

Development of law on protection from disability-based discrimination in Russia

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The article describes and analyses current law on protection from disability-based discrimination in Russia. Amendments in national legislation were adopted in accordance with the Convention on the rights of persons with disabilities ratified in 2012. Prohibition of discrimination on the grounds of disability is included in law. However, the process of development of the mechanisms of protection of the right not to be discriminated against has only started. While a special anti-discrimination law is not yet devised, legal actors have to apply the existing legal provisions which do not cover all aspects of protection from disability-based discrimination.

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A prohibition of discrimination on the grounds of disability as quite a new legal phenomenon recently appeared in Russian law. Though the general principle of equality and non-discrimination¹ had been included in national law years ago, disability as a prohibited ground of discrimination appeared in legislation only after the ratification of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter - the Convention). The concept of disability-based discrimination and the corresponding field of law therefore have only recently begun taking its shape within the national legal system.

¹ Article 19(par. 2) of the Russian Constitution (1993) reads: *the State guarantees equality of human and civil rights and freedoms, regardless of sex, race, ethnicity, language, origin, property or official status, place of residence, religious beliefs, convictions, membership of civil society associations or other circumstances. All forms of restrictions on the citizens' rights on the ground of social, racial, national, language or religious affiliation are prohibited.*

Pursuant to Arts 4 and 5 of the Convention States Parties ought to establish measures of implementation of the provisions on protection against discrimination. According to the UN Committee's interpretation² such measures include the following:

- an explicit prohibition of discrimination on the basis of disability in national law;
- recognition in legislation that the denial of reasonable accommodation is a prohibited form of discrimination in all areas of law;
- an entitlement of persons with disabilities to protection under the law on an equal basis with others;
- measures to ensure effective, accessible and affordable access to remedies by persons with disabilities;
- independent mechanisms tasked with the investigation and sanction of cases of discrimination against persons with disabilities.

Analysis of national legislation shows the following.

1. Prohibition of discrimination on the basis of disability in law

The notion of disability-based discrimination became a part of national law after the ratification of the Convention. Article 3.1 of the Federal Act On social protection of invalids in the RF³ reads as follows:

In the Russian Federation, discrimination based on disability is not allowed. For the purposes of this Federal Law, discrimination on the basis of disability is understood as any distinction, exclusion or restriction due to disability, the purpose or effect of which is to diminish or deny the recognition, realization or exercise, on an equal basis with others, of all human rights and freedoms guaranteed in the Russian Federation in political, economic, social, cultural, civil or any other field.

As follows from the provision, it is not allowed to discriminate (treat differently, exclude or restrict of rights stipulated by national law) on the mere ground that a person has any disability. The national definition of disability actually reproduces the definition of Art.2 of the Convention. The wording of the provision implies that any distinction, exclusion or restriction the purpose or effect of which is to diminish or deny equal recognition or exercise of human rights and freedoms stipulated in the Constitution and legislation of Russia is not

² UN Committee on the Rights of Persons with Disabilities. Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedures, CRPD/C/3, pars 18 -26. These guidelines are aimed at assisting States parties to incorporate the human rights-based approach in their implementation policies.

³ Federal Act On social protection of invalids in the RF (amended), dated November 24, 1995, No. 181-FZ.

allowed. It does not leave any ground to a differing interpretation of the prohibition to discriminate and therefore is explicit and unambiguous.

There are several points in the provision, however, that entail omission of some important ideas of the Convention. Firstly, the scope of the notion of disability as represented in national law is abridged compared to that in the Convention. Disability, in accordance with the above mentioned Federal Act, implies a result of an expert assessment of persistent disorders influencing a person's organism functioning because of illnesses, injuries or defects, and causing a limited day life for the person and the need for measures of social protection. Actually, only relatively serious disorders lead to the status of a disabled person (*invalid*) and the respective social protection in accordance with the above said law. Such situations as e.g. temporary illnesses (however serious), mild mental or other disorders, mild psychiatric or intellectual dysfunctions are generally out of the scope of disability. Persons in such circumstances may receive protection in accordance with various different acts⁴ which, however, does not amount to the same measure of protection as the status of *an invalid* provides. The respective laws do not include the reference to the Federal Act On social protection of persons with disabilities. The clause '*For the purposes of this Federal Law*' prevents those persons who may have assumed (anticipated, prospective) disability from a claim that they were discriminated on the basis of their disability. The same concerns family members of persons with disabilities – they are not protected by this Federal Act. The scope of the prohibition of disability-based discrimination is therefore narrow and embraces only those who fall under provisions of the above mentioned Federal Act.

