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Ó Fathaigh, R.; Voorhoof, D.

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Strasbourg Observers

Kablis v. Russia: prior restraint of online campaigning for a peaceful, but unauthorised demonstration violated Article 10 ECHR

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This blogpost was written by Ronan Ó Fathaigh and Dirk Voorhoof

On 30 April 2019, in [Kablis v. Russia](http://hudoc.echr.coe.int/eng?i=001-192769) (<http://hudoc.echr.coe.int/eng?i=001-192769>), the European Court's Third Section unanimously found that the blocking by Russian authorities of an activist's social networking account and entries on his blog had breached his right to freedom of expression under Article 10 ECHR. The applicant, Grigoriy Kablis, had called for participation in a 'people's assembly' at a square in Syktyvkar, the capital of the Komi Republic. However, the local authorities had already refused Kablis' request to organise a public event at that venue, and had proposed another specially designated location for holding such public events. Apart from finding the blocking orders a breach of Article 10 ECtHR, the ECtHR also found a violation of Kablis' right to freedom of peaceful assembly as guaranteed by Article 11 ECHR and of this right to an effective remedy under Article 13 ECHR. This blog concentrates on the blocking measures as a form of prior restraint, banning 'illegal material' from the Internet.

Facts

In 2015, the Governor of the Komi Republic and several high-ranking officials were arrested and criminal proceedings were opened on suspicion of their membership of a criminal gang and fraud. The applicant notified the city authorities of Syktyvkar of his intention to organise a 'picket' a few days later at the crossroads behind the Lenin monument at Stefanovskaya Square. The aim of the event was to discuss the arrest of the Komi Republic government; approximately 50 people were expected to take part in this peaceful public event. Kablis also published comments on his Internet blog about the events and his plan to organise a 'picket'. After the refusal by the Syktyvkar Town Administration to approve the venue chosen at Stefanovskaya Square, Kablis posted a message on his blog and he also published a post on VKontakte ([https://en.wikipedia.org/wiki/VK_\(service\)](https://en.wikipedia.org/wiki/VK_(service))), the most popular online social networking service in Russia, calling for participation in the public discussion behind the Lenin monument in Syktyvkar two days later.

The next day Kablis' VKontakte account was blocked following an order by the Federal Service for Supervision of Communications, Information Technology and Mass Media and a deputy Prosecutor General of the Russian Federation. The deputy Prosecutor General found that the VKontakte post contained information about an unauthorised 'picket' to be held, and therefore amounted to

campaigning for participation in an unlawful public event in breach of the Public Events Act, justifying the blocking of the account pursuant to section 15.3(1) of the Information Act. Kablis was also informed by the administrator of the Internet site that hosted his blog, that access to the three blog entries campaigning for the announced 'picket' had been restricted on the order of the Prosecutor General's office, because the posts contained calls to participate in public events held in breach of the established procedure. Kablis challenged the decisions of the Prosecutor General's office, but his complaint was dismissed at all relevant domestic levels.

The Court

Kablis made an application to the European Court, complaining that the blocking of his social networking account and entries on his blog calling for participation in an unauthorised public event had breached his right to freedom of expression. The ECtHR starts by referring to some of its established principles, emphasising the importance of the Internet in the exercise of freedom of expression, and reiterating that 'in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general'. In particular, the ECtHR recalls that 'user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression'. The ECtHR confirms that also in the digital environment the right to freedom of expression is subject to exceptions and limitations, but such restrictions must be construed strictly, and their need must be established convincingly, responding to a 'pressing social need'.

The ECtHR disagrees with the Russian authorities' argument that there was no restriction of Kablis' right to freedom of expression, as his account could have been unblocked if he had deleted the unlawful content and that he could also have created a new social networking account and written new Internet blogs. The ECtHR leaves no doubt that the blocking of Kablis' social networking account and of the entries on his blog 'amounted to 'interference by a public authority' with Kablis' right to freedom of expression, 'of which the freedom to receive and impart information and ideas is an integral part'. The ECtHR clarifies: '[t]hat the applicant could create a new social networking account or publish new entries on his blog has no incidence on this finding'.

