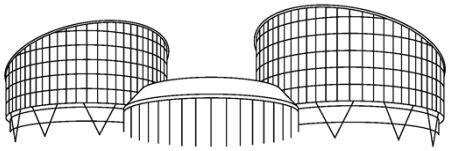

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF KARASTELEV AND OTHERS v. RUSSIA

*(Application no. 16435/10)*

JUDGMENT

Art 10 • Freedom of expression • Prosecutor's unfettered discretion to issue warnings, cautions and orders under "anti-extremism" legislation lacking foreseeability and safeguards • Lack of foreseeable criteria for deducing the risk of the "extremist activity" to be prevented • No clear criteria to distinguish between non-punishable conduct, conduct that would give rise to a warning or by itself entail criminal liability • Prosecutors not required to take due account of the factors and principles developed in Court's freedom of expression case-law • Lack of safeguards against arbitrariness and inadequate judicial review • Failure to demonstrate that the applicants' conduct was capable of leading to violent obstructive conduct toward the authorities
Art 6 § 1 • Access to court • Unjustified discontinuation of the proceedings brought by the first applicant, with reference to the parallel proceedings brought by the second applicant

STRASBOURG

6 October 2020

**FINAL**

06/01/2021

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Karastelev and Others v. Russia,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President,*
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Lorraine Schembri Orland, *judges,*
and Milan Blaško, *Section Registrar,*

Having deliberated in private on 1 September 2020,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 16435/10) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 3 March 2010 by two Russian nationals: Mr Vadim Yevgenyevich Karastelev ("the first applicant") and Mrs Tamara Viktorovna Karasteleva ("the second applicant"); and the non-governmental organisation, the Novorossiysk Committee for Human Rights (hereinafter – "the NCHR" or "the third applicant"). The second applicant died on 3 December 2011. On 17 May 2017 the first applicant informed the Court accordingly and expressed his wish to pursue the second applicant's complaints before the Court. In February 2018 the Court received a letter signed by Ms Agaltsova, acting on behalf of the first applicant and Mr Dmitriy Vadimovich Karastelev. That letter indicated that the latter was the second applicant's son and heir under a succession certificate issued in December 2017; that he would pursue his late mother's complaints before the Court; and that the first applicant withdrew his earlier related statement.

2. At different stages of the proceedings before the Court the applicants were represented by Mr F. Tishayev, Ms M. Agaltsova and other lawyers of the Human Rights Centre Memorial, Moscow, and the European Human Rights Advocacy Centre (EHRAC), United Kingdom.

3. The Russian Government ("the Government") were initially represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

4. On 7 November 2016 the Government were given notice of the complaints in respect of the first and second applicants under Articles 6, 10 and 13 of the Convention and Article 2 of Protocol No. 7 to the Convention

and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1965 and at the material time lived in Novorossiysk, Krasnodar Region. The third applicant was then an NGO operating in Novorossiysk.

6. At the relevant time, the first and second applicants were the NCHR's deputy chief officer and chief officer respectively.

### A. The first and second applicants' demonstrations

7. On 21 July 2008 the Krasnodar Regional Law on preventive measures against misconduct on the part of minors ("the Minors Protection Act") was adopted. It provided, *inter alia*, that parents were required to ensure that their children did not go to public places at night without being accompanied by an adult.

8. The first and second applicants staged public protests in Novorossiysk against the Minors Protection Act, which, in their opinion, was too restrictive and unconstitutional, particularly because it prevented adolescents from going out in order to get medication for their sick parents. It appears that all their public protests were preceded by notice being given to the local authorities, as required by the applicable legislation on public events.

9. On 4 April 2009 the first and second applicants staged a static demonstration. A poster stating "Freedom is not granted, it has to be taken"[1] was publicly exhibited during this demonstration.

10. On 18 April 2009 they staged another static demonstration near the Novorossiyskaya Respublika monument. V. and K., aged fifteen and sixteen, approached the applicants and had a short conversation with them (see also paragraphs 13-17 below). According to the applicants, on that occasion, the above-mentioned poster was not used (see, however, the findings of the domestic court in paragraph 26 below).

### B. Procedures against the applicants

11. On 22 April 2009 V. and K.'s parents lodged complaints with the Novorossiysk prosecutor's office. In particular, they alleged that the first and second applicants had conducted propagandistic activity

[1] This appears to be paraphrasing "Rights are not granted; they are taken!" from *Meshchane* (*Bourgeois*), a play by Maksim Gorkiy, a Soviet writer.

(*агитационные действия*) among minors, including activity on the premises of secondary school no. 22, and that, during the demonstration of 18 April 2009, the first applicant had invited V. and K. and their friends to participate in future demonstrations calling for the abolition of the Minors Protection Act (see also paragraphs 15-17 below).

12. On 27 April 2009 the first and second applicants were summoned to the prosecutor's office for the purpose of giving statements. They insisted that the NCHR had had nothing to do with their protest actions, including those of 18 April 2009.

13. The first applicant stated that he and his wife (the second applicant) had not carried out any work with school children in relation to their opposition to the Minors Protection Act and that the protest actions taken by him and his wife as private citizens in relation to that Act between January and April 2009 had been notified to the local authorities in compliance with the Public Events Act. He indicated that during the protest on 18 April 2009 two adolescents had approached him and his wife and, in reply to their questions, he had told them that it was a protest against the Minors Protection Act and had pointed to the poster(s) displayed at the venue of the protest. Thereafter, the adolescents had been called over by a woman standing across the road (possibly the mother of one of them) and they had left.

14. The second applicant made a similar statement, corroborating the first applicant's statement.

15. V., aged fifteen, was interviewed by an assistant prosecutor, and stated that he had heard about a forthcoming demonstration from a friend and had decided "to have a look". He confirmed that during the demonstration he and his friend K. had approached a woman (the second applicant) and had asked her why she did not like the Minors Protection Act, and upon her suggestion he had taken posters and had taken a photograph. The woman had told him that if the Act were to be repealed, he could walk outside after 10 p.m. without any fear of the police who would not "touch them". He stated that no one had come to his school or invited him to any demonstrations.

16. K., aged sixteen, was also interviewed and made a statement in similar terms. He had talked to a man (the first applicant) who had suggested that they should bring their friends along to another demonstration; if the Minors Protection Act were to be repealed the police would not bother the young people who would be able to spend time outside at night. K. had been content with that approach but at the same time had considered that it could lead to disorder. He had disagreed with the poster stating "Freedom is not granted, it has to be taken" because nobody had taken his freedom. In K.'s view, the first applicant's negative attitude toward the police, together with his actions during the demonstration, had amounted to calls to carry out anti-social activities consisting of disobeying

the law and the public authorities. Without the Minors Protection Act, there would be a rise in drug consumption, alcoholism, hooliganism and other crimes.

17. Subsequently, V. amended his statement to bring it in line with K.'s statement.

18. On 12 May 2009 the municipal authority lodged a complaint against all three applicants because their activity had allegedly been of a "destructive nature" and asked the prosecutor's office to take the requisite measures, including dissolving the NCHR.

19. On 21 May 2009 the prosecutor's office issued four documents under three legal procedures.

(a) Two separate written warnings (*предостережения*) concerning the unacceptability of violating the law were issued, based on section 25.1 of the Prosecutors Act (see paragraph 40 below). Those warnings were addressed to the first and second applicants in their capacity as NCHR officials – they were warned that failure to comply with the terms of the warnings could result in their personal liability for an administrative offence. According to the prosecutor's office in subsequent proceedings (see paragraph 26 below), the warning to the second applicant was not formally served on her and thus did not entail any legal consequences for her.

(b) A caution (*предупреждение*) indicating the unacceptability of extremist activities was issued to the NGO, based on section 7 of the Suppression of Extremism Act (see paragraph 38 below). That document was addressed to the second applicant as the NCHR's chief officer and it indicated that if within twelve months of the caution new facts came to light indicating possible extremist activity, the NCHR could be dissolved by a court order; and

(c) An order (*представление*) seemingly requiring the third applicant to remedy violations of the legislation to counteract extremist activities (see paragraph 41 below) was issued. It pointed out that extremist activities on the part of an NGO could entail its dissolution. The order required the second and third applicants to "take measures in order to remedy the violations of the law and to remove the reasons and grounds for such violations" and to report back to the prosecutor's office within a month confirming the measures taken (see also paragraphs 31-32 below).

In all the above-mentioned documents the prosecutor indicated, in nearly identical terms, that the first and second applicants' calls for minors to attend protest actions against the Minors Protection Act amounted to calls to carry out anti-social actions consisting of disobedience to the law and the public authorities and that such conduct might, in future, entail extremist actions consisting of obstructing the work of the public authorities in Novorossiysk.

20. The warnings issued to the first and second applicants read as follows:

"The parents of minors V. and K. complained to the town prosecutor's office of [the first and second applicants'] propagandistic actions calling for participation in protests against the Minors Protection Act and of their calls for persons to carry out anti-social activities.

Specifically, it follows from the complaints that [the first/second applicant] carried out propagandistic actions among school pupils, inviting them to take part in protests against the Minors Protection Act. Minors V. and K. were interviewed by the prosecutor in the presence of their parents and a school official and stated that on 18 April 2009 [the first and second applicants] had invited them to bring their friends along to similar protests seeking to obtain the revocation of the Act.

The minors stated that they had perceived [the first/second applicant's] actions as calls to carry out anti-social actions consisting of disobeying the law and the public authorities.

Thus, it should be concluded that [the first/second applicant's] conduct may in future entail extremist activities aimed at obstructing the lawful activity of the State authorities in Novorossiysk.

Section 9 of the Suppression of Extremism Act prohibits the creation and functioning of non-governmental organisations aimed at carrying out extremist activities ... Where such activities or actions entail violations of individual rights or freedoms, damage to a person, his or her life or limb, the social order, public safety ... or create a real threat of such damage, the organisation may be dissolved ... Thus, as a preventive measure, under sections 22(2) and 25.1 of the Prosecutors Act, I warn [the first/second applicant] that it is not acceptable to violate the anti-extremist legislation. I inform [the first/second applicant that his/her] failure to comply with the present requirement (*требование*) may entail [his/her] liability for an administrative offence."

21. The order read as follows:

"The parents of minors V. and K. complained to the town prosecutor's office of [the first and second applicants'] propagandistic actions calling for participation in protests against the Minors Protection Act and of their calls for persons to carry out anti-social activities. The investigation disclosed violations of the Suppression of Extremism Act.

Specifically, it follows from the complaints that [the second applicant] carried out propagandistic actions among school pupils, inviting them to take part in protests against the Minors Protection Act. Minors V. and K. were interviewed by the prosecutor in the presence of their parents and a school official and stated that on 18 April 2009 [the first and second applicants] had invited them to bring their friends along to similar protests seeking to obtain the revocation of the Act. Moreover, K. and V. stated that they had perceived [the first and second applicants'] actions as calls to carry out anti-social actions consisting of disobeying the law and authorities.

Thus, it is possible to conclude that such conduct may in future entail extremist actions aimed at obstructing the lawful activities of the public authorities in Novorossiysk.

Section 9 of the Suppression of Extremism Act prohibits organisations from aiming to commit extremist activities or acting in such a manner. Where such activities or actions entail violations of individual rights or freedoms, damage to a person, his or her life or limb, the social order, public safety ... or create a real threat of such damage, the organisation may be dissolved ... Thus, under section 24 of the Prosecutors Act, I invite you to consider this order and to take effective actions to remedy the violation of the law that we have identified, the related reasons and

> grounds for it, to conduct enquiries into the persons concerned and decide whether they should be subjected to disciplinary penalties, and to report back to the prosecutor's office within a month."

22. On 29 May and 5 June 2009, after the warnings, the caution and the order had been issued, the poster "Freedom is not given, it has to be taken" was examined, apparently at the request of the prosecutor's office, by:

(i) a holder of a PhD degree in philosophy, Mr R., who concluded that the poster was of an extremist nature;

(ii) the head of the municipal medical and social centre, Ms G., who stated in her findings that the poster contained a provocative statement that could be perceived by minors as a call for active resistance against the authorities.

