LITIGATING 'ARTICLE 18 CASES' 2021 PODCAST TRANSCRIPT

This is a transcript to the "Litigating 'Article 18 cases'" podcast, available on Spotify and through www.ehrac.org.uk. It is also available in Russian.

Our accompanying Guide "Litigating 'Article 18 cases'" is also available in Russian, English, Georgian, and Ukrainian on our website which provides further details on Article 18 and strategies to raise it within a case before the European Court of Human Rights.

EHRAC

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Transcript

00:00:00 Sam Knights

Hello and welcome to the EHRAC Podcast! My name is Sam Knights, I'm a barrister at Matrix and chair of EHRAC's UK Advisory Board, and I've been involved in EHRAC's work at various points, particularly in Russia and Georgia, for many years. I'm joined today by Philip Leach, founder and director of EHRAC and Professor of Human Rights at Middlesex University.

I'm also joined by Rasul Jafarov, lawyer and Human Rights Defender in Azerbaijan and Başak Çalı Co-director of the Center for Fundamental Rights, and Professor of International Law at the Hertie School in Berlin, and also chair of the European Implementation Network.

We are here to discuss the important but comparatively little used Article 18 of the European Convention on Human Rights, which concerns misuse of power, improper or ulterior motives, and underlying restrictions of rights. The provision states the restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

So, Phil, if I can begin by asking you to sort of unpack what is meant by Article 18? What's it all about, what are its origins, its aims, how does it work?

00:01:24 Philip Leach

Yes, certainly Sam as you said, this provision is aimed at preventing authorities from restricting our human rights, our convention rights, for ulterior reasons, ulterior purposes. And it's been applied particularly in relation to what some people would describe as political prosecutions.

And its origins go back to the very beginnings of the convention. Of course, the European Convention on Human Rights was being drafted in the late 1940s, immediately after the Second World War, and this particular provision had despotism and authoritarianism in its sights. It was intended to stop the misuse of power; to stop authorities using arbitrary measures, and an attempt to promote the Rule of law.

And the way we've seen it develop, is that it's been very dormant for a number of decades and only in recent, very recent years, have we seen a real sort of flowering of the case law from the court. And that's because politicians, human rights defenders, journalists, activists, those opposing certain authoritarian governments have used this provision successfully in cases against Russia, and Azerbaijan, and Turkey, in particular.

And then these cases are very, I think, very remarkable, not least because the court has a number of the cases; it even said that the authorities intended to silence and punish the activists for their human rights work. And in some cases, to stifle pluralism by having opposition politicians arrested, which the court has said threatens the very essence of democracy.

00:03:21 Sam Knights

Başak, I wonder if we could bring you in at this point. Phil has spoken a bit about why it's been little used to date and why it's had a recent flowering. But can you say something about why it's an important provision, even if it is little used? And also what sort of cases it's been mainly used in?

00:03:46 Başak Çalı

So Sam, actually the applicants before the former European Commission on Human Rights and the Court of Human Rights have used article 18 in their submissions to the court going back even to the 1950s. And so, for example, in 1955, a homosexual man in Germany, in the WD versus Germany case, did say to the Commission that his homosexuality was criminalised and that this was something that was against Article 18 of the Convention.

So the applicant use of the provision really goes back. What is very interesting is that the Court and the Commission just did not take these sort of Article 18 claims of applicants very seriously, and actually they haven't for a very, very long time so we see in the 50s, and 60s, 70s, well into the 1990s that the applicants were saying that there were some illegitimate ulterior purposes were at work in the restrictions of these rights, but when we also go back and look at the case law of the former Commission, and as the Court is now the full time court and the Commission does not exist, the former Commission took the view that to show ulterior purposes, applicants must really need an exacting standard of proof.

And in most of these cases, the Commission and the Court said that these claims were simply not necessary to examine, or that there was no sort of evidence for them to substantiate these types of claims.

So this is something really interesting because the discovery, or if we could say, the re-discovery of Article 18 is really in the 2000s. And the first case was a case against Russia, Gusinsky versus Russia, when it was the first time ever in 2004 that the court felt that the applicant has given an exacting proof to the court to say that there was an ulterior purpose in the detention of Mr. Gusinsky.

So why is this article so important?

