



Russian Federation vs. Alexander Pichugin

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



Oliver Wallasch, Partner at Wallasch & Gärtner and member of the TrialWatch Experts Panel, assigned this trial a grade of D:

The trial was characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm. Mr. Pichugin has exclusively exercised his right to freedom of expression that belongs to everyone, without overstepping the bounds of the law. The Russian authorities have tried to give the proceedings the appearance of the rule of law by hearing alleged experts in court. But this approach only served to conceal the real intention of criminalising politically inconvenient citizens. This first criminal ‘fake news’ case was unfortunately just a preview of what was to come, with new laws imposing severe penalties on those who report on Russia’s invasion of Ukraine.

From July to November 2020, the Clooney Foundation for Justice’s TrialWatch initiative monitored the criminal trial of Alexander Pichugin in Nizhny Novgorod, Russia. Mr. Pichugin is a journalist and was also the anonymous administrator of a channel called “Sorokin Hvost” on online messaging platform Telegram. Mr. Pichugin was charged with violating Article 207.1 of the Criminal Code of the Russian Federation, which makes it a crime to “publicly disseminate disguised as truthful knowingly false information about circumstances that pose a threat to the life and safety of citizens.”

The charges related to a sarcastic comment Mr. Pichugin made on “Sorokin Hvost” on April 12, 2020, which is celebrated by the Russian Orthodox Church as Palm Sunday, criticizing the holding of Easter services during the COVID-19 pandemic. In particular, Mr. Pichugin said that there was “a planned campaign to infect the population with a deadly disease” and likened participants in church services to “adherers-suicide assassins” who would be used “as disseminators of infection” and suggested the Church had gathered “them in specially designated places, where the distributors deliberately violate sanitary rules and then penetrate the society.”

On November 11, 2020, the Bogorodsk City Court found Mr. Pichugin guilty and sentenced him to a fine of 300,000 rubles. The court relied on a selective reading of expert evidence and disregarded flaws in the prosecution’s case to reach this verdict. In particular, the court did not require the prosecution to prove Mr. Pichugin’s intent – a critical element of the offense – disregarded reasons to doubt a prosecution witness’s reliability, and discounted any and all efforts to accurately characterize the nature of the Telegram channel where Mr. Pichugin had posted his comments (the name of which is roughly translated as ‘a little bird told me,’ connoting a gossipy, unreliable nature). As a result, this report concludes that the court violated Mr. Pichugin’s right to a fair trial, including his right to be presumed innocent, his right to an impartial, independent, and competent tribunal, and his right to a duly reasoned judgment in order to facilitate the right to appeal. Further, the proceedings

breached Mr. Pichugin’s right to be informed of charges because the prosecution did not explain how it proposed to prove intent – and indeed never did.

Finally, by convicting Mr. Pichugin for a sarcastic comment using a vague and expansive law, Russia also violated Mr. Pichugin’s right to freedom of expression. Indeed, not only is Article 207.1 overbroad, but a criminal penalty is a disproportionate response to the kind of critical expression at issue in this case.

The trial described in this report may be just a preview of what is to come. On March 4, Russian lawmakers enacted new laws under the Criminal Code and the Code of Administrative Offences that make it an offence to spread “fake news” about the Russian armed forces – essentially making it illegal to report on Russia’s invasion of Ukraine or even call it that.¹ Mr. Pichugin’s trial shows just how easily this new law will likely be able to be misused.

¹ Article 207.3 of the Criminal Code makes it an offence to publicly disseminate, under the guise of truth “knowingly false information including facts on the use of the Armed Forces of the Russian Federation for the purpose of protecting the interests of the Russian Federation and its citizens, maintaining international peace and security.” The penalty ranges from 3 years’ imprisonment to up to 15 years’ imprisonment if the dissemination of information causes “grave consequences.”

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

While the Russian constitution ostensibly provides for the right to freedom of expression and prohibits censorship,² the Russian government has appeared in recent years to have engaged in a concerted effort to restrict free speech, particularly independent media voices.³ In 2021, Russia ranked 150th out of 180 countries on a ranking prepared by Reporters Without Borders (RSF) due to “draconian laws, website blocking, [and] Internet cuts.”⁴ Journalists and bloggers risk being arrested and prosecuted under vague laws that range from prohibitions of “extremism”⁵ to those criminalizing expressing “disrespect” online for the state or authorities⁶—and now a new raft of laws relating to expression concerning Russia’s invasion of Ukraine.⁷

The COVID-19 pandemic has provided yet another excuse for the Russian government to crack-down on free speech. In March 2020, Russian lawmakers added Article 207.1 to the Criminal Code, which criminalizes “publicly disseminat[ing] disguised as truthful knowingly false information about circumstances threatening life and safety of citizens and/or measures to ensure safety of the populace and areas, of ways and methods of protection from such circumstances.”⁸

This provision—often referred to by the media and human rights organizations as Russia’s “fake news” law⁹—was justified as part of the government’s response to the global COVID-

² Constitution of the Russian Federation, Chapter 2, Art 29(1) and (5).