23. On 3 June 2009 the first applicant requested permission from the prosecutor's office to examine the investigation file which formed the basis for issuing him with the written warning. On 15 June 2009 that request was refused.

### C. Judicial review proceedings by the second applicant

24. In June 2009 the second applicant lodged a complaint with the Oktyabrskiy District Court of Novorossiysk, contesting the warning issued to her, as well as the caution and the prosecutor's order which had been addressed to her as the chief officer of the NCHR, all of which were dated 21 May 2009.

25. It is apparent from the written record of the trial that at the last hearing on 24 June 2009 the prosecutor adduced in evidence the reports issued by Ms G. and Mr R.

26. In a judgment delivered on 24 June 2009, the District Court dismissed the complaint. The court found the warning, the caution and the order well-founded and endorsed the conclusions of the expert reports by Ms G. and Mr R. In particular, the court confirmed that the poster "Freedom is not given, it has to be taken" was of an extremist nature, noting that it contained a provocative statement which "could be perceived by adolescents as an appeal to exercise active resistance against the authorities and statutes". The court held as follows:

> "The Suppression of Extremism Act sets out the legal basis for organising the fight against extremist activities and provides for liability for that type of activity, with the aim of protecting human rights and freedoms and the foundations of the constitutional regime, and for the purpose of ensuring national integrity and security. Measures aimed at preventing (*предупреждение*) extremist activity form part of the main principles of this fight ... 'Extremist activity' [under the Act] includes the obstruction of the lawful activities of State authorities ... combined with violence or threats of violence ... The poster used by [the first and second applicants] during the demonstration was described by the experts [Ms G. and Mr R.] as contributing to opposition to the activities of State authorities ... 'A human being has inherent inalienable rights of natural law such as freedom of thought, freedom to express his

> opinion, freedom to live and so on. Thus, one cannot wait for such rights to be granted "from above"; they need to be taken by force ...' ... The call to 'take' freedom from outside the framework of the statutory rules is interpreted as a call by the organisers of the demonstration to engage in active opposition to the existing legislation, namely the 'Minors Protection Act' ...
>
> The prosecutor's office considered that [the first and second applicants] had carried out campaigning (propagandistic) activities calling on pupils to take part in action against the 'Minors Protection Act' ... and that [the first and second applicants] had issued calls to carry out anti-social activities ... The specialists concluded that the poster and the [first and second applicants'] actions could be perceived by adolescents as incitement to engage in active opposition to the State authorities ... A call to 'take' freedom means prioritising human rights over the State's interests. Thus, the slogan 'Freedom is not granted, it has to be taken' is of an extremist nature ..."

27. The second applicant lodged an appeal with the Krasnodar Regional Court. She argued as follows.

(a) The adolescents could not have seen the poster referred to because no such poster had been used during the demonstration in question, as confirmed by the electronically date-stamped photographic evidence in the case file, and in any event the experts and the court had reached contradictory conclusions regarding the utterances made and the details of who had been holding the poster at the material time – whether it was the second applicant or the first applicant (who, in any event, was not a party to the case before the domestic courts at that time).

(b) The court had not assessed the argument and the supporting evidence suggesting that during the demonstration the second applicant had acted as a private person and not as an official of the NGO.

(c) The report by Ms G. was a specialist report obtained by the prosecutor's office rather than an expert report commissioned by the court, meaning that the second applicant had not been afforded an opportunity to suggest which expert institution to consult or what questions should be raised before the chosen expert. It had not been adduced as evidence during the trial and had therefore not been examined in adversarial proceedings that would have offered the opportunity to comment or to interview Ms G. Further, the Code of the Civil Procedure did not allow for evidence such as a specialist's report. Despite those factors, the court had used that report to justify its judgment.

28. On 3 September 2009 the Regional Court upheld the judgment of 24 June 2009, although it removed a reference to the first applicant from that judgment.

29. The first applicant sought a supervisory review of the court decisions of 24 June and 3 September 2009. His application was rejected as inadmissible.

### D. Judicial review proceedings by the first applicant

30. In the meantime, on 23 July 2009 the first applicant complained to the Primorskiy District Court of Novorossiysk about the warning issued to him on 21 May 2009. On 14 August 2009 the District Court issued a decision discontinuing the proceedings because the same subject-matter had already been determined by the judgment of 24 June 2009 by the Oktyabrskiy District Court (see paragraph 26 above). On 17 November 2009 the Regional Court upheld that procedural decision.

### E. Other proceedings

31. In order to comply with the requirements of the order of 21 May 2009, on 3 August 2009 the second applicant – representing the NCHR – requested that the prosecutor's office clarify its requirements because the documents had not explained how exactly the applicants' alleged actions had breached the law. The second applicant also argued that the prosecutor's office had failed to refer to the relevant law in its warnings. On 20 August 2009 the prosecutor's office issued a clarification of the order of 21 May 2009, indicating that it might be appropriate to subject the first and second applicants to disciplinary sanctions. On 14 September 2009 the second applicant, representing the NCHR, replied to the prosecutor's office, explaining that measures had been undertaken by the NCHR in order to comply with the prosecutor's order. Namely, the second applicant had resigned from her position as the NCHR's chief officer.

32. On 15 June 2009 – and thus after the prosecutor had issued the warnings of 21 May 2009 to the applicants – the headmaster of school no. 22 complained to the prosecutor's office of another instance of propagandistic activity and incitement to anti-social activity on the part of the first and second applicants (in their capacity as NCHR's officials) which had allegedly been carried out on the school's premises on 25 and 26 May 2009. On 7 August and 7 September 2009 the prosecutor's office sought the dissolution of the NCHR because the first and second applicants had "repeatedly engaged in unlawful activity" after the warnings issued on 21 May 2009. Subsequently, the prosecutor's office asked the court to discontinue the proceedings seeking the dissolution of the NCHR because the procedure for submitting such a request had not been complied with. The court agreed to that request and discontinued the proceedings.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Freedom of expression

33. Article 29 of the Constitution of the Russian Federation guarantees the right to freedom of thought and expression, as well as freedom to freely seek, receive, transfer and spread information by any legal means.

34. Article 55 of the Constitution provides that rights and freedoms may be limited by federal statute only in so far as is necessary for protecting the foundations of the constitutional regime, the morals, health, rights and legitimate interests of others, and for ensuring national defence and security.

### B. Suppression of Extremism Act

35. The preamble to the Suppression of Extremism Act (Federal Law no. 114-FZ on Combatting Extremist Activity, 25 July 2002) explains that the Act provides for liability for extremist activity and aims to protect individual rights and freedoms, the foundations of the constitutional regime and ensure the integrity and security of the Russian Federation.

36. Section 1 of the Suppression of Extremism Act defines extremist activity (*экстремистская деятельность*) as, *inter alia*, obstruction of the lawful activities of State authorities, electoral commissions and their officials, combined with violence or threats of violence as well as public calls to carry out (*публичные призывы к*) such obstruction; mass dissemination of material known to be extremist (*заведомо экстремистские материалы*).

37. Section 6 authorises the competent supervising authority to issue to the chief officer of an NGO or other persons a warning (*предостережение*) of the unacceptability of extremist activity if there is sufficient verified information that unlawful actions of an extremist nature are being planned but, at the same time, there are insufficient grounds to make out a case of criminal liability. Failure to comply with the instructions as set out in the written warning entails liability on the part of the person to whom the warning was issued (see also paragraph 40 below).

38. Section 7 authorises the competent supervising authority to issue an NGO with a caution (*предупреждение*) regarding the unacceptability of extremist activity.

39. On 2 July 2013 the Constitutional Court, in its decision no. 1053-O, dismissed as inadmissible a request for a review of the constitutionality of sections 1 and 13 of the Suppression of Extremism Act – in particular, the parts of section 1 concerning incitement of social, racial, ethnic or religious discord and propaganda about the exceptional nature, superiority or deficiency of people on the basis of their social, racial, ethnic, religious or linguistic affiliation or their attitude to religion – on the grounds of their

alleged vagueness and the consequent lack of foreseeability in their application. The Constitutional Court held, in particular, that the requirement of foreseeability did not prevent the use of value or common terms, the meaning of which was understandable directly from the legal provision in question, from a combination of related legal provisions or through interpretation by the courts. When applying section 1 of the Suppression of Extremism Act, the courts had to take into account that the requisite element of that form of extremism was an explicit or implicit disrespect for the constitutional prohibition of incitement of social, racial, ethnic or religious discord and of propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or their attitude to religion. To establish whether there was such disrespect, the courts had to take into account all the relevant circumstances of the case, such as the form and content of the activity or information in question, its audience, purpose, social and political context and whether there was a real threat to public order arising from, among other things, calls to, or substantiation or justification of, unlawful infringements of constitutionally protected values. The Constitutional Court found that anti-extremism legislation did not permit restrictions to be imposed on the right to freedom of conscience, religion and speech on the sole ground that the activity or information did not conform to common views, established traditions and beliefs, or moral and religious preferences. Such restrictions would be contrary to the constitutional requirements of necessity, proportionality and fairness. The wording of section 1 of the Suppression of Extremism Act did not, therefore, allow for its unforeseeable interpretation or arbitrary application.

### C. Supervising powers of prosecutors

40. For the purpose of avoiding (*для предупреждения*) the commission of offences (*правонарушения*) and where there is information that unlawful actions (*противоправные деяния*) are being planned, a prosecutor is able to issue a written warning (*предостережение*) of the unacceptability of violations of the law. Such a warning may be issued to the officials of an NGO or – if the available information reveals plans for extremist activity – to the chief officer of the organisation in question, or other appropriate persons (section 25.1 of the Prosecutors Act, Federal Law no. 2202-1 of 17 January 1992). Failure to comply with the prosecutor's instructions as set out in the written warning entails liability on the part of the official to whom the warning is issued (ibid. – see also paragraph 37 above).

41. A prosecutor may also issue an order (*представление*) requiring the organisation to remedy violations of the law. Such an order should be addressed to the official who has the competence to remedy such violations (section 24 of the Prosecutors Act).

### D. Judicial review

42. For a summary of the applicable legislative provisions and judicial practice in relation to judicial review under Chapter 25 of the Russian Code of Civil Procedure ("the CCP"), see *Roman Zakharov v. Russia* ([GC], no. 47143/06, §§ 92-100, ECHR 2015), and *Lashmankin and Others v. Russia* (nos. 57818/09 and 14 others, §§ 276-88, 7 February 2017).

43. Article 248 of the CCP provided that a court could refuse to deal with a claim or discontinue the proceedings where there was already a court decision that had entered into force and concerned the same subject-matter (*предмет*). Article 250 of the Code provided that where a court decision had entered into force, neither a person involved in related proceedings, nor any other person, could institute new proceedings in respect of the same claim (*требование*) on the same grounds (*основания*).

## III. OTHER RELEVANT MATERIAL

### A. European Commission against Racism and Intolerance

44. On 8 December 2015 the Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted General Policy Recommendation No. 15 on combating hate speech. In its relevant parts, the recommendation reads as follows:

> "The European Commission against Racism and Intolerance (ECRI):
>
> ...
>
> Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of 'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;
>
> ...
>
> Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech...
>
> ...
>
> Aware of the grave dangers posed by hate speech for the cohesion of a democratic society, the protection of human rights and the rule of law but conscious of the need to ensure that restrictions on hate speech are not misused to silence minorities and to suppress criticism of official policies, political opposition or religious beliefs;
>
> ...
>
> Recalling that the duty under international law to criminalise certain forms of hate speech, although applicable to everyone, was established to protect members of

vulnerable groups and noting with concern that they may have been disproportionately the subject of prosecutions or that the offences created have been used against them for the wrong reasons;

...

Recommends that the governments of members States:

...

10. take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:

a. ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;

...

c. ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;

...

e. provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response...”

