

UDK: 342.736/.738:659.3](47)  
UDK: 341.645(4-672EU)

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**MEDIA VS. RIGHT TO PRIVACY:  
Russian cases in the ECHR**

**Abstract:** Since Russia ratified European Convention of Human Rights in 1998, the European Court of Human Rights (ECHR) has issued 1212 judgments on different cases filed against Russia. Among them, there are 94 cases where the Court founded that there was a violation of Article 8 of the European Convention which guarantees the right to respect for one's private and family life. Almost half of these cases were connected with publications in newspapers, TV program broadcasts or the Internet-related information, and many of them involved the journalists' interference with one's private life.

Article 8 of the European Convention of Human Rights is divided into two parts. The first paragraph of Article 8 sets out the specific rights which are to be guaranteed to an individual by the State: the right to respect for private life, family life, home and correspondence. The second paragraph of Article 8 clarifies that those rights are not absolute as it may be necessary in certain circumstances for the public authorities to interfere with the rights. Article 8 para. 2 also indicates the specific circumstances under which the public authorities may interfere with the rights set out in Article 8 para. 1.

In determining the admissibility of a complaint filed by an individual under Article 8 of the Convention, the Court applies a two-stage test. The first stage concerns the applicability of Article 8 of the Convention; in other words, the Court has to determine whether the right which an individual claims to have been interfered with actually falls within the scope of the right guaranteed by Article 8 para. 1 of the Convention. This often involves discussion on, for example, what constitutes private life or home within the meaning of Article 8 para. 1. If the judge considers, on the basis of the ECHR jurisprudence, that the right invoked by an individual (for example, the right to be provided with free housing) is not in fact a right covered by the guarantees in Article 8 para. 1, then Article 8 is inapplicable and the complaint ends there.

*However, if Article 8 is found to be applicable, the Court goes on to the second stage of the assessment. The most common situation is where the applicant has claimed that the State took action which he/she considers to have been in violation of his/her Article 8 rights; in that case, the Court considers whether the interference with the Article 8 right can be justified with reference to the requirements of Article 8 para. 2. Applicants also complain (although less frequently) that the State or public authorities failed to take action which should have been taken, and which would have been necessary to provide the necessary “respect” for his/her Article 8 rights. In that case, the Court should consider whether the State had, given the circumstances, a positive obligation to act in compliance with the “respect” element of Article 8.*

*The analyses of the ECHR case law help the domestic judicial systems with interpretation of the definition of privacy and the specifics of applying the law in such cases.*

**Key words:** *media, right to privacy, ECHR jurisprudence, Russian cases*

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Since 1998 when Russia ratified European Convention of Human Right and 2002, the year of the first Court’s decision on the Russian case, Russia came thru tremendous changes in politics, legislation and judicial system. ECHR started to be for Russian people an important instrument of defense of their rights. At the same time Russia is country-leader in the number of applications bringing to the European Court of Human Rights against it. As of the end of April, 2012 25% of pending before the Court cases are Russian (total number 37500). Totally in 10 years ECHR issued 1212 decision on Russian cases. Statistics show the fields of main problems in our society: right to a fair trial – 21%, protection of property – 17%, ill-treatment – 15 %, right to liberty and security – 14%. 94 cases(8% of the total) concerns the violation of the right to respect for private and family life, formulated in article 8 of the Convention and 23 cases are based on violations of the freedom of expression( article 11).Practice of implementation of this two main democratic values creates number of situations of controversy among them. In fact, in public every day life we often meet the conflict: Freedom of Speech vs. Right for Privacy.

It is obvious that Article 8 is divided into two parts. The first part, Article 8 para. 1, sets out the precise rights which are to be guaranteed to an individual by the State – the right to respect for private life, family life, home and correspondence. The second part, Article 8 para. 2, makes it clear that those

rights are not absolute in that it may be acceptable for public authorities to interfere with the Article 8 rights in certain circumstances. Article 8 para. 2 also indicates the circumstances in which public authorities can validly interfere with the rights set out in Article 8 para. 1; only interferences which are in accordance with law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in Article 8 para. 2 will be considered to be an acceptable limitation by the State of an individual's Article 8 rights.

