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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE OFFICIAL WARNING
ADDRESSED ON 13 JANUARY 2010
TO THE BELARUSIAN ASSOCIATION OF JOURNALISTS
BY THE MINISTRY OF JUSTICE
OF BELARUS**

by

Mr Pieter van DIJK (Member, The Netherlands)

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WARNING BY THE MINISTER OF JUSTICE OF BELARUS TO THE BELARUSIAN ASSOCIATION OF JOURNALISTS (THE GA BAZh)

Introductory remark

The present provisional observations are based upon the scarce information available at the time. It may, therefore, well be that some of them have been inspired by a misunderstanding of the facts. The visit to Belarus planned for May may offer the opportunity to clarify the background and the details of the warning.

According to the available information, the warning is based upon the fact that a member of the Belarusian Association of Journalists (the GA BAZh), when performing journalist activities, introduced himself as a journalist and, by way of identification, showed a document issued by the GA BAZh displaying the word "PRESS". According to the Minister of Justice, the issue and use of such a document amounted to a violation of several provisions of the Mass Media Act of the Republic of Belarus, while Article 5 of the Public Association Act of the Republic of Belarus stipulates that a public association shall carry out its activities in compliance with the Constitution and the laws of the Republic of Belarus.¹

Under the European Convention on Human Rights the State shall secure to everyone within its jurisdiction the rights and freedoms defined therein (Article 1), including the right to freedom of expression and freedom to hold opinions and to receive and impart information and ideas without interference by public authorities (Article 10), and the right to freedom of association with others (Article 11). Since the Republic of Belarus is not a party to the Convention, it is not bound by its provisions. However, the Republic of Belarus is a party to the International Covenant on Civil and Political Rights, which contains the same obligations in its Articles 19 and 22, respectively. Since the Republic of Belarus wishes to become a member of the Council of Europe, the "acquis" of the Council of Europe, including the case law of the European Court of Human Rights, constitutes a relevant frame of reference for monitoring measures by public authorities with a human-rights impact.

According to Article 8 of its Constitution the Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles. Moreover, Article 59 of the Constitution of the Republic of Belarus provides that the State shall take all measures at its disposal to create the domestic and international order necessary for the exercise in full of the rights and liberties of the citizens of the Republic of Belarus that are specified in the Constitution.²

The GA BAZh as a public association

According to the available information the GA BAZh is a public association. From Article 34 of the European Convention, which provides that the European Court of Human Rights (ECtHR) may receive applications, in addition to individuals and groups of individuals, from **non-governmental** organisations, it would seem to follow that the GA BAZh, as a public association, cannot invoke any of the rights and freedoms laid down in the Convention.

However, this would leave open the question whether the legislation and legal practice of Belarus provides journalists with additional or alternative opportunities to enjoy freedom of association. As the ECtHR has observed in another connection: "Totalitarian regimes have resorted – and resort – to the compulsory requirement of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses."³

¹ See also Article 5 of the Constitution of the Republic of Belarus.

² The restriction to "citizens" would require a critical comment, but will not be dealt with here because it is not relevant to the issue examined.

³ ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, § 65.

More importantly, the ECtHR has stressed that “association” in Article 11 of the Convention has an autonomous meaning, and that the qualification by the national authorities of an association as “public” is not decisive. The ECtHR looks into the private and public law aspects of the functions and powers of the association concerned. Even if the association performs certain functions which are provided by law and which serve not only its members but also the public at large, it may still be dominantly private in character and come under Article 11.⁴

In view of lack of evidence of the contrary, it will be presumed for the moment that Article 11 of the Convention is relevant to the case submitted to the Venice Commission by the Parliamentary Assembly. Evidently, the Parliamentary Assembly starts from the same presumption, since in its Recommendation 1897 (2010), with respect to the warning addressed to the GA BAZh, it calls on the authorities in Belarus “not to abuse arbitral administrative regulations to restrict unduly the rights to freedom of expression and freedom of association under Articles 19 and 22 of the International Covenant on Civil and Political Rights and Articles 10 and 11 of the European Convention on “Human Rights, thus assuming that the GA BAZh is entitled to those rights under the two treaties.

Freedom of association

Article 36 of the Constitution of the Republic of Belarus states that everyone shall be entitled to freedom of association.

According to the case law of the ECtHR concerning Article 11 of the Convention, the right to freedom of association not only guarantees the right to form and register an association, but also includes those rights and freedoms that are of vital importance for an effective functioning of the association to fulfil its aims and protect the rights and interests of its members; the freedom of association presupposes a certain autonomy.⁵ The aim of the GA BAZh is not only to protect the interests of their members, but also to ensure and facilitate their professional activities, including their right to unimpeded acquisition, storage and distribution of information.⁶ This brings also the freedom of Article 10 to receive and impart information into the examination.