45. The Explanatory Memorandum to the recommendation, in its relevant parts, provides as follows:

“7. For the purposes of this Recommendation, the following definitions shall apply:

...

q. ‘incitement’ shall mean statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them; ...

ff. ‘violence’ shall mean the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation; ...

14. The Recommendation further recognises that, in some instances, a particular feature of the use of hate speech is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. As the definition above makes clear, the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.

15. Intent to incite might be established where there is an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker. However, the existence of intent may not always be easy to demonstrate, particularly where remarks are ostensibly concerned with supposed facts or coded language is being used.

16. On the other hand, the assessment as to whether or not there is a risk of the relevant acts occurring requires account to be taken of the specific circumstances in which the hate speech is used. In particular, there will be a need to consider (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked): (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a 'live' event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).

...

62. ... there is also concern on the part of bodies responsible for supervising the implementation of States' obligations in this regard that such restrictions can be unjustifiably to silence minorities and to suppress criticism, political opposition and religious beliefs.

63. Thus, for example, the Committee on the Elimination of Racial Discrimination, when reviewing reports of States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination, has recommended that the definitions in legislation directed against 'extremism' be amended so as to ensure that they are clearly and precisely worded, covering only acts of violence, incitement to such acts, and participation in organizations that promote and incite racial discrimination, in accordance with Article 4 of that Convention. Similarly, the United Nations Human Rights Committee has expressed concern that such legislation could be interpreted and enforced in an excessively broad manner, thereby targeting or disadvantaging human rights defenders promoting the elimination of racial discrimination or not protecting protect individuals and associations against arbitrariness in its application. In addition, concerns about the use of hate speech restrictions to silence criticism and legitimate political criticism have also been voiced by ECRI and others such as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Advisory Committee on the Framework Convention on National Minorities.

...

148. ... in order to ensure that there is no unjustified interference with the right to freedom of expression, any liability should be limited to the more serious uses of hate speech, namely, those which are intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it. Thus, it should not be enough to demonstrate damage or loss as a result of a particular use of hate speech for any liability to be imposed; the particular use must also be of such gravity – namely, where there is the intention to incite or an imminent risk of this occurring – that its imposition is warranted.

...

169. The requirements for the prohibition or dissolution of a political party or other organisation are even more exacting given the gravity of such a measure. This is reflected in the limitation by the recommendation 9 of the use of such measure to situations in which the hate speech concerned is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination. There will, therefore, be a need to establish that there is plausible evidence either that such an intention exists or that there was an imminent likelihood of the acts concerned occurring. Moreover, where the use of hate speech involved the speeches or other conduct of individuals as opposed to more formal policy documents or pronouncements, there will also be a need to establish that these were imputable to party or organisation concerned and that they gave a clear picture as to the approach which it supported and advocated. This will most often be the case with the speeches and conduct of leading figures in a party or organisation. Thus, it may be appropriate to place less emphasis in this context on the activities of individual members, including former leaders, where these have not been endorsed in an explicit or tacit manner."

## B. Venice Commission

46. Opinion no. 660/2011 on the Federal Law on Combating Extremist Activity of the Russian Federation adopted by the European Commission for Democracy through Law (the Venice Commission) at its 91st Plenary Session held in Venice on 15-16 June 2012, CDL-AD(2012)016-e (Opinion of the Venice Commission), contained, in particular, the following opinions and conclusions:

"30. The Venice Commission notes that the definitions in Article 1 of the Law of the "basic notions" of "extremism" ("extremist activity/extremism", "extremist organisation' and "extremist materials") do not set down general characteristics of extremism as a concept. Instead, the Law lists a very diverse array of actions that are deemed to constitute "extremist activity" or "extremism". This should mean that, according to the Law, only activities defined in Article 1.1 are to be considered extremist activities or fall within the scope of extremism and that only organisations defined in Article 1.2 and materials defined in Article 1.3 should be deemed extremist.

31. The Commission however has strong reservations about the inclusion of certain activities under the list of "extremist" activities. Indeed, while some of the definitions in Article 1 refer to notions that are relatively well defined in other legislative acts of the Russian Federation, a number of other definitions listed in Article 1 are too broad, lack clarity and may open the way to different interpretations. In addition, while the definition of "extremism" provided by the Shanghai Convention, as well as the definitions of "terrorism" and "separatism", all require violence as an essential element, certain of the activities defined as "extremist" in the Extremism Law seem not to require an element of violence (see further comments below).

...

35. Extremist activity under point 3 is defined in a less precise manner than in a previous version of the Law (2002). In the 2002 Law the conduct, in order to fall within the definition, had to be "associated with violence or calls to violence". However the current definition ("stirring up of social, racial, ethnic or religious discord") does not require violence as the reference to it has been removed. According to non-governmental reports, this has led in practice to severe anti extremism

measures under the Extremism Law and/or the Criminal Code. The Venice Commission recalls that, as stated in its Report devoted to the relation between freedom of expression and freedom of religion, hate speech and incitement may not benefit from the protection afforded by Article 10 ECHR and justify criminal sanctions. The Commission notes that such a conduct is criminalized under Article 282 of the Russian Criminal Code and that, under Article 282.2, the use of violence or the threat of its use in committing this crime is an aggravating circumstance.

36. The Venice Commission is of the opinion that in order to qualify "stirring up of social, racial, ethnic or religious discord" as "extremist activity", the definition should expressly require the element of violence. This would maintain a more consistent approach throughout the various definitions included in article 1.1, bring this definition in line with the Criminal Code, the Guidelines provided by the Plenum of the Supreme Court and more closely follow the general approach of the concept of "extremism" in the Shanghai Convention.

...

41. Extremist activity under point 5 brings together a collection of criteria, the combination of which may or may not be required before establishing that the Law applies to them. Clarification is required of what is intended here. If violating rights and freedoms "in connection with a personal's social, racial, ethnic, religious or linguistic affiliation or attitude to religion", in the absence of any violent element is an extremist activity, it is clearly a too broad category.

42. Similarly, under point 10 incitement to extremist activity is in itself an extremist activity. This provision is problematic to the extent that certain of the activities listed, as pointed out above, should not fall into the category of extremist activities at all.

...

47. [Article 1.3] defines extremist materials not only as documents which have been published but also as documents intended for publication or information, which call for extremist activity (to be understood, most probably, by reference to the definition of such an activity in Article 1.1) or which justify such activity...

...

49. Considering the broad and rather imprecise definition of "extremist documents" (Article1.3), the Venice Commission is concerned about the absence of any criteria and any indication in the Law on how documents may be classified as extremist and believes that this has the potential to open the way to arbitrariness and abuse. The Commission is aware from official sources, that the court decision is systematically based on prior expert review of the material under consideration and may be appealed against in court. It nonetheless considers that, in the absence of clear criteria in the Law, too wide a margin of appreciation and subjectivity is left both in terms of the assessment of the material and in relation to the corresponding judicial procedure. According to non-governmental sources, the Federal List of Extremist Materials has in recent years led to the adoption, in the Russian Federation, of disproportionate anti-extremist measures. Information on how this list is composed and amended would be necessary for the Commission to comment fully.

...

53. Under Article 6 of the Law, the Prosecutor-General may, in case there is "sufficient and previously confirmed information on unlawful acts in preparation presenting the characteristics of extremist activity" and in the absence of sufficient

grounds for bringing criminal prosecution, send a "written warning" to the head of a public, religious or other organisation and other relevant persons, "to the effect that their activity is inadmissible and that there are concrete grounds for giving a warning". Moreover, article 6 states that "in the event of failure to comply with the demands set out in the warning, the individual issued with that warning may be prosecuted under the established procedure. According to the Russian authorities, article 17.7 of the Code of Administrative Offences is applicable in this case: "Wilful failure to satisfy the demands of a prosecutor resulting from his authority established by federal law, as well as the lawful demands of an investigator, an inquirer or an official carrying out proceedings related to an administrative offence shall entail the imposition of an administrative fine on citizens ... and on legal entities ..."

54. However, it is not clear how the presence of "concrete grounds for issuing warnings" is assessed. According to the Russian Institute of Legislation and Comparative Law, "[a] warning is pronounced if there are no sufficient grounds for criminal prosecution that is if there is no crime proper and before the actions which may later be considered extremist have been committed. Should there exist sufficient grounds for prosecution different steps are to be taken." So, whilst there does not appear to be an offence under the Criminal Code for failure to obey a warning, there is an administrative offence backed by a fine. It has been explained to the Commission that if the warning is ignored and the organisation then engages in extremist activities its leaders might be prosecuted for engagement in extremist activities. In this case the court may take the failure to obey the warning into account in sentencing.

55. Notwithstanding the above explanations, the Venice Commission is of the view that article 6 of the Extremism Law lacks clarity and it does appear that an administrative offence is committed where a warning is not obeyed even though no extremist activity has been engaged in. It thus recommends to reformulate the Law to make it clear that prosecution will only be brought against the person to whom the warning has been addressed if that person has engaged in extremist activity and has committed a criminal act and not for the mere failure to comply with the warning.

56. The Commission further notes that the Law does not provide for any procedure for the person to whom a warning is addressed to challenge the evidence of the Prosecutor-General upon which it is based at the point when the warning is given, though it is noted that article 6 of the Law provides that the warning may be appealed to a court. ...

61. ... [I]n the Commission's view the Law should be made more specific as to the procedures available in order to guarantee the effective enjoyment of the right to appeal both the warning/the notice issued, and the liquidation or suspension decision before an independent and impartial tribunal, as enshrined in Article 6 ECHR.

...

63. ... It is worrying at the same time that, as a result of the vagueness of the Law and of the wide margin of interpretation left to the enforcement authorities, undue pressure is exerted on civil society organisations, media outlets and individuals, which undoubtedly has a negative impact on the free and effective exercise of human rights and fundamental freedoms.

...

65. ...It is therefore essential, in order for the warnings and notices or any other anti-extremism measures to fully comply with the requirements of Articles 10 and 11 of the ECHR, to ensure that any restrictions that they may introduce to fundamental rights stem from a pressing social need, are proportionate within the meaning of the

ECHR and are clearly defined by law. The relevant provisions of the Extremism Law should thus be amended accordingly.

...

73. The Venice Commission is aware of the challenges faced by the Russian authorities in their legitimate efforts to counter extremism and related threats. It recalls that, in its recent recommendation devoted to the fight against extremism, the Parliamentary Assembly of the Council of Europe expressed its concern over the challenge of fighting extremism and its most recent forms and encouraged the member States of the Council of Europe to take resolute action in this field, "while ensuring the strictest respect for human rights and the rule of law".

74. However, the manner in which this aim is pursued in the Extremism Law is problematic. In the Commission's view, the Extremism Law, on account of its broad and imprecise wording, particularly insofar as the "basic notions" defined by the Law - such as the definition of "extremism", "extremist actions", "extremist organisations" or "extremist materials" – are concerned, gives too wide discretion in its interpretation and application, thus leading to arbitrariness.

75. In the view of the Venice Commission, the activities defined by the Law as extremist and enabling the authorities to issue preventive and corrective measures do not all contain an element of violence and are not all defined with sufficient precision to allow an individual to regulate his or her conduct or the activities of an organisation so as to avoid the application of such measures. Where definitions are lacking the necessary precision, a law such as the Extremism Law dealing with very sensitive rights and carrying potential dangers to individuals and NGOs can be interpreted in harmful ways. The assurances of the authorities that the negative effects would be avoided thanks to the guidelines of the Supreme Court, the interpretation of the Russian Institute for Legislation and Comparative Law or good faith are not sufficient to satisfy the relevant international requirements.

76. The specific instruments that the Law provides for in order to counter extremism – the written warnings and notices - and the related punitive measures (liquidation and/or ban on the activities of public religious or other organisations, closure of media outlets) raise problems in the light of the freedom of association and the freedom of expression as protected by the [European Convention on Human Rights] and need to be adequately amended.