Secondly, a part of Art.2 of the Convention is missing in the above said provision. The last sentence of Art.2 '*It includes all forms of discrimination, including denial of reasonable accommodation*' was not included in the law. As all provisions of the Convention, including Art.2, apply directly and immediately in Russia the absence of the provision in the national law does not hinder the reference to it. However, the implementation of the Convention requires that the concept of reasonable accommodation and the relevant national legislation must be established.

2. Legislation on reasonable accommodation

While the concept of reasonable accommodation was not included in the law on social protection of invalids practical issues are left to the discretion of executive authorities of the federal, regional and municipal level (in the framework of their competence) within their

⁴ Federal Act On psychiatric assistance and guarantees of its provision; Federal Act On social insurance in case of a temporary labor incapacity, etc.

general obligation to provide accessibility of services, buildings, facilities and the whole infrastructure. Article 15 of the Act establishes a scope of this obligation which includes the duty to provide barrierless access, assistive facilities, and accompanying and personal assistance services. In cases of impossibility to adapt constructively buildings or transport infrastructure to the needs of persons with disabilities the public agencies-owners of the respective objects have to establish (devise) in counsel with (by agreement with) organizations of persons with disabilities minimal measures of accessibility or provide services either at home or in a remote access mode if possible.

One of the first government agencies responded to the accessibility provisions of the Act was the Federal Ministry of transport, which adopted a special Decree⁵ with unified regulations concerning accessibility of railway transport and stations and services provided there. A huge and old railway infrastructure is, however, transforming efficiently enough.

The same may be said about air carrier companies for which certain impetus was given by the judicial cases referred to below.

Provisions on accessibility have been included in regulations of all executive agencies and instructions for public officials. However, the reference to the concept of reasonable accommodation in such regulations is scarce and is not supported by an expressed obligation to provide.

3. Access to court and remedies

While a special anti-discrimination law seems to be a distant future Russian law does not prevent or hinder access to justice in cases of discrimination. Complaints that a person was discriminated against on the ground of his/her disability can be filed in accordance with the ordinary judicial civil or administrative procedure. Administrative procedure applies in cases where provisions of a normative act or a decision, action (or inaction) of a public agency (authority) or an official are adopted (made) against the principle of equality and non-discrimination as stipulated by the Constitution or specific legislation and interferes with certain individual rights. In cases where a private person or organization exercised discriminatory actions thus violating the respective right of the person the civil judicial procedure applies. In both cases the applicant must prove the fact of unequal treatment, and provide evidence that such treatment violated a certain individual right. In administrative cases the public agency or an official must prove that the disputed decision or action (inaction) is made in accordance with law.

⁵ Decree of the Ministry of Transport. November 6, 2013, No. 329.

In the absence of a specific anti-discrimination legislation an applicant in most cases is left without such guarantee as the “shift of burden of proof”. Moreover, the absence of the provision that the denial of reasonable accommodation constitutes discrimination makes it complicated to the applicant to dispute a discriminatory character of such denial and claim for remedies, even if the applicant can apply to the court within the framework of the regular civil procedure. Absence of anti-discrimination law leaves an applicant without a possibility to acquire a judgement “not to discriminate in future” and to receive a material redress. It is not therefore unusual that applicants (in cases of discrimination) complain about a violation of a certain right and claim a compensation for moral damages only.

Some examples from the judicial practice can illustrate the initial steps of forming the legislation on protection from disability-based discrimination.

