, did not compromise the uniformity of court practices, and consequently, there are no grounds for the Supreme Court to intervene.

The form of the Constitutional Court's decision – a "ruling" versus a "resolution" – became a bone of contention in the argument as to whether that decision was binding on the highest court of general jurisdiction and whether that decision was to be unconditionally complied with.

In effect, the Supreme Court proceeds from the premise that the legal positions formulated by the Constitutional Court in its rulings are not binding on courts of general jurisdiction.

In this connection, the Commissioner appealed to the Chairman of the Commission for Better Governance and Justice under the President of the Russian Federation suggesting that amendments be considered to Article 389 of the RF Code of Civil Procedure regarding the procedure for reviewing court judgments in civil cases in order to ensure the uniformity of court practices and legality in a manner consistent with the constitutional human rights and the supremacy of the Constitution of the Russian Federation.

In addition, the Commissioner suggested to the Chairman of the Supreme Court that a plenary session of the Supreme Court consider complementing Resolution No.23 of the Plenary Session of the Supreme Court of December 19, 2003, "On Court Judgments" with a provision requiring that courts of general jurisdiction dealing with civil cases take into account the rulings of the Constitutional Court that interpret the laws applied in particular cases from the point of view of the constitution. Regrettably, according to the reply received from the Supreme Court, it was deemed inexpedient to make the proposed addition to the text of the resolution.

The correspondence between the Commissioner and the government authorities relating to his involvement in court hearings in connection with the complaints filed by individuals revealed numerous instances where the Supreme Court failed to comply with Constitutional Court rulings. Meanwhile, the Constitutional Court itself assumes that his rulings are unconditionally binding. At issue, therefore, is a conflict between the Supreme Court and the Constitutional Court over interpretation of legal provisions.

Inevitably, this situation has an adverse effect on the administration of justice, and consequently on the rights and legitimate interests of all those under the jurisdiction of the Russian Federation.

For his part, the Commissioner is convinced that **compliance with judgments of the Constitutional Court is mandatory for all government bodies and officials, irrespective of the form such judgments may take – a ruling or a resolution.**

The Commissioner is calling on all branches of government authority to pay attention to the problem and take measures within their powers to ensure compliance with Constitutional Court judgments in order to eliminate the conflict.

While acting on the complaints and appeals he receives, the Commissioner also comes across instances where Russian courts fail to comply with decisions of the European Court of Human Rights, explaining their failure by the lack of the necessary mechanisms.

While investigating a number of complaints about unjustified confiscation of smuggled items, the Commissioner decided to check on how the European Court of Human Rights handled a similar case, "Baklanov vs. Russia". In accordance with Part 5, Article 415 of the RF Code of Criminal Procedure, in such situations criminal cases are to be reviewed by the Presidium of the Supreme Court in response to a submission from the Chairman of the Supreme Court no later than one month after such submission has been made. It was established that one year after the European Court issued its ruling, the

criminal case in which Baklanov's property was confiscated had not be reviewed. Apparently, the lawmakers did not specify the time within which the Chairman of the Supreme Court is to make a submission to the Supreme Court Presidium. Besides, the procedural law does not specify who should initiate such submission – the individual concerned or the Chairman of the Supreme Court himself. In this particular case, it was the Commissioner who had to come up with the initiative. It was only after that that the criminal case was reviewed by the Presidium of the Supreme Court and the confiscated property was returned to Baklanov on the basis of a court decision.

The problem of non-execution of judgments was discussed at special conferences held in all federal districts with the participation of the regional leaders and representatives of the Presidential Administration between December 2006 and March 2007. It was suggested that a "national filter", or an institution that would screen all complaints submitted to the European Court of Human Rights, be established. A bill was drafted to empower the Supreme Court of the Russian Federation to consider complaints filed by individuals against the state. The purpose of the proposed innovations is to create a mechanism a person could use to go to court and seek compensation for violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which entitles everyone to a fair hearing within a reasonable time, in situations where a court judgment with regard to such person is not being executed or is taking too long to be executed.

The Commissioner believes it important to emphasize that concerted efforts should be directed not at nominally reducing the number of Russian citizens' complaints to the European Court of Human Rights at any cost but rather at creating an environment which would reduce the number of reasons for appealing to international courts.