³ See generally: TrialWatch Fairness Report: Russia v. Svetlana Prokopyeva, available at: <https://cfj.org/wp-content/uploads/2021/02/Svetlana-Prokopyeva-February-2021.pdf> (Journalist Svetlana Prokopyeva was convicted of “justifying terrorism” for comments she made on the radio station discussing the link between the political environment in Russia and a suicide bombing attack); Committee to Protect Journalists, “Russia Charges Independent Journalist with Terrorism Offenses”, (June 26, 2018), available at: <https://cpj.org/2018/06/russia-charges-independent-journalist-with-terrori/> (reporting that a journalist was charged with terrorism offenses “for transcribing and publishing a 2015 speech that a Kremlin critic gave at his trial”).

⁴ Reporters Without Borders, “Russia”, available at: <https://rsf.org/en/russia>.

⁵ See generally Article 19, “Rights in Extremis: Russia’s Anti-extremism Practices From an International Perspective, Article 19 (Sept. 23, 2019), available at: <https://www.article19.org/resources/rights-in-extremis-russias-anti-extremism-practices-from-an-international-perspective/>

⁶ See generally The Atlantic, “Putin’s Crackdown on Dissent Is Working”, (March 22, 2019), available at: <https://www.theatlantic.com/international/archive/2019/03/putins-new-law-makes-it-illegal-disrespect-russia/585502/> (discussing a new law that “criminalize[s] any ‘disrespect’ for Russian society, the government, official symbols, the constitution, or any state body, as well as what the authorities deem to be ‘fake news.’”).

⁷ For instance, Article 280.3 of the Criminal Code prohibits “public actions aimed at discrediting the use of the Armed Forces ... including public calls to prevent their use,” with a fine of up to 300,000 rubles or 3 years’ imprisonment.

⁸ Criminal Code of the Russian Federation, Art. 207.1.

⁹ See generally: Amnesty International, “Russian Federation: Fake news bill promoted by COVID-19 threatens freedom of expression”, (3 April 2020), available at: <https://www.amnesty.org/download/Documents/EUR4620932020ENGLISH.pdf>; International Press Institute, “New ‘fake news’ law stifles independent reporting in Russia on COVID-19”, (May 8, 2020), available at: <https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19/>; The Economist, “Censorious governments are abusing ‘fake news’ laws”, (Feb. 11, 2021), available at:

19 pandemic. In particular, Russia argued that the law was necessary to stop the spread of misinformation.¹⁰ However the law itself is not limited to the current pandemic and has broader application. The law expands an existing provision in the Criminal Code, which had made it an offence to spread false information related to a terrorist attack; Article 207.1 broadens the offence to cover various other circumstances that “pose a threat to the life and safety of citizens.”¹¹ A clarifying note specifies that the term “circumstances” under the newly-adopted provision covers everything from man-made to ecological disasters.¹² At the same time the Criminal Code was amended, lawmakers also amended Article 13.15 of the Code on Administrative Offences to provide for corresponding liability for dissemination of ‘fake news’ by legal entities.¹³ Following these amendments, both the Criminal and Administrative Code are vaguely worded and risk capturing a wide range of information about so-called “threatening circumstances.”

The Supreme Court of Russia has sought to clarify Article 207.1 through two advisory opinions. In the first opinion, the court distinguished administrative liability under Articles 13.15.10.1- 13.15.10.2 from criminal liability under Article 207.1:¹⁴ The Court opined that Article 207.1 only applies to individuals, while Articles 13.15.10.1-13.15.10.2 only apply to legal entities. In the second opinion, the Supreme Court further clarified several aspects of Article 207.1.¹⁵ For example, it defined “false information” for the purposes of the law as information that is false, and that the defendant knows is false.¹⁶ Additionally it made clear that to incur liability, the defendant must disseminate the false information in such a way as to suggest its truthfulness. To this point, the Court gave hypothetical examples such as citing sources that seem legitimate or forging documents.¹⁷ The Court also restricted the application of the provision to circumstances where the person “acted with direct intent,

<https://www.economist.com/international/2021/02/11/censorious-governments-are-abusing-fake-news-laws>; Radio Free Europe: Radio Liberty, “Fake News’ Law Targets Russian Media Over Coronavirus Info”, (May 2, 2020), available at: <https://www.rferl.org/a/russia-fake-news-law-coronavirus/30587690.html>.

