LITIGATING 'ARTICLE 18 CASES'

Produced by the European Human Rights Advocacy Centre (EHRAC), Middlesex University, London, April 2021

Middlesex University London

Contents

Introduction 3

What does Article 18 cover? 3

When should you raise Article 18? 4

In what kind of cases has Article 18 been applied? 4

How can you prove the authorities were driven by an 'ulterior purpose'? 4

What difference does a finding of a violation of Article 18 make? 6

Other useful resources 8

Introduction

One provision of the European Convention on Human Rights which had, in effect, been dormant for several decades, but which has seen a recent flowering of its jurisprudence, is Article 18. It is a provision which, in essence, prevents state authorities from restricting Convention rights for ulterior purposes, and has been applied in particular in political prosecution cases - in other words, where state bodies have targeted individuals in bad faith. At its core, the object and purpose of Article 18 is to prohibit the misuse of power.

At EHRAC, we have successfully utilised Article 18 in cases brought on behalf of human rights defenders in Azerbaijan (Rasul Jafarov v Azerbaijan, Aliyev v Azerbaijan and Leyla Yunusova and Arif Yunusov), and a former Georgian prime minister (Merabishvili v Georgia) and in other situations too.

But what does Article 18 cover, when and how should it be raised, how do you do so successfully and what is its impact? This Guide, written by Philip Leach, Director of EHRAC, seeks to provide some answers to those questions. It does not purport to provide a comprehensive analysis of the caselaw which can be found elsewhere (see the Useful Resources below), but instead it aims to help lawyers and NGOs litigating cases at the European Court of Human Rights (or in national courts) develop their understanding of this provision, and adopt suitable strategies in raising it.

What does Article 18 cover?

The text of Article 18 states as follows:

> The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

It enables the Court to examine the reasons for a restrictive measure and if in fact the measure complained of was taken for reasons other than those invoked, then there may be a Convention violation. It is therefore linked to the underlying Convention concept of lawfulness and, in particular, the prevention of arbitrary measures.

What 'restrictions' does it therefore cover? As the text of the Article says, it applies to any restrictions which the Convention allows. In most cases to date, it has been raised by applicants complaining of restrictions on their liberty, and so it is raised in conjunction with Article 5 (the right to liberty and security of the person). But it has also been applied in respect of the search and seizure of a lawyer's home and office (under Article 8 – the right to respect for private life and home) and the repeated arrest of a politician at public demonstrations (under Article 11 – the right to freedom of assembly).

Article 18 has not, as yet, been applied, together with Article 6 (the right to a fair hearing) on the basis that Article 6 does not incorporate any restrictions on which Article 18 can bite (although this stance has been questioned and is being challenged).

In any event, it is important to remember the origins of this provision, which was introduced in order to oppose despotism, as the Travaux Préparatoires to the Convention confirm:

> 'what we must fear today is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means. Experience has shown that it is sufficient to establish an atmosphere of intimidation and terror in one single electoral campaign in a country for all the executive acts establishing a totalitarian regime to acquire a character, an appearance, of legality'.

When should you raise Article 18?

There are some formalities which apply. Article 18 cannot be raised alone – it must be invoked together with another Convention right (similar to Article 14). For example, applicants alleging that they have been prosecuted and detained in bad faith, will argue that Article 18 has been breached in conjunction with Article 5.

But there can be a violation of Article 18 (taken together with another Convention right), even if there is no violation of the other right taken alone.

The Court applies its ordinary standard of proof in assessing Article 18 complaints (there is now no stricter standard required, as had been suggested in earlier case-law).

Aside from these formalities, there are likely to be broader strategic questions to assess in considering whether to raise Article 18, and how to do so. Given the significance of a finding of a violation of Article 18 (that the authorities have acted in bad faith), the Court tends to be cautious in reaching such conclusions. These questions are discussed further in the sections which follow.

In what kind of cases has Article 18 been applied?

Opposition politicians in Ukraine, Azerbaijan, Georgia, Turkey and Russia have successfully raised Article 18, including former Ukrainian Prime Minister Yuliya Tymoshenko and former Interior Minister Yuriy Lutsenko. The same is true for Azerbaijani opposition politician Ilgar Mammadov and the former Georgian Prime Minister Ivane Merabishvili, as well as the Turkish politician Selahattin Demirtaş and the Russian political activist Alexey Navalny (see also here).