Freedom of association and freedom to receive and impart information

Article 34 of the Constitution of the Republic of Belarus deals with the right of free access to information. It provides, *inter alia*, that State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests, thus expressly recognizing the role of public associations in the dissemination of information.

Article 5, paragraph 2, of the Constitution of the Republic of Belarus provides that public associations shall have the right to use state mass media. However, this may not be interpreted to imply that they shall not be engaged in their own mass media activities. Such kind of State monopoly in the area of mass media would be contrary to Article 10 of the Convention in conjunction with Article 11. And, indeed, Article 33 of the Constitution of the Republic of Belarus states that no monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted. In this respect it is also worth mentioning that Article 4 of the Constitution of the Republic of Belarus states that democracy in the Republic of Belarus “shall be exercised on the basis of diversity of (...) views”

⁴ ECtHR, *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, § 31 ; *Chassagnou v. France*, judgment of 29 April 1999, §§ 98-101.

⁵ See, e.g., with respect to trade unions, ECtHR, *National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, § 39.

⁶ See Section 2.1.1 of the Article of Association of the GA BAZh.

Article 10, paragraph 1, of the Convention provides in its last sentence that this provision shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. As this restriction on the freedom of expression is included in paragraph 1 and not in paragraph 2, one could argue that the domestic authorities, when applying that restriction, are not confined to the restriction grounds and other requirements for justification listed in paragraph 2. However, the ECtHR has developed a different approach. It held that the last sentence of paragraph 1 permits the Contracting States "to control the way in which the broadcasting is organised", especially with regard to "technical aspects", but that otherwise the licensing measures have to comply with the requirements of paragraph 2.⁷ Consequently, even to the extent that the warning issued and the regulations on which it was based concern broadcasting, its justification has to be reviewed on the basis of the second paragraphs of Article 10.

Article 10 of the Convention may be of direct relevance for the question whether the freedom of association of Article 11 has been infringed upon. This holds good for political parties⁸ and for religious associations,⁹ but in particular also for associations of journalists. As the ECtHR held with respect to the link between Articles 10 and 11: "Such a link is particularly relevant where – as here - the authorities' intervention against an assembly or an association was, at least in part, in reaction to views held or statements made by participants or members".¹⁰

Provisional conclusion

By ordering that a written warning be issued to the GA BAZh and that the administrative body of the GA BAZh be placed under the obligation to ensure that all membership documents issued previously to members of the GA BAZh which displays the words "PRESS" and "PRESS REPUBLIK OF BELARUS" are withdrawn, and see to it that they cannot be used in future, the Minister of Justice has infringed upon the right of the GA BAZh and its members to freedom of association in connection with their right to freedom to receive and impart information and ideas as guaranteed in Articles 11 and 10 respectively of the Convention and Articles 19 and 22 respectively of the International Covenant on Civil and Political Rights.

It is assumed for the moment that this infringement is provided by law, *viz.* Articles 26 and 27 of the Belarus Public Association Act. However, this will have to be examined on the basis of the translation of these provisions.

As a justification of the infringement, the Minister of Justice refers to the fact that, in his opinion, the issue and use of the membership documents constitutes a breach of certain provisions of the Belarus Mass Media Act, without indication which of the limitation grounds of the second paragraphs of Articles 11 and 10 of the Convention would be applicable. Moreover, the Minister of Justice has not given any reason why the infringement was "necessary in a democratic society" in the sense of the second paragraphs of Articles 11 and 10 of the Convention; he only states that the issuing of the documents has led to an unjustified assumption by members of the GA BAZh of the powers attributed to a mass media journalist as stipulated in Article 34 point 2 of the Belarus Mass Media Act.

On the basis of the foregoing it may be concluded that the warning by the Minister of Justice constitutes a violation of Articles 11 and 10 of the Convention and Articles 19 and 22 of the International Covenant on Civil and Political Rights.

⁷ ECtHR, *Groppera Radio AG v. Italy*, judgment of 28 March 1990, §§ 59-61.

⁸ ECtHR, *Refah Partise (Prosperity Party) and Others v. Turkey*, judgment of 31 July 2001.

⁹ See European Commission for Democracy through Law (Venice Commission), Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective "Eucumenical", CDL-AD(2010)005, 15 March 2010, § 53.

¹⁰ ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001, § 85.

Effective remedy

The Venice Commission has no information at its disposal on whether, under Belarusian law, the GA BAZh has the right to submit the warning, which concerns a civil right or obligation, to an independent and impartial tribunal in conformity with Article 6 of the Convention, or has access to another effective remedy against the restriction of its freedom of expression and freedom of association, as provided for in Article 13 of the Convention.

Article 60 of the Constitution of the Republic of Belarus states that everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law within time periods specified in law. Article 116 of the Constitution only deals with supervision of the **constitutionality** of enforceable enactments of the State, which shall be exercised by the Constitutional Court of the Republic of Belarus.

For the moment, on the basis of the information available it is not clear whether Article 6 or Article 13 of the Convention has also been violated.