

SECRETARIAT GENERAL

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRETARIAT DU COMITE DES MINISTRES



Contact: Abel Campos
Tel: 03 88 41 26 48

Date: 25/02/2013

DH-DD(2013)193

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1164 DH meeting (5-7 March 2013)

Item reference: Communication from a NGO (ICJ - International Commission of Jurists) (15/02/13) in the case of Alekseyev against Russian Federation (Application No. 4916/07)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

Les documents distribués à la demande d'un/e Représentant/e le sont sous la seule responsabilité dudit/de ladite Représentant/e, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1164 réunion DH (5-7 mars 2013)

Référence du point : Communication d'une ONG (ICJ - International Commission of Jurists) (15/02/13) dans l'affaire Alekseyev contre Fédération de Russie (Requête n° 4916/07)
(Anglais uniquement)

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DGI

15 FEB. 2013

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH



International
Commission
of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org

President
Prof. Sir Nigel Rodley, United Kingdom

Vice-President

Justice John Dowd, Australia
Justice Michèle Rivet, Canada

Executive Committee

Prof. Carlos Ayala, Venezuela
Justice Azhar Cachalia, South Africa
Prof. Robert Goldman, United States
Prof. Jenny E. Goldschmidt, Netherlands
Ms Imrana Jalal, Fiji
Ms Karinna Moskalenko, Russia
Prof. Mónica Pinto, Argentina

Other Commission Members

Mr Muhannad Al-Hasani, Syria
Dr. Catarina de Albuquerque, Portugal
Mr Ghanim Alnajjar, Kuwait
Prof. Abdullahi An-Na'im, Sudan
Mr Abdelaziz Benzakour, Morocco
Justice Ian Binnie, Canada
Prof. Alexander Brödtl, Slovakia
Justice Moses Chinhengo, Zimbabwe
Dr. Rajeev Dhavan, India
Prof. Louise Doswald-Beck, Switzerland
Justice Unity Dow, Botswana
Justice Elisabeth Evatt, Australia
Prof. Jochen Frowein, Germany
Dr. Gustavo Gallón Giraldo, Colombia
Mr Stellan Gärde, Sweden
Mr Roberto Garretón, Chile
Prof. Michelo Hansungule, Zambia
Ms Sara Hossain, Bangladesh
Ms Gulnora Ishankanova, Uzbekistan
Ms Asma Jahangir, Pakistan
Justice Kalthoum Kennou, Tunisia
Prof. David Kretzmer, Israel
Prof. Kazimierz Maria Lankosz, Poland
Justice Ketil Lund, Norway
Justice José Antonio Martín Pallín, Spain
Justice Charles Mkandawire, Malawi
Mr Kathurima M'Inoti, Kenya
Justice Sanji Monageng, Botswana
Prof. Iulia Motoc, Romania
Prof. Vítit Muntarbhorn, Thailand
Prof. Andrei Richter, Russia
Prof. Claes Sandgren, Sweden
Mr Belisario dos Santos Junior, Brazil
Mr Raji Sourani, Palestine
Justice Philippe Texier, France
Prof. U. Oji Umozurike, Nigeria
Justice Vilenas Vadapalas, Lithuania
Justice E. Raúl Zaffaroni, Argentina

15 February 2013

Ms. Geneviève Mayer

Department for the Execution of Judgments of the ECHR
DGI - Directorate General of Human Rights and Rule of Law
Council of Europe
F-67075 STRASBOURG CEDEX
Genevieve.Mayer@coe.int

*ICJ's Submission to the Committee of Ministers of the Council of
Europe in the case of Alekseyev v. Russia (Application No.
4916/07)*

Dear Ms. Mayer :

Please find enclosed a briefing submitted in accordance to Rule 9
(2) of the Rules of the Committee of Ministers for the supervision
of the execution of judgments and of the terms of friendly
settlements with a view to assisting the Committee of Ministers in
its evaluation of the general measures taken to date by the
Russian government to fulfil its obligations to implement the
judgment in the case of *Alekseyev v. Russia*.

Yours sincerely,

Alli Jerchow
Senior Legal Adviser



**Submission of the International Commission of Jurists (ICJ) to the
Committee of Ministers of the Council of Europe in the case of
Alekseyev v. Russia, (Application No. 4916/07)**

February 2013

The International Commission of Jurists is pleased to present to the Committee of Ministers of the Council of Europe this submission under Rule 9.2 of the *Rules of Procedure* for consideration at the meeting CM-DH 1164, 5-7 March 2013. The present submission will focus on the adoption of laws prohibiting "propaganda of homosexuality among minors" and their incompatibility with the Russian Federation's obligations under international human rights law.

