

INTERNATIONAL STANDARDS ON THE INDEPENDENCE, EFFICIENCY AND QUALITY OF JUSTICE

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On 26 September 2016, the International Commission of Jurists (ICJ), in cooperation with the Institute of Law and Public Policy (ILPP), held a round table discussion in Moscow on *Independence, Efficiency and Quality of Justice*. ICJ international and Russian national experts, including judges from Russia, Norway, the Netherlands and Italy, discussed a range of issues related to the efficiency of the judiciary, the allocation of cases, the quality and enforcement of court decisions and related topics. The meeting allowed Russian and foreign judges and lawyers to share their experiences and discuss key aspects of organization of the judiciary.

In Russia, there is a complex and highly distinctive system of judicial administration with procedures in place regulating judicial selection, appointment, promotion and disciplinary proceedings.¹ Yet, it is striking that most of the judgments of the European Court of Human Rights finding violations of the European Convention of Human Rights (ECHR) by the Russian Federation concern the right to a fair trial under Article 6 of the Convention. Russia is second only to Turkey in the number of violations of Article 6 ECHR found by the Court each year.²

Participants at the seminar discussed the continuing low levels of public trust in the judiciary in the Russian Federation and the need for further reforms to ensure that the judiciary can discharge its role as a true guarantor of the rule of law and human rights. Concerns exist not only in regard to the guarantees that directly relate to the fairness of court hearings, but also as regards the organization of the judiciary. While these institutional aspects are less often addressed in individual cases, they are essential to uphold the right to a fair trial under Article 6 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as well as other international standards on the independence of the judiciary and fairness of court proceedings.

The organization of the judiciary and of its caseload must ensure that the judicial system upholds a high standard of decision-making that meets the requirements of a fair trial, provides effective access to justice, including access to effective remedies and reparation, and ensures accountability for crimes involving violations of human rights. Participants at the seminar noted that one aspect of the right to fair trial which requires particular attention in the Russian Federation is the quality of judicial decisions and that this is related to reasonable working conditions including the caseload for judges. It was noted that there seems to be a considerable difference between the caseload of Russian judges and of judges in the systems of the international experts who took part in the event. The caseload of Russian judges is disproportionately heavy. Adequate time for the consideration of each case is one of the conditions for ensuring the quality of a judgment that complies with Article 6 ECHR (see below). The caseload of every judge should allow her or him to administer justice by adopting adequately reasoned decisions, also integral to the enjoyment of other fair trial rights including review and appeal.

¹ International Commission of Jurists, 'Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014', page 58 available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf>. Also see: International Commission of Jurists, 'Securing justice: The disciplinary system for judges in the Russian Federation Report of an ICJ mission', available at URL: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf>.

² See the ECtHR statistics, 'Violations by article and respondent State 1959-2015', available at URL: http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf.

When judges are under pressure from heavy caseloads, the short of time that a judge has to spend on each case may mean that he or she is prevented from giving the necessary consideration to the facts and law, and that instead of delivering justice in individual cases, judges' primary function becomes one of rubberstamping decisions. Solutions may include changes to the jurisdiction of courts, reforms of case management procedures, changes to the systems for selection and training of judges and better enforcement of judgments that will result in diminished caseload. However, when addressing the problem of time for judges, it is important to take account of the obligation of the State to ensure that justice remains accessible and that access to court is not unduly restricted.

The present paper aims to provide an analysis of relevant international law and standards applicable to the topics discussed at the round table, including assessment of the work of judges and its impact on judicial independence; assignment of cases; quality of judgments; and enforcement of judgments. The paper sets out the international and European regional law and standards related to these key aspects of the internal functioning of the judiciary, which should serve as guidelines for policy makers and practitioners in the Russian Federation when assessing national legislation and practice in regard to these issues. The paper makes recommendations in light of the international law and standards analyzed, having particular regard to the challenges within the Russian judicial system, discussed at the round table.

FAIR TRIAL AND INDEPENDENCE OF THE JUDICIARY

At the heart of all of the questions considered at the round table is the need for a judiciary that is independent and accountable, and that can fully discharge its central role in protecting and upholding human rights. In accordance with international human rights law, everyone has a right to a fair and public hearing by a competent, independent and impartial tribunal established by law.³ Independence of the judiciary is protected as an element of the right to a fair trial under international and regional human rights treaties,⁴ including the ICCPR and the ECHR, which guarantee the right to a hearing by an "independent and impartial tribunal".

As reaffirmed in a recent UN Human Rights Council resolution:

"an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly, and the integrity of the judicial system are prerequisites for the protection of human rights and the application of the rule of law, and for ensuring fair trials and the administration of justice without any discrimination".⁵

Judicial independence requires both individual independence of judges and institutional independence of the judiciary as a whole.⁶ Institutional independence refers to independence from other branches of power, and individual independence refers to the

³ Among many other authorities see ICCPR, Article 14 and ECHR, Article 6.

