EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

# THIRD SECTION

# DECISION

Application no. 36027/19
Nadezhda Viktorovna DADUSENKO against Russia
and 3 other applications
(see list appended)

The European Court of Human Rights (Third Section), sitting on 7 September 2021 as a Chamber composed of:

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
María Elósegui,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to the above applications lodged on the various dates indicated in the appended table,

Having deliberated, decides as follows:

## THE FACTS

1. A list of the applicants is appended to the present decision.

### A. The circumstances of the applicants' cases

2. The applicants complained of a disproportionate interference with their right to respect for family life on account of their or their relatives' allocation to a remote penal facility.

*1. Application no. 36027/19 lodged by Ms Dadusenko*

3. The first applicant lives in Chelyabinsk. In 2015 her sister was convicted in Yekaterinburg for drug-trafficking and sent to IK-6, which is

located in the same region but is 352 km from the first applicant's place of residence.

4. On 30 January 2019 her request for her sister's transfer to IK-5 (Chelyabinsk) was dismissed by the Federal Service of Execution of Sentences ("the FSIN").

*2. Application no. 47807/20 lodged by Mr Molchanov*

5. The second applicant is serving his sentence at IK-25 (Komi Republic) following his conviction in 2012 in the same region for drug trafficking. He requested a transfer to the Kaliningrad region where his mother and brother reside, i.e. 2,500 km from his current penal facility.

6. On 4 August 2020 his request was dismissed by the FSIN.

*3. Application no. 4241/21 lodged by Ms Asma Gazgireyeva and Ms Zarina Gazgireyeva*

7. The third and fourth applicants live in Ingushetia. In 2016 the third applicant's son, who is also the fourth applicant's husband, was convicted in Krasnoyarsk for illegal appropriation of a car and transport of arms and allocated to IK-5, located in the same region.

8. On an unspecified date in 2020 their request for transfer was dismissed by the FSIN.

*4. Application no. 8151/21 lodged by Mr Shishkin*

9. The fifth applicant is serving his sentence pursuant to his conviction in 2005 by the Tambov Regional Court. He was allocated to IK-18 (Yamalo-Nenets Region), a colony for persons convicted to life imprisonment, located 4,000 km from his home region where his relatives, including his minor daughter, live.

10. On 18 June 2019 his request for a transfer to a penal facility in Mordovia, a region bordering on his home region, was dismissed by the FSIN. The applicant challenged the refusal in court.

11. On 21 October 2020 the Supreme Court of the Russian Federation declared the refusal by the FSIN unlawful, quashed all the previous courts' decisions confirming it and sent the case for re-examination (see paragraph 18 below).

## B. Relevant domestic law and practice

*1. Recent amendments to the Code on the Execution of Criminal Sentences ("the CES") of 8 January 1997*

12. The initial allocation and subsequent transfer of convicts are governed by Articles 73 and 81 of the CES. Their content prior to the recent

amendments was summarised in the *Polyakova and Others v. Russia* judgment (nos. 35090/09 and 3 others, §§ 45-52, 7 March 2017). They provided that those sentenced to deprivation of liberty, save for those falling under the specific categories listed in Article 73 § 4 of the CES (e.g. persons sentenced to life imprisonment, persons convicted for terrorism-related offences, etc.), should serve their sentences in correctional penal facilities in the region where they resided prior to their conviction or where they were convicted ("the general distribution rule").

13. On 1 April 2020 those provisions were amended under Federal Law no. 96-FZ, which amendments entered into force on 29 September 2020. The amended Article 73 §§ 2 and 2.1 of the CES provides that prisoners subject to the general distribution rule may be sent to serve their punishment in a penal institution in one of the regions where their close relatives reside or, in the absence of an appropriate facility there, in the next closest region.

14. The amended Article 81 § 2 of the CES entitles prisoners and/or their relatives with the prisoner's consent to apply for a subsequent transfer (once during the period of execution of the sentence) to a penal institution in a region where one or several family members reside or, in the absence of an appropriate facility there, in the next closest region.

15. Article 6 § 2 of the CES provides that criminal sentences are executed in accordance with the legislation in force at the time of their execution.

