EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Websites blocked in Russia in violation of the right to freedom of expression

The cases Vladimir Kharitonov v. Russia (application no. 10795/14), OOO Flavus and Others v. Russia (application nos 12468/15, 23489/15, and 19074/16), Bulgakov v. Russia (no. 20159/15), and Engels v. Russia (no. 61919/16) concerned the blocking of websites in Russia.

In **Chamber** judgments[1] in the cases the Court held, unanimously, that there had been:

a violation of Article 10 (right to freedom of expression) of the European Convention on Human Rights, and,

a violation of Article 13 (right to an effective remedy) in conjunction with Article 10 of the European Convention.

The cases concerned different types of blocking measures, including "collateral" blocking (where the IP address that was blocked was shared by several sites including the targeted one); "excessive" blocking (where the whole website was blocked because of a single page or file), and "wholesale" blocking (three online media were blocked by the Prosecutor General for their coverage of certain news).

The Court highlighted the importance of the Internet as a vital tool in exercising the right to freedom of expression. Among other things, it found that the provisions of Russia's Information Act used to block the websites had produced excessive and arbitrary effects and had not provided proper safeguards against abuse.

Principal facts

Vladimir Kharitonov v. Russia

In late 2012 the applicant discovered that the IP address of his website, *Electronic Publishing News* (www.digital-books.ru), had been blocked by the Roskomnadzor telecoms regulator. The measure had been taken after a decision by the Federal Drug Control Service, which wanted to block access to another website, rastaman.tales.ru – a collection of cannabis-themed folk stories – which had the same hosting company and IP address as the applicant's website.

The applicant lodged a court complaint, arguing that blocking the IP address had also blocked access to his website, which did not have any illegal information. The courts upheld Roskomnadzor's action as lawful without assessing its impact on the applicant's website.

OOO Flavus and Others v. Russia

The applicants own opposition media outlets: the first applicant, OOO Flavus, owns grani.ru; the second applicant, Garry Kasparov, is the founder of www.kasparov.ru, an independent web publication; and the third applicant, OOO Mediafokus, owns the *Daily Newspaper* (*Ezhednevnyy Zhurnal*) at ej.ru, which publishes research and analysis critical of the Russian Government.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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In March 2014 Roskomnadzor blocked access to the applicants' websites on request from the Prosecutor General, acting under section 15.3 of the Information Act, over content which allegedly promoted acts of mass disorder or extremist speech. No court order was required.

The applicants unsuccessfully applied for a judicial review of the blocking measure, complaining about the wholesale blocking of access to their websites, and of a lack of notice of the specific offending material, which they could therefore not remove in order to restore access.

Bulgakov v. Russia

In November 2013 the applicant found out that the local Internet service provider had blocked access to his website, *Worldview of the Russian Civilization* (www.razumei.ru), on the basis of a court judgment of April 2012, which he had not been aware of. That judgment, given under section 10(6) of the Information Act, targeted an electronic book in the files section of the website which had been previously categorised as an extremist publication. The court ordered that the block be implemented by blocking access to the IP address of the applicant's website at the provider level.

The applicant deleted the e-book as soon as he found out about the court's judgment. However, the courts refused to lift the blocking measure on the grounds that the court had initially ordered a block on access to the entire website by its IP address, not just to the offending material.

Engels v. Russia

In April 2015 a court ordered the local internet service provider to block access to the applicant's website on freedom of expression and privacy issues, *RosKomSvoboda* (rublacklist.net), on the basis of a complaint by a prosecutor. The prosecutor argued that information about bypassing content filters – which was available on the applicant's website – should be prohibited from dissemination in Russia as it enabled users to access extremist material on another, unrelated website. The applicant was not informed about the proceedings.

After the court order Roskomnadzor asked the applicant to take down the offending content, otherwise the website would be blocked. He complied with the request. The courts rejected a complaint by the applicant without addressing his main argument that providing information about tools and software for the protection of the privacy of browsing was not against any Russian law.

Complaints, procedure and composition of the Court

All the applicants complained under Article 10 (freedom of expression) that the blocking of access to their websites had been unlawful and disproportionate, and, directly or in essence, under Article 13 (effective remedy) that the Russian courts had failed to consider the substance of their complaints.

The applications were lodged with European Court of Human Rights between 2013 and 2015.

