

CONSULAR REPRESENTATION OF FOREIGN PERSONS IN THE COURTS OF THE RUSSIAN FEDERATION

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Abstract

Continuous growth of international relations in various spheres of public life causes an increase in the number of civil legal relations, in which representatives of different states enter. At the same time, the number of civil disputes inevitably increases the consideration and resolution of which most often occur precisely in the courts.

Foreign countries are certainly interested in providing full and high-quality protection of the rights and interests of their citizens and legal entities in the territory of other states, not only to ensure the guarantees established by their national legislation, but also for the purposes of compliance with and enforcement of Section 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

One of the effective means to achieve this goal is the institution of judicial representation, which provides the interested person with qualified legal assistance. This institution serves to realize the right to judicial protection, is aimed at provide access to justice, and also facilitates the court's decision of a legitimate and informed decision by assisting the court in establishing objective truth in the case.

This article analyzes the norms of the Vienna Convention on Consular Relations, 1963 and the CCP RF in an attempt to determine the legal nature of the consular judicial representation of foreign citizens from the point of view of Russian law, including with the purpose of resolving the problematic issue of the scope of the consul's authority acting as a representative of a foreign person in civil process.

Keywords: foreign person, judicial representation, consul, international civil process

1 INTRODUCTION

In the Russian Federation, due to the operation of the national regime, foreigners have the same scope of procedural rights and obligations as Russian citizens and organizations (Article 398 of the Code of Civil Procedure of the Russian Federation (hereinafter - the CCP RF)).

Thus, foreign persons can participate in the civil process in person or through their representatives. Personal participation in the case of a foreign citizen does not deprive him of the right to have a representative in this matter (Article 48 of the CCP RF). However, unlike the representation of Russian citizens and organizations, the representation of foreigners in the civil process has its own peculiarity - an extended circle of persons who have the right to be representatives of foreigners in the Russian court. In particular, to represent the interests of foreign persons in the civil process, other than those specified in Articles 49, 50 and 52 of the CCP RF may also be consuls of foreign states in accordance with the Vienna Convention on Consular Relations, 1963 and bilateral consular conventions executed by the Russian Federation with other states.

Some problematic issues related to the judicial representation of foreigners in civil proceedings were covered by such authors as A. Balashov, M. Shalagina (Balashov & Shalagina, 2008), I.V. Vorontsova (Vorontsova, 2013), A.A. Koltsov (Koltsov, 2006) etc.

At present, an important issue on the scope of the consul's authority as a representative of a foreign person in a civil process remains open for discussion, and, as a consequence, an issue on a procedure for registering the relevant procedural powers of a consul.

In the opinion of a number of authors, such as M.M. Boguslavsky (Boguslavsky & Rubanov, 1960), A.A. Rubanov (Rubanov, 1962), M.Y. Porokhov (Porokhov, 2001), the norms of international treaties release the consul from the obligation to represent a power of attorney in the representation of citizens of their state in court. Therefore, the consular officer enters into a process on the basis of the norms of the international treaty and is endowed with both general and special (administrative) procedural powers, which is in accordance to Article 49, Section 3 of Article 52 and Section 4 of Article 53 of the CCP RF.

Other authors, such as Luntz L.A. & Marisheva N.I. (Luntz, & Marisheva, 2002), Galenskaya L.N. (Galenskaya, 1970), believe that foreign consuls while implementing the representation in Russian courts without power of attorney have the right to perform all procedural actions, except those that excluded under domestic law, in compliance with the requirements of Article 54 of the CCP RF, should be specially stipulated in the power of attorney.

It should also be noted that the scope of the consul's procedural powers is not defined either by the Consular Conventions or by the the CCP RF.

It seems that in order to resolve the indicated dispute, it is first of all necessary to analyze and determine the legal nature of the consular representation of citizens of their country in the courts of the Russian Federation.

2 METHODOLOGY AND RESULTS

In scientific publications, the consular representation is referred to a legal representation. This approach is generally accepted (Osokina, 2002; Afanasyev & others, 2016), explainable by the fact that, firstly, this office arises because of direct reference to international contracts, and secondly, ipso jure representation of capable persons, both physical and legal is also possible.

