OVERVIEW OF THE ECHR CASE-LAW ON THE MATTER

(ATTACHMENT 1 TO THE OBSERVATIONS BY THE APPLICANT TO THE CASES OF 23818/04 SROO SUTYAZHNIK (II) V. RUSSIA 42665/06 SROO SUTYAZHNIK (III) V. RUSSIA)

THE RIGHT TO FREEDOM OF ASSOCIATION UNDER ARTICLE 11 OF THE CONVENTION APPLICABLE IN 23818/04 SROO SUTYAZHNIK (II) V. RUSSIA 42665/06 SROO SUTYAZHNIK (III) V. RUSSIA

Article 11 has been cemented by several cases, which (the Court still use to explain great principles it has developed over the years.)**.** Article 11 is constructed of two parts; one that gives States positive obligations, the other that allows some limits.

Below is an analysis of different decisions concerning Article 11. It is based on the case-law that concern different groups or associations such as political parties, associations and non-governmental organisations. The aim of the analysis is to provide an overview of elements on which the Court focused, when deciding on a violation of Article 11 in circumstances similar to those of the present case.

A) GENERAL PRINCIPLES AND LITIGANT'S ATTITUDE

GENERAL PRINCIPLES

In *Siridopoulos*, the Court points out that the right to freedom of association is an inherent part of the right set forth in Article 11 :

> citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions[1].

APPLICANT'S ATTITUDE

In most cases, the Court attaches importance to applicants' overall attitude. In *Ramazanova*[2], the government held that there was actually no true denial of registration, but only delays due to the

1 *Sidiropoulos and Others v. Greece*, 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 40.
Mentioned in : *Bekir-Ousta and Other v. Greece*, *Ramazanova and Others v. Azerbadjian*, *Koretskyy and Others v. Ukraine*, *Tebieti Mühafize Cemiyyeti et Israfilov c. Azerbaïdjan*, *The Moscow Branch of Salvation Army v. Russia*, *Jehovah's witnesses of Moscow and Others v. Russia*, *Church of Scientology Moscow v. Russia*, *Republican Party of Russia v. Russia* [Sidiropoulos].

2 *Ramazanova and Others v. Azerbaijan*, no. 44363/02, 1 February 2007 [Ramazanova].

organisation's failure to comply with the legal requirements. The Court underlined that those delays, always based on different procedural reasons, were unlawful and could be assimilated to a refusal de facto. Additionally, the Court was sensitive to the fact that the government itself failed to comply with the time-limit set forth in its domestic law. Having a statutory time-limit of 5 to 10 days to reply after the reception of a request, it took several months for the Ministry to provide a response. The government held that delays were due to an overwhelming pressure on the system. The Court stated that it is the duty of the authorities to ensure that they comply with their domestic law. In so doing, the Court also paid attention to the applicants' overall conduct:

> Having regard to the facts of the case, the Court observes that, each time the registration documents were returned to the applicants, they rectified the deficiencies noted in the Ministry's letters and re-submitted a new registration request in a prompt manner [...]. On the other hand, the Ministry delayed the response to each of the applicants' registration requests for several months. Accordingly, it cannot be disputed that the delay of almost four years in the association's registration is to a large extent attributable to the Ministry's failure to respond in a timely manner[3].

In *Tebieti*[4], the Court recognized that the applicants were negligent. Seven years passed and the NGO hadn't stopped to breach the law. Nevertheless, the Court recognized its manifest goodwill, having held an assembly and shown positive signs of compliance. The Court stated that the authorities should have taken it into account in the determination of the measure:

> Nevertheless, in assessing whether the authorities' subsequent decision to apply the sanction of involuntary dissolution was justified and proportionate, it cannot be overlooked that the Association actually attempted to rectify the problem by convening a general assembly [...]. Due account should have been taken of this intention when deciding upon the necessity of the interference with the Association's rights in the present case. The Association should have been given a genuine chance to put matters right before being dissolved[5].

