Access to Justice for Vulnerable Groups in Russia

Seminar

Defending the Rights of Persons with Disabilities and Migrants

September 29 – 30, 2017

St. Petersburg

There is an informal yet emphasized distinction in the Russian legal community between 'lawyers as such' and 'human rights lawyers.' Lawyers dealing with general criminal, administrative and civil cases tend to be interested in human rights standards to the extent they can apply this knowledge in their routine practice. They seldom have clients from vulnerable groups and therefore know little about international practice of defending the rights of refugees or people with mental disabilities.

The seminar "Defending the Rights of Migrants and Persons with Disabilities", which was held on September 29-30, 2017 in St. Petersburg, has shown that the attitudes of young and more experienced lawyers are beginning to change. Many of the participants found prospects for their own professional development in complicated cases lagging behind the international standards. Lawyers from St. Petersburg and other regions who came to the seminar were motivated by the opportunity to learn about the British experience firsthand and to meet with the leading Russian human rights lawyers experienced in defending the rights of migrants (Olga Tseytlina) and of patients with mental disorders (Dmitri Bartenev).

Catherine Casserley, a barrister from Cloisters Chambers (London) provided a brief overview of the Convention on the Rights of Persons with Disabilities and emphasized the importance of the social model of disability as opposed to the medical model. The medical model assumes that problems of persons with disabilities are related to health condition. The social model assumes that problems of persons with disabilities are related to the attitude of the society. This is fundamentally important for law enforcement practice.

The Convention has been ratified by both the European Union and the Russian Federation. However, the implementation of the principles that are stated in the Convention remains very difficult. Consistent application of these principles depends not just on the economic situation in the country but also on the society's attitude to persons with disabilities. Respect for the dignity of persons with disabilities and ensuring their maximum independence including freedom of decision making are the cornerstones of the disability policy stipulated by the Convention. In the UK, these principles (respect for the dignity and freedom) have been long accepted. In Russia, lawyers, persons with disabilities and general public sometimes find it difficult even to understand what kind of benefits and values are meant to be protected. A simple and informative example described by Catherine is the British debate about the correct definition ('persons with disabilities' vs 'disabled persons). This is not a linguistic dispute. From the point of view of respect for the inner dignity, it is fundamentally important to know how these people prefer to call themselves in order to emphasize self-identification rather than evaluation by other people. The Russian practice of defending the rights of disabled people is not possible without referring to the index of diseases or certificates confirming the existence and severity of a listed disease. The English understanding is broader covering various situations related to difficulties that a person might experience due to his or her condition.

Ms. Casserley discussed in detail the practical significance of clear distinction and implementation of the accessibility requirement and the right to ‘reasonable accommodation’, which must be specified to a person’s needs. There are efforts made in Russia to ensure the accessibility of the environment for persons with disabilities, but a particular individual is often unable to use the results of these efforts because there has been no reasonable accommodation that is needed in his or her particular situation.

The implementation of the Convention standards in the UK is not perfect, either. Access to justice can still be not easy for persons with disabilities. They can become victims of violence including hate crime that can happen outdoors and at home. It is difficult for them to go to police or courts, to collect evidence and to participate in the investigation proceedings as victims or witnesses. They need special support, and for this purpose it is equally important to educate police officers and judges, not only lawyers.

The Convention along with other international human rights treaties guarantees protection of fundamental rights to persons with disabilities including freedom and personal security, freedom from torture, privacy, and protection of personal integrity. The latter right is relatively new and not developed enough. In the Russian language, there is not even an adequate translation.
Ms. Casserley linked the essence of this right with personal dignity in the broadest possible interpretation. Dmitri Bartenev mentioned that this legal notion will possibly be clarified in the future but already now, the requirement to protect personal integrity can be used for justifying e.g. prohibition of forced hospitalisation or forced treatment.

Access to information is another important right, which, it seems, has become much easier to exercise in the digital world. Persons with disabilities should have access to all socially significant information including, e.g., broadcast of the Parliament sessions. The government should ensure

accessibility of information in a suitable form. And yet, in Britain most websites remain inaccessible for persons with disabilities, even though it is an easy thing to do.

Catherine drew special attention to the role of the Committee on the Rights of Persons with Disabilities. The Committee has extended the scope of the accessibility principle to information and communication issues and extended the range of accessed objects by specifying them (courts, prisons, areas for cultural, sports, and recreation activities, etc.) and including the private sector. It is very important that the Committee perceives the standards as the maximum possible conditions and not as the minimum requirements. When analysing the accessibility situation, the Committee is guided by the best practices of various countries and obliges the other parties of the Convention to follow the best examples. In addition to harmonizing the national legislation with the Convention, the Committee requires that national action plans and strategies be adopted for identifying and removing any barriers to environment accessibility for persons with disabilities.

