NO ONE IS PERFECT

On 14 September 2009 the request by the Russian Government that the case of *Kudeshkina v. Russia*[1] be referred to the Grand Chamber of the European Court of Human Rights[2] has been dismissed by the panel of judges authorised to examine such requests.

At the same time, the judgment by the Chamber of the Court of 26 February 2009 in the case gives rise to a number of serious questions that were not resolved and perhaps were not determined either by the Chamber or by the panel of judges, which dealt with the request that the case of *Kudeshkina v. Russia* be referred to the Grand Chamber of the Court.

Publishing a translation of the above judgment we could not but give an opportunity to other experts to express their view, which is in contrast with the Court's approach in the case. In this connection we publish below notes regarding the final judgment by the Court.

It should be noted that the approach of these authors is based upon lucid legal reasoning and one can only be sorry, proceeding from the text of the judgment, that their arguments were not subject of the examination by the European Court.

Although it is up to you to judge, dear readers…

Vitaly Portnov

NOTES REGARDING THE JUDGMENT BY THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF KUDESHKINA V. RUSSIA

In its judgment of 26 February 2009 the Chamber of the First Section of the European Court arrived to the conclusion, by four votes to three, that in the case at issue there has been a violation of Article 10 of the Convention[3].

It should be emphasised that there were two dissenting opinions of three minority judges annexed to the judgment.

It should be noted that factual and legal context of the case at issue is such that it raises both a «a serious question affecting the interpretation or application» of Article 10 of the Convention (see below) and a «serious issue of general importance» in the meaning of Article 43 § 2 of the Convention (see below).

While assessing the judgment, unfortunately, the following facts have not been taken into consideration.

It seems that with the exception of one decision delivered by the Commission of Human Rights in 1997 (see below) there were no individual precedents related to dismissal of a judge pursuant to results of disciplinary proceedings carried out in accordance with the law by competent authorities. This explains the new nature of the issue, which has not been resolved finally by the Grand Chamber of the European Court yet.

As regards facts of the present case, the course of events clearly shows that statements, which the applicant was imputed with, had been made by her during the election campaign where she had been running as a candidate. One can note mounting intensity of the applicant's initiatives since the moment she obtained competent authority's permission to run as a candidate during general elections scheduled for 7 December 2003.

Please judge for yourself: on 29 October 2003 there was the decision taken by the Moscow Judicial Council (the one that temporarily suspended the applicant's office as judge pending the general elections); on 1 December 2003 the applicant gave an interview to the radio station; on 4 December 2003 two major newspapers published two interviews with the applicant. It should be noted that the content of the interviews was related not only to issues of administration of justice in Russia in general and in Moscow in particular, but it was also related more particularly to criminal case, which had been transferred from the applicant from 23 July of that year, since before that date, on 22 July, the applicant filed a request for annual leave, and between 4 July and 22 July in view of the dismissal of the trial court she did nothing to form a new court composition.

---

[1] In the case of *Kudeshkina v. Russia* (№ 29492/05, 26 February 2009; the text of the judgment in Russian see at page 29 of the journal) the applicant alleged in her application lodged with the European Court of Human Rights that termination of her office as judge (she worked as a judge on the Moscow City Court in recent years), which followed as a disciplinary sanction after she had made critical statements in mass media, has violated her right to freedom of expression secured by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms . Chamber of the First Section of the European Court, having examined the circumstances of the case and having dismissed objection of the respondent State regarding the fact that the applicant had made public defamatory far-fetched and offensive statements regarding judges and the judicial system of the Russian Federation, thus having violated the rules of judicial ethics, held, by four votes to three, that there has been a violation of Article 10 of the Convention. The judgment was attached with dissenting opinions by judges Kovler, Steiner and Nicolaou (see pp. 46, 48 of the journal).

[2] Hereinafter, the European Court or the Court.

[3] Article 10 reads:

«1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers <…>.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary».

Moreover, during that short period of time, when the election campaign was at its height, on 2 December 2003 the applicant lodged a complaint against the leadership of the Moscow City Court with the High Judiciary Qualification Panel of the Russian Federation; the applicant alleged that the leadership of the Moscow City Court was culpable of serious breaches of judicial ethics, such breaches that are prone to undermine authority of the judiciary. As it is known, the complaint was subsequently dismissed, on 14 May 2004. However, during the time when the applicant was in charge of the criminal case until 22 July 2003 inclusively (but not during the election campaign) she was entitled to lodge and should have lodged with the relevant authority a complaint about the pressure that allegedly had been exerted upon her in the course of criminal proceedings. She failed to do so and for that reason it may be asserted that she failed to avail herself of one quite available domestic remedy.

