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To the 15th Anniversary of action of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto

Abstract: It is considered the issues of application by the courts of general jurisdiction of the Russian Federation on protection of human rights and fundamental freedoms of 4 November 1950 and the Protocols thereto; it is given proposals to improve a juridical practice in this direction.

Keywords: Constitution of the RF; State Duma; Council of Europe; the European Convention for the Protection of Human Rights and Fundamental Freedoms; Constitutional Court of the RF; Supreme Court of the RF; human rights; human rights activities.

Russia formally submitted an application to join the Council of Europe even before the adoption of the new Constitution of Russian Federation on May 7, 1992. Later, planning its participation in the Council of Europe and European Convention on protection for the Human Rights and Fundamental freedoms (further “Convention”) Russia had presented a project of the Constitution into the international expert examination. In 1993 the three plenary sessions of the European Commission for Democracy through Law (Venice Commission of the Council of Europe) were dedicated to the project of the Constitution of the RF (7, p. 81-100), and it is no wonder that the many provisions of the Constitution of the RF concur with the provisions of the international agreements, to which Russia would had intended to join.

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If to familiarize with the verbatim record of the sessions of the State Duma of the RF, where the issues on joining to the Council of Europe and to the Convention on protection for the Human rights and Fundamental freedoms had been discussed then it might be found that as the main goal was indicated providing of the citizens our country with much protection from violation of the human rights. It was supported by the European structures, which have very long-standing practice, checked technology of human rights activity (1). In 1996 in a session of the State Duma of the RF during discussion of the issues about joining to the Council of Europe, a chairman of the Committee of the State Duma on international affairs indicated the purposes of joining to the Council of Europe as follows: “if we join to the Council of Europe then it would be the single matter when it absolutely obvious that this step it would be good for our citizens, specific citizens, which had been elected us to here, but not for the authorities, especially for executive ones. Why? The Council of Europe is an organization, which is on the whole done with human rights activity. It is existed the European Court, and if we sign appropriate documents then the European Court would be made decisions of the cases of a specific our citizens, it is true, after all procedures examined by the national judicial instance. I think that it is not bad to withstand the bureaucratism and arbitrary of our authorities, which sometimes are very strong.” (2). Moreover, during discussion of a project of Federal law on joining of Russian Federation to the Charter of the Council of Europe, an official representative of the President of Russian Federation, the first Deputy of the Minister of Foreign Affairs of Russian Federation, a chairman of Interdepartmental commission on preparation of Russian Federation to joining to the Council of Europe I.S. Ivanov pointed out as argument that “whole chapter of the Russian Constitution on the rights and freedoms of a man and citizen is made up just on the base of the Convention of the Council of Europe on protection for the Human rights and Fundamental freedoms” (3).

Signing of the Convention, its ratification and deposit of ratification’s documents to the Council of Europe was the next step.

Federal Law from 30.03.1998 “On ratification of the European Convention on protection for Human rights and Fundamental freedoms” included the provisions of the Convention into the legal system of Russia.

5th May 1998 after handing over the ratification documents, the citizens of Russia obtained a chance to apply to the control body of the Convention to the European Court on the Human rights (further “ECHR”).

23 November 1999 the first time the Constitutional Court of the RF quoted of the decisions of the European Court on Human rights in its resolution No. 16-P on the case on examination the constitutionality of the indentions of the third and forth clauses of the article 3 of the Federal law 27 “On Freedom of Conscience and Religious Associations” in connection with the complaints of the Religious society of Jehovah’s Witnesses in Yaroslavl and religion association “Christian Church glorification”, indicated that the decision of the European Court on Human rights from 25 May 1993 (Series A no.260-A) and from 26 September 1996 (Reports of Judgments and Decisions, 1996-IV), make clear a nature and scale of the state obligations that follow from the article 9 of the Convention.