Unfortunately, just as in other areas of international law, the countries' attitudes towards international standards for protection of the rights of persons with disabilities are very diverse. The Committee assesses the implementation of recommendations by the member countries. Some countries do implement them while others ignore them completely.

Catherine provided examples from the practice of the Committee, the European Court of Human Rights, and the UK national courts. Some resolutions left the audience quite puzzled, such as the case of the deaf Australian citizen Michael Lockrey who won the right to be a juror. Some situations reminded of problems in the Russian practice.

The participants joined the discussion actively and offered their own arguments that supported the parties' arguments in real life cases.

The Russian lawyers and the expert compared the advantages of the two international mechanisms for defending the rights of persons with disabilities: the Committee on the Rights of Persons with Disabilities and the European Court of Human Rights. Russian lawyers do not have

such a choice yet, as Russia has not signed an additional protocol allowing individual appeals to the Committee. However, Russian human rights defenders are allowed to present an alternative report on the implementation of the Convention and the Committee's recommendations. In addition, in some cases of defending the rights of persons with disabilities, there are other tools available, e.g., individual complaints to the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, etc.

Dmitri Bartenev, Attorney at Law at ONEGIN Group Law Office (St. Petersburg), began his overview of the ECHR practice by reminding that the Convention for the Protection of Human Rights and Fundamental Freedoms does not expressly protect the rights of persons with disabilities. However, it protects many rights by interpreting them in the context of the rights of persons with disabilities. In the *Glor v. Switzerland* case (2009), the ECHR recognised the Convention on the Rights of Persons with Disabilities as a universal standard.

Decisions of the ECtHR have a serious effect on national practice. This is not yet the case with resolutions of the UN bodies. The first examples are only just arising. The Supreme Court of the Russian Federation has once referred to a resolution of the Committee on the Elimination of Discrimination against Women as the ground for reviewing a case (by analogy with newly discovered circumstances). Recommendations of the Council of Europe and the practice of the ECtHR, which develops new standards for treatment of persons with disabilities, are changing the attitude to standards that are customary for the Russian practice. E.g., if a person has been placed forcibly into a psychiatric hospital, it does not mean the doctors have the right to apply treatment by default. These are two different interventions, which need special procedures to verify the need for each intervention. Currently, forced hospitalisation in Russia allows involuntary treatment by default (at the discretion of the psychiatrist), which can be regarded as violation of Article 8 of the European Convention in the light of recommendations of the Council of Europe and the judgment in the *X v. Finland* case. At the same time, the ECHR has not yet said that involuntary treatment of people with mental disorders is inadmissible, while the Committee on the Rights of Persons with Disabilities has done it.

Dmitri Bartenev reminded the audience about the 1997 Convention on Human Rights and Biomedicine, also used in the ECtHR practice. In the *Bataliny v. Russia* case (2015), violation of Article 3 of the European Convention on Human Rights was found, namely, inhuman treatment (involuntary treatment with a drug that was not allowed for clinical practice at that time).

Dmitri further talked about identifying and declaring disabilities in Russian practice, having emphasised that the concept of 'disabled persons' in Russian law and 'persons with disabilities' in the meaning of the Convention are not identical. Disability is an autonomous concept. E.g., an HIV-positive person or a person with a mental disorder in the practice of the ECHR can be considered as disabled even in absence of an official certificate of their condition. For Russian lawyers, such flexibility of the Convention provisions in the interpretation of the Court is a challenge and an opportunity at the same time.

Dmitri then illustrated a variety of rights of persons with disabilities and methods to defend them with examples from the ECtHR practice and his own practice.

The ECtHR will sometimes avoid a special additional discussion of the discrimination issue if a violation of another article has been found, but the situation is changing gradually. In a case from Dmitri's practice, a child was removed from a neuropsychiatric asylum patient for five years; the Court found violation of Article 8 while avoiding to find violation of Article 14. However, three of the seven judges wrote a special dissenting opinion where they stated that in that case the discrimination issue was in fact the main disputed issue.

Dmitri then shared examples of complex ECtHR cases, such as *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (2014). Dmitri then provided examples from Russian and UK cases at the European Court. The Hungarian case, in which a deaf and dumb young defendant

who did not understand the sign language and could only communicate with his mother, caused a heated discussion. It is by discussion of such 'extreme' situations that lawyers develop critical thinking and deep understanding of the meaning of human rights and justification of any restrictions.

