IN THE EUROPEAN COURT OF HUMAN RIGHTS

APP. NO. 31674/20

BETWEEN

YEGOR SERGEYEVICH ZHUKOV

Applicant

- and -

THE RUSSIAN FEDERATION

Respondent

THIRD-PARTY INTERVENTION SUBMISSION BY

ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION

Submitted on 10 June 2022

INTRODUCTION

1. This third-party intervention is submitted on behalf of *ARTICLE 19: Global Campaign for Free Expression* (ARTICLE 19). We welcome the opportunity to intervene in this case, by leave of the President of the Court, granted on 28 September 2021 with the extension granted on 20 May 2022, pursuant to Rule 44 (3) of the Rules of Court.

2. The present case concerns the criminal conviction of the Applicant under Russia's anti-extremism legislation for publishing four videos on his YouTube channel calling on its viewers to use all possible nonviolent means to oppose the government. More specifically, the Applicant's Youtube publications were considered by the Respondent to constitute "extremist activit[ies]" in accordance with Section 1 of the Federal Law of 25 July 2002 no. 114-FZ on Suppression of Extremist Activities (Suppression of Extremism Act). As implied in the second question communicated to the parties in this case, the Respondent found that the videos illegally targeted 'representatives of the current government' which were considered a protected 'social group' under the relevant domestic legislation.

3. The case raises critical issues surrounding the right of individuals to freely protest their government and provides the Court with an opportunity to express itself on whether the European Convention on Human Rights (ECHR) allows States to restrict speech targeting government representatives with reference to 'hate speech' or anti-extremism legislation. ARTICLE 19 submits that there is no basis in international law to treat government representatives as a protected group. We are concerned that certain States are instrumentalising expansive interpretations of the notion of protected group to silence protesters and criminalise criticism directed against public officials. Such practices are in clear breach of well-established freedom of expression principles that political speech requires enhanced protection and that politicians and public officials are subject to wider limits of acceptable criticism than private individuals.

4. As per the instructions of the Court, in this submission, ARTICLE 19 focuses on providing an outline of the meaning and scope of the term 'protected groups' according to the international standards on freedom of expression.

5. Prior to addressing the scope of the term 'protected groups', ARTICLE 19 wishes to highlight that international human rights standards recognise that incitement to violence and hatred constitutes a serious threat to human rights and social cohesion. The right to freedom of expression can be restricted where it presents a serious danger for others and for their enjoyment of human rights.[1] On that basis, restrictions of certain categories of 'hate speech' are permissible. However, the threshold for such restrictions is high – it is well-established, including in this Court's case law, that the right to freedom of expression extends to controversial, disturbing or even shocking speech.[2] Moreover, States must not misuse provisions against terrorism and incitement to silence critics or discourage political pluralism.

6. 'Hate speech' is a broad term that has no definition under international human rights law. Indeed, international and regional human rights instruments imply varying standards for defining and limiting 'hate speech'. These variations are also reflected in differences in domestic legislation. In the lowest common denominator, 'hate speech' often refers to an expression of discriminatory hate towards certain people without entailing a particular consequence. In a

[1] *See* Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on hate speech and incitement to hatred, A/67/357, 7 September 2012, para 37.
[2] *See, eg, Handyside v United Kingdom* (App. no. 5493/72), para 49; *Giniewski v France* (App. no. 64016/00), para 43.

limited number of severe forms of 'hate speech', international law requires explicitly that they be prohibited. These include direct and public incitement to commit genocide (as defined under international criminal law[3]) and advocacy of discriminatory hatred that constitutes incitement to discrimination, hostility, or violence (under Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR)[4]). Importantly, any restrictions on speech (whether mandated by Article 20(2) ICCPR or not) must satisfy the requirements of legality, legitimacy, necessity and proportionality as established under Article 19(3) ICCPR and Article 10(2) ECHR. This means that 'hate speech' should only be restricted if it reaches a certain threshold of severity. In this context, the former Special Rapporteur on Freedom of Expression has emphasised that Article 20(2) ICCPR allows for administrative and civil sanctions and that only extreme instances of incitement to hatred should be criminalised, taking into account the six-part test outlined in the United Nations Rabat Plan of Action.[5]

7. We invite this Court to draw on the six-part threshold test set out in the Rabat Plan to assess whether the actions of the Applicant warranted a criminal conviction.[6] Without addressing the merits and the facts of the case, we are extremely concerned by the fact that the Applicant was criminally prosecuted after calling for peaceful political protest. Unfortunately, the present case is no exception. ARTICLE 19's assessment of cases prosecuted under legislation such as the Suppression of Extremism or Article 282 of the Russian Criminal Code, has shown that the Respondent has been exploiting these legal instruments to stifle critical voices under the pretext of countering 'hate speech' and extremism.[7]

SUBMISSION

Restrictions of freedom of expression to protect government representatives from "hate speech" have no basis in international law

8. As set out in our introduction, opinions on what constitutes 'hate speech' and under what circumstances it can be prohibited, vary widely. This includes the question of who should be protected by 'hate speech' legislation. While most 'hate speech' laws define protected characteristics, there is no internationally accepted list of characteristics that require special protection. For example:

   - Article 20(2) ICCPR only lists the advocacy of "national, racial or religious hatred";
   - The United Nations' International Committee on the Elimination of Racial Discrimination

[3] *See* The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN Treaty Series, vol. 78, p. 277, Article 3(c); The Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Articles 6 and 25(3)(e).
[4] International Covenant on Civil and Political Rights, 16 December 1966, UN Treaty Series, vol. 999, p. 171.
[5] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *op.cit.*, para 47. The UN Rabat Plan of Action provides guidance on how to balance between Articles 19 and 20 ICCPR. Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence', UN Doc A/HRC/22/17/Add 4, 11 January 2013.
[6] The Rabat Plan of Action suggests a high threshold for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 ICCPR. It outlines a six-part threshold test taking into account the social and political context; status of the speaker; intent to incite the audience against a target group; content and form of the speech; extent of its dissemination; and likelihood of harm, including imminence.
[7] *See* ARTICLE 19, *Rights in extremis: Russia's anti-extremism practices from an international perspective*, 2019.

understands 'hate speech' as "a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society".[8]

- The Council of Europe's Committee of Ministers considers 'hate speech' as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin," and makes reference in its preamble to "groups from different racial, ethnic, national, religious or social backgrounds".[9]

- The Council of Europe's European Commission against Racism and Intolerance (ECRI) describes the protected characteristics for the purposes of 'hate speech' as "'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status".[10]

9. ARTICLE 19 considers that, with sufficient safeguards for freedom of expression, the grounds for protection against 'hate speech' should include all those protected characteristics that appear under the broader non-discrimination provisions of international human rights law, namely in Articles 2 and 26 ICCPR and Article 14 ECHR. These should include but not be limited to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status.[11]

10. Whilst we endorse a wide and, if appropriate, dynamic interpretation of the protected characteristics, these should be objectively justified and reasonable. We submit that this standard is not met for the characteristic of belonging to a 'social group', which the Respondent relies on in the present case.[12] ARTICLE 19 has repeatedly raised concerns about criminalising speech directed against a 'social group' or 'social class'. Unlike characteristics like nationality, disability, or ethnic origin, belonging to a 'social group' is not immutable or in some manner essential to a person's identity. In addition 'social group' and 'social class' are vague categories – where such terms are used without a clear definition they fall short of the legality requirement under international human rights law.

11. We are further concerned that State authorities have exploited legislative provisions countering hatred against 'social groups' to effectively criminalise criticism directed against them. A number of human rights bodies have raised concerns about the dangers of vaguely formulated restrictions to free expression:

    - The Committee on the Elimination of Racial Discrimination said that "[it] observe[d] with concern that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention on the Elimination of All Forms of Racial

[8] UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on combatting racist hate speech, CERD/C/GC/35, 26 September 2013, para 10.
[9] Recommendation No. R (97) 20 of the Committee of Ministers to Member States on 'Hate Speech', 30 October 1997, Scope.
[10] ECRI General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015, Preamble.
[11] *See* ARTICLE 19, 'Hate Speech' Explained – A Toolkit, pp 13 to 14.
[12] The Respondent in fact includes the belonging to a 'social group' in its list of protected grounds in a number of legislations criminalising speech (namely Article 282 of the Russian Criminal Code, Article 20.3.1 of the Code of Administrative Offences and Section 1 of the Suppression of Extremism Act). *See* ARTICLE 19, *Rights in extremis: Russia's anti-extremism practices from an international perspective*, *op.cit.*, p 5.

Discrimination. State parties should formulate restrictions on speech with sufficient precision […]. The Committee stresses that measures to monitor and combat racist speech should not be used as a pretext to curtail expression of protest at injustice, social discontent or opposition".[13]

- ECRI recommended that "prosecutions for [hate speech offences] … are not used to suppress criticism of official policies, political oppositions or religious beliefs".[14]

12. These concerns are by no means abstract. For example, whilst the Respondent seeks to protect individuals belonging to a 'social group', the Republic of Kazhakstan applies a similar concept by criminalising incitement of 'social hatred'.[15] Both Russia and Kazakhstan have interpreted these terms expansively to suppress speech directed against 'public officials' or 'government representatives' – including in the present case. In 2016, Kazakhstan convicted prominent activists of five years imprisonment for exercising their right to protest, finding them guilty of "incitement to social hatred" under Article 174 of the Criminal Code.[16] In 2018, this Court in *Savva Terentyev v Russia* found that the Respondent had violated Article 10 ECHR in a case similar to the present one as it applied the concept of 'social group' to police officers.[17]

13. This Court's findings in *Terentyev* should indeed be instructive for the present case. In *Terentyev*, the applicant was prosecuted in criminal proceedings and given a suspended prison sentence for statements that, according to the Russian authorities, "incited hatred and enmity against police officers as a 'social group' and called for their 'physical extermination'". The Court denied that it was "necessary in a democratic society" to restrict Terentyev's freedom of expression on the basis that he had incited violence against police officers as a social group. Despite this Court's finding that the statements in question were "particularly aggressive and hostile in tone" (the applicant had called for incineration of "infidel cops" in "Auschwitz-[like]" ovens), it held that in the context, the statements had to be understood as a provocative metaphor and "a scathing criticism of the current state of affairs in the Russian police".[18] Other relevant findings were:

    - Terentyev's remarks did not attack personally any identifiable police officers but rather targeted the police as a public institution;[19]

    - Civil servants acting in an official capacity are subject to wider limits of acceptable criticism than ordinary citizens, even more so when such criticism concerns a wholly public institution;[20] and

    - The Court's rejection of the notion that the police officers required enhanced protection as a group: "The Court further considers that the police, a law-enforcement public agency, can hardly be described as an unprotected minority or group that has a history of oppression or inequality, or that faces deep-rooted prejudices, hostility and discrimination, or that is vulnerable for some other reason, and thus may, in principle, need a heightened protection

[13] UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on combatting racist hate speech, para 20.
[14] ECRI General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015, Recommendation 10.c.
[15] Article 174 of the Kazakh Criminal Code. *See* for ARTICLE 19's analysis of the draft version of the Code, *Kazakhstan: Draft Criminal Code*, 2013.
[16] *See* ARTICLE 19, Kazakhstan: Land Reform Protesters Must Be Released, 30 November 2016.
[17] *Savva Terentyev v Russia* (App. no. 10692/09).
[18] *Ibid.*, para 71.
[19] *Ibid.*, para 75.
[20] *Ibid.*, para 75.

from attacks committed by insult, holding up to ridicule or slander."[21]

14. We agree with this Court's finding that members of the police, just as government representatives, cannot be considered individuals who as a group have experienced discrimination, exclusion or oppression. The aim of 'hate speech' legislation should be to protect the rights of vulnerable groups[22] and not to shield the most powerful from criticism. Therefore, the status of individuals associated with the State, such as public officials, is not a protected characteristic on which discrimination claims or the characterisation of 'hate speech' can be based. Limiting the ability to criticise and protest public authorities, would undoubtedly harm those groups and individuals that are in fact victimised and that international human rights law intends to protect.

15. Accepting that government representatives require enhanced protection would further undermine two well-established and fundamental freedom of expression principles. First, as this Court has consistently emphasised, protecting freedom of political speech is of particular importance and there is little scope under Article 10(2) ECHR for restrictions on political speech or on the debate of questions of public interest.[23] In *Feldek v Slovakia*, this Court found that:

> The promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.[24]

16. Second, it is equally well-established that public officials are legitimate subjects of criticism and political opposition and are expected to tolerate more, not less, criticism than ordinary citizens.[25] This principle has been reiterated many times in the Court's jurisprudence. In *Lingens v Austria*, the Court said:

> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[26]

17. In *Thoma v Luxembourg*, the Court made it clear that the same principle applies to public officials:

> Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.[27]

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[21] *Ibid.*, para 76.

[22] *See, eg,* ECRI General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015, Preamble.

[23] *See also* in the context of the ICCPR, UN Human Rights Committee, General Comment No. 34, CPR/C/GC/3, 12 September 2011, para 38.

[24] *Feldek v Slovakia* (App. no. 29032/95), para 83. *See* similarly, among many other authorities, *Lingens v Austria* (App. no. 9815/82), para 42; *Castells v Spain* (App. no. 11798/85), para 43; *Wingrove v United Kingdom* (App. No. 17419/90), para 58.

[25] General Comment No. 34, para 38.

[26] *Lingens v Austria, op.cit.*, para 42.

[27] *Thoma v Luxembourg* (App. no. 38432/97), para 47.

18. The African Court of Human Rights[28] and Inter-American Court of Human Rights[29] have employed the same rationale that formed the basis for this Court's judgments in *Lingens v Austria* and *Thoma v Luxembourg* and found that statements concerning public officials and other individuals who exercise functions of a public nature should be the subject of a lesser degree of interference. It is also notable that the Respondent's own Supreme Court endorsed this principle in Resolution no. 11 on Court Practice in respect of Criminal Cases concerning Criminal Offences of Extremist Orientation.[30]

19. To conclude, we invite the Court to reject the Respondent's argument that 'representatives of the current government' merit enhanced protection. Applying 'hate speech' legislation to expression targeting government representatives, politicians or civil servants of any rank is in breach of international freedom of expression standards and can only serve to silence critics and political opposition. Such an interpretation would also contravene consistent case law stating that public officials are legitimate subjects of scrutiny and therefore need to tolerate higher levels of scrutiny than other citizens.

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[28] *Lohé Issa Konaté v Burkina Faso* (App. no. 4/2013), para 155.
[29] *See, eg, Canese v Paraguay,* Judgment of 31 August 2004, para 98, and *Herrera-Ulloa v Costa Rica*, Judgment of 2 July 2004, para 128.
[30] Russian Supreme Court, Resolution No. 11 on Court Practice in respect of Criminal Cases concerning Criminal Offences of Extremist Orientation (in Russian), para 7.