European Court of Human Rights: *Pryanishnikov v. Russia*

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Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

The European Court of Human Rights (ECtHR) has delivered a judgment concerning the refusal to grant a film reproduction licence to a Russian film producer on the ground that he was suspected of producing and distributing pornographic films. The ECtHR found that the refusal was a too far-reaching and non-justified restriction on the film producer's freedom of expression, violating Article 10 of the European Convention on Human Rights (ECHR).

The applicant in *Pryanishnikov v. Russia* is a film producer who owns the copyright to over 1 500 erotic films. The films were approved for public distribution by the Ministry of Culture for audiences over eighteen years of age, and Pryanishnikov held valid distribution certificates in respect of them. However, the Ministry of the Press, Broadcasting and Mass Media refused Pryanishnikov's application for a licence for the reproduction of his films because he was involved in investigative measures concerning the illegal production, advertising and distribution of erotic and pornographic material and films, an offence under Article 242 of the Criminal Code. Pryanishnikov challenged the refusal before the Commercial Court of Moscow, which upheld the refusal, as did the Commercial Appeal Court and the Federal Commercial Court of the Moscow Circuit. The charges of producing and distributing pornography were subsequently dropped.

Before the ECtHR, Pryanishnikov alleged that the refusal to grant him a film reproduction licence had violated his freedom of expression. In essence, he argued that the domestic decisions refusing to grant him a film reproduction licence had not contained any proof that he had ever distributed pornography. The Russian Government argued that the interference was prescribed by law and pursued the legitimate aims of protecting morals and the rights of others, in particular protecting children from access to pornographic material.

First, the ECtHR referred to the general principles concerning freedom of expression, also reiterating that freedom of expression includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. It also recalled the principle that those 'who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society'. However, artists and those who promote their work are

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certainly not immune to the possibility of limitations, as provided for in Article 10, section 2 ECHR. Furthermore, under the third sentence of Article 10, section 1, states are permitted to regulate, by means of a licensing system, the way in which broadcasting, television or cinema enterprises are organised in their territories, particularly in respect of their technical aspects. The granting of a licence may also be made conditional on such matters as the nature and objectives of a broadcasting, television or cinema enterprise; its potential audience at national, regional or local level; the rights and needs of a specific audience; and the obligations deriving from international legal instruments. As regards the protection of morals as a legitimate aim to interfere with the right to (artistic) freedom of expression, the ECtHR observed that it is not possible to find a uniform European conception of morals. The view taken on the requirements of morals varies from time to time and from place to place. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements, as well as on the necessity of a restriction or penalty intended to protect morals.

Next, the ECtHR observed that under the domestic law in force at the material time, a film producer needed a film reproduction licence to be able to make copies of his films for the purpose of selling, broadcasting, or distributing them to cinemas, video libraries or video rental facilities. Without such a licence, the applicant was therefore *de facto* unable to distribute them; hence, the refusal amounted to an interference with Pryanishnikov's right to freedom of expression. As this licencing duty was prescribed by law and pursued the legitimate aims of protecting morals and the rights of others, in particular children, it remained to be determined whether the interference was 'necessary in a democratic society'.

The ECtHR found that the domestic judgments – in so far as they relied on a suspicion regarding the involvement in producing and distributing pornography – were based on assumptions rather than on reasoned findings of fact. Therefore, the domestic courts did not provide relevant and sufficient reasons for the finding that Pryanishnikov produced or distributed pornography; and although, in their judgments, the domestic courts briefly referred to the need to protect minors from pornographic material, the ECtHR found no evidence that Pryanishnikov was ever suspected of distributing pornography to children. Next, it observed that the ban on distributing pornography in Russia was not limited to minors, and extended to any audience. The ECtHR referred to its judgment in *Kaos GL v. Turkey* (IRIS 2017-2/1) in which it found that even a temporary ban on distributing a piece of pornographic material to any audience was not justified. In that judgment, the ECtHR held that the domestic authorities could have applied a less restrictive measure, for example, a ban on selling the material in question to persons under eighteen years of age; an obligation to sell it with a special cover displaying a warning addressed to persons under eighteen years of age; or an obligation to sell it via a subscription only. Finally, the ECtHR observed that the

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refusal to grant a film reproduction licence made it impossible for the applicant to distribute any films, including the more than 1 500 films for which the competent authorities had issued distribution certificates after verifying that they were not pornographic, or indeed any other audiovisual products or audio recordings on any types of medium, while there was no evidence in the text of the domestic judgments that the domestic courts weighed the impact which the refusal of a film reproduction licence would have on the film producer's ability to distribute the films for which he had distribution certificates or on his freedom of expression in general. The domestic courts therefore failed to recognise that the present case involved a conflict between the right to freedom of expression and the need to protect public morals and the rights of others, and failed to perform a balancing exercise between them. On this ground, the ECtHR unanimously came to the conclusion that such a far-reaching restriction on Pryanishnikov's freedom of expression, which deprived him of the opportunity to distribute any audiovisual products or audio recordings to any audiences, could not be considered justified. There was, therefore, no reasonable relationship of proportionality between the means employed and the aim sought to be achieved, and accordingly there has been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Third Section, Pryanishnikov v. Russia, Application no. 25047/05, 10 September 2019

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