The Chamber of the European Court failed to give an assessment to this fact. In this instance there was a non-exhaustion of domestic remedies (Article 35 of the Convention), which allowed the Court to declare the application inadmissible as it had happened in another case before that Chamber.

Interpretation of Article 10 of the Convention

In connection with interpretation of Article 10 of the Convention, two aspects are worth attention. The first one relates to the substance of the freedom of expression; the second one relates to the role of guarantor, which is played by the judiciary in a law-governed State.

As regards the first aspect, the European Court repeatedly emphasised the important role played by the freedom of expression in the very nature of the Convention and in honouring and furthering human rights and fundamental freedoms, starting from its judgment in the case of *Handyside v. the United Kingdom*, 7 December 1976, up to its most recent judgments.

Having said so, it seems important to note the following. The freedom of expression, as well as other rights and freedoms, is not absolute, since it may run contrary to no less legitimate requirements of the society. Therefore values enshrined in the Convention may occasionally be restricted by requirements that for instance are listed in Article 10 § 2 of the Convention; the requirements may legitimately limit the freedom, provided that the conditions, which are mentioned in the Convention, are complied with in a manner reflected in the case-law of the European Court. As it was indicated by the Court earlier, considering the place of the freedom of expression in a democratic society, the «necessity» for any restriction on that freedom «must be convincingly established» (*Worm v. Austria*, 29 August 1997, § 47). In order to see whether such restrictions meet the standard of the «necessity», the case-law suggests three principles: such restriction must correspond to a «pressing social need»; the restriction must be proportionate to the legitimate aim pursued; the reasons adduced by the national authorities to justify the restriction must be relevant and sufficient. Meanwhile — and this aspect has fundamental significance for the case at issue — an assessment by the Court, considering these principles, should be naturally within the context of subsidiarity. Therefore the Court's task «is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation» (*Dalban v. Romania* (GC), 29 September 1999, § 47).

The above principles acquire special significance in relation to the second aspect of the matter. The aspect relates to the significance that the European Court attaches in its case-law to the issue of authority and impartiality of the judiciary. Suffice is to note the following.

First of all, the phrase «authority of the judiciary» includes, in particular, the notion that «the courts are <...> the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto» (*The Sunday Times v. the United Kingdom (No. 1)*, 26 April 1979, § 55). Besides, even with respect to the freedom of press, which a value that must be protected, «[r]egard must, however, be had to the special role of the judiciary in society» (*Prager and Oberschlick v. Austria*, 26 April 1995, § 34). Indeed, «[a]s the guarantor of justice, a fundamental value in a law-governed State, [the judiciary] must enjoy public confidence if it is to be successful in carrying out its duties» (op. cit.). It follows that «[i]t may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded» (op. cit.). Moreover, «[i]f the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts» (*The Sunday Times v. the United Kingdom (No. 1)*, cited above, § 63.) The European Court also added that if the public becomes accustomed «to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes» (op. cit.). It is especially important to stress that as regards such attacks even those that are essentially unfounded there is concerned judges' «duty of discretion that precludes them from replying» (*Prager and Oberschlick v. Austria*, cited above, § 34; *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37).

There is no doubt that in this last proposition the European Court has placed special emphasis on the importance of the duty of reserve and discretion which is ultimately the duty of a judge, considering not only special but also major role of the judiciary in a democratic society.

Application of the principles in the present case

In its judgment of 26 February 2009 the Chamber of the European Court basically concentrated on three aspects in order to substantiate the conclusion it has reached.

First of all, the Chamber examined the content of statements made in the mass media by the applicant. Then the Chamber analysed these statements as regarded the subject of political speech of the applicant. Finally, the Chamber gave its assessment to the nature of sanctions imposed on the applicant to address the issue of proper balance between rights and duties.

It seems that in the course of its analysis the Chamber has rather confused notions, having refused, as it seems, to be clear and transparent in order to set out its consistent reasons considering seriousness of the utterances by the applicant.