77. The Venice Commission recalls that it is of crucial importance that, in a law such as the Extremism Law, which has the capacity of imposing severe restrictions on fundamental freedoms, a consistent and proportionate approach that avoids all arbitrariness be taken. As such, the Extremism Law has the capacity of imposing disproportionate restrictions of fundamental rights and freedoms as enshrined in the European Convention on Human Rights (in particular Articles 6, 9, 10 and 11) and infringe the principles of legality, necessity and proportionality. In the light of the above comments, the Venice Commission recommends that this fundamental shortcoming be addressed in relation to each of the definitions and instruments provided by the Law in order to bring them in line with the European Convention on Human Rights."

# THE LAW

## I. ALLEGED VIOLATIONS OF ARTICLES 6 AND 10 OF THE CONVENTION IN RESPECT OF THE THIRD APPLICANT

47. The Court notes that in the application form of 3 March 2010 the applicants' representatives alleged violations of the first and second applicants' rights and freedoms under the Convention. As regards the third applicant, the only complaints concerned a risk of dissolution and related proceedings (see paragraph 32 above). The Court rejected this part of the application in November 2016 (see paragraph 4 above).

48. In so far as the observations submitted to the Court on behalf of the third applicant in 2017 may be understood as alleging before the Court, for the first time, violations of its rights and freedoms under Articles 6 and 10 of the Convention in 2009, those complaints were submitted outside the six-month period under Article 35 § 1 of the Convention. Accordingly, they have been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

## II. Mr DMITRIY KARASTELEV'S STANDING TO PURSUE THE SECOND APPLICANT'S COMPLAINTS

49. The Court notes that following the second applicant's death in 2011, in 2018 her son expressed a wish to pursue the proceedings lodged before the Court by his late mother in 2010, raising complaints under Articles 6, 10 and 13 of the Convention.

50. The Government contended that the complaints mentioned above were of an inherently personal nature and concerned non-transferable rights, and thus invited the Court to strike this part of the application out of its list of cases.

51. The Court reiterates that in determining this matter the decisive point is not whether the rights in question are transferable to the heirs wishing to pursue the procedure, but whether the heirs or the next of kin can in principle claim a legitimate interest in requesting the Court to deal with the case on the basis of the applicant's wish to exercise his or her individual and personal right to lodge an application with the Court (see *Ergezen v. Turkey*, no. 73359/10, § 29, 8 April 2014; *Barakhoyev v. Russia*, no. 8516/08, §§ 22-23, 17 January 2017; and *Ksenz and Others v. Russia*, nos. 45044/06 and 5 others, §§ 87 and 117, 12 December 2017). Also, human rights cases before the Court generally have a moral dimension and persons near to an applicant may thus have a legitimate interest in ensuring that justice is done, even after the applicant's death (ibid.). The Court is satisfied that Mr Dmitriy Karastelev has a legitimate interest in ensuring that the application is pursued on behalf of the second applicant. The Court

has no reason to doubt that the second applicant and her son were in a sufficiently close relationship. Thus the Court concludes that Mr Dmitriy Karastelev has standing to pursue his late mother's complaints before the Court.

52. For practical reasons, Mrs Karasteleva will continue to be called "the second applicant" in this judgment.

## III. ALLEGED VIOLATIONS OF ARTICLE 10 OF THE CONVENTION IN RESPECT OF THE FIRST AND SECOND APPLICANTS

53. The first and second applicants argued under Article 10 of the Convention that the documents issued by the prosecutor on 21 May 2009 had been unlawful and that the domestic legislation defined as "extremist" the act of "obstruction of the lawful activities of the State authorities, combined with violence or threats of violence", but that nothing in their actions or their verbal expressions could substantiate the contention that there had been a risk of the eventual obstruction of the lawful activities of the public authorities combined with violence or threats of violence. The interference with their freedom of expression, including the freedom to impart information and ideas, had not pursued any legitimate aim and had not been necessary in a democratic society.

54. Article 10 of the Convention in the relevant parts reads as follows:

> "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."

### A. Admissibility

#### *1. The parties' submissions*

55. The Government argued that the first applicant's complaint should be dismissed for lack of any significant disadvantage under Article 35 § 3 (b) of the Convention in view of the domestic court's finding that the legal instruments being challenged in the proceedings before it had not been addressed to him (see paragraph 28 above).

56. The first applicant contested this argument.

*2. The Court's assessment*

57. The Court considers that the appeal court's finding in the second applicant's case that the legal instruments being challenged in those proceedings did not concern the first applicant (see paragraph 28 above) does not mean that he sustained no significant disadvantage under Article 35 § 3 (b) of the Convention. The Court notes that one written warning was addressed to the first applicant and stated that he could be held personally liable for a failure to comply with it. The prosecutor's findings contained within that warning were based on the first applicant's conduct (see paragraph 20 above). The Government's argument is misconceived and is thus dismissed.

58. The Court notes that the first and second applicants' complaints under Article 10 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

*1. The parties' submissions*

**(a) The first and second applicants**

59. The applicants submitted that Russian law provided for the unfettered discretion for a prosecutor to resort to the warning, caution or order procedures (see paragraphs 37-41 above). The Suppression of Extremism Act and the Prosecutors Act used vague terms (such as "sufficient verified information that unlawful actions of an extremist nature are being planned" or "obstruction" of the lawful activities of the State authorities) and confirmed that unfettered discretion. The applicants could not reasonably foresee that their criticism of a regional statute by way of a demonstration would fall within the ambit of the anti-extremism legislation as an "extremist activity".

60. The applicants pointed out that the Government had failed to specify how issuing official warnings to them in respect of their peaceful criticism of a statute pursued the aim of protecting morals. The Government had not specified which "rights of others" had purportedly been protected by such an interference with their freedom of expression. Two adolescents had approached the applicants of their own initiative and had questioned the first and second applicants as to "what was going on". They had explained to them the reason for their protest and had had no further interaction with them. They had not forced the children to attend the public event and had not in any way been a threat to their rights or morals. Their protest had not cast anyone in a negative light, and had not debased anyone's dignity.

61. The national authorities should have given a narrow interpretation to the notions of maintaining public order and of preventing disorder or crime. The circumstances of the case disclosed no public disturbance or even a risk of such a disturbance. To the contrary, the expressive actions of the first and second applicants on 18 April 2009 had merely resulted in a peaceful conversation with two minors.

62. The Government had failed to demonstrate any "pressing social need" for the interference. The applicants had not called for any disturbances or violence. The actual purpose of the interference had been to thwart their criticism of the regional statute and to produce a "chilling effect", by way of threatening them with personal liability, including the possibility of a criminal sentence of up to ten years' imprisonment, or the dissolution of the NCHR.

63. The procedure for judicial review under Chapter 25 of the CCP did not allow room to assess, at least in substance, whether an administrative act "interfering" with a fundamental right or freedom was "necessary in a democratic society" on account of a "pressing social need" and with due regard to the requirement of proportionality.

**(b) The Government**

64. The Government accepted that there had been interferences with the applicants' freedom of expression on account of the documents issued on 21 May 2009.

65. The Government argued that the first and second applicants had made statements calling on minors to commit anti-social actions consisting of disobedience to the law or the public authorities. Those statements fell within the notion of an "extremist activity" under the Suppression of Extremism Act, namely public calls to carry out anti-social conduct consisting of the obstruction of the lawful activities of the public authorities. In order to avoid further extremist offences it had been necessary to take measures of "prosecutorial supervision" by means of the warning, caution and order procedures. Those measures were of a preventive nature and did not impinge upon the first and second applicants' freedom of expression, and namely the freedom to hold opinions.

66. The regional statute that the applicants criticised had been adopted in 2008 after the relevant federal statute had been adopted in 1999. The impugned regional statute set a legal basis for protecting minors and tackling the problems of offences committed by minors and a lack of parental supervision. That statute had not been challenged and was thus binding on the territory of the Krasnodar region.

67. The first and second applicants had invited school children to take part in protest actions against the statute. Namely, they had invited them to bring their friends along, so that together they could seek to have the regional statute annulled.

68. The "interference" had pursued the legitimate aim of maintaining public order (*общественный порядок*), protecting the morals and rights of others and preventing disorder or crime. Having recourse to the warning, caution and order procedures had not amounted to an offence but had been a proportionate reaction of the State *vis-à-vis* the applicants' unlawful conduct.

69. The applicants had had effective remedies in respect of the warning, caution and order procedures by way of seeking judicial review.

*2. The Court's assessment*

**(a) Nature and scope of the "interference" and the first and second applicants' standing under Article 10 of the Convention**

70. The Court reiterates that an "interference" with the exercise of freedom of expression or the freedom of peaceful assembly under Article 10 or 11 of the Convention does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities (see *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 103, 15 November 2018). The terms "formalities, conditions, restrictions [and] penalties" in Article 10 § 2 must be interpreted as including, for instance, measures taken before or during an assembly and those, such as punitive measures, taken afterwards (see *Novikova and Others v. Russia*, nos. 25501/07 and 4 others, § 106, 26 April 2016).

71. For instance, a prior ban can have a chilling effect on those who may intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities (see *Navalnyy*, cited above, § 103). A penalty consisting in a warning issued to a private broadcasting company for disseminating content in breach of an applicable statute constituted an "interference" under Article 10 § 1 of the Convention, on account of, *inter alia*, its effect of putting pressure on the applicant company so that it abstained from broadcasting content which might be perceived as contrary to the interests of the State (see *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey (no. 1)*, nos. 64178/00 and 4 others, § 73, 30 March 2006). In addition, the Court noted in that case that a second warning could have entailed a temporary suspension of all broadcasting by that applicant (compare with *Schweizerische Radio- und Fernsehgesellschaft and Others v. Switzerland* (dec.), no. 68995/13, §§ 70-81, 12 November 2019 as regards the existence of an "interference").

72. Furthermore, even in the absence of any actual penalty or the like, an individual may nevertheless argue that a law breaches his or her rights in the absence of a specific instance of enforcement, and thus claim to be a "victim", within the meaning of Article 34 of the Convention, if he or she is required either to modify his or her conduct or risk being prosecuted, or if

he or she is a member of a category of persons who risk being directly affected by the legislation (see *S.A.S. v. France* [GC], no. 43835/11, §§ 57 and 110, ECHR 2014 (extracts)).

73. The Government accepted that there had been an "interference" with the first and second applicants' freedom of expression in the present case.

74. As to the nature and actual scope of that "interference", the Court notes that the first and second applicants were each issued with a written warning under the Prosecutors Act and the Suppression of Extremism Act (see paragraph 20 above). While the applicants were not found guilty of any administrative or criminal offence under Russian law, their conduct was considered unlawful in a broader sense as potentially giving rise to what might be classified under Russian law as an "extremist activity". The applicants were put on notice of that finding of unlawfulness and, as expressly indicated in the warnings, were required to act under the threat that a failure to do so could result in liability for an administrative offence (see also §§ 54 and 55 of the Venice Commission's Opinion quoted in paragraph 46 above). In addition to the above "interference" in relation to their previous conduct during the demonstration, the applicants were also confronted with a dilemma: either they complied with the warning and thus, in substance, refrained from further protests, or they refused to comply and faced prosecution (compare *S.A.S. v. France*, cited above, § 110).

75. As to the caution and the order, they were addressed to an NGO, the NCHR, via its chief officer (see paragraphs 19 and 20 above). The Court reiterates that it interprets the concept of "victim" autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act, even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 52, ECHR 2012 and cases cited therein). Article 34 of the Convention concerns not just the direct victim or victims of an alleged violation, but also any indirect victim to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 47, ECHR 2013 (extracts) and cases cited therein). As it happened, the second applicant was also the NCHR's chief officer. Her expressive conduct during the demonstration had laid the foundation for those documents to be issued. She then resigned from her post as chief officer of the NGO, in order to ensure compliance with the impugned order and to avoid the NGO's dissolution (see paragraph 31 above). Lastly, it is noted that under Russian law she also had the standing required to challenge those documents before the domestic courts. Thus, although the second applicant was not found personally liable or placed under a threat of any penalty, in the circumstances of the present case the caution and order procedures did amount to "interferences" with her freedom of expression (compare with *Centro Europa 7 S.r.l. and Di Stefano*

*v. Italy* [GC], no. 38433/09, §§ 92-93, ECHR 2012, and *Margulev v. Russia*, no. 15449/09, §§ 36-38, 8 October 2019). Thus she does have standing to complain under Article 10 of the Convention about the caution and the order.