Prior restraint

In evaluating the justification of the blocking order, the ECtHR emphasises that this measure was taken before a judicial decision was issued on the illegality of the published content, and that therefore the interference with Kablis' right to freedom of expression amounted to a prior restraint. Although Article 10 ECHR does not prohibit prior restraints on publication as such, the dangers inherent in prior restraints call for the most careful scrutiny on the part of the Court and are justified only in exceptional circumstances. The Court adds that this approach of 'careful scrutiny' is especially applicable as far as the press is concerned, 'for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest'. It clarifies that this danger 'also applies to publications other than periodicals that deal with a topical issue'. The ECtHR reiterates that

'in cases of prior restraint, a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power. In that regard, the judicial review of such a measure, based on a weighing-up of the competing interests at stake and designed to strike a balance between them, is inconceivable without a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression'.

The Court is of the opinion that from this perspective section 15.3 of the Information Act is 'too broad

and vague', as the Prosecutor General and his deputies may order the blocking of an entire website or webpage 'on the grounds that it contains some illegal material'. The Court furthermore observes:

'that according to any breach of the procedure for the conduct of public events, no matter how small or innocuous, may serve as a ground for the Prosecutor General's decision to block access to Internet posts containing calls to participate in that event. Access to such posts can therefore be blocked by a prosecutor, as in the present case, for the sole reason that it calls for participation in a public event at a location that has not been approved by the authorities, without having to establish a risk of disorder or of any real nuisance to the rights of others'.

The Court also finds that only two of the four posts contained called to participate in the public event planned by Kablis, and it reiterates that it is 'important for the public authorities to show a certain degree of tolerance towards peaceful unlawful gatherings'. Furthermore section 15.3 of the Information Act does not require the Prosecutor General's office to examine whether the wholesale blocking of the entire website or webpage, rather than of a specific information item published on it, is necessary, having regard to the criteria established and applied by the Court under Article 10 ECHR. The Court, referring to its judgments in *Ahmet Yıldırım v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-115705>) and *Cengiz and Others v. Turkey*, (<http://hudoc.echr.coe.int/eng?i=001-159188>) emphasises that

'such an obligation, however, flows directly from the Convention and from the case-law of the Convention institutions. In particular, Article 10 requires the authorities to take into consideration, among other aspects, the fact that such a measure, by rendering large quantities of information inaccessible, is bound to substantially restrict the rights of Internet users and to have a significant collateral effect on the material that has not been found to be illegal'.

This makes the ECtHR conclude that 'the applicable legal framework affords the Prosecutor General and his deputies very wide powers to apply prior restraint measures to Internet posts containing calls to participate in public events, both as regards the grounds for ordering the blocking measure and as regards its scope'.

The Court recognises that the exercise of the Prosecutor General's powers to block Internet posts is subject to judicial review, but that it is 'likely to be difficult, if not impossible' to effectively challenge the blocking measure on judicial review. The Court is of the opinion that in cases concerning prior restraints on publications calling for participation in a public event, there must be a possibility to obtain a judicial review of the blocking measure before the date of the public event in question, as 'the information contained in the post is deprived of any value and interest after that date, and the annulment of the blocking measure on judicial review at that stage will therefore be meaningless'. The ECtHR concludes that the blocking procedure provided for by section 15.3 of the Information Act 'lacks the necessary guarantees against abuse required by the Court's case-law for prior restraint measures, in particular tight control over the scope of bans and effective judicial review to prevent any abuse of power'.

Aim, content and context of the online posts

Finally, the ECtHR observes that the fact that Kablis breached a statutory prohibition by calling for participation in a public event held in breach of the established procedure 'is not sufficient in itself to justify an interference with his freedom of expression'. Consequently, the ECtHR examines whether it was necessary in a democratic society to block the publications at issue, having regard to the facts and specific circumstances of the case. The Court took into account a number of considerations, including that (a) the aim of the public event was to express an opinion on a topical issue of public interest, namely the recent arrest of the regional government officials; (b) approval of the public event had been refused on formal grounds, rather than on the grounds that the event in question presented

