

## The ones that lost: Russian cases rejected at the European Court

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### Summary:

Landmark victories in defiance of the Russian government have made the European Court of Human Rights the most popular legal institution in the country. Many cases fail at the initial committee stage. Grigory Dikov finds a huge disconnect between the capabilities of the Court and the hopes of the many thousands who now apply to it.

In the ten years since [Russia ratified the European Convention on Human Rights](#) [1], much has been written about the work of the European court in relation to Russian applications. Almost exclusively, however, these writings have focused on official rulings on cases that have been examined in one of the Chambers of the Court. What they fail to mention is that such “chamber” cases actually account for no more than one third of the total number of cases received by the Court, with the overwhelming majority of applications being rejected at the earliest stage by a committee of three judges.

Official statistics [1] [2] for 2008 show that out of 27,242 awaiting examination at the end of the year, 23,595 cases (86.6%) were preliminary referred to committee rather than Chamber. Russia is by no means unique here: the vast majority of applications from all countries will not get past this initial filtering. The same statistics, for example, show the figure for Romania is 57%, for Poland – 63%, for Ukraine – 72%, for Norway – 84%, for the Netherlands – 88% and for Estonia – 91%. In other words, the common assumption that the majority of Russian cases win against the state is somewhat of a myth. The majority of Russian cases are examined, and rejected, by committee, and this is true not only in relation to Russia but to other countries as well.

Despite their volume, “committee” cases nonetheless remain terra incognita for the majority of lawyers and sociologists studying the work of the Court. There are three reasons for this. First, the bulk of these cases present no particular legal interest. Secondly, rulings are not made public via the Internet and are only communicated to the applicant by letter. Thirdly, the official rulings in these cases are somewhat laconical in nature and do not offer any detailed explanations as to why they have been deemed inadmissible.

Russian applications to the European Court also go underreported in another important respect. Concentrating on the legal side of the Court’s activity, and particularly the legal positions of the Court on specific issues, researchers tend to ask very little about the sociological component of the cases. As far as I can tell, there is only one study [2] [3], conducted in 2008 by the [Moscow Center for Political Technology](#) [4] (MCPT), which visits the issue from such an angle. This MCPT report is based on interviews with a large sample of hundreds of applicants and experts, sheds much light on the motivation of applicants in going to Court and offers a valuable insight into the attitude of the professional community towards the Court.

For all its excellence, however, the MCPT study is limited in its scope. First, the survey only covered applicants in “chamber” cases, which, as we have seen, are but a small minority of the total. Second, the majority of the applications concerned specific issues such as supervisory review system (nadzor) or non-enforcement of the domestic judgments (although the Court commonly deals with such issues in relation to Russian cases, it is not the only thing that it deals with). Finally, the very methodology of the work implies a certain perspective, put simply: “the European Court through the eyes of Russian applicants who won”.

This article looks not only to explain why applicants took their cases to the European Court, but who they were, what they took there, which issues they raised in Court and why they lost (which,

as we have established, nearly all do). It draws on my own personal experience as a lawyer in the Court Secretariat, in addition to the experience of my colleagues. It also draws from new data, which I collected from a sample of 250 files of “committee” cases, all of which were found inadmissible in 2009<sup>[3]</sup> <sup>[5]</sup>. This data included the main biographical details of the applicants (date of birth, place of work, place of residence) alongside the nature of the application itself.

All this information is in principle accessible to the public, though detailed rulings on the inadmissibility of a case remain closed. As a result, I cannot present anything other than a generalized summary of the reasons why cases were declared inadmissible.

### **Profile of an applicant**

The first thing of note is that of the 250 files I examined, only three were submitted from legal persons (including one from an unregistered informal association). The remaining applications were split 152:95 men-to-women. One inference from this might be that men are in some way more active in making applications. This would, however, be to ignore the fact that a large number of the male cases were submitted either by prisoners (19), or by people connected to the Ministry of the Interior or Ministry of Defence (53), both constituencies with very low female populations. It would probably be more accurate to say the European Court is given to deal with “men’s” problems more than “women’s”.

The geography of Russia was reflected very evenly in the cases I looked at, which would suggest people are well aware of the European Court outside the two capitals of Moscow and St Petersburg. Some 59 of the 250 applicants lived in the country, in a rural community or farmstead; 81 lived in small towns; 77 lived in regional centers; and 31 lived in Moscow or St Petersburg. Two applications came from foreign citizens currently residing in Israel and Ukraine.

