

Elena Shinkareva

Institute of Open Education in Arkhangelsk

len.shinkar@mail.ru

ORCID ID: <https://orcid.org/0000-0002-2065-367X>

Development of Law on Protection from Disability-Based Discrimination in Russia

Abstract: The article describes and analyses current law on protection from disability-based discrimination in Russia. Amendments in the 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 into the law. However, the development of the mechanisms of protection of the right not to be discriminated against has only just 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.

Keywords: Russian law on protection of persons with disabilities, concept of disability, prohibition of disability-based discrimination, judicial practice concerning protection of rights of persons with disabilities

Introduction

Prohibition of discrimination on the grounds of disability is quite a new legal phenomenon in Russian law. Although the general principle of equality and non-discrimination¹ had been included into the national law years ago, disability as a prohibited ground of discrimination only appeared in the legislation after the ratification of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter – the Convention). The concept of disability-based

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.*

discrimination and the corresponding field of law therefore have only recently begun taking shape within the national legal system.

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 interpretation,² 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 discrimination against persons with disabilities.

Analysis of the national legislation shows the following.

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

The notion of disability-based discrimination became part of the national law after ratification of the Convention. Article 3.1 of the Federal Law *On social protection of persons with disabilities in the Russian Federation*³ 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 the disability, the purpose or effect of which is to diminish or deny the recognition, realization or equal enjoyment 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 rights stipulated by the national law) on the mere ground that a person is disabled in any way. The national definition of disability actually reproduces the definition given in Art. 2 of the Convention. The wording of the provision implies that any distinction, exclusion or restriction the purpose or effect

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 Law *On social protection of persons with disabilities in the RF* (amended), dated November 24, 1995, No. 181-FZ.

of which is to diminish or deny equal recognition or exercise of human rights and freedoms stipulated both in the Constitution and the Russian legislation is not allowed. It does not leave any ground to misinterpret 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 expressed in the Convention. Firstly, the scope of the disability notion as represented in the national law is limited compared to that in the Convention. Disability, in accordance with the above mentioned Federal Law, implies a result of an expert assessment of persistent disorders influencing a person's body functions due to illnesses, injuries or defects, and causing a limited everyday life for such person and their need for social protection measures. Actually, only a relatively serious disorder may result in the status of a disabled person (*invalid*) entailing respective social protection in accordance with the said law. Such conditions as e.g. temporary (yet serious) illnesses, mild mental or other disorders, and mild psychiatric or intellectual dysfunctions are generally outside the scope of disability. In accordance with various laws, persons in such circumstances may receive protection⁴, which, however, does not match the level of protection the status of *an invalid* provides. The respective laws do not refer to the Federal Law *On social protection of persons with disabilities*. The clause '*For the purposes of this Federal Law*' deprives those persons who may have assumed (anticipated, prospective) disability of a right to 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 Law. 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 Law.

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 persons with disabilities, practical issues are left to the discretion of executive authorities at federal, regional and municipal level (within their competence) as their general obligation to provide accessibility of services,

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

buildings, facilities and the whole infrastructure. Article 15 of the Act establishes the scope of this obligation including the duty to provide barrierless access, assistive facilities, and accompanying and personal assistance services. In case it is impossible to constructively adapt buildings or transport infrastructure to meet the needs of persons with disabilities, the owners of the respective objects in cooperation with organizations of persons with disabilities have to establish (devise) minimal measures of accessibility or provide services either at home or remotely, if possible.

One of the first government agencies to respond to the accessibility provisions of the Law was the Federal Ministry of Transport, which adopted a special Decree⁵ with unified regulations concerning accessibility of railway transport and stations as well as services provided there. Notwithstanding a huge and old railway infrastructure, it is efficiently being transformed.

The same applies to airlines for which certain impetus was given by the judicial cases referred to below.

Provisions on accessibility have been included into the 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 not binding.

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 about a person being discriminated against on grounds of their 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 interfere with certain individual rights. In cases where a private person or an organization exercised discriminatory actions, thus violating the respective right of a 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) conformed with legal requirements.

