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俄罗斯联邦人权事务专员办事处 * 提交的资料

秘书处的说明

人权理事会秘书处谨转交俄罗斯联邦人权事务专员办事处提交的来文，** 按照理事会第 5/1 号决议附件载列的议事规则第 7(b)条转载如下。该条规定，国家人权机构的参与要根据人权委员会议定的安排和惯例，包括 2005 年 4 月 20 日第 2005/74 号决议进行。

* 具有增进和保护人权国家机构国际协调委员会赋予的“A 类”认可地位的国家人权机构。

** 作为附件，仅以原文和英文印发。

Annex

[ENGLISH AND RUSSIAN ONLY]

THE RIGHT TO JUDICIAL PROTECTION AND A FAIR TRIAL

The right to judicial protection and a fair trial is one of the most important constitutional human rights. For the realization of this right, citizens must have real access to justice; their cases must be tried in a court and before a judge of the legally prescribed jurisdiction; trial procedure must be strictly observed and the trial conducted within a reasonable time; the procedural rights and guarantees stipulated for those involved must be upheld; judicial errors must be appealable and remediable in a court of law; and the State must ensure enforcement of judgements.

The Commissioner's experience has shown that the right to judicial protection is very important to the public. As people increasingly turn to the courts to solve their problems, the Commissioner is receiving ever more complaints of violations of the right to a fair trial. Citizens frequently believe that one of their constitutional rights has been violated by the judicial authorities. Of course, in any dispute, one of the parties is usually dissatisfied with the judgement, so the right to a fair trial, of itself, by no means guarantees a universally acceptable outcome. Nevertheless, this right is intended to ensure equitable and fair proceedings for all trial participants.

Analysis of the complaints received by the Commissioner reveals a number of problems affecting the exercise by citizens of the right to a fair trial.

7.1 Time limits for trials

The most common complaints are of courts failing to meet the time limits for trials in civil cases. Unfortunately, such failures occur throughout the court system. The phenomenon is so widespread that it is often viewed as the norm in judicial practice. The time limits for hearing cases may be exceeded because of the heavy case loads in all branches of the court system, a shortage of personnel and, sometimes, lack of competence on the part of judges. It should be noted, however, that proceedings may also be delayed at the instigation of one of the parties, in order to complicate the litigation. In such instances, it is fair to say that the individuals concerned are abusing their rights and that the protracted nature of the trial is not indicative of a violation of the right to judicial protection.

Unreasonably protracted trials, which sometimes last for years, undermine confidence in the judiciary.[1] Moreover, **even though this phenomenon is widespread, there are no legal**

[1] In the opinion of the European Court of Human Rights, the reasonableness of the length of a trial should be assessed in the light of the specific circumstances of a case, with due account for the criteria established by the case law of the Court, in particular the complexity of the case and the conduct of the claimant and the competent authorities.

consequences as far as either the judgement or the complainant is concerned when it is established that the time limit for hearing a case has been exceeded. Only exceptionally are disciplinary measures taken against a judge who has failed to enforce the time limits.

7.2 Direct participation by the parties in court hearings

An equally important obstacle to ensuring the right to a fair trial is the failure to notify the parties or give sufficient notification that a hearing has been scheduled. An individual's right to participate personally in a hearing is an integral part of a fair trial. The great number of complaints testifies to the failure to fulfil this important legal requirement. Individuals often learn about proceedings after they have taken place or even, at times, when the judgement is being enforced. The Commissioner himself, when going to court to protect citizens' rights, has frequently received subpoenas on the very day of the hearing, or even after it had been held.

Particular attention should be given to the assessment of the reasons for individuals' non-appearance in court. Legislation provides for the court to use its discretion when deciding whether an individual's failure to appear is justified; it does not, however, set out any criteria for assessing the reasons for such failure. It is not uncommon for individuals to meet the legal requirements by sending the court a request to reschedule a hearing owing to their inability to attend for what they believe to be valid reasons, without, however, being able sufficiently to foresee the consequences of their actions (omissions).

> The Commissioner received a complaint from C. about a decision handed down in an administrative case by a justice of the peace in C's absence. An investigation established that C. had been on an official trip on the day of the hearing and that he had notified the court thereof in advance, requesting that the hearing be rescheduled. In the light of the reduced time limits for trials of administrative offences, the judge had deemed the reason given for C's failure to appear to be inadequate and taken administrative measures against C. in his absence.
>
> A similar situation was faced by B., who submitted a medical certificate to the court and asked for the hearing on the merits of his case to be postponed. The justice of the peace in the case also deemed the circumstances cited to provide insufficient grounds for the non-appearance and tried the case in B.'s absence.
>
> It should be noted that the above-mentioned reasons for failing to appear are usually recognized as valid by courts in civil proceedings and lead to the rescheduling of the hearing.