### *2. The Code of Administrative Procedure*

16. On 15 September 2015 the Code of Administrative Procedure ("the CAP") entered into force. Its relevant provisions are summarised in *Shmelev and Others v. Russia* (dec.), nos. 41743/17 and 16 others, §§ 16-32, 17 March 2020. Before its entry into force, any proceedings challenging a decision or act (or failure to act) by State or municipal authority or official brought by a person who considered that it violated his/her rights were governed by Chapter 25 of the Russian Code of Civil Procedure ("the CCP") referred to in the judgment *Voynov v. Russia* (no. 39747/10, §§ 16 and 39-47, 3 July 2018).

### *3. Rulings and practice of the Supreme Court of the Russian Federation*

#### (a) Rulings of the Plenary of the Supreme Court on issues arising out of the application of the CAP in relation to detainees' rights

17. The relevant Rulings of the Plenary of the Supreme Court are summarised in the aforementioned *Shmelev and Others* decision, §§ 40-54. Ruling no. 47 of 25 December 2018 in particular concerns different rights of detainees, including the right to protection of family ties (see *Shmelev and Others*, cited above, § 52).

**(b) Practice of the Supreme Court of the Russian Federation under the amended provisions of the CES**

18. On 23 December 2020 the Presidium of the Supreme Court of the Russian Federation issued a review of judicial practice in administrative cases, in which it referred to the case lodged by the fifth applicant (no. 4 (2020), § 41). Referring to the European Prison Rules, to the judgment delivered by the Court in the case of *Polyakova and Others* (cited above, § 100) and the amended Articles 73 § 4 and 81 § 2 of the CES, the Supreme Court held that since the legislation in force could not be interpreted as allowing arbitrary allocation of convicted persons to penal institutions, the "exceptional circumstances" referred to in the relevant provision of the CES should encompass the right to respect for family life, thus justifying the transfer to another penal facility should the detainee be unable to maintain his/her family ties.

# COMPLAINTS

19. All the applicants complained under Article 8 of the Convention of a violation of their right to respect for family life on account of the decisions refusing to allocate them or their relatives to the penal facilities close to the family members' residence. The first, second and fifth applicants also complained under Article 13 of the Convention about the lack of an effective remedy in this respect.

# THE LAW

## A. Joinder of the applications

20. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their similar factual and legal background.

## B. Alleged violations of Articles 8 and 13 of the Convention

21. The applicants complained of a violation of their right to respect for family life on account of their or their relatives' allocation to remote penal facilities and their subsequent inability to obtain a transfer elsewhere. They relied on Article 8, and the first, second and fifth applicants also relied on Article 13 of the Convention, which read, in so far as relevant, as follows:

**Article 8**

"1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**Article 13**

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

*1. General principles on exhaustion of domestic remedies*

22. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014; *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 220, ECHR 2014 (extracts); and *Gherghina v. Romania* [GC] (dec.), no. 42219/07, § 83, 9 July 2015).

23. The obligation to exhaust domestic remedies, therefore, requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV, and *Vučković and Others*, cited above, § 71). To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Gherghina*, cited above, § 85, with further references). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Vučković and Others*, cited above, § 74, and *Gherghina*, cited above, § 86).

24. The Court has already ruled on cases in which a contracting State introduced a special remedy, notably following the adoption of a leading judgment identifying a large-scale problem giving rise to numerous applications before it. It thus declared inadmissible repetitive applications once a remedy capable of remedying a structural problem was put in place in the domestic legal order (see *Tekin and Baysal v. Turkey* (dec.),

nos. 40192/10 and 8051/12, §§ 25-28, 4 December 2018, with the references therein).

*2. Application of these principles to the present case*

25. The Court has previously found that Articles 73 and 81 of the CES fell short of the "quality of law" requirement since they did not expressly provide for the authorities' obligation to take into account the convicts' family ties when they were allocated to a penal institution, thus depriving the latter of an adequate opportunity to vindicate their right to respect for family life at domestic level (see *Polyakova and Others*, cited above, § 116, and *Voynov*, cited above, §§ 42-43).