⁴ Universal Declaration of Human Rights, Article 10, the International Covenant on Civil and Political Rights, Article 14, European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6; the Charter of Fundamental Rights of the European Union, Article 47; the American Declaration of the Rights and Duties of Man, Article XXVI; the American Convention on Human Rights, Article 8; the African Charter on Human and Peoples' Rights, Articles 7; the Arab Charter on Human Rights, Article 13; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

⁵ UN Human Rights Council Resolution 29/6 (2015) on independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc A/HRC/29/6 (2015).

⁶ Consultative Council of European Judges, 'Magna Carta of Judges (Fundamental Principles)', Strasbourg, 17 November 2010, CCJE (2010)3 Final, para. 3.

independence of a particular judge.⁷ These two aspects of judicial independence are interlinked since independence of individual judges can only be ensured where there is sufficient institutional protection of the independence of the judiciary.⁸

It is equally vital that the independence of individual judges is protected from undue influence from within the judiciary itself.⁹ Therefore, judicial independence requires not only guarantees against external pressure on judges but equally importantly internal procedural safeguards.¹⁰

Regulation of almost every aspect of the judicial career can affect judicial independence.¹¹ As noted by the UN Human Rights Committee, it may be affected by, amongst other things, "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature".¹² Remuneration of judges and financing of the judiciary are also key to its independence.¹³

Assessment of the work of judges, case assignment, quality of judgments and their enforcements are intrinsically linked to the fairness of the proceedings and judicial independence depends directly on these aspects of the functioning of the judiciary.

EVALUATION OF JUDICIAL PERFORMANCE

There is no universal approach to evaluation of judicial performance: it may be considered to be a prerequisite of judicial independence in one country and could be incompatible with it in another.¹⁴ According to the Consultative Council of European Judges (CCJE) Opinion On the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence (CCJE Opinion No 17), where they exist, methods of evaluation of judges vary and are linked to the way the judicial system has evolved in a particular country.¹⁵ "Evaluation" may include formal and structured evaluation systems applying defined criteria or more informal systems for gathering information about the quality of work of a judge.¹⁶ In a formal evaluation there is a defined aim, criteria for evaluation, structure of the evaluating body and its procedures as well as legal and/or practical consequences as a result of an evaluation.¹⁷ An informal evaluation does not have these elements and may not necessarily have direct consequences for the judge

⁷ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, ICJ Practitioners' Guide No 1 (2007), p.21, available at URL: <http://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>. On institutional independence see *Beaumartin v. France* (1994) ECHR 40, para. 38; and on individual independence see *Sramek v. Austria* (1984) ECHR 12, para. 42.

⁸ Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, para. 4.

⁹ Consultative Council of European Judges, Opinion No. 1 (2001), CCJE (2001) OP No 1, para. 66; and European Commission for Democracy Through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, paras. 68-72.

¹⁰ *Langborger v. Sweden* (1989) ECHR 11, para. 32; and *Kleyn and Others v. The Netherlands* (2003) ECHR 226, para. 190.

¹¹ CCJE Opinion No 1 (2001), op cit, para. 11.

¹² Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC32 (2007), para. 19; *Langborger v. Sweden* (1989) ECHR 11, para. 32; *Kleyn and Others v. The Netherlands* (2003) ECHR 226, para. 190.

¹³ Magna Carta of Judges, op cit.

¹⁴ Consultative Council of European Judges, Opinion No 17, 16 December 2014, para. 22.

¹⁵ Ibid, paras. 21-22.

¹⁶ Ibid, para. 8.

¹⁷ Ibid, para. 9.

evaluated.¹⁸ An informal gathering of information about a judge's performance for promotion may also be considered as an evaluation.¹⁹

The aim of any kind of evaluation should be to maintain and improve the quality of the work of judges and therefore the judiciary as a whole²⁰ and to maintain "total respect for judicial independence".²¹ Therefore, evaluation of judges "should not be seen as a tool for policing judges, but on the contrary, as a means of encouraging them to improve, which will reflect on the system as a whole".²² General conditions of the work of judge should be taken into account in the evaluation, so that poor working conditions of judges that are beyond their control do not negatively impact upon the evaluation.²³

Evaluation should be based on objective criteria published by a competent judicial authority.²⁴ CCJE Opinion 17 explains, in particular, that "[o]bjective standards are required not merely in order to exclude political influence, but also for other reasons, such as to avoid the risk of a possible impression of favoritism, conservatism and cronyism, which exist of appointment/evaluations are made in an unstructured way or on the basis of personal recommendations".²⁵ These criteria should "be based on merit, having regard to qualifications, integrity, ability and efficiency".²⁶

The criteria for evaluation should not be purely quantitative. For example, the Kyiv Recommendations specify that: "[t]he evaluation of judges' performance shall be primarily qualitative and focus upon their skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead. These same skills should be cultivated in judicial training programmes, as well as on the job."²⁷ In its Opinion on an Armenian Draft Law Amending and Supplementing the Judicial Code, the Venice Commission noted:

"The proposal, under Article 96.2.9, to measure the average duration of examination of cases is inappropriate for similar reasons to those already referred to above, in relation to the counting of cases in general. Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? The use of such a managerial tool in the evaluation process should be

¹⁸ Ibid, para. 10.