However, in our opinion, while agreeing with this position and recognizing the consular representation to be exclusively legal in all cases that arise, we run the risk of making a semantic and logical mistake in conferring procedural powers on the consul, considering that the Consular conventions and the national law of the Russian Federation do not establish any restrictions in this matter. This view is not fully consistent with the norms of the international treaty due to the following grounds.

First of all, it is necessary to refer to the provisions of the Vienna Convention on Consular Relations, 1963, which establish consular functions, in particular in Article 5, paragraphs "g", "h" and "i": "

... (g) Safe guarding the interests of nationals, both individuals and bodies, in the territory of the receiving state, in accordance with the laws and regulations of the receiving State;

(h) safe guarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons, lack of full capacity, who are the nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons ;

(i) subject to the practices and procedures in the receiving State, representing or arranging appropriate representation for the nationals of the sending State before the tribunals and other authorities for the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation the rights and interests of these nationals, where, because of absence or any other reason, such nationals are at the proper time to assume the protection of their rights and interests ...

Next, let us refer to the comments of the above provisions of the Vienna Convention, prepared by the International Law Commission of the United Nations and published in the Yearbook of the International Law Commission of 1961, Volume II, which are of particular value for the study of our question:

... (14) Paragraph (g), which provides for the safeguarding of the interests of the nationals of the sending State in matters of the succession of mortgages, recognizes the right of the consul, in accordance with the law of the receiving state, to take all measures necessary to ensure the conservation of the estate. He may, accordingly, represent, without obtaining a power of attorney, the heirs and legatees or their successors in the title until such time as the person concerned undertakes the defense of his own interests or appoints an attorney. By virtue of this provision, consuls have the power to appear before the courts or to approach the authorities of the receiving State all measures necessary to discover the whereabouts of the assets. The consul may, when the inventory of the assets is being drawn up, take steps in connexion with the assets of the estate, left by the deceased, the appointment of an administrator and disposal of the assets by the authorities of the receiving State. The consular conventions often contain the provisions of conferring upon consuls, in matters of succession, rights that are much more extensive and, in particular, the right to administer the estate ...

... (15) Among the nationals of the sending State, minors and persons lacking full capacity are those who stand in the special need of protection and assistance from the consulate. That is why it seemed necessary to set forth in paragraph (h) the consul's function of safeguarding the interests of minors and persons lacking full capacity. This function will be exercisable in particular where the institution of trusteeship and guardianship is required ...

... (16) Paragraph (i) recognizes the consul's right to represent before the courts and other authorities of the receiving state. Nevertheless, the consul's right to representation is limited to provisional measures for the preservation of rights and interests of the person concerned. Where judicial or administrative proceedings have taken place. In no case, however, does this provision empower the consul to dispose of the rights of the person he is representing. Furthermore, the consul's right of representation is also limited in time; it ceases as soon as the person concerned. The right of representation, as is stressed in the text, must be exercised in accordance with the laws and regulations of the receiving State. This right is absolutely essential to the exercise of consular functions, which consist (of others) of that of protecting the interests of the sending State and of its nationals (article 5, paragraph (a)). The consul could not carry out these functions without the power of the inquiring into the affairs of the absent nationalities of the transmitting to courts and other authorities sending State, drawing the attention of the courts, drawing the attention of the courts to the provisions of any international treaties that may be applicable to the particular case, and arranging for the representation of absent nationals before the courts and other competent instances their rights and interests ...

... (17) The function referred to in paragraph (i) is the general of which refers to all cases where the nationals of the sending State, whether individuals or bodies corporate, are in need of representation, owing to their absence or for any other reason . The latter of the latter means, in particular, cases where the person concerned is prevented from looking after his interests by serious illness or where he is detained or imprisoned. Nevertheless, since the purpose of this provision, is to ensure provisional representation, it cannot be applied to the special case in the paragraph (h) where the consul's function of safeguarding the interests of minors and persons lacking full capacity is necessarily exercised on a long-term basis, and where his powers must therefore be broader than those provided for in paragraph (i) ...