One of the things that perhaps we could say is that this Article, it's not important in the sense that it doesn't tell us whether a right is violated or not, because the court has found the violation of rights of arbitrary detention or expression also to rights in thousands of cases. But this Article is very important because it tells us why the rights in the Convention were violated, and it particularly tells us a different story. It says the violation is not because the authorities did not adequately apply the Convention, or because the authorities were acting in an arbitrary way, but that actually the authorities had an ulterior, and an illegitimate ulterior purpose in mind when they were mistreating these rights.

So as Phil has also highlighted the Court so far has focused on two types of ulterior purposes. One is economic ulterior purposes, and the other one is political ulterior purposes. But what we've been seeing particularly in the last decade is the focus of the Court on ulterior political purposes and the restrictions of rights; in the way of silencing opposition members, silencing human rights defenders and activists, and also maybe punishing them - not just silencing, but also punishing them. So the focus has really shifted in the recent case law, where the court is using more and more Article 18 to say that something really extraordinary is taking place in a jurisdiction, which means that the authorities are seriously stepping outside of the rule of law in their jurisdictions and the failure to respect the rights and the Convention is not just a mere problem of lack of capacity; lack of deficient interpretation; or some sort of lack of proper legal framework, but actually a motive of stepping outside of the rule of law when engaging citizens.

00:08:27 Sam Knights

I think it's incredibly useful to have this overview of the development of Article 18, and so before we go to Rasul, and I want to ask Rasul specifically about how Article 18 has been used in Azerbaijan, but I wanted to just pick up on something, again to do with the history, and this is whether it's right to look at the decision of Merabishvili in 2017 as something of a turning point in the way in which the court approaches Article 18. Is that right? I mean this was a case that you were involved in.

00:09:13 Philip Leach

Yes, indeed, this was one of the EHRAC cases. It related to the proceedings brought against Vano Merabishvili, who was for many years, Minister of Interior in Georgia and for a short period Prime Minister of Georgia. He was prosecuted after the change of government in 2012 for various offenses: abuse of power related offenses, and the Court in the Grand Chamber in that case found that there was a particular incident when he was clandestinely taken out of his cell while he was in pretrial detention, driven across Tbilisi and presented in front of the head of the prison service and the Prosecution Service in Georgia and essentially was blackmailed for information about other politicians. Now he came out immediately, the first opportunity he could, when he was at a court hearing a couple days later to report about this. The Georgian authorities denied it at the time, and have always denied it, but the court found that it had happened, and as a fact, that the event had happened as we argued in the case. I think the case is an important case because it's the Grand Chamber and it sets out the basic case law on this provision, but it's important because it throws up a problem that some of these cases, not all of them, but some of them raise, which is where you have evidence that suggests that someone, that there is reasonable suspicion for someone having committed offense, and the court finds that there was some basis for a prosecution. And then you have other information that the authorities were acting for ulterior purposes, for political purposes usually. What do you do about that?

And the Court's answer is to try to gauge what the predominant purpose is, and it's actually quite a difficult judgment to make, it seems to me. But so the example in this Merabishvili case was that the Court took the view that after this blackmailing incident, which they did accept happened, that the purpose shifted at that point, so it's important in that sense. I think it's important in the point that Başak was talking about, the evidence needed to establish ulterior purposes. You can imagine that's quite a difficult problem. How do you, if you're acting for someone, how do you show the court that the government was acting for ulterior reasons, and what the Court confirmed in Merabishvili is that there won't be a particularly high standard which the Court had been imposing prior to Merabishvili. It's just a normal standard that the court applies.

00:12:12 Sam Knights

OK, so we can see that it's been helpful in many respects to have this guidance from the Court but obviously there are very serious considerations that need to be looked at before raising Article 18, so I want to turn now to Rasul and actually look at how Article 18 has been used in Azerbaijan. So Rasul, do you want to talk about some of the cases you've been involved in? And indeed the case of *Jafarov and Others v Azerbaijan*.

00:12:47 Rasul Jafarov

Yes. So let me start by saying that I believe Article 18 started to be interesting for the lawyers to think about in 2013, because in Azerbaijan, because it seems that year, we observed a massive crackdown of Azerbaijani authorities against the opposition, political activists, as well as numerous defenders and as you mentioned, this included myself.

So the first case where the Court issues a judgment with recognition of the violation of Article 18 was the case of Ilgar Mammadov in 2014, and then it was the case of Rasul Jafarov and later Intigam Aliyev, and Anar Mammadli who are colleagues, defenders and human rights lawyers. Anar Mammadli is an election expert.

