The Topical Issues of Public Law

SCIENTIFIC-PRACTICAL INFORMATIONAL EDITION
REGISTERED IN THE ROSKOMNADZOR. REGISTRATION NUMBER - EL. NO. FS 77-48634, 20.02.2012.
IS PUBLISHED MONTHLY. THE MAGAZINE HAS BEEN PUBLISHED SINCE JANUARY, 2012.

No. 01 (13) 2013

The issue allowed for posting on the web site
on the 11 of March 2013

Vypusk dopushhen k razmeshheniju na sajte
11.03.2013

•CONTENTS•

GUILTINESS OF A LEGAL ENTITY AS A NECESSARY SIGN OF ADMINISTRATIVE OFFENCE 3
Dzhamirze B. Yu.

PROVOCATION TO CRIMES IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 8
Karamanukyan D. T.

RULING OF THE HIGHER ARBITRATION COURT OF THE RUSSIAN FEDERATION ON REFUSAL TO TRANSFER A CASE TO THE PRESIDIUM OF THE HAC RF: IS IT A PROCEDURAL JUDICIAL ACT OR AN ACT OF JUSTICE? 20
Kizilov V. V.

ABOUT THE ORIENTATION OF THE ADMINISTRATIVE-LAW POLICY OF RESISTING RELIGIOUS EXTREMISM IN THE RUSSIAN FEDERATION 30
Proletenkova S. E.

POLITICIZATION OF RELIGIOUS ASSOCIATIONS AS ONE OF FACTORS OF RELIGIOUS EXTREMISM DEVELOPMENT 33
Proletenkova S. E.

APPLYING ADMINISTRATIVE RESPONSIBILITY FOR UNFAIR COMPETITION IN THE FIELD OF USE OLYMPIC AND PARALYMPIC SYMBOLICS 39
Sidorkin A. V.

Universal Decimal
Classification 342.9

Dzhamirze B. Yu.

GUILTINESS OF A LEGAL ENTITY AS A NECESSARY SIGN OF ADMINISTRATIVE OFFENCE

Dzhamirze Bela Yunusovna,
Senior Lecturer of the Department of civil-legal and criminal-legal disciplines of the Federal State Budgetary Institution of Higher Professional Education "Maikop State Technological University", Maikop,
bella901@mail.ru

Administrative suspension of activity is a justified and necessary measure, but its place, in the structure of the Code on Administrative Offences of the RF, must be conditioned by carried out tasks to prevent offences. Article 2.1 of the CAO RF defining an administrative offence as a guilty deed, requires determining of this sign in a corpus delicti. Existing judicial practice of application the specified penalty indicates that the necessary guiltiness sign is not subject to mandatory determination in imposing the administrative suspension of activities.

Keywords: guilt, administrative offence, legal entity, preventive measure, prevention of an offence.

In accordance with article 3.1 and 3.12 of the Code on Administrative Offences of the RF the object for the application of a penalty in the form of administrative suspension of activity, in addition to general objectives – compliance with the rule of law and ensuring the lawful conduct of citizens and legal persons, the general and special crime prevention (general and private prevention), is "providing sanitary-epidemiological, anthropogenic, environmental, fire, and other types of public security" [2, 50].

Administrative suspension of activities is applied to prevent the harm that can come from a revealed administrative offense, that is, as a measure of administrative prevention. In addition, by administrative suspension of activity "in the case

of an administrative offense in the sphere of trafficking in narcotic drugs, psychotropic substances and their precursors, in countering the legalization (laundering) of proceeds from crime and financing of terrorism..." (Part 1 of article 3.12 CAO RF) is achieved the objective of termination a revealed administrative offense. In these cases, a temporary ban and administrative suspension of activity are applied as a measure of administrative suppression [6].

Designated purpose of administrative suspension of activity goes beyond the scope of the purposes of administrative punishment. These measures of administrative coercion, given their direct designated purpose, should be attributed in some cases to prevention, in others to suppression as a legal form of state coercion, but not to punishment or measures of procedural ensuring.

Argument in favor of this statement is the following fact – a penalty is a coercive measure, the response of the state to an offense. A necessary condition of sentencing is guiltiness of committing an unlawful act. One of the conditions of applying administrative suspension of activity is the presence of a "threat to the life or health of people, threat of the occurrence of epidemic, epizootic, infestation (contamination) of quarantineable objects by quarantine objects, occurrence of a radiation accident or man-made disaster, causing significant damage to the quality of environment" (Part 1 article 3.12 CAO RF).

In a situation of no fault of a legal entity in the presence of threat to the above objects in contradiction enters subjective aspect – guilt of a person brought to administrative responsibility, and public interest that can be affected. Not the determination of legal entity's guilt, but the presence of threat to legally protected objects is a major factor in deciding on the application of administrative suspension of activity. I. V. Maksimov answers this question as follows: "Application of administrative suspension of activity without taking into account guilt, but only because of the need to prevent negative circumstances of administrative-wrongful deed distorts the essence of coercion involving application the measures of administrative responsibility ..." [4, 433].

Before us is a formal contradiction between the two norms of the Code (about guilt as a necessary element of an administrative offense and the conditions of imposing administrative suspension of activity). Moreover, in practice, the collision is often resolved in favor of the second norm.

O. N. Sherstoboev sees the settlement of the problem in the change of administrative-tort legislation norms governing the responsibility of legal persons, which should be divided into two groups: financed by the state and (or) municipal budget; financed from its own funds. Guilt of each group should be understood in the

light of their organizational and legal specificities. Responsibility for violation rules because of underfunding should be imposed on officials of bodies (if there is any guilt in their actions), and in some cases on the very bodies that exercise administration in a specified area [7].

This opinion is shared by G. I. Kalinin, "the application of the suspension of activity ignores the specificity of the way of financing legal entities" [3]. Lack of money, necessary to meet the standards and rules, of an organization, fully funded by the state or local budget, if it is directly led to the emergence of an administrative offense, lets to talk about the absence of the subjective side of the offense.

Thus, in the application of the administrative suspension of activity to municipal institutions in the field of education, such as nursery schools and schools, is not solved the problem of bringing to administrative responsibility of a guilty person, whose decisions caused violations of legislation, namely the person who signed the decree to open the newly created institution, which does not meet the requirements, or a person that defines the funding of the institution that involves a correspondence of the institutions to established requirements. This viewpoint is presented by R. A. Bruner, who in the determination of a legal entity's guilt follows the principle of subjective imputation, according to which "the guilt of a legal entity of an administrative offense is determined by the guilt of its officials" [1, 9].

The lack of economic independence of an organization receiving funds from the state or municipal budget cannot justify admission of guilt. When deciding on a case, the court must with certainty establish the guilt of a legal entity. According to part 2 of article 2.1 of the CAO RF the guilt of a legal entity can be proved only by the determination that it had the ability to comply with rules and norms, violation of which considers administrative responsibility, but this person did not take all possible measures to comply with them.

According to part 2 of article 32.12 of the CAO RF when administrative suspension of activity shall not be allowed the application of measures that may lead to irreversible consequences for the production process, as well as for the operation and security of critical infrastructure. These limits are designed primarily to ensure the continuous operation of socially important enterprises and institutions. In particular, it is impossible to stop the activity of fuel and energy complex or an organization responsible for urban passenger transport without prejudice to the population [5].

Shortening the period of administrative suspension of activity is associated with the termination of an offense – elimination of the circumstances that led to the sentencing. However, the purpose of punishment is not the cessation of a wrongful

conduct, but retribution for it; hence, the possibility of early termination of administrative suspension of activity, in the case of elimination of the circumstances that gave rise to its imposition, once again proves not so much punitive as preventive and preclusive nature of the impact of this measure on the subject of an offense. As indicated by I. V. Maksimov «this demonstrates the functional orientation of the measure and characterizes administrative suspension of activity not as a punitive measure, but as a «preclusive injunction» [4, 440].

Under such conditions, administrative responsibility becomes a universal legal instrument for resolving a variety of law enforcement tasks due to inclusion to the number of administrative penalties the measures of influence that are not inherently measures of responsibility.

Attention is drawn to the normative requirement of article 3.3 of the CAO RF, which states that administrative suspension of activity can be used only as the main administrative punishment. This, in turn, means, that whatever an administrative offense committed by an organization, court cannot impose a penalty in the form of administrative suspension of activity along with other major administrative penalties (fines or disqualification, etc.).

Summarizing the above, the following should be noted – administrative suspension of activity is a justified and necessary measure. However, its place in the structure of the Code is due to the performed tasks in the form of offenses suppression. The current position of the legislator is explainable – inclusion of administrative suspension of activity to the sanctions of articles helps eliminate the possibility of abuse, in addition, application of this punishment is guaranteed by judicial control. However, this approach contradicts the content of article 2.1 of the CAO RF that defines administrative offense as a guilty deed. Existing court practice of application this form of punishment evidences, that a necessary sign of guilt is not subject to obligatory determination when imposing of administrative suspension of activity.

References:

1. Bruner R. A. Administrative Suspension of Activity – a New Kind of Administrative Punishment [Administrativnoe priostanovlenie deyatel'nosti - novyi vid administrativnogo nakazaniya]. *Aktual'nye problemy bor'by s prestupleniyami i inymi pravonarusheniyami. Materialy chetvertoi mezhdunarodnoi nauchno-prakticheskoi konferentsii, 27 aprelya 2006 – The Topical Issues of Combating against Crimes and other Offences. Proceedings of the fourth international scientific*

and practical conference dated April 27, 2006, Barnaul: publishing house of Barnaul Juridical Institute of the Russian MIA, 2006, pp. 153-155.

2. Gulyaeva A. P. *Comments to the Code on Administrative Offences of the Russian Federation* [Kommentarii k Kodeksu Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh]. Under edition of A. P. Gulyaev, L. L. Popov, Moscow: 2006.

3. Kalinin G. I., Kalinina L. E. To the Issue of Administrative Suspension of Activity [K voprosu o primenenii administrativnogo priostanovleniya deyatel'nosti]. *Pravo i ekonomika – Law and Economics*, 2012, no. 4.

4. Maksimov I. V. *Administrative Punishments* [Administrativnye nakazaniya]. Moscow: Norma, 2009.

5. Malyutin N. Administrative Suspension of Activity: How to Protect your Company? [Administrativnoe priostanovlenie deyatel'nosti: kak zashchitit' kompaniyu]. *Nalogi i nalogovoe planirovanie – Taxes and Tax Planning*, 2012, no. 1.

6. Reznikova A. A. Administrative Suspension of Activity – Is it an Administrative Punishment? [Administrativnoe priostanovlenie deyatel'nosti – administrativnoe nakazanie?]. *Izvestiya vuzov. Pravovedenie – Proceedings of Higher Schools. Jurisprudence*, 2009, no. 4.