Evidently, the exercise of the constitutional right to judicial protection and a fair trial should not depend to such a degree on judges' discretion and assessment. **In this connection, clear criteria should be established in law for assessing the reasons for non-appearance in court.**

7.3 Impartiality of the justice

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

The provision allowing judges to take part in criminal proceedings in higher courts involving cases they have already examined is highly controversial.

> An investigation into a complaint submitted by T., who alleged that his case had been tried by an unlawfully constituted court in violation of his constitutional right to judicial protection and a fair trial, established that T. had been found guilty of a number of serious offences on 30 October 1995.
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> Following a series of unsuccessful appeals against the conviction, the criminal case was submitted for consideration by the Presidium of the Supreme Court, which also decided to uphold the conviction on 14 September 2005. Four of the judges who heard the case in the Presidium had previously handed down decisions rejecting T.'s cassational and supervisory appeals.
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> In reply to the Commissioner's enquiry about the legality of the composition of the court of supervisory instance, which included judges who had taken part previously in the examination of the facts of the case, the Deputy Chief Justice of the Supreme Court explained that, under article 63, part 2, of the Code of Criminal Procedure, judges are barred from taking part in the hearing of a criminal case only if a sentence, ruling or decision passed with their participation has been overturned.

Regarding T., it should be noted that a ruling passed earlier in his case with the participation of one of the above-mentioned judges was subsequently revoked. The practice of a**llowing judges to take part in further judicial proceedings in a case on the basis that their earlier judgements have not been overturned is open to question. In this regard, the Commissioner submitted a complaint to the Constitutional Court about the unconstitutionality of the law applied in this particular case.** The Constitutional Court has admitted the complaint for consideration.

7.4 Institutional subordination of judges and arrangements for disciplinary action

The independence of the judiciary is a major element in guaranteeing the right to a fair trial. The exertion of any form of influence on a judge is inadmissible. This undoubtedly also applies to the exercise of organizational or official influence on a judge by the president of a court. Currently, presidents of courts have a wide range of powers when it comes to appointing judges. They are also virtually alone in being able to take disciplinary measures against judges.

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[2] In accordance with the Basic Principles on the Independence of the Judiciary (approved by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), the judiciary must 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.

Therefore, the proposals to transfer a number of functions from court presidents to the Judicial Department of the Supreme Court and remove their responsibility for assigning cases to judges seem entirely justified.

It should be observed that the procedure whereby presidents of courts are appointed at the recommendation of the Chief Justice of the Supreme Court is not entirely in keeping with the spirit of democracy. **The introduction of arrangements for the election of court presidents by popular vote from among existing judges merits consideration.**

The special procedure established in law whereby only members of the judicial community may examine disciplinary cases against judges is necessitated by the unique legal status of judges. The Judicial Qualification Board may consider information contained in citizens' complaints concerning misconduct by judges at the recommendation of the president of the relevant court or of a higher court.

Nevertheless, cases do arise in which individuals wishing to see disciplinary action taken against a judge who has acted inappropriately, or sometimes even offensively, during proceedings encounter an impenetrable wall of corporate "solidarity". Moreover, citizens cannot appeal against actions (omissions) of the Qualification Board, as only judges against whom disciplinary action is being considered by the Board enjoy the right of appeal in such cases.

7.5 Compensation for harm caused by judicial actions

There is an obvious need for a legally regulated State compensation scheme for harm caused by the unlawful actions of a court (judge) in those cases where the dispute is not settled on the merits. While these issues are to some degree regulated in criminal proceedings (with the exception of compensation for persons exonerated at the pretrial stage), there is clearly a legal lacuna in relation to civil and administrative proceedings.

> N. complained to the Commissioner about the actions of a justice of the peace. After investigation, it was established that the justice of the peace who considered the administrative case against N. had transmitted to the traffic police for enforcement a decision that was not yet final. Acting on the decision, the traffic police patrol service suspended N. from driving, confiscated his temporary driving licence, impounded his car and officially recorded administrative offences under articles 12.15, part 3, and 12.3, part 1, of the Code of Administrative Offences.
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> The actions of the justice of the peace were later found to have been unlawful. N. attempted to obtain compensation for moral and material harm by submitting to the courts the appropriate statements of claim against the traffic police patrol service and the justice of the peace. The actions of the patrol service were found to have been lawful. **It proved impossible to obtain compensation for the harm occasioned by the actions of the justice of the peace for the simple reason that the law does not provide grounds for such claims or a procedure for dealing with them.**

In 2001, the Constitutional Court adopted Decision No. 1-P instructing the Federal Assembly to adopt a statute specifying grounds and a procedure for State compensation of harm caused by the unlawful actions (omissions) of a court (judge) and assigning responsibility for and jurisdiction over such cases.

