

European Court of Human Rights: Kilin v. Russia

IRIS 2022-3:1/7

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Since the Russian Federation ratified the European Convention on Human Rights (ECHR) in 1998, the European Court of Human Rights (ECtHR) has found 116 violations by the Russian authorities of the right to freedom of expression and information as guaranteed by Article 10 ECHR. The judgment in the case of Kilin v. Russia is one of the rare judgments in which the ECtHR has found that an admissible complaint did not lead to the finding of a violation of an applicant's right to freedom of expression by the Russian authorities. In Kilin v. Russia the ECtHR agreed with the domestic courts that the applicant's conviction for incitement to violence against non-Russian ethnicities could be considered necessary in a democratic society. The ECtHR however found a violation of Article 6 ECHR (right to a fair trial) because the exclusion of the press and public from the appeal hearing had not been justified.

The applicant in this case is Roman Kilin who was convicted in Russia for public calls to violence and ethnic discord on account of video and audio files that had been made accessible via his social-network account. Mr. Kilin had uploaded a video file onto the popular online social network VKontakte (VK), entitled Russia 88 (Granny) and an audio file with a song called "Glory to Russia!". The regional office of the Federal Security Service found that the files contained images and texts inciting ethnic discrimination and violence. Criminal proceedings against Mr. Kilin were initiated, his home was searched, and his personal computer was seized. Mr. Kilin was convicted for extremist activities and sentenced to a suspended term of eighteen months' imprisonment. On appeal, the District Court emphasised that Mr. Kilin had made the impugned video and audio in his VK account accessible for an unlimited number of people and that he had acted with the intent to incite ethnic discord and to incite others to commit violations of the rights and freedoms of people of non-Russian ethnicity. The fact that Mr. Kilin was not the author of the audio and video files did not mean that the calls to extremist activities did not emanate from him. By intentionally disseminating such material, Mr. Kilin had expressed his endorsement or approval and had intended that others would be receptive to the calls contained in the impugned material. The District Court found that such an incitement amounted to a public call to carry out extremist activities which was a criminal offence under Article 280 § 1 of the Criminal Code. Before the ECtHR, Mr. Kilin complained that his criminal conviction violated his right to freedom of expression as guaranteed by Article 10 ECHR.

First the ECtHR dismissed the argument of the Russian government that Mr. Kilin could not rely on Article 10 because of the so-called abuse clause in Article 17 ECHR. The ECtHR reiterated that Article 17 was only applicable on an exceptional basis and in extreme cases. In cases concerning Article 10 ECHR, Article 17 ECHR could only be resorted to if it was immediately clear that the impugned statements sought to deflect that Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the ECHR, or when the applicant had attempted to rely on the ECHR and his right to freedom of expression to engage in an activity or to perform acts aimed at the destruction of the rights and freedoms of others laid down in the ECHR. The ECtHR was of the opinion that this point was not immediately clear in the case and overlapped with the question of whether there had been an interference with Mr. Kilin's right to freedom of expression and whether that interference was "necessary in a democratic society".

Before the ECtHR, Mr. Kilin denied that he had been the user of the relevant VK account and alleged that the impugned video and audio had been published on it by others. The ECtHR however saw no reason to disagree with the domestic courts' finding that Mr. Kilin had used the VK account, retained exclusive access to it and had made accessible the impugned material using it. Next the ECtHR found Mr. Kilin's criminal prosecution had been prescribed by law as provided for by Article 280 § 1 of the Criminal Code read together with section 1 of the Suppression of Extremism Act, and that his conviction could be regarded as having been intended for the prevention of disorder and crime and for the protection of the rights of others within the meaning of Article 10 § 2 ECHR, specifically the dignity of people of non-Russian ethnicity, in particular Azerbaijani ethnicity. The ECtHR added that racial discrimination was a particularly invidious kind of discrimination and, in view of its perilous consequences, required from the authorities special vigilance and a vigorous reaction. It reiterated that "negative stereotyping of an ethnic group was capable, when reaching a certain level, of having an impact on the group's sense of identity and on its members' feelings of self-worth and self-confidence". Therefore incitement of discord between ethnic groups through calls to violence might be prejudicial to all the groups involved and other sectors of the population. Still, it remained to be determined whether *in casu* the criminal conviction was "necessary in a democratic society" in the pursuance of those legitimate aims. The ECtHR referred to various factors that might have been pertinent and need to be taken into account, including: the social and political background against which the statements had been made; whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call to violence or as a justification of violence, hatred or intolerance; the manner in which the statements had been made, and their capacity – direct or indirect – to lead to harmful consequences. It was the interplay between those various factors, rather than any of them taken in isolation, that determined the outcome of where the balance had to be struck

between freedom of expression and the rights of others. Mr. Kilin insisted that the prosecution and conviction for a quotation from a work of art which was not banned could not be compatible with Article 10 ECHR, but that argument was not accepted. The ECtHR considered that a specific feature of “hate speech” was that it might be intended to incite, or could reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. The element of incitement entailed there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular “hate speech” used. In the Court’s view, Mr. Kilin’s conviction had been based on the consideration that his actions had been intended to incite violence, while Article 280 of the Criminal Code did not appear to require any assessment of a risk of harmful consequences, it being sufficient to establish a defendant’s direct intent and his or her actual aim to incite (to call) others to carry out extremist activities, that is – in the present case – to induce ethnic discord and to violate the rights of people of non-Russian ethnicities.

The ECtHR accepted the District court’s finding that the video and audio file could be reasonably perceived as stirring up ethnic discord by calling for violence against people of Azerbaijani origin or people of non-Russian ethnic origin. At the same time the ECtHR found that there was no indication that the material posted by Mr. Kilin was liable to produce imminent unlawful actions in respect of Azerbaijanis or other ethnic groups and to expose them to a real threat of physical violence. Nevertheless, it regarded the domestic courts’ reasoning based on Mr. Kilin’s criminal intent as both relevant and sufficient in the present case to justify Mr. Kilin’s prosecution for a criminal offence for a call for ethnic discord through violence. The ECtHR also emphasised that it saw no reason to consider, that by uploading the impugned material to his VK account and making it accessible to other users Mr. Kilin had contributed or at least intended to contribute to any debate on a matter of public interest. The ECtHR saw neither a reason to consider, that Mr. Kilin’s act of sharing the impugned video was (or intended as) a means of his own artistic expression or satirical social commentary. The ECtHR did not exclude that the sharing of the content at issue within an online group (even a relatively small one) of like-minded persons might have the effect of reinforcing and radicalising their ideas without being exposed to any critical discussion or different views, although the ECtHR also observed that the domestic courts had not referred to any factors or context which would show that Mr. Kilin’s actions could have actually encouraged violence and thus put those groups, or any of its members, at risk. However, the ECtHR did not find this last element decisive in the present case. It agreed with the domestic courts’ finding that Mr. Kilin’s criminal intent was both relevant and sufficient to justify his conviction under Article 10 § 2 ECHR. The ECtHR did however find a violation of Article 6 § 1 ECHR in so far as Mr. Kilin’s right to a public hearing on appeal was concerned, and more precisely because of the non-justified exclusion of the press and public from

the appeal hearing in the District Court.

Judgment by the European Court of Human Rights, Third Section, in the case of Kilin v. Russia, Application no. 10271/12, 11 May 2021

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