7. Sherstoboev O. N. Administrative Suspension of Activity: Problem Statement [Administrativnoe priostanovlenie deyatel'nosti: k postanovke problem]. *Rossiiskaya yustitsiya – Russian Justice*, 2010, no. 2.

Universal Decimal
Classification 341.4 : 343.2

Karamanukyan D. T.

PROVOCATION TO CRIMES IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Karamanukyan David Tonievich,
Head of the Department of constitutional and international law Private Educational Institution of Higher Professional Education "Omsk Law Academy",
karamanukyan.dt@omua.ru

This paper explores the features of qualifying the deeds of law enforcement bodies as a provocation (incitement) to crimes with taking into account the legal positions of the European Court of Human Rights.

Keywords: European Court of Human Rights, Strasbourg Court, provocation to crimes, human rights.

At the contemporary stage of international relations development at the time of globalization and integration of socio-cultural, economical, legal sectors of various countries, national legal systems [12, 4-7], the rights of man have become an integral part of any civil society, the highest manifestation of its moral and legal values. In this regard, in international public law has been formed a practice of their systematization through the conclusion multilateral international treaties, which reflect the obligation of States to comply with the fundamental principles of respect and protection the rights of man and citizen.

Thus, in international legal literature, appeared the notion of "human rights standards", which are the obligations of States not only to provide persons under their jurisdiction certain rights and freedoms, but also do not infringe these rights and freedoms.

It should be noted that the above standards are developed not by separate countries, but by derivative subjects of international law – international organizations. The leading organization in the field of international relations is the Council of Europe that over the last few decades has turned into a major regional integration organization, the membership of states in which indicates the presence of high levels of democracy and respect for basic features of a constitutional state.

One of the most important achievements of this organization is the establishment of a common for all Europe standards' system of fundamental human rights, the core of which is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – Convention, European Convention). At present time the Convention structure consists of a preamble, three sections, fourteen additional protocols and is a model for the unification of normative and legal acts on human rights of countries in other regions of the world (for example, constitutional acts in almost all the countries of the post-Soviet area).

Section I of the Convention "rights and freedoms" (articles 2-18) contains the substantive provisions of the Convention defining the rights and freedoms that must be observed by States-participants.

Section II "The European Court of Human Rights" (articles 19-51) establishes a special mechanism to protect the rights guaranteed under the Convention, establishes the European Court of Human Rights, the procedure and jurisdiction.

Section III "Other Provisions" (Articles 52-59) contains the final rules on the procedures for the entry into force of the Convention, conditions of its denunciation, and establishing reservations.

Due to the fact that, since the signing of the Convention, the text has been revised several times, were signed by a total of 14 protocols, each of which is a separate international agreement, supplementing the Convention by new rights, principles and guarantees and structurally separated from the main part. In order to systematize all protocols can be conditionally classified into two groups, the first of which is designed to improve the control mechanism of the Convention, first and foremost, in order to enhance the role of the European Court of Human Rights in the system of protection and complying with the inalienable rights of man (protocols No. 2, 3, 5, 8, 9, 14). The second group is aimed at addition the Convention new rights, principles and guarantees (No. 1, 4, 6, 7, 12, 13).

To determine the essence and significance of the Convention it is appropriate to characterize and classify it on various grounds.

On the content of enshrined norms the Convention includes the following categories of rights and freedoms:

- personal and political rights (the right to life – article 1; to dignity in the form of the prohibition of torture and other inhuman; freedom of movement – article 2 of Protocol No. 4, etc.);
- socio-economic rights (the right to respect for private property – article 1; to education – article 2; to freedom of thought, conscience and religion –article 9; to freedom of expressions – article 10 of Protocol No. 1).

Under the chronological approach the enshrined in the Convention guarantees are the rights of first generation, i.e. the rights that have been recognized in the national constitutions of the post bourgeois era (18th-19th centuries) [13, 14-16].

However, the specificity of the European framework for the protection of human rights lies in not only an implementation of an international act that unifies all the natural rights and freedoms, but also in the creation of a supervisory body for compliance with the Convention norms – the European Court of Human Rights.

The European Court of Human Rights (hereinafter referred to as the European Court, the Strasbourg Court) is an independent supranational justice authority, which monitors compliance with the fundamental human rights by all States-participants of the Convention at the European level. During the consideration of specific complaints from private individuals against the acts and decisions of authorities and officials of the States-participants of the Council of Europe the European Court of Human Rights providing uniformity at the same time solves an important task of interpretation of the Convention norms. The content of the norms laid down in the document is substantially supplemented and refined in the judicial practice of the European Court, which is actually the second most important source of European human rights standards.

Constantly emphasizing that the Convention is a living document, i.e., it is able to adapt its content to the development of society, the Strasbourg Court has demonstrated the ability to deduce from it, and such provisions, which are far away from the original intentions of the authors of its text. Interpretive activity of the Strasbourg Court is not limited to a simple explanation of international treaty norms. The Court often deduces new provisions from the Convention, which are recognized by the Court as inherent in the Convention or arising from it. This way of an official interpretation in the theory of law commonly referred to as an evolving one. (*author's note*. for the first time evolving interpretation method was applied by the European Court of Human Rights in the case "Tyrer v. UK", where it was established that corporal punishments, which were not contrary to human rights standards that existed at the time of the adoption of the Convention, during the consideration of the case ceased to conform to the principles and values of European society. Therefore, the Court refused to follow the original intentions of the authors of the document and recognized that corporal punishments of schoolchildren violate article 3 of the Convention). Due the possibility of evolving way of interpreting, the Convention is not considered as a set of stuck norms, but as a document that is constantly evolving and must be interpreted in

the light of current conditions. As a result Court activity quite often turns into a genuine legislative policy.

As an argument in favor of the above statement can serve the decision of the Strasbourg Court from October 06, 2005 on the case "Hirst v. United Kingdom" [7] regarding the automatic loss of active electoral rights of persons serving sentences in prisons. The Court recognized that such a limitation of voting rights was only possible as an individual sanction type for specific categories of offenders, but not as a common ban for all convicts. In interpreting the Strasbourg Court referred to article 3 of Protocol No. 1 of the Convention, which provides that States-participants of the Council of Europe undertake to periodically hold free elections by secret ballot, to ensure the free expression of citizens' will in formation of the legislative branch of state power.

As can be seen, in its literal wording the cited article does not in itself guarantee the electoral rights of convicts. However, the Court interpreted that these rights derive from it and this may require legislative reforms in several countries of the Council of Europe, including the Russian Federation.

Became axiomatic the formula: Convention norms are applied in such form in which they are interpreted by the European Court. It has never been enshrined anywhere, but is recognized by all the states-participants of the Council of Europe, regardless of to which legal family belongs the legal system of a state-participant, whether it recognizes judicial precedent as the source of law or not.

Russia, acting as a full member of the Council of Europe since 1998, takes the rules of the Convention as part of the national legislation on the basis of part 4 article 15 of the Constitution. At the same time, recognizing the provisions of the Convention, our state is under an obligation to comply with the case-law of the European Court, which, in turn, proves the existence of a precedent as the main source of Russian law [13, 143-147].

History evidences repeated references by the Supreme Court of the Russian Federation to the precedents of the European Court. An example is the decision of the Plenum of the Supreme Court of the RF No. 5 dated October 10, 2003 "On application by the courts of general jurisdiction generally recognized principles and norms of international law and international treaties of the Russian Federation", in accordance with paragraph 10 of which law enforcement activity of Russian courts must be carried out in line with practice of the Strasbourg Court in order to avoid violation of the Convention [9].

However, the need to comply with the views of the European Court of Human Rights also applies to the executive authorities. Thus, section 2.1 of the decision

of the Constitutional Court of the Russian Federation No. 2-P dated February 05, 2007 states that the case-law of the European Court of Human Rights, along with the rules and ratified protocols of the Convention, is an integral part of the Russian legal system [8]. In this regard, the aforementioned sources must be taken into account by the federal legislator in regulating social relations and law enforcement agencies in the application of relevant law norms.

Through the practice of the European Court all branches of the Russian law are constantly being upgraded, including the criminal law. Moreover, there are direct references to the European Court in codified acts of many procedural branches [1; 2; 3].

One of the urgent problems of criminal-law nature in judicial practice (both the Strasbourg Court and national courts) is the question of responsibility for the provocation of a crime (*author's note*. Despite ongoing doctrinal debate among scientists, law enforcers and lawmakers on the issue of correlation the concepts of "provocation" and on the correlation between the concepts of "provocation" and "incitement" in the theory of criminal law, in this article these terms are synonymized). Crime provocation committed by law enforcement officials is quite common in law enforcement practice. This problem is particularly relevant in cases involving drugs, namely offences under articles 228-228.1 of the Russian Criminal Code.

Provocation is also often takes place in cases of bribery and commercial bribery (articles 204, 290, 291 of the Criminal Code RF), infringement of copyright and related rights (part 2 article 146 of the Criminal Code RF) and others.

Under the influence of the European Court July 24, 2007 was passed the Federal Law No. 211-FL "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Improvement of Public Administration in the Field of Combating Extremism", according to which article 5 of the Law "On Operational-Investigative Activity" was amended as follows: bodies implementing operational-investigative activity are prohibited to incite, induce, encourage, directly or indirectly, to commit unlawful acts (provocation).

In other words, crimes provocation legally recognized unlawful method of operatively- investigative activity. However, despite the decent level of doctrinal elaboration and extensive experience of the European Court on crimes provocation on the part of law enforcement officials, national courts still makes glaring mistakes in cases of this category. Evidence of this can be the case "Veselov and Others v. Russia. The essence of the case is the fact that a few years ago, three citizens of Russia (Viktor Veselov, Maxim Zolotukhin and Igor Druzhinin) filed

complaints in Strasbourg (complaints number 23200/10, 24009/07, 556/10) [15] with statement that their guilt in national courts had been proven in violation of the European Convention and that they had risen to provocations of undercover police agents (militia at that time), who were inciting these citizens to commit crimes.

October 02, 2012, the European Court issued a decision, in which it found a violation of paragraph 1, article 6 of the Convention in respect of all three applicants who had been found guilty of the crimes that had been provoked. In favor of the applicants had been collected in a total of 15 600 euro in compensation for moral damages and court costs. And this is just the tip of an iceberg. This decision of the European Court is likely to become the leading precedent for another 150 similar cases against the Russian Federation, which are under consideration.

However, in all fairness, it should be noted that before the said case back in 2005 the European Court adopted a decision on the case "Vanyan v. Russia" from December 15, 2005, which contained the basic legal criteria to qualify law enforcement actions as a provocation [4].

In decision to the above case the European Court interpreting the provisions of the Convention concluded that "if the crime was allegedly provoked by the actions of secret agents, and there was no suggestion that it would be done without any intervention, then these actions were no longer agent's activity and constituted an incitement to commit a crime. Such an intervention and its use in criminal proceedings can lead to irreparably undermined principle of a fair court proceeding" [16]. The European Court also pointed out that law enforcement officers did not have reason to suspect the applicant of drug trafficking.

