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Commentary

Ognevenko v. Russia: A New Brick in the Wall between ECtHR and the Russian Constitutional Court

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Introduction

The European Court of Human Rights (ECtHR) took more than ten years to consider the 2007 case of *Ognevenko v. Russia*, by which time several international bodies had already found the national legislation in this case to be incompatible with international standards.[1] In 2007, the Russian Constitutional Court had considered the constitutionality of the provisions but did not find any contradiction: the ban for railway staff was justified by the need to protect the rights of others.[2]

Relevant ECtHR Case Law

Since *National Union*, the Court has interpreted the freedom of association as entitling a trade union to protect its members' interests and to be heard; the case, however, left a wide margin of appreciation to the States.[3]

1 UN CESCR, Concluding observations on the sixth periodic report of the Russian Federation, E/C.12/RUS/CO/6, 16 October 2017; ILO CFA, Report no. 333, March 2004, case no. 2251; ILO CEACR, Observations in respect of Russia, adopted in 2016, 2012, 2010, 2006, 2005, 2004, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1; ECSR, Conclusions, 5 December (2014/def/RUS).

2 Ruling of the Constitutional Court of the Russian Federation, 8 February 2007, no. 275-oo.

3 ECtHR, *National Union of Belgian Police v. Belgium*, Application no. 4464/70, 27 October 1975, para. 39; see also *Tek Gıda İş Sendikası v. Turkey*, Application no. 35009/05, 4 April 2017.

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In *Schmidt*, the Court held that the right to strike is one of the most important ways to protect trade union interests. It also pointed that such a right, which is not expressly enshrined in Article 11 ECHR, "may be subject under national law to regulation of a kind that limits its exercise in certain instances."[4] However, as in *Demir*, limitations to rights must be construed restrictively and not impair the essence of the right to organize.[5] Such restrictions should define clearly the categories of officials concerned.[6]

In the most recent case, the Court focused on the need for compliance with out-of-court settlement of labor disputes, which national law dictates should be exhausted before resorting to strike.[7]

In a case concerning the ban of secondary strikes, the Court established that the State had enough policy and factual justification to deem such a ban as "necessary in a democratic society" and that such a ban did not violate the freedom of association because the trade union was able to exercise its essential elements.[8]

In sum, a certain framework for such cases is clear: first, establishment of the legitimate aim of restrictions; second, analysis of their proportionality based on the review of the justifications provided by the State and of other ways to exercise the right to be heard; and, third, consideration of the compliance of the strike with national procedural requirements.

The Court's View

The Court assumed that the interference pursued a legitimate aim, but stated that such conclusion is possible only because "in any event it [the ban] was not "necessary in a democratic society."[9] Considering proportionality, the Court noted that railway transport cannot be considered an essential service.[10] The

4 ECtHR, *Schmidt and Dahlström v. Sweden*, Application no. 5589/72, 6 February 1976, para. 36; see also *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, Application no. 31045/10, 8 April 2014.

5 ECtHR, *Demir and Baykara v. Turkey*, Application no. 34503/97, 8 April 2014, para. 97.

6 ECtHR, *Junta Rectora Del Ertzainen Nazional Elkartasuna* (*Er.N.E.*) *v. Spain*, Application no. 45892/09, 21 April 2015, para 33.

7 ECtHR, *Trade Union in the Factory "4th November" v. The Former Yugoslav Republic of Macedonia*, Application no. 15557/10, 8 September 2015, para. 47.

8 *National Union*, para. 104.

9 ECtHR, *Ognevenko v. Russia*, 20 November 2018, Application no. 44873/09, para. 66.

10 *Ognevenko*, para. 72; ILO CFA, *Digest of decisions and principles* (5th ed., 2006), paras. 587, 621.

Court also pointed that even had it been, solid evidence from the State would be required to justify a full ban.

It was therefore possible for the Government to demonstrate that railway was an essential service. The Government also could have exposed solid justification for such a ban in respect to train drivers, providing the Court with information on alternative measures of collective rights protection.[11]

The ECtHR was cautious in estimating the proportionality of the ban itself, basing its conclusion on the established disproportionality of the dismissal as a sanction for participating in strike, which amounted to the violation of Article 11 of the ECHR.[12] The dissenting opinion of Judge Dedov emphasized the lack of coherence in the Court's case law on strikes and the shortcomings of the proportionality test.[13]

In the opinion of the author of the commentary, two points of the case need to be examined: the nature of the applicant's refusal to perform his job and the blanket ban on strikes for the railway staff.

1. According to the judgment, the trade union declared the strike after failing to negotiate with the employer a general pay raise and long-service bonuses. The Court did not investigate whether the union indeed had a collective labor dispute or referred to conciliation procedures. That a ban on strikes was in place does not justify any union-mandated work stoppage when the employer does not meet union demands to raise worker salaries.

To be protected under law, a strike must respect certain rules.[14] These should be reasonable and not place a substantial limitation on actions open to trade unions.[15] According to Article 37 of the Russian Constitution and Article 409 of the Labour Code, a strike is a way to resolve a collective labor dispute if conciliation procedures do not.