This comforted the Court in its conclusion that the interference was disproportionate and unnecessary. The authorities gave several warnings, giving sometimes 5 or 10 days to rectify the situation, which shows, for the Court, bad faith coming from the Ministry, who did not give a real chance of compliance.

In *AGVPS-Bacau*[6], the Court noted that the applicants were not cooperative with the authorities and responsible for the multiple delays. The Court added that the authorities showed appreciable good faith, by sending warnings announcing the dissolution if no measures were taken, and by joining on the late the complaint lodged by a competitive association. The interference was, in light of all those reasons, proportionate in a democratic society.

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3 *Ibid*., § 57.

4 *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009 [Tebieti].

5 *Ibid*., § 76.

6 *AGVPS-Bacau v. Romania*, no 19750/03, 9 November 2010 [AGVPS-Bacau].

In *The Moscow Branch of the Salvation Army*[7], the reasons given for denial of re-registration were not legally based. The Justice Department refused to process because *inter alia* the applicant was ineligible since its founders were foreign nationals, while the District Court noted the applicant's failure to describe adequately its faith and objectives. This led the European Court to conclude to the arbitrariness of the authorities' decisions :

> In view of the Court's finding above that the reasons invoked by the Moscow Justice Department and endorsed by the Moscow courts in order to deny re-registration of the applicant branch had no legal or factual basis, it can be inferred that, in denying registration to the Moscow branch of The Salvation Army, the Moscow authorities did not act in good faith and neglected their duty of neutrality and impartiality[8].

In *Jehovah's witnesses of Moscow*[9], the Court even asserted that by not giving reasons on why the applications were incomplete, the Justice Department had acted arbitrarily. In *Church of Scientology Moscow*, the Justice Department refused at least four applications on the same grounds, but it did not specify why it deemed the applications incomplete:

> The Court notes the inconsistent approach of the Moscow Justice Department on the one hand accepting that it was competent to determine the application incomplete but on the other hand declining its competence to give any indication as to the nature of the allegedly missing elements. Not only did that approach deprive the applicant of an opportunity to remedy the supposed defects of the applications and re-submit them, but also it ran counter to the express requirement of the domestic law that any refusal must be reasoned. By not stating clear reasons for rejecting the applications for re-registration submitted by the applicant, the Moscow Justice Department acted in an arbitrary manner. Consequently, the Court considers that that ground for refusal was not "in accordance with the law"[10].

B) LIMITATIONS

In *Siridopoulos*, the Court develops on its specific role in the process of ensuring Article 11's respect and application :

> When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts[11].

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7 *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, 5 October 2006.
8 *Ibid.*, § 97.
9 *Jehovah's Witnesses of Moscow and Other v. Russia*, no. 302/02, 10 June 2010, § 171 [Jehovah's Witnesses of Moscow].
10 *Church of Scientology Moscow v. Russia*, no. 18147/02, 5 April 2007 [Church of Scientology Moscow], § 91.
11 *Sidiropoulos, supra* note 1.

In *Gorzelik*, the Court held that freedom of association "is not absolute":

> however, and it must be accepted that where an association, through its activities or the intentions it has expressly or implicitly declared in its programme, jeopardises the State's institutions or the rights and freedoms of others, Article 11 does not deprive the State of the power to protect those institutions and persons[12].

Nonetheless, according to the Court, "that power must be used sparingly":

> exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a “pressing social need”; thus, the notion “necessary” does not have the flexibility of such expressions as “useful” or “desirable”[13].

PRESCRIBED BY LAW

Limitations to Article 11 should be "prescribed by law". In *Church of Scientology Moscow*, the Court defined this expression:

> According to the Court's settled case-law, the expression “prescribed by law” requires that the impugned measure should have a basis in domestic law and also that the law be formulated with sufficient precision to enable the citizen to foresee the consequences which a given action may entail and to regulate his or her conduct accordingly[14].

Therefore, the Court is concerned about imprecise, vague or unclear law that could leave a wide margin of discretion to the State, which must protect moral and physical persons from arbitrary decisions.