Thus, the intervention of the police and the use of obtained evidences in criminal proceedings against the applicant violated the spirit of the Council of Europe Convention.

The above results of interpretative activities of the European Court reflected in the decision of the Plenum of the Supreme Court of the Russian Federation No. 14 from 15.06.2006 "On judicial practice in cases of crimes related to drugs, psychotropic, potent and toxic substances" [10]. It explains, in particular, that results of operational-investigative activity could form the basis of a verdict, if obtained in accordance with the requirements of the law and indicate the presence of a culprit's intent on illicit trafficking in narcotic drugs or psychotropic substances, which has been formed independently of the activities of operational units employees, and the preparatory steps of a suspect necessary to commit a wrongful act.

Summing up the legal position of the European Court on cases involving provocation, we can select the following scheme of qualification law enforcement actions as a crime provocation.

First, we should focus on the definition of the concept of "provocation", which is contained in the resolution on the case "Ramanauskas v. Lithuania": "provocation by the police happens in cases where law enforcement officers or persons acting on their behalf are not limited to the investigation of criminal activity mainly passively, but have an impact and incite the commission of a crime, which otherwise would not have been committed, in order to solve a crime, namely, to obtain evidence of its commission and initiate criminal prosecution..." [5] [author's translation].

Regarding the above definition national courts often make it difficult to understand the phrase about carrying out an investigation by law enforcement agencies "mainly passively". This concept consists of two aspects: firstly, the existence of grounds for conducting a covert operation, and, secondly, the actions of the authorities in the course of its implementation.

Speaking of the first aspect, the case-law of the European Court establishes that must be objective suspicions that an offense would have been committed without the intervention of law enforcement authorities. Moreover, any preliminary information that an entity has already had intent to commit a crime must be verifiable. Law enforcement agencies should be able to demonstrate that they had a good reason for carrying out an infiltration mission. A mere allegation of police officers that they had information on the participation of a person in the committing of an offence shall not be taken into account.

The question about the moment, when authorities has begun a covert operation, is closely linked to the criterion of objective suspicion. National courts have to determine what exactly has taken place – a simple joining of law enforcement agencies secret agents to a being committed offense or incitement to the committing.

In this question, is of considerable importance the precedential ruling of the European Court on the case "Sequeira v. Portugal" [6], in which was found that there was no provocation on the part of law enforcement agencies, as citizens, A. and S. asked to cooperate with the investigation police department only after the applicant (the subject of an offense) had contacted with A. to arrange the delivery of cocaine to Portugal. From this point A. and S. acted as secret agents under the supervision of the investigation department with the permission of the prosecutor's office of the country. In other words, only after the voluntarily applicant's request the police started monitor the crime. Exactly this procedural factor distinguishes

this case from the case "Teixeira de Castro v. Portugal" [11], in which namely the police initiated the crime, but did not join the being committed one, as it was in the case "Sequeira v. Portugal".

Drawing a line between legitimate penetration of a secret agent and a provocation to an offense, the European Court considers the issue whether the applicant has been influenced to commit a crime by the police or agents-provocateurs. Relying upon the European Court's legal positions following the results of considering the above cases, we can safely assert that such an authorities' behavior like a repeated proposals to the commission of a wrongful act, despite the initial refusal of the very subject or persevering request is not a passive behavior.

On the issues of repeated proposal the case "Ramanauskas v. Lithuania" serves as a leading law enforcement benchmark. Being a prosecutor, the applicant argued that he had been privately asked by an unknown person who later turned out to be a member of a special anti-corruption police unit. The employee offered the applicant a bribe of 3000 dollars for the promise to contribute to the acquittal of a third party. Initially the applicant refused, but later agreed, after a police officer repeated his offer several times. A police officer informed his superiors, and in January 1999, the Deputy Attorney General sanctioned provocation of the bribe. Shortly thereafter, the complainant took a bribe from the employee. In August 2000, he was convicted of taking a bribe in the amount of $ 2500 and sentenced to imprisonment.

The European Court noted that the actions of the police officer and getting acquainted with the applicant went beyond passive monitoring of existing criminal activity: there was no evidence that the applicant has ever previously committed crimes, in particular those related to corruption, all meetings of the applicant and the police officer took place at the initiative of the last.

Thus, there is a provocation, if intent to commit a crime initially absented and was formed solely by the actions of operational law enforcement officers. The main question is who took the initiative. A person should start criminal activity on its own, without any external interference. Operational-investigative activities should monitor already ongoing criminal processes, but not promote to and, all the more provoke crimes.

Applying the above criteria, the European Court places the burden of proof on the public authorities. To this end, it ruled that the prosecution party had to prove the absence of provocation, provided that the statements of the accused were plausible.

Due to the numerous mistakes made by law enforcement agencies in investigations and courts in consideration this category of criminal cases, the Supreme

Court of the RF took decision on the generalization principle legal positions of the European Court on complaints against provocation of offenses, as a result of which the Presidium of the Supreme Court of the RF 26.06.2012 approved "Overview of the judicial practice in criminal cases on crimes related to illegal trafficking in narcotic drugs, psychotropic, potent and poisons substances" (hereinafter – Overview).

In this overview national judicial bodies are given clarifications about the cases, in which the results of the operational-investigative activity, used by the bodies of preliminary investigation to prove the guilt of particular individuals in committing acts related to illegal drug trafficking, should be recognized as inadmissible evidence. Also in the overview for the first time was given the definition of the term "Provocation on the part of law enforcement officers in carrying out operational-investigative activity".

With reference to the provision in paragraph 14 of the Plenum resolution No. 14 from 15.06.2006 it is said, that under provocation of drug pushing should be understood incitement, inducing, encouraging, directly or indirectly, to commit illegal actions aimed at the transfer of narcotics drugs to law enforcement officers (or secret agents).

However, up to this day, take place significant violations by law enforcement officials in the implementation of operational-investigative activity and by courts in consideration the cases of this category, what is certainly not acceptable in a legal state, in a State-participant of the Council of Europe.

Of course, it is not so easy to change the sense of justice among law enforcers and judicial community. But also it would be wrong to give up on the generally accepted principles of fair trial, which are not compatible with the provocation of crime by the authorities. It is important to absorb the principles of a fair trial enshrined in article 6 of the Convention and decisions of the ECHR, and to introduce into the consciousness of ordinary citizens and law enforcement officials the need for strict adherence to generally accepted in a civilized society principles of fairness in administration of justice.

References:

1. Arbitration Procedural Code of the Russian Federation from July 24, 2002, Federal law No. 95-FL [Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii ot 24 iyulya 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

2. Civil Procedural Code of the Russian Federation from November 14, 2002, Federal law No. 138-FL [Grazhdanskii protsessual'nyi kodeks Rossiiskoi

Federatsii ot 14 noyabrya 2002 g. № 138-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

3. Criminal Procedural Code of the Russian Federation from December 18, 2001, Federal law No. 174-FL [Ugolovno-protsessual'nyi kodeks Rossiiskoi Federatsii ot 18 dekabrya 2001 g. № 174-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

4. Decision of the European Court of Human Rights from December 15, 2005. The case of "Van'yan (Vanyan) against the Russian Federation" (complaint No. 53203/99) (First Section) [Postanovlenie Evropeiskogo Suda po pravam cheloveka ot 15 dekabrya 2005 g. Delo «Van'yan (Vanyan) protiv Rossiiskoi Federatsii» (zhaloba № 53203/99) (Pervaya sektsiya)]. *System GARANT* [Electronic resource], Moscow: 2013.

5. Decision of the European Court of Human Rights from February 15, 2008. The case of "Ramanauskas against Lithuania" (complaint No. 74420/01) (Big Chamber) (extraction) [Postanovlenie Evropeiskogo Suda po pravam cheloveka ot 5 fevralya 2008 g. Delo «Ramanauskas protiv Litvy» [Ramanauskas v. Lithuania] (zhaloba № 74420/01) (Bol›shaya Palata) (izvlechenie)]. *System GARANT* [Electronic resource], Moscow: 2013.

6. Decision of the European Court of Human Rights from May 06, 2003. On the admissibility of the complaint No. 73557/01 "Sekveyra against Portugal" [Sequeira - Portugal] (III Section) [Reshenie Evropeiskogo Suda po pravam cheloveka ot 6 maya 2003 g. po voprosu priemlemosti zhaloby № 73557/01 «Sekveira protiv Portugalii» [Sequeira - Portugal] (III Sektsiya)]. *System GARANT* [Electronic resource], Moscow: 2013.

7. Decision of the European Court of Human Rights from July 08, 2003. The case of "Herst against the United Kingdom" [Hirst - United Kingdom] (complaint No. 74025/01) (IV Section) (extraction) [Reshenie Evropeiskogo Suda po pravam cheloveka ot 8 iyulya 2003 g. Delo «Kherst protiv Soedinennogo Korolevstva» [Hirst - United Kingdom] (zhaloba № 74025/01) (IV Sektsiya) (izvlechenie)]. *System GARANT* [Electronic resource], Moscow: 2013.

8. Decision of the Constitutional Court of the RF No. 2-R from February 05, 2007 "On the case on the constitutionality test of the provisions of articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedural Code of the Russian Federation in connection with the request of the Cabinet of Ministers of the Republic of Tatarstan, the complaints of open joint stock companies "Nizhnekamskneftekhim" and "Khakassenergo" as well as complaints of

number of citizens" [Postanovlenie Konstitutsionnogo Suda RF ot 5 fevralya 2007 g. № 2-P «Po delu o proverke konstitutsionnosti polozhenii statei 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 i 389 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii v svyazi s zaprosom Kabineta Ministrov Respubliki Tatarstan, zhalobami otkrytykh aktsionernykh obshchestv «Nizhnekamskneftekhim» i «Khakasenergo», a takzhe zhalobami ryada grazhdan»]. *System GARANT* [Electronic resource], Moscow: 2013.

9. Decision of the Plenum of the Supreme Court of the RF No.5 from October 10, 2003 "On application by the courts of general jurisdiction universally received principles and norms of international law and international treaties of the Russian Federation" [Postanovlenie Plenuma Verkhovnogo Suda RF ot 10 oktyabrya 2003 g. № 5 «O primenenii sudami obshchei yurisdiktsii obshchepriznannykh printsipov i norm mezhdunarodnogo prava i mezhdunarodnykh dogovorov Rossiiskoi Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

10. Decision of the Plenum of the Supreme Court of the RF No.14 from June 15, 2003 "On judicial practice in cases of crimes related to drugs, psychotropic, superpotent and poisonous substances" [Postanovlenie Plenuma Verkhovnogo Suda RF 15 iyunya 2006 g. № 14 «O sudebnoi praktike po delam o prestupleniyakh, svyazannykh s narkoticheskimi sredstvami, psikhotropnymi, sil'nodeistvuyushchimi i yadovitymi veshchestvami»]. *System GARANT* [Electronic resource], Moscow: 2013.