76. Having thus delimited the scope of the "interference", the Court will now turn to the assessment of the justification for using the warning, caution and order procedures in the present case.

**(b) Justification of the "interference"**

77. An "interference" infringes Article 10 of the Convention unless it satisfies the requirements of paragraph 2 of that provision. It thus remains to be determined whether the interference was "prescribed by law", sought to pursue one or more legitimate aims as defined in that paragraph and was "necessary in a democratic society" to achieve those aims.

*(i) "Prescribed by law"*

(1) Proceedings before a prosecutor

78. The Court reiterates that the expression "prescribed by law" requires that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, which should be accessible to the persons concerned and foreseeable as to its effects, that is that it is formulated with sufficient precision to enable the persons concerned – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct (see *Öztürk v. Turkey* [GC], no. 22479/93, § 54, ECHR 1999-VI). The phrase "prescribed by law" implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts)). "Law" includes everything that goes to make up the written law, including enactments of lower rank than statutes, and the relevant case-law authority (ibid.).

79. For domestic law to meet those requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (see *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 82, 14 September 2010, and

*Ivashchenko v. Russia*, no. 61064/10, § 73, 13 February 2018, and the cases cited therein). The existence of sufficient procedural safeguards may be particularly pertinent, having regard to, to some extent at least and among other factors, the nature and extent of the interference in question (see *Ivashchenko*, cited above, § 74).

80. In the present case, it is common ground between the parties that the warnings had a basis in national law, namely section 6 of the Suppression of Extremism Act and section 25.1 of the Prosecutors Act (see paragraphs 19, 20, 37 and 40 above), and that those provisions were accessible. Similarly, the caution and order procedures were based on section 7 of the Suppression of Extremism Act and section 24 of the Prosecutors Act (see paragraphs 38 and 41 above). What the applicants called into doubt, however, was the foreseeability of those provisions as applied by the domestic authorities, including the courts. They argued that they could not reasonably have expected that mere criticism of a statute could fall within the scope of those provisions, and that certain terms used in the provisions were vague.

81. The Court notes that the legal basis for the measures against the applicants was the classification of their actions as potentially leading to an "extremist activity" consisting of obstructing the lawful activities of the State authorities. In the present case, there are two intertwined salient issues: (i) whether by conducting themselves in a given manner the applicants knew or ought to have known – if need be, with appropriate legal advice – that this could expose them to the procedure(s) under the anti-extremism legislation because their (expressive) conduct relating to their freedom of expression posed a risk of future "extremist activities" consisting of "obstructing the lawful activities of the public authorities"; and (ii) whether Russian law afforded a measure of legal protection against arbitrary interferences by public authorities with the right to freedom of expression.

82. The applicants took issue with the notion of "obstructing" the lawful activities of the public authorities, contending that it was vague. The Suppression of Extremism Act authorises the competent supervising authority to issue a warning of the unacceptability of extremist activity if there is "sufficient verified information" that unlawful actions of an "extremist nature" are "being planned" (see paragraph 37 above). The Court notes that in the context of the anti-extremist legislation, the term "obstruction" was used to characterise a type of "extremist activity", and that the use of this term was and remains specifically linked and limited to situations of "violence or threats of violence". However, the Government did not refute the applicants' argument that, as the circumstances of their case showed, this notion was, nevertheless, vague and given an unjustifiably broad interpretation as to its reach thus making it permissible to infer, without conclusive evidence and substantiation, from one's exercise of the right to freedom of expression (see paragraphs 19-20 and 74 above) that acts

of obstruction were actually being planned while omitting to specify what they would supposedly consist of.

83. For its part, the Court considers that the interpretation and the application of the above notions at the relevant time were problematic under Article 10 of the Convention.

84. It is a particular feature of the warning procedure applied in the present case that no offence had been committed, either by the applicants or by any other person. The procedure in question aims to avert a risk of unlawful reprehensible conduct that might amount to an offence under national law, where there is information that such conduct is "being planned" and, at the same time, there are insufficient grounds to make out a case of criminal liability (see paragraphs 37 and 40 above). In the present case the offences that the Russian authorities aimed to avert or avoid when resorting to the warning procedure concerned the obstruction of lawful activities of the State authorities, combined with violence or threats of violence.

85. In so far as Article 10 § 2 of the Convention is concerned, the rationale of the warning procedure under Russian law corresponded in substance to the aim of the "prevention of crime or disorder", namely a future crime. The Convention being a treaty for the effective protection of individual human rights, clauses, such as Article 10 § 2, that permit interference with Convention rights must be interpreted restrictively, and, more generally, exceptions to a general rule cannot be given a broad interpretation (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 151, ECHR 2015 (extracts)). Thus, the Court considers that the risk of the "crime" to be prevented by having recourse to the impugned procedure, and in particular the warning procedure, should be a real one and concern a concrete and specific offence of a certain level of seriousness; it should be closely linked to a specific person or persons, namely the one(s) who are "planning" the extremist activity to be prevented; and it should be established that the risk arose from statements or conduct attributable to the person who is being subjected to the warning procedure. The Court has at its disposal no information that the domestic regulatory framework was circumscribed accordingly (see also paragraphs 101-106 below).

86. The Court notes in that connection that ECRI indicated that for an impugned statement to be classified (particularly, within criminal prosecution) as prohibited incitement, it needs to be established that it created an imminent risk of harmful consequences, namely violence, for instance against persons belonging to a group being targeted (see paragraph 45 above). The element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular speech used (see §§ 14-17, 148 and 169 of the Explanatory Memorandum to ECRI's Recommendation No. 15 quoted in

paragraph 45 above; see also *Savva Terentyev v. Russia*, no. 10692/09, §§ 77 and 84, 28 August 2018). In the Court's view, while recourse to the warning procedure cannot be equated to a fully fledged criminal prosecution, it remains unclear whether the Russian authorities used any ascertainable and foreseeable criteria for deducing a risk of obstructive conduct from behaviour such as the applicants'(see also paragraphs 101-106 below).

87. More generally, the Court reiterates that when assessing a specific instance of "interference" with freedom of expression in this type of case, alongside the general principles formulated in the Court's case-law under Article 10 of the Convention (see *Perinçek*, cited above, §§ 196-97), various factors may prove to be pertinent and have to be taken into account, including: the context in which the impugned statements were made, their nature and wording, their potential to lead to harmful consequences (such as violent obstruction of lawful activities of public authorities, in so far as it is relevant in the context of the present case); whether the statements were made against a tense political or social background; whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence (or hatred or intolerance as may be pertinent in other situations); the manner in which the statements were made, and their capacity – direct or indirect – to lead to such harmful consequences. It is the interplay between the various factors, rather than any of them taken in isolation, that determines the outcome of a particular case (see *Perinçek*, cited above, §§ 204-08; *Mariya Alekhina and Others v. Russia*, no. 38004/12, §§ 217-21, 17 July 2018; and *Ibragim Ibragimov and Others*, nos. 1413/08 and 28621/11, § 99, 28 August 2018).

88. It is also pertinent to reiterate, in view of the context being examined in the present case, that protests, including actions taking the form of physically impeding certain activities, can constitute expressions of opinion within the meaning of Article 10 of the Convention (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, *Reports of Judgments and Decisions* 1998-VII; *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 28, ECHR 1999-VIII; *Lucas v. the United Kingdom* (dec.), no. 39013/02, 18 March 2003; *Açık and Others v. Turkey*, no. 31451/03, § 40, 13 January 2009; *Taranenko v. Russia*, no. 19554/05, §§ 69-71, 15 May 2014; and *Słomka v. Poland*, no. 68924/12, § 58, 6 December 2018; see also *Chorherr v. Austria*, 25 August 1993, §§ 7-8 and 23, Series A no. 266-B; *Barraco v. France*, no. 31684/05, §§ 26-27, 5 March 2009; and *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, §§ 20-22 and 85-86, ECHR 2015).

89. Nothing in the Government's submissions discloses that a prosecutor was required to take account of the elements analysed in paragraphs 84 to 88 above when taking a decision to react, by way of the warning procedure,

to an individual's exercise of the right to freedom of expression (see also §§ 63, 65 and 73-77 of the Venice Commission's Opinion quoted in paragraph 46 above). In particular, the Court has not been provided with examples relating to any guidelines applied by the authorities imposing warnings or cautions, or any relevant authoritative case-law of the Russian courts (compare *Beghal v. the United Kingdom*, no. 4755/16, §§ 97 and 103-05, 28 February 2019).

90. Furthermore, the Court notes that the Suppression of Extremism Act lists examples of "extremist activity", which include "obstruction of the lawful activities of the public authorities". Calls to carry out such extremist activity were also classified as an "extremist activity" *per se*. Both the actual extremist activity and calls to carry out such extremist activity could amount to a criminal offence. In this connection, the Government have provided no explanation as to any ascertainable manner in which a distinction could be made between them and conduct that did not amount to such an offence but could still give rise to the warning procedure. In the present case the applicants' past conduct did not appear to have been classified as an "extremist activity" *per se*. Nor was it classified as a call to carry out such extremist activity. Instead, their conduct was considered as giving grounds for using the warning and caution procedures. In the absence of clear criteria, it appears to be difficult to distinguish between a criminal call to obstruct the activities of public authorities combined with (a threat of) violence, a slogan in the same vein, which might give rise to a warning, and a slogan that would not give rise to any liability under the anti-extremism legislation. The resulting uncertainty adversely affected the foreseeability of the regulatory framework, while being conducive to creating a negative chilling effect on freedom of expression, and left too much discretion to the executive.

91. Thus, the Court is not satisfied that at the material time Russian law afforded a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by Article 10 of the Convention in so far as the related discretion granted to the executive was expressed in terms of an unfettered power. Russian law did not indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (see *Ivashchenko*, cited above, § 73). In view of the above considerations, the Court comes to the conclusion that the domestic law was formulated in broad terms, leaving too wide discretion to the prosecutor and making its application unforeseeable.

92. Lastly, it is noted that separately from the warning procedure a chief officer of an NGO (such as the second applicant in the present case) could be targeted in the caution and order procedures. The above findings also apply to those procedures. Moreover, the Government have not provided any explanation as to the rationale for such procedures in the event where the impugned actions were directly attributable to an individual's personal

exercise of the right to freedom of expression, rather than to the NGO's activities.

93. The Court will now ascertain whether *post factum* remedies were available under the applicable domestic framework and afforded protection against arbitrariness and exercise of unfettered power by a non-judicial authority.

(2) Judicial review

94. The Court notes that a warning, caution or order issued under the Suppression of Extremism Act and the Prosecutors Act was amenable to judicial review under Chapter 25 of the Russian Code of Civil Procedure (CCP) (in force until 2015).

95. In this connection the Court refers to its findings under Article 13 of the Convention, read in conjunction with Article 11, in *Lashmankin and Others v. Russia* (nos. 57818/09 and 14 others, § 356, 7 February 2017), which also concerned the same type of judicial review procedure under Chapter 25 of the CCP. In particular, the Court made the following observations. The scope of the judicial review procedure was limited to examining the lawfulness of the impugned administrative act or measure. Under Chapter 25 of the CCP, the sole relevant issue to be considered by the domestic courts was whether the contested act or measure was lawful. "Lawfulness" was understood to refer to compliance with the rules that: (i) the authority had to have the competence to make the contested decision or perform the contested act or omission; (ii) the relevant procedure laid down in law had to be complied with; and (iii) the contents of the decision, act or omission had to meet the requirements of law (ibid., § 280). The Supreme Court expressly stated that the courts had no competence to assess the reasonableness of the authorities' acts or decisions made within their discretionary powers. It followed that the courts were not required by law to examine the issue of "necessity in a democratic society", and in particular whether the contested decision answered a pressing social need and was proportionate to any legitimate aims pursued – principles which lie at the heart of the analysis of complaints relating to Article 11 of the Convention (ibid., § 356). The analysis of the judicial decisions made in the case of *Lashmankin and Others* showed that the courts had failed to recognise that the cases involved a conflict between the right to freedom of assembly and other legitimate interests and to perform a balancing exercise. The Court concluded that in practice Russian courts had not applied standards which were in conformity with the principles embodied in Article 11 and had not applied the "proportionality" and "necessity in a democratic society" tests (ibid., § 358).