Thus, in accordance with the Vienna Convention on Consular Relations, 1963, the consul represents in court:

- 1) Heirs, legatees or their successors (citizens of their country) on matters of succession to mortis causa until a person concerns to take protection of his own interests by himself or appoints a lawyer;
- 2) underages and other persons who do not have full legal capacity who are citizens of the represented state, including when it is required to establish any kind of guardianship or trusteeship over such persons;
- 3) the citizens of a represented state (with a view to ensuring the preliminary representation and protection of the rights and interests of the person concerned) if, due to absence or to other reasons (the list of such reasons is open), such citizens cannot timely protect their rights and interests.

It is necessary to remind, that the establishment of a legal representation in the Russian law is due primarily to the fact that, a represented person due to its incapacity or partial incapacity, cannot dispose of its own will either as material rights or procedural, in particular, elect a representative, but therefore it is determined by

law. This entails conferring a legal representative special procedural powers by the law, along with general procedural powers, since the disposal of such procedural rights as, for example, the refusal of a claim, is nothing but the disposal of a substantive right (the refusal of a claim is the disposal of the subject matter of the claim, and the subject of the claim is a material right of the person).

Thus, representation by the consul in court of the rights and interests of underages and other persons who do not have full legal capacity, unconditionally, must be attributed to the case of legal representation. Consequently, in such cases, the consul will enter the process without a power of attorney, and will also be authorized to perform all procedural actions, including those related to the disposal of the material rights of the person being represented. The long-term perspective of legal protection also characterizes this case of consular representation as legal (compulsory).

The remaining cases of consular representation have similar features. As indicated in paragraph (17) of the above commentary to Article 5 of the Vienna Convention, this is due to the general nature of the function referred to in paragraph "i" in relation to the other consular functions provided in the convention.

The representation established in paragraphs (g) and (i) of the Vienna Convention on Consular Relations, 1963, integrates the following:

- 1) this representation is limited in time (as long as the interested persons cannot take up the protection of their rights and interests) themselves and does not have a long-term perspective (except when we think that the representative will voluntarily elect the consul by his representative);
- 2) the preliminary (urgent) nature of the representation (with a view to taking urgent measures to protect the rights and interests of citizens who cannot attend the court for various reasons);
- 3) it occurs when a person cannot independently protect his rights and interests not because of his incapacity or limited capacity, but under the influence of subjective events and circumstances (the unknown location of the person, his absence in the host country, temporary departure, illness and etc.);
- 4) a prohibition to execute administrative procedural actions without a power of attorney issued in accordance with the procedure established by the national legislation of the host country ("subject to the practices and procedures of obtaining in the receiving state"; "in no case, however, does this provision empower the consul to dispose of the rights of the person).

In turn, these features aggregated direct us to Article 50 of CCP RF, regulating representation on purpose. Despite the fact that this article names only a lawyer as a representative for appointment as a person capable of providing qualified professional legal assistance, having professional knowledge in the field of law, the consular officer, by virtue of the purposes and specificity of his activity, is also obliged to have professional knowledge in the field of law of a host country. We can conclude that the consular representation also has the features of a representative office for the purpose.

3 CONCLUSIONS

The study of the legal nature of the consular judicial representation made in this article leads us to the conclusion that this type of procedural representation has the features of both legal representation and official representation for the purpose from the point of view of the Russian procedural legislation.

The Russian procedural legislation does not directly refer the consular representation to the lawful one (Article 52 of the Code of Civil Procedure of the Russian Federation) or to the representative office (Article 50 of the Code of Civil Procedure of the Russian Federation).

International treaties, which establish and regulate consular relations between different countries, fix only general provisions, which give to the national legislation of each state -party to the treaty, the freedom to determine the mechanism for implementing these provisions.

In this regard, and taking into account the positions stated in this article, we consider it necessary to single out the consular representation as an independent type of procedural representation in the civil legal proceedings of the Russian Federation, having dedicated a separate article to the CCP of the Russian Federation, and, therefore, to regulate the scope and procedure of registration the authority of the consul - the judicial representative of foreign persons.

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