¹⁹ Ibid, para. 10.

²⁰ Ibid, para. 24.

²¹ Ibid, para. 6; European Network of Councils for the Judiciary, 'Distillation of ENCJ Guidelines, Recommendations and Principles, Report 2012-2013, para. 41, available at URL: http://www.ejtn.eu/Documents/encj_distillation_report_2004_2016.pdf; Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Judicial Administration, Selection and Accountability, Kyiv, 23-25 June 2010, para. 27, available at URL: <http://www.osce.org/odihr/KyivRec?download=true>.

²² European Commission for Democracy Through Law (Venice Commission), Joint Opinion on the Draft Law Amending and Supplementing the Judicial Code (Evaluation System for Judges) of Armenia adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), Opinion No 751/2013, para. 24, available at URL: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)007-e).

²³ CCJE Opinion No 17, op cit, para. 26.

²⁴ CCJE Opinion No 17, op cit, para. 31; Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, para. 58.

²⁵ CCJE Opinion No 17, op cit, para. 31; CCJE Opinion No 1, op cit, para. 24.

²⁶ CCJE Opinion No 17, op cit, para. 31; CCJE Opinion No 1, op cit, para. 25.

²⁷ Kyiv Recommendations, op cit, para. 27. See also: OSCE ODIHR, Expert meeting on judicial independence in Eastern Europe, South Caucasus and Central Asia. Challenges, Reforms and Ways Forward, Kyiv, 23-25 June 2010, p.14, available at URL: <http://www.osce.org/odihr/71178?download=true>.

approached with great caution, as it will affect the judge's independence. The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it."²⁸

It is an important principle that life-tenure should not be jeopardized because of an unfavorable evaluation. The Council of Europe Committee of Ministers has recommended that: "A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions".²⁹ In particular, a decision of a case should never be a basis for a sanction.³⁰ Accordingly, the Kiyev Recommendations state: "Judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal)".³¹ In any event, it should be the methodology that a judge applies, rather than legal merits of individual decisions, that should be the focus of any evaluation (on the quality of judicial decisions, see below).³²

Key observations and recommendations:

The evaluation of judicial performance is a delicate issue that can undermine or uphold judicial independence and efficiency depending on its goals, criteria and implementation. In any event, any evaluation should be fully compatible with the security of tenure of judges and their irremovability, so as not to put at risk the independence of judges.

In the Russian Federation, evaluation of judicial performance is carried out by Qualification Commissions of Judges (QCJ) in particular when "qualification classes" are designated to judges.³³ Court presidents play a significant role in the evaluation of judges. Safeguards need to be put in place to ensure that the procedure of evaluation is transparent and is based on clear criteria objectively applied in a particular case. Currently, in Judicial Qualifying Evaluations, QCJs evaluate judges' professional skills and ability to apply them in the administration of justice, judicial efficiency, professional and moral qualities and compliance with the judicial requirements established by the Status of Judges Act and the Code of Judicial Ethics.³⁴ Russia's unusually low level of acquittals in criminal cases of around one per cent is partly attributed by experts and judges themselves to the system of judicial evaluation.³⁵ Therefore, criteria for evaluation should not include a high acquittal rate,³⁶ as this may undermine an independent evaluation of fact and law by judges in individual cases.

ASSIGNMENT OF CASES

²⁸ Venice Commission Joint Opinion on the Draft Law Amending and Supplementing the Judicial Code (Evaluation System for Judges) of Armenia, op cit, para. 43.

²⁹ Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12, para. 50.

³⁰ CCJE Opinion No 17, op cit, para. 28.

³¹ Kyiv Recommendations, op cit, para. 28.

³² CCJE Opinion No 17, op cit, para. 35.

³³ On "qualification classes" and related procedures see: Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014, op cit, pp.45-48.

³⁴ Regulation on qualification collegia of judges, adopted by the High Qualification Collegia of Judges of the Russian Federation on 22 March 2007, Article 25.1 para. 5.

³⁵ On "qualification classes" and related procedures see: Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014, op cit, p.48.

³⁶ Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014, op cit, p.48.