¹⁰ Amnesty International, “Russian Federation: Fake news bill promoted by COVID-19 threatens freedom of expression”, (3 April 2020), available at:

<https://www.amnesty.org/download/Documents/EUR4620932020ENGLISH.pdf>.

¹¹ Criminal Code of the Russian Federation, Art. 207.

¹² Criminal Code of the Russian Federation, Art. 207.1, available at: <https://rulaws.ru/uk/Razdel-IX/Glava-24/Statya-207.1/> (“Note. In this article, circumstances posing a threat to the life and safety of citizens are recognized as natural and man-made emergencies, environmental emergencies, including epidemics, epizootics and other circumstances resulting from accidents, dangerous natural phenomena, catastrophes, natural and other disasters, entailed (which may entail) human casualties, damage to human health and the environment, significant material losses and disruption of the living conditions of the population”).

¹³ The Administrative Code already included a provision that imposed fines on organizations and individuals for distributing to the media knowingly unreliable information of public importance under the guise of reliable reports where that “created a threat of causing harm to the life and/or health of citizens.” Code of Administrative Offences of the Russian Federation, Art 13.15.9. The March 2020 amendments to Article 13.15

added higher penalties for legal entities for acts similar to those covered by Article 207.1. Code of Administrative Offences of the Russian Federation, Art 13.15.10.1-13.15.10.2.

¹⁴ “Обзор по отдельным вопросам судебной практики, связанным с применением законодательства и мер по противодействию распространению на территории Российской Федерации новой коронавирусной инфекции (COVID-19) № 1.” Question 16 (April 21, 2020), available at: <https://www.vsrp.ru/files/28856/>. (Russian), (Supreme Court of the Russian Federation).

¹⁵ “Обзор По Отдельным Вопросам Судебной Практики, Связанным с Применением Законодательства и Мер По Противодействию Распространению На Территории Российской Федерации Новой Коронавирусной Инфекции (COVID-19) № 2.” Supreme Court of the Russian Federation, Question 12 (April 30, 2020), available at: <https://www.vsrp.ru/documents/all/28882/>.

¹⁶ Id.

¹⁷ Id.

was aware that the information posted by [them] under the guise of reliable information was false, . . . and had the goal of bringing this information to the attention of information of others.”¹⁸ Finally, the opinion clarified the meaning of “public dissemination,” defining it as information addressed to a group or unrestricted circle of individuals and expressed in means that are comprehensible.¹⁹ The Supreme Court advised that whether dissemination was “public” was to be assessed by courts depending on the circumstances of a case.²⁰

While the Supreme Court’s clarifications appear to limit the scope of the law – by requiring knowledge of falsity, evidence that the defendant had offered the information as truthful, and specific intent to share it with others—it does not appear that the law has been so limited in its application. Indeed, a local human rights organisation estimated that in the first two months after Article 207.1 came into force “criminal proceedings under this article [were] initiated more often than every two days, including weekends and holidays.”²¹

On March 4, 2022, lawmakers enacted new “fake news” laws, this time making it an offence to spread “fake news” about the Russian armed forces following Russia’s invasion of Ukraine on February 24, 2022.²² Similar to the “fake news” laws introduced in response to the pandemic, Russian lawmakers created both administrative offences and criminal offences relating to the spread of “fake news” about the Russian armed forces.²³ The new laws were enacted seemingly to silence the thousands of Russians who are protesting against Russia’s invasion of Ukraine²⁴ and effectively also make it illegal for independent media to report on the invasion – or even to call it that.²⁵ Similar to Article 207.1, the laws

¹⁸ Id.

¹⁹ Id., Question 13

²⁰ Id.

²¹ Agora International Human Rights Group, “The fake news ‘infodemic’: the fight against coronavirus as a threat to freedom of speech”, available at: https://agora.legal/fs/a_delo2doc/196_file__ENG_final.pdf

²² Human Rights Watch, “Russia Criminalizes Independent War Reporting, Anti-War Protests”, (Mar. 7, 2022), available at <https://www.hrw.org/news/2022/03/07/russia-criminalizes-independent-war-reporting-anti-war-protests>; Marko Milanovic, “The Legal Death of Free Speech in Russia”, EJILK Talk!, (Mar. 8, 2022), available at: <https://www.ejiltalk.org/the-legal-death-of-free-speech-in-russia/>.