11. Case No. 44/1997/828/1034. Available at: http://do.gendocs.ru/docs/index-166840.html?page=23 (accessed: 15.01.2013). *C*

12. Karamanukyan D. T. The Integration of Contemporary Legal Systems (through the example of American Law) [Integrirovanie pravovykh sistem sovremennosti (na primere amerikanskogo prava]. *Vestnik Omskogo yuridicheskogo instituta – Bulletin of Omsk Law Institute*, 2011, No. 3(16), pp. 4-7.

13. Karamanukyan D. T. Case Law of ECHR as an Integral Part of the Russian Legal System [Pretsedentnoe pravo ESPCh kak sostavnaya chast' rossiiskoi pravovoi sistemy] *Sovremennye problemy gumanitarnykh i estestvennykh nauk: materialy VIII vseros. nauch. konf. – Contemporary problems of human and natural sciences: proceedings of VIII all-Russian scientific conference*, Moscow: Omsk Law Institute, 2011, pp. 143-147.

14. Karamanukyan D. T. Contemporary Standards of European Integration Associations in the Field of Human Rights [Sovremennye standarty

evropeiskikh integratsionnykh ob"edinenii v oblasti prav cheloveka]. *Vestnik Omskogo yuridicheskogo instituta – Bulletin of Omsk Law Institute*, 2011, No. 4(17), pp. 13-16.

15. Survey of judgments and decisions of the European Court of Human Rights on the Russian complaints for October 2012 [Obzor postanovlenii i reshenii Evropeiskogo Suda po pravam cheloveka po rossiiskim zhalobam za oktyabr' 2012 g.]. *System GARANT* [Electronic resource], Moscow: 2013.

16. Available at: http://www.lawrussia.ru/texts/legal_305/doc305a389x916.htm (accessed: 16.01.2013).

Universal Decimal
Classification 347.5 : 347.9

Kizilov V. V.

RULING OF THE HIGHER ARBITRATION COURT OF THE RUSSIAN FEDERATION ON REFUSAL TO TRANSFER A CASE TO THE PRESIDIUM OF THE HAC RF: IS IT A PROCEDURAL JUDICIAL ACT OR AN ACT OF JUSTICE?

Kizilov Viacheslav Vladimirovich,
c.j.s. (PhD of jurisprudence), Editor in chief of the maga-zine "The Topical Issues of Public Law", Omsk.
attorney1961@mail.ru

Based on the legal position of the Constitutional Court of the Russian Federation regarding the qualifications of the HAC RF ruling on the refusal to transfer a case to the Presidium of the HAC RF the author discusses options for compensation for damage caused by this ruling (as judicial tortious act) in the case of its non-conformity to the law or the legal position of the Constitutional Court of the RF. There is noted a feature of the HAC RF ruling on the refusal to transfer a case to the Presidium of the HAC RF, which has a dual nature – of a procedural judicial act and an act of justice.

Keywords: ruling of arbitration court, procedural judicial act, act of Justice, the refusal to transfer a case to the Presidium of the HAC RF.

Return to the issue of qualifications the ruling of the Higher Arbitration Court of the Russian Federation on the refusal to transfer a case to the Presidium of the Higher Arbitration Court of the Russian Federation is not accidental. It would seem that the Constitutional Court of the Russian Federation clearly defined its purpose and legal content [5, 6], but, in our view, not all the provisions of the supreme judi-

cial body of the country we can accept. About the conformity of the established by the legislator in the APC RF [2] proceedings procedure in supervisory instance to the Constitution of the Russian Federation [1] was mentioned in the Ruling of the Constitutional Court of the Russian Federation No. 160-O from April 21, 2005 [6].

We should agree that the method and procedure of judicial contesting in arbitration proceedings are determined by the APC RF on the basis of the Constitution of the Russian Federation, its articles 46, 123 and 128. This provision applies to the review of the decisions of arbitral courts, including the final decisions.

Determining cassation instance as final one, which still allows a trial and taking final decision on a case, the legislator in order to check the quality of judgments held introduced a procedure for the review of judicial decisions by way of supervision with special provisions that protect, as we believe, the judicial system from excessive use by participants of arbitration disputes the right to appeal court decisions.

Proceeding from the provision that a supervisory appeal passes the validation procedure for the presence of reason to transfer it along with the case to the Presidium of the HAC of the Russian Federation, we can say that the revision of entered into legal force court decisions by way of supervision is exceptional and occurs only in cases under article 304 of the APC RF when a contested legal act:

1) breaks the uniformity in the interpretation and application of law norms by arbitral courts;

2) violates civil rights and freedoms of man and citizen in accordance with universally recognized principles and norms of international law, international treaties of the Russian Federation;

3) infringes rights and legitimate interests of an indeterminate number of persons or other public interests.

However, the refusal of the HAC RF to review by way of supervision entered into legal force court's judgments cannot, in our opinion, be considered only as a procedural act completing a preliminary review of an application or presentation for revising the judicial act by way of supervision by collegial panel of judges of the Higher Arbitration Court of the Russian Federation, which, without considering the merits of the case, resolved only the issue of availability of the grounds for review the judicial act by way of supervision by the Presidium of the HAC RF.

It should be remembered that the ruling of refusal to transfer the case to the Presidium of the HAC RF, in some cases (in the context of articles 311, 312 APC RF) can form the basis of review judicial acts under new circumstances. In accordance with paragraph 5 part 3 article 311 of the APC RF in the ruling of refusal to transfer

the case to the Presidium of the HAC RF can be mentioned the possibility of revising entered into legal force court decisions due to the fact that in the decision of the Plenum of the HAC RF or in the decision of the Presidium of the HAC RF, taken before the ruling of refusal, was defined or changed the practice of applying a law norm, on which relied courts in passing contested judicial acts. This provision is confirmed by the norm of article 312 of the APC RF, which establishes the procedure and time of filing application for revising a judicial act under new or newly discovered evidence, including in the case of getting by the applicant the ruling of refusal to transfer the case to the Presidium of the HAC RF.

Such a ruling of the HAC RF on refusal hardly can be attributed simply to a procedural act of arbitration court, because it is actually an obliging document for the lower courts, which will be obliged at the request of a participant to re-examine a case in view of the legal position of the HAC RF.

The norm of law, which establishes requirements for the content of the ruling on refusal to transfer a case to the Presidium of the HAC RF (article 301 of the APC RF), in itself cannot be regarded as breaching any constitutional rights of citizens and organizations [6]. And this should be accepted. However, application by the Higher Arbitration Court of the Russian Federation this norm in law enforcement practice can lead, we believe, to a violation of the rights of subjects, who have applied with a supervisory appeal (application in the context of the APC RF) to arbitration court.

In our opinion, the possibility of occurrence a tort legal relation lies in the discretionary powers of judges who consider a supervisory complaint (presentation), in the absence of normative consolidation in article 301 of the APC RF at least indicative list of reasons for the refusal to transfer the case to the Presidium of the HAC RF to review a judicial act by way of supervision. Expectation that the HAC RF panel of judges will output grounds for refusal from the absence of reasons for review by way of supervision judicial decisions provided for by article 304 of the APC RF, in our opinion, is not justified.

Moreover, a set of norms of articles 311 and 312 of the APC RF as a ground for refusal to transfer a case to the Presidium of the HAC RF actually provides for a conflict norm in relation to the norm of article 304 of the APC RF. Presence of circumstances listed in article 304 of the APC RF, which must guide the panel of judges of the HAC RF in deciding the issue of transfer a case to the Presidium of the HAC RF, is crossed out by the occurrence of the legal position of the HAC RF, which is expressed in the Resolution of the Plenum of the HAC RF or Presidium of the HAC RF regarding the norm of law, which until the issuance of the specified

decision was incorrectly applied by arbitration courts (i.e., there was a judicial mistake, if to call a spade a spade), and its application was contested in a supervisory complaint (application).

The absence of a list of motifs in the norm of law will always generate dissatisfaction of the party in an arbitration dispute who has filed a supervisory appeal to the Presidium of the HAC RF and is refused in its consideration, particularly if the legal position of the complainant is based on the grounds provided for in article 304 of the APC RF, and moreover, when the panel of judges of the HAC RF in the ruling of refuse to transfer the case to the Presidium of the HAC RF to revise the judicial act by the way of supervision establishes the facts of violations of uniformity in the interpretation and application by arbitration courts of law norms and violations of rights and legitimate interests of an indefinite range of people, but because of the lack of the legal position of the Presidium of the HAC RF on the norms of law applicable in the case the panel does not find reasons at least for a revision the case on new circumstances by lower courts.

In this case, it should be noted the identity of the de facto on the legal consequences of the ruling on refusal to transfer a case to the Presidium of the HAC RF to review judicial act by way of supervision and the resolution of the Presidium of the HAC RF on abandonment application by way of supervision. Despite the fact that the panel of judges of the HAC RF does not make any new solution, differently defining the rights and responsibilities of persons involved in the case, for a supervisory complaint applicant terminated statutory means to appeal court's judgments made by lower court instances of arbitration court, and thus there is placed a final point in the arbitration dispute of adversaries. It is impossible to do by any other procedural judicial act (not resolving case on the merits) in other (lower) instances of arbitration court. Therefore, it would seem, that a purely procedural judicial act of the HAC RF judicial board on a supervisory complaint (the ruling of refuse to transfer the case to the Presidium of the HAC RF to revise judicial act by way of supervision) has an effect identical to the judicial act, which resolves the case on the merits, that is to say, it is equal in power to an administered justice.

Thus, the legal consequences of the ruling on refusal to transfer the case to the Presidium of the HAC RF to revise judicial act by way of supervision are completely identical to decree of the Presidium of the HAC RF, which has left the contested judicial act unchanged, and the application (supervisory appeal) or presentation without satisfaction (see paragraph 1, part 1, article 305 APC RF). Therefore, in our opinion, the position of the Constitutional Court of the RF on the issue of qualification of the HAC RF ruling on refusal to transfer the case to the Presidium of the

Russian Federation, according to which it does not refer to judicial decisions that resolve the dispute on the merits, is questionable. In fact, this ruling serves as an approval (upholding) of complained court's judgments of earlier court instances of arbitration court, but not as an ordinary procedural document. Therefore, a ruling on refusal to transfer the case to the Presidium of the HAC RF should be seen as a judicial act resolving the case on the merits in supervisory instance with negative result for a petitioner.

However, we do not see non-constitutionality in granting by the Presidium of the HAC RF the judicial panel of the HAC RF the powers on so-called negative verdicts. The Presidium of HAC RF would be just overwhelmed with supervision complaints and presentations, formally complying with the requirements of the APC RF for content of a supervisory appeal (as it take place in cassation instance especially on tax disputes where a complaint of the tax authority repeats word for word the appeal complaint or answer to the request of the taxpayer in first instance). We consider justified a kind of filter before the Presidium of the HAC RF, mostly chipping off supervisory complaints and presentation of judicial acts, which really do not contain grounds for revision by way of supervision. In this case, the panel of judges of the HAC RF accelerates administration of justice through ending an arbitration dispute participant's appeal procedure, not placing on the Presidium of the HAC RF the burden of making "negative" decision on an application.