And we also have the later cases- the case of Khadija Ismayilova, a prominent investigative journalist, and the case of Yunus, a human rights defender forced to leave Azerbaijan after spending two years in jail. So it clearly shows that Article 18 was used to help those who faced the repression and the legal problems in Azerbaijan that were applied by the government, legal problems, I mean, from the government of Azerbaijan.

So currently Azerbaijan has, I believe more than 10 cases, and no other Member State of the Council of Europe has the same number. So we kind of have this record among the members of the Council of Europe. And it clearly demonstrated the situation with regards to human rights in Azerbaijan. And at the same time, as it was indicated in the case of Intigam Aliyev versus Azerbaijan, this is not just ordinary cases, it's a systematic approach that is applied by the law enforcement agencies and at the same time, by the courts of Azerbaijan, aiming to silence politicians and human rights defenders in the country.

So that's how Article 18 is applied in Azerbaijan. As I said, it's more than 10 cases right now.

00:15:57 Sam Knights

Thank you, Rasul. As you said, a dubious honor to have so many cases on Article 18. Can I ask you a follow up question to that, which is what practically do you think the effect of these cases has been on human rights and Azerbaijan? Do you think that the government is concerned about having negative findings based on Article 18 against it?

00:16:25 Rasul Jafarov

Yes, I surely believe that they are concerned, although they don't like to demonstrate concern, in most of the cases they prefer to demonstrate that they don't care much about it. But I believe in practice it's different. They are definitely concerned especially, in the case of Ilgar Mammadov, when the Committee of Ministers for the first time ever in the history of the Council of Europe acquired the article 6.4, which is about the infringement proceedings, and as a result of these proceedings there were years of communication and diplomatic measures by the Council of Europe and Committee of Ministers in turn, in order to explain to the government of Azerbaijan that they have to execute the judgments in full. And in practice, there's two cases, the case of Mammadov and my own case, where the Supreme Court executed the judgments of the European Court in full and they quashed all articles that were brought against us as criminal charges and also in the decision, they indicated that we had to be paid compensation for illegally spending time behind bars.

But unfortunately we don't see the same approach to other cases, although, and I would highlight it as a practical part of the importance of Article 18 in Azerbaijan, other cases, besides Mammadov and Jafarov, are also included in the agenda of the Supreme Court, so right now most of the cases are in the Supreme Court and it was in the communication between the Committee of Ministers and the government of Azerbaijan. Representatives of the government mentioned them a few times and also in the official record, they mentioned that the Supreme Court will reconsider the cases as soon as possible. They were saying that because of the pandemic, and because of the war that occurred between Azerbaijan and Armenia last year, the government was saying that the Supreme Court could not operate normally, but right now we don't have any limitations, so I believe the Committee of Ministers as well as human rights defenders and organizations should also urge the government of Azerbaijan to consider the cases and quash all the charges against human rights defenders, activists and other cases.

So from this point of view I think it was very important. Of course it took longer than we wanted. It's a long process. It's a difficult process. The government ambassador tried to prevent this process, but in the end we managed to get two acquittances, and other cases are also right now under the consideration of the Supreme Court. This is the legal aspect, but there is also a general aspect, I would say, a campaigning aspect of it. As a result of the judgments in the Council of Europe, two years ago they appointed a special rapporteur on political prisoners in Azerbaijan and the rapporteur prepared a report on alleged cases of political prisoners in the country. And her main argument, her main reference, was exactly the judgments of the European Court, where the Court recognized violation of Article 5 in conjunction with Article 18, which clearly shows that there is room for international advocacy and hopefully to get some results.

00:21:17 Sam Knights

That's very interesting and it sounds as if, as you say, some very positive outcomes in terms of the rule of law in Azerbaijan from using Article 18. Well, we'll come back to the enforcement and the impact on remedies a little later and look at it again more broadly, but I want to turn now to looking at some of the practicalities for lawyers and NGOs when they're thinking about whether they might have a case in which they could raise Article 18.

So Başak, do you want to talk about the limitations on the use of Article 18 and say something about the fact that it has to be raised in conjunction with the another right, and whether it can be referred to all of the other rights of the Convention, or just those where there are express qualifications written in for example, Article 5 or Article 8.