Very similar laws prohibiting "homosexual propaganda" have now been adopted in ten regions: the Republic of Bashkortostan, the Krasnodar, Arkhangelsk, Kostroma, Magadan, Novosibirsk, Ryazan, Samara and Kaliningrad Regions, and the City of St. Petersburg. The Kaliningrad law differs slightly from the others in that the ban is not limited by the phrase "among minors." In addition, on 25 January 2013 a federal version of the law passed in the State Duma at first reading.

The first person convicted under the St. Petersburg law was in fact Nikolai Alekseyev, the applicant in this case. During a one-man demonstration in May 2012 near City Hall, he had held up a sign that read: "*Homosexuality is not a perversion. Field hockey and ice ballet are.*" He was quoting from a book entitled *Faina Ranevskaya: The Fate is a Whore* by Dmitry Shcheglov. Faina Ranevskaya was a famous Soviet-era actress and that book is available in bookstores throughout Russia.

In the Decision adopted by the CMCE at its 1144th meeting on 6 June 2012, the Deputies invited Russian authorities "to clarify how these laws could be compatible with the Court's conclusions in the present judgment." The ICJ submits that the "homosexual propaganda" bans are incompatible with *Alekseyev v. Russia* and with general principles of freedom of expression articulated by the European Court of Human Rights as well as by the UN Human Rights Committee. They are not permissible restrictions on the right to freedom of expression for three reasons:

- First, they are so vague that they fail the requirement that a restriction be "prescribed by law."
- Second, they are not necessary for a legitimate purpose or proportional to achieving that purpose.
- Third, they discriminate on the basis of sexual orientation.

1. Overview of the Rights to Freedom of Expression, Peaceful Assembly and Association under International Law

Article 10 of the European Convention provides that freedom of expression includes the freedom to receive and impart information and ideas. The exercise of these freedoms may be subject to restrictions "as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 11 of the Convention guarantees the right to freedom of peaceful assembly and association with others. As with Article 10, restrictions must be "prescribed by law" and "necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

In *Alekseyev*, the Court found a violation of Article 11 in conjunction with Article 14 (non-discrimination) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Restrictions on Article 10 rights are nonetheless relevant to Article 11 because these rights are so closely intertwined. Assemblies and associations have an expressive purpose. That is, participants in assemblies and the members of associations typically intend to communicate a message. Freedom of expression is thus "integral to the enjoyment of the rights to freedom of assembly and association."¹ The European Court has held that "the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association."² Expression, association and assembly are essential components of democratic, pluralistic society, enabling individuals to express and receive opinions, information and ideas and to raise their collective voices in public.³ When

¹ HRC, General Comment No. 34, UN Doc. CCPR/C/GC/34 at para. 4.

² *ÖZDEP v. Turkey*, Application no. 23885/94, Judgment of 8 December 1999, at para. 37.

³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Frank La Rue, UN Doc. A/HRC/14/23 at paras. 26-29; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, at para.12.

Alekseyev was arrested for holding up his sign near City Hall, both his right to freedom of expression and his right to peaceful assembly were restricted.

International law protects all kinds of expression, including expression that is unpopular or considered offensive by others. Thus the European Court of Human Rights has explained that Article 10 "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'."⁴

Making room for dissenting voices and minority or even unpopular views is a fundamental aspect of democracy. The Human Rights Committee has called freedom of expression "the foundation stone for every free and democratic society."⁵ In *Bączkowski v. Poland*, the European Court stated: "Referring to the hallmarks of a 'democratic society', the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."⁶

On a number of occasions, the Court has reiterated "that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention."⁷

It is common knowledge that public statements concerning homosexuality or affirming human rights for members of the LGBT community are politically disfavored in the Russian Federation. The Duma bill was adopted by a vote of 388 to 1.⁸ Sergei Markov, vice-chancellor of Pelkhanov Economic University in Moscow and a former member of the Parliamentary Assembly of the Council of Europe, has written that Russia defines its political system as one that "respects the rights and wishes of

⁴ *Palomo Sanchez and Others v. Spain*, Application Nos. 28955/06, 28957/06, 28959/06 and 28964/06, Judgment dated 12 September 2011, at para. 53.

⁵ Human Rights Committee, General Comment No. 34, at para. 2.

⁶ *Bączkowski v. Poland*, Application No., 1543/06, Judgment dated 3 May 2007, at para. 63.

⁷ *Alekseyev v. Russia*, Application Nos. 4916/07 25924/08 14599/09, Judgment dated 21 October 2010, at para. 81.