While there is no universal standard that should be applied to the system of allocation of cases to individual judges, it should be the fundamental rule that the system of assignment of cases does not undermine the independence of courts and judges who adjudicate those cases. The mechanism itself should be independent of external influence and, as specified by the UN Basic Principles on the Independence of the Judiciary, “[t]he assignment of cases to judges within the court to which they belong is an internal matter of judicial administration”.³⁷

The European Network of Councils for the Judiciary developed a number of criteria to be met by the system of allocation of cases, which include compatibility with Article 6 ECtHR, a method that ensures fair and time-efficient administration of justice and public confidence, objective criteria and uniformity.³⁸ According to these standards there should be an established method of allocation of cases that should be made available to the public.³⁹ The standards mention the President, Senior Judge of the Court or a Court Board among those who can allocate cases, although the practical arrangements for the allocation of cases can be delegated to another judge or a civil servant authorised for the purpose of the allocation of cases.⁴⁰

³⁷ UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985, and endorsed by General Assembly resolutions 40/32 (1985) and 40/146 (1985), Principle 14.

³⁸ European Network of Councils for the Judiciary, ‘Minimum Judicial Standards IV. Allocation of Cases,’ ENCJ Report 2013-2014, available at URL: https://www.encj.eu/index.php?option=com_content&view=article&id=179:allocationofcases&catid=11&Itemid=229. The report sets out the following 11 standards for the allocation of cases:

“1. All cases should be allocated on a basis that is compatible with Article 6 ECHR.

“2. There should be an established method of allocation of cases. The method of allocation should be made available to the public. This method of allocation may be governed by statute, regulation or judicial or administrative practice.

“3. The method for the allocation of cases should ensure the fair and time efficient administration of Justice, and the enhancing of public confidence.

“4. The following principles and criteria to be applied in the allocating of cases should be taken in to account in all established methods of allocation, including administrative or electronic allocation, and allocation by a senior judge, Presiding Judge or President of a Court.

“5. The principles and criteria to be considered in the methodology for allocating cases should be objective and include:

“6. When considering complexity, it may be defined as including some or all of the following factors:

“7. The method of allocation should be applied uniformly according to the criteria in paragraph (5); differences in the application of the principles and criteria may be required due to the nature of the jurisdiction, the size of the Court, the level of the Court and the judicial district where the case is heard.

“8. Allocation should be the responsibility of the President, Senior Judge of the Court or a Court Board, but the practical arrangements for the allocation of cases can be delegated to either another judge or a civil servant authorised for the purpose of the allocation of cases.

“9. The motivation/reasoning for any derogation from the established method of allocation should be recorded.

“10. The method for the allocation of cases should comply with the principles and criteria set out herein whether the Judge is sitting alone or as part of a panel. When Judges sit as a panel it is the combined composition of the panel that should comply with the principles and criteria.

“11. The parties to a case are entitled to be informed about the allocation of the case at a time prior to the start of the hearing/consideration of the case that is reasonable taking into account the nature and complexity of the case, and the time by which the party has to exercise any right to challenge the allocation of the case to the specific Judge/Judges. This may be done in writing, electronically, or by the publishing of a Court list or any other means”.

³⁹ ENCJ Report 2013-2014, *ibid*, para. 2.

⁴⁰ ENCJ Report 2013-2014, *ibid*, para. 8.

Cases should be allocated to judges in accordance with objective pre-established criteria.⁴¹ They should not be withdrawn from a particular judge without valid reasons,⁴² such as serious illness or conflict of interests.⁴³ Decisions on the withdrawal of cases should only be taken on the basis of pre-established criteria following a transparent procedure.⁴⁴ A decision to withdraw a case from a judge should be taken by an authority that has the same level of independence from external pressure and interference as judges.⁴⁵ Where court presidents have a role in the allocation of cases among the members of the court, CCJE Opinion No 19 provides that these principles should be followed.⁴⁶

Unlike Council of Europe standards, the OSCE Kiev Recommendations unambiguously disallow distribution of cases by court presidents: "Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons. One example is case assignment, which should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with".⁴⁷

The ECtHR, in *Moiseyev v Russia*, stressed that although the system of assignment of cases falls within a State's margin of appreciation, authorities must ensure that whatever system is adopted is compatible with Article 6(1) of the European Convention:

"The Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. The assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters. There is a wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests, accessibility of the place of hearings for the parties etc., which the authorities must take into account when assigning a case. Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to (re)assign a case to a particular judge or court, the Court must be satisfied that such (re)assignment was compatible with Article 6 § 1, and, in particular, with its requirements of objective independence and impartiality".⁴⁸

This approach echoes the Court's earlier decision in *Bochan v Ukraine*, where the Court concluded that:

"Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to assign a case to a particular judge or court, the Court must be satisfied that such reassignment was compatible with Article 6 § 1, and, in particular, with its requirements of objective independence and impartiality".⁴⁹

Key observations and recommendations:

While most international standards do not rule out a role for court presidents in the allocation of cases, if they have a role, their decisions should be based on established criteria and should comply with the right

⁴¹ Consultative Council of European Judges, Opinion No 19 (2016), The Role of Court Presidents, CCJE(2016)2, para. 21.