3.1 The case of Natalya Prisetskaya (District court of Moscow, 2008).⁶

Circumstances of the case

The Applicant (a member of an NGO of persons with disabilities) was going to fly with the air-carrier company “S7 Sibir”. While buying a ticket, she duly informed the company that she used a wheel-chair. When she arrived at the airport she passed through check-in for the flight and underwent a safety inspection in accordance with the regular procedure. In the car of the airport assistance services she was further followed to the aircraft where she was going to board with the help of the airport assistants. While waiting permission to board near the aircraft ladder she received a response from the aircraft crew that she cannot be on board during the flight without a personal assistant. Communication with the crew mediated by the airport assistants had no effect; the crew denied permission to board and refused to communicate with the applicant personally. Further on, she had to buy a new ticket and flew the same route by another air-carrier and from another airport later the same day; she had to spend about 10 hours in the airports and flights altogether without a possibility to have a rest. She said that the denial of boarding could not be predicted so far as being an NGO activist she flew previously by other air-carriers without restrictions. She felt discriminated against and the overall situation caused her physical and moral suffer. She sought a compensation for moral damages.

Applicable law

⁶ Decision of the Cheryomushky district court of Moscow, 17 October 2008, case No. 2-5572/08. The case description and documents are available on the web-site of the Non-Governmental Organization “Perspektiva” (Moscow) <https://perspektiva-inva.ru/protect-rights/trial/851-vw-851> (last accessed 08.08.2018).

Article 15 of the Federal Law On social protection of invalids in the RF obliges all organization (public and private equally) to provide access to all means of transport for persons with disabilities.

Article 310 of the Civil Code of the RF prohibits unilateral cancellation of the agreement between persons which applies as a general rule to all types of agreement including an agreement between a customer and an air-carrier. The Civil Code states that specific grounds for unilateral cancellation of agreement shall be stipulated only by a legislative act.

Article 107 of the Air Code of the RF stipulates that an air-carrier has the right of unilateral cancellation of the air-carrier agreement with a passenger only in cases when a state of health of the passenger requires specific conditions of transportation or makes a threat to the passenger or other passengers on board which is proved by medical documentation.

According to the Customers' Rights Protection Act unlawful denial of services to a customer entails an administrative fine. A violation of the rights of customers according to this law gives the customer a right to claim a compensation for moral damages.

According to Article 55 (3) of the Constitution of the RF human rights and freedoms may be restricted only by a federal law and only to the extent necessary to protect the constitutional order, morality, health and interests of other persons, state defense and public safety.

Defendant's views

Representatives of the air-carrier "S7 Sibir" stated that the crew acted in accordance with the company's regulations based on the Decree of the Ministry of Transport⁷ according to which an air-carrier has the right to reject carriage (boarding) to a passenger-wheel-chair user, a passenger on the stretcher for patients in case of absence of the necessary conditions on board of the aircraft. The decision to deny carriage to the passenger was made by the aircraft captain as the passenger-wheel-chair user had no personal assistant who could help her move. According to the Ministry's General Regulations of air carriage as understood and applied by the Defendant the passenger unable to move independently shall have a personal assistant. The decision was made with a purpose to protect her from a possible harm.

Decision of the court

The Court upheld the claim and ruled that the Defendant violated the rights of the passenger. The court noted that the Defendant had no reasonable grounds to assume that the state of health of the passenger could harm her or other passengers. Neither law nor regulations stipulated that the "absence of accompanying person or assistant" was a specific reason to

⁷ General Regulations of the carriage of passengers, luggage and cargoes and the respective services. Decree of the Ministry of Transport dated June 28, 2007, No. 82.

restrict the rights of passengers or refuse of boarding. Moreover, in case of specific restrictions the passenger should be informed beforehand of such restrictions in accordance with the law and the regulations which was not done in this case.

The Defendant appealed the decision but the appeal was not supported and the court of cassation instance upheld the decision.

3.2 Redress - possible and actual

As far as the complaint was based on the provisions of the Customers' Rights Protection Act the applicant had certain rights to claim a compensation for material and moral damages. According to this Act a customer whose rights are violated has the right to claim a refund of the sum paid to the perpetrator and a compensation of related material losses (in this case – the sum paid for another ticket and the expenses related to the delay in the airport and transport to another airport, time outage, and so forth). Similarly, in other cases of violations of civil rights or agreement, a victim has the right to claim a compensation of material damages.