Supreme Arbitration Court of the RF also quickly drew attention on the Convention and the practice of the ECHR distributed on 20 December 1999 a special informational letter No. C1-7/SMP-1341 “On the main provisions applied by the European Court on the human rights during protection of the property rights and the right to justice”, in which orientated arbitration courts on observance of the provisions formulated by the European Court on the human rights during protection of the property rights and the right to justice.

Only in 2003, for the first time, the Supreme Court of the RF gave clarifications on necessity of application of the legal positions of the European Court on Human rights only. In Resolution of the Plenum of the Supreme Court of the RF No. 5 from 10 October 2003 “On application with the courts of general jurisdiction of the generally recognized principles and norms of international law and international agreements of Russian Federation” were given the following clarifications:

“... Russian Federation as a participant of the Convention on protection for Human rights and Fundamental freedoms recognizes the jurisdiction of the European Court on human rights on issues of interpretation and application of the Convention and its Protocols in case of supposed violation of Russian Federation the provisions of these treaty acts when presupposed violation would have a place after their entry into force in respect of Russian Federation (article 1 of the Federal law No. 54-FZ from 30 March 1998 “On ratification of the Convention on protection the Human rights and Fundamental freedoms and its Protocols”). *Therefore, application with the courts of above named Convention should be fulfilled with considering of the practice of the European Court on human rights in order to avoid any violation of the Convention on protection of the Human rights and Fundamental freedoms.* The Convention on protection of the Human rights and Fundamental freedoms possesses its own mechanism, which includes an obligatory jurisdiction of the European Court on Human rights and systematical control for performance of the resolutions of the Court by the Committee of the Ministers of the Council of Europe. By virtue of clause 1 of the article 46 of the Convention these resolutions in respect of Russian Federation are mandatory for all bodies of the state authorities of Russian Federation including the courts.

Execution of the resolutions related to Russian Federation is presupposed in case of necessity the commitment from the state side to accept the measures of a private nature directing to eliminate the violations of the human rights provided by the Convention, and the consequences of these violations for a complainant, and also the measure of general nature in order to prevent of reiteration of these violations. In frame of their powers the courts should act such way in order to provide fulfillment of the commitments of the state, which are followed from participation of Russian Federation in the Convention on protection for the Human rights and Fundamental freedoms.

If during the court examination of a case were found the circumstances, which had caused to the violation of the rights and freedoms of citizens guaranteed by the Convention, the court has the right to make a private ruling (or decision), in which is

drew attention of the proper organizations and official persons into the circumstances and facts of violation of the indicated rights and freedoms, which require an acceptance of necessary measures”.

Further the references on the legal positions of the ECHR have regularly given in the Resolutions of the Plenum of the Supreme Court of the RF (13).

However, number of appeals in the ECHR and the number of decisions adopted against Russia had been only increased, including large stream of the complaints, which were connected with repeal of the court decisions in order of supervision on the base of provisions of the Civil-procedural Code of the RF.

In Resolution of the Constitutional Court of the RF No. 2-P from 5 February 2007 “On a case about examination the constitutionality of the provisions of the article 16, 20, 112, 336, 376, 377, 381, 382, 383, 387, 388 and 389 of the Civil-procedural Code of Russian Federation in connection with request of the Cabinet of Ministers of the Republic of Tatarstan, the complaints of the OJSC “Nizhnekamskneftekhim” and “Khakasenergo”, and also with the complaints of a number of citizens” was made the next step in application of the decisions of the ECHR. The Constitutional Court of the RF clarified that “... ratifying the Convention on protection for the Human rights and Fundamental freedoms, Russian Federation recognized the jurisdiction of the European Court on the human rights as mandatory on issues of interpretation and application of the Convention and its Protocols in cases of presupposed violation by Russian Federation of the provisions of these treaty acts (federal law No. 54-FZ from 30 March 1998). Thus, as in the Convention on protection for the Human rights and Fundamental freedoms so and in the decisions of the European Court on human rights, in the part generally recognized principles and norms of international law, are given interpretation of the content of the rights and freedoms fixed in the Convention, including the right to access to the court and fair justice. They are an integral part of the Russian legal system and therefore, should be considered by the Federal legislation during regulation of the public relations and law enforcement bodies at application of the proper norms of the law”.