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 for the applicant to dispute the discriminatory

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

character of such denial and claim for remedies, even if the applicant can apply to the court pursuant to the regular civil procedure. The 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 for applicants (in cases of discrimination) to complain about a certain right violation and claim 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 (Moscow District Court, 2008)⁶

Circumstances of the case

The Applicant (a member of an NGO of persons with disabilities) was going to travel with the *S7 Sibir* airline. While buying a ticket, she duly informed the company that she used a wheelchair. On arrival at the airport she passed through check-in for the flight and underwent a security inspection in accordance with the regular procedure. She was then driven by airport assistance services to the aircraft she was to board with the help of airport assistants. While waiting for permission to go on board the aircraft at the foot of the boarding steps, she received notice from the aircraft's crew that she could not take the flight without a personal assistant accompanying her. 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 directly. Later that day, she had to buy a new ticket and flew the same route with another airline but from a different airport; Altogether she had to spend about 10 hours in the airports, travelling from one to the other and then the flight, without the possibility to take a rest. She said that the denial of boarding could not be predicted because as an NGO activist she had flown previously with other carriers without restriction. She felt discriminated against and the overall situation caused her physical suffering and emotional distress. She sought compensation for moral damages.

Applicable law

Article 15 of the Federal Law *On social protection of persons with disabilities in the RF* obliges all organizations (public and private alike) 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 agreements including an agreement between a customer and an airline. The Civil Code states that

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/protec-rights/trial/851-vw-851> (access 08.08.2018).

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 the state of health of the passenger requires specific conditions of transportation or threatens the passenger or other passengers on board providing that it 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 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 S7 Sibir airline 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 in a wheel-chair, or a passenger on a stretcher in case appropriate conditions are not available on board the aircraft. The decision to deny carriage to the passenger was made by the aircraft captain as the passenger in a wheel-chair had no personal assistant to help her move. According to the Ministry's General Regulations on air carriage as understood and applied by the Defendant, a passenger unable to move independently shall be accompanied by a personal assistant. The decision was made with the purpose of protecting the passenger from 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 the law nor other regulations stipulated that the "absence of an accompanying person or assistant" was a specific reason to restrict the rights of passengers or deny boarding. Moreover, in case there exist specific restrictions, the passenger should be informed thereof beforehand 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 upheld the decision.

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

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 compensation for material and moral damage. According to this Act, a customer whose rights are violated has the right to claim refund of the sum paid to the perpetrator along with 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 lost, etc.). Similarly, in other cases of violations of civil rights or agreements, a victim has the right to claim compensation for material damage.

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

“Moral damage” is a legal concept that gives a person the right to claim pecuniary compensation for physical and moral suffering in cases of violation of personal non-material rights (e.g. degrading treatment, disparagement, 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 rubles (sought by the applicant) to 50 thousand rubles (a 95% reduction). Whether the compensation for moral damages was fair in this case is generally at the discretion of the court, which decides 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 the applicant's suffering. The legal provisions on moral damage outline only the general framework for such decisions.

Art. 151 of the Civil Code envisages that in cases of moral damage caused by a violation of non-material rights or in other cases specifically stipulated in the legislation (as with the law on protection of customers' rights) the court has the right to decide on compensation for moral damage. While deciding on the amount of the compensation the court must take into account the degree of the perpetrator's guilt, the individual circumstances of the case and the applicant. The Decree of the Supreme Court Plenum⁸ on compensation for moral damage was adopted long before the new developments in law and has no reference to discrimination cases.

Judicial practice of compensation for moral damage varies significantly and induces professional discussions on fairness and common criteria of such

8 Decree of the Supreme Court Plenum as of December 20, 1994 (last amended in 2007) on the issue of applying the legislation on compensation for moral damage.

compensation. One of the points of view is that the existing judicial practice diminishes the concept of moral damage (the objective reason for which is a difficulty to “calculate” a moral harm) while the society requires more clear and objective criteria of fair and reasonable compensation for its occurrence.⁹

Getting 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 the Russian law that would prevent discrimination in future and provide reasonable and fair redress for 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 damage in discrimination cases, which would make such compensation inevitable for the perpetrator.

