Blog | What future for settlements and undertakings in international human rights resolution?

Resolving problems through settlements and by eliciting undertakings from governments has become a significant feature of the Strasbourg landscape. At the European Court of Human Rights (the Court), the use of friendly settlements (agreed confidentially between the parties) has been on the increase. So too, for □□□□□□□□□□ declarations □ (UD) which are utilised by the Court to resolve cases on terms put forward by the government, and which are deemed acceptable by the Court, even in the absence of agreement from the applicant. In 2018, more than 3,000 cases were resolved either by settlement or by UD, a 34% increase from the previous year. Within that figure, the number of priority cases resolved in this way more than doubled in the same period. Indeed, in 2019 the ECtHR is trialling a new non-contentious phase in its

proceedings, which means that when a government is notified of a case, the parties will have an initial 12 week friendly settlement phase, followed by a 12 week contentious phase. More than that, the Court registry will itself usually make a friendly settlement proposal setting out suggested terms.

Such alternative forms of dispute resolution have been relatively under-explored and deserve further scrutiny. A common feature of both friendly settlements and UDs is that governments will provide undertakings to take remedial steps, which become binding under international law. Their significant potential is reflected in the fact that such undertakings *can* go further than the ECtHR itself would go in its judgments. But whose job is it to assess whether an undertaking has been met, and what happens when governments do not comply? The Committee of Ministers (CM) has a supervision role vis-à-vis friendly settlements, but will rarely monitor UDs only when they are incorporated into a judgment of the Court, rather than a decision.

Police and prison abuses in Georgia

An ongoing, systemic human rights issue in Georgia is illustrative of the potential created by the UD mechanism but also the drawbacks, where the follow-up is inadequate. A series of cases litigated by the Georgian Young Lawyers Association (GYLA) and the European Human Rights Advocacy Centre (EHRAC) concern allegations of abuse perpetrated by the police or prison authorities in Georgia and the lack of an effective investigation. One group of cases relates to the forceful dispersal of a peaceful demonstration held in June 2009 outside the Tbilisi police headquarters to protest about the arrest of opposition leaders. The applicants, who included activists, journalists and a monitor from the Public Defender Office, complained of brutal police assaults. Another case concerned the death of Kakhaber Tedliashvili in a prison in Rustavi in April 2011. Tedliashvili was found hanged in a solitary confinement cell. Prior to his death, he had complained that he was being systematically subjected to ill-treatment and threats to his life by prison warders. In a series of decisions in 2015 (see here and here), the Court struck these cases out of its list, as a result of either a UD or friendly settlement in each case the Georgian government acknowledged that there had been a violation of the European Convention on Human Rights (ECHR) and gave an undertaking to carry out an effective investigation into the incidents in question.

These were important developments. The Court has not yet, in terms, ordered a state

to carry out an effective investigation, as part of its remedial process (although it has got very close – see, for example, *McCaughey and others v United Kingdom*, *Abuyeva and others v Russia*, *Benzer and others v Turkey* and *Tagayeva and others v Russia*). However, these strike out decisions established binding obligations on the Georgian authorities to do just that.

Over the following months – extending into years – GYLA and EHRAC monitored the cases closely, by liaising with the Georgian prosecutors to try to ascertain what investigatory steps were being taken. Although some measures were being carried out, it became evident, in our view, that the authorities were not conducting what could be described as *effective* investigations. By early 2018, the investigations had still not been completed, some seven years after Kakhaber Tedliashvili's death, and nine years after the Tbilisi demonstrations. It was at this point that we felt it was fully justified to revert to the ECtHR to apply to have the cases re-opened, on the basis that the Georgian authorities had clearly not complied with their undertakings (under Article 37(2) ECHR). Although the Georgian Government had frequently sought to resolve cases through friendly settlements or UDs since 2012, this was the first time, to our knowledge, that applicants has asked the Court to reopen their cases on the basis that undertakings had not been met.

It was pointed out to the Court that in the Tedliashvili case, a number of very basic investigatory steps had still not been carried out, including interviewing named prison warders who had been implicated in the alleged harassment of Mr Tedliashvili before his death, as well as other prisoners, the prison psychiatrist, his lawyer and representatives of the Public Defender's Office, all of whom had had contact with Mr Tedliashvili shortly before he died. Furthermore, it was argued that key witnesses, including the prison director and prison doctors, needed to be re-interviewed, either because of clear inconsistencies in the evidence, or simply because their earlier questioning had not addressed obviously pertinent issues. Moreover, potentially critical lines of inquiry had not been pursued – investigators had not properly considered whether Mr Tedliashvili should have been transferred to solitary confinement because of his mental condition or whether the prison administration was required to assess his state of health before transferring him (when prison employees knew about his mental health problems) or after having done so, since Mr Tedliashvili injured himself during his period in solitary confinement. The authorities had also failed to assess whether Mr Tedliashvili's transfer to solitary confinement was

appropriate, given the evidence that pressure was being exerted on him by prison officers. Finally, it was argued that the authorities had not properly obtained the requisite expert forensic evidence.