²³ Article 280.3 of the Criminal Code prohibits “public actions aimed at discrediting the use of the Armed Forces . . . including public calls to prevent their use.” With a fine of up to 300,000 rubles or 3 years’ imprisonment. If the “public actions” lead to “mass disruption of public order” the maximum penalty increases to 5 years’ imprisonment. Article 284.2 of the Criminal Code makes it a criminal offences to call on a foreign state to impose sanctions on Russia and again imposes a fine of 500,000 rubles or up to 3 years’ imprisonment. Article 20.3.3 of the Code of Administrative Offences makes is an offence to commit “[p]ublic actions aimed at discrediting the use of the Armed Forces of the Russian Federation for the purpose of protecting the interests of the Russian Federation and its citizens, maintaining international peace and security, including public calls to prevent the use of the Armed Forces of the Russian Federation for these purposes.” Article 20.3.4 of the Code of Administrative Offences makes it an administrative offence for a citizen to call on the imposition of sanctions by a foreign state. The penalty for both offences is a fine of up to 50,000 rubles but is doubled if “accompanied by calls for holding unauthorized public events”.

²⁴ See: Ivan Nechepurenko and Dan Bilefsky, “Thousands of Russians protest President Vladimir V. Putin’s assault on Ukraine. Some chant: ‘No to war!’” N.Y. Times, (Feb. 24, 2022), available at: <https://www.nytimes.com/2022/02/24/world/europe/russia-protests-putin.html>; Guy Faulconbridge; Editing by Catherine Evans, Frances Kerry, William Maclean and Kevin Liffey, “More than 4,300 detained at anti-war protests in Russia”, Reuters, (Mar. 7, 2022), available at: <https://www.reuters.com/world/europe/more-than-64-people-detained-anti-war-protests-russia-protest-monitor-2022-03-06/>.

²⁵ Article 207.3 of the Criminal Code makes it an offence to publicly disseminate, under the guise of truth “knowingly false information including facts on the use of the Armed Forces of the Russian Federation for the purpose of protecting the interests of the Russian Federation and its citizens, maintaining international peace and security.” The penalty ranges from 3 years imprisonment to up to 15 years imprisonment if the dissemination causes “grave consequences”.

have been drafted in a broad way and are not limited to the current invasion but apply more generally to any Russian military deployment.

In practice “fake news” laws, such as Article 207.1, seem just another tool in Russia’s speech-suppression arsenal.

B. CASE HISTORY

Alexander Pichugin is a journalist in Nizhny Novgorod, where he serves as the chief editor of independent news website “Reportyor-NN,” as well as the administrator of “Sorokin Hvost” (The Magpie’s Tail)—an anonymous channel on Telegram, an instant messaging service that can be used to broadcast messages to groups of people.

On April 12, 2020, Mr. Pichugin posted the following message on Sorokin Hvost:

“Attention! Today, a planned campaign to infect the population with a deadly disease is taking place across the country. The action is launched by the members of a specific organization; officials of the law enforcement agencies and the FSB have all the names, passwords, and safe houses information. The leadership of the organization uses its adherers-suicide assassins as disseminators of infection, gathering them in specially designated places, where the distributors deliberately violate sanitary rules and then penetrate the society. In a week, an even more ambitious repetition of the action is planned to take place. Be prepared! For reference: Criminal Code of the Russian Federation, Art. 205 ‘Act of Terrorism’ The carrying out of an explosion, arson or **other actions intimidating the population, and creating the threat of human death**, of infliction of significant property damage or the onset of other grave consequences, **for the purpose of influencing the taking of a decision by authorities or international organisations**, and also the threat of commission of the said actions for the same purposes.”²⁶

According to Mr. Pichugin, the post was intended as satirical commentary on the fact that the Russian Orthodox Church was continuing to hold services “[during a] period when the coronavirus just came to Russia”²⁷ without complying with measures meant to limit the spread of COVID-19. The day he published the message was Palm Sunday and Russian Orthodox Churches across Russia were open for services.²⁸

On April 13, an officer of the Russian Federal Security Service (FSB) spoke to Mr. Pichugin over the phone and inquired about the publication. According to the indictment, the officer told Mr. Pichugin to delete the message after Mr. Pichugin told him that “there were no specifics in [the] publication, but rather a metaphorical technique was used, which allows one to immediately understand what event is being discussed.”²⁹ Mr. Pichugin deleted the message, taking the FSB officer’s request as an order.³⁰

²⁶ Indictment of Pichugin, Aleksandr Vladimirovich on Suspicion of Committing a Crime under Article 207.1 of the Criminal Code of the Russian Federation (June 5, 2020) [hereinafter ‘Indictment’].