This Resolution of the Constitutional Court of the RF had seriously influenced in insertion of the supplements into the Civil-procedural Code (the CPC) of the RF.

In spite of all these positive facts in the CPC of the RF, long time it was not provided any legal consequences of passing of the Resolutions of the ECHR. This fact had repeatedly been an object of appeals of the citizens and their associations in the Constitution Court of the RF, but only in 2010 was made the Resolution of the Constitutional Court No. 4-P from 26 February 2010 “On a case of examination the constitutionality of the second part of the article 392 of the CPC of the RF in connection with the complaints of the citizens A.A. Doroshka, A.E. Kot and E.Yu. Fedotova”, clarifying an opportunity of reconsideration on newly opened circumstances on the base of the Resolution of the ECHR. One of the motives of this Resolution was that “the rights and freedoms of a man and citizen, recognized by the Convention on protection for the Human rights and Fundamental freedoms, are the same, which are fixed in the Constitution of Russian Federation. Confirmation of their violation accordingly with the ECHR and the Constitutional Court of the RF – in force of a general nature of the legal status of these bodies and their role – presuppose an opportunity to use in purpose of full restoration of violated rights of the unified institutional mechanism of fulfillment of accepted by them decisions”.

Further, a lawmaker made changes in the CPC of the RF, and since 1 January 2012 an establishment of the ECHR the violation of the provisions of the Convention during examination by the court of a specific case (in connection with acceptance of a decision, on which a complainant had appealed into the ECHR) is the ground for reconsideration on newly circumstances (cl. 4 of p. 4 of art. 392 of the CPC of the RF).

However, a fixation of the procedure of reconsideration in connection with new circumstances did not solve all problems with fulfillment of the resolutions of the ECHR and application of provisions of the Convention in interpretation of the ECHR.

Moreover, after adoption by the ECHR of the Resolution from 7 October 2010 on a case “Konstantin Markin vs. Russia”, in which had sounded critics of the Constitutional Court of the RF, was put a question on opportunity of non-

performance of the Resolutions of the ECHR. More sharpened was a speech of the Chairman of the Constitutional Court of the RF V.D. Zorkin “Limit of compliance”, in which was said – “Each decision of the ECHR is not only juridical, but and political act. When such decisions are accepted for benefit of protection of the rights and freedoms of the citizens and development of our country, Russia will be always rigorously observe them. But, when those or that decisions of Strasbourg court are doubtful from the point of view of the essence of the Convention and moreover affect the national sovereignty, basic constitutional principles, Russia has the right to work out a protective mechanism from these decisions. Just through a prism of the Constitution of the RF should be resolved an issue of correlation of the decisions of the Constitutional Court and the ECHR” (5).

After that, number of the judges of the Constitutional Court of the RF and its employees publically criticized this Resolution of the ECHR. Later, other officials stated that the decisions of interstate bodies will be fulfilled only if the Constitutional Court of the RF establishes that a norm, with which is linked these decisions correspond to the Constitution of the RF, and imposing by them commitments do not contradict to it.