No right to strike therefore exists in the absence of a collective labor dispute or when the trade union does not refer to conciliation procedures. This conclusion is in line with both ECtHR's case law[16] and the approach of the ILO CFA.[17]

The Government stated that the applicant had participated in an "action" that was not a strike de jure because the trade union in question was not a

11 Ibid., paras. 77–79.

12 Ibid., paras. 79–84.

13 *Ognevenko*, Dissenting Opinion of Judge Dedov, paras. 2-12.

14 See Article 8, UN CESCR.

15 ILO CFA Digest 2006, para. 498.

16 The Court repeatedly stated that the right to strike is not absolute and may be subject to certain conditions and restrictions. See *Junta Rectora* para. 33; *Trade Union in the Factory "4th November"*; ECtHR, *Enerji Yapı-Yol Sen*, Application no. 68959/01, 21 April 2009, para. 32.

17 ILO CFA Digest 2006, paras. 547–51.

representative one with which a collective agreement might be concluded and that no collective labor dispute between the parties existed.[18] The applicant did not contest these arguments.

Finally, according to Russian labor law, the collective bargaining process, the presentation of the worker's demands to the employer, and the declaration of a strike cannot be carried out by a trade union that does not unite more than the half of employees without approval from the employees' general meeting.[19] No information in the judgment indicates that the trade union's demands or the decision to strike were so supported.

That is, no collective labor dispute existed and the trade union's action was not a strike but instead an illegal appeal to stop work. The applicant's refusal to work was in turn not an exercise of collective labor rights but instead a disciplinary offense. Such an offense constitutes grounds for dismissal. The dismissal, therefore, did not violate Article 11.

The ECtHR noted that the strike itself was not declared unlawful.[20] However, should the employer contest the lawfulness of the trade union's declaration to stop work made in the absence of a collective labor dispute? According to Article 409 of the Labour Code, a strike is illegal if it is declared without taking into account the deadlines, procedures, and requirements stipulated by the Code. At the same time, the employer should not challenge a union decision in the absence of collective labour dispute or in case of non-referral to obligatory conciliation procedures.[21] In such cases, the employer may use discipline to manage workers who refuse to work.

2. This application raises an issue for Russian collective labor law—a restricted approach to strikes in essential services and transportation. The Court, referring to the conclusions of the ILO CFA and the ECSR, contributed to the establishment of a unique vision of the right to strike on the international stage. This is a very timely decision, especially when this right is contested by the employer's representatives at the ILO.[22]

18 *Ognevenko*, para. 41.

19 Articles 29–31, 399, 409 of Labour Code.

20 *Ognevenko*, para. 81.

21 Judge Dedov pointed that the domestic courts stated that other safeguards like conciliation and arbitration set out in the Russian Labour Code were obligatory for the trade union to exhaust before the strike, para. 15 of the dissenting opinion.

22 Elena Gerasimova and Svetlana Kolganova, "The Right for Strike in ILO Jurisprudence: Crisis of Recognition?" *Law Journal of the Higher School of Economics*, no. 4 (2016): 184–97; Lee Swepston. "Crisis in the ILO Supervisory System: Dispute over the Right to Strike' *International Journal of Comparative Labour Law and Industrial Relations*, no. 2 (2013): 199–218.

The Court is also sound that the prohibition of the railway staff from participation in strikes requires solid evidence from the State to justify. The general prohibition of all occupations "connected to the circulation of trains, shunting and provision of services to passengers and of freight services on public railways"[23] is incompatible with Article 11 of the ECHR. It is formulated broadly and can be interpreted as including all railway staff, given that each worker is somehow engaged with train operations and provision of services to passengers, but a ban of the right to strike of controllers as well as other workers not personally responsible for train operation is unjustified.

Practical Implications

This is the first binding judgment of the human rights body that acknowledges—albeit indirectly—that the general prohibition of strikes for the railway staff is incompatible with human rights standards, specifically, Article 11 of the ECHR. It is also an example of the interconnection between human rights bodies. The judgment demonstrates that human rights bodies are seeking to develop not only a common understanding among UN agencies[24] but also a kind of global common understanding between the United Nations and regional bodies.

It is to be hoped that this judgment will make the Russian Government at least adopt a list of professions of railway staff to whom the prohibition of a strike will be addressed. Expecting that the ban will be repealed, however, is almost unrealistic. According to the new norms of the federal constitutional law "On the Constitutional Court of the Russian Federation" adopted in 2015, this court has now jurisdiction to decide whether it is possible to execute a judgment of ECtHR in light of the provisions of the Russian constitution. Therefore, taking into account that the position of the Constitutional Court expressed in 2007 was contrary to the opinion of the ECtHR, it is highly unlikely that this judgment will lead to significant changes in law or practise.

23 Article 26, Federal Law of 10 January 2003, no. 17-FZ, "On Railway Transport in the Russian Federation."

24 See UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming, 2003.