As for the employment status of applicants, 99 were pensioners, 53 were prisoners and 19 were either unemployed or homemakers. There were 13 civil servants (including soldiers and police), 14 qualified specialists (mainly employed by the state, e.g. doctors, teachers, scientists), 9 managerial-level employees, 17 salaried workers without higher education (e.g. workers, salespeople), 15 representatives of free professions (e.g. lawyers, artists) and one student. The average age of applicants was high: only four applicants were younger than 25; 25 were between 25 and 35; 36 between 35 and 45; 52 between 45 and 55; 55 between 55 and 65; and 43 were over 65. Interestingly, the MCPT report presents a similar picture with “chamber” cases, reporting an average age of 56.

The MCPT report also touched on the material well-being of typical applicants, noting that applicants in “chamber” cases were generally not “middle class”, but “poor Russians, who have difficulty making ends meet”. Although it is difficult for me to say what can be considered “middle class” in Russia, the data I collected seemed to show some correspondence to these comments. Summarising, we could say that a typical applicant on “committee” cases has a low income, is elderly, lives in the provinces, and in the majority of cases depends on state support.

### **Legal representation**

Applicants will only rarely be represented by lawyers in “committee” cases. Out of the 250 files I examined, just 49 contained reference to legal representation. Even when such representation was alluded to, it was not always clear if the lawyer knew anything about it. Indeed, from the quality of applications written, I got the impression that a great many did not. In the main, applicants instead choose to appoint non-professional representatives, who unfortunately tend to be a hindrance both to the Court and the applicants themselves.

Of course, the “quality” of an application is an open-ended concept, especially in regard to the procedures of the European Convention. But it is nonetheless arresting that the vast majority of cases, many of which are legally and factually complex, are decided in Strasbourg without a lawyer

being present at any stage. It is difficult to say exactly why this is: whether it is down to the applicants' unenviable financial positions, or because there is no real culture of using a lawyer in Russia. It seems to me that the latter is more likely, but this is difficult to argue based on the materials of my study.

Interesting too is the fact that, as the MCPT report notes, lawyers play an important role in the success of Chamber-reviewed cases. Perhaps some of these cases became "chamber" cases thanks to the lawyers.

## Typical Applications

What type of applications do Russian citizens take to the European Court? Since the topics of cases examined by the Chambers of the Court are already fairly well publicized, we shall not concern ourselves with them here. Instead, we immediately turn our attention on committee-reviewed applications and an analysis of the 250-file sample. From these files, I believe it is possible to identify five broad thematic groups.

The first, and largest group contains applications concerning criminal legal proceedings. I counted 60 applications in which the central complaint raised perceived unfairness of the proceedings. The applications often featured supplementary complaints about poor detention conditions in detention facilities, allegations of beatings and harassment by the police or illegal detention in custody. In other words, applicants were frequently referring to articles 3 (torture) and 5 (liberty and security) of the Convention alongside article 6 (fair trial). At the same time, few applications were lodged exclusively in respect of article 3 (three, all of which concerned conditions of detention in penal colonies) or article 5 (just one case).

The next most common category stem from civil cases about property disputes. There were 54 cases in this category. Here, the dispute is between two private persons — natural or legal — with the state's only role limited to administering the trial. Naturally enough, in any trial there is a winning and a losing side. If sufficiently aggrieved, the losing side will turn to the European Court with a complaint that the dispute was resolved incorrectly. In these cases, applicants usually make reference to article 6 (right to a fair trial) and/or article 1 of Protocol I to the Convention (protection of property). Sometimes, the applications are supplemented by complaints about the length of court proceedings. Generally, however, they can usually be reduced down to the simple argument: "my case was handled incorrectly".

The third most important category relates to those cases involving pensions, benefits and other social payments. The sample of 250 files brought up 52 such cases, 28 concerning [Chernobyl pensions](#) [6], nine with pensions issued by the Ministry of Defence or Ministry of the Interior and 15 with old-age or disablement pensions. Applicants usually dispute the method in which their pension has been calculated — the application of various coefficients, and how contradictory norms of pension legislation have been applied etc. Again, these applications usually refer to article 6 and article 1 of Protocol I.

The final two categories are of broadly equal importance. The first relates to issues over property rights, particularly disputes over social rent or property privatization (i.e. obtaining the right of ownership). These cases, of which I counted 22, are clearly distinguishable from applications linked to civil property disputes, in that the state's role here is not passive. The second category involves applications that follow on from employment law cases (21 in this sample). These invariably follow a similar pattern to private disputes in that applicants almost always disagree with the interpretation of the evidence or legislation.