As regards the content of the statements at issue, one can only be surprised at the weight attributed to them by the Chamber. It seems that the applicant's utterances regarding justice in Russia in general and regarding an individual court in particular have more to do with serious grievance of the applicant in connection with her alleged controversy with the leadership of the Moscow City Court, where she was a judge and to whom she was naturally

subordinate, rather than with balanced judgment to be expected from the judge, whose role is to administer justice calmly, with reserve and reasonably.

If one looks closely at the reasoning by the Chamber, it is surprising how little is addressed in the judgment to the seriousness of utterances of the applicant with respect to the actions she was carrying out in the criminal proceedings. In fact, those were quite serious statements, which referred to not only restrained relations with the leadership of the Moscow City Court, but also to alleged facts of pressure exerted upon the applicant by the leadership of the Moscow City Court, who withdrew the criminal case from her «without any explanation» (interview to the radio station). But there a more serious aspect to it. In her interviews to the two newspapers the applicant put forward accusations, quite sharp ones, against officials involved in administration of justice, who were allegedly culpable of «brutal manipulation» with cases and were even involved in «corruption»[1] and who exerted pressure upon her[2]. It is all aggravated by an allegation, which is desirable to be examined separately and to be censured, since such a position of the judge is unacceptable. According to the applicant, she has learnt (see the summary of the radio interview outlined in § 19 of the Chamber's judgment) that there was «common cause» in the case.

What is more surprising and unacceptable is that the Chamber (§ 91 of the Chamber's judgment) has assessed these utterances as «statements of facts» inseparable from the context, in which they were made. Proceeding from this premise, the Chamber's judgment addresses the well-foundedness of these statements and denies, based upon general reasoning, the legitimate effect of the assessments by the Moscow Judicial Council, the Moscow Judiciary Qualification Panel, the Moscow City Court, and the Russian Federation Supreme Court, as well as the Russian Federation High Judiciary Qualification Panel (which findings were upheld by the President of the Russian Federation Supreme Court). Thus, the above authoritative bodies have allegedly failed to review whether there had been any violations to the detriment of the applicant while withdrawing her from the criminal proceedings. Briefly stating, the alleged fact that all these high bodies of judiciary and justice have allegedly failed, based upon unsubstantiated propositions, supposed reasons of the applicant's withdrawal for the criminal proceedings has resulted in the Chamber's confidence in these reasons, while denying trust to the above six bodies of the Russian judiciary. In so doing, the Chamber, as it seems, in a sense has shifted the burden of proof, having found that «the applicant's allegations of pressure have not been convincingly dispelled in the domestic proceedings» (the Chamber's judgment, § 92, p. 28).

In fact, it would have been extremely important that the Grand Chamber of the European Court sooner or later nevertheless expressed its attitude towards such approach in order to define more precisely the sphere of effect of and limits on the supranational supervision, which should, naturally to certain extent, honour the autonomy of judgments of domestic judicial bodies. It would be all otherwise, if the precision would have been there, but it was not done in the case at issue, that it was not ascertained that these bodies of the judiciary overstepped the boundaries of reasonable interpretation, perhaps even unintentionally, of the domestic law.

In order to set a proper balance between utterances, which are serious indeed, and political statements, — which naturally should draw the great attention of the European Court — it may be again stressed that in this instance the Chamber, as it seems, having no evident ground has failed to set a balance between purely personal interest and very important necessity to protect public interest, preserving first of all the authority of the judiciary in European societies. The proposition of the Chamber utterances of the applicant «were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance» (the Chamber's judgment, § 95, p. 29) is amusing.

It is quite hard to see upon which ground these utterances, which are in fact accusations groundlessly addressed to the judge and the prosecutor, may be treated as a «fair comment» and should be accepted with unwarranted tolerance.

There may be an impression that having said that the Chamber treats, with certain confidence, such assertions, which are undesirable to be heard from members of national judicial bodies.

As regards the disciplinary sanction imposed upon the applicant, the Chamber considered that the manner in which the disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees taking into account the seriousness of the sanction (the Chamber's judgment, § 97–98, p. 29–30). In other words, proceeding from the fact that the applicant by her statements helped to explain to the public the matter of general interest, the sanction was disproportionate in the sense it could be regarded as capable of having «chilling effect» on those who would wish to participate in the public debate. The Chamber's judgment still proceeds from ignoring actual nature of the applicant's utterances, which cannot be protected by Article 10 of the Convention.