²⁷ Trial Monitor’s notes October 22, 2020 hearing.

²⁸ Indictment, *supra* note 30, 4.

²⁹ *Id.*, 3

³⁰ *Id.*

On April 16, authorities conducted a search of Mr. Pichugin's home and seized his mobile phone and laptop.³¹ According to the indictment, through these searches the authorities were able to identify Mr. Pichugin as the administrator of Sorokin Hvost and found that there were 1,306 subscribers to the channel.³²

On April 30, Mr. Pichugin was charged with violating Article 207.1.³³ The criminal case file and indictment were submitted to the Prosecutor on May 26, 2020.

The Trial

The trial commenced on July 10, 2020, before the Bogorodsk City Court of Nizhny Novgorod. The prosecution argued that Mr. Pichugin's message on Sorokin Hvost was a statement of fact, that it had frightened some people, and therefore that Mr. Pichugin had violated Article 207.1.

In arguing that the post was a statement of fact, the prosecution relied exclusively on a linguistic expert report they had commissioned that concluded that the message used the "indicative mood," which meant that "all actions that are described in [the] text...are perceived as existing in reality."³⁴

The prosecution also argued that the post had created danger because one witness testified that the post "scared me, I took it seriously... inform[e]d all relatives about this, advise[d] [them] to refrain from performing any actions."³⁵ The Prosecution also relied on the testimony of the Deputy Head of the Office of the Federal Service for Supervision of Consumer Rights Protection and Human Welfare, Nizhny Novogrod Region, who testified that she thought the post would create panic.

By contrast, the defense argued that the post was an opinion, not a statement of fact. A linguistic expert for the defense testified that the post was written in the form of a metaphor.³⁶ Mr. Pichugin self-described the genre of the text as "sarcastic journalism"³⁷ and explained that to give people the opportunity to "look at the situation from the other side" he used "the method of detachment, alienation."³⁸ A defense witness also testified that Mr. Pichugin's message was sent after the provincial governor gathered local bloggers and asked them to "...influence the audience. In order for people to hear as many words as possible about non-violation of quarantine measures."³⁹

³¹ Id., 12 ("Among the programs available on the phone, there is an Internet messenger "Telegram". In the course of examination, Telegram channels, including "Sorokin hvost," were found. The properties of this channel contain information about the channel: public channel, description, invitation link, number of subscribers –1,306, as well as information about its administrator (Aleksandr Pichugin), who is also the owner of the channel. When viewing publications, there is an eye-shaped icon, which indicates the number of views of this or that information by different people. Similar information was found during the examination of the laptop.")

³² Id., 12.

³³ Id., 12.

³⁴ Trial Monitor's notes August 24, 2020 hearing.

³⁵ Trial Monitor's notes July 10, 2020 hearing.

³⁶ Trial Monitor's notes July 16, 2020 hearing.

³⁷ Trial Monitor's notes October 22, 2020 hearing.

³⁸ Id.

³⁹ Trial Monitor's notes July 16, 2020 hearing.

Further, the defense pointed out that the prosecution's expert's opinion was flawed. In particular, during cross-examination, the expert admitted that the post had been presented to them for analysis as having come from a news channel, not as an anonymous post on a Telegram channel.⁴⁰ On this basis, the defense petitioned the court for a supplementary linguistic examination. This petition was granted, and a court appointed linguistic expert report was prepared by the Federally-funded Institution "Privolzhsky Regional Forensic Center." These additional experts concluded that Mr. Pichugin's message included both facts (information that could be verified) and opinions (information that could not be verified). The experts also concluded that the message was constructed in the form of a metaphor and that the overall communicative goal was to share a personal opinion about the negative attitude the author had to the actions described in the message.⁴¹

The defense also argued that the post had not created a danger to public order. On cross-examination, the Deputy Head of the Office of the Federal Service for Supervision of Consumer Rights Protection and Human Welfare admitted that there had been no panicked "outbreaks" in April and that her department, which is charged with providing information about COVID-19 and denying false information to avoid panic, had not been aware of Mr. Pichugin's message at the time.⁴² In addition, the prosecution's first expert testified that "speech acts of threat and inducement to any actions in the disputed text were not revealed."⁴³

At the conclusion of trial, the prosecution asked the court to impose a sentence restricting Mr. Pichugin's liberty for two (2) years and six (6) months. By contrast, Mr. Pichugin's closing remarks to the court summarized the case as follows: "As far as I understand, the investigation, and then the prosecution, had to prove that I, realizing that I was writing a lie, nevertheless wrote it. In fact, everything is different. I wrote the pure truth, just in a certain author's manner. I shared my assessment of what is happening and the forecast of what the current situation may lead to."⁴⁴