One striking aspect about the applications is that they almost never refer to violations of civil liberties. I only counted six cases where it could be said that there was infringement of the rights of the applicant under article 8 (right to the respect of private and family life, home and secret of correspondence), article 9 (freedom of religion), 10 (freedom of speech) or 11 (freedom of

assembly and association). In only three cases was the state alleged to have infringed the applicant's right of ownership by confiscation or restriction of rights. It was much more typical for cases to be linked to article 6 (fair trial) and 1 of Protocol I (property rights), being in vast majority (209 out of 250) concerned either criminal procedure, private property disputes or disputes on social benefits that the state was supposed to provide.

### **Typical grounds for inadmissibility**

#### **(i) Inadmissible on procedural grounds**

Nearly half of the 250 cases were automatically rejected under article 26 of the Convention, which requires applications to be lodged within six months following the final domestic decision. Applicants usually missed this deadline for one of two reasons: they were either unaware of the requirement itself; or were unaware that the European Court discounts periods of supervisory review when calculating those six months. It is quite common for individuals to pass the six month mark simply because they are waiting for the results of a supervisory review complaint.

Three cases fell outside the material competence of the Court and two were excluded for other reasons. Only three cases were officially rejected on account of the applicant not having exhausted all legal remedies available to him. This is not to say that legal remedies were exhausted in all other cases, however. Non-exhaustion of legal remedies is, in fact, one of the most widespread grounds for inadmissibility, but it is more often encountered in combination with other grounds.

The remaining applications (119) were rejected as being "manifestly ill-founded". Behind this obscure wording lies any number of possible scenarios. For example, an individual may be applying under Article 6 of the Convention, on the grounds that a lawyer was not present at a criminal trial. It may be that the applicant refused a lawyer and wished to defend himself. Alternatively, the applicant may have hired a lawyer, but that lawyer missed one of the court sessions without a reasonable excuse and without requesting a postponement. Though the situations are clearly different from one another, each applicant would receive an identical letter rejecting their application on the grounds of it being "manifestly ill-founded".

The phrase "manifestly ill-founded" can also cover a combination of different grounds of inadmissibility. Very often the Court encounters applications that have been raised under several articles of the Convention and/or on several grounds. It might transpire that one aspect of the complaint may be inadmissible under the 6-month rule, another because the applicant did not raise the issue in originally lodging an application, while a third might fall outside the material competence of the court. Although each aspect of the application will be addressed separately in an internal Court note, the final letter sent out to the applicant will only state that the case had failed on account of it being "ill-founded".

#### **ii) Inadmissible on merits**

Of greater professional interest, however, are those applications that are "manifestly ill-founded" *stricto sensu*, i.e. applications deemed inadmissible on their merits alone. Here, it makes sense to examine the question in terms of the two groups of applications we identified in section 4. These, if we recall, were applications made in respect of unjust treatment in civil disputes, and applications made in respect of "unfair trial" in criminal legal proceedings.

### **Civil disputes**

The first thing I would say is that the MCPT paper makes some unlikely conclusions about the treatment of applications involving civil disputes. It notes that a typical "chamber" case from Russia is concerned with social benefit or pension entitlement. Indeed, it goes as far as giving an

impression that the European Court mainly favours applicants over the state in such disputes. The paper states, and I quote: “the incorrect calculation of pension coefficients, which carries a moral as well as financial significance for applicants, is a big problem”. Similar expressions are used with respect to those receiving Chernobyl-related benefits.

The problem with such comments is that they fly in the face of the evidence, which instead shows that the overwhelming majority of applications disputing pension entitlements are actually rejected by the Court at committee stage. The successful cases that do make it to Chamber examination — evidently the basis of the MCPT argument — are substantively distinct cases. They concern two or three very narrow legal issues, in particular the non-implementation of court decisions already made in favour of the applicants, or their arbitrary re-examination at supervisory review.

The vast majority of pension and benefit entitlement cases fall at the first hurdle because the applicants do not properly understand the European Court’s subsidiary role. Very frequently, the applications raise an objection to the way evidence or domestic law was interpreted at the original trial. The European Court is not a court of cassation, let alone a court of appeal, and so ordinarily is not interested in re-examination of this kind. Misunderstanding this mandate is the main reason why so many applications are made to the European Court and, accordingly, why so many are rejected.