Another strand of cases concerns human rights activists, journalists and lawyers in Azerbaijan who have been the target of criminal proceedings, including Rasul Jafarov, Intigam Aliyev, Anar Mammadli, Khadija Ismayilova, Leyla Yunusova and Arif Yunusov and board members of the civic movement, NIDA. The Turkish human rights defender Osman Kavala has also successfully invoked Article 18.

How can you prove the authorities were driven by an 'ulterior purpose'?

One of the most difficult issues is to how establish that the authorities have acted in bad faith – what kind of evidence is needed? This is not an easy question to answer - but some clarity can be gleaned from reading the cases where Article 18 has been utilised, both successfully and in vain. You will want to consider firstly whether there is any specific evidence relating to a particular applicant, which indicates that the authorities have taken steps against them with an ulterior purpose. Categoric evidence of bad faith in respect of an individual may be hard to come by, however, in which case you will want to consider relevant statements made by the authorities, as well as the authorities' prior conduct and the broader context. For example, in the cases brought by human rights defenders in Azerbaijan (discussed below) the Court has carefully scrutinised the prevalent domestic context of the repression of human rights activists.

In some high-profile cases where allegations of bad faith might have been expected to hit home, Article 18 has been raised, but without success. For example, complaints brought by Mikhail Khodorkovskiy, the former board member and major shareholder of the Yukos oil company in Russia, that his arrest, detention and prosecution were politically motivated, were rejected by the Court. The Court acknowledged that 'certain suspicions' were raised in his case, but there was insufficient proof to establish, as Mr Khodorkovskiy argued, that in his case the whole legal machinery had been misused from the outset. Article 18 was also raised unsuccessfully by the applicant oil company in OAO Neftyanaya Kompaniya Yukos v Russia, which concerned the prosecution and enforcement of tax proceedings against the company, leading to the imposition of massive fines, its insolvency and liquidation. The Court found no

evidence of any political motivation behind the proceedings. Article 18 was also relied on in vain by Zurab Tchankotadze, who as chair of the Civil Aviation Agency of Georgia was prosecuted for abuse of authority. He was able to establish that his trial had been unfair and in breach of Article 6, as the Court was unable to understand how the acts in question (relating to contracts signed with civil aviation companies) were considered to be criminal at all. In support of his Article 18 complaint (in conjunction with Article 5), Mr Tchankotadze referred to statements made by Mikhail Saakashvili, during a presidential campaign, threatening to have Mr Tchankotadze jailed. However, that was not considered sufficient to establish that the authorities had acted with ulterior motives in detaining and prosecuting him.

It is very rare that applicants can adduce documentary evidence establishing ulterior purpose, but that is what business mogul Vladimir Gusinskiy was able to do. He claimed that by detaining him the authorities actually intended to force him to sell his media business to Gazprom on unfavourable terms and conditions. The Court detected bad faith on the basis that Gazprom had asked him to sign an agreement when he was in prison, that a minister then endorsed this agreement with his signature and that an investigating officer later implemented the agreement by dropping the charges. The Court concluded that 'it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies'.

In most cases where Article 18 has been raised successfully, the Court will draw its conclusions about bad faith from the wider context in which the criminal cases have been instigated, and sometimes also from reasoning given by the prosecuting authorities. In the case of Yuriy Lutsenko the Court noted that the prosecuting authorities had stated that the applicant's communication with the media was one of the grounds for his arrest and accused him of distorting public opinion about crimes he had committed, of discrediting the prosecuting authorities and of trying to influence the outcome of his upcoming trial. For the Court, this clearly demonstrated the prosecuting authorities' wish to punish Mr Lutsenko for publicly disagreeing with the accusations made against him and for asserting his innocence - therefore, the restriction of his liberty was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons, which violated Article 18 in conjunction with Article 5. Similarly, the Court found that the actual purpose of detaining Yuliya Tymoshenko had been to punish her for her perceived hindering of the proceedings brought against her and her contemptuous behaviour towards the court. In the case of Turkish human rights defender Osman Kavala, the Court found that his prosecution and detention were not based on facts that could reasonably be considered as behaviour criminalised under domestic law, and also largely related to his exercise of Convention rights. Noting in particular the unexplained lapse of time (several years) between the events in question and Mr Kavala's detention, and the fact that he was charged shortly after two speeches by the President of Turkey had targeted Mr Kavala personally, the Court concluded that the actions had been taken against him for the ulterior purpose of silencing him as a human rights defender.