On November 11, the court convicted Mr. Pichugin and sentenced him to a fine of 300,000 rubles. In its judgment, the court relied principally on a selective reading of the report and testimony of the supplementary linguistics experts to hold that "the specified information - about the actual actions of a particular organization to intentionally infect citizens - was presented in the message disseminated by Pichugin A.V., as factual information and not as an opinion."⁴⁵ By contrast, the court perfunctorily dismissed the expert evidence put forward by the defense in part due to the fact that the defense expert's testimony "contradicts the conclusions and testimonies of the two expert examinations [appointed by the court], conducted on similar issues."⁴⁶

The findings of the various linguistic experts are explained in further detail below.

⁴⁰ Id.

⁴¹ Federal State-Funded Institution "Privolzhsky Regional Forensic Center" under auspices of the Ministry of Justice of the Russian Federation, Report No. 5291/07-1, Oct. 15, 2020 [hereinafter "Report by the Federal State-Funded Institution"].

⁴² Trial Monitor's notes July 10, 2020 hearing.

⁴³ Trial Monitor's notes November 9, 2020 hearing.

⁴⁴ Id.

⁴⁵ Sentence in the name of the Russian Federation, Case No. 1-194/2020 UID 52RS0011-01-2020-00131364 (Nov. 11, 2020), 10 [hereinafter, "Sentence"].

⁴⁶ Id., 12.

Linguistic Expert Examinations

Prosecution Expert: Barablina Yu.S

In her Expert Report, the prosecution's initial expert Yulia Barablina was asked to answer two questions: 1. "Are there any statements in the presented text which verbally express facts of reality or the state of affairs?"; 2. "If so, exactly what facts of reality or state of affairs? In what form are they presented?". To answer these questions the prosecution provided the expert with the message from Sorokin Hvost, the indictment, and the record of interrogation of Mr. Pichugin. According to the report, the text provided by the prosecution "start[ed] with the word "Attention!" and end[ed] with the words "Be prepared!"⁴⁷ Based on this text, the expert conducted a semantic and grammatical analysis and found statements with an objective real modality that were "represented by specific verb word forms – verbs in the indicative mood, past or present tense."⁴⁸ The expert thus concluded that the first question could be answered in the affirmative – there were statements in the text that verbally expressed facts of reality. In answering the second question, the expert appeared to take a literal approach and broke the text into phrases to show how, according to her, most of the information was expressed as facts of reality, ultimately concluding that the information in the text was presented in the form of an affirmative statement.⁴⁹

At trial, the prosecution's first expert testified that the message fell within a "journalistic style." She also testified that the message was presented in the "form of statements containing statements of facts" as indicated by Mr. Pichugin's use of the indicative mood, which according to the expert meant that "all actions that are described in the text...are perceived as existing in reality."⁵⁰ The expert seemingly based her analysis on grammatical indicators in the message and concluded that there was no figurative meaning to the text because Mr. Pichugin used imperative verbs rather than the subjunctive verbs.⁵¹ She also found no signs of metaphor or satire.

On cross-examination this first expert testified that she had been informed in the interrogation protocol provided by the investigator that Sorokin Hvost was a Telegram news

⁴⁷ Barablina Yu.S, Expert Report No. 246-17-06, Apr. 23, 2020, p 2.

⁴⁸ Id, p 4.

⁴⁹ Id, p 9-10. [Expert Yulia Barablina concluded that the following facts of reality are verbally expressed in the text: 1. conducted in accordance with the plan, an action ("campaign") to infect the population with a deadly disease; the time of the action ("campaign") – present ("today"); the place of implementation is a certain territory ("across the country"); 2. the action to infect the population with a deadly disease was initiated by a group of people "members of a specific organization"; 3. groups of people "officials of the law enforcement agencies and the FSB" have certain data (names, passwords, safe houses information); 4. a group of people "the leadership of the organization" gathers in a certain place ("in specially designated places") a group of people "its adherers-suicide assassins" / "disseminators" in order to use it as a "tool" for the transmission of an infectious disease (infection); 5. in a certain place ("specially designated places") a group of people "its adherers-suicide assassins" / "disseminators" deliberately does not comply with sanitary rules and measures to maintain cleanliness, which leads to infection (contagion) of people within the said group; 6. after contagion (infection), a group of people "its adherers-suicide assassins" / "disseminators" penetrates the society with the aim of infecting it (transmission of infection); 6. the planning of a repeated action ("campaign") is currently in progress; the content of the action ("campaign") – infecting the population with a deadly disease; the repeated action ("campaign") will be more extensive and significant than the first, the subject of the action "is planned" – "members of a specific organization," the time of the repeated action ("campaign") – "in a week"].

