European Court of Human Rights: Ecodefence and others v. Russia

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On 14 June 2022, the European Court of Human Rights (ECtHR) delivered a judgment finding a gross and systemic violation by the Russian state of the right to freedom of association in combination with the right to freedom of expression and information as protected by Articles 11 and 10 of the European Convention on Human Rights (ECHR). The complaints by 73 non-governmental organisations (NGOs), formulated in 61 applications, all concerned the 2012 Foreign Agents Act. The ECtHR found the restrictions imposed by the Russian authorities on the NGOs which had been categorised as “foreign agents” a breach of their freedom of expression and association. One of the applicants was the Mass Media Defence Centre in Voronezh, whose mission is the protection of human rights, freedom of expression and the rights of the mass media.

The Foreign Agents Act requires Russian NGOs which are deemed to be engaged in “political activity” and to have been in receipt of “foreign funding” to seek registration as “foreign agents”, under the threat of administrative and criminal sanctions. They were also required to label their publications as originating from a “foreign-agent” organisation and to more extensive accounting and reporting requirements. In June 2014, the Ministry of Justice was given the power to put organisations on the register of foreign agents at its own discretion. The Foreign Agents Act has resulted in the imposition of administrative fines, financial expenditure, a set of restrictions on the NGOs’ rights, activities and receiving of funding, and in the institution of criminal proceedings. Many applicant organisations were liquidated for violating the requirements applicable to “foreign agents”, or had to take decisions on self-liquidation because they were unable to pay the fines, or because it became practically impossible to continue their activities due to the obligations and restrictions imposed on them.

After the applicants unsuccessfully challenged the decisions of the justice department and prosecutors' offices before the domestic courts, they complained before the Strasbourg Court that the statutory requirements introduced by the Russian foreign-agent legislation and the practice of its application amounted to unforeseeable and excessive restrictions on their freedom of expression and association under Articles 10 and 11 ECHR. Their complaint was supported by a wide range of third-party interventions, inter alia by the United Nations Special Rapporteur on the situation of human rights defenders, the International

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Commission of Jurists, Amnesty International, and the Media Legal Defence Initiative. The ECtHR examined the complaints under Article 11 interpreted in the light of Article 10 ECHR, given that the implementation of the principle of pluralism in a democracy is impossible without an association being able to express freely its ideas and opinions, while the protection of opinions and the freedom of expression is one of the objectives of the freedom of association

The ECtHR observed that the Foreign Agents Act severely restricted the ability of the applicant organisations to continue their activities and their ability to participate in public life and engage in activities which they had been carrying out prior to the creation of the new category of "foreign agents". It found that the classification of NGOs' activities based on the criterion of "political activities" produced incoherent results and engendered uncertainty among NGOs wishing to engage in civil society activities, while the domestic courts had failed to provide consistent guidance as to what actions did or did not constitute "political activity". Furthermore the ECtHR considered that the legal norm on foreign funding did not meet the "quality of law" requirement and deprived the applicant NGOs of the possibility to regulate their financial situation. Although the finding that these two key concepts of the Foreign Agents Act, as formulated and interpreted in practice by the Russian authorities, fell short of the requirement "prescribed by law" and hence was sufficient for a finding of a violation of Article 11, interpreted in the light of Article 10 ECHR, the ECtHR continued to verify whether the restrictions on the applicants' activities corresponded in principle to a "pressing social need", and whether they were proportionate to the aims sought to be achieved, as part of the broader issue of whether the interference was "necessary in a democratic society". While the ECtHR accepted in principle that the objective of increasing the transparency with regard to the funding of civil society organisations may correspond to the legitimate aim of the protection of public order, it found however that the interferences with the NGOs right to freedom of expression and association, were not necessary in a democratic society.

The ECtHR acknowledged that the function of creating various platforms for public debate was not limited to the press, but may also be exercised by, among others, NGOs, whose activities are an essential element of informed public debate. The ECtHR has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press. The ECtHR recognised that civil society makes an important contribution to the discussion of public affairs and that their activities may have a significant impact on the proper functioning of a democratic society.

The ECtHR considered that attaching the label of a "foreign agent" to civil society organisations which have received any funds from foreign entities was unjustified and prejudicial and also liable to have a strong deterrent and stigmatising effect on their operations. That label coloured them as being under foreign control in

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disregard of the fact that they saw themselves as members of national civil society working to uphold respect for human rights, the rule of law, and human development for the benefit of Russian society and democratic system. The ECtHR also found that there were no relevant and sufficient reasons for imposing the additional requirements on the applicant organisations purely on account of their inclusion on the register of "foreign agents". In any event, those additional measures imposed a significant and excessive financial and organisational burden on the applicant NGOs and their staff, and undermined their capacity to engage in their core activities. The ECtHR concluded that such additional requirements as provided for by the Foreign Agents Act and subsequent legislation were not "necessary in a democratic society" or proportionate to the declared aim. It also found that the restrictions on access to foreign funding had not been shown to be necessary in a democratic society.

Taking into account the essentially regulatory nature of the offences, the ECtHR also concluded that the sanctions imposed on the basis of the Foreign Agents Act had been disproportionate. The substantial amounts of the administrative fines imposed and their frequent accumulation, and the fact that the applicants were not-for-profit civil society organisations which suffered a reduction in their budgets due to restrictions on foreign funding, could not be regarded as being proportionate to the legitimate aim pursued. The ECtHR emphasised that this finding would be applicable a fortiori to criminal sanctions.

The ECtHR, unanimously, reached the overall conclusion that the Russian Government had not shown relevant and sufficient reasons for creating a special status of "foreign agents", imposing additional reporting and accounting requirements on organisations registered as "foreign agents", restricting their access to funding options, and punishing any breaches of the Foreign Agents Act in an unforeseeable and disproportionately severe manner. The cumulative effect of these restrictions – whether by design or effect – was a legal regime that places a significant "chilling effect" on the choice to seek or accept any amount of foreign funding, however insignificant, in a context where opportunities for domestic funding were rather limited, especially in respect of politically or socially sensitive topics or domestically unpopular causes. Therefore the measures could not be considered "necessary in a democratic society". Accordingly, there had been a violation of Article 11 ECHR interpreted in the light of Article 10 ECHR. The ECtHR awarded most of the applicant NGOs substantial amounts in respect of pecuniary damage, and in respect of costs and expenses, while each of the applicants was awarded EUR 10,000 in respect of non-pecuniary damage.

From 16 September 2022 onwards the Russian Federation will cease to be a High Contracting Party to the ECHR, following its expulsion from the Council of Europe on 16 March 2022, however the ECtHR remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the ECHR provided that they

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occurred before16 September 2022. As such, this judgment will most probably not be the last finding of a violation by the Russian authorities of the right to freedom of expression or association. The Committee of Ministers will continue to supervise the execution of judgments finding violations of the ECHR by the Russian Federation, albeit with a lack of instruments for enforcement.

Judgment by the European Court of Human Rights, Third Section, in the case of Ecodefence and others v. Russia, Applications nos. 9988/13 and 60 others, 14 June 2022

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