As at 2005, four years after the above-mentioned decision was adopted, the corresponding amendments had not been made to the legislation in force. The Commissioner therefore suggested to the Chairman of the Government of the Russian Federation that the drafting of the relevant bill should be included in the Government's workplan for 2006. Although the Ministry of Justice and the Ministry of Finance were instructed to jointly review the Commissioner's suggestion and take the necessary measures to implement Constitutional Court Decision No. 1-P of 25 January 2001, no bill has yet been drafted and legislation still does not provide grounds or a procedure for State compensation of harm occasioned by the unlawful actions (omissions) of a court (judge); responsibility for and jurisdiction over such cases have also not been assigned. **The Commissioner considers it extremely important to regulate these issues in law and would therefore like to draw the attention of the legislative and executive authorities to the need for strict implementation of the aforementioned decision of the Constitutional Court.**

7.6 Failure to enforce judgements

Justice would turn into a legal fiction if judicial proceedings did not presuppose, as a prerequisite, the rigorous enforcement of judgements once they become final. Nevertheless, judgements at present are often not enacted. About 80 per cent of all complaints submitted to the European Court of Human Rights from the Russian Federation are related precisely to the non-enforcement of judgements passed by the Russian courts. The European Court of Human Rights proceeds on the basis that unenforced judgements cannot be regarded as having been rendered and therefore awards all claimants in such cases monetary compensation, which is paid by the State.

In this connection, it should be noted that judgements are commonly regarded as a kind of non-binding recommendation, not only by the public but also by Government bodies.

The Commissioner wishes to draw particular attention to the problem of non-enforcement of judgements of the Constitutional Court. The Commissioner receives numerous complaints from individuals about violations of their rights by legislative, executive and, ironically, judicial bodies that ignore Constitutional Court judgements. Many such judgements have still not been enacted, even though there is a legally established mechanism to ensure their enforcement, which provides, inter alia, for liability for non-compliance.

This also applies to the above-mentioned Constitutional Court Decision No. 1-P and other decisions containing directives on the regulation through legislation of problems. It should be recalled that, under article 80, paragraph 1, of the Federal Constitutional Act on the Constitutional Court, if it emerges from a Constitutional Court decision that a lacuna in the existing legislation needs to be filled, it is the duty of the Russian Government to draft the requisite bills and submit them to the State Duma.

The Commissioner received a complaint from the President of the Severomorsk Union of Military Pensioners about violations of the servicemen's rights to receive pensions and housing arising from a failure to enforce Constitutional Court judgements. In its Ruling No. 187-O of 11 May 2006, the Constitutional Court stated that an appropriate legal mechanism must be envisaged to ensure that military pensioners employed under contracts received the insurance component of the employment pension taking into account the insurance contributions paid into their individual accounts with the National Pension Fund, in addition to their State pensions. Under the ruling, the relevant legislation was to enter into force no later than 1 January 2007.

As at the end of 2007, no amendments to the corresponding legislation had been adopted. The Commissioner therefore asked the Chairman of the Government of the Russian Federation to expedite the submission of the relevant bills to the State Duma. According to a reply received from the Government, work on the draft amendments is to be completed in 2008, while the necessary recalculation of pension amounts will be done retroactively as from 1 January 2007.

In a few cases, the Constitutional Court hands down a judgement in the form of a ruling, which may contain legal views that essentially determine the outcome of a legal dispute. In the Commissioner's experience, there have been cases where the Supreme Court has failed to take account of Constitutional Court rulings when the Commissioner has requested it to review under the supervisory procedure a court decision that has become enforceable.

Thus, in his 2006 report, the Commissioner cited the example of Constitutional Court Ruling No. 444-O of 2 November 2006 on the complaint submitted by the Commissioner for Human Rights of the Russian Federation about the violation of the constitutional rights of Ms. Irina Alexandrovna Astakhova by the provisions of article 220, paragraph 1 (1), of the Tax Code of the Russian Federation.

In its ruling, the Constitutional Court stated that the enforcement decisions taken in the Astakhova case on the basis of article 220, paragraph 1 (1), of the Tax Code (which differed in their interpretation from the legal position of the Constitutional Court) must be reviewed in accordance with the established procedure, provided that there were no other obstacles to so doing.