The determination of a complaint by an individual under Article 8 of the Convention necessarily involves a two-stage test. The first stage concerns the applicability of Article 8; in other words, is the right which an individual complains has been interfered with, a right actually guaranteed by Article 8 para. 1 of the Convention. This will often involve discussion of, for example, what constitutes private life or home within the meaning of Article 8 para. 1. If the judge considers, based on the jurisprudence of the European Court, that the right invoked by an individual (for example, the right to be provided with free housing) is not in fact a right covered by the guarantees in Article 8 para. 1, then Article 8 is inapplicable and the complaint will end there.

If, however, Article 8 is found to be applicable, the Court will go on to the second stage of the assessment. The most common situation is where the applicant has claimed that the State took action which he or she considers was in violation of his or her Article 8 rights; in that situation, the Court will consider whether the interference with the Article 8 right can be justified with reference to the requirements of Article 8 para. 2. It is also true that applicants also complain, although much less often, that the State or public authorities should have but failed to take action which action the applicant argues would have been necessary in order to provide the necessary "respect" for his or her Article 8 rights. In that case, the Court should consider whether the State had, in the circumstances, a positive obligation to so act in order to in compliance with the "respect" element of Article 8.

Principles of positive obligations. The Court has held that although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be *positive* obligations inherent in an effect respect of the rights concerned. Genuine, effective exercise of certain freedoms does not depend merely on the State's duty *not* to interfere, but may require positive measures of protection even in the sphere of relations between individuals. The Court has found that such obligations may arise under *Article 8* (see, amongst others, *Gaskin v. the United Kingdom*, §§ 42-49.)

How does the Court evaluate whether a positive obligation exists?

Regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. The scope of the obligation will vary, having regard to the diversity of situations, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources.

The obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.

As an example I'll examine the *Case Porubova v. Russia*. In late September 2001 the applicant's newspaper published in the same issue several items concerning the large-scale misappropriation of budgetary funds allegedly committed by Mr V., the head of the Sverdlovsk Regional Government, for the benefit of Mr K., an employee of the Moscow representative office of the Sverdlovsk Region.

The first article, entitled "Gay scandal in the White House" ("*Гей-скандал в «Белом доме»*") told the story of the homosexual relations between the head of the regional government and a twenty-five year-old employee of the region's representative office in Moscow.

On 12 October 2001 the prosecutor's office of the Sverdlovsk Region, acting on requests from V. and K., initiated criminal proceedings against the applicant for criminal libel and insult disseminated via the media, offences under Articles 129 § 2 and 130 § 2 of the Criminal Code.

The investigator commissioned a linguistic and cultural expert examination of the articles in question. On 6 November 2001 the expert came to the conclusion that they contained allegations that V. and K. were homosexuals who had engaged in sexual intercourse in the representative office of the Sverdlovsk Region. The expert considered that the articles had sought to present a negative image of V. The District Court gave judgment that the articles in question had been damaging to their reputation as politicians and public servants. The applicant was found guilty as charged and sentenced to one and a half years' correctional work, with retention of fifteen percent of her wages for the benefit of the State.. On 4 September 2002 the Sverdlovsk Regional Court upheld the conviction, endorsing the reasons given by the trial court. Subsequently, the applicant was dispensed from serving her sentence on the basis of an amnesty act in respect of women and minors passed by the Russian legislature on 30 November 2001.

The European Court noted that it is common ground between the parties that the applicant's criminal conviction constituted "interference" with her right to freedom of expression as protected by Article 10 § 1. It is not contested that the interference was "prescribed by law", namely by Articles 129 and 130 of the Criminal Code, and "pursued a legitimate aim", that of protecting the reputation

or rights of others, for the purposes of Article 10 § 2. It had to be determined whether the interference was “necessary in a democratic society”.

The test of necessity in a democratic society requires the Court to determine whether the “interference” complained of corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not however unlimited. The European Court's task in exercising its supervisory function was not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation. In so doing, the Court noted that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Krasulya v. Russia*, no. 12365/03, § 34, 22 February 2007).

In examining the particular circumstances of the case, the Court took the following elements into account: the position of the applicant, the position of the persons against whom the criticism was directed, the subject matter of the publication, the characterisation of the contested statements by the domestic courts, the wording used by the applicant, and the penalty imposed on her. As regards the applicant's position, the Court observes that she was a journalist and editor-in-chief of a newspaper. She was convicted for publishing articles of which she was found to be the author; therefore, the impugned interference must be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy.