According to legal position of the Constitutional Court of the RF, laid down in the decision No. 1-P from January 25, 2001, under administration of justice understand not a whole court proceeding, but only the part, which "lies in adoption acts of judicial power on resolving cases subordinate to court, i.e., judicial acts resolving cases on the merits. Judicial process is finished by taking such acts, which shows the will of state to resolve a case that is within the jurisdiction of court". Hence we can conclude that the judicial acts that do not resolve cases on the merits, do not define material and legal status of the parties, are not covered by the concept of "carrying out (administration) of justice" in the sense in which it is used in part 2 of article 1070 of the Civil Code of the RF [2]. Constitutional Court of the RF attributes to such acts, for example, those ones, in which "solved mainly procedural legal issues arising in the course of proceedings – from acceptance of application and up to the execution of judgment, including at the completion of a case (termination of proceedings and abandonment of application without consideration)" [5].

The qualifications issue of the HAC RF ruling on refusal to transfer the case to the Presidium of the HAC RF is not idle, depending on its attribution to dispensed justice or procedural judicial decisions here are provided for different mechanisms

of compensation for harm inflicted by the given ruling in the case of determination in it a tort content (nature). Russian law does not preclude the possibility of taking illegal court decisions, including those in the form of a ruling on refusal to transfer the case to the Presidium of the HAC RF, as well as provides for appropriate material responsibility (responsibility for damage caused by the judicial bodies and their officials).

Russian Constitution provides for the right to state compensation for damage caused by unlawful actions (or inaction) of state power bodies (and hence the judiciary) or their officials (article 53). The rights of victims of crime and abuse of power are also protected by the law, and the state declares in the constitution of the country the ensuring victims (individuals or legal entities) access to justice and compensation for damages (article 52 of the RF Constitution).

According to the legal position of the RF Constitutional Court, the harm caused in the administration of justice by unlawful actions (or inaction) of the judiciary and its officials, including as a result of the abuse of power, is compensated by the state regardless of their guilt, if these actions do not apply to the category of direct administration of justice. In order to provide the general legal principle of fairness and establishment the balance of constitutionally protected values and goals the legislator has established in part 2 of article 1070 of the Civil Code of the RF, that damage caused in the administration of justice shall be compensated in the event of a judge guilt is ascertained by a court verdict, which came into force, excluding tort actions, where the right of citizens and legal persons to damage compensation is not related to the presence of a judge guilt (see part 1 of article 1070 of the RF Civil Code):

1) in the case of harm to a citizen as a result of:

- unlawful conviction,
- unlawful bringing to criminal responsibility,
- unlawful applying as a preventive measure taking into custody or recognizance not to leave,
- unlawful bringing to administrative responsibility in the form of administrative detention;

2) in the event of infliction harm to a legal entity as a result of unlawful bringing to administrative responsibility in the form of administrative suspension of activity.

Thus the provision of part 2 of article 1070 of the RF Civil Code not only excludes the tortfeasor presumption of guilt, but assumes as an additional prerequisite for state compensation for damages the ascertainment of a judge guilt by a

court verdict and, therefore, binds the responsibility of the state with a judge tort committed intentionally (article 305 of the RF Criminal Code "Knowingly Giving an Unjust Judgement, Decision, or any Other Juridical Act") or by negligence (non-performance or improper performance by a judge as an official of court its duties due to fraud or neglect to the service, if it causes a significant breach of the rights and legitimate interests of citizens – article 293 of the RF Criminal Code "Neglect of Duty").

As indicated by the RF Constitutional Court, "such a special condition of responsibility for damage caused in the administration of justice is due to the peculiarities of the functioning of the judiciary that are enshrined by the Constitution of the Russian Federation (Chapter 7) and particularized by procedural legislation (adversary character of a judicial process, considerable freedom of judicial discretion, and etc.) as well as by special procedure for revision acts of judicial authority" [5]. It should be recognized that "judicial review by the way of court proceedings on a citizen's claim for compensation damages inflicted in the administration of justice, in fact, would be reduced to the assessment of the legality of court (judge) actions in connection with the adopted act, that is, would mean another procedure to check the legality and substantiation of the already taken court's judgment, and, moreover, would create the possibility of replacing (on the choice of the person concerned) the established procedures for inspection judicial decisions on their contesting by bringing tort actions" [5].

However, the RF Constitutional Court does not recognize the ruling of the HAC RF on the refusal to transfer a case to the Presidium of the HAC RF as an act of justice, ranking it as an ordinary procedural document of arbitration court.

By justice in accordance with the legal position of the RF Constitutional Court recognized only certain actions of court, that part of it, which lies in the adoption acts of the judicial power to resolve cases subordinate to court , i.e., court decisions resolving a case on the merits. "Judicial process ends with the adoption of such acts, which express the will of the state to resolve a case that is under court jurisdiction" [5].

Indeed, from articles 18, 118 (parts 1 and 2), 125, 126 and 127 of the RF Constitution follows that the "administration of justice is associated, first of all, with resolving relevant cases in such acts, which define legal relations of the parties or other legal circumstances, eliminate controversy, provide opportunities of smooth implementation of rights and legally protected interest and the protection of violated or disputed substantive rights and legitimate interests. In acts resolving a case on the merits, the court defines the actual material and legal situation of the parties,

that is, applies law norms to a particular case in a dispute about a right. Exactly through resolving a case (articles 126, 127 and 128 of the Constitution of the Russian Federation), and taking a decision in accordance with the law (article 120 of the Constitution of the Russian Federation), the court shall administer justice in the true sense of the word ..." [5].

Judicial acts, which do not resolve cases on the merits and do not define material and legal situation of the parties, are not covered by the term of "administration of justice" in the sense in which it is used in provision of paragraph 2 of article 1070 of the RF Civil Code. "Such acts solve mainly procedural legal issues arising in the course of proceedings – from acceptance of application and up to the execution of judgment, including at the completion of a case (termination of proceedings and abandonment of application without consideration)".

Taking the specified position of the RF Constitutional Court regarding the ruling of the HAC RF on refusal to transfer a case to the Presidium of the HAC RF, it should be noted that in this case the provision on ascertainment of judge guilt in a court verdict does not apply to the mentioned judicial act (if it is of tort nature). For compensation for damage caused by judge actions (or inaction) in the course of proceedings, if it takes an illegal act (or shows a wrongful omission) on the issues defining not substantive (resolving of a dispute on the merits), but procedural and legal status of the parties, for example:

- violation of the reasonable time of proceedings,
- unlawful denial of succession,
- unlawful termination of proceedings,
- another grave violation of procedure

the guilt of a judge can be ascertained by another judicial decision (at least in the form of negligence). Since, criminal non-punishable, but unlawful guilty actions (or inaction) of a judge in civil (arbitration) proceedings must be regarded as a violation of the right to a fair trial, which requires reasonable compensation to the person who has suffered from violation of this right [5].

The state is obliged to compensate the damage caused by unlawful actions (or inaction) of a court (judge) in the implementation of civil (arbitration) proceedings in the cases where the dispute is not resolved on the merits, when the guilt of the judge is ascertained not by a court verdict, but by another appropriate court judgment. However, what court does ascertain the guilt of a court for unlawful ruling of the HAC RF on refusal to transfer the case to the Presidium of the HAC RF?

In our opinion, there is allowed bringing of an action to the Higher Arbitration Court for damages compensation in the case of illegal ruling of the HAC RF

on refusal to transfer a case to the Presidium of the HAC RF, the alternative of which may be only the determination in the Constitutional Court of the RF unconstitutional law norms application by the HAC RF in a particular case (law enforcement decisions based on the act, which although as a result of resolving the case in the constitutional proceedings is recognized consistent with the Constitution of the Russian Federation, but to which in the course of applying to an individual case the arbitration court gave an interpretation at variance with its constitutional-legal sense that has been identified by the RF Constitutional Court [5]).

Unfortunately, the Federal Law No. 68-FL from April 30, 2010 "On the Compensation for the Violation of the Right to Trial within a Reasonable Time, or the Right to the Execution of a Judicial Act within a Reasonable Time" [4] does not cover all the admissible in court proceedings procedural violations and the thus contributes to reduce the sense of responsibility of certain members in the judicial community.

In addition it should be mentioned that such acts of justice (passed by appeal and cassation instances of arbitration court), as the provisions containing in the operative part the issues of succession, termination of proceedings on procedural aspects, not resolving a case on the merits and not defining a substantive status of the parties, in the context of legal provisions of the RF Constitutional Court, are not covered by the concept of "administration of justice". And, therefore, can also be considered as potential targets of lawsuits for compensation damages inflicted by State authorities.

References:

1. Constitution of the Russian Federation (adopted on National Voting, December 12, 1993) [Konstitutsiya Rossiiskoi Federatsii (prinyata na vsenarodnom golosovanii 12 dekabrya 1993 g.)]. *System GARANT* [Electronic resource], Moscow: 2013.

2. Arbitration Procedural Code of the Russian Federation from July 24, 2002, Federal law No. 95-FL [Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii ot 24 iyulya 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

3. Part two of the Civil Code of the Russian Federation from January 26, 1996, No. 14-FL [Grazhdanskii kodeks Rossijskoj Federatsii. Chast' vtoraya ot 26 yanvarya 1996 g. № 14-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

4. Federal law No. 68-FZ from April 30, 2010 "On Compensation for Violation of the Right to Court Proceeding within Reasonable Period of Time or the Right to Exercising of a Judicial Act within Reasonable Period of Time" [Federal'nyi zakon ot 30 aprelya 2010 g. № 68-FZ «O kompensatsii za narushenie prava na sudoproizvodstvo v razumnyi srok ili prava na ispolnenie sudebnogo akta v razumnyi srok»]. *System GARANT* [Electronic resource], Moscow: 2013.

5. Resolution of the Constitutional Court of the RF No. 1-P of January 25, 2001 "Under the case on verification the constitutionality of provision of paragraph 2 article 1070 of the Civil Code of the RF in connection to claims of citizens I. V. Bogdanov, A. B. Zernov, S. I. Kal'janov and N. V. Truhanov" [Postanovlenie Konstitutsionnogo Suda RF ot 25 yanvarya 2001 g. № 1-P «Po delu o proverke konstitutsionnosti polozheniya punkta 2 stat'i 1070 Grazhdanskogo kodeksa Rossiiskoi Federatsii v svyazi s zhalobami grazhdan I. V. Bogdanova, A. B. Zernova, S. I. Kal'yanova i N. V. Trukhanova»]. *System GARANT* [Electronic resource], Moscow: 2013.