In other cases, the position is even starker. The case of Ilgar Mammadov concerned the detention and prosecution of a politician and blogger who was accused of instigating a riot. The Court found that there had been no reasonable suspicion to justify his arrest, and accordingly the authorities had failed to demonstrate that they had acted in good faith. Indeed, the Court noted that his arrest was linked to his publication of several blog posts about the causes of the riots.

A plurality of purposes

Rather more difficult to assess are the cases where the Court finds a combination of restrictions on a person's Convention rights which are both valid and invalid (a 'plurality of purposes'). In such situations, the Court will assess what was the predominant purpose. To do that it will consider the nature and degree of reprehensibility of the alleged ulterior purpose.

That was the position in Merabishvili, concerning the prosecution for abuse of office (and other offences), and pre-trial detention, of a leading opposition politician in Georgia. The Court found that,

originally, he was detained for the valid purpose of bringing him before the competent legal authority on reasonable suspicion of the offences with which he had been charged. However, it also found as credible and convincing his account that he was taken from his prison cell late one night to a meeting with the Chief Public Prosecutor and the head of the prison authority who tried to persuade him to provide evidence about an investigation into the death of the former prime minister and a case relating to the former president. This led the Court to conclude that the predominant purpose of the restriction of the applicant's liberty changed (to one of obtaining information about other cases). There was therefore a violation of Article 18 together with Article 5. A similar conclusion was reached in Selahattin Demirtaş. In that case, the Court acknowledged that the applicant politician had been detained both because there was reasonable suspicion of his having committed an offence (Article 5(1)(c)), and also for political reasons. However, it found that the predominant ulterior purpose had been one of stifling pluralism and limiting freedom of political debate.

These cases show that in some situations it will be important and beneficial to raise Article 18 and in other instances it may be better not to do so, because of the risk of losing the point. Where a case looks 'touch and go' whether an Article 18 complaint will be successful, your strategy may depend upon the importance for the applicant of establishing that the authorities acted in bad faith, or conversely, the importance of not losing such a point. As a matter of the case-law, the Court clarified in Merabishvili, that it will only consider Article 18 where it is a 'fundamental aspect' of the case.

Take for example a heavy-handed and unjustified police search and seizure operation at the office of a human rights activist. You are likely to want to argue that such a measure is a disproportionate breach of Article 8 (right to respect for private and family life, home and correspondence), but whether you can successfully also raise Article 18 depends on whether you can establish that the authorities acted with bad faith, and that this was a fundamental aspect of the case.

Alexey Navalny complained about being arrested seven times at public demonstrations, and that Article 18 was breached (in relation to two of those episodes) because he was targeted due to his political activism. The Grand Chamber of the Court found that his Article 18 complaint did indeed represent a fundamental aspect of the case (in contrast to an earlier chamber decision). It also decided that the essence of that complaint had not been addressed in its assessment of the complaints he made under Articles 5 and 11 of the Convention.

What difference does a finding of a violation of Article 18 make?

Article 18 judgments are significant because a Council of Europe state has been found to have deliberately acted in bad faith. In a number of these cases, the Court has found that state agencies have targeted individuals who are in opposition to, or otherwise critical of, the presiding government. Even more stark are the judgments finding expressly that the authorities took action with the intention of silencing and punishing politicians (Ilgar Mammadov), journalists (Khadija Ismayilova) and human rights activists (Intigam Aliyev, Anar Mammadli, Osman Kavala and Leyla Yunusova and Arif Yunusov).

The cases are also seen as directly challenging fundamental democratic principles. In the case brought by the Turkish opposition politician Selahattin Demirtaş Article 18 was breached where criminal proceedings instigated against him during election campaigns were found to have been aimed at 'stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society'.

Similarly, in Alexey Navalny the Grand Chamber signalled a wider threat to democracy:

> '…the restriction in question would have affected not merely the applicant alone, or his fellow opposition activists and supporters, but the very essence of democracy as a means of organising society…'

What is the effect of an Article 18 judgment on the individuals themselves – and in particular their criminal convictions? The Court answered this question directly in the litigation brought by Ilgar Mammadov, confirming that its finding of a violation of Article 18 in conjunction with Article 5 in the first Mammadov judgment vitiated any action resulting from the imposition of the charges against him.

As a result of the gravity of the violations in these cases, both the Court and the Committee of Ministers have taken steps to exert further pressure on the states in question to ensure compliance with the Convention.

