

## РОЗДІЛ 2

### ПРАВОВЕ ЗАБЕЗПЕЧЕННЯ ЕФЕКТИВНОГО ВИКОНАННЯ РІШЕНЬ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

*Pavel Biriukov*

*The Head of the International and European Law Department  
of the Voronezh State University (Russia), Doctor of Legal Sciences,  
Professor*

*Research fields: <http://intern.law.vsu.ru/eng/birukov.html>*

#### **ON THE PROBLEM OF EXECUTION THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS**

***П. М. Бірюков. До проблеми виконання рішень Європейського суду з прав людини. – Стаття.***

У статті розглянуті проблеми виконання і імплементації рішень ЄСПЛ як взагалі, так і в Росії. Увага приділяється питанням справедливих компенсацій, індивідуальних і загальних заходів. У статті міститься огляд російськомовної літератури щодо тематиці дослідження.

*Ключові слова:* Європейський суд з прав людини, виконання рішень, заходи індивідуального характеру, заходи загального характеру.

***П. Н. Бирюков. К проблеме об исполнении решений Европейского суда по правам человека. – Стаття.***

В статье рассмотрены проблемы исполнения и имплементации решений ЕСПЧ как в общем, так и в России. Внимание уделено вопросам справедливых компенсаций, индивидуальных и общих мер. В статье также приводится обзор русскоязычной литературы по тематике исследования.

*Ключевые слова:* Европейский суд по правам человека, исполнение решений, меры индивидуального характера, меры общего характера.

***P. Biryukov. On the problem of execution the European Court of Human Rights judgments. – The Article.***

The article deals with problems of the European Court of Human Rights decisions execution and implementation in common and in Russia. Attention is paid to questions of fair compensation, individual measures and

general measures. The article also contains Russian literature review on the theme of the research.

*Keywords:* European Court of Human Rights, execution of judgments, individual measures, general measures.

The European Court of Human Rights (ECHR) is a mechanism for monitoring the implementation of the international obligations by States. Thus, it contributes to the universalization of national legislation. After the recognition of violations of the Convention by the ECHR, state in accordance with Part 1 of Article 46 of the Convention has: a) to pay compensation; b) to «put an end to the violation and to eliminate its consequences in order to restore, as far as it is possible, the situation existing before the breach» [1], and c) to take «the effective measures to prevent new violations of the Convention similar to the violations that were revealed by orders of the Court [2]. «

### **Fair compensation**

The goal of monetary compensation (the Article 41 of the Convention) consists of compensation for damages only for those violations, which cannot be eliminated any way.

The operative part of the ECHR judgment, which indicates the amount of the payment of fair compensation in itself is mandatory for the national legal order. For the execution of judgments of the European Court a writ of execution is not required.

The Convention does not contain the terms on which it awards compensation, as well as the criteria used in determining its size. However, according to the practice of the Court, we can distinguish the following conditions and criteria for the award of just compensation:

1. The applicant must provide a requirement for the award of just compensation, specifying the amount. If the applicant does not do this, the Court does not consider it necessary to award the compensation its own initiative.

In paragraph 1 of rule 60 of the Rules it is stated that the requirement to pay just compensation in accordance with Article 41 of the Convention should be stated in written comments as a matter of fact. When dealing with certain cases the Chairman of the House suggests the applicant adducing a claim, if it has not been submitted yet, no later than two months after the decision on the admissibility of the complaint.

In case of non-compliance with the specified terms by the applicant the Court may reject the claim for compensation [3].

2. The court is required to provide the proof that the damage actually existed, that the applicant really suffered court costs, which were sent directly to the restoration of the rights guaranteed by the Convention.

The court must also demonstrate the presence of cause – effect relationship between the committed offense of the Convention and the damage, as well as the court costs.

3. The size of the material damage is calculated on the basis of ascertained fact and objective economic data on condition of the proof of its reality and cause-and-effect relationship in violation of the Convention. In the calculation of the damages, it is possible that the Court's decision is based on the decisions of domestic courts.

According to the practice of the Court, the claim for pecuniary damages may also include amounts that the applicant has not received in the national legal system, for example, for non-fulfillment of decisions delivered by the domestic courts. In particular, the judgment in the case of refineries «Countries» and Stratis Andriadis against Greece [4] the Court has decided to award the applicant a certain sum of money, which it was to receive according to the decision made by the national court in its favor, plus any tax that may be imposed on that amount.