From the example of *Stanev v. Bulgaria* (2012), the participants learned that inhuman treatment in social care institutions can happen in other countries, too.

Dmitri also mentioned a subject that links the two parts of the seminar, the rights of persons with disabilities in migration cases. If in the event of deportation there is a risk of inhuman treatment due to disability, violation of Article 3 may be admitted in exceptional cases. However, it does not apply to all diseases (e.g., a child with the Down syndrome was denied protection against deportation to the country of origin). In addition, the situation may change with time (as in *Aswat v. the United Kingdom* (2013, 2015)).

Dmitri Bartenev then provided a detailed description of a number of issues related to defending the rights of people with mental disabilities. The main problem is that from the point of view of international human rights law, only 'extremely compelling reasons' can justify restriction of the rights of people with mental disabilities. In Russia, the situation is just the opposite: mental disability makes it easier for government bodies and courts to interfere.

ECHR requires special guarantees in cases of forced hospitalisation. The patient's right to challenge restriction of his or her freedom must be secured. In one of Dmitri Bartenev's cases, *Shtukaturov v. Russia*, the government claimed that the freedom of a patient of a psychiatric hospital was not legally restricted, as he was unable to state his will. However, the person had asked to be released! After the ECtHR ruling, amendments were made in the law regarding 'protesting' patients.

A legally incapable person can be sent to a neuropsychiatric asylum without his or her consent. These institutions are, in fact, similar to imprisonment. Although the living conditions in asylums are different (in some of them, patients are allowed to walk around the property and even go out), the Constitutional Court did not investigate the difference and applied *habeas corpus* to all neuropsychiatric asylums.

Another important issue is access to justice and the right to a fair trial. How efficient is the participation of persons with disabilities in a trial? ECtHR does not check the acts of the individual and his or her representative as such. However, persons with disabilities are an exception. The state, which is represented by the courts, should take consideration of the special needs of persons with disabilities and even adapt the procedure. If a person with disabilities cannot represent his or her interests to the full extent, special efforts must be made.

There are recent examples of good practice from regional courts and the Supreme Court of Russia. In one of the cases, the applicant was a disabled person who had no hands and could not effectively represent himself, and in the review a reference was made to the Convention on the Rights of Persons with Disabilities. In another example, an orphanage graduate did not have any information and therefore missed the application deadline; the missed period was renewed.

After a Q&A session, the participants did some practical exercise.

Working in small groups, the lawyers analysed two situations, identifying the signs of violation of rights of persons with disabilities and proposing defence strategies. In the discussion, the lawyers provided examples from their own practice. It could be seen how the initial scepticism and pessimism with regard to the prospects of defending the rights of persons with disabilities were replaced by professional interest and boldness of true lawyers. By the end of Day 1, the borderline between 'lawyers as such' and 'human rights lawyers' was erased. All the participants joined the team work and demonstrated good professional skills and interest in learning new things on defending the rights of persons with disabilities.

The subject of Day 2 was protection of migrants' and refugees' rights.

Deirdre Sheahan, Associate Solicitor at Paragon Law (Nottingham), described the application of international standards of refugee rights in legal practice in England and Wales and the problems lawyers face when defending the rights of migrants.

The procedure of granting the refugee status is very different in Russia and the UK. In fact, these are two different migration policies. Britain has traditionally been an attractive country for refugees, and the asylum seeking system is well developed. Russia had until recently been more of a transit country, and the asylum seeking is just beginning to develop. In the entire year 2016, just 39 people were granted a refugee status in Russia. At the same time, hundreds of thousands of people, primarily from East Ukraine, have their temporary asylum status. In the UK, specialisation of migration lawyers is well developed, and some of them focus on refugee rights. In Russia, the rights of refugees are primarily defended by non-governmental organisations that often request help from professional lawyers.

And yet, if one researches the journey of an asylum seeker in the labyrinth of national proceedings, one can find a lot in common between Russia and the UK.

Very emotionally and with numerous examples, Deirdre Sheahan described the difficulties faced by applicants and their lawyers in getting the refugee status in England. “Getting the refugee status is like running up an escalator going down...”.

Deirdre often represents children with no documents at all. At an interview with a migration officer, a child will be asked to tell where he or she comes from, to name the neighbouring villages, to sing the national anthem, to name the rivers, etc. These children are not educated and they do not know the answers but they want to show they do… Another test is used when an expert is called to determine the origin of an asylum seeker by his or her accent.