In the above said case the applicant preferred not to claim such compensation so far the case was a judicial precedent, and it was important to reach a judgment that would serve for future protection for other persons with disabilities in principle. Such idea proved efficient so far several other cases were further brought before courts and finally induced the adoption of amendments in the General Regulations of air carriage.

“Moral damages” is a legal concept which gives a person the right to claim compensation in a pecuniary form for physical and moral suffering in cases of violation of personal non-material rights (e.g. degrading treatment, disparagement, and insult by words or actions, etc.). The Customers' Rights Protection Act endows a person the right to claim compensation for moral damages also in cases of violation of consumers' rights.

In the above said case the applicant sought for such compensation and the court partly upheld the claim. The court actually reduced the sum of the compensation from 1 million (sought by the applicant) to 50 thousand rubles (20 times reduced). Whether the compensation for moral damages was fair or not in this case it is generally in the discretion of the court to decide on the amount of compensation (within the sum claimed by the applicant) according to the circumstances of the case and the inner assumption of the judge on the degree of suffering of the applicant. The legal provisions on moral damages outline only general framework for such decisions.

Art.151 of the Civil Code envisages that in cases of moral damages caused by a violation of non-material rights or in other cases especially stipulated in legislation (as with the law on

protection of customers' rights) the court has the right to decide on compensation of moral damages. While deciding on the amount of the compensation the court must take into account the degree of guilt of the perpetrator, the individual circumstances of the case and the applicant. The Decree of the Supreme Court Plenum⁸ on compensation of moral damages was adopted long before the new developments in law and gives no reference to cases of discrimination.

Judicial practice of compensation for moral damages varies significantly and induces professional discussions on fairness and common criteria of such compensation. One of the points of view is that the existing judicial practice diminishes the concept of moral damages (the objective reason for which is a difficulty to “calculate” a moral harm) while the society requires more clear objective criteria of fair and reasonable compensation for moral damages.⁹ Back to the prohibition of discrimination in law – there is a need to support the general provision by the correspondent reasonable and fair redress for victims of discrimination. Currently there are no adequate legal instruments in Russian law that would prevent discrimination in future and provide for a reasonable and fair satisfaction to the victim. One of the ways to induce serious changes in practices and prevent tolerant attitudes towards discrimination could be a legal concept of presumed moral damages in cases of discrimination which will make such compensation inevitable for the perpetrator.

3.3 Implications of the Prisetzkaya case

As said above, the case of Natalia Prisetzkaya was a precedent which influenced the following judicial practice in similar cases¹⁰ However, the still existing provision of the General Regulations of air carriage gave opportunity to air-carrier companies to reject boarding to a passenger-wheel-chair user, a passenger on the stretcher for patients in case of absence of the necessary conditions on board of the aircraft.

⁸ Decree of the Supreme Court Plenum of December 20, 1994 (last amended in 2007) on questions concerning application of the legislation on compensation for moral damages.

⁹ A discussion on the issue has recently taken place in the Council of judges where the participants denoted that the current need is to establish clear criteria of reasonable and fair compensation in law and that the subjective views of judges on moral damages are outdated and should be changed. See: “The Price of Insult will Rise: the chairperson of the council of judges urged to rise the size of compensation for moral damages”, Rossiiskaya Gazeta, dated March 26, 2018, <https://rg.ru/2018/03/26/razmer-kompensacij-za-moralnyj-vred-predlozhili-povysit.html> (last accessed August 8, 2018).

¹⁰ As an example, a case with the similar circumstances was heard before the Tulski regional court in 2009. An applicant, a blind person, was denied boarding to the aircraft of the same air-carrier company, which was grounded in the reference to the same Regulations and the requirement of accompanying person. The court ruled similarly as in the Prisetzkaya case. The company had to change the inner instructions as an effect¹⁰ <http://perspektiva-inva.ru/protect-rights/juri/vw-852/> (last accessed August 8, 2018).

