BRIEFING PAPER

Use of Administrative Proceedings to Prosecute Civil Society Organisations and Activists in Russia and to Deny Them Judicial Protection

Many cases against civil society groups and activists are conducted under the legislation governing administrative procedure. Such cases may result, firstly, in heavy fines for administrative offences. It is easy for the authorities to hand down such fines and do so often, because of the multiple drawbacks of the Code of Administrative Offences. Secondly, when individuals or groups seek judicial review or when authorities seek dissolution of organisations, it is the Code of Administrative Proceedings and Russian case-law in administrative matters that deny them protection. These will be dealt with in turn.

Administrative offence proceedings

Besides criminal offences, Russian law contains a long list of regulatory offences ('administrativnye pravonarusheniya') codified in the Code of Administrative Offences ("the CAO"). Violations of its provisions may result in fines of up to several thousand euros for individuals and legal entities, or imprisonment for up to one month for individuals. The amendments to the Code adopted since 2012 increased fines for acts constituting normal civic activities manifold. Currently, the fine for driving 120 km/h in a city where general speed limit is 60 km/h amounts to RUR 1,500 (approx. EUR 23), whereas the fine for participation in a peaceful demonstration without authorisation of local authorities, which is more often than not capriciously refused, is between RUR 10,000 and 20,000 (EUR 153 to 306). Such fines are also imposed on static single protesters, even though theoretically one-person demonstrations do not require official authorisation. Repeated peaceful protesters may be sent to prison for up to 30 days.

Even heavier fines are imposed on those found in violation of the so-called "Foreign Agents' Act": a leader of the group that did not apply to be included in the "foreign agents roster" may be fined RUR 100,000 to RUR 300,000 (EUR 1,530 to 4,590). Groups may be fined RUR 300,000 to 500,000 (EUR 4,590 to 7,650) for the same offence, as well as for the failure to make a statement that the information they disseminate comes from a "foreign agent".

Not only the fines are heavy, the executive is also at ease to impose them. Authorities may compile a several-page file ('administrativny material') and, depending on the nature of the offence, impose a fine or send the record to a judge who will not put the documents she received under tight scrutiny. Indeed, there is hardly any judicial scrutiny of the files compiled by the executive. Judges cannot be said to be impartial, and the defendants, especially indigent, are or may be deprived of professional legal assistance. This is despite the regular findings of the European Court of Human Rights that Russian administrative offences constitute 'criminal charge' within the meaning of Article 6 of the European Convention on Human Rights, so that all the guarantees of Article 6 need to be provided to the defendants.

Unlimited discretion of the executive

The executive, be it prosecutors, police, Ministry of Justice, Communications Authority ('Roskomnadzor'), or Fire Department, may open administrative offence proceedings whenever they think fit. A suspicion of an administrative offence allows the executive agencies inspect organisations, enter their premises and/or require the organisations to produce voluminous documentation at the organisations' expense.

The CAO does not lay down any detailed rules of evidence and does not set any standard of proof. Two written statements by policemen stating that they saw the defendant participating in an unauthorised demonstration are enough to open the proceedings against the defendant and send the file to the court. The statements may be just several sentences long and repeat each other verbatim, as well as pre-printed, leaving blank only the name of the defendant. The police is also at liberty to qualify the actions of the protester as either participation in an unauthorised demonstration, an offence punishable by a fine (the defendant cannot be detained for more than 3 hours), or as resistance to a lawful police order to stop participation in an unathorised demonstration, an offence punishable by arrest for up to 15 days (and allowing to keep the defendant detained 48 hours pending trial). Where the police are unable to compile the file against such defendant in 3 hours, the charges against him or her may be 'requalified', allowing for longer detention. Also, nothing prevents the police from bringing both charges simultaneously[1] or bringing criminal proceedings following conviction of an administrative offence.[2]

Administrative offence record ('protokol ob administrativnom pravonarushenii') is both the equivalent to a bill of indictment setting out the charges and evidence against the defendant, and the main piece of evidence at the same time. Treating bill of indictment as evidence makes it virtually impossible for the judge to scrutinise the case against the defendant: the evidence presented by the executive is by definition concordant and non-contradictory.

Restrictions on access to lawyer

The CAO does not limit the right of the defendant to choose the person to represent him or her in the course of administrative proceedings: membership in the bar or even legal training are not required. However, there are many restrictions in practice and in law. When a protester is taken to the police station so that the case against him or her may be compiled, it is routine practice to deny the lawyer who arrives at the police station access to their client.[3] Even though the detention pending compilation of the administrative offence record is limited to 3 hours, and should only be extended where the defendant faces the penalty of arrest and on compelling reasons by a written decision,[4] in no case such written

[1] ECHR, Andreyeva and others v. Russia, no. 67936/14, communicated on 23 September 2016.
[2] ECHR, Sergey Zolotukhin v. Russia [GC], no. 14939/03, 10 February 2009.
[3] ECHR, Navalnyy and Yashin v. Russia, no. 76204/11, 4 December 2014.
[4] Russian Constitutional Court (RCC), Constitutionality of articles 24.5, 27.1, 27.3, 27.5 and 30.7 of the CAO, articles 1070(1) and 1100(3) of the Civil Code, and article 60 of the Code of Civil Procedure, no. 9-P, 16 June 2009.

decision is known to have been issued by a police officer. This results in a situation where the defendant may spend a day or more in detention without access to lawyer.