6. Ruling of the Constitutional Court of the RF No. 160-O form 21.04.2005 "On refusal to examine complaint of CJSC "Rus'" on violation of its constitutional rights and freedoms by parts 8 and 9 of article 299 and article 301 of the Arbitration Procedural Code of the RF [Opredelenie Konstitutsionnogo Suda RF ot 21 aprelya 2005 g. № 160-O «Ob otkaze v prinyatii k rassmotreniyu zhaloby zakrytogo aktsionernogo obshchestva «Rus'» na narushenie konstitutsionnykh prav i svobod chastyami 8 i 9 stat'i 299 i stat'ei 301 Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

Universal Decimal
Classification 322.2 : 348.04

Proletenkova S. E.

ABOUT THE ORIENTATION OF THE ADMINISTRATIVE-LAW POLICY OF RESISTING RELIGIOUS EXTREMISM IN THE RUSSIAN FEDERATION

Proletenkova Svetlana Evgen'evna,
c.j.s. (PhD of jurisprudence), Associate professor, Doctoral student of Federal State Owned Institution "All-Russian Research Institute of the MIA of the RF», Moscow, G-69 GSP-5 (official municipal post #5), 25 Povarskaya street, zip code 123995.

The article identifies the major problems of legal normative ensuring countering religious extremism in Russia. The author suggests ways to improve legal regulation in this area.

Keywords: religious extremism, State, legal regulation, policy, confession.

Many years practice of implementation the main provisions of the Russian legislation on freedom of conscience, freedom of religion and religious associations, based on the relevant provisions of the Constitution of the Russian Federation [1], leads to the conclusion that in general it has created the necessary foundation and conditions for the activity of religious associations, realization of the citizens› inalienable rights and freedoms in the ideological and religious spheres.

For the first time in the history of the Russian statehood freedom of conscience and freedom of religion are guaranteed by the state and implemented on the basis of universally recognized principles and provisions of international law and the domestic democratic legal norms.

Alongside this, patternless legal regulation of the religious sphere of Russian society, conducted in the early 1990s, led to a deep ideological confusion of a part of Russian population, devaluation of traditional moral values, which up to the present moment have been difficultly influenced by law. The typical result of such legal policy was the aggravation of the problems associated with manifestations of open religious hatred in society, often developing into religious extremist activity.

Despite the awareness of public authorities about the scale of the threat, we cannot talk that at the present time there is a balanced and complete system of legal regulation of combating religious extremism in the Russian Federation. So, it seems that the adoption of strict science-based legal solution is interfered by "frailty" of the issue, due, first, to the instability of forecasts of seriously developed extremist underground (most of Islamist nature) response to measures taken; and secondly due to the inability, despite all the measures taken, to come to a social partnership of the state and the largest denominations, not to mention the interdenominational partnership, in the mechanism of combating religious extremism.

Such judgments prove the fact, that any attempt to legal intervention in the religious sphere of society with positive intentions of eliminating extremist threats are speculatively described by political and ideological opponents of the government as an attack on religious freedom. That is why, in our view, the legislature should arm by political will and come to understanding of the obligation not only to protect the freedom of conscience and ideological diversity, but also to ensure social stability and security of the very foundations of statehood. In this case, authorized public bodies should take a methodologically correct and scientifically justified way in forming the legal framework of the system of religious extremism combating, going away from the explicit expression of religious preferences in the face of the Russian Orthodox Church of the Moscow Patriarchate, and exercising their powers under the Constitution of the Russian Federation and adopted in accordance with it legal laws. However, adherence to the principles of a secular state should harmonically go with the active work on the formation of church-state relations that can positively suppress the problem of religious extremism. In this connection, we should find legal means to orient denominations not to churching, or turning to religion, but to addressing intra-confessional problems (firstly of a political nature, struggle for intra-confessional leadership) and to social service for the good of society.

Acting in a federal state, the public authorities of the Russian Federation and its subjects should pay close attention to the regional legislation on countering religious extremism, which currently does not hold water. So, most of the regional laws adopted in this area do not meet the particular provisions of existing federal legislation, are of populist nature, do not reflect the actual regional trends. Many regional programs of law-enforcement orientation, including in the field of combating religious radicalism and extremism, are not methodologically thought out, financed on leftovers, and often simply «rewritten» again with no change after they expire. At the same time, regional law-enforcement potencial of regional legislation

on administrative responsibility is practically not used, since relevant regional laws do not contain norms on responsibility for the initial manifestations of illegal activity that could later turn into a crime motivated by religious hatred.

The lack of an adequate mechanism for cooperation between the state and religious associations with respect to socially important issues, including on combating criminal and administrative tort, significantly worsens the situation in the field of combating religious extremism. Individually conducted joint activities are formed spontaneously, obeying more political will, rather than clear legal requirements. In particular, in regions it causes distortions associated with faith-based preferences of the current government, what contributes to forming a religious opposition, and in the traditionally Islamic regions – to an open confrontation between the various Islamic movements.

Thus, today we need a serious amendment of legal policy against religious extremism associated with the formation, on the already existing legal basis, a more delicate system of legal controllers of public relations in the field of religiosity manifestation among Russian citizens. In this case, the main vector for improving the legal environment of such relationships should be not the tightening of certain sanctions, but an active influence on confessional environment, formation of prescriptions that help a citizen to identify the limits of the permitted in religious field.

References:

1. Constitution of the Russian Federation (adopted on National Voting, December 12, 1993) [Konstitutsiya Rossiiskoi Federatsii (prinyata na vsenarodnom golosovanii 12 dekabrya 1993 g.)]. *System GARANT* [Electronic resource], Moscow: 2013.

Universal Decimal Classification
322.2 : 32.019.51 : 348.04

Proletenkova S. E.

POLITICIZATION OF RELIGIOUS ASSOCIATIONS AS ONE OF FACTORS OF RELIGIOUS EXTREMISM DEVELOPMENT

Proletenkova Svetlana Evgen'evna,
c.j.s. (PhD of jurisprudence), Associate professor, Doctoral student of Federal State Owned Institution "All-Russian Research Institute of the MIA of the RF», Moscow, G-69 GSP-5 (official municipal post #5), 25 Povarskaya street, zip code 123995.

The article describes the current trends in the development of State-Church relations in Russia. The author points out that the politicization of religious associations is a major occurrence factor of religious extremism.

Keywords: religious associations, religious extremism, Orthodoxy, Islam, policy.

Analysis of the legislation of the Russian Federation on the Freedom of Conscience and Religious Associations in general leads to the conclusion that it being based on the relevant provisions of the RF Constitution created the necessary foundation and conditions for the activities of religious associations and implementation by citizens the inalienable rights and freedoms in the ideological and religious spheres.

However, a deeper study of the activity of religious associations shows that there are still remain unresolved problems, caused by the presence of legal gaps and institutional weaknesses.

The most important of these is the fact that a characteristic feature of the contemporary religious situation in Russia is a politicization process of a number of denominations and religious associations. This process inevitably leads to confrontation of religious associations involved in politicization, a conflict of interest forms between them, which in the extreme forms of its manifestations may develop in the formation of extremist ideology based on religion

Most clearly the process of politicization is seen in the activity of the "traditional" Russian confessions – the Russian Orthodox Church and Muslim religious organizations. Along with active participation in public life, social and other programs, their activity often goes far beyond the limits of religious relations, goals and objectives, for which were created these religious organization, outgrows in settlement of political tasks in the field of positioning both their own, and other corporate interests.

Involving into such processes representatives of faith-based associations happens, in our view, for two main reasons:

1) Internal - related to the fact that separate people acting within of a religious community, who are proclaiming distancing from politics, have their own career or other ambitions and by their public statements and activities try to influence political processes, enter the circle of the political elite.

Similar trends so dramatically approve themself in the early 1990s, that the Holy Synod of the Russian Orthodox Church issued a resolution from 08.10.1993, which prescribed priests not to participate in elections as candidates of deputies of representative authorities of Russia. As a result of non-compliance with the said resolution some clerics were deprived of priestly dignity. It should be noted that the examples of such a serious violation the principle of separation of church from state were noted earlier in domestic practice, when the priests practiced their election to the Council of People's Deputies in the post-perestroika period.

At this, it should be emphasized that the only conscious actions of the religious functionaries, who use the religious factor to solve political problems, is of concern, because it is obvious that the above does not apply to such persons' participation in the political life of the country as "ordinary" members of civil society. In this it is difficult to disagree with the words told by the Patriarch on February 24, 1991 at Epiphany Patriarchal Cathedral on Sunday of Orthodoxy: "Orthodoxy is a search for the life with God, and every state and national dispensation of life is secondary for us. Christians can engage in politics, but that does not mean that religion is engaged in politics" [1, 58].

2) External – namely, that many political forces (political parties, movements, leaders, and so on) realizing that hundreds of thousands of believers stand for religious organizations, who are at the same time voters, are trying to "benefit from" the religious factor for their own purposes in the struggle for power.

There are a lot of examples of such trends. So, "in Moscow from 25 to 27 May 2011 took place XV World Russian People's Council (WRPC), at which Patriarch Kirill spoke of pluralism and diversity of social forces in our country, and in view

of the forthcoming elections, in December 2011, the Patriarch assured people that the Church was not going to support any political party, but would maintain relationships with all the political forces. Objective of this partnership is an inculcation politicians and society "basic values" (the most important of which is faith) that should unite Russians and serve to their national identity. Reasoning from this fact, the attempt of the "United Russia" (Edinaya Rossiya, in Russian), in spite of the constitutionally secular nature of the Russian state, to call Orthodox religion "the moral basis of modernization", seems interesting. February 13, 2011 at a meeting of party clubs of the "United Russia" on the issue of morality was accepted official document "The moral basis of modernization", where for the role of the state ideology was suggested Orthodoxy" [6, 213].

The other side of this same coin is the fact noted by A. Mironov and Yu Babinov "Non-Religious part of society in Ukraine and Russia, and it is very high – up to 50% of the population, also feels uncomfortable. Religious freedom is perceived as an aggression, violence against their conscience. There is a distributed conviction, that modern society is being artificially clericated by certain forces. The symptoms of this phenomenon are clearly seen in the media (especially television), in education, army, public administration. This is evidenced by a demonstrative display of religiosity on the part of government officials; widely spread all kinds of "consecration" of state institutions, military installations, regimental flags, warships. Feeling of deprivation in these circumstances of non-religious category of people is exacerbated by the fact that there are no opportunities to promote non-religious views and beliefs of the population. Thus, the growth of national tension is added to the existing in society political and social stratification" [4, 56].

Currently, obviously you can trace the dynamics and characteristics of the politicization of the largest denominations in Russia, which can be affected neither the federal legislation nor the political will of the country.