In general, from the very beginning the system does not believe the individuals and tries to prove that they are lying. The burden of proof rests with the applicant, but if the government alleges that he or she is lying, the burden of proof shifts to the government.

The consequences of asylum denial are serious and include deportation to the country where the person came from, but sometimes there are deportations to other countries. In the UK, many Zimbabweans entered under false passports, e.g., South African passports. Such passports look like real ones, but the information in them is false. Often, alternative strategies need to be prepared; e.g., your client will say that he is from Syria but the judge assumes that he is from Iraq. The lawyer can argue that there is danger for the applicant in Syria but even if he is from Iraq, fears would also be well-grounded.

From vivid examples, Deirdre moved to the analysis of legal grounds for granting a refugee status in accordance with the 1951 UN Convention on the Status of Refugees. Having ‘fear’ of a situation is a subjective element of the grounds for granting a refugee status. Sufficient validity of the fear is an objective element. The standard of proof for such cases in England is a reasonable degree of plausibility.

Any doubts must be interpreted in favour of the applicant. This is confirmed by the ECtHR practice: any doubt will be interpreted in favour of the applicant (*JK v. Sweden*); even if there are some

doubts, it does not necessarily detract from the overall general credibility of the applicant's claim (*N v. Finland*).

It is necessary to prove a reasonable likelihood, e.g., persecution in the past means that it is likely to repeat in the future (although the UK courts try not to recognise that).

In England, the court will analyse all records in the applicant's case from the moment of arrival. They will find out the entire history since childhood in detail and in the chronological order. They will search for discrepancies. They will also compare the applicant's story will other information (e.g., the time when a town was bombed). The applicant is expected to remember all the details. The applicants, especially children, are exposed to a new stress. They try to always tell the same story, which also causes suspicion. They are afraid to tell the truth about the transit journey, as it is often illegal. Anything that is done to conceal information, e.g., destroying a ticket, is regarded as an attempt to mislead.

Possible persecution applicants fear can be very different including rape, beatings, denial of access to education or healthcare, deprivation of housing, insult or humiliation. The court can assess the validity of fears in different ways. Proving the grounds for persecution requires high professionalism and creativity from the lawyer.

Another ground that is hard to prove is political beliefs. These are hard to prove in cases when a person has not been an activist or has not spoken publicly before. The applied principle is that a person should not feel fear because of demonstrating his or her beliefs.

The hardest thing to prove is belonging to a particular social group. Courts in England are guided not only by the provisions of the Convention but also by the special EU directive.

Ms. Sheahan drew attention to the great importance of the country analysis in preparing for the trial. One of the things that are analysed is a possibility of obtaining government protection in the country of origin. The lawyers will engage experts with the knowledge about this country.

Deirdre then provided a description of the algorithm of the lawyer's work on a case.

In the very beginning, Deirdre tries to get the most detailed statement of facts from the applicant, to find out as much as possible what evidence there may be. The documents from the country of origin must be translated. The lawyer needs to find out where the document comes from and whether it is genuine. She basically teaches the applicants law and explains why they will be asked certain questions. She finds if they have experienced any vulnerability, trauma, stress, etc. In the case of medical examination, she asks doctors to present their findings in an understandable language and to not go beyond their competence. Details matter. Every scar must be explained (the UN Istanbul Protocol on the Investigation of Torture).

Deirdre praised the UK system of Legal Aid. It is the lawyer who decides whether the applicant is entitled to Legal Aid. The state pays for the services of lawyers, interpreters and experts. The applicant is provided with an interpreter for an interview at the Home Office that is in charge of migration issues. The lawyer may record and listen to the interview.

Assistance is also provided to persons who committed crimes (the status may be granted for a certain period if there is threat of torture) and e.g. Russian fraudsters (it is considered of what will happen to the person in the conditions of detention centres, especially if he or she has diseases, etc.). If the person has a family, the right to family life can prevent deportation, but this right under Article 8 of the ECHR is not absolute; the principle of proportionality is applied.

The presentation of Olga Tseytlina, Attorney at Law at Iusland Law Offices (St. Petersburg), was also emotional and contained numerous examples from practice. The work of a refugee lawyer in Russia is extremely difficult. The probability of obtaining a refugee status is minimal. The attitude of

the Migration Office is absolutely formal. The courts will usually support the officials and will not consider the details. At the same time, the European Convention of Human Rights operates as a mechanism for protection against involuntary return to countries where there is threat of torture or inhuman treatment and punishment.