96. In the Court's view, that assessment is also applicable to the context of adverse decisions taken within the warning or caution procedure, as challenged in the judicial review proceedings. After examining the parties'

submissions, the Court finds no reason to depart from the above assessment (see also §§ 56, 61 and 77 of the Venice Commission's Opinion quoted in paragraph 46 above).

97. In addition, the Court observes that the Chapter 25 review in this type of case should be carried out in the light of applicable legislation, such as the Suppression of Extremism Act, which served as the basis for the interference. The Government have not demonstrated that that legislation or judicial practice at the time added anything to enable the courts to ascertain whether the applicable framework provided adequate safeguards against arbitrariness. The breadth of the prosecutor's powers was such that the applicant faced formidable obstacles in showing that the prosecutor's decisions were unlawful and otherwise in breach of the right to freedom of expression (compare *Ivashchenko*, cited above, § 88; *Polyakova and Others v. Russia*, nos. 35090/09 and 3 others, §§ 110-14, 7 March 2017; *Lashmankin and Others*, cited above, § 356; and *Ustinova v. Russia*, no. 7994/14, §§ 51-52, 8 November 2016; see also *Beghal*, cited above, §§ 103-05). The Court notes that later on, in 2013, the Constitutional Court made findings pointing to a more nuanced assessment of interference with fundamental rights and freedoms in that type of case (see paragraph 39 above).

(3) The applicants' case

98. The following circumstances of the applicants' case further highlight the general deficiencies of the regulatory framework as already identified above.

99. The only specific factual allegation held against the applicants concerned their interaction with two adolescents and the display of a poster stating "Freedom is not granted, it has to be taken" during the protest on 18 April 2009. The prosecutor's reasoning for finding a risk of "extremist activity" was as follows: the poster and calls for minors to attend protest actions against the Minors Protection Act amounted to calls for anti-social actions consisting of disobedience to the law and the public authorities; such conduct might in future entail extremist actions consisting in obstructing the work of public authorities in Novorossiysk.

100. Even accepting the facts were as asserted by the authorities, it was far-fetched to conclude that the mere display of the poster and the remarks made were capable of inciting obstruction of or disobedience to the authorities (whether by means of resistance or, even less so, violence). It rather transpires from minor K.'s statement to the prosecutor that he had a reasonably mature mind and took a critical attitude towards both the events and others' views and opinions (see paragraph 16 above).

101. The prosecutor did not specify whether the risk of such possibly reprehensible conduct was imputed to the first or second applicant or to third parties (such as V. and/or K., other adolescents or other adults). It

follows from the definition of a "warning" in section 6 of the Suppression of Extremism Act that it is related to certain unlawful actions being "planned" by the person to whom the document is addressed and warns him or her that it would be unacceptable to pursue such actions. From this perspective it is not clear what evidence justified the prosecutor's finding that the applicants were "planning" any extremist activity.

102. The Suppression of Extremism Act itself classifies as "extremist activity" instances of "obstruction of the lawful activities of the State authorities" only where they are "combined with violence or threats of violence". There was nothing in the prosecutor's warning to substantiate any risk of violence. Furthermore, it is unclear what public authorities were considered to be at risk of obstruction.

103. As to "inciting" those and other adolescents to participate in – what are presumed to have been lawful and peaceful – protest actions against the regional statute concerning minors, it is noted that in staging their demonstrations the first and second applicants did not seek to interact with any person who was manifestly under the age of majority, nor to intrude into their private space (compare *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 80, 20 June 2017). Two people, who were aged fifteen and sixteen and were upper-grade secondary school pupils, approached the first and second applicants and asked them questions as to the purpose of their demonstration.

104. The first and second applicants' demonstration touched upon a matter of public interest pertaining to a regional statute, its utility and the need for further reform. In the Court's view, criticism of a piece of legislation forms part of normal public debate.

105. Thus, it was not reasonable to deduce a risk of violent obstructive conduct towards the authorities (or any real threat of violence) from the applicants' conduct in the present case. It has not been demonstrated that their conduct was capable of leading directly or indirectly to disorder, for instance in the form of public disturbances obstructing the activity of the public authorities in Novorossiysk (see *Perinçek*, cited above, §§ 151-53).

106. Similarly, the existence of a risk that a crime would be committed has not been substantiated and was not linked to any specific person or persons.

*(ii) Conclusion*

107. The Court concludes that the domestic legislation and practice were not foreseeable as to their effects and did not provide adequate protection against arbitrary recourse to the warning, caution and order procedures.

108. There has accordingly been a violation of Article 10 of the Convention in respect of the first and second applicants, the "interference" not being "prescribed by law".

109. Having reached this conclusion, the Court finds it appropriate to dispense with the assessment of whether the "interference" with the first and second applicants' right to freedom of expression was "necessary in a democratic society" in the pursuance of a legitimate aim.

## IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

110. The first applicant alleged that he had been denied access to a court in respect of the warning issued to him personally (see paragraph 30 above).

111. Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ..."

### A. Admissibility

#### *1. The parties' submissions*

112. The Government submitted that the criminal limb of Article 6 of the Convention was not applicable to the non-judicial proceedings that had resulted in the issuing of a warning and then judicial review proceedings under Chapter 25 of the Code of Civil Procedure. The first applicant had not been found liable for any criminal or administrative offence and had not been subjected to any penalty. The impugned measure (a warning) could be thought of as an interim measure and thus the initial non-judicial procedure leading to it did not fall within the scope of the civil limb of Article 6 of the Convention. However, the Government accepted that the civil limb of Article 6 of the Convention was applicable to the Chapter 25 proceedings in so far as the first applicant's civil rights and civil obligations had been or could have been determined in such a judicial procedure. They noted, at the same time, that the applicant had challenged the warning issued to his wife.

113. The first applicant argued that the criminal limb of Article 6 of the Convention was applicable to the decision-making procedure that had resulted in a written warning and then in judicial review proceedings. The warning procedure under Russian law aimed to deter him from exercising his freedom of expression and exposed him to liability for failing to comply with it. The warning procedure was established under rules of general application and was punitive in nature. The first applicant further argued that, in any event, the civil limb of Article 6 of the Convention was applicable. Judicial review proceedings against a written warning determined a "civil right", namely freedom of expression upon which the warning had a serious chilling effect.

*2. The Court's assessment*

114. The Court notes that following the first applicant's exercise of his rights to freedom of assembly and freedom of expression a prosecutor issued him with a "warning" under the Suppression of Extremism Act. The applicant sought judicial review of the written warning under Chapter 25 of the CCP. His application for judicial review and the judicial findings in his case do not support the Government's submission to the Court that he had erroneously challenged the warning issued to his wife.

115. The Government accepted that those judicial review proceedings fell within the scope of the civil limb of Article 6 of the Convention in so far as the first applicant's civil rights and obligations had been or could have been determined in those proceedings.

116. For its part, in so far as the compatibility of a complaint *ratione materiae* concerns the Court's jurisdiction, it reiterates that it has previously accepted that judicial challenges under Chapter 25 of the CCP in respect of administrative decisions affecting one's rights or freedoms fall within the scope of the civil limb of Article 6 of the Convention, the absence of any monetary claim notwithstanding (see, among others and in various contexts, *Lashmankin and Others*, cited above, § 494; *Mityanin and Leonov v. Russia*, nos. 11436/06 and 22912/06, §§ 38-39 and 93-94, 7 May 2019; *Yevdokimov and Others v. Russia*, nos. 27236/05 and 10 others, §§ 49-53, 16 February 2016; and *Polyakova and Others*, cited above, §§ 40 and 126-31; see also *Laidin v. France (no. 2)*, no. 39282/98, § 76, 7 January 2003, and *Slyusar v. Ukraine*, no. 34361/06, § 20, 8 March 2012).

117. The Court has on several occasions found that Article 6 of the Convention was applicable under its civil head to domestic proceedings concerning the right to freedom of assembly (see *Lashmankin and Others*, cited above, § 494, and the cases cited therein). It does not see any reason to hold otherwise in the present case. Even though no related issue is being examined by the Court under Article 11 of the Convention in the present case, it remains that the impugned proceedings were linked to the first applicant's exercise of his freedom of assembly (together with his wife).

118. In addition, the Court has held that proceedings relating to certain aspects of the right to freedom of expression also fall within the ambit of the civil head of Article 6 (see *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, § 27, 9 February 2017, and the cases cited therein). The Russian Constitution protected the right to freedom of expression (see paragraph 33 above). In the present case, a warning was issued to the first applicant in relation to his expressive conduct during a demonstration. The subsequent judicial proceedings concerned a review of the State's reaction to the first applicant's exercise of his freedom of expression and the imposition of certain obligations on him, under a threat of liability, as to his subsequent exercise of that freedom. In that connection the Court has found above that there had been an "interference" with the

first applicant's freedom of expression in breach of Article 10 of the Convention.

119. The Court concludes that the civil limb of Article 6 of the Convention was applicable. Thus the first applicant may complain under that provision of the alleged violation of his right of access to a court.

120. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The parties' submissions*

#### (a) The first applicant

121. The first applicant submitted that the second applicant had challenged the warning issued to her, as well as the caution and the order issued to the third applicant (see paragraphs 24-28 above). The separate warning issued to the first applicant personally had not been part of that judicial review procedure. This had been confirmed by the appeal court in that procedure, which had stated that the first applicant's name had to be removed from the judicial findings (see paragraph 28 above). The first applicant had brought separate proceedings for a judicial review of the warning addressed to him (see paragraph 30 above). However, those proceedings had wrongly been discontinued on the grounds that the same matter had already been determined by a first-instance court in the proceedings initiated by the second applicant. The first applicant's attempt to seek a review of the judgments issued in the earlier proceedings had also failed (see paragraph 29 above). As a result, the first applicant had been deprived of any judicial assessment of the warning issued against him.

#### (b) The Government

122. The Government argued that in the first set of proceedings the second applicant had complained about all the legal instruments issued on 21 May 2009, including the one issued to the first applicant. The warning issued to the first applicant had been examined in the judicial review proceedings brought by the second applicant (see paragraph 26 above) because the first-instance court had stated that the first and second applicants' actions had amounted to inciting minors to take part in protest actions. Indeed, the first-instance judgment in that case had subsequently been amended. The appeal court had acknowledged that the warnings being challenged in those proceedings had not concerned the first applicant (see paragraph 28 above).

123. In the second set of proceedings the first applicant had actually challenged the warning issued to his wife, the second applicant. That warning had in fact been examined in his wife's case. Thus, pursuant to Article 248 of the Code of Civil Procedure, the courts in that second case had lawfully discontinued it because the same subject-matter had already been determined by a final judgment.

*2. The Court's assessment*

124. The Court reiterates that the right to a fair hearing must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, is one particular aspect (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 192, 25 June 2019). The right of access to a court is not absolute, but may be subject to limitations; these are permitted by implication since the right of access, by its very nature, calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In addition, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ibid., § 195).

125. Articles 248 and 250 of the CCP required the rejection of a judicial review challenge against an administrative decision if there was already a final court decision relating to the same subject-matter, or to the same claim (be it by the same or another person) on the same grounds as in proceedings that were already subject to a final judgment (see paragraph 43 above).