Where the defendant is taken to the court and is without a lawyer, the judge is under no obligation to postpone the hearing to allow the defendant to consult the lawyer.[5] In cases where the defendant is indigent, Russian law does not provide for appointment of a legal aid lawyer.[6]

Judicial impartiality compromised

Judicial proceedings on administrative offences are held in the presence of the judge and the defendant. The prosecutor or any other executive agency that sent the case to the court does not take part in the hearing. The judge reads out the administrative offence record, hears what the defendant has to say and withdraws for deliberation. Occasionally – and discretionary, – the judge may hear witnesses. However, in the absence of a prosecuting authority it is the judge who supports prosecution in court and then decides the case. The combination of two functions, to prosecute and to judge, in one person of a judge deprives the latter of impartiality: she cannot be a party and an umpire at the same time.

This system was upheld by the Russian Constitutional Court on a number of occasions.[7] The European Court of Human Rights, however, handed down a 'pilot judgment' finding Russia not only in breach of Article 6, but also finding that the lack of impartiality of Russian judges dealing with administrative offence cases is systemic and requires the state to undertake general legislative or regulatory measures to remedy it.[8] No such measures have been adopted or even proposed so far.

Lack of overall judicial oversight

The problems described above may be relatively easily remedied without affecting the nature of the proceedings: it is neither complicated nor extravagant to make a prosecutor or a police officer or another official sit in the courtroom, read out and speak in support of the administrative offence record, as well as to provide indigent defendants with legal aid lawyers. The issue remains that the judges accept unreservedly everything found in the administrative offence record.

This means in practice that the judges routinely refuse to hear witnesses to whose testimonies the administrative offence record refers, in particular, the policemen who arrested the defendant. The depositions of the defence witnesses, if they are heard at all, are discarded for the reasons that the written evidence in the case-file is consistent with the administrative offence record, and that by calling defence witnesses the defendant tries to avoid responsibility, or that the defence witnesses are known to the defendant. One or more

[5] ECHR, Sozayev and others v. Russia, no. 67685/14, communicated on 29 September 2016.
[6] ECHR, Mikhaylova v. Russia, no. 46998/08, 19 November 2015.
[7] RCC, Astakhova, Vinogradov and others, no. 2157-O, 25 September 2014.
[8] ECHR, Karelin v. Russia, no. 926/08, 20 September 2016.

of these reasons are invoked even though the judge did not hear the witnesses of the 'prosecution'.

Even the most absurd charges thus stand. For example, Human Rights Centre "Memorial" was fined for the failure to put the 'foreign agent label' on the publications of the International Society of Memorial, a different legal entity which was not on the list of foreign agents.[9] Activists at demonstrations are charged with, and found guilty of, chanting slogans no reasonable person would formulate (e.g., "Freedom for same-sex marriages", which makes no sense in Russian, including for supporters of same-sex marriages, or "Down with the legitimate parliament")[10].

Judicial scrutiny is thus limited to the executive's compliance with the formal procedural requirements: whether the defendant was informed of the drawing up of the administrative offence record[11] and of the trial[12] and appeal[13] hearings, whether jurisdictional rules were complied with,[14] and/or whether the imposition of a penalty was not time-barred.[15] This cannot be said to constitute substantive assessment of whether evidence was collected to the required standard to prove the guilt of the defendant. Lack of judicial oversight allows the executive to proceed with virtually unrestricted impositions of penalties on activists and groups.

Judicial review proceedings

Applications for judicial review are available to individuals and legal entities who believe their rights are affected by the decisions of the executive agencies. The proceedings used to be governed by a chapter of the Code of Civil Procedure which was replaced by the Code of Administrative Proceedings ("the CAP") as of 15 September 2015. All major rules remained the same, with the exception of the obligation of the parties to be represented by a person with legal training (not necessarily by a member of the bar). Judicial review in Russia does not allow for interim relief, judges accept every submission of the executive, so the latter is able to act free of any substantive oversight.

The CAP is also used to prosecute civil society organisations for it sets out the procedures by which the Russian Ministry of Justice seeks dissolution of such organisations by bringing applications to courts.

Absence of interim relief in the proceedings under the CAP

[9] Russian Supreme Court (RSC), Human Rights Centre "Memorial", no. 5-AF16-1493, 6 June 2016, and no. 5-AF16-1491, 8 June 2016.
[10] ECHR, Sozayev and others v. Russia, communication cited above.
[11] RSC, Institute of Regional Press, no. 78-AD15-6, 16 November 2015.
[12] Moscow City Court, Sakharov Centre, supervisory review (administrative offences), 30 March 2016.
[13] Moscow City Court, Orlov, no. 4a-866, 25 May 2015.
[14] St. Petersburg City Court, Coming Out, no. 4a-1300/2013, 27 September 2013.
[15] Moscow City Court, Public Verdict Foundation, no. 7-11622/2016, 26 September 2016.