It was introduced two draft laws (No. 564315-5 and 564346-5), adopted by the State Duma of the Federal Assembly of the RF in the first reading in June 2011 and relating a participation of the Constitutional Court of the RF in process of realization of the decisions of the ECHR. The draft law No. 564315-5 suggested introducing the alterations in the CPC and APC of the RF, in particular, providing the following: reconsideration of entering into force judicial act due to established by the ECHR violation of the provisions of the Convention is implemented if the federal law, applied in this case, is recognized corresponding to the Constitution of the RF by the Constitutional Court of the RF. The draft-law No. 564346-5 suggested providing of the Constitutional Court of the RF with the powers on determination of the constitutionality of the normative act of a body of the state power (agreement between the bodies) in connection with adoption by the interstate body on protection the rights and freedoms of a man of a decision, by which is established violation of

the provisions of international treaty of the RF in connection with application of normative act or agreement. In our view, the both draft-laws were unsuccessful attempts to prevent of performance of the decisions of the ECHR. Fortunately, to the present day these draft-laws have not had the further movement in the State Duma of the RF. All this have been accompanied with eventual discussion and in the mass media and in juridical publications (4, p. 7-12; 6, p. 45-53; 10; 11, p. 77-90; 8, p. 122-130; 9, p. 46-50; 14, p. 58-61; 15, p. 2-6).

Further, the ECHR reconsidered the case “Markin vs. Russia” in complement of the Grand Chamber of the ECHR, mollifying of criticism of the Constitutional Court of the RF, made accent in the facts of considered case, but increasing a size of compensation paid to Markin.

Fortunately, this event did not disturb to the victory of sanity and the Supreme Court of the RF has not left a work on preparation of clarifications about legal consequences of the resolutions of the ECHR during examination of the cases of the general jurisdiction courts.

For submission of the comments and suggestions on spring 2013 to the courts of the general jurisdiction and scientific institutions, universities has been sent a project of the Resolution of the Plenum of the Supreme Court of the RF “On fulfillment by the courts of general jurisdiction of the resolution of the ECHR”.

The Supreme Court carried out a considerable job and in a year of 15th Anniversary entry into a force of the Convention for Russia was adopted the Resolution of the Plenum of the Supreme Court of Russian Federation No. 21 from 27 June 2013 “On application by the courts of general jurisdiction of the Convention on protection for the human rights and fundamental freedoms from 4 November 1950 and its Protocols”. Undoubtedly, this important act is allowed a wider using in the courts of legal position of the ECHR and possible reduce a stream of the complaints in the ECHR, being made Russian justice fairer and corresponding to the European standards of protection for the rights and fundamental freedoms.

Changing of the name of the Resolution, in our view, is quite soundly, since the initial name got narrow the bounds of this Resolution.

Undoubtedly, this important act should be properly assessed by the practitioners and scientists. In this article we will reveal number of important moments, though we specify at once that the Resolution is rich with important moments.

First of all, we note that the Supreme Court of the RF stresses attention in that *the protection of the rights and freedoms of a man provided by the Convention is assigned, first of all, on the bodies of the state including the courts.*

It was resolved an old dispute on possibility of application the legal positions of the ECHR by the courts of general jurisdiction. The Supreme Court of the RF clarified that the legal positions of the ECHR, which were contained in the final decisions of the Court, were accepted in respect of Russian Federation are mandatory for the courts; and containing in the decisions of the ECHR related to other countries – participants of the Convention, should be taken into account by the courts to provide efficient protection of the rights and freedoms an individual. Wherein, a legal position is considered by the court if circumstances of examined case are the same circumstances, which were a subject of analysis and conclusions of the ECHR.

It was also eliminated an issue with false understanding of the Convention as subsidiary normative act, which is applicable only when the norms of the Russian laws regulating those or that relations are absent. The Supreme Court of the RF was needed to indicate that legal positions of the ECHR are considered under application of legislation of Russian Federation; content of the rights and freedoms providing by the Russian legislation is determined with considering of the content of similar rights and freedoms revealing by the ECHR under application of the Convention and its Protocols.