Olga Tseytlina gave many examples of problems faced by applicants and their lawyers. One of the issues is the written record of an interview. In Russia, an applicant has to sign the Russian text of the interview without a reverse translation or checking the content. The interpreters at the migration service are not independent.

The main argument for prohibiting extradition is Article 3 of ECHR. Olga Tseytlina provided examples of exemplary decisions of the ECtHR even with regard to extradition of dangerous criminals (*Soering v. the United Kingdom*, *Saadi v. Italy*). The prohibition of torture under Article 3 is absolute, and it does not matter who the applicant is.

Russian courts treat extradition formally; if there has been a request and the procedure has been observed, the ruling will be to extradite.

In some cases, it is difficult to know what is happening in the country of origin. *Ryabikin v. Russia* concerned the extradition of a person to Turkmenistan. Olga Tseytlina and the Memorial lawyer Kirill Koroteyev took the position that due to the lack of information about the conditions in national prisons, inability to observe, no access for international observers, and limited information from some reports of international organisations, a conclusion should be made that there is danger for the person from a vulnerable group on the ground of nationality (Russian). ECtHR agreed with this approach.

Olga commented on the ECtHR practice regarding extradition to countries such as Uzbekistan, Kazakhstan, Belarus, and Kyrgyzstan. This practice is ambiguous, which is due to individual features of the applicants and also to the changing situation in some countries.

The participants then discussed using country analysis. In two cases (*Sufi and Elmi v. the United Kingdom* (2011) and *K.A.B. v. Sweden* (2013)), the Court assessed the situation in Mogadishu, the capital of Somalia. In the first case, the criteria for assessing the situation in the country were used in favour of the applicants, and in the second case it was concluded that there was no threat although there were special opinions on the living conditions of hundreds of thousands of refugees, victims of looting, arbitrary arrests, rape, etc.

Russian refugee lawyers also refer to Rule 39, i.e. interim measures pending the adoption of the ECtHR judgment. They also use Article 5 of ECHR in the case the term of detention at deportation centres is exceeded. The term of detention at deportation centres is two years. However, there is no periodical court control. E.g., in *Kim v. Russia*, the applicant came from Kazakhstan but Kazakhstan did not recognise him as its national. ECtHR found that Article 5 had been violated. The Court pointed out the need for general measures (reduction of the period of detention for deportation, regular review). In Olga's practice, federal courts would allow such complaints and release people, primarily citizens of the former USSR. Finally, in the *Noe Mskhiladze* case, the Russian Constitutional Court ruled the practice unconstitutional. The Constitutional Court ordered amendments to be made to the Code of Administrative Offences (currently, the only grounds for release are the expiration of the term or death). The Constitutional Court resolved that if the period

of detention is longer than three months, the person is entitled to apply to a court. So far, no amendments to the law have been made technically. However, the courts have already released hundreds of people in Russia including stateless persons.

In addition, Russian lawyers refer to Article 8 of ECHR, i.e. the right to family life. Olga commented on *Zakayev and Safonova v. Russia*. According to ECtHR, it is necessary to evaluate family ties and the circumstances of the offence.

Kiyutin v. Russia was mentioned again, which brought the participants back to the subject of the previous day. The fact that a person has HIV cannot be used as a ground to deny entry or as a ground for deportation.

Olga Tseytlina answered the participants' questions, giving a lot of practical advice with references to judgments of ECtHR and the Constitutional Court of Russia.

The Russian lawyers then discussed two study cases. First, the participants analysed the situation with a Syrian refugee from Aleppo kept at a temporary detention centre. The lawyers found signs of violation of virtually all the articles of the European Convention. They also used the UN Convention on the Status of Refugees in their argumentation. That was followed by a discussion on the best opportunities for defence.

The second practical exercise had elements of a role play. The lawyers analysed information given by a young woman seeking asylum in the UK. They stated the grounds for granting a refugee status and identified supporting circumstances; they also determined what other evidence could be used. Then they changed their roles and acted as officials criticising the applicant's story as implausible. And then, having changed their roles once again, they tried to find counter-arguments on behalf of the applicant. The participants demonstrated excellent analytical and rhetorical skills. According to the British colleagues, with such skills and such creative approaches, the Russian lawyers could well practice in England!

Despite the very difficult subjects and tragic examples, the seminar ended on a positive note. The lawyers are ready to defend the rights of vulnerable groups and want more practical advice from their British colleagues to expand the range of tools that they could use in Russian practice.