Steps taken by the Court

The Court has the option (which it uses only sparingly) of invoking Article 46 in order to diagnose systemic issues and also to indicate the measures which the authorities should take in order to implement a judgment. It did so, for example, in the case brought by Intigam Aliyev, finding that the Article 18 judgments against Azerbaijan reflected

> 'a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law'.

The Court also pointed a finger at the national courts:

> 'the domestic courts, being the ultimate guardians of the rule of law, systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention in the cases which resulted in the judgments adopted by the Court, limiting their role to one of mere automatic endorsement of the prosecution's applications to detain the applicants without any genuine judicial oversight'.

Such findings led the Court to specify the 'general measures' to be taken by the Azerbaijani authorities in response to the judgment, who were required to

> 'focus, as a matter of priority, on the protection of critics of the government, civil society activists and human-rights defenders against arbitrary arrest and detention. The measures to be taken must ensure the eradication of retaliatory prosecutions and misuse of criminal law against this group of individuals and the nonrepetition of similar practices in the future'.

In addition, the Court went further in setting out what it expected for Mr Aliyev himself, namely that the authorities should '[restore] his professional activities', by taking measures that are 'feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court, and they should put the applicant, as far as possible, in the position in which he had been before his arrest'.

In the case brought by Alexey Navalny, the Court applied Article 46 to indicate that the Russian authorities should take legislative or other measures to ensure that the right to freedom of peaceful assembly is respected.

The Court was even more prescriptive in its judgment in the case of Selahattin Demirtaş, requiring the Turkish authorities to ensure the applicant politician's release from pre-trial detention 'at the earliest possible date', and it similarly directed the immediate release of Osman Kavala.

Directions issued by the Committee of Ministers

In the light of the seriousness of these decisions, the Committee of Ministers has reacted by requiring far-reaching measures in response from the states concerned. Although the Court did not, as such, direct the release of unlawfully detained politician Ilgar Mammadov, the Committee of Ministers demanded it. As a result, Mr Mammadov was released in 218 (after the Committee of Ministers

referred his case back to the Court using the infringement procedure). It has also directed the quashing of the applicants' convictions in Article 18 cases, and indeed both Ilgar Mammadov and Rasul Jafarov had their convictions quashed by the Supreme Court in Azerbaijan in April 2020.

In following up the judgments in the two Article 18 cases brought by Alexey Navalny, the Committee of Ministers has continued to pursue the question of legislative changes in Russia to ensure that the right to freedom of assembly is respected. Furthermore, as regards Mr Navalny himself, it has directed that

> 'it is essential that the applicant is not hindered in the exercise of his right to freedom of peaceful assembly in the future and, in this context, that he is no longer subjected to unlawful arrests and unfair trials and punishments for participating in such assemblies'.

In the case of Merabishvili, the Committee of Ministers has continued to press the Georgian authorities to investigate the incident in which he was removed from his cell illicitly, requiring a 'fully effective investigation with a view to establishing the identity and criminal liability of those responsible for all aspects of the Article 18 violation'.

Other useful resources

The Court publishes its own Guide on Article 18 of the European Convention on Human Rights which is available in several languages including Azerbaijani and French.

The Court's leading authority on Article 18 (at the time of writing) is its 2017 Grand Chamber judgment in Merabishvili v Georgia.

The Council of Europe Commissioner for Human Rights has intervened as a third party in a number of Article 18 cases.

EHRAC submitted a third party intervention in Navalnyy and Ofitserov v Russia (No. 78193/17) (with Professor Jeffrey Kahn) arguing the applicability of Article 18 to Article 6.

See the EJIL:Talk! blogpost written by EHRAC's Jessica Gavron and Ramute Remezaite about Article 18's applicability to Article 6.

As to whether Article 17 (prohibition of abuse of rights) is a provision which would be more appropriate to apply than Article 18, read the separate opinion of Judges Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay in Alexey Navalny.

European Human Rights Advocacy Centre

Middlesex University
The Burroughs Hendon
NW4 4BT
Tel: +44 208 411 2826
www.ehrac.org.uk
ehrac@mdx.ac.uk

EHRAC is established within Middlesex University. The University is an exempt charity by virtue of the Charities Act 1960.

Cover image: “Москва. Марш в поддержку политзаключённых” by Vladimir Varfolomeev is licensed under CC BY-NC 2.0