In *Ramazanova*[15], an NGO working in the field of human rights’ defence filed six requests for registration, all rejected on different grounds. The Court observed that the law did not specify the time within which the government must respond to a request of information, while the latter would enable the applicants to re-apply in accordance with government requirements. Therefore, it was impossible for the applicants to have a foreseeable legal ground to stand on: "The law did not afford the applicants sufficient legal protection against the arbitrary actions of the Ministry of Justice[16]".

In *Koretskyy*[17], the Court found that the provisions of the Act regulating the registration of associations, was too vague to be "foreseeable" enough and left an excessively wide margin of appreciation to the

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12 *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004, § 94.
Mentioned in *Bekir-Ousta and Other v. Greece*, *Koretskyy and Others v. Ukraine*, *Tebieti Mühafize Cemiyyeti et Israfilov c. Azerbaïdjan*, *The Moscow Branch of Salvation Army v. Russia*, *Jehovah's witnesses of Moscow and Others v. Russia*, *Church of Scientology Moscow v. Russia*.

13 *Ibid*., § 95.

14 *Church of Scientology Moscow*, *supra* note 10, § 92.

15 *Ramazanova*, *supra* note 2.

16 *Ibid*., § 66.

17 Koretskyy and Others v. Ukraine, no. 40269/02), 3 April 2008 [Koretskyy].

authorities in deciding whether a particular association could be registered or not. In such a situation, the judicial review procedure available to the applicants could not prevent from arbitrary refusals:

> The Act does not specify whether that provision refers only the substantive incompatibility of the aim and activities of an association with the requirements of the law [...] the Court notes that the provision at issue allowed a particularly broad interpretation and could be read as prohibiting any departure from the relevant domestic regulations of associations' activities[18].

In *Tebieti*[19] the Court followed the applicants' claim, stating that the law was not precise and specific enough, leaving the authorities, a too broad discretion on the proper way to apply the law. According to the Court:

> The applicants argued that the interference was not prescribed by law, because the *NGO Act*, being vague and imprecise, gave the Ministry of Justice an unlimited discretion to issue warnings to public associations without specifying clearly the scope of such discretion. This situation allowed the Ministry to request dissolution of an association for anything that it deemed to be a breach of the requirements of the NGO Act, even if it was relatively minor. Therefore, the NGO Act was not formulated with sufficient precision, which made it impossible to foresee, to a reasonable degree, the specific actions (or omissions) that could entail the forced dissolution of the Association[20].

Moreover, the domestic law provided clear information about the possible sanctions related to violations by NGOs. The European Court nevertheless found it vague and unreliable because it permitted the Ministry to decide what it considered "compatible with the law", which led to wide discretion.

LEGITIMATE AIM

In *AGVPS-Bacau*[21], the Court underlined that the domestic law which pursued the purpose of controlling and regulating the activities of hunting and fishing was clear enough to ensure a good management of natural resources and protection of nature. Therefore, the law pursued a legitimate aim.

NECESSARY IN A DEMOCRATIC SOCIETY

The Court assessed at several times how important it is for a democracy to supervise and, *to a certain extent*, limit NGOs in their civil rights and obligations, within a legal framework. In return, the Court raised the issue that States have the equivalent responsibility to ensure proportionate measures towards a possible breach. Therefore, its domestic law must be flexible enough to sanction the association correctly and proportionately when procedural requirements can be easily fixed or when they are not related to important questions of public order or national interests.

In *Bekir-Ousta*[22], Greek authorities refused to register the organisation because the Muslim minority it represented was not recognized and its official name was controversial. The Court noted that even if the aim pursued by the government could be considered reasonable, a simple refusal couldn't be an appropriate

18 *Ibid*, § 48.
19 *Tebieti*, *supra* note 4.
20 *Ibid*., § 48.
21 *AGVPS*, *supra* note 6.
22 *Bekir-Ousta and Other v. Greece*, no 35151/05, 11 October 2007.

remedy in a democratic society. In other words, the Court criticized the decision of the national courts, in so far as they are based only on suspicions of and intentions attributed to the association's founders. Moreover, the Court held that the large discretion held by Greek authorities amounted to an arbitrary intervention in the freedom set forth in Article 11 of the Convention.