⁴² CCJE Opinion No 19, *ibid*, para. 21.

⁴³ Committee of Ministers of the Council of Europe, Recommendation No. R(94)12 on the Independence, Efficiency and Role of Judges, Principle I.2(f).

⁴⁴ CCJE Opinion No 19, *op cit*, para. 21.

⁴⁵ Recommendation No. R(94)12, *op cit*, Principle I.2(f).

⁴⁶ CCJE Opinion No 19, *op cit*, para. 21.

⁴⁷ Kyiv Recommendations, *op cit*, para. 12.

⁴⁸ *Moiseyev v. Russia* (2008) ECHR 1031, para. 176.

⁴⁹ *Bochan v Ukraine*, Application No 7577/02, ECtHR judgment of 3 May 2007, para 71.

to fair trial, including by ensuring judicial independence and impartiality. In countries where judicial or organizational culture means that assignment of cases by court presidents may undermine or threaten judicial independence, contrary to the right to fair trial as protected under Article 6 of the ECHR, it is advisable that court presidents are excluded from allocation of cases as recommended by the Kiev Recommendations.

Although this function is not prescribed in law, case assignment in Russia is predominantly undertaken by court presidents, which in practice may undermine independence of judges if cases are assigned to a judge in order to achieve a particular outcome in a case.⁵⁰ Court presidents also have ultimate powers to withdraw a case from a judge. The ICJ reiterates its previous recommendation that a clear, transparent, credible system of automatic allocation of cases is introduced in courts to uphold independence of those judges deciding on individual cases as well as the judiciary as a whole.⁵¹

QUALITY OF JUDGMENTS

Fair trial rights require and depend on a high quality of judgments based on clear reasoning and analysis.⁵² Among other things, a reasoned decision serves as a safeguard against arbitrariness.⁵³ It also allows parties make effective use of any existing right to appeal.⁵⁴ While the ECtHR has held that States have a certain margin of appreciation about the arguments used and evidence accepted, reasons for decisions should be given.⁵⁵

The quality of the court hearing is an important factor in ensuring that the decision is reasoned. The proper development of the proceedings is conducive to the quality of the decision.⁵⁶ A court hearing that complies with all corresponding ECHR requirements has a direct impact on the parties' and society's understanding and acceptance of the final decision and of the proper administration of justice.⁵⁷ It should also give the judge all the elements necessary for the proper assessment of the case and thus has a critical impact on the quality of the judicial decision. The ECtHR has held that "unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing under Article 6 § 1 implies a right to an oral hearing at least before one instance".⁵⁸

A decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation and it must be effectively enforceable.⁵⁹ Irrespective of the judicial system and practice

⁵⁰ Securing justice: The disciplinary system for judges in the Russian Federation Report of an ICJ mission, op cit, p.5; International Commission of Jurists, The State of the Judiciary in Russia. Report of the ICJ Research Mission on Judicial Reform to the Russian Federation on 20-24 June 2010, p.23, available at URL: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf>.

⁵¹ The State of the Judiciary in Russia, ibid, p.36.

⁵² *H. v. Belgium* (1987) ECHR 30, para. 53; OPINION No.11, para. 3.

⁵³ Consultative Council of European Judges, Opinion No 11, The Quality of Judicial Decisions, para. 35.

⁵⁴ *Hirvisaari v. Finland* (2001) ECHR 559, para. 30.

⁵⁵ *Suominen v. Finland* (2003) ECHR 330, para. 36.

⁵⁶ CCJE Opinion No 11, op cit, para. 25.

⁵⁷ CCJE Opinion No 11, op cit, para. 29.

⁵⁸ *Salomonsson v. Sweden* (2002) ECHR 736, para. 36; *Fischer v. Austria* (1995) ECHR 11, para. 44.