But at the same time the Court considered that, since both Mr V. and Mr K. were professional politicians – the head of the regional government and a member of the regional legislature respectively – they inevitably and knowingly laid themselves open to close scrutiny of their every word and deed by both journalists and the public at large (compare *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002). It emphasised that the right of the public to be informed, which is an essential right in a democratic society, can even extend to aspects of the private life of public figures, particularly where politicians are concerned. By reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest” (see *Von Hannover v. Germany*, no. 59320/00, § 63, ECHR

2004-VI). The case in question was, in the Court's view, distinguishable from those cases in which publication of the photos or articles had the sole purpose of satisfying the curiosity of a particular readership regarding the details of the individual's private life. As the Court has found, the impugned articles purported to contribute to a debate on an issue of public concern. Accordingly, the Russian courts were required to demonstrate a "pressing social need" for the interference with the applicant's freedom of expression, but failed to do so. Therefore, the Court considers that the domestic courts overstepped the narrow margin of appreciation afforded to them where restrictions on debates of public interest are concerned, and that the interference was disproportionate to the aim pursued and not "necessary in a democratic society".

Practice of the ECHR shows us how delicate is a sphere of interference into the human being private life, how delicate state authorities, mass-media and public must be in the cases where public interest and the guaranteed rights for privacy overlap.

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#### **МЕДИЈИ И ПРАВО НА ПРИВАТНОСТ:**

##### **Руски случајеви пред Европским судом за људска права**

*Од како је Русија 1998 године ратификовала Европску конвенцију о људским правима, Европски суд за људска права је донео 1212 пресуда о разним случајевима који су поднети против Русије. Међу њима је и 94 случајева где је Суд установио повреду члана 8 Европске конвенције којим се гарантује право на поштовање приватног и породичног живота. Скоро половина ових случајева односи се на информације објављене у новинама, на телевизији или на интернету, а многи од њих се директно односе на мешање у приватност и породични живот.*

*Члан 8 Европске конвенције о људским правима садржи два става. У првом ставу овог члана се наводе специфична права која држава уговорница треба да гарантује сваком појединцу, т.ј. да свако има право на поштовање приватног живота, породичног живота, дома и преписке. У другом ставу овог члана се прецизира да ова права нису апсолутна јер у*

одређеним околностима може бити неопходна интервенција државних органа власти. У ставу 2 члана 8 се такође наводе специфичне околности у којим органи власти могу да се умешају у остваривање права која су предвиђена у ставу 1 члана 8 Европске конвенције.

Приликом испитивања основаности захтева поднетог од стране појединца на основу члана 8 Конвенције, Суд примењује поступак који се састоји од две фазе. Прва фаза односи се на утврђивање примењивости члана 8 Конвенције, када Суд треба да утврди да ли право на које се апликант позива спада у оквир права која се гарантују чланом 8 став 1 Конвенције. Уколико се на основу судске праксе Европског суда за људска права утврди да право на које се особа позива (на пример, право на обезбеђивање смештаја) није обухваћено правима из члана 8 став 1 Конвенције, онда се члан 8 не може применити на тај случај и тужба се одбија.

Међутим, уколико се утврди да се члан 8 може применити, Суд онда прелази на другу фазу испитивања. Најчешћа је ситуација где подносилац захтева тврди да је држава предузела неку радњу која по његовом мишљењу представља повреду права из члана 8. У том случају, Суд разматра да ли се повреда права из члана 8 може оправдати у односу на услове истакнуте у члану 8 став 2. Апликанти се такође (мада не тако често) жале да држава или органи јавне власти нису предузели одређене радње које је требало предузети, а које би обезбедиле неопходно поштовање права из члана 8. У том случају, Суд треба да процени да ли је држава у датим околностима имала обавезу да позитивно делује у складу са елементом поштовања права из члана 8.

Анализе случајева из судске праксе Европског суда за људска права помажу домаћем правосудном систему у тумачењу дефиниције појма приватности као и специфичности примене права у таквим случајевима.

**Кључне речи:** медији, право на приватност, судска пракса Европског суда за људска права, руски случајеви.