In a case¹¹ initiated by the NGO of persons with disabilities the applicant (the Consumer Rights Protection Association) asked the Supreme Court to decide that the paragraph 110(4) of the General Regulations is null and void as it does not comply with the Air Code of the RF. According to the par.110 (4) carriage of a passenger wheel-chair user or a passenger on the stretcher for patients shall be made together with an accompanying person who provides the passenger assistance during the flight. The applicant pointed out that the provision of the paragraph was discriminatory insofar it allowed an arbitrary rejection of carriage to persons with disabilities using wheel-chairs and justified the practice of air carrier companies to avoid taking measures of accommodation of aircrafts to the needs of such persons. The Ministry of justice supported the claim confirming that the contested provision infringes the right of persons with disabilities to access to air transport services by providing an excessive discretion to air carriers in making decision on a denial of transportation.

The defendant Ministry of transport opposed to the application stating that the provision as such does not contradict the law.

The court dismissed the claim and agreed with the Ministry of transport statement. However, the court ruled that the contested provision must be read in accordance with the provisions of the Air Code of the RF and other legal acts of the high legal force which does not allow arbitrary rejection of services. According to law, the air carriage services shall be accessible for everyone and the court concluded that as such the contested provision does not allow denying boarding on the grounds of disability. Such denial can be justified only in special situations when a state of health of a person requires special measures of accommodation, which an air carrier is not able to provide for technically. Concurrently, the impugned provision does not exempt the air carrier company from the duty to offer reasonable alternative to such passenger. Moreover according to the court, it is the duty of the transport authorities to adopt rules on technical equipment of aircrafts and requirements concerning accessibility thereof.

The interpretation given by the Supreme Court gave impetus to further changes in the General Regulations.

In 2016 the provisions changed and were amended with more detailed regulation. It currently envisages that a passenger with hearing or visual disability, as well as wheel-chair user may board without an accompanying person. Persons with visual impairment may be boarded together with a dog-guide. Only blind-deaf persons shall have an accompanying passenger for

¹¹ Decision of the Supreme Court of 14 November 2012, case no. АКПИ12-1299, http://www.consultant.ru/document/cons_doc_LAW_139341/ (last accessed August 8, 2018).

assistance during the flight. And a passenger on the stretcher shall be provided with an additional place in the aircraft.

While the Supreme Court thus left the room for discretion to air-carrier companies it at least limited the scope of it and induced clearer regulations leaving less opportunity to arbitrary denial of carriage.

Conclusion

Acceptance of the principle of non-discrimination and prohibition of disability-based discrimination was the first step implemented in Russia after the ratification of the Convention as it happened in many other countries. However, the concept of disability in Russian law needs revision and the concept of reasonable accommodation is obviously missing in legislation. The judicial practice shows that the current legislation provides access to protection of the rights of persons with disabilities in court. However, it is only a beginning of the development of this field of law. NGOs of persons with disabilities agree that in order to implement the Convention in full the next step shall be the adoption of special legislation on protection from disability-based discrimination. The existing legal mechanisms do not provide appropriate guarantees of the right to redress in cases of discrimination, and the prohibition of discrimination in future needs more robust support in law. It is therefore high time to learn international experience of the legal mechanisms of protection against disability-based discrimination.

Bibliography

UN Convention on the Rights of Persons with Disabilities;

UN Committee on the Rights of Persons with Disabilities. Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedures, CRPD/C/3;

Federal Act On social protection of invalids in the RF, dated November 24, 1995, No. 181-FZ;

Decision of the Cheryomushky district court of Moscow, 17 October 2008, case No. 2-5572/08. The case description and documents are available on the web-site of the Non-Governmental Organization “Perspektiva” (Moscow) <https://perspektiva-inva.ru/protec-rights/trial/851-vw-851> (last accessed 08.08.2018);

Decision of the Supreme Court of 14 November 2012, case no. АКПИ12-1299, http://www.consultant.ru/document/cons_doc_LAW_139341/.

Abbreviation

RF - Russian Federation

UN – United Nations