⁵⁹ CCJE Opinion No 11, op cit, para. 30.

in different countries, judicial decisions must meet a number of requirements in relation to which some common principles can be identified.⁶⁰ The Magna Carta of Judges prescribes that court documents and judicial decisions must be drafted "in an accessible, simple and clear language. Judges shall issue reasoned decisions, pronounced in public within a reasonable time, based on fair and public hearing. Judges shall use appropriate case management methods."⁶¹

The quality of a judicial decision depends principally on the quality of its reasoning.⁶² At the same time, proper reasoning requires that judges have sufficient time to prepare their decisions.⁶³ Proper reasoning should never be neglected in the interests of speed in issuing a judicial decision but should be considered to be "an imperative necessity".⁶⁴ Consistent, clear, unambiguous and not contradictory reasons must allow the reader to follow the chain of reasoning which led the judge to the decision.⁶⁵

The reasoning must reflect the judges' compliance with the principles enunciated by the ECtHR, in particular on the right to a fair trial.⁶⁶ To respect the principle of a fair trial, the reasoning should demonstrate that all the main issues submitted to the judge have been actually examined.⁶⁷ A judicial decision should include an examination of the factual and legal issues lying at the heart of the dispute,⁶⁸ as well as objections to them.⁶⁹ Pleas that concern rights guaranteed under international human rights treaties should be considered with particular rigour and care.⁷⁰ However, "while Article 6 § 1 obliges the courts to justify their decisions, it cannot be understood as requiring a detailed answer to each argument".⁷¹ The extent of this duty may vary depending on the nature of the decision.⁷² Yet, where a party's submission is decisive for the outcome of the case, a specific and express reply should be provided in the judgment.⁷³

Importantly, both national and international law should be applied in this examination, including national Constitutions, international case-law or that of the courts of other countries, as well as reference to legal literature.⁷⁴ This requires that international and European legislation and case-law "must be properly understood by judges in order to perform their judicial functions according to the principle of the rule of law shared by democratic countries".⁷⁵ When interpreting the law, judges should take into account the principle of legal certainty.⁷⁶ Judges should in general apply law consistently and

⁶⁰ CCJE Opinion No 11, op cit, para. 7.

⁶¹ Magna Carta of Judges, op cit, 16.

⁶² CCJE Opinion No 11, op cit, para. 34.

⁶³ CCJE Opinion No 11, op cit, para. 34.

⁶⁴ CCJE Opinion No 11, op cit, para. 34.

⁶⁵ CCJE Opinion No 11, op cit, para. 36.

⁶⁶ CCJE Opinion No 11, op cit, para. 37.

⁶⁷ CCJE Opinion No 11, op cit, para. 41.

⁶⁸ CCJE Opinion No 11, op cit, para. 42.

⁶⁹ CCJE Opinion No 11, op cit, para. 43.

⁷⁰ *Wagner and J.M.W.L. v. Luxembourg*, Application No. 76240/01, Judgment of 28 June 2007, para. 96; CCJE Opinion No 11, op cit, para. 37.

⁷¹ *Affaire Boldea c. Roumanie*, Requête No 19997/02, Définitif de 15 février 2007, para. 29. See also: CCJE Opinion No 11, op cit, para. 41; *Van De Hurk v. The Netherlands* (1994) ECHR 14, para. 61; *Garcia Ruiz v. Spain* (1999) ECHR 2, para. 26; *Perez v. France* (2004) ECHR 72, para. 81.

⁷² *Affaire Boldea c. Roumanie*, *ibid*, para. 29; *Ruiz Torija v. Spain* (1994) ECHR 47, para. 29; *Hiro Balani v. Spain* (1994) ECHR 45, para. 27. See also CCJE Opinion No 11, op cit, para. 41.

⁷³ *Ruiz Torija v. Spain*, *ibid*, para. 30; *Hiro Balani v. Spain*, *ibid*, para. 28.

⁷⁴ CCJE Opinion No 11, op cit, para. 44; *Ruiz Torija v. Spain*, *ibid*, para. 29, para. 27.

⁷⁵ Consultative Council of European Judges, Opinion No 9 (2006), Role of national judges in ensuring an effective application of international and European law, CCJE(2006)7, para. 7.

⁷⁶ CCJE Opinion No 11, op cit, paras. 46-47.

departure from previous case-law should be clearly mentioned in a decision, with reasons given for such departure.⁷⁷

Judges are not the only factor that affects the quality of the decision.⁷⁸ The quality of a judicial decision depends not only on the individual judge, but also on a number of factors outside the process of administering justice including the quality of legislation, the adequacy of the resources provided to the judicial system and the quality of legal training.⁷⁹ In particular, however, the quality of a decision depends on the ability of a judge to decide freely on and to dispose effectively of resources such as the time needed.⁸⁰ The enforcement stage is of equal importance for the quality of decisions (see below).⁸¹ The quality of judicial decisions also depends on internal factors: judges' professionalism, procedures, case management, hearings and elements inherent to the decision.⁸²

Key observations and recommendations:

The quality of a judicial decision does not stand independently from the court proceedings in the case but is inherently linked to and follows from the conduct and fairness of these proceedings. A well-reasoned decision that clearly takes account of the arguments of the parties and genuinely scrutinizes them is a safeguard that demonstrates that the judge has carried out his or her role of delivering justice through a fair application of law. The ability to deliver such a judgment may depend on factors such as resources, including the time that each judge has at his or her disposal to decide on a case.