Meanwhile, applications relating to property disputes most often claim rights not necessarily listed in the Convention, especially with respect to substantive issues. Take, for example, the right to housing: here, though the Convention guarantees inviolability of housing, it does not compel the state to provide housing of a better quality or larger size to those who require it. Concurrently, it makes no provision for labour rights (rights of earnings, working hours, just cause for dismissal).

### **Criminal legal proceedings**

There is no need to go into great detail about why applications made in respect of criminal legal proceedings are found inadmissible, for the simple reason that it would require hundreds of pages of legal analysis. The main problem here is that, first, the applicants misunderstand the very limited mandate of the Court and the principle of its “subsidiarity”. Secondly, when they are aware of the Court’s mandate and bring up valid grounds — say, the absence of a lawyer, not being made familiar with the materials of the case, non-calling of witnesses etc. — applications usually fail because of the manner in which the defense was conducted during the initial domestic legal process.

A typical problem is that many of the applicants did not avail themselves of an appropriate legal defense during the initial stages of their trial. This might be out of ignorance. It might be the result of a mistrust of legal mechanisms. Unfortunately, the rejection of a lawyer — perhaps combined with an inability to clearly formulate a defense or completely exhaust all legal remedies — does not help applicants present their case in the best way. Applications fail in this way not only in respect of Article 6 (right to a fair trial): a great number of applications claiming torture were also rejected because the applicant did not raise a complaint during a medical examination, write an application to the Prosecution Service or keep copies of medical certificates and other statements and evidence.

### **Conclusion**

Reviewing the committee cases from Russia does not, on the whole, leave an encouraging impression of the Russian legal environment. The first and most fundamental problem to note is the peculiarity of the local legal culture in Russia. My point here is not about the lack of legal information, or even the absence of an instinctive reflex action to call a lawyer when difficulties arise. Rather, I believe the problem is in fact the accessibility of the Russian judicial procedure, which in its reverse side encourages litigiousness, poorly prepared cases, confused law suits and so on. I have a feeling Russian judges must have the same impression.

Second, it is impossible not to notice how little trust applicants place in the Russian legal system (and, by the same token, the extent to which they overvalue the capabilities of the Court). This is seen in their letters, and was likewise reported in the MCPT paper. Applicants generally see the Court as a *deus ex machina*, as the last hope for justice in this unjust world. They forget that the Court depends to significant degree on the domestic legal system and uses material that system created. For all its independence, the Court operates within strict boundaries, and has a limited ability to restore justice.

Third, there seems to be little correlation between the troubles and concerns of most Russians and the problems the European Court was created to solve. The European Convention on Human Rights sets out to guarantee so-called “first generation” rights, i.e. personal and civil liberties. Russian society, on the other hand, remains very “paternal”. The average citizen is first of all interested in how the state fulfills socio-economic obligations, rather than issues of freedom of speech or privacy. To put it another way, the paternalistic palates of applicants are ill suited to the liberal menu the Court has on offer.

So we see a paradox: Russian citizens write to the Court en masse, yet do not understand the Court is unlikely to be able to help. The Court, on the other hand, devotes enormous resources towards processing the flow of applications, the vast majority of which are doomed to failure. Many argue that the Court has become a victim of its own success. It could well be a good thing were the Court to become less popular, and consequently better able to concentrate on the issues for which it was created.

I have no doubt, however, that this situation will remain for so long as the right of individual petition is preserved in unchanged form. The situation today is that individual petitions are essentially unrestricted; there is no requirement for fees or compulsory legal representation. The 14th protocol to the Convention — which Russia has signed, but refuses to ratify — might be the first step on the path to restricting the right of individual petition, bringing in new grounds of inadmissibility such as the “(absence of) significant disadvantage to applicant”. All the same, even this measure will probably prove insufficient. It seems that Russians’ faith in the European Court will remain strong as long as mistrust in the country’s legal mechanisms remains.

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*Opinions and analysis are presented in the article in a personal capacity and should not in any way be interpreted as the official position of the Court.*

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[1] <sup>[7]</sup> <http://www.echr.coe.int/NR/rdonlyres/55E4E440-6ADB-4121-9CEB-355E527600BD/0/Analysisofstatistics2008.pdf> <sup>[8]</sup>

[2] <sup>[9]</sup> <http://www.politcom.ru/tables/oec.pdf> <sup>[10]</sup>