00:22:36 Başak Çalı

So the case law of the European Court of Human Rights is, we could say that it's still evolving, though Phil mentioned the Grand Chamber judgment in Merabishvili. There's recently been another Grand Chamber judgment in Demirtaş versus Turkey. But this is an area where I think the court as well as the lawyers and litigants are still kind of finding their way a little bit. So one of the qualities that the Court has established about Article 18 is that it's not a standalone provision, because the Article 18, as we discussed, says that you can't restrict rights for reasons that are not provided for in the Convention. And so the Court says that, well, this means that this right, or actually this provision as it is not a right, it's a provision, can really be used in conjunction with another right.

And there is an interesting discussion about whether this Article 18 can only be used in conjunction with rights that have restriction clauses in them, so the court has so far learned how to use this case, as Rasul also highlighted, in relation to Article 5 cases where we see something more than an arbitrary deprivation of liberty. So in Article 5 cases, Article 18 says the deprivation of liberty was more than arbitrary. It was carried out in bad faith, for ulterior purposes.

In their purposes, the court has also now recognized that it's not just in the context of Article 5 but also in other qualified rights that that Article 18 can be in play. But whether it was supposed to come into play with respect to other provisions of the article, such as absolute rights or the right to fair trial, is part of an ongoing discussion and an ongoing debate within the court.

So what I suspect is that these discussions are not settled. And that more litigation before the Court is going to give us a better sense of how Article 18 works. If you think about the fact that the first time that the court has spoken about Article 18 was in 2004, and it only has delivered 18 judgments, if I'm not incorrect, so it's a very important case law, but also very small part of the case law of the European Court of Human Rights. Perhaps we could say something about the evidence that litigants have been bringing to say that one of their substantive rights, and mostly as we said, deprivation of liberty or what we've called political prosecutions being the core focus.

But let's also say it doesn't have to be necessarily that. Well, this is the practice as we see it, as Rasul also just highlighted. In these types of cases, practically there seems to be two ways in which the Court approaches the questions around Article 18. The first has to do with immediate facts surrounding the case, and the court is looking at manifest irregularities, some sort of deeper problems in how the fact has been, the case, or prosecution or trial has been handled, for example, whether someone is being prosecuted based on some sort of factual events that happened five or six years after the fact, so it's sort of asking why would a prosecution be so interested in it, in a trial of an individual after a very long time after the fact of events, for example. But the Court is also interested not just what is the surrounding irregularities around a situation, but also the general pattern of human rights protections in the country. So one of the important indicators that we have learned actually from the Azerbaijani cases, it's the highest number as Rasul said of cases before the European Court of Human Rights, is that the Court is sort of looking at whether the situation

is an isolated incident or whether it forms part of a broader pattern, say a crackdown against politicians, opposition leaders; a crackdown against human rights defenders, human rights lawyers or journalists. So the Court, if you will, tries to use this sort of duel standard. One is looking at the immediate irregularities and facts around an individual's story, but also whether there's a general pattern, so we can say that the situation of an individual fits within a broader pattern of the undermining human rights protections in that country. What we've seen also in the Article 18 cases is that they usually tell us a story about either the decay of democracy, because the Court emphasizes the crackdown of opposition, pluralism, differences of opinion, and so on. But also the Court is telling us that the judiciaries are not acting in independent, impartial ways, in particular that they may be acting under the influence of their political leaders or the Executive. So these are sort of the duel things that we are seeing in Article 18 cases where it tells us a much bigger story about perhaps what we may call the decay of democracy and rule of law in some of the Council of Europe Member States.

00:28:57 Sam Knights

Thank you. We've heard quite a bit about the use and types of evidence that you need to bring an Article 18 case, and I think it's very clear from everything that the three of you have been saying that the decision as to whether or not to use Article 18 maybe a tricky one strategically, so I wonder whether Phil, you wanted to say something about this strategic use of Article 18: how you would decide when to use it, when not to use it, and if so, perhaps, whether you can say something about the political prosecution angle in the cases of Khodorkovsky, where the Article 18 case wasn't successful, and how we kind of compare and contrast that with Navalnyy cases. Are there lessons that we can extract as lawyers from those decisions?