It is of crucial importance that judicial decisions in the Russian Federation are appropriately reasoned and that the arguments of both sides are considered with equal weight when evaluating them. One of the key obstacles in this regard is the apparent overload in work of Russian judges who have to cope with a tremendous amount of cases. In practice, this may make it impossible for the judge to provide reasons for the decision in a way that complies with fair trial standards and at the same time meets time pressure demands. It is therefore important that judges are allocated a manageable caseload to make sure that access to justice is not impeded by excessive workload.

ENFORCEMENT OF JUDGMENTS

It is an integral part of the right to a fair trial as guaranteed under ECHR Article 6⁸³ that the enforcement of court judgments is guaranteed.⁸⁴ Otherwise, as the ECtHR has held, the provisions of Article 6(1) would be deprived of all useful effect.⁸⁵ The effective

⁷⁷ CCJE Opinion No 11, op cit, paras. 49.

⁷⁸ CCJE Opinion No 11, op cit, para. 15.

⁷⁹ CCJE Opinion No 11, op cit, para. 10.

⁸⁰ CCJE Opinion No 11, op cit, para. 13.

⁸¹ CCJE Opinion No 11, op cit, para. 15.

⁸² CCJE Opinion No 11, op cit, para. 20.

⁸³ Committee of Ministers of the Council of Europe, Recommendation Rec(2003)17 on enforcement; Consultative Council of European Judges, Opinion No 13 (2010) on the role of judges in the enforcement of judicial decisions, para. 7.

⁸⁴ European Commission on the Efficiency of Justice, Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on enforcement, CEPEJ(2009)11REV2, 9–10 December 2009, para. 25; *Hornsby v. Greece* (1997) ECHR 15, para. 40; *Scordino v. Italy (No. 1)* (2006) ECHR 276, para. 196.

⁸⁵ *Burdov v. Russia* (2002) ECHR 432, paras. 34 and 37.

enforcement of a binding judicial decision is a fundamental element of the rule of law.⁸⁶ The rule of law and public confidence in the courts depend on an effective and fair enforcement processes.⁸⁷ The Magna Carta of Judges stipulates that “[t]he enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice”.⁸⁸ Judicial independence⁸⁹ is compromised if the decision is not enforced.⁹⁰

Enforcement action must be proportionate, fair and effective.⁹¹ Resolution No 3 of a Conference of European Ministers of Justice held in Moscow stated in this regard that: “proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, reinforce and develop a strong and respected judicial system”.⁹² This resolution specified a number of principles that should be respected for a procedure to be effective and efficient:

- a. Enforcement should be defined and underpinned by a clear legal framework, setting out the powers, rights and responsibilities of the parties and third parties;
- b. Enforcement should be carried out in compliance with the relevant law and judicial decisions. Any legislation should be sufficiently detailed to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible.⁹³

Opinion No 11 of the CCJE specifies the following characteristics of an enforceable decision:

- “(i) It must first of all, where relevant, be enforceable in terms of wording: this means that the decision must include operative provisions that clearly state, without any possibility of uncertainty or confusion, the sentence, obligations or orders imposed by the court. An obscure decision which is open to different interpretations impairs the effectiveness and credibility of the judicial process.
- “(ii) An order must also be enforceable under the relevant system of execution: that is how it will be effectively executed. There are in most legal systems procedures whereby execution may be stayed or suspended. A stay or suspension is undeniably legitimate in some cases. But it can be sought for tactical purposes, and the inappropriate grant of a stay or suspension can lead to paralysis of the judicial process and permit procedural strategies designed to make court decisions inoperative. To ensure the efficiency of justice, all countries should have procedures for provisional enforcement.”⁹⁴

⁸⁶ CCJE Opinion No 13, op cit, para. 7.

⁸⁷ Guidelines for a Better Implementation of the Existing Council of Europe’s Recommendation on enforcement, op cit, para. 6; CCJE Opinion No 13, op cit, para. 7.

⁸⁸ Magna Carta of Judges, op cit, 17.

⁸⁹ See CCJE Opinion No 13, op cit, which states at para 12: “The very notion of an “independent” tribunal set out in Article 6 of the ECHR implies that its power to give a binding decision may not be subject to approval or ratification, or that the decision may not be altered in its content, by a non-judicial authority, including the Head of State”.

⁹⁰ CCJE Opinion No 13, op cit, para. 7.

⁹¹ CCJE Opinion No 13, op cit, para. 25.

⁹² 24th Conference of European Ministers of Justice, held in Moscow on 4 and 5 October 2001, Resolution No 3 on “General approach and means of achieving effective enforcement of judicial decisions”, available at URL: <http://www.coe.int/en/web/human-rights-rule-of-law/mju24-2001-moscow>.

