The right of journalistic newsgathering during demonstrations

By Dirk Voorhoof and Daniel Simons

In a case about a Ukrainian journalist being arrested during an anti-globalisation protest in Russia, the European Court of Human Rights (ECtHR) in Butkevich v. Russia (13 February 2018) has clarified that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom. The ECtHR found that the arrest, prosecution and conviction of the journalist had violated his right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR). The ECtHR also found violations of Article 5 § 1 (right to liberty) and of Article 6 § 1 (right to a fair trial). This blog focuses on the aspects of journalism and freedom of expression under Article 10 ECHR, and in relation to the right of peaceful demonstration under Article 11 ECHR. The judgment offers important support to journalists covering public events, demonstrations and police actions, especially after the disappointing outcome in the case of Pentikäinen v. Finland.

The facts

The case concerns the arrest and conviction of Maksim Aleksandrovich Butkevich, who was covering an anti-globalisation protest in July 2006 in St Petersburg. While observing and photographing the demonstration and police efforts to disperse it, two officers approached the journalist and ordered him to cease his “unlawful actions”. As Butkevich continued taking pictures, he was taken to the police station and formally detained. Administrative offence proceedings were brought against him for disobeying a lawful order. The same evening he was heard by a judge, convicted as charged, and sentenced to three days’ detention. Two days later the appeal court reduced this sentence to two days and ordered his immediate release.

Butkevich lodged a complaint before the ECtHR, alleging that his administrative arrest and delayed release from detention had been unlawful (breach of Article 5 § 1 ECHR); that he had not been given a fair trial by an impartial court (breach of Article 6 § 1 ECHR) and that his freedom of expression had been interfered with in an unlawful and disproportionate manner (Article 10 ECHR). Third-party submissions were made by the Ukrainian Government and by the Media Legal Defence Initiative, ARTICLE 19, and the Mass Media Defence Centre.

The Court’s judgment

The Government’s position was that while Butkevich considered himself as a journalist, he had in fact taken part in an unlawful event as a demonstrator. The ECtHR however agrees that Butkevich was acting as a journalist, and that the case should be analysed under Article 10 ECHR (freedom of expression). While he was not on a journalistic assignment from any media outlet on the day, the ECtHR considers it relevant that his aim was to collect information and photographic material relating to a public event and
to impart them to the public via means of mass communication. Whether Butkevich identified himself as a journalist in a timely and adequately manner may also be pertinent, but to assess the justification for the authorities’ actions, rather than to his status as journalist.

Accordingly, the ECtHR does not examine whether the measures taken against Butkevich are compatible with Article 11 ECHR (freedom of peaceful assembly). Nevertheless, it does find it appropriate to take the general principles established under Article 11 into account in this case, given the close link between freedom of expression and assembly in cases relating to public events.

As regards the pre-trial deprivation of Butkevich’s liberty in the police station, the ECtHR refers to its findings in respect of Article 5 § 1 ECHR, in which the ECtHR emphasizes that it was incumbent on the domestic authorities to ascertain that the deprivation of liberty was “reasonably considered necessary” in the circumstances of the case “to prevent [a person from] committing an offence or fleeing after having done so”. It also considers that the Russian authorities should have borne in mind that the measure had been applied in the context of an administrative offence and, possibly, in the context of the exercise of a fundamental right or freedom, such as freedom of expression or freedom of peaceful assembly. As the Russian authorities had not provided any justification for the administrative arrest of Butkevich, the ECtHR concludes that this aspect of interference with the journalist’s right to freedom of expression was not “prescribed by law” within the meaning of Article 10 ECHR.

With regard Butkevich’s prosecution and sentence of administrative detention, the ECtHR accepts the legality of the interference pursuing the legitimate aim of prevention of disorder, but it does not accept that these were necessary in a democratic society, in accordance with Article 10 § 2 ECHR. The ECtHR recognises that the media fulfil an important task in a democratic society, when providing information on the authorities’ handling of public demonstrations and the containment of disorder. Therefore any attempt to remove journalists from the scene of demonstrations must be subject to “strict scrutiny”. This also applies to ensuing measures, such as prosecution for an alleged offence.