3.3. Implications of the Prisetskaya case

As said above, the case of Natalia Prisetskaya was a precedent to influence following judicial practice in similar cases.¹⁰ However, the still existing provision of the General Regulations on air carriage provided airlines with the opportunity to refuse boarding to passengers in wheelchairs, or passengers on stretchers in the absence of necessary conditions being available on board the aircraft.

In a case¹¹ initiated by the NGO of persons with disabilities, the applicant (the Consumer Rights Protection Association) asked the Supreme Court to rule that paragraph 110(4) of the General Regulations shall be invalid, as it does not comply with the Air Code of the RF. According to the par. 110 (4), carriage of a passenger in a wheelchair or a passenger on a stretcher shall be made together with an accompanying person who provides the passenger with assistance during the flight. The applicant pointed out that the provision of the paragraph was discriminatory insofar that it allowed an arbitrary rejection of carriage to persons with disabilities using wheelchairs and justified the practice of airlines to avoid adapting aircraft to

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 legally establish clear criteria of reasonable and fair compensation, and that the subjective views of judges on moral damage 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 damage”, Rossiiskaya Gazeta, dated March 26, 2018, <https://rg.ru/2018/03/26/razmer-kompensacij-za-moralnyj-vred-predlozhili-povysit.html> (access 8.08.2018).

10 As an example, a case with the similar circumstances was heard before the Tula regional court in 2009. An applicant, a blind person, was denied boarding to the aircraft of the same airline due to the same Regulations and the requirement of accompanying person. The court ruled similarly as in the Prisetskaya case. The company had to change the inner instructions as an effect <http://perspektiva-inva.ru/protec-rights/juri/vw-852/> (access 8.08.2018).

11 Decision of the Supreme Court as of 14 November 2012, case no. АКПИ12-1299, http://www.consultant.ru/document/cons_doc_LAW_139341/ (access 8.08.2018).

accommodate 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 the air transport services by providing to the air carriers excessive discretion concerning the issues of transportation denial.

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

The court dismissed the claim and agreed with the statement made by the Ministry of Transport. However, the court ruled that the contested provision must be interpreted in accordance with the provisions of the Air Code of the RF and other preceding legal acts that do not allow arbitrary rejection of services. According to the law, air carriage services shall be accessible for everyone, and the court concluded that the contested provision as such does not allow denying boarding on the grounds of disability. Such denial can be justified only in specific situations, if a person's state of health requires special accommodation, which an air carrier is not able to provide. Concurrently, the impugned provision does not exempt the air carrier from the duty to offer such passenger a reasonable alternative. Moreover, according to the court, it is the duty of the transport authorities to adopt the rules on technical equipment of aircraft 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 were changed and amended with more detailed regulation. It currently envisages that a passenger with hearing or visual disability, as well as wheelchair user may board without an accompanying person. Persons with visual impairment may be boarded together with a guide dog. Only persons who are both blind and deaf shall have an accompanying passenger for assistance during the flight. A passenger who is stretcher-bound shall be provided with an additional place in the aircraft.

While the Supreme Court has still left room for discretion to air-carriers, it has at least limited its scope and induced clearer regulations leaving less opportunity to arbitrary denial of carriage.

4. Conclusion

Acceptance of the principle of non-discrimination and prohibition of disability-based discrimination was the first step implemented in Russia after ratification of the Convention, as happened in many other countries. However, the concept of disability in the Russian law needs revision and the concept of reasonable accommodation is obviously missing in the 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 just the beginning of the development of this legal field.

NGOs of persons with disabilities agree that in order to implement the Convention in full, the next step is to adopt 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 legal support. It is therefore high time to learn from international experience of the legal mechanisms of protection against disability-based discrimination.

BIBLIOGRAPHY

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> (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/.

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

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.

UN Convention on the Rights of Persons with Disabilities.

Abbreviation

RF – Russian Federation

UN – United Nations