⁹³ Resolution No. 3 of the 24th Conference of European Ministers of Justice on a “General approach and means of achieving effective enforcement of judicial decisions”, held in Moscow on 4 and 5 October 2001, para. III.1.a,b.

⁹⁴ CCJE Opinion No 11, op cit, para. 55.

It is of particular importance that administrative bodies comply with court judgments.⁹⁵ A refusal of a State body to comply with a judgment undermines the rule of law.⁹⁶ In particular, as stated by the ECtHR, "a person who has obtained an enforceable judgment against the state as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed".⁹⁷ Criminal, disciplinary prosecution and civil liability procedures should be available against officials to whom refusal or delay of execution is attributable.⁹⁸ In criminal matters, there should be a full implementation of criminal⁹⁹ sanctions or penalties regardless of the nature of the sentence.¹⁰⁰ When higher courts' rulings on the correct interpretation of the law, which should form the legal basis for future decisions, are disregarded by lower authorities, this is contrary to proper administration of justice.¹⁰¹

There should not be a postponement in enforcement of a judgment except when such postponement is prescribed by law.¹⁰² It should be swift and effective, which requires funds to be provided and clear legal regulations to determine available resources, the authorities in charge and the applicable procedure for their allocation.¹⁰³ In case of a delay in execution, the complexity of the enforcement proceedings, behaviour of the applicant and of the authorities, and the nature of the award should be taken into account.¹⁰⁴ While a delay in the execution of a judgment may be justified in particular circumstances, it may not be such as to impair the essence of the right protected under Article 6(1).¹⁰⁵

Finally, the principle of legal certainty requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question.¹⁰⁶ Therefore the ECtHR has held that, "judicial systems characterised by the objection (протест) procedure and, therefore, by the risk of final judgments being set aside repeatedly... are, as such, incompatible with the principle of legal certainty that is one of the fundamental aspects of the rule of law for the purposes of Article 6 § 1 of the Convention...".¹⁰⁷ A departure from this principle is justified only when made necessary by circumstances of a substantial and compelling character, e.g. to correct judicial errors or miscarriages of justice.¹⁰⁸

Key observations and recommendations:

A court judgment is not a final stage in the administration of justice, but rather an element in the process that requires an effective legal and institutional framework to ensure that the decision is enforced. Only then can the justice system be accepted as effectively delivering justice by the

⁹⁵ *Hornsby v. Greece* (1997) ECHR 15,, para. 41; *Kyrtatos v. Greece* (2003) ECHR 242, paras. 31-32.

⁹⁶ CCJE Opinion No 13, op cit, para. 31.

⁹⁷ *Burdov v. Russia (No 2)* (2009) ECHR 86, para. 68; *Koltsov v. Russia* (2005) ECHR 113, para. 16; *Petrushko v. Russia* (2005) ECHR 137, para 18; *Metaxas v. Greece* (2004) ECHR 230, para. 19.

⁹⁸ CCJE Opinion No 13, op cit, para. 33.

⁹⁹ CCJE Opinion No 13, op cit, specifies a number of principles applicable to enforcement of criminal court decisions (see in particular paras. 38-47).

¹⁰⁰ *Matheus v France* (2005) ECHR 204, para. 58; *Popescu c. Roumanie* (Requête No 48102/99) Définitif du 2 mars 2004, paras. 68-76; CCJE Opinion No 13, op cit, para. 38.

¹⁰¹ *Turczanik v. Poland* (2005) ECHR 463, para. 49.

¹⁰² CCJE Opinion No 13, op cit, para. 13.

¹⁰³ CCJE Opinion No 13, op cit, para. 16.

¹⁰⁴ *Privalikhin v. Russia* (2010) ECHR 664, para. 26; *Raylyan v. Russia* (2007) ECHR 157, para. 31.

¹⁰⁵ *Burdov v. Russia* (2002) ECHR 432, para. 35.

¹⁰⁶ *Brumarescu v. Romania* (1999) ECHR 105, para. 61.

¹⁰⁷ *Sovtransavto Holding v. Ukraine* (2002) ECHR 626, para. 77.

¹⁰⁸ *Ryabykh v. Russia* (2003) ECHR 396, para. 52.

parties to the case and by society at large. A decision that is not enforced means in effect that access to justice is impeded. Therefore, a clear framework that prevents delays and ensures enforcement of judgments is a prerequisite of a functioning justice system based on the rule of law.

Enforcement of judgments in the Russian Federation remains unsatisfactory despite the recent attempts to reform it. This includes compliance with court orders by State bodies and individuals. A system of effective enforcement of judgments should be introduced, inter alia to relieve courts from the caseload of repetitive cases related to enforcement.