⁸ "Duma Approves Gay Propaganda Bill," *RiaNovosti*, 25 January 2013.

its majority.”⁹ Nevertheless, deeply unpopular ideas, opinions, and information, even ones that the majority find offensive, fall under the protection of Article 10.

2. The Meaning of “Prescribed by Law”

The requirement that a limitation be characterized as a “law” means that it “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”¹⁰ The European Court has stated that an individual “must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”¹¹ Laws that are vague or that confer unfettered discretion on those charged with their execution fail this test.

The “homosexual propaganda” bans are so vague and the contours of what expression is prohibited so far from foreseeable that they cannot be characterized as “laws” within the meaning of the European Convention. This is evident in the range of conduct which has given rise to arrests under these laws. As noted in Action Plan submitted by the Russian Federation, individuals have been arrested for holding up signs stating that homosexuality is normal and that sexual orientation is not a choice. Although these individuals were acquitted, Irina Fedotova was found liable under the Ryazan law for holding up posters stating: “Homosexuality is normal” and “I am proud of my homosexuality.”¹² Nikolai Alekseyev was, as noted above, holding up a sign with a quote from a popular and readily available book by a famous actress.

The explanatory notes for some of these laws, including the St. Petersburg law and the draft federal law, describe homosexual propaganda as “the purposeful and uncontrolled dissemination of the information that could harm the health and moral and spiritual development, as well as form misperceptions about the social equivalence of conventional and unconventional sexual relationships, among individuals who, due to their age, are not capable to independently and critically assess such information.”¹³ This language is drawn from the January 2010 decision of the Constitutional Court of the Russian

⁹ Sergei Markov, “Russia Should Create Private Zones for LGBT,” *The Moscow Times*, 5 February 2013.

¹⁰ Human Rights Committee, General Comment No. 34, para. 25.

¹¹ *Revkenyi v. Hungary*, Application No. 25390/94, Judgment dated 20 May 1999, at para. 34.

¹² *Fedotova v. Russian Federation*, Communication No. 1932/2010, UN Human Rights Committee (October 2012), at para. 2.2.

¹³ See, e.g., Explanatory Note to the Draft Federal Law “On Amendments to the Code of the Russian Federation on Administrative Offences” (unofficial English translation) available at http://www.unitedagainstracism.org/attachments/ENG_Explanatory%20Note.pdf.

Federation, dismissing an appeal concerning the Ryazan law.¹⁴ Although the interpretation of the homosexual propaganda laws may be limited by courts in specific instances, as the Russian Federation submits, there is nothing in the text of the ban itself that informs either an individual or a law enforcement officer as to what information might "harm" the health or moral or spiritual development of a minor or might induce "misperceptions" about conventional or unconventional relationships. Evaluations of whether particular expression was banned by any one of these laws would thus depend on a highly subjective and variable determination. For these reasons the bans fail the first prong of the European test for a restriction on freedom of expression.

3. Necessary for a Legitimate Purpose

Any interference with the right to freedom of expression must be for a legitimate purpose, necessary in a democratic society to achieve that purpose, and proportionate to the legitimate aim pursued. As the European Court has explained, "necessary" implies "the existence of a pressing social need."¹⁵ Furthermore, the reasons proffered by the national authorities to justify the measure must be "relevant and sufficient."¹⁶ Among other requirements, national authorities must rely "on an acceptable assessment of the relevant facts."¹⁷

Assuming that the bans have been enacted for the legitimate purpose of protecting the rights of others, in this case children, the bans are nonetheless an impermissible restriction on freedom of expression because they are neither necessary nor proportionate. There has simply been no showing by national authorities that "homosexual propaganda" causes harm to children. "Misperceptions" as to the social equivalence of traditional or non-traditional relationships is not "harm" but rather an opinion about what relationships are valued and recognized in society. "Misperceptions" cannot possibly constitute harm. The right that the national authorities claim to protect is the right to be free from exposure to other ideas and ways of thinking, and under the European Convention this is not a right at all.

Furthermore, expression concerning "homosexuality, lesbianism, bisexuality or transgenderism" is fundamentally distinct from sexually explicit or pornographic material. Nothing in the ban is limited to the

¹⁴ See Communication from the Russian Federation concerning the case of Alekseyev against Russian Federation, 24 August 2012, DH-DD(2012)754, at 2.

¹⁵ See, e.g., *Muller and Others v. Switzerland*, Application No. 10737/84, Judgment dated 24 May 1988, at para. 32.

¹⁶ See, e.g., *Guja v. Moldova*, Application No. 14277/04, Judgment dated 12 February 2008, at para. 69.