126. In the present case the first applicant's claim was turned down with reference to the parallel proceedings brought by the second applicant and in which a final judgment had yet to be delivered. It is questionable whether the "sameness" principle could be relied upon in such circumstances in terms of Russian law, given the unequivocal text of Articles 248 and 250 of the CCP referring to a requirement for the finality of the first set of proceedings. In any event, in so far as Article 6 of the Convention is concerned, the Court is not satisfied that there were any legitimate grounds for rejecting the first applicant's claim at that stage or subsequently, for the reasons stated below.

127. In fact, it turned out that the first applicant had been wrongly mentioned in the earlier proceedings. However, that finding did not subsequently prompt the appeal court to reconsider the decision not to

examine the first applicant's own case. As a result, he was deprived of any opportunity to have access to a court for the determination of his civil rights and obligations by the written warning issued to him.

128. The Court does not overlook that the underlying circumstances of the warnings issued to the first and second applicants were identical (see paragraph 20 above). It also notes that the warnings were addressed to each of them in their respective capacities as deputy chief officer and chief officer for one and the same NGO. However, there was one material difference in the operative parts of the written warnings pointing specifically to each applicant's personal liability in the event of non-compliance with their respective warnings. The warning to the first applicant constituted an "interference" with his own right to freedom of expression (see paragraph 74 above) and in that sense was also distinguishable from the warning that was being challenged by the second applicant in relation to her own exercise of freedom of expression.

129. In view of the foregoing considerations, the Court concludes that the first applicant's right of access to a court was reduced in such a way and to such an extent that the very essence of the right was impaired.

130. There has therefore been a violation of Article 6 § 1 of the Convention in respect of the first applicant.

## V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

131. The first and second applicants also argued, in substance under Article 13 of the Convention in conjunction with Article 10, that the domestic authorities, including the courts during the judicial review process, had failed to carry out a necessity and proportionality assessment, confining their review to formal legality and the observance of relevant procedures. The first applicant also argued that the refusal of the judicial review in respect of the warning violated Article 2 of Protocol No. 7 to the Convention.

132. Lastly, the second applicant complained under Article 6 of the Convention that the court proceedings had been unfair and that the courts had failed to deal with the key arguments. In particular, the second applicant complained that restricting public access to the hearings had been disproportionate and that she had been put at a substantial disadvantage *vis-à-vis* the prosecutor in that case, in particular owing to the belated submission of G.'s report and the violation of the adversarial procedure in respect of R.'s report.

133. Having regard to the nature and scope of the finding of a violation under Article 10 of the Convention in relation to the first and second applicants and, in addition under Article 6 of the Convention (see paragraphs 126-130 above) in relation to the first applicant, the Court considers that it is not necessary to examine the admissibility and the merits

of the remaining complaints under Article 6, Article 13 taken in conjunction with Article 10 of the Convention and under Article 2 of Protocol No. 7 to the Convention.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

134. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

135. The first applicant, Mr Vadim Karastelev, claimed compensation on account of non-pecuniary damage that he had sustained, leaving the amount to be awarded to the Court's discretion. Mr Dmitriy Karastelev made no submissions in relation to the matter of just satisfaction on account of the alleged violation of the Convention in respect of his late mother (the second applicant).

136. The Government contested the claim.

137. The Court awards 3,000 euros (EUR) to the first applicant on account of non-pecuniary damage, plus any tax that may be chargeable.

### B. Costs and expenses

138. The following amounts were claimed by the applicants on account of the legal work in relation to the proceedings before the Court: EUR 5,200 – by Ms T. Chernikova per time sheets dated February-March 2009; EUR 5,200 – by Ms M. Agaltsova per time sheets dating to 2017. The first and second applicants also claimed 5,261 British pounds sterling (GBP) and EUR 474 for other expenses, including translation costs and legal advice provided by lawyers in London. They requested that these amounts be paid in GBP to the European Human Rights Advocacy Centre – EHRAC, United Kingdom.

139. The Government stated that the applicants had submitted no evidence that the above fees had been actually paid or that the applicants were under any legal obligation to pay them. In any event, the claims were excessive.

140. An applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 61, ECHR 2015). It has not been shown that Ms Chernikova performed any legal work in relation to the events referred to in the present application, which occurred in April 2009, or that

either the first or second applicant is or was under a legal obligation to pay any fee to her. It is noted that the application form was signed by Mr Tishayev, who lodged the present application before the Court.

141. Nothing indicates that the first applicant (or, even less, Mr Dmitriy Karastelev who only joined the proceedings before the Court in early 2018) paid or is or was under a legal obligation to pay any fee to Ms Agaltsova on account of the observations that she submitted in 2017 or the legal advice that she sought from lawyers in London. Thus, it cannot be said that the first applicant "incurred" any related expenses *vis-à-vis* Ms Agaltsova.

142. At the same time, in so far as it has been shown that some expenses such as translation costs have been actually and necessarily incurred by EHRAC on behalf of the first and second applicants and noting that the first applicant has requested that they be reimbursed to EHRAC, the Court awards EUR 850 to be paid to EHRAC (compare *Mardonshoyev v. Russia* [Committee], no. 8279/16, § 38, 29 January 2019). The Court dismisses the remainder of the claims.

### C. Default interest

143. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* that Mr Dmitriy Karastelev has the standing to pursue the complaints under Articles 6, 10 and 13 of the Convention in Mrs Karasteleva's stead;

2. *Declares* the first and second applicants' complaints under Article 10 of the Convention and the first applicant's complaint under Article 6 § 1 admissible and the third applicant's complaints inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the judicial review proceedings brought by the first applicant;

4. *Holds* that there has been a violation of Article 10 of the Convention in respect of the first and second applicants;

5. *Holds* that there is no need to examine the remaining complaints under Articles 6 and 13 of the Convention and Article 2 of Protocol No. 7 to the Convention;

6. *Holds*

(a) that the respondent State is to pay the first applicant, Mr Vadim Karastelev, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that the respondent State is to pay the European Human Rights Advocacy Centre – EHRAC (United Kingdom) EUR 850 (eight hundred and fifty euros), in respect of costs and expenses, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, to be converted into British pounds sterling at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 6 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Milan Blaško | Paul Lemmens |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Lemmens and Elósegui are annexed to this judgment.

P.L.
M.B.

# CONCURRING OPINION OF JUDGE LEMMENS

1. I fully agree with the conclusion that there has been a violation of Articles 6 § 1 and 10 of the Convention.

I have, however, some reservations concerning the reasoning adopted by the majority in order to arrive at its conclusion under Article 10. While the majority's reasoning with respect to the justification of the interference with the applicants' right to freedom of expression is developed entirely under the heading "prescribed by law", it seems to me that at least part of that reasoning does not relate to the "law" in question, but rather to the application of the law in the specific case of the applicants.

## A. The quality of domestic law

2. I agree with the majority that the provisions of the Suppression of Extremism Act enumerating activities deemed extremist (section 1) and determining the conditions for the issuance of a warning or a caution (sections 6 and 7) are not foreseeable in their application (see paragraphs 78-92).

On this point, like the majority, I fully concur with the conclusions of the Venice Commission (see its opinion no. 660/2011 of 15-16 June 2012, in particular §§ 74-77, quoted in paragraph 46 of the judgment).

3. I also agree with the majority that the picture of domestic law would not be complete if no attention were paid to the existing system of judicial review of measures taken under the Suppression of Extremism Act. A system of robust review could indeed have the effect of containing the application of the Act within limits that are permissible under Article 10 § 2 of the Convention.

I agree with the majority that for cases like those of the applicants the scope of judicial review is not sufficiently broad to allow for such a correction (see paragraphs 94-105 of the judgment).

4. The domestic legal system, including in particular the Suppression of Extremism Act and Chapter 25 of the Code of Civil Procedure, thus does not offer demonstrators in a situation like that of the applicants sufficient protection against arbitrary interferences with their freedom of expression.

This is sufficient for me to conclude that the interferences in question were not "prescribed by law" and thus violated Article 10 of the Convention.

## B. Application of the law in the applicants' case

5. The majority do not stop there, as they additionally examine "the applicants' case" (see paragraphs 98-106 of the judgment). They do so in

order to "further highlight the general deficiencies of the regulatory framework" (see paragraph 98 of the judgment).

It seems to me that the majority are in reality arguing that the measures taken by the prosecutor did not comply with the conditions set by the Suppression of Extremism Act. The majority explain that it was not clear that the applicants were "planning" any (extremist) activity (see paragraphs 100-01 of the judgment), that the risk of any violence with which such activity might be combined was not substantiated (see paragraph 102 of the judgment), and that it was unclear which public authorities' activities might be obstructed (ibid.).

Unless formulated as an alternative argument (which does not seem to be the case), such an argument presupposes that the legal basis is a valid one under the Convention. Indeed, it does not make much sense to examine the compatibility of certain enforcement measures with an Act that itself is not compatible with the Convention. I am afraid that the arguments of the majority do not strengthen their reasoning in relation to the legislative framework, but rather weaken it. It is as if everything would be fine if only the prosecutor had refrained from taking measures that did not fit within the Suppression of Extremism Act.

This detracts from the central message, namely that the Suppression of Extremism Acts needs to be amended in order to make it Convention-compliant. I consider it useful to emphasise this message.

# CONCURRING OPINION OF JUDGE ELÓSEGUI

1. In the present case I was completely in agreement with the finding of violations of Articles 6 § 1 and 10 of the Convention and with the reasoning. In fact, the judgment was adopted unanimously. For my part, I find important that the judgment contains references to ECRI's Recommendation No. 15 on combating hate speech.

2. My concurring opinion is intended only to go more deeply into the case-law of the Court referred to in paragraph 88 of the judgment. As a general point of departure the judgment considers that any limitations on freedom of expression under Article 10 have to be prescribed by law in a foreseeable way. The first and second applicants staged public protests in Novorossiysk against the Minors Protection Act. They subsequently received warnings from the public prosecutor that they should avoid the repetition of such acts in the future.

3. The core of the judgment lies in the statement that "for the purpose of avoiding ... the commission of offences ... and where there is information that unlawful actions ... are being planned, a prosecutor is able to issue a writing warning" (see paragraph 40 of the judgment). The issue is that the applicants were not punished for their actual behaviour but were warned by the prosecutor, without this being prescribed by a clear law and in the absence of any previous judgment. The prosecutor used the Suppression of Extremism Act as the basis for the warnings. According to the applicants, that Act uses vague terms such as "sufficient verified information that unlawful actions of an extremist nature are being planned" or "obstruction" of the lawful activities of the State authorities (see paragraph 59 of the judgment).

4. On the one hand, "[t]he Court notes that in the context of the anti-extremist legislation, the term 'obstruction' was used to characterise a type of 'extremist activity', and that the use of the notion of 'obstruction' was and remains specifically linked and limited to situations of 'violence or threats of violence'" (see paragraph 82 of the judgment).

5. On the other hand, citing some general principles, the judgment observes that "protests, including actions taking the form of physically impeding certain activities, can constitute expressions of opinion within the meaning of Article 10 of the Convention" (see paragraph 88 of the judgment). What I would like to emphasise is that all instances of interference impeding certain activities which constitute expressions of opinion are protected by Article 10. This means only that Article 10 is applicable and that the Court will then proceed to an examination of the merits in order to ascertain whether, in certain circumstances, the prohibition of some forms of conduct is prescribed by law and proportionate and hence does not give rise to a violation of the right of freedom of expression.

However, the case-law quoted in this paragraph found no violation of Article 10 in most of the cases cited. The first issue is that the domestic legislation and practice, and their effects, must be foreseeable (see paragraph 107 of the judgment). In the particular case of *Karastelev and Others v. Russia*, all the judges concluded that "the law was not foreseeable and did not provide adequate protection against arbitrary recourse to the warning, caution and order procedures" (ibid.). As a result it was not necessary to continue with the examination of the test of proportionality and of the limitations provided for in Article 10 § 2 of the European Convention on Human Rights.