So, the condition of church-state relations in Russia indicates a tendency to "governmentalization" of Orthodoxy and the use by the political institutions of Church authority to implement their political interests. At this, the process of politicization is occurring not going beyond the legality defined by the current law norms. Politicization of Islam manifests itself in various forms, including in the form of a radicalization of its individual currents. Manifestations of militant, politicized, criminal Islam are well within the term "Islamism", which in turn is synonymous with the most dangerous to date form of extremism - Islamic extremism. Also of great concern regional trends of building Islamic religious traditions into social and political systems that affect the general legal and general social situation

in the Russian Federation. Politicization of Buddhism in modern Russia is due primarily to its use in opposition of some political elites and for demonstrating before the federal center readiness of revival "traditional" Buddhism to strengthen the cultural and moral foundations of individual nations in Russia.

An even greater problem than the politicization of "traditional" religions is the political orientation of new religious associations of a destructive nature. PhD in Law N. Krivelskaya in her book "Sect: the Threat and Search for Protection" rather accurately lists policy goals of such associations. She calls the following political objectives of their activities:

"1. The destruction of the Russian Orthodox Church as a factor of stability in Russia;

2. The undermining of the spiritual foundations of Russian society, in order to weaken the Russian State;

3. The establishment in the face of religious sectarianism, mostly of destructive nature, powerful potential political lever of pressure on power;

4. Developing an interconnected network of some destructive religious organizations to gather intelligence information;

5. Creation of a reserve fanatically devoted performers in the case of the need to organize for any political purposes riots and other anti-social actions in the cities of the Russian Federation;

6. Instituting control over various government officials through the influence on them by the leaders of destructive religious organizations (bribery, blackmail, lies, controlling the mind)" [2, 58].

Doctor of Philosophy, Professor N. A. Trofimchuk in his book "Expansion" [7], also analyzes in detail the issue of the invasion of foreign missionaries in Russia, as well as calls to draw attention to the activities of destructive religious organizations. The author, based on the enormous amount of factual material regards the invasion as a serious destabilizing geopolitical factor.

From the point of view of law enforcement activity new religious associations of destructive and occult nature carry the following risks:

a) *extremist and terrorist activities, including the seizure of state power* (for example, Sun Men Mun, founder of the Unification Church promoted the following: "When our time comes, we must bring to power over the world automatic theocracy (which is the rule of God through his earthly representative (Sun Men Mun). So, we cannot separate politics from religion. Separation between religion and politics – is what Satan likes most ... When we come to power in America, we will have to amend the Constitution and introduce death penalty for anyone found having

a physical contact with any other person, except one, which was prescribed to him or her" [5, 303]);

b) *ordinary crimes, including inducement to suicide* (greatest scandalous fame acquired the emerged in 1967 in the U.S.A. sect "Children of God", founded by former Protestant preacher David Brandt Berg. The sect included a large number of teens who were forced into begging and were constantly transported from place to place; followers were forced to pedophilia, parents were forced to have sexual relations with their children. In Russia, most often "the representatives of The Hare Krishna Movement, Scientologists, followers of Satan, esoteric and eschatological cults have problems with the criminal law" [5, 272]. The highest public outcry in the world got cases of mass self-sacrifice in anticipation of the end of the world. Here is a few list of such acts: 1900 – the end of the world according to the teachings of the sect "Red Death" in Russia, about a hundred members of which committed self-immolation; 1993 – the day of doom, in anticipation of which the followers of the Ukrainian-Russian sect "White Brotherhood" of Marina Tsvigun, who declared herself Maria Devi Christos, had to commit self-immolation; 1995, then 2000 – shifted days of the end of the world according to the teachings of the sect "The movement for the revival of the ten commandments" of Kredonii Mverinda in Uganda, hundreds of whose members were killed in an act of self-sacrifice; 2008 – the end of the world in anticipation of which the followers of the sect of Peter Kuznetsov locked up themself in a cave in the Penza region.

PhD in law A.N. Listkov in the study of the considered issue concluded that: "More often cult members are brought to legal responsibility for murder (ritual or to respect the confidentiality), for incitement to suicide, torture, kidnapping, violation of the graves, the turnover of psychotropic drugs and narcotics, sex crimes, organizing mass disorder, extortion, and the creation organizations encroaching on identity and rights of citizens; the illegal use of psychotechnics, fraud and abuse of trust, manipulation of sensitive information about citizens" [3, 78].

c) *violation of information security, informational victimization* (mainly activity of sects is rather personalized and directed against representatives of public authorities, representatives of the "traditional" religious organizations. An important role is played here by the publication and distribution of extremist literature among its followers, use of the Internet for such purposes);

d) *penetration of representatives of sects in government at various levels, attempts to communicate with law enforcement bodies;*

d) *the destruction of family values;*

e) *refusal to perform civil obligations, political and other rights.*

Listed by us problems of state-confessional relations of modern Russia dictate to the state an urgent need to implement in its religious policy dialectical pairing of implementation the constitutional principles of freedom of conscience and the equality of all religions before the law, with the ensuring interests of national security in the spiritual realm, with the priority to the preserving, revival and development of historical and cultural heritage, spiritual values of the peoples of Russia. One of the steps on the way to solution of the problem would be the adoption of the Concept of church-state relations, which would be able to formulate design principles of countering the process of religious associations' politicization.

References:

1. *Magazine of the Moscow Patriarchate – Zhurnal Moskovskoi Patriarkhii*, 1994, no. 2.

2. Krivel'skaya N. V. *Sect: the Threat and Search of Protection* [Sekta: ugroza i poisk zashchity]. Moscow: Fund «Blagovest», 1999.

3. Listkov A. N. About Unlawful Activity of Totalitarian Sects [O protivopravnoi deyatel'nosti totalitarnykh sekt]. *Materialy mezhdunarodnoi nauchno-prakticheskoi konferentsii «Totalitarnye sekty – ugroza XXI veka» – proceedings of all-Russian scientific and practical conference "Totalitarian Sects – the Threat of XXI Century"*, Nizhnii Novgorod: Brotherhood of St. Alexander Nevsky, 2001.

4. Mironov A., Babinov Yu. *Fundamentals of Religious Study: Workbook of Teacher and Student.* [Osnovy religiovedeniya: Rabochaya kniga prepodavatelya i studenta]. Moscow: NOU, 1998.

5. *Sects vs. Church* [Sekty protiv Tserkvi]. Moscow: Moscow Patriarchate, 2000.

6. Stankevich G. V. Religious Factor of the Current Political Process: thesis of doctor of political science [Religioznyi faktor sovremennogo politicheskogo protsessa: diss... dokt. polit. nauk]. Pyatigorsk: 2012.

7. Trofimchuk N. A. Svishchev M. P. *Expansion* [Ekspansiya] The Department of Religious Studies Russian Academy of State Service at the President of the RF, Moscow: 2000.

Universal Decimal
Classification 342.9

Sidorkin A. V.

APPLYING ADMINISTRATIVE RESPONSIBILITY FOR UNFAIR COMPETITION IN THE FIELD OF USE OLYMPIC AND PARALYMPIC SYMBOLICS

Sidorkin Andrei Vvladimirovich,
Post-graduate of Omsk Law Academy, Omsk.

The article deals with the problem of bringing to administrative responsibility for the illegal use of Olympic and Paralympic symbols. Identified and justified the necessity of changing the norms of substantive law, providing for a special truncated concept of unfair competition in relation to offences related to the illegal use of Olympic and Paralympic symbolics. As a solution the author suggests to exclude this norm of law.

Keywords: administrative responsibility, unfair competition, use of Olympic and Paralympic symbolics, the ratio of an administrative offence and penalties.

In this article, we will continue to explore the issue of administrative responsibility for illegal use of the Olympic and Paralympic symbols and criticism of provisions of the Federal Law No. 310-FL from December 01, 2007 "On the Organization and Hosting of the XXII Olympic Winter Games and XI Paralympic Winter Games of 2014 in Sochi, the Development of Sochi as a Mountain Resort and Amendments to Certain Legislative Acts of the Russian Federation" [3] (hereinafter - the Law No. 310-FL) on ensuring fair competition in connection with the Olympic and Paralympic games. If in the previous article [7] we studied the issue of legal protection the interests of victims and the Russian Federation providing protection of the rights and freedoms of an individual, in this paper we study the issues of fairness and

reasonableness of statutory regulations (regarding proportionality of punishment to committed offense) in relation to persons subjected to punishment for committing offenses in this area.

The reason for this kind of thinking was the high-profile court case No. A40-105222/11 on a petition of LLC "Dzheneral Motorz Deu Avto and Tekhnolodzhi SNG" (hereinafter – the Company, the Claimant) to the Federal Antimonopoly Service with participation of third parties: autonomous noncommercial organization "Organizing Committee of the XXII Olympic games, XI Paralympic games of 2014 in Sochi", LLC "Volkswagen Group Rus" on the invalidation of the decision, prescriptions and resolution on violating antitrust legislation made by the Federal Antimonopoly Service [5]. This case was considered in three instances, each of which supported the decision of the Federal Antimonopoly Service, in which LLC "Dzheneral Motorz Deu Avto and Tekhnolodzhi SNG" was found guilty of an administrative offense under part 2 of article 14.33 of the Code on Administrative Offences of the RF expressed in presence in the actions of LLC "Dzheneral Motorz Deu Avto and Tekhnolodzhi SNG" unfair competition, expressed in the introduction into circulation of goods with illegal use of intellectual property and equivalent means of individualization of a legal person, means of differentiation of products, works and services, and the Company was imposed an administrative penalty of a fine in the amount of 23,270,115 RUR in accordance with part 2 of article 14.33 of the CAO RF.

According to the circumstances of the case the Company has carried out an initial introduction to the circulation in the Russian Federation cars "CHEVROLET", in particular models of "EPICA" and "CRUZE", with the body color "Olympic White". The Company used this verbal designation in booklets on cars «CHEVROLET», and on the websites of car dealers of the brand «CHEVROLET» in the Russian Federation. Verbal designation "OLYMPIC" is a protected word element of a combined trademark belonging to the International Olympic Committee the rights to the use of which must be settled in a contract between the Company and the International Olympic Committee or the ANO "Organizing Committee of the XXII Olympic games, XI Paralympic games of 2014 in Sochi". But the question is why the Company was imposed such a high fine – in the amount of 23,270,115 RUR, and can actions of the offender be considered as an unfair competition?

According to paragraph 9 of article 4 of the Federal Law No. 135-FL from July 26, 2006 "On Protection of Competition" [2] (hereinafter – the Law "On Protection of Competition") by unfair competition is understood any actions of economic entities (groups of persons) that are intended to receiving benefits in entrepreneurial

activity, contrary to the legislation of the Russian Federation, usual and customary business practices, requirements of fairness, reasonableness and justice and have caused or may cause damage to other economic entities –competitors, or have been or may be harmful to their business reputation.