The City Department of Kyiv informed the applicants, in the case of *Koretskyy*[23] of its refusal to register the Civic Committee on the ground that its Charter had not been drafted in accordance with the domestic law. The Committee redrafted its articles, but partially, and did not fully comply with legal requirements. The Court considered that the Civic Committee's ability to function properly without legal entity status would have been impeded (it could not carry out publishing activities on its own, publicise its activities, lobby the authorities about environmental protection, etc.). The Court therefore concluded that the Ukrainian authorities had not given relevant and sufficient reasons for their refusal for registration, which had not pursued a "pressing social need", in violation of Article 11. Thus, again, administrative refusals lying on procedural deficiencies are no reason, according to the Court, to keep an organisation from starting its activities.

The case of *APEH*[24] is an example where the Court argues in favour of the State. The applicants attempted to form an alliance dedicated to taxpayer's defence and included in its name the legal Hungarian authority in charge of taxation, the APEH. A regional court refused the registration, claiming that the applicant never obtained the approval of the APEH to use their name, and that it could lead to defamatory consequences. The Court said that the interference concerned directly the name of the association, not its activities. Therefore, the interference with the applicant's freedom of association was proportionate.

Finally, the Court stated in *Tebieti*[25] that it was legitimate for the State to provide a legal framework for NGOs and to establish clear rules for their taxe benefits, as long as it do so in a manner that permits flexibility. Still, its powers of intervention do not extend to the internal management of the NGO.

THE RIGHT SET FORTH IN ARTICLE 6 REGARDING NON-ENFORCEMENTS OF JUDGMENTS APPLICABLE IN 23818/04 SROO SUTYAZHNIK (II) V. RUSSIA 42665/06 SROO SUTYAZHNIK (III) V. RUSSIA

A)GENERAL PRINCIPLES

23 *Koretskyy, supra* note 17.
24 *APEH Üldözötteinek Szövetsége and Others v. Hungary* (dec.), no. 32367/96, 31 August 1999.
25 *Tebieti*, *supra* note 4.

Article 6, the right to a fair hearing, enshrines several principles. However, it is only a specific part of it that interests us: the enforcement of a judgement. Nonetheless, it is an inherent part of the right to a fair trial: its guarantees go beyond the trial phase and continue to apply to the execution phase.

In *Hornsby v. Greece*[26], the government maintained that the applicants' complaint did not fall within the scope of Article 6, which guaranteed only the fairness of the "trial" in regards to the proceedings conducted, that is the proceedings conducted before the judicial authority alone. The administrative authorities' delay in complying with the mentioned judgments of the Supreme Administrative Court was an entirely different question from the judicial determination of the existence of those rights. Execution of the judgments of the Supreme Administrative Court fell within the sphere of public law and, in particular, of the relations between the judicial and administrative authorities, but could not in any circumstances be deemed to come within the ambit of Article 6; such a conclusion could not be deduced from either the wording of that Article or even the intentions of those who had drafted the Convention[27].

The Court stated that, according to its established case-law, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 had to describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would likely lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6; moreover, the Court has already been accepting this principle in cases concerning the length of proceedings[28].

The above principles are of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights. By lodging an application for judicial review with the State's highest administrative court the litigant seeks not only annulment of the impugned decision but also and above all, the removal of its effects. The effective protection of a party to such proceedings and the restoration of legality presuppose an obligation on the administrative authorities' to comply with a judgment of that court. The Court observed in this connection that the administrative

26 *Hornsby v. Greece*, no. 18357/91, 19 March 1997.
27 *Ibid*., § 39.
28 *Ibid*., § 40.

authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose[29].

29 *Ibid*., § 41