4. The issue of the value of non-pecuniary damage is at the discretion of the Court. The court takes into account the severity and duration of the violations committed by the state – defendant, also stress and suffering endured by the applicant.

In some cases connected with non-blatant violations of procedural origin, the Court does not award sums of money for damages because it proceeds from the fact that «a statement of a violation constituted in itself is sufficient for damages [5].»

It should be noted that in deciding on the amount of material and moral damage the Court takes into account two factors: the presence in the national legislation the mechanism of reparation, and the rate of inflation in the Member State concerned.

5. In considering whether to meet legal costs, the Court uses the claimant proof, for example, the payment of advocatory services, transportation, technical and other necessary expenses. It should be noted that it has to be proved that the expenses were reasonable and necessary [6]. The assess of the rationality and necessity of spending in each case is left to the discretion of the Court.

In awarding attorneys' fees, the Court deducts from the amount to be paid, the money spent on legal aid provided by the applicant during the pending case on the basis of rules 91 – 96 of the Rules of Court [7]. The Court never requires that the applicant return the amounts paid in the manner of legal aid, even in cases when violations of the Convention have not been established in the final rule.

Payment of just compensation specified in the court order is carried out «in the national currency of the country – defendant at the date of settlement, plus any tax that may be imposed».

After the decision of the case of Stratis Andriadis against Greece Court began to provide the amount of annual interest to be paid by the state in the event of non-compliance with the three-month period of time (usually according to the official interest rates of the European Central Bank) [8]. These percentages are not appointed for the punishment of the state – defendant, but to maintain the real value of the fees awarded over time.

Usually, the payment of just compensation by the state does not cause difficulties. History of the Convention knows only two exceptions to the successful practice of paying monetary compensation to the states – defendants: the case of refineries, the case of refineries «Country» and Stratis Andriadis against Greece, which has been designated by the biggest financial compensation ever awarded by the European Court of Justice (\$30 million) and the case Loizidou against Turkey [9]. The state has paid compensation to the applicants only one and a half years and five years, respectively, after the adjudication.

Payment of just compensation does not replace the legal obligations of States to take measures to put an end to the violation and to eliminate its consequences.

### **Individual measures**

Individual measures are aimed at stopping the violations going on in time and elimination of violations committed in the past in order to restore as far as it is possible, the situation of the applicant, which took place prior to the violation of the Convention (*restitutio in integrum*).

The most common types of individual measures are re-trial and review of cases by the national courts.

Retrial can afford to fix the solution of internal institutions, which has been recognized by the Court contrary to the Convention on the merits. For example, in the case of banning on the publication

of information in violation of Article 10 of the Convention and the sentencing of the applicant pursuant to the decision suggests, other than the payment of monetary compensation, the repeal of the sentence or the removal of conviction [10]. In consequence of the issued order of the expulsion of a foreign national from the state – defendant in violation of Articles 3 and 8 of the Convention pursuant to the judgment calls for urgent measures to ensure the return of the applicant to the country he had been deported from or cancellation of the expulsion decision [11].

Retrial and review of cases by national courts is an important and effective measure in some cases to eliminate the consequences of violations of the Convention relating to unfair internal procedure [12].

The procedure for reviewing the cases of domestic courts used in violation of both material and procedural norms of the Convention. It should be noted that violations of the material rules can be effectively corrected by administrative actions (for example, clearing (smb) of a criminal record), which eliminates the need to carry out the entire judicial process again.

Currently, the majority of states – members provide in domestic law the legal basis for the review of judicial decisions in case the European Court of Justice finds violations of the Convention (such standards are developed, for example, in Austria, Belgium, Denmark, Spain, Slovakia, etc.).

Other individual measures include: the abolition of the court decision (such as confiscation of property [13]), the decision to reduce the sentence, the reinstatement of the employee in the position [14], the exclusion from the criminal case of illegally obtained information [15].

However, the individual measures by their nature are not a panacea, and the limits of their use are limited. The practical application of these measures may cause harm to third parties, particularly in civil cases. In cases when the resumption of the proceedings raise questions about the fate of sentences of persons involved in the case, but did not apply to the Court. Moreover, the application of such measures inevitably involves changing the timing of the final examination of the case in court.

### **General measures**

General measures are the measures taken by the state to prevent further violations of the Convention in the future, such as those that have been identified in the Court's judgments.

General measures require more precise analysis of the causes of the violation of the Convention by the public authorities (judicial, legislative and executive).