26. In 2020, in response to these findings, the Russian authorities adopted amendments to the relevant provisions of the CES to bring them into line with the Convention requirements (see paragraphs 12-14 above). The amended Article 73 §§ 1, 2 and 2.1 of the CES now expressly lists the convicted persons' family situation as one of the factors to be taken into account at the time of their initial allocation to a penitentiary facility (compare and contrast with *Polyakova and Others*, cited above, § 101). Further, the amended Article 81 § 2 opens a possibility for convicted persons to request a transfer to another penitentiary institution located closer to the place of residence of their family members (compare and contrast with *Polyakova and Others*, cited above, § 105). Such a request can also be lodged by relatives of a convicted person (see paragraph 14 above).

27. A refusal by the FSIN to take account of prisoners' family situation either at the moment of their initial allocation to a penitentiary institution or when examining their request for a subsequent transfer is amenable to a judicial review in accordance with the CAP. Its provisions largely reproduced the provisions of Chapter 25 of the CCP which were found by the Court to guarantee due process of law and effective participation for the aggrieved individual in the proceedings and thus to provide a solid theoretical legal framework for adjudicating the detainees' complaints (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 109 and 112, 10 January 2012). However, the Court found this remedy ineffective because the lack of a specific reference in the CES to family-related reasons among those to be taken into account when deciding on prisoners' allocation or transfer prevented the Russian courts from exercising the review of the proportionality of the relevant decisions taken by the FSIN (see *Voynov*, cited above, §§ 42-43). It notes that this obstacle has been removed by the aforementioned reform, thus providing the applicants with an avenue whereby they could adequately vindicate their right to respect for family life.

28. The decision issued by the Supreme Court in the fifth applicant's case corroborates the above assessment. The Supreme Court concluded that the inability of a convict to maintain family ties while serving his sentence

constitutes "exceptional circumstances" within the meaning of Article 81 § 2 of the CES and is one of the reasons for a prisoner to be relocated closer to his relatives' place of residence (see paragraph 11 above). The Court is particularly mindful of this example, which is included in the Review of judicial practice in administrative cases issued by the Presidium of the Supreme Court (see paragraph 18 above), as this applicant belongs to one of the specific categories excluded from the general distribution rule (see paragraph 12 above and *Polyakova and Others*, cited above, §§ 48 and 51). It is consequently satisfied that all prisoners, and notably those excluded from the general distribution rule, can vindicate their right to respect for family life at the domestic level in accordance with the amended provision of the CES.

29. The Court does not overlook the fact that the domestic proceedings in the fifth applicant's case are not yet terminated, and that their outcome under the new provisions cannot as yet be ascertained. Nor have the domestic courts so far been able to develop any extensive case-law under the new amendments. At this stage, however, the Court cannot see any reason for believing that the amended CES provisions, as interpreted and applied by the Supreme Court, would not afford the applicants the opportunity to remedy their grievances at the domestic level or that they would offer no reasonable prospects of success. In any event, it remains free to assess the question of whether, in view of the outcome of the domestic proceedings initiated by the applicants, they have lost victim status. Such assessment can be made, in every individual case, only after the relevant national remedy has been tried (see *Shmelev and Others*, cited above, § 118, and, in particular, § 128, with further references).

30. Bearing in mind its subsidiary role to the national systems safeguarding human rights (see *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24), the Court considers that the applicants thus have at their disposal a new remedy allowing the national authorities to restore at the domestic level their rights envisaged by Article 8 of the Convention. In this context, the Court is particularly mindful of the fact that the aforementioned reform was adopted in response to its previous judgments and in order to provide the national authorities with an opportunity to put matters right at domestic level, thus preventing numerous repetitive applications before it (see *Trăilescu v. Romania* (dec.), nos. 5666/04 and 14464/05, § 72, 22 May 2012, and *Koksal v. Turkey* (dec.), no. 70478/16, § 27, 6 June 2017). Its task, as defined by Article 19 of the Convention, would not be best achieved by taking such cases to judgment in the place of domestic authorities, let alone considering them in parallel with the domestic proceedings (see *Nagovitsyn and Nalgiyev v. Russia* (dec.), nos. 27451/09 and 60650/09, § 40, 23 September 2010, with numerous further references).