In the light of that Constitutional Court ruling, the Commissioner applied to the Chief Justice of the Supreme Court on 13 February 2007 for review, under the supervisory procedure, of those judicial decisions handed down in the Astakhova case that had entered into force, in order to ensure uniformity of court practice and legality.

The Commissioner's application was dismissed, and the reply from the Deputy Chief Justice of the Supreme Court stated that arguments of inconsistencies between the legal position of the Constitutional Court and the interpretation by the ordinary courts of the provisions applied in the Astakhova case did not constitute substantiation of a violation of uniformity of judicial practice and, consequently, there were no grounds for intervention.

The issue of whether a Constitutional Court judgement takes the form of a ruling or a decision has become a stumbling block in the debate over the bindingness and absoluteness of such judgements for the highest ordinary court. The Supreme Court proceeds de facto on the basis that the legal views of the Constitutional Court as set forth in its rulings are not binding on the ordinary courts.

In this regard, the Commissioner suggested to the Chairman of the Presidential Commission on the Enhancement of Governance and Justice that amendments should be considered to article 389 of the Code of Civil Procedure, which deals with the procedure for reviewing judgements in civil cases, in order to ensure uniformity of court practice and legality, in keeping with constitutional human rights and with the supremacy of the Constitution of the Russian Federation.

In addition, the Commissioner suggested to the Chief Justice of the Supreme Court that the plenum of the Supreme Court should consider supplementing its Decision No. 23 of 19 December 2003 on court judgements by adding a provision requiring the ordinary courts, when settling civil cases, to take account of Constitutional Court rulings containing constitutional or legal interpretations of the law applied in particular cases. Regrettably, according to the reply received from the Supreme Court, the proposed addition to the text of the decision was not deemed appropriate.

Correspondence between the Commissioner and State bodies in connection with his involvement in court proceedings related to citizens' complaints has brought to light numerous instances in which the Supreme Court failed to enact Constitutional Court rulings. The Constitutional Court itself, however, proceeds on the basis that its rulings are absolutely binding. What we are presented with, therefore, is a conflict in the interpretation of legal standards by the country's Supreme Court and Constitutional Court.

Such a situation cannot but adversely affect the administration of justice and, consequently, the rights and legitimate interests of all those under the jurisdiction of the Russian Federation.

The Commissioner, for his part, is convinced that **all State bodies and officials are obliged to enact Constitutional Court judgements, irrespective of whether such judgements take the form of a ruling or a decision.**

The Commissioner calls on all branches of government to examine the issue and to take, within their powers, measures to ensure the enforcement of Constitutional Court judgements, in order to eliminate this conflict.

While examining the complaints and appeals he receives, the Commissioner also encounters instances in which Russian courts fail to enact judgements of the European Court of Human Rights, invoking a lack of the requisite mechanisms.

While investigating a number of complaints about the unjustified confiscation of smuggled items, the Commissioner deemed it necessary to elucidate the outcome of a similar affair, the facts of which had been examined by the European Court of Human Rights in the *Baklanov v. Russia* case. In accordance with article 415, part 5, of the Code of Criminal Procedure, criminal cases must be reviewed in such instances by the Presidium

of the Supreme Court at the recommendation of the Chief Justice of the Court and no later than one month after such recommendation has been made. It was established that the criminal case resulting in the confiscation of Mr. Baklanov's property had still not been reviewed one year after the European Court had issued its judgement. In fact, lawmakers have established no deadline by which the Chief Justice of the Supreme Court must make a recommendation to the Presidium of the Court. Furthermore, procedural law does not specify who should initiate such a recommendation, the individual concerned or the Chief Justice himself. In the case under discussion, the Commissioner was obliged to intervene. Only then was the criminal case reviewed by the Presidium of the Supreme Court and the confiscated property returned to Mr. Baklanov by judgement of the Court.

The problem of the non-enforcement of judgements was discussed at special conferences held in all federal areas between December 2006 and March 2007, in which representatives of the regional administrations and the Office of the President participated. It was suggested that a new "national filter" should be established, an institution that would verify all complaints submitted to the European Court of Human Rights. A bill was drafted proposing that the Supreme Court should be given jurisdiction to consider individuals' complaints against the State. The purpose of the changes announced is to establish a mechanism to enable individuals, in cases where enforcement of a court judgement in a matter affecting them has not occurred or has been unduly delayed, to go to court to seek compensation for violation of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, under which everyone is entitled to a fair hearing within a reasonable time.

The Commissioner believes it important to emphasize that concerted efforts should be directed not at nominally reducing by any means the number of complaints by Russian citizens to the European Court of Human Rights, but rather at creating conditions in which there would be fewer reasons for appealing to the international courts.

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