It was important indication of the Plenum that in interpretation by the ECHR the provisions of the Convention and its Protocols is followed that under limitation of the rights and freedoms of an individual (interference in the rights and freedoms of an individual) is understood *any decisions, actions (inactions) of the bodies of a state power, local authorities, officials, and also other persons which due to acceptance or implementation created any obstacles to realize his rights and freedoms.*

Accordingly, being drew attention of the courts on a subject of examination during consideration of the disputes about violation of the rights and fundamental freedoms of an individual, and namely, whether were during restriction of the rights and freedoms of an individual ensured the following criteria: opportunity restriction only in federal law; presence of socially significant, legal goal for such restriction being necessity in democratic society (proportional to followed socially significant, legal goal).

Non-ensuring of one of the criteria of restriction is a violation the rights and freedoms of a man, which is subject of judicial protection in established by the law order.

In accordance with provisions of the article 46 of the Convention, interpreted with considering of Recommendation of the Committee of ministers of Council of Europe No. R (2000) 2 from 19 January 2000 “On reconsideration of cases and resumption of production on a case in an internal state level in connection with decisions of the ECHR” (further – Recommendation on reconsideration), a ground for reconsideration of a judicial act in view of new circumstances is not any established by the ECHR violation of the provisions of the Convention and its Protocols by Russian Federation.

The Supreme Court clarified that judicial act might be reconsidered if an applicant continues to feel unfavourable consequences of than act (for example, if in violation of provisions of the Convention a person continues to be in custody) and paid to the applicant a fair compensation (in fulfillment of article 41 of the Convention) did not provide restoration of his violated rights and freedoms.

Undoubtedly, the Decision of the ECHR should not be ground for reconsideration on new opened circumstances, if it is established violation of the Convention with non-performance of a court decision. In our opinion, it cannot be the ground for reconsideration such Decision of the ECHR, which compensated material and non-material damage in full. Specifically, we can provide as an example the Decision of the ECHR on a case “Ermishev vs. Moldova” complaint No. 42288/02 from 8 August 2006. Obviously, reconsideration in such situation is not admissible.

Supreme Court of the RF clarified sufficiency for reconsideration of established by the ECHR violation, from which is followed that a decision of a court contradicts to the Convention on merits or made violation of the Convention and its Protocols, having a procedural nature, casts doubt on the results of case examination.

It was also drew attention that during examination by the court of an issue on necessity reconsideration of a judicial act is taken into account a causal link between established by the ECHR violation or its Protocols and unfavourable consequences, which continued to be felt by an applicant.

In Decision of the Plenum was also drew attention that from the provisions of the article 1 of Federal law on ratification interpreted with considering of the article 46 of the Convention is followed that during reconsideration of a judicial act (due to acceptance of which an applicant appealed to the ECHR) the court should take into account the legal positions of the ECHR, indicated in a proper decision, and established by the Court violations of the Convention and its Protocols.

It should be noted that cl. 4 of p.4 of the article 392 of CPC of the RF specified that a ground for reconsideration on new circumstances is *establishment by the ECHR violations* of the provisions of the Convention on protection for the human rights and fundamental freedoms during examination by a court of specific case, due to acceptance of which an applicant had applied in the ECHR. That is, the ground is establishing of a delict – violation of the Convention and nothing else.

By the way, on eve of acceptance of this Decision of the Plenum of Supreme Court of the RF, the Constitutional Court of the RF accepted to examination an inquiry of the presidium of Leningrad District Military Court about checking constitutionality of the clauses 3 and 4 of part 4 of the article 392 in interlink with article 11 of the Civil Procedural Code of Russian Federation.

In this inquiry is put a question on constitutionality of the clauses 3 and 4 of part 4 of the article 392 in interlink with article 11 of the CPC of the RF in those part, in which these norms allow reconsideration of entering into legal force a judicial decision by a court of general jurisdiction under presence of opposite legal positions of the ECHR and the Constitutional Court of the RF in respect of compliance the

norms of national legislation (applied during examination of a specific case) to the provisions of the Convention on protection of the rights and fundamental freedoms, disturb to a correct resolving of this civil case.