a risk of public disorder or public safety; (c) the impugned Internet posts did not contain any calls to commit violent, disorderly or otherwise unlawful acts; (d) in view of the event's location, small size and peaceful character, there is no reason to believe that it would have been necessary for the authorities to intervene to guarantee its smooth conduct; and (e) as Kablis explicitly stated on his blog that the public event had not been duly approved, he did not try to mislead prospective participants by making them believe that they were going to participate in a lawful event. On these grounds, the Court is not convinced that there was 'a pressing social need' to apply prior restraint measures and to block access to the impugned Internet posts. As the Russian courts did not provide 'relevant and sufficient' reasons for the interference with Kablis' right to freedom of expression, there has been a violation of Article 10 ECHR.

Comment

The Court's judgment of the same day in *Elvira Dmitriyeva v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-192771>) reflects obvious similarities with the case of *Kablis v. Russia*, with the exception of the 'prior restraint'-issue, as the applicant, Dmitriyeva, was ordered by a court, *a posteriori*, to pay an administrative fine because she had campaigned via her VKontakte account for participating in a public event that had not been approved by the authorities. The aim of the event was to protest against corruption and to demand the Prime Minister's resignation. In *Elvira Dmitriyeva*, the ECtHR is of the opinion that the only reason for the interference by the Russian authorities was the need to punish unlawful conduct. In view of the event's location and peaceful character, and in the absence of any identified risk of clashes with other public events, there was no reason to believe that it would be necessary for the authorities to intervene to guarantee the event's smooth conduct and the safety of the participants and passers-by. As the Court sees no sufficient reasons related to 'a pressing social need' to justify Dmitriyeva's conviction for making calls to participate in an event on a topical issue of public interest, it finds a violation of Article 10 ECHR. In this case, the ECtHR also found violations of Article 5 (unlawful arrest), Article 6 (breach of the objective impartiality requirement as part of the right to a fair trial) and of the Articles 11 and 13 ECHR.

The *Kablis* judgment in particular is an important and timely judgment on national legislation permitting the blocking of social media accounts (and posts) within 24 hours, and without any judicial order. The Court rightly characterised such measures as 'prior restraint', carrying the inherent dangers associated with preventive restrictions on free expression. As such, the Court applied its highest standard of scrutiny under Article 10 – most careful scrutiny – finding that the blocking procedure violated Article 10 ECHR. This was even so where there existed judicial review, with the Court finding that such judicial review was not 'effective' in curing the dangers of prior restraint on speech.

The Court rightly gave short shrift to the government's argument that because the applicant had the option to create a 'new social networking account', this somehow meant there had been no interference with freedom of expression. The point is important, as the Court has on other occasions taken into account there being 'many' other 'suitable opportunities' to express one's views, in finding no violation of Article 10 where an applicant had breached domestic legislation (see our [post](https://strasbourgobservers.com/2018/03/19/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10/) (<https://strasbourgobservers.com/2018/03/19/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10/>) on *Sinkova v. Ukraine* (<http://hudoc.echr.coe.int/eng?i=001-181210>)). Such an approach arguably turns the logic of Article 10 upside down which reverses the burden of proof: it is not up to the individual to show that breaching the law was necessary. Indeed, there are always other forms or channels available to express an opinion or formulate a criticism. In *Kablis* the ECtHR correctly decides that the fact that the applicant could have created a new social networking account or publish new entries on his blog had no incidence on the finding that the blocking interfered with, and ultimately violated his right to freedom of expression.

The *Kablis* judgment should hopefully serve as a benchmark for the Court's future approach to other

national legislation adopting (unfortunately) similar approaches to 'illegal material' (para. 94) (see also the Committee of Ministers' Recommendation (https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14) 2018(2) on the roles and responsibilities of internet intermediaries). The judgment especially contains a clear message against 'too broad and vague' provisions in law organising forms or procedures of prior restraint. It also clarifies that as a minimum guarantee such legislation must guarantee the possibility to obtain a judicial review of a blocking measure of posts or accounts calling for participation to peaceful demonstrations before the date of the public event in question. It is obvious that there can be also other circumstances where a prompt judicial review must effectively be guaranteed 'for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest' (para. 91).

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