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

Information Note on the Court's case-law 263

June 2022

Ecodefence and Others v. Russia - 9988/13, 14338/14, 45973/14 et al.

Judgment 14.6.2022 [Section III]

Article 11

Article 11-1

Freedom of association

Application of Foreign Agents Act to non-governmental organisations and their directors neither prescribed by law nor necessary in a democratic society: *violation*

Article 34

Hinder the exercise of the right of application

Failure to comply with interim measure through enforcement of dissolution order against a non-governmental organisation: *violation*

Facts – The applicants are Russian non-governmental organisations (NGOs) and, in some cases, their directors. Most of them have been placed on a register of "foreign agents" funded by "foreign sources" and exercising "political activity" under the Foreign Agents Act (since updated several times). The relevant applicants unsuccessfully challenged the decisions categorising them as "foreign agents" before the domestic courts.

The application of the Act has resulted in the imposition of administrative fines, financial expenditure, restrictions on the applicant organisations' activities and the institution of criminal proceedings against the director of one organisation. 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 in order to avoid new sanctions.

Law – Article 11:

(a) *Interference*

The applicant organisations and their directors had been directly affected by a combination of inspections, new registration requirements, sanctions and restrictions on sources of funding and the nature of the activities which had been imposed by the Foreign Agents Act. They had had to alter their conduct significantly to reduce the risk of facing further penalties under the Act, which, however, had not stopped the authorities from issuing further fines while they had been on the register of "foreign agents". Those measures had resulted in the dissolution of some applicant organisations. Dissolution of an association, whether effected by its members under duress or ordered by the

domestic authorities, amounted to an interference with the right to freedom of association.

There had therefore been an interference with the applicants' right to freedom of association under Article 11, interpreted in the light of Article 10.

(b) *"Prescribed by law"*

The Court had to determine whether the relevant law had been sufficiently clear and foreseeable in its terms and whether domestic law had afforded a measure of legal protection against arbitrary interference:

(i) *The interpretation of the term "political activity"*

The Russian authorities had applied an extensive and unforeseeable interpretation of the term "political activities" which had been used in the Foreign Agents Act, to include even activities which had been specifically listed as being excluded from its scope, and they had treated indiscriminately the activities of organisations themselves, those of their directors or members who had been acting in a personal capacity, and those that had lacked the requisite finality to influence State decisions and policy. Whereas the Foreign Agents Act had required the purpose of influencing State policy in order to qualify as political activity, the practice of executive and other authorities had extended the concept of "political activity" to any form of public advocacy on an extremely wide set of issues, without establishing whether the organisation had pursued its activities with the aim of influencing State policy. The classification of NGOs' activities based on this criterion – whether they had constituted "political activities" – had produced incoherent results and engendered uncertainty among NGOs wishing to engage in civil society activities relating to, in particular, human rights or the protection of the environment or charity work. That was so especially as the domestic courts had failed to provide consistent guidance as to what actions did or did not constitute "political activity".

(ii) *The provisions on "foreign funding"*

The Act had not contained any rules as to the purpose of "foreign funding" and did not require the authorities to establish any link between such funding and the alleged "political activities" of the organisation. The term "foreign funding" had also been used indiscriminately by the authorities to include disbursements paid to applicant organisations' members or directors, even where they had acted in a personal capacity without involving the organisation. Further, the Act defined the term "foreign source" as one including both proper foreign sources, such as foreign States, institutions, associations and individuals, and any Russian entities "receiving funds and other property from those sources". The law did not specify any criteria in accordance with which a Russian entity might be deemed to fall into that category, which created a situation of uncertainty. The absence of clear and foreseeable criteria had given the authorities unfettered discretion to assert that the applicant organisations had been in receipt of "foreign funding", no matter how remote or tenuous their association with a purported "foreign source" had been. The circumstances in which a refusal of foreign funding could be considered valid were also neither clear nor foreseeable.

Accordingly, the applicants had been unable to envisage with a sufficient degree of foreseeability what funding and what sources of funding would qualify as "foreign funding" for the purposes of registration as a "foreign agent". The legal norm on foreign funding which allowed for its overbroad and unpredictable interpretation did not meet the "quality of law" requirement and deprived the applicants of the possibility to regulate their financial situation.

Overall, two key concepts of the Act ("political activity", "foreign funding") had fallen short of the foreseeability requirement and judicial review had failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive. That would be sufficient for a finding of a violation of Article 11, interpreted in the light of Article 10. Nevertheless, the questions in the case were closely related to the broader issue of whether the interference had been "necessary in a democratic society":

(c) *Legitimate aim*

The Court accepted in principle that the objective of increasing transparency with regard to the funding of civil society organisations might correspond to the legitimate aim of the protection of public order.

(d) *"Necessary in a democratic society"*

(i) *Creating a special status of "foreign agents"*

Attaching the label of a "foreign agent" to any applicant organisations which had received any funds from foreign entities had been unjustified and prejudicial and also liable to have a strong deterrent and stigmatising effect on their operations. That label had coloured them as being under foreign control in disregard of the fact that they had seen 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 creation of the new status had severely restricted the ability of the applicant organisations to continue their activities, because of the negative attitude of their target groups and because of the regulatory and legislative restrictions on involving "foreign-agent" organisations in cooperation and monitoring projects. Their registration as "foreign agents" had restricted 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". The Government had not been able to adduce "relevant and sufficient" reasons for creating that new category, or show that those measures had furthered the declared goal of increasing transparency. The creation of that status as defined in domestic law had therefore not been "necessary in a democratic society".