00:30:11 Philip Leach

These cases do raise difficult strategic questions. If you make an Article 18 claim, you're trying to raise the profile…it raises the stakes of the issue. You're accusing the government of very serious and deliberate misuse of power, of bad faith. Those are serious accusations. It takes the case, arguably, to another level, and the court won't draw such conclusions lightly. So you are faced with this difficult problem of proving ulterior purpose. Now, in the Azerbaijani human rights defenders cases that Rasul was talking about- his own case and Intigam Aliyev's case, and the case brought by Leyla and Arif Yunus and others- the context of the repression of human rights defenders in Azerbaijan was so strong from 2014, it was so stark and so obvious that the Court has been able to make a series of decisions, confirming that that the prosecution of these human rights activists and people who are politically active and opposing the government was for ulterior purposes. They looked at the broad context and prosecuting people like Rasul for allegedly breaching the law in relation to the work of his NGO and allegedly breaching law in relation to foreign funding, it had no real basis, the court said, and so it was the broader context. We've got a similar case that's pending on behalf of Alexei Navalny going back to 2019 and the prosecutions of him and his colleagues, and the raids carried out at his offices and those of his colleagues and associated organizations and the freezing of bank accounts, and so on. We raise Article 18 there again, because we feel there is sufficient evidence of this broad context, of this broader repression by the authorities. So all those questions have got to be…you have to make a judgment about them and the risk of losing, the consequences of losing those kind of arguments. One of the other things we'll come onto I think is the effect on redress and if you raised the stakes in this way and you're successful, then you can have, I think, important consequences in terms of redress, both for those who are affected, the applicants, and more widely. I think we make sure to come on to that.

The Khodorkovsky and Gusinsky cases are really interesting. They are earlier, they go back to 2004, 2011, and they're related in that both were businessmen who had benefited from the sell-off of state assets in the mid-1990s- Mikhail Khodorkovsky in the context of the Yukos Company Oil Company and Mr. Gusinsky in the media context as he owned or was major owner of NTV. Both also had political aspirations. Both were critical or supporting critical voices in Russia. Both were prosecuted and raised Article 18 in their cases.

And as you said, Sam, Mikhail Khodorkovsky was unsuccessful, the Court finding that there were some basis for the prosecutors, essentially tax evasion, although other offenses. There was some basis for reasonable suspicion, but his lawyers didn't produce enough evidence to show as they argued, that the whole legal machinery was being misused. The Court also said that they're applying these cases at a very, very high standard of proof, and I think that's changed as we were saying. Gusinsky was successful because I think essentially there was a document that proved what was going on, and remarkably, the then press Minister went to see Mr. Gusinsky in prison and said "well we'll drop the charges against you if you sell your NTV shares to Gazprom" which he promptly did, and he was then released.

But there was, remarkably, there was a contract which the minister signed, which they produced, and that was enough for the court to accept that there was the ulterior purposes in that particular case.

00:35:04 Sam Knights

Well, it just goes to show the importance as well of very, very meticulous disclosure exercises and the careful preparation of all these cases, and that a case can turn on sometimes only one or two documents.

So let let's talk now about this whole issue of enforcement and what practically is the impact of an Article 18 win in a sense. I mean, Rasul spoke very clearly about the impact on cases in Azerbaijan but I mean taking this sort of step back and looking at overall implementation, which is such a big issue for the ECHR.

What can the Committee of Ministers realistically and practically do when there is an Article 18 finding if the state's not compliant, in terms of re-prosecuting or undoing a wrongful prosecution? Or carrying out a thorough investigation? Does it give the Committee of Ministers an extra tool? Phil would you like to comment on that, and perhaps and Başak.

00:36:34 Philip Leach

Yes certainly. The cases I think do raise the stakes and raise the profile as I said earlier, and that can lead to stronger measures of redress both for the applicants and also other wider measures through changes in the law and so on. And so we've already mentioned some examples of these cases have led to the opposition politician Ilgar Mammadov being released.

They've also led to, in the Turkish context that Başak will say more about, the Committee of Ministers calling recently for the release of the Kurdish politicians Selahattin and Tamir Tash, and the human rights activist Osman Kavala. That hasn't happened yet, but they have called, as the Court did, for their release. In Rasul's case his convictions has now been quashed, and that's quite a remarkable development. If we were sitting here in the years just after 2014, I wouldn't have been able to predict whether or not we would have got to that position so the measures can be significant for the applicants. In the Merabishvili case with the Georgian politician, the Committee of Ministers have stipulated that the Georgian investigation that's now going on into his clandestine removal from prison and his blackmailing, that must be sufficient to establish any criminal liability of those involved and it also, they say, must be sufficient to decide whether it had an impact on the criminal proceedings against Mr. Merabishvili himself. So really significant consequences.