In our view, if the Decision of the Plenum of Supreme Court of the RF accepted earlier then it would not be an inquiry to the Constitutional Court of the RF. In our opinion, this is obvious, since during examination of application about reconsideration on new circumstances it is not resolved an issue on application those or that legislation, and it is considered only presence of procedural grounds stipulated in article 392 of the CPC of the RF. In this case, a delict is violation of the Convention. The issue of application those or that norms are resolved only after repeal of a judicial decision and new examination of a case. Incidentally, the situation with this inquiry in Constitutional Court of the RF and also the Decision of the Plenum of Supreme Court are required more detailed analysis and we hope that on the pages of the Bulletin of civil process will be expressed different points of views and it is possible help to fair resolving of the situation.

Bibliography

1. Speech of a Chairman of the Committee of the State Duma on international affairs Lukin V.P. // Verbatim record of a session of the State Duma of the RF from 22.06.1994 “On a project of statement of the State Duma of the Federal Assembly of Russian Federation on the European Convention on protection for the human rights and fundamental freedoms, adopted on 4 November 1950”.
2. Speech of a Chairman of the Committee of the State Duma on international affairs Lukin V.P. // Verbatim record of a session of the State Duma of the RF from 16 February 1996, discussion of an issue “On a project of Federal law about joining of Russian Federation to the Charter of the Council of Europe”.
3. Report of the official representative of the President of Russian Federation, first Deputy of the Minister of Foreign Affairs, Chairman of Interdepartmental

commission on preparation to joining of Russian Federation into the Council of Europe I.S. Ivanov // Verbatim record of session of the State Duma of the RF from 21 February 1996. Time of Ratification.

4. Zaykov D.E. Vacation on care for a child for the military man of a male: to be or not to be? // Law in the Armed Forces. 2011. No. 5, p. 7-12.

5. Zorkin V.D. Bound of compliance // Rossiyskaya gazeta. Federal issue No. 5325 (246) from 29 October 2010.

6. Zorkin V.D. Interaction of national and supranational justice in modern stage: new perspectives // Comparative constitutional review. 2010. No. 5, p. 45-53.

7. Constitutional Meeting. Verbatim record, materials, documents. Reference volume. (v. 21). M. 1996.

8. Koroteyev K.N. Conflict, which is not available. Commentary to decision of the Grand Chamber of the ECHR on a case “Konstantin Markin vs. Russia” // Comparative constitutional review. 2012. No. 4, p. 122-130.

9. Kurdyukov G.I., Alexandrov S.V. International and constitutional legal aspects of juridical nature of the decisions of the ECHR // Yuridichesky mir. 2012. No. 6, p. 46-50.

10. Lapayeva V.V. Problem of correlation of juridical force of the Constitution of the RF and the European Convention on protection the human rights and fundamental freedoms (following to the materials of the case “Konstantin Markin vs. Russia”). <http://igpran.ru/articles/2957/>.

11. Lapayeva V.V. The case “Konstantin Markin vs. Russia” in context of the problem of national sovereignty // Comparative constitutional review. 2012. No. 2, p. 77-90.

12. Pokrovsky I.A. The state and humanity. M. 1919. Quoting on the book of Pokrovsky I.A. The main problems of civil law. M. 2003.

13. Decision of the Plenum of Supreme Court of the RF from 19 December 2003 No. 23 “On judicial decision” cl. 4, in preamble, cl. 1, p. 9 of the Decision of the Plenum of Supreme Court of the RF from 24 February 2005. No. 3 “On judicial practice on

cases on protection of honor and dignity of citizens and business reputation of individuals and legal entities”.

14. Filatova M.A. Strasbourg Court: is there way between “sovereignism” and “activism”? // Judge. 2011. No. 10, p. 58-61.

15. Fokov A.P. International and national rights in activity of Constitutional Court of the RF: history, modernity and problems of interrelations with the ECHR // Rosyisky sudya. 2011. No. 1, p. 2-6.