Vladimir Kharitonov v. Russia and *Bulgakov v. Russia* were decided by a chamber of seven judges composed as follows:
Paul Lemmens (**Belgium**), *President*,
Georgios A. Serghides (**Cyprus**),
Helen Keller (**Switzerland**),
Dmitry Dedov (**Russia**),
Alena Poláčková (**Slovakia**),
Lorraine Schembri Orland (**Malta**),
Ana Maria Guerra Martins (**Portugal**),
and also Milan Blaško, *Section Registrar*.

OOO Flavus and Others v. Russia and *Engels v. Russia* were decided by a chamber of seven judges composed as follows:
Paul Lemmens (**Belgium**), *President,*
Georgios A. Serghides (**Cyprus**),
Helen Keller (**Switzerland**),
Dmitry Dedov (**Russia**),
María Elósegui (**Spain**),
Gilberto Felici (San **Marino**),
Erik Wennerström (**Sweden**), *judges,*
and Milan Blaško, *Section Registrar*

Decision of the Court

Article 10

The Court was unanimous in finding a violation of Article 10 in all four cases.

Highlighting in general the importance of the Internet for expressing the right to freedom of expression and information, it found that the measures blocking access to websites had amounted to interference with the applicants' right to impart information and the public's right to receive it.

The Convention required that such interference had to meet conditions, including being "prescribed by law". The law in question had, among other things, to be clear and predictable; set limits on the discretion allowed to the authorities; and provide protection from arbitrary interference. However, it was precisely deficiencies in the provisions which led largely to it finding violations of Article 10.

Mr Kharitonov's website had been blocked in accordance with section 15.1 of the Information Act, which listed categories of illegal web content. However, the applicant's website had not itself had any illegal material on it, but had been blocked merely because it had the same IP address as a website which did. The interference in Mr Kharitonov's case had therefore not been grounded in any law. The Court also noted that the third-party interveners in the case had pointed out that millions of websites had remained blocked in Russia for the sole reason that they shared an IP address with other websites featuring illegal content.

The websites in *OOO Flavus and Others* had been blocked under section 15.3 of the Information Act, which allowed the Prosecutor General to request the blocking of various types of content, including calls for mass disorder or taking part in unauthorised public events.

In so far as Roskomnadzor's notices to the web hosting service had referred to the entire websites, rather than to specific web pages, the procedural requirements of the law had not been met. By failing to specify URLs, the authorities had prevented the applicants from either removing the content or challenging the Prosecutor General's demand by referring to particular web pages.

Moreover, the Prosecutor General's finding that the material in question had amounted to calls for participation in unauthorised public events was an interpretation of its contents that had had no basis in fact and was arbitrary and manifestly unreasonable.

There was also no legal basis in the order against www.kasparov.ru for reproducing an image of a pamphlet which had allegedly incited people in Crimea to commit "unlawful actions": the Prosecutor General did not have legal authority over what was and what was not unlawful outside the Russian jurisdiction. In any event, the concept of "unlawful actions" fell outside the categories of content susceptible to blocking under section 15.3.

The Court also examined whether the blocking of access to whole websites in these three applicants' case had been "necessary in a democratic society". It highlighted that such a comprehensive block was an extreme measure, which had been compared to banning a newspaper or a television station, and required separate justification. Any indiscriminate blocking which interfered with lawful content or websites as a collateral effect of a measure aimed only at illegal content constituted arbitrary interference with the rights of the owners of such websites.

However, the Government had not given any justification for the wholesale blocking order or detailed any legitimate aim or pressing social need. Furthermore, an allegation by the applicants that the true aim had been to suppress access to opposition media gave rise to serious concern. The blocking measures against the applicants' websites had lacked any justification and the Court found that they had not pursued any legitimate aim.

The legal provision at issue in Mr Bulgakov's case was section 10(6) of the Information Act, which allowed the authorities to block certain content, including the e-book on his website. It was not in dispute that the e-book was extremist material, and Mr Bulgakov had promptly removed it.

However, the domestic court's order had led to the website as a whole being blocked, not just the illegal content, even though such a method did not feature in any primary legislation or implementing rules. Furthermore, the block had been maintained even after the applicant had removed the offending content, which had also thus been unlawful.

The Court concluded that the interference resulting from the application of the procedure under section 10(6) of the Information Act had produced excessive and arbitrary effects.