And then you've got wider measures, other broader steps. Again in Article 18 cases the Court has shown itself willing to push harder and further, and has been backed up by the Committee of Ministers. So in Intigam Aliyev's case for example, the human rights lawyer in Azerbaijan that Rasul mentioned, there the Court and the Committee of Ministers have pushed for his own personal restoration of his professional role. He's had a travel ban; his office was shut up for many years and so on, but also wider than that, there's been a call for the end to these kind of retaliatory prosecutions and for human rights activists and critics to be properly protected. So it goes much further than the original applicants themselves, and can lead to real changes in laws and policies.

00:39:24 Sam Knights

That's really interesting. Başak I wonder whether you might comment on how you see Article 18 being useful in the context of the cases against Turkey in particular. I mean on this question of implementation and what can be done overall to strengthen the rule of law and human rights in a country.

00:39:51 Başak Çalı

Let me just start by agreeing with Phil on the point that delivering an Article 18 judgment through the Court is no easy matter, because of the problem of proving the range of evidence that has to be laid out that we just discussed. So it is a very serious signal that the Court is trying to emit to everyone within the Council of Europe. That this is an urgent, important case that it requires an immediate and serious execution [implementation].

We've also seen that the Court is becoming a lot more articulate in its remedy jurisprudence, and we've seen it in the Turkish context, in the Kavala judgment and in the Demirtaş judgment. But the Court still has indicated that these individuals must be immediately released from pretrial detention, and for those listeners who know about the ECHR, the Court is not very well known for indicating such specific, urgent that individual remedies.

So when it comes to the Committee of Ministers, I think we've also seen a very heartened sort of responsiveness to Article 18 judgments. We see that the Committee of Ministers is regularly putting these Article 18 judgments on their agenda. And they are always on the top of the priority of implementation although we know that the Committee of Ministers has to deal with a huge volume of non-implemented cases. Article 18 judgment climbs up that urgency ladder, and the Committee of Ministers has done infringement proceedings as Rasul highlighted in the case of Mammadov and have issued interim resolutions. But when we sort of look beyond some of the positive examples, and there are positive examples, that these sort of aggravated, almost a form of a violation, really kind of gathers a lot of attention and a lot of responsiveness. This has also happened in the case of Ukraine and Ukraine's Article 18 judgments can also be told as a success story, I would say.

We still have a few bigger issues. So the two countries, Turkey and Russia, are the major countries of the Council of Europe that have received Article 18 judgments, and haven't yet been so responsive, or as responsive as Georgia or Azerbaijan or Ukraine to these judgments. In relation to Turkey and the Kavala and Demirtaş judgment, when we look at the communication of the government to the Committee of Ministers or their action plans that they all have to submit in the process of the execution of judgment, we see a new kind of a problem in the process. And so it seems that, for example Turkey does not necessarily agree with the judgments of the European Court of Human Rights, or that there was an ulterior purpose at stake in the continued detention of Kavala and Demirtaş, and one of the things that they have raised in relation to this issue, is that they say "well these persons were detained in the context of the trial. And then they were released. And from that detention, and then they were charged with a separate crime. And then they were detained on the base of that new charge. So one of the core arguments of Turkey before the Committee of Ministers in relation to Kavala and Demirtaş is that there is no judgment to execute or there's no one to release from pretrial detention, because these people have been charged and detained anew. So a very interesting and important question is what tools the Committee of Ministers can really employ in cases when the authorities disagree with this aggravated form of finding and even beyond perhaps disagreements; when they actually find some sort of new tactics or strategies to actually not execute these judgments. So there is a lot of success and stories, I think in terms of the detention and responsiveness that these judgments have received. But so far I think the Turkish cases, Kavala and Demirtaş, as well as the complete non responsiveness of Russia in the case of Navalny, also tells us that when states are not willing to cooperate, Article 18 doesn't really deliver a very concrete outcome for applicants and their lawyers.

00:44:58 Sam Knights

Yes, so the more negative aspects of using Article 18. Rasul, I wanted to come back to you and ask you whether you think there are risks involved in using Article 18 in in some of the cases in Azerbaijan, and perhaps how you see Article 18 being used in in future cases in Azerbaijan. Do you think it could be used a lot more going forward?

00:45:34 Rasul Jafarov

Certainly there are some risks. I agree with my colleague that some countries, they do their best to ignore the judgments as much as possible. That's clear.