While the ECtHR notes that the legitimate aim of preventing disorder weighed heavily in Pentikäinen v. Finland (see also our blog), it is of the opinion that the present case was different in this respect, as there was nothing in the case file confirming that the demonstration was not peaceful or had turned violent.

According to the ECtHR the domestic authorities should also have questioned and investigated, already at the pre-trial stage, whether Butkevich’s alleged actions were excusable or otherwise mitigated, given his argument that he had been acting as a journalist. As the ECtHR is of the opinion that the domestic decisions did not contain an adequate assessment of this aspect of the case, and as the Russian authorities had not produced any relevant and pertinent reasons in order to justify the prosecution and conviction of Butkevich, it comes to the conclusion, unanimously, that the journalist’s
right to gather information has been violated. The ECtHR finally considers that it was not necessary in the present case to make further findings concerning Butkevich’s removal from the venue of the demonstration.

In application of Article 41 ECHR, the ECtHR awarded Butkevich 7,000 EUR in respect of non-pecuniary damage, and 2,000 EUR for costs and expenses.

Comments

The judgment in *Butkevich v. Russia* offers important support to journalists covering demonstrations and police actions, especially after the disappointing outcome in the case of *Pentikäinen v. Finland*. In that ruling, the ECtHR already stated that any attempt to remove journalists from the scene of demonstrations must be subject to “strict scrutiny”, but a majority of the Court seemed to reserve the closest scrutiny for the applicant’s conduct, faulting him for ignoring police dispersal orders and for not wearing distinctive clothing.

In this case, the European Court’s emphasis is on the fact that the gathering of information is an essential preparatory step in journalism, solidly protected as a part of press freedom, and on the fact that media fulfil an important task in a democratic society when providing information on the authorities’ handling of public demonstrations.

The judgment also implies that it is not required for journalists to wear distinctive clothing or press badges during public gatherings in order to claim Article 10 ECHR protection. Importantly, the Court leaves no doubt that Butkevich was acting as a journalist, even though he was not on assignment for a media outlet. It considers his intention to collect and disseminate information and photographic material decisive. This reflects a functional and open approach to the notion of a journalist, comparable with the Court’s approach in other cases in which it attached particular weight to the applicant’s role as a journalist or as a social watchdog or non-governmental organisation, informing or reporting about matters of public interest (see *Magyar Helsinki Bizottság v. Hungary*, GC 8 November 2016, §§ 164-168).

The Court’s recognition that Article 10 ECHR must be read in light of Article 11 ECHR is also a helpful development. A relevant principle developed under Article 11 is that the unlawfulness of a peaceful assembly does not justify its dispersal. Translated to Article 10 ECHR, this principle implies that authorities should not interfere with the work of journalists merely on the grounds that the assembly they are documenting is considered unlawful. The ECtHR does not draw this connection in *Butkevich v. Russia*, but has opened the door to doing so in future. A pending case to watch is *Bryan and Others v. Russia*, in which two of the applicants are freelance journalists who were charged with piracy alongside Greenpeace activists, after joining their boats during a protest at sea. Furthermore, the fact that a demonstration is unlawful or turns into riots and police action, might even increase the relevance of media coverage and journalistic reporting. It is a missed opportunity however that the Court only focussed on the prosecution and conviction of the journalist and that after finding a violation of Article 10 ECHR relating
these aspects, it considered that it did not need to make further findings concerning Butkevich’s removal from the venue of the demonstration.

Finally we like to draw the attention on the third-party intervention by the Ukrainian government, in support of the applicant journalist claiming protection under the ECHR. This is probably not the kind of third party interventions by state parties the drafters of the Draft Copenhagen Declaration of 5 February 2018 had in mind calling upon the states parties to “increase coordination and co-operation on third-party interventions” (para. 40). But there is certainly room for more of this kind of third-party interventions by state parties in support of (alleged) victims of violations of the European Convention’s rights and freedoms. Paraphrasing the Court’s opinion on the draft Copenhagen Declaration, the option for this kind of third-party interventions by states “does not appear to be used to its fullest potential” (para. 16, see also Strasbourg Observers blogs on this issue).

Judgment by the European Court of Human Rights, Third Section, case of Butkevich v. Russia, Application no. 5865/07 of 13 February 2018.

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