6. The fact remains that most of the cases quoted in paragraph 88 ended in a finding of no violation of Article 10. It is worth emphasising that the exercise of one individual's freedom may be limited if it impedes the rights of others. For instance, in the case of *Steel and Others v. the United Kingdom* (23 September 1998, *Reports of Judgments and Decisions* 1998-VII), the applicant, together with approximately sixty others, took part in a protest against a grouse shoot on Wheeldale Moor, Yorkshire (§ 6). She was arrested for a "breach of the peace". Moreover, "[a]ccording to the police she was intentionally impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun to take aim, thus preventing him from firing" (§ 8). She was further charged with using "threatening, abusive or insulting words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress" (§ 10).

7. The second applicant took part in a protest "against the building of an extension to the M11 motorway in Wanstead, London. During the course of that day a group of twenty to twenty-five protesters repeatedly broke into a construction site, where they climbed into trees which were to be felled and onto some of the stationary machinery" (§ 15). In both cases, the common-law concept of "breach of the peace" was applied in order to punish these persons. The conclusion of the judgment was that there had been no violation of Article 5 § 1 in respect of the arrest and initial detention of the first and second applicants, and likewise no violation of Article 10. In the case of the first applicant, the Court took into account the "dangers inherent in the applicant's particular form of protest activity and the risk of disorder arising from the persistent obstruction by the demonstrators of the members of the grouse shoot as they attempted to carry out their lawful pastime" (§ 103). In the same vein, the Court took the view that the conduct of the second applicant in "placing herself in front of machinery in order to impede the engineering works" (§ 108) could not attract the protection of the Convention. The Court also found to be correct the balance struck by the domestic courts in the case of this applicant, "taking into account the interest in maintaining public order and protecting the rights of others ..." (§ 109).

8. By contrast, in the same judgment the Court found a violation of Article 10 in the case of the third, fourth and fifth applicants, who had gathered in the street holding banners and distributing leaflets against the sale of fighter helicopters, during the "Fighter Helicopter II" Conference at the Queen Elizabeth Conference Centre. The Court saw no reasons to regard their protest as other than entirely peaceful (see § 64). It held that there had been a violation of Article 10 because the measures taken against these applicants had not been "lawful" or "prescribed by law" since it was not satisfied that the police had had grounds reasonably to apprehend that the applicants' peaceful protest would cause a breach of the peace. For similar reasons it considered that the interference with the exercise by the applicants of their right to freedom of expression had also been disproportionate to the aims of preventing disorder and protecting the rights of others and had not, therefore, been "necessary in a democratic society" (§ 110).

9. In the case of *Lucas v. the United Kingdom* ((dec.), no. 39013/02, 18 March 2003) the Court found the application inadmissible under Article 10 and Article 11 as being manifestly ill-founded. The case related to the applicant's participation in a demonstration at the Faslane naval base in Scotland against the decision of the British Government to retain the Trident nuclear submarine. The applicant and a number of other protesters sat in the public road leading to the naval base. The applicant refused to move and was arrested for committing a "breach of the peace". The important concepts here were the risk and danger to drivers on the road. The domestic courts had observed that there was a genuine likelihood of alarm, distress or violence, and the Court accepted this reasoning and found that the definition of a breach of the peace provided reasonable foreseeability (conversely, in *Hashman and Harrup v. the United Kingdom* ([GC], no. 25594/94, ECHR 1999-VIII), the Court found the use of the concept of *contra bonos mores* too weak and not foreseeable).

10. In the case of *Chorherr v. Austria* (25 August 1993, Series A no. 266-B), the Court also concluded that there had been no violation of Article 10. A military ceremony was held in the Rathausplatz in Vienna to mark the thirtieth anniversary of Austrian neutrality and the fortieth anniversary of the end of the Second World War. The applicant distributed leaflets calling for a referendum on the purchase of fighter aircraft by the Austrian armed forces. What is important here is that the Austrian Constitutional Court used the concept of breaching the peace, but specifically took into account the fact that, in its opinion, the majority of the spectators had come to watch the parade and that they also had the right to enjoy that event peaceably. The applicants were prevented from carrying on distributing leaflets because they were disturbing the other citizens (and because a poster projecting above a rucksack was blocking the view of a number of spectators), not because of their ideas. During the event, "[t]wo

policemen informed the applicant and his friend that they were disturbing public order and instructed them to cease what could only be regarded as a demonstration. However, they refused to comply, asserting their right to freedom of expression ... they were arrested" (§ 8). Furthermore, the spectators of the event were annoyed and started to protest against the applicants. The latter's conduct risked disturbing public order and causing a breach of the peace. The Court held that the limitations in question were sufficiently prescribed by Austrian law.

11. The case of *Barraco v. France* (no. 31684/05, 5 March 2009), which also concerned a demonstration on a motorway, likewise ended with a finding of no violation of Article 10. As it is summarised in the Information Note of the Court published on HUDOC, the case related to Article 11 § 1 on freedom of peaceful assembly. The applicant, a lorry driver, was involved in a complete blockade of the motorway by heavy-goods vehicles in a "go-slow" operation in 2002. Seventeen motorists, including the applicant, took part in a traffic-slowing operation on a motorway, which involved driving along a predetermined route in a convoy, at slow speed, occupying several lanes, to slow down the traffic on the motorway. When three drivers at the front of the convoy, one of whom was the applicant, stopped their vehicles, completely blocking the road for other users, the police arrested them. The drivers concerned were summoned to appear in court for having obstructed the public highway by placing or attempting to place on it an object that obstructed vehicular traffic, or using or attempting to use any means to obstruct it – in the instant case by stopping their vehicles several times. The court acquitted the accused, but the public prosecutor appealed and the Court of Appeal set aside that judgment, found them guilty as charged and sentenced them each to a suspended term of three months' imprisonment together with a fine of 1,500 euros (EUR). The Court of Cassation dismissed an appeal on points of law lodged by the applicant.

12. The Court found that the applicant's conviction had amounted to interference by the public authorities with his right to freedom of peaceful assembly, which included freedom to demonstrate. The interference had been "prescribed by law" and had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. As to whether it had been necessary in a democratic society, it was to be noted that no formal prior notice of the demonstration had been given as required by the relevant domestic law. However, the authorities had been aware of it and had also had the opportunity to take measures for the protection of safety and public order, for example by organising police protection and a police escort. So even if the demonstration had not been tolerated, at least it had not been prohibited. Moreover, the applicant had not been convicted of taking part in the demonstration as such, but for his particular conduct during the demonstration, namely blocking a motorway and thereby causing

more of an obstruction than would normally be caused by exercising one's right to freedom of peaceful assembly. It was indeed clear from the case file that while the demonstration was in progress, from 6 a.m. to 11 a.m., the traffic had been held up, but also that several total stoppages had been caused by drivers at the head of the convoy, including the applicant, stopping their vehicles. This complete blockage of the traffic had clearly gone beyond the mere inconvenience caused by any demonstration on the public highway. The police, whose task had been to protect safety and public order, had arrested the three demonstrators only in order to unblock the traffic, after the drivers had been warned several times not to stop their vehicles on the motorway and informed of the penalties they could incur. In that context and for several hours, the applicant had been able to exercise his right to freedom of peaceful assembly and the authorities had displayed the tolerance that should be shown towards such gatherings. The applicant's conviction and sentence had therefore not been disproportionate to the aims pursued. The conclusion of the judgment was that there had been no violation of Article 11 § 1 of the Convention.

13. Interestingly, the case of *Kudrevičius and Others v. Lithuania* (no. 37553/05, 26 November 2013) was referred to the Grand Chamber. The earlier Chamber judgment finished in a split vote, with four judges in favour of finding a violation of Article 11 and three judges dissenting. In April 2003 a group of farmers held a demonstration in front of the Seimas (the Lithuanian Parliament) building to protest about the situation in the agricultural sector with regard to a fall in wholesale prices for various agricultural products and the lack of subsidies for producing those products, demanding that the State take action. In principle, the farmers had a permit from Kalvarija municipality to hold a peaceful assembly in Kalvarija town. However, they blocked and demonstrated on streets not included in the permit and eventually drove tractors onto a major highway and stopped the traffic, entailing a number of consequences for citizens, other drivers and transporters of goods. The Supreme Court upheld the applicants' conviction for deliberately organising a riot with the aim of breaching public order, causing public violence or damaging property (see § 33 of the Chamber judgment). The judgment stated that "for the Government, the interference had also been necessary for the prevention of disorder and for the protection of the rights of others, given that the applicants had been personally involved in committing unlawful actions during the demonstration" (Chamber judgment, § 74). The four judges making up the majority applied a test of proportionality to the specific case, finding in favour of the farmers. They considered that the element of violence was clearly absent in the instant case (§ 82). According to this assessment, the penalty imposed on the five applicants was also a severe one. The applicants "had to go through the ordeal of criminal proceedings, and, as a result of criminal conviction, were given a custodial sentence. Although the execution of the sentences

was suspended for one year, the applicants were also ordered not to leave their places of residence for more than seven days without the authorities' prior approval, that restrictive measure having lasted for an entire year" (§ 83).

14. In contrast, the three dissenting judges, Judges Raimondi, Jočienė and Pinto de Albuquerque, took the view that there had been no violation of Article 11 and that the applicants' claims were unfounded. For them, the interpretation of national law made by the domestic courts in this case did not seem arbitrary (see § 4 of the separate opinion). In the view of these judges, the law was completely foreseeable (§ 5). The demonstrators had ignored the limits of the permits granted to them and had disobeyed the police orders not to hinder the traffic (§ 6). The dissenting judges considered that the applicants' actions had constituted a serious abuse of the freedom of peaceful assembly and that the action of the State had been necessary and proportionate, as had the criminal conviction, which had been proportionate to the gravity of the applicants' conduct (§ 19). Furthermore, the execution of the sentence had ultimately been suspended. The judges in question considered the case at hand to be even more serious than the case of *Barraco* (cited above, § 15).

15. The Grand Chamber held, by a unanimous vote of the seventeen judges, that there had been no violation of Article 11 of the Convention. In this case the Grand Chamber subscribed to the reasoning of the national courts and saw no reason to depart from it. It found that "in sentencing the applicants for rioting, in relation to their behaviour from 21 to 23 May 2003 during the farmers' demonstrations, the Lithuanian authorities struck a fair balance between the legitimate aims of the 'prevention of disorder' and of the 'protection of the rights and freedoms of others' on the one hand, and the requirements of freedom of assembly on the other. They based their decisions on an acceptable assessment of the facts and on reasons which were relevant and sufficient. Thus, they did not overstep their margin of appreciation in relation to the subject matter" (see § 182 of the Grand Chamber judgment). The Grand Chamber departed from the Chamber judgment and adopted a position more in line with the previous dissenting opinions. It considered that "the moving of the demonstrations from the authorised areas onto the highways was a clear violation of the condition stipulated in the permits" (Grand Chamber judgment, § 165). In the Grand Chamber's view, the farmers' conduct could not attract the protection of Article 11 of the Convention. The Court found "that, even though the applicants had neither carried out acts of violence nor incited others to engage in such acts, the almost complete obstruction of three major highways in blatant disregard of police orders and of the needs and rights of the road users constituted conduct, which, even though less serious than recourse to physical violence, can be described as 'reprehensible'" (§ 174). The Court also considered that the sanction had been proportionate to the

gravity of the facts (§ 179) and that the interference complained of had been "necessary in a democratic society" within the meaning of Article 11 of the Convention (§ 183).

16. In sum, all these cases show the test of proportionality as carried out by the Court in cases relating to freedom of expression or assembly, exercised through conduct such as demonstrations, gatherings and similar situations. To satisfy the first step of the test, any interference with such a right has to be prescribed by law. We then have to proceed to the next step, in order to ascertain whether it pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. Such interference must also be necessary in a democratic society. In the present case of *Karastelev and Others v. Russia*, the warnings issued by the prosecutor were not prescribed by law. Hence, the analysis did not even pass the first step of the proportionality test. In conclusion, there has been a violation of Article 10 of the Convention.