⁵⁰ Trial Monitor's notes August 24, 2020 hearing.

⁵¹ Id.

channel and had conducted her assessment on that basis. She also admitted that she was not provided with any additional messages from the channel for context and that the message in question was not provided to her in full, as the text provided for her analysis ended after the words “be prepared.”⁵² The expert also did not take into consideration the name of the channel “Sorokin Hvost,” which refers to the Russian expression “the magpie brought it on its tail”—similar to “a little bird told me.”⁵³

Defense Expert: Koltunova E.A.

In her Expert Report the defense’s expert Elizaveta Arkadyevna Koltunova was asked to answer three questions: 1. “Do the statements posted on the telegram channel “Sorokin hvost” contain knowingly false socially significant information about facts?” (after determining that only a court could decide this question Ms. Koltunova rephrased the question to “do the statements posed on the telegram channel... contain information expressed in the form of a statement of facts? If so, do they have the linguistic features of a “bad faith statement?”); 2. “Does this information pose a threat to the life and health of citizens, to property?”; and 3. “Does this information pose a threat of mass disruption to public order and public safety?”⁵⁴ Ms. Koltunova was provided with a screenshot of the post from the Sorokin Hvost Telegram channel to complete her analysis.

In answering the first rephrased question, Ms. Koltunova had regard to the fact that the post was made on the social media platform Telegram as well as the communicative situation at the time of the post, noting that it was posted on Palm Sunday and that only a few weeks earlier the Governor of Nizhny Novgorod had issued a decree prohibiting any mass events yet Russian media were reporting that large numbers of people were attending churches. Ms. Koltunova concluded that the post was expressed as an extended metaphor and that “all lexical means that are accurate and relevant in the communicative situation of the fight against coronavirus are replaced with periphrases (periphrasis; from Old Greek περιφρασις - “descriptive expression”) allegorical expressions.”⁵⁵ That is, the text is an extended value judgment of the author and there are no linguistic markers of information expressed in the form of statements of fact in the text. Furthermore, the text does not contain linguistic signs of a speech act of bad faith information.”⁵⁶ In answering the second and third questions Ms. Koltunova determined that a linguist could not evaluate the consequences of the dissemination of this information, however, she could not find any linguistic signs of a threat against a specific person or group, nor could she identify any call to action in the text.⁵⁷

At trial, the defense expert testified that the message was written in the form of a metaphor, without specifics. She noted that Mr. Pichugin’s message lacked the details – such as related to time and place – that would indicate that the message was a statement of fact.⁵⁸ In her opinion, the message was a value judgement and expressed the author’s attitude

⁵² Id.

⁵³ Id.

⁵⁴ Elizaveta Arkadyevna Koltunova, Expert Report, Jul. 1, 2020, p 2.

⁵⁵ Id. p 6. [For example “instead of “church service” — a campaign to infect the population, instead of “COVID-19” — deadly disease. Instead of “organization” — by members of a specific organization, instead of “churches, temples” — specially designated places, etc. The said lexical means are used for the purpose of an emotional-expressive assessment of the events of April 12.”

⁵⁶ Id. p 8.

⁵⁷ Id. p 10

⁵⁸ Trial Monitor’s notes July 16, 2020 hearing.

towards the events in question (i.e., the holding of church services despite the prevalence of COVID-19).⁵⁹

When asked whether the message included a threat, the defense expert also testified that while each person's reaction was subjective, her task was to find an objective meaning and she could not say that the message was knowingly false or that there were any words associated with a threat.⁶⁰

Supplementary Experts appointed by the court: Ryabova N.B. and Myasnikova T.V.

The additional court-appointed experts' written report focused on answering the following questions:

1. Were there any statements of fact in the text? If so, what information was provided as a statement of fact?
2. Were there any value judgements in the text?
3. Were there any means of artistic expression in the text? If so, what were they?

To answer the first three questions, the experts divided the message into small phrases, which they analysed separately and classified as either information that could be verified – a statement of fact – or information that could not be verified – a value judgement.

The experts concluded that the phrase “law enforcement agencies and the FSB have all the names, passwords, and safe houses information” was a statement of fact.⁶¹ This phrase was interpreted by the experts to mean, literally, that law enforcement agencies and the FSB had all this information regarding the organization that has planned the action of spreading the “deadly disease” and that this information could be verified.⁶² Likewise, the experts concluded that the phrase “in specially designated places,” which the experts interpreted to mean that the management of the organization had agreed in advance to specific places for the collective actions planned for April 12, was also a statement of fact and could be verified.⁶³

On the other hand, the experts concluded that the remaining phrases fell either into the category of value judgement as the information could not be verified,⁶⁴ or phrases that could

⁵⁹ Id.; Sentence supra note 49, 8.