Theoretically, the CAP provides that a judge may, on the date of the receipt of an application for judicial review, and of the applicant party's motion to that end, suspend the administrative decision the review of which is sought. However, no such suspending order is known to have been issued in a case concerning, for example, judicial review of the Ministry of Justice's decision to put an NGO on the "foreign agents' roster". This means that the NGOs were under obligations to provide reporting, to label their publications, to undergo audit and other bureaucratic requirements, while the application challenging the decision of the Ministry of Justice to put the NGO on the roster and to impose all the obligations of a "foreign agent" has been pending. The practical unavailability of interim relief seriously undermines the effectiveness of the judicial review proceedings in general.[16]

Judges as assistants of the executive on the matters of procedure

The CAP, as the Code of Civil Procedure before it, does not require full disclosure of evidence at a preliminary stage of proceedings, e.g., at a preparatory hearing. As a result, evidence may be produced at virtually every stage of proceedings. This allows judges who see weakness in the executive agency's case as the case progresses to postpone hearings so that the executive is able to produce more evidence for a new hearing. Given that theoretically the burden of proof of the legality of administrative decisions is on the executive, judges guide its officials so that the latter are able to avail themselves of the burden to the standard acceptable to the judge.[17]

Complete deference of judges to the executive

With regard to the substantive merits, deference of judges to the executive is virtually unlimited. It is the Russian Supreme Court's case-law that an administrative decision, adopted in clear violation of procedural rules and ultra vires withstands nevertheless judicial scrutiny if it is deemed substantively correct.[18] This is reflected in the CAP, according to which no administrative decision may be declared illegal on purely formal grounds.

The results may be absurd, especially in the cases under the "Foreign Agents' Act". When Association GOLOS refused foreign funding, it was fined under the CAO for having failed to register as a "foreign agent". Russian Constitutional Court ruled that the actions of GOLOS constituted valid refusal of foreign funding,[19] so the fine under the CAO was subsequently quashed by the Moscow City Court.[20] Less than two weeks later the same, albeit differently composed, court dismissed the GOLOS' application for judicial review of a separate prosecutorial decision which had required GOLOS to register as a "foreign agent",[21] even

[16] ECHR, Gebremedhin [Gaberamadhien] v. France, no. 25389/05, 26 April 2007.
[17] See, e.g., http://iphronline.org/russia-new-foreign-agents-ruling-against-prominent-group-20140523.html
[18] RSC, Kaverin, no. 14-KG14-6, 2 July 2014.
[19] RCC, Constitutionality of article 2(6) of the Not-for-Profit Organisations Act, article 32(7) of the Public Associations Act, and article 19.34(1) of the CAO, no. 10-P, 8 April 2014.
[20] Moscow City Court, Association "Golos", no. 4a-1435/2014, 1 September 2014.
[21] Moscow City Court, Association "Golos", no. 33-19259/2014, 12 September 2014, confirmed by the Russian Supreme Court: RSC, Plenipotentiary for Human Rights on behalf of Association "Golos", no. 5-KF15-1932, 22 July 2015.

though the prosecutors referred to the same transaction refused by GOLOS that had been found to have constituted valid refusal of foreign funding in the case under the CAO.

International Society of Memorial was registered by the Ministry of Justice as a "foreign agent" despite the "Foreign Agents' Act" reference to Russian NGOs and the Constitutional Court's finding that international NGOs cannot be "foreign agents". Zamoskvoretskiy District Court of Moscow dismissed International Memorial's application for judicial review regardless of the clear meaning of the applicable legislative provisions, having agreed with the Ministry of Justice's submissions that the status of international NGO "did not matter".[22] The same court and for the same reason[23] dismissed the same NGO's application for reopening of the case concerning the legality of a prior inspection by the prosecutors despite the Constitutional Court's ruling in the NGO's favour and a clear order in the operative part of the judgment to reopen the proceedings.[24]

The cases concerning civic activists or groups declared "foreign agents" are a showcase of the failures of judicial oversight of the executive in Russia, whether they are conducted under the CAO or the CAP. Judges allow the executive to act as if it was "revolutionary legality" of 100 years ago. But the impact of such approach goes well beyond the cases of civil society activists and groups: having assisted the executive to suppress dissident voices in such cases, judges won't be able to refuse such assistance in cases concerning supermarkets or candy producers or oil extracting factories.

[22] Zamoskvoretskiy District Court of Moscow, International Memorial, no. 2a-7176/2016, 16 December 2016.
[23] Zamoskvoretskiy District Court of Moscow, International Memorial, no. 2-4896/2013, 20 July 2015, confirmed by the Russian Supreme Court: RSC, International Memorial, no. 5-KF16-2702, 22 August 2016.
[24] RCC, Constitutionality of articles 6(1), 21(2) and 22(1) of the Prokuratura Act, no. 2-P, 17 February 2015.