¹⁷ *Soskinowska v. Poland*, Application No. 10247/09, Judgment dated 18 October 2011, at para. 69.

public display of sex, information about sexual activity, or expression that might otherwise be characterized as obscene. Indeed, Russia already has laws outlawing obscenity and public indecency, and these laws are neutral with regard to sexual orientation. None of the arrests made in Russia thus far were for statements or material that would be considered "obscene" under current obscenity laws.

In *Alekseyev v. Russia*, the European Court rejected claims of protecting morality or children as reasons to uphold a ban on gay pride marches. The Court stated that the officials "own views on morals" was not a sufficient rationale. There was, moreover, "no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities social status, would adversely affect children or 'vulnerable adults.'"¹⁸ Therefore, the Court concluded, the gay pride ban "did not correspond to a pressing social need and was thus not necessary in a democratic society."¹⁹

Similarly, in *Fedotova v. Russian Federation*, the UN Human Rights Committee found that the Ryazan ban on homosexual propaganda violated the author's rights under Articles 19 and 26 of the International Covenant on Civil and Political Rights.²⁰ According to the Human Rights Committee, the State party had "not shown that a restriction on the right to freedom of expression in relation to 'propaganda of homosexuality' – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced."²¹ Even if Fedotova had "intended to engage children in the discussion of issues related to homosexuality," the State party still had not demonstrated why a restriction on her right to freedom of expression was necessary.²²

The reasoning of *Alekseyev* and *Fedotova* are directly applicable to the regional homosexual propaganda bans and the proposed federal law. In short, the homosexual propaganda bans are not necessary to achieve a legitimate purpose.

4. The Homosexual Propaganda Bans are Discriminatory

In addition to undermining rights guaranteed by Article 10 of the European Convention, the homosexual propaganda bans are

¹⁸ *Alekseyev v. Russia*, Application Nos. 4916/07, 25924/08 and 14599/09, Judgment dated 21 October 2010, at para. 79.

¹⁹ *Id.* at para. 87.

²⁰ *Fedotova v. Russian Federation*, Communication No. 1932/2010, UN Human Rights Committee Views dated 31 October 2012.

²¹ *Fedotova* at para. 10.6.

²² *Fedotova* at para. 10.8.

discriminatory within the meaning of Article 14. They constitute a difference in treatment based on sexual orientation, which is forbidden under international law.²³ The Court has stated, "Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification."²⁴ In a number of cases it has repeatedly held that if the reasons advanced for a difference in treatment are based solely on sexual orientation, this amounts to discrimination under the Convention.²⁵

if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention

Laws that prohibit the "propaganda of homosexuality" – as opposed to the propaganda of heterosexuality or sexuality generally – target one particular kind of sexual preference for differential treatment. There is simply no justification for this difference in treatment based on sexual orientation. In cases concerning bans on gay pride, the Court has repeatedly found that the subject State had not only violated rights to freedom of peaceful assembly but had also violated the non-discrimination guarantee of Article 14. In *Alekseyev*, for example, the Court concluded that because the only reason for the ban was "the authorities' disapproval of demonstrations which they considered to promote homosexuality," it was discriminatory, in violation of Article 14 of the Convention.²⁶ Similar findings about official disapproval of "homosexual propaganda" or "promoting homosexuality" were made in *Bączkowski* and *Genderdoc-M*. In all three cases, fears about promoting homosexuality were not only insufficient to justify an interference with the right to freedom of assembly but were also evidence of discrimination.

5. Conclusion

The ICJ urges the Committee of Ministers to require that the Russian Federation undertake immediate steps to safeguard the rights to freedom of assembly and freedom of expression comply with its obligations under Articles 10 and 11 of the European Convention. In particular the Russian Federation should:

²³ *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgment dated 21 December 1999, at para. 28; see also *Toonen v. Australia*, Communication No. 488/1992, UN Human Rights Committee Views dated 31 March 1994.

²⁴ *Karner v. Austria*, Application No. 40016/98, Judgment dated 24 July 2003, at para. 37.

²⁵ *E.B. v. France*, Application No. 43546/02, Judgment dated 22 January 2008, at para. 93; *GenderDoc-M v. Moldova*, Application No. 9106/06, Judgment dated 12 June 2012, at para. 51; *Kozak v. Poland*, Application No. 13102/02, Judgment dated 2 March 2010, at para. 92.

²⁶ *Alekseyev* at para. 109.

- Repeal the existing regional laws providing administrative liability for homosexual propaganda.
- Take prompt measures to ensure that the federal draft law is not enacted.
- Ensure in law and practice that LGBT individuals and organizations have the same right as everyone else to hold peaceful assemblies.
- Cease arresting individuals for displaying signs, posters or flags that refer to issues of homosexuality.