In this instance too, it may be noted that the Chamber's judgment is based on an axiom, which calls for further clarification.

Summing up, questions raised by the Chamber's judgment were serious as regards both the interpretation of Article 10 of the Convention and the application of the principles in the present case.

In the instant case, the point is not the free discussion of ideas. The point is not protection of the freedom of the press. The proof is that neither the radio station, nor newspapers connected with the relevant statements ran into any difficulties. The point of the matter is whether a judge involved in administration of justice may publicly throw serious accusations against higher-ranking officials and make disrespectful and unsupported statements with respect to State agencies without any restrictions, even if the person concerned wishes, as it happens in may member States, to become a candidate to the elected post. And this is done under the pretext that issues related to the functioning of justice are of interest to the public, which is self-evident though.

It is supplemented by the topic of the «duty of reserve and discretion» imposed upon public servants, and the duty must be strictly honoured especially in case of judiciary members, who must not cross the «red line» of confidentiality and secrecy of judges' deliberations[3].

The case-law based on the case of *Wille v. Liechtenstein* (GC), 28 October 1999, cannot be of help in this instance, since the case-law concerns not utterances during particular

[1] «<…> you cannot imagine such brutal manipulation and <...> corruption to such an extent» (§ 21, p. 5 of the Chamber's judgment).

[2] «The public prosecutor exerted pressure on me» (§ 21, p. 6 of the Chamber's judgment).

[3] Should it be recalled that Rule 3 of the Rules of the Court reaffirms the importance of keeping secret all deliberations?

proceedings in the court but it concerns the statements of academic nature related to the resolution of the matter, mostly theoretical, concerning the interpretation of the Constitution.

On the other hand, as it was already noted, the Commission of Human Rights examined an application against Austria[1] related to disciplinary sanctioning of a judge for the words said to a journalist during a confidential conversation upon results of the «spectacular» criminal case, where the applicant acted as presiding judge in the jury trial. The applicant was subjected to disciplinary proceedings for making statements about corrupt nature of the whole judiciary and one individual judge. Believing that these statements were of such nature that diminished public confidence in the judiciary while the latter needed such confidence to fulfil its tasks, a disciplinary court imposed on the applicant a sanction in the form of a «reprimand».

Having dismissed the application as manifestly ill-founded, the Commission of Human Rights held that the interference was proportionate and necessary in a democratic society within the meaning of Article 10 of the Convention.

It should be said that in the above case the sanction was not as serious as the one imposed upon the applicant in the present case. It is also necessary to note that utterances at issue in the case against Austria had nothing to do with any particular case under examination and what is especially important the utterances did not touch upon aspects of court proceedings subject to principle of secrecy of judges' deliberations.

Serious issue of general importance

The fact of examination of the case by the Grand Chamber of the European Court would have been even more justified, since the case raised a serious issue, which affects all member States. It seems to be quite appropriate here to refer to the Opinion No. № 3 (2002) by the Consultative Council of European Judges (hereinafter, the CCJE) addressed to the attention of the Committee of Ministers of the Council of Europe «On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality» (CCJE (2002) Op. No. 3).

In the above Opinion, the CCJE addresses both the matter of out-of-court conduct of the judge while administering justice and the relations the judge may have with the mass media.

As regards judges' participation in political activities, the Opinion states as follows:

> «30. Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.
>
> 31. More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary».

As regards judges' relations with mass media, the Opinion states as follows:

> «40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public».

A comparative in-depth study of the main problems related to all aspects examined in the above documents could have been of great help to the Court's Chamber due to detailed examination of the matter, which is of great importance for a balanced determination of the judge's status in the society.

It is quite regrettable that all these considerations were not taken into account during examination of the present case by the Court's Chamber, and reasons to dismiss the request to re-examine the case by the Grand Chamber of the European Court are not known to us. Such are the Rules of the Court.

It seems that the Grand Chamber of the European Court will sooner or later answer to the questions raised, but it will unfortunately be another case.

A. Lisitsin, B. Mikhailo

[1] Decision of the Commission of Human Rights as to the admissibility of application No. 26601/95 lodged by Hans-Christian Leiningen-Westerburg against Austria, D.R. 88-B, p. 85 *et seq*.