Lastly, the interference in the case of Mr Engels, an online-freedom activist from Germany, was based on section 15.1 of the Information Act, specifically the second part of subsection 5, which allowed websites to be blocked on the basis of a "judicial decision which identified particular Internet content as constituting information the dissemination of which should be prohibited in Russia".

The Court found that, in so far the provision did not list the categories of content susceptible to be blocked, it was excessively vague and overly broad, failing to satisfy the Convention's foreseeability requirement. In particular, website owners like Mr Engels could not regulate their conduct by it as they could not know what content could be banned and lead to a website block.

Indeed, Mr Engels' case illustrated how the provision could produce arbitrary effects: his website had been blocked even though the court had not established that either filter-bypassing tools and other software as such, or providing information about them, was illegal. Nor had the court found any extremist speech or other prohibited content on the applicant's webpage, but had referred to the possibility that the technology might be used to access extremist content elsewhere.

The Court found that suppressing information about technology for accessing information online because it could incidentally aid access to extremist material was no different from trying to restrict access to printers and photocopiers because they could be used for reproducing such material. In the absence of a narrowly defined and specific legal basis, the Court found that such a sweeping measure was arbitrary.

Safeguards in the law

The Court's finding of a violation of Article 10 in the applicants' cases was also based on a lack of safeguards against arbitrary interference.

In all cases, no advance notice of the blocking measure had been given and the Information Act did not require any form of involvement by website owners in blocking proceedings; in *Kharitonov* and *OOO Flavus and Others* blocking measures had not been sanctioned by a court or other independent adjudicatory body providing a forum in which the interested parties could have been heard.

The blocking measure had also lacked transparency. While it was possible to consult the regulator's website to check for blocking decisions and blocked websites, no access was given to reasons for such a measure or information about how to appeal.

In the proceedings to review the blocking measure, the courts had only examined whether the regulator had complied with the law. However, they had not carried out a Convention-compliant assessment of the effect of the measure.

The law did not require the authorities to carry out an impact assessment of the blocking measures prior to their implementation or justify the urgency of their immediate enforcement without giving the interested parties the opportunity to remove the illegal content or apply for a judicial review.

The Court found no indication that the judges considering the applicants' complaints had sought to weigh up the various interests at stake, in particular by assessing the need to block access to the entire websites. A Convention-compliant review should have been taken into consideration, among other elements, the fact that such a blocking measure, by rendering large quantities of information inaccessible, had substantially restricted the rights of Internet users and had had a significant

collateral effect. The Court noted in particular that in none of the four cases had the courts applied the Plenary Supreme Court's Ruling no. 21 of 27 June 2013, which required them to have regard to the criteria established in the Convention in its interpretation by the Court.

The Court also noted, in *Bulgakov* and *Engels*, that involving a local ISP as the designated defendant was insufficient to give such proceedings an adversarial character.

Article 13 in conjunction with Article 10

The Court found that none of the courts in the applicants' cases had carried out examinations of the substance of what had been arguable complaints of violations of their rights.

In *Kharitonov*, they had not examined the lawfulness or proportionality of the effects of the blocking order on the applicant's website, while in *OOO Flavus and Others,* they had not looked at the authorities' failure to comply with the legal requirement to identify the webpages or examine the necessity and proportionality of the blocking measures or their excessive scope.

The appeal court in *Bulgakov* had not addressed the legal distinction between a webpage and a website or examined the necessity and proportionality of the blocking measure, and the excessive effects of the chosen method of its implementation. In *Engels*, it had not dealt with the specific nature of the information about particular technologies or examined the necessity and proportionality of the blocking measure.

None of the remedies available to the applicants had been effective in the circumstances and there had been a violation of Article 13 in conjunction with Article 10 in each case.

Just satisfaction (Article 41)

The Court held that Russia was to pay the applicants in the four cases 10,000 euros (EUR) each in respect of non-pecuniary damage. It also held that Russia had to pay in respect of costs and expenses: EUR 2,000 to Mr Kharitonov; EUR 1,000 to OOO Mediafokus in *OOO Flavus and Others*; and EUR 91 to Mr Bulgakov.

Separate opinions

Judges Lemmens, Dedov and Poláčková issued separate joint concurring opinions in the cases of *Vladimir Kharitonov v. Russia* and *Bulgakov v. Russia* which are annexed to the respective judgments.

The judgments are available only in English.

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