31. Furthermore, as in the case of the present applicants, in virtually all the cases pending before the Court concerning this issue, convicts or their convicted relatives are still serving their sentences, and therefore retain the possibility of lodging a transfer request with the FSIN and/or of challenging the proportionality of its refusal in the courts (see paragraphs 15 and 18 above). Accordingly, the applicants should exhaust this remedy before their complaints can be examined by the Court (see, similarly, *Shmelev and Others*, cited above, § 163).

32. Finally, the Court sees no reason not to apply the same approach to the applications which were lodged, as in the case of the first applicant, even before the above amendments to the CES had been adopted. It reiterates in this regard that although the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged, this rule may be subject to exceptions, in particular following the enactment of new legislation specifically aimed at remedying a systemic problem identified in the previous pilot or leading judgment delivered by the Court (see for a similar approach, among many other authorities, *Demopoulos and Others v. Turkey* [GC] (dec.), no. 46113/99, 1 March 2010; *Nogolica v. Croatia* (dec.), no. 77784/01, 5 September 2002; *Andrášik and Others v. Slovakia* (dec.), no. 57984/00, 22 October 2002; *Içyer v. Turkey* (dec.), no. 18888/02, 12 January 2006; *Stella and Others v. Italy* (dec.), no. 49169/09, 16 September 2014; and *Shmelev and Others*, cited above).

33. Having regard to the above considerations, the Court concludes that the applicants' complaint under Article 8 of the Convention should now be declared inadmissible for non-exhaustion of domestic remedies and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

34. The Court has found above that the applicants have an effective remedy at their disposal which they have been required to use for the purpose of Article 35 § 1 of the Convention. Accordingly, their complaint under Article 13 of the Convention must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 (a) and 4 of the Convention.

### C. Other alleged violations of the Convention

35. Lastly, the Court has examined the fifth applicant's complaint raised under Article 6 § 1 and, having regard to all the material in its possession and in so far as the complaint falls within the Court's competence, it finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court

*Decides,* unanimously, to join the applications;

*Declares*, by a majority, the applications inadmissible.

Done in English and notified in writing on 30 September 2021.

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Milan Blaško
Registrar

Paul Lemmens
President

# Appendix

| No. | Application no. | Case Title | Introduction Date | Details of conviction | Detention facility | Family member(s) and their place of residence | Approximate distance between the facility and the place of residence of the family member(s) (in km) | Examination of the transfer request |
|---|---|---|---|---|---|---|---|---|
| 1. | 36027/19 | Dadusenko v. Russia | 28/06/2019 | 03/07/2015<br><br>Chkalovskiy District Court of Yekaterinburg convicted to 14 years and 6 months | IK-6<br><br>Nizhniy Tagil<br><br>Sverdlovsk Region | sister<br><br>Chelyabinsk Region | 350 | 25/12/2018 request to FSIN<br><br>30/01/2019 dismissal by FSIN |
| 2. | 47807/20 | Molchanov v. Russia | 05/10/2020 | 23/03/2012<br><br>Ukhta Town Court convicted to 11 years | IK-25<br><br>Komi Republic | mother, brother<br><br>Kaliningrad Region | 2,500 | 08/07/2020 request to FSIN<br><br>04/08/2020 dismissal by FSIN |

| No. | Application no. | Case Title | Introduction Date | Details of conviction | Detention facility | Family member(s) and their place of residence | Approximate distance between the facility and the place of residence of the family member(s) (in km) | Examination of the transfer request |
|---|---|---|---|---|---|---|---|---|
| 3. | 4241/21 | Gazgireyevy v. Russia | 22/12/2020 | 19/02/2016<br><br>Zheleznodorozhnyy District Court of Krasnoyarsk convicted to 7 years and 6 months | IK-5<br><br>Krasnoyarsk Region | mother, wife<br><br>Sunzha,<br><br>Republic of Ingushetia | 5,200 | 25/06/2020 request to FSIN<br><br>Unspecified date dismissal by FSIN |
| 4. | 8151/21 | Shishkin v. Russia | 21/12/2020 | 09/09/2005<br><br>Tambov Regional Court convicted to life imprisonment | IK-18<br><br>Yamalo-Nenets Region | Unspecified relatives, including his minor daughter<br><br>Tambov Region (bordering Mordovia Region) | 4,000 | 15/05/2019 request to FSIN<br><br>18/06/2019 dismissal by FSIN |