Changes to the judicial practice. Most of the violations of the Convention are connected with the enforcement practice of public authorities, in particular the courts. Bringing the judicial practice into line with the Convention is a necessary measure of a general nature and can lead to a significant reduction in the number of violations of rights that could potentially be the subject of discussion at the European Court.

In practice, the non-application of domestic law, contrary to the provisions of the Convention and / or the adoption of a new interpretation of the law often become an acceptable means for the direct implementation of the obligation to prevent further violations [16].

In the majority of states – participants the courts are applying the Convention in view of judgments of the European Court and thereby give these regulations the direct action in domestic law. In many cases, the direct effect of judgments of the European Court allows to prevent a breach of the Convention by the state towards its own citizens automatically, and sometimes to other countries – members. As an example, the judgment of November, 10, 1980 the Regional Court of Luxembourg, who, applying the decision of the European Court in the case of Marx, ruled that the two children born out of wedlock have the same rights to property as if they were legitimate [17].

Thus, the key role in the adoption of general measures in performance the judgments of the European Court of Justice by the state belongs to the judicial power, which directly integrates the requirements of the Convention into domestic law, without waiting for other branches of government doing the same.

Legislative changes. The precedent practice of the ECHR makes a great contribution to the harmonization of national legislation, encourages parliamentarians to verify compliance with the Convention.

In order to reduce the time of the trial the court system in Spain, Portugal and Italy was significantly reformed, and in Nordic countries administrative proceedings underwent some transformations. Most often, the resolutions of the European Court lead to increased due process of law of citizens, especially in the area of criminal law and the rules of imprisonment. Legislation is also reformed to guarantee the rights of the mentally ill, children out of wedlock, etc.

Some of the Court's judgments necessitate amendments to the Constitution of the state – defendant [18]. In this case, of course, it can be difficult, as in many states changes to the Constitution are made on the basis of the results of a nation-wide referendum [19].

However, states are interested in speeding up the process of amending the legislation that will prevent similar violations of the Convention's provisions.

*Other measures of a general nature.* The translation and publication of ECHR decisions in legal publications or central print and dispatch of the orders to the appropriate authorities or agencies may sometimes be sufficient for their execution, as usually the authorities automatically take into account the published decision and, therefore, prevent similar violations in their practice. The United Kingdom may be an example: there the ECHR judgments are published in Reports on violations of human rights, and due to this a general report is made, which, in its turn, is discussed in Parliament. In Turkey, the judgment can be found in the Official Journal of the Minister of Justice.

Among other general measures practical activities can be pointed out. These, for example, are an increase in the judiciary [20], training of police [21] and etc.

The measures taken by the state – the defendant depend on decisions made by the Court. However, the state is obliged to provide the controlling bodies of the execution of the Court's specific result execute the judgment of the Court and put an end to such violations of the Convention.

In its decisions, the Court has repeatedly pointed out to the need for strict enforcement of the judgment. In particular, in the case of Hornsby against Greece [22], the Court noted that the right to a fair trial guaranteed by Article 6, would be «illusory if the state legal system allowed the final, binding judicial decision to remain inoperative to the detriment of one party.» According to the Court, «execution of a judgment given by any court must be regarded as an integral part of the «trial» within the meaning of Article 6.» The Court found that «the right to execute based on the principle of the rule of law.»

This conclusion also applies to the enforcement of decisions of international courts, including the European Court of Justice.

The principle of compulsory of judgments of the European Court provided for in Article 46 of the Convention, according to which «The

High Contracting Parties oblige to abide the final judgment of the Court in cases in which they are parties.”

According to the provisions of Part 1 of Article 46 of the Convention the judgment should be binding. Obligation to comply with the decisions does not exist in isolation: The Convention provides for a mechanism for «monitoring the performance of» judgments of the Court, as specified in Part 2 of Article 46 of the Convention.

As a matter of fact, the Committee of Ministers may raise the question of the further presence of the state in the Council of Europe (Article 8 of the Statute of the Council of Europe). Constant failure to regulations could be interpreted as a serious violation of the «principle of the rule of law and the principle according to which all persons within its jurisdiction should exercise human rights and fundamental freedoms» within the meaning of Article 3 of the Statute.

Thus, the recognition of the binding nature of ECHR decisions, as well as control over the execution of the Court states – participants of their obligation underlie the entire mechanism of the Convention and are subject to important difference between this Agreement from other international legal acts.

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