But at the same time we also need to understand that not all countries have the same tools. I wouldn't say that for example Azerbaijan will be ready to leave the Council of Europe, but maybe in the Russia case it's possible, and they wouldn't care about it much if in the end they decided to leave without implementing the execution of a judgment. So what I want to say is that the risks exist, and this is more political risk, that the countries at the end of the day, they could decide that they are just leaving the Council of Europe, and the obligations and commitments under the European Convention. So this is the number one risk, in my opinion, for some of the countries, particularly Russia, maybe even Turkey, I'm not sure, but unfortunately, it's also possible. I hope it will not happen, but if we're talking about the risk, then this kind of risk exists in my opinion. With regard to Azerbaijan, I think the cases, Article 18 judgments, are also important from a moral point of view. The political prisoners, and those who are arrested under political motivations, they feel in some way some kind of support in these kind of cases. They realize that everyone in the country realizes that this case is probably political, and despite all the propaganda and blackmailing materials in the media and social networks, the person who is behind bars, he or she receives a kind of an acquittal decision by the judgment of the European Court. So from my point of view, it is a very important. I would expect that there will be more judgments because until 2018, and including 2018, we had a huge number of politically motivated cases. We can talk about the cases of journalists, political activists, members of the opposition parties, and most of these cases either have already been communicated to the government of Azerbaijan by the Court and now we are expecting their judgments, or the communication will start soon between the Court and the government. So that's why I believe there will be more judgments of Article 18 judgments, because the number of cases since 2013, as I mentioned in my answer to the first question, you asked, dramatically increased, especially after January of 2013, when the parliamentary assembly did not manage to adopt the resolution on political prisoners in Azerbaijan. Then journalists and experts dug into this issue and provided information that it had happened as a result of huge corruption and mechanisms that existed in Council, in the Parliamentary Assembly, so the government of Azerbaijan in 2013, they felt they had assurances that they can start this massive crackdown. So between 2013 and 2019, there was a group of politically motivated cases and I think we can expect more cases.

00:50:55 Sam Knights

Very interesting. I think we've got time for two short questions before we close. First of all, Phil, a question to you. Are there equivalent provisions to Article 18 in other international human rights instruments, we've obviously got some protection in domestic law, but I'm interested in what else there is in the international arena that does a similar job to Article 18.

00:51:26 Philip Leach

That's a really interesting question, Sam, but there isn't anything that's really equivalent to this. It's quite a unique provision across international human rights and regional human rights systems. And it's really one

of the areas where Europe, I think, has led, because it has this specific provision that that the others don't.

00:51:54 Sam Knights

And Başak, the final question to you. We've heard a lot in the course of this session about the use of Article 18 against the states in the former Soviet Union and against Turkey, but has it been used against other states and if not, why not?

00:52:23 Başak Çalı

So the applicants from the older Council of Europe or smaller Western Council of Europe tried to use Article 18 on many occasions, but they haven't really succeeded in the past, and now that we see in the past two decades that Article 18 has really become a very important provision to really point to sort of authoritarian strategies, the influence of the Executive on the judiciary, the stifling of pluralism and democracy, so this has really been the context in which Article 18 has been used so far. So we don't have any judgments in relation to other contexts that Article 18 may be used. My sort of take on the question will be why not? Because as a Phil has highlighted, the use of Article 18 is about raising the stakes of a very particular issue, and that doesn't necessarily have to be maybe the authoritarian sort of practices, the rise of crackdowns on opposition. And so there may be some opportunities to think about, ulterior purposes in other contexts. And, for example, one context that comes to my mind is migration control practices and so on. But to my knowledge, the context in which Article 18 has been used so far has really being in relation to anti-democratic practices that go against the very basics of rule of law protection so far.

00:54:13 Sam Knights

Thank you to all, it's been a really fascinating 55 minutes and really illuminating as well. So we've got a lot of food for thought. Thank you all for listening to this EHRAC podcast. If you want more information on Article 18, you can read the written EHRAC guide on litigating Article 18 cases which is available on EHRAC's website and the Court itself has also published a guide, and very importantly if you want to support EHRAC's amazing work you can do so with a donation, small or large, and you can find the link to donate on the homepage of the EHRAC website on www.ehrac.org.uk or by visiting committedgiving.uk.net/middlesexboard/public/. Thank you all very much.

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