In part 1 of article 8 of the Law No. 310-FL is given a different interpretation of the concept of unfair competition in the application area of the mentioned Law. By unfair competition is understood the sale, exchange or other introduction of goods involving unlawful use of Olympic and/or Paralympic symbols, and misrepresentation, including by creating a false impression that a manufacturer or an advertiser of goods is associated with the Olympic Games and/or the Paralympic Games, including in the capacity of a sponsor.

As pointed out by the Higher Arbitration Court of the RF in paragraph 16.2 of the Resolution of the HAC RF Plenum "On some Application Issues of the Special Part of the Code on Administrative Offences of the Russian Federation" [4] (hereinafter – the Resolution of the HAC RF Plenum) the norm of the Law No. 310-FL "is special with respect to paragraph 9 of article 4 of the Law "On Protection of Competition". Given this, such acts are recognized as unfair competition also in the event that they do not lead and cannot lead to the consequences referred to in paragraph 9 of article 4 of the Law on Protection of Competition". Thus, in order to bring a person to administrative responsibility under part 1 or part 2 of article 14.33 of the CAO RF, the law enforcer is not obliged to prove either (1) a presence of action (or inaction) tendency of a person to receive benefits in carrying out entrepreneurial activities, or (2) the fact of infliction or possibility to inflict damage to other economic entities –competitors, or the fact of infliction or possibility to hurt their business reputation, which are mandatory elements. Is such interpretation of the concept of unfair competition and, consequently, truncation up to formal offenses under part 1 and part 2 of article 14.33 of the CAO RF justified? According to the author, it was possible to avoid prosecution exactly under part 2 of article 14.33 of the CAO RF and the imposing of such disproportionate in relation to the deed punishment in the form of a fine in the amount of 23,270,115 RUR, if the necessity in proving the above circumstances still had the place to be.

Were the actions of the Company aimed to receiving benefit in entrepreneurial activity? In considering the case before the Commission of the Federal Antimonopoly Service on the consideration of the violation of antitrust law the Company said that "the name of the color of a car is unable to provide the Company with the benefits of the product market, because it is not a significant factor for wholesale and retail customers in choosing car model, the manufacturer or seller of a car, as

opposed to the price factor, technical characteristics, reputation of the manufacturer, the quality of service and warranty service. This argument, in the opinion of the Company, is confirmed by sociological survey on the topic "Identification of the most important, according to respondents, characteristics of a car", conducted by JSC "All-Russian Public Opinion Research Center" (hereinafter - the ARPORC), commissioned by the Company" [6]. The counter-evidence of the anti-monopoly authority was the fact that in our case the "orientation to receive the benefits of entrepreneurial activity is expressed in the use by the Company as a means of individualization for color of cars introduced into circulation in the Russian Federation the Olympic symbols, the use of which is allowed only on the grounds of contracts with International Olympic Committee and / or the ANO "Organizing Committee "Sochi 2014", in order to attract consumer interest in products offered for sale, given the known fact of hosting in the Russian Federation of the XXII Olympic winter games 2014 in Sochi" [6].

Frankly, it is difficult to imagine a situation where the name of the color would affect the consumer's decision to buy a particular car, even with the undeniable popularity of the Olympic Games. It should be noted that the Arbitration Court of Moscow in its decision did not use the counter-evidence of the anti-monopoly authority regarding the specified argument of the Company, but merely pointed out that it was needed to install only the fact of illegal use by the economic entity of Olympic and / or Paralympic symbolism.

Could the actions of the Company lead to the infliction of damages to a competitor or causing harm to its business reputation? Anti-monopoly authority identified that the only economic entity with the right to use Olympic symbols when introducing into circulation in the Russian Federation vehicles was LLC "Volkswagen Group Rus", which was involved by the court to participate in the proceedings as a third party, not declaring independent claims on the subject of the dispute. LLC "Volkswagen Group Rus" in the hearing by words of mouth supported defendant's position, pointing to the legality and validity of the contested decision and prescriptions of the Russian FAS; however, it focused attention of the Court on the fact that LLC "Volkswagen Group Rus" had not suffered any losses from illegal, according to the anti-monopoly authority, actions. Hence, "Volkswagen Group RUS" would hardly suffer any losses in the future. It is also seen that business reputation of LLC "Volkswagen Group Rus" was not affected.

Thus, in author's opinion, the above arguments sound convincing enough, and the anti-monopoly authority could not prove the presence in actions of the Company of unfair competition within the understanding of the Law "On Protection

of Competition". In this case, the Company could be subject to administrative responsibility for unlawful use of someone else's trademark, service mark, appellation of origin or similar designations for homogeneous goods, which is provided for by article 14.10 of the CAO RF. The signs of the offense indeed have been proven because the Company used the registered trademark without the conclusion of an appropriate agreement with the copyright holder. Consequently, the punishment would have been much less – up to forty thousand rubles with confiscation of items containing illegal reproduction of the trademark, that is, brochures and leaflets, in which was stated the name of the color "Olympic White".

The Higher Arbitration Court in an attempt to somehow legally justify the use of a special concept of unfair competition under the Law No. 310-FL, in paragraph 16.1 of the Resolution of the HAC RF Plenum stated that "when considering of the question of whether was the particular action committed by a person an act of unfair competition, shall be subjected to accounting not only the mentioned legal provisions, but also the provisions of article 10bis of the Paris Convention for the protection of Industrial Property [1], according to which the act of unfair competition is any act of competition contrary to honest practices in industrial or commercial matters" [4]. But then the question arises about what Russian practices in industrial and commercial matters is in question? In many European countries such practices are anyway supported by a common repute, the use in business turnover or reference to in judicial practice. There is no such a practice in the Russian Federation, and the direct application of article 10bis of the Paris Convention would not be entirely justified.

We also consider it necessary and interesting to apply for example of the normative-legal acts of other countries in the sphere of protection Olympic symbols, in particular, to the normative-legal acts of the UK, as a state with a longer history of protection Olympic symbols and, of course, because it is in the UK most recently in 2012 were held Summer Olympics.

Act of 1995 on the protection Olympic symbols [8] regulates in more detail the provisions about what is meant by illegal "controlled use" and how such use is expressed. But we note only that, according to article 8 of the specified Act, a person may be convicted for illegal use of Olympic symbols only if its actions are aimed at extracting benefits for themselves or another person or the person has the intention to cause damage to someone else. These signs actually bear the same meaning as the common signs of unfair competition in Russia.

Thus, the author sees no prerequisites to the application in relation to the use of Olympic symbols special truncated concept of unfair competition under the Law

No. 310-FL, and the example described in this article shows injustice of application sanctions provided for by part 2 of article 14.33 of the CAO RF for actions, which in fact are not an unfair competition.

The solution seems simple – delete part 1 of article 8 of the Law No. 310-FL, which provides for the special concept of unfair competition. In this case, a person may be held administratively liable for unfair competition only at presence of all its signs and upon the occurrence of the circumstances specified in the law "On Unfair Competition". As a result, depending on the actual circumstances, a person can be brought to administrative responsibility for an offense related to the illegal use of the Olympic and Paralympic symbols:

1. Under article 14.10 of the CAO RF for unlawful use of someone else's trademark, service mark, appellation of origin or similar designations for homogeneous goods; or

2. Under part 1 of article 14.33 of the CAO RF for unfair competition if these actions are not a criminal offense, excepting cases provided for in article 14.3 of the CAO RF and part 2 of article 14.33 of the CAO RF, the more so, that part 2 of article 14 of the Federal Law "On Protection of Competition" expressly provides for the inadmissibility of unfair competition related to the acquisition and use of exclusive rights to the means of individualization of a legal person, means of differentiation of products, works and services; or

3. Under part 2 of article 14.33 of the CAO RF for unfair competition, expressed in the introduction into circulation of goods with illegal use of intellectual property and equivalent means of individualization of a legal person, means of differentiation of products, works and services.

The legislator must always take care about how this or that new norm of law will be applied in practice, and if there are problems in its application – quickly respond by amending the law.

References:

1. Convention on protection of industrial property (Paris, March 20, 1883) [Konventsiya po okhrane promyshlennoi sobstvennosti (Parizh, 20 marta 1883)]. *System GARANT* [Electronic resource], Moscow: 2013.

2. Federal law No. 135-FL from July 26, 2006 "On Competition Protection" [Federal'nyi zakon ot 26 iyulya 2006 g. № 135-FZ «O zashchite konkurentsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

3. Federal law No. 310-FL from December 01, 2007 "On the Organization and Conduct of the XXII Olympic Winter Games and XI Paralympic Winter

Games of 2014 in Sochi, the Development of Sochi as a Mountain Resort and Amendments to Certain Legislative Acts of the Russian Federation" [Federal'nyi zakon ot 1 dekabrya 2007 g. № 310-FZ «Ob organizatsii i o provedenii KhKhII Olimpiiskikh zimnikh igr i XI Paralimpiiskikh zimnikh igr 2014 goda v gorode Sochi, razvitii goroda Sochi kak gornoklimaticheskogo kurorta i vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

4. Resolution of the Plenary Session of the Higher Arbitration Court of the RF No. 11 from February 17, 2011 "On some issues of application the Special part of the Code on Administrative Offences of the Russian Federation" [Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda RF ot 17 fevralya 2011 g. № 11 «O nekotorykh voprosakh primeneniya Osobennoi chasti Kodeksa Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh»]. *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii - Bulletin of the Higher Arbitration Court of the Russian Federation*, 2011, no. 5.

5. *Decision of the Arbitration Court of Moscow on the case No. A40-105222/11 from March 05, 2012* [Reshenie Arbitrazhnogo suda g. Moskvy ot 5 marta 2012 g. po delu № A40-105222/11]. Available at: http://kad.arbitr.ru/PdfDocument/4fd18351-957a-428d-b504-27e1eba39066/A40-105222-2011_20120305_Reshenija%20i%20postanovlenija.pdf. (accessed: 14.01.2013).

6. Decision and injunction on the case of LLC "Dzheneral Motorz Deu Avto e'nd Tekhnolodzhi SNG" (No. 1 14/51-11) [Reshenie i predpisanie po delu v otnoshenii OOO «Dzheneral Motorz Deu Avto e'nd Tekhnolodzhi SNG» (№ 1 14/51-11)]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

7. Sidorkin A. V. Administrative Responsibility for Illegal Use of Olympic and Paralympic Symbolics [Administrativnaya otvetstvennost' za nezakonnoe ispol'zovanie olimpijskoj i paralimpijskoj simvoliki*]. Aktual'nye problemy administrativnoj otvetstvennosti : materialy Vseros. nauch.-prakt. konf. (Omsk, 25 maja 2012 g.) – Topical Issues of Administrative Responsibility: proceedings of all-Russian scientific and practical conference (Omsk, May 25, 2012)*, under edition of Yu. P. Solovei, Omsk: Omsk Institute of Law, 2012, pp. 104-111.

8. *Olympic Symbol etc. (Protection) Act 1995*. Available at: www.legislation.gov.uk. (accessed: 14.01.2013).