In the peaceful assembly cases, the authorities had still failed to interview two high-ranking police officers who had been identified by the Public Defender □□ Office and a number of witnesses in 2009, as having ordered the ill-treatment of the participants in the rally. The way in which the investigation was conducted suggested that there was no real inquiry into the responsibility of high-ranking officials who planned the dispersal of the demonstration and the ill-treatment, but rather that its focus was on the lower level police officers who executed the orders. There were also unaccountable delays in the period from 2015 to 2017 in the questioning of witnesses and the appointment of experts, and no apparent inquiry into the reasons for the payment of high cash bonuses to certain police officers implicated in the events.

Accordingly, it was put to the Court that the investigations in these cases had been neither effective nor timely. It was also emphasized that these were not isolated incidents. The ineffectiveness of investigations into violations perpetrated by law enforcement officials has been a serious, systemic problem in Georgia for a number of years. The CM continues to supervise the implementation of the Court □□ judgments against Georgia in a series of cases raising this issue (the Tsintsabadze group of cases □ five judgments and 11 friendly settlements with undertakings). In December 2016, the CM said it was □□ source of concern that in the vast majority of the cases, investigations have now been pending for years without any tangible results ☠□□ The CM also said it was □☀□□□□□□□□□ that in two cases the investigations were closed without result notably on grounds of passage of time. This shows the importance of speeding up the investigations still pending, in order to avoid prescription □□ The issue has been taken up in recent years by the Georgian Public Defender, the Council of Europe Commissioner for Human Rights, the Committee on the Prevention of Torture and the UN Special Rapporteur on Torture, amongst others.

The responses of the Court to our application to have these cases restored to the list surprised us. Initially, we were criticised by the Court for making the application collectively in a group of cases. However, we did so of course to demonstrate the widespread nature of the problem. Then in November 2018 we were notified that the application had been rejected: □☀□□□ requests do not refer to any exceptional circumstances within the meaning of Rule 43 § 5 of the Rules of Court which would

justify the restoration of these applications to the list of cases □□ No further reasons were given. A second paragraph of the Court □□ letter stated: □□□□□□□□□ I should inform you that the Court and its Registry have a very heavy workload. The Registry can therefore no longer answer your letters nor accept any telephone calls from you regarding the above-mentioned applications □□ On its face, the Court □□ letter appears to deny the applicants in these cases the right to apply again in the future to have their cases restored □ even though Article 37(2) ECHR provides for an open-ended power to restore applications if the Court □□□□□□□□□ that the circumstances justify such a course □□ If in another year, or two years, or five years, these cases are still ostensibly being investigated by the authorities, but without fruition, should not the applicants be entitled to apply again to the Court?

Monitoring government undertakings

These important cases from Georgia suggest a clear incongruity between the Court □□ increasing reliance on friendly settlements and UDs as a means of resolving cases on its books, and the limited extent to which pivotal government undertakings are being assessed for compliance. Court statistics indicate that the restoration of cases struck out through a UD are very rare □ in the 2016 judgment in Jeronovičs v. Latvia, the Grand Chamber noted that there had been just one such case. Lize Glas has adjusted this figure □ identifying nine restored cases in the five year period from 2012-2017 □ but still concluding that the Strasbourg institutions hardly ever supervise the implementation of UDs.

We acknowledge the potential that forms of settlement offer to the Strasbourg system, and elsewhere, for the swifter resolution of litigation, and the facilitation of systemic change within the national polity. However, these cases suggest that greater caution needs to be exercised in imposing UDs where the right to life or the prohibition of ill-treatment is in issue, especially where they concern issues which have already been identified as systemic (not least by the CM), and given also that there is no mechanism for monitoring the implementation of UDs at the national level. Therefore, this should be one of the important factors which the Court takes into account when applying the □□□□□□□ for human rights test □ when considering whether or not to strike out a case.

Furthermore, if significant reliance is to be placed on governmental undertakings, there is a need for more intense scrutiny of them, for which there are two primary

opportunities (by the Court). The first is at the point where the undertaking is initially proffered. If only generally-worded undertakings are the norm, why could not greater specificity be required? For example, taking the problems of investigation in the Georgian cases, rather than an undertaking promising simply an □□□□□□□□□ investigation □□ why should it not also stipulate more specifically what that should include, and by when it should be carried out? In another recent case concerning allegations of ill-treatment by the police *(Zurashvili v. Georgia)* we proposed that the terms of a government undertaking should include specific steps relating to the conduct of an effective investigation, however our suggestions were not taken up by the government or the Court. Nevertheless, the inclusion of detailed terms in such undertakings may be needed to safeguard the principle of respect for human rights and ensure that applicants receive adequate redress.

The second opportunity for assessment is where an applicant challenges compliance with the undertaking and requests the restoration of the case, as we discuss here. Some further guidance (through case law relating to a request for restoration or otherwise) would be useful, as to how the Court will consider such applications. The Court □□ understandable desire to keep its overall caseload down should not, of course, justify a superficial assessment. Instead there must be a rigorous evaluation, and a clear indication from the Court that governments will not be allowed to sweep significant ongoing problems under the carpet. Such steps would, in our view, also serve to further enhance the authority and legitimacy of the Court.

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