(ii) *The additional auditing and reporting requirements*

The Government had also failed to put forward "relevant and sufficient" reasons for imposing additional requirements on the applicant organisations purely on account of their inclusion on the register of "foreign agents". Those requirements had included the increased frequency of reporting and inspections, the obligation on "foreign-agent" organisations to undergo a mandatory audit and publish it on a dedicated website, and such organisations being denied the benefit of simplified book-keeping. The Court was unable to find that those measures could substantially facilitate the provision of more transparent and complete information to the public, as the Government had claimed it should. In any event, those additional measures had imposed a significant and excessive financial and organisational burden on the applicant organisations and their staff, and had undermined their capacity to engage in their core activities. Such additional requirements as provided for in domestic law had not been "necessary in a democratic society" or proportionate to the declared aims.

(iii) *Restricting access to sources of funding*

In the absence of clear conditions for the applicability of the Foreign Agents Act, the only way for the applicant organisations to avoid the application of the "foreign-agent" label

and restrictions, and continue their activities, had been to forego "foreign funding" altogether. The applicants had thus been confronted with a choice between either refusing all "foreign funding" in the widest possible interpretation of the term, or incurring additional expenses and abiding by the other requirements. By imposing that choice on the applicant organisations, the Act had made them opt for either exclusively domestic or foreign funding, thereby effectively restricting the available funding options.

An enforced choice between accepting foreign funding and soliciting domestic State funding represented a false alternative. In order to ensure that NGOs were able to perform their role as the "watchdogs of society", they had to be free to solicit and receive funding from a variety of sources. The diversity of those sources might enhance the independence of the recipients of such funding in a democratic society. Furthermore, the Court was not convinced by the assertion that the domestic grants and subsidies for non-commercial organisations implementing "projects of social importance" could have adequately compensated for the previously available foreign and international funding.

The Government had been unable to show that the applicant organisations which had been forced to refuse foreign funding under the threat of being included on the register of "foreign agents" could have secured access to domestic funding on a transparent and non-discriminatory basis. Nor had the Government put forward "relevant and sufficient" reasons for causing the applicant organisations to choose between continuing their work while accepting foreign funding and the burdensome requirements of "foreign-agent" status, and significantly reducing their activities on account of insufficient domestic funding or a complete lack thereof. Without proper financing, the applicant organisations had been unable to carry out activities constituting the main objective of their existence, and some of them had had to be wound up. Neither the executive authorities nor the domestic courts had considered the consequences of the "foreign-funding" provisions for the work of those organisations, or the accessibility of alternative funding in Russia. It followed that the restrictions on access to funding had not been necessary in a democratic society.

(iv) *Nature and severity of the penalties*

The Foreign Agents Act had introduced fines for continuing the activities of an organisation without registering as a "foreign agent", failing to comply with additional accounting or reporting requirements, and failing to label publications as originating from a "foreign-agent" organisation. It had also introduced criminal liability for individuals who had deliberately omitted to provide documents for registration of an organisation as a "foreign agent". Even the minimum amount of the relevant fine had been set at a level exceeding the monthly minimum salary by a factor of between thirty (in 2013) and thirteen (in 2019), or, in other words, it had been approximately equivalent to one to three years' subsistence income. Further, the sanctions applicable to "foreign-agent" organisations had been many times higher than the sanctions for analogous offences committed by non-commercial organisations which did not have the status of a "foreign agent".

While sanctions of that magnitude triggered heightened scrutiny of their proportionality, the Government had not put forward any relevant and sufficient reasons for setting the fines at such a high level. The fines had been unaffordable for many of the applicant organisations. Some had had to significantly scale down their activities or be wound up, as they had been unable to pay the fines already imposed or face further fines.

The domestic courts had also failed to provide "relevant and sufficient reasons" for their choice of sanctions. They had not considered the proportionality of a fine, in particular in relation to its impact on the organisation's ability to continue its work. The domestic case-law presented to the Court also indicted that the sanctions had been unpredictable.

The Act had not provided for any guidance as to what would amount to a more or less serious offence, and had left room for arbitrariness as to the amounts of the fines.

Taking into account the essentially regulatory nature of the offences, the substantial amounts of the administrative fines imposed and their frequent accumulation, and the fact that the applicants had been not for profit civil society organisations which had suffered a reduction in their budgets due to restrictions on foreign funding, the fines provided for by the Foreign Agents Act could not be regarded as being proportionate to the legitimate aim pursued. That finding was applicable *a fortiori* to criminal sanctions, since a failure to comply with formal requirements relating to the re-registration of an NGO could hardly warrant a criminal conviction and was disproportionate to the legitimate aim pursued.

Overall, the 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 those restrictions – whether by design or effect – was a legal regime that placed 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. The measures accordingly could not be considered "necessary in a democratic society".

Conclusion: violation in respect of each applicant (unanimously).

The Court also held, unanimously, that there had been a violation of Article 34, in that the enforcement of a dissolution order against International Memorial had disclosed a failure to comply with an interim measure indicated by the Court under Rule 39 and violated its right of individual application.

Article 41: sums ranging between EUR 60 and EUR 21,430 in respect of pecuniary damage; EUR 10,000 to each applicant NGO and their directors, in respect of non-pecuniary damage.