⁶⁰ Id.

⁶¹ Report by the Federal State-Funded Institution, supra note 45.

⁶² Id.

⁶³ Id.

⁶⁴ Phrases considered by the experts to be value judgements that could not be verified included: “deadly disease”; “Today, a planned action for infecting the population with a deadly disease is taking place across the country. The action is launched by a specific organization ... The management of the organization ...”; “the management of the organization is using its adherents-suicide bombers as spreaders of the infection”; “suicide”; “intentionally breach”; “the action is planned to be repeated in a week”; “the action is planned to be repeated in a week ... Be on alert!”, “An even larger action is planned to be repeated in a week”; and “For information <...> The carrying out of an explosion, arson or **other actions intimidating the population, and creating the threat of human death**, of infliction of significant property damage or the onset of other grave consequences, **for the purpose of influencing the taking of a decision by authorities or international organisations**, and also the threat of commission of the said actions for the same purposes”.

be classified as both a statement of fact and a value judgement depending on the interpretation.⁶⁵ For example, the phrase “where the distributors deliberately violate sanitary rules” could be interpreted to mean that at least on one occasion the adherents had gathered and not complied with the public health regulations. The experts concluded that this could be a statement of fact that could be verified through observation. However, it could also be interpreted as the author’s own conclusions on what he believed to be the repeated actions of adherents not complying with public health regulations.⁶⁶

More broadly, though, the experts concluded that the communicational goal of the message was to share a personal opinion about the author’s negative attitude towards the actions described. Finally, the experts answered the third question by concluding that the message was constructed as a developed metaphor and also contained other artistic rhetorical techniques, including comparison, synecdoche, and paraphrasing.

At trial, expert Myasnikova T.V.’s testimony aligned with the conclusions in the report.⁶⁷

⁶⁵ Phrases considered by the experts to be both value judgements and statements of fact included the following: “its adherers-suicide assassins as disseminators of infection”; “Gathering them in specially designated places”; “where the spreaders intentionally breach the sanitary norms”; “where the spreaders <...> and then infiltrate the society”

⁶⁶ Report by the Federal State-Funded Institution, supra note 45.

⁶⁷ Trial Monitor’s notes October 22, 2020 hearing.

METHODOLOGY



A. THE MONITORING PHASE

The Clooney Foundation for Justice monitored this case by obtaining audio recordings of each hearing. The monitor, who is a fluent Russian speaker, listened to these audio recordings and created a transcript.

The monitor used a standardized TrialWatch questionnaire to record what transpired at trial and the degree to which the defendant's fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade of D, TrialWatch Expert Oliver Wallasch reviewed the transcripts prepared by the trial monitor, the monitor's responses to the standardized questionnaire, as well as various court documents, including the indictment, expert reports, and judgment. The entire course of the trial, and also the pre-trial investigations, which were only conducted superficially and already in the light of an upcoming verdict against the accused that was predetermined from the perspective of the objective observer, were fully documented.

Despite some linguistic deficiencies, the documentation contained all the necessary documents to enable an objective assessment of the facts in question.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights ("ICCPR")⁶⁸ a multilateral treaty adopted by the U.N. General Assembly in 1966, which is part of the International Bill of Human Rights; jurisprudence from the United Nations Human Rights Committee, which is tasked with monitoring implementation of the ICCPR; the European Convention on Human Rights ("ECHR")⁶⁹; and jurisprudence from the European Court on Human Rights ("ECtHR"), which is tasked with monitoring the implementation of and enforcing the ECHR. The USSR acceded to the ICCPR in 1973, and the Russian Federation succeeded to USSR's obligations under the covenant in 1991. Russia ratified the ECHR in 1998, subject to certain reservations.⁷⁰

⁶⁸ International Covenant on Civil and Political Rights Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"]

⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 [hereinafter "ECHR"].

⁷⁰ Chart of Signatures and Ratifications of Treaty 005, Council of Europe (2020) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>.

B. VIOLATIONS AT TRIAL

Right to Presumption of Innocence

The right to be “presumed innocent until proven guilty according to law” is enshrined in Article 14(2) of the ICCPR. Likewise, Article 6(2) of the ECHR protects the right to be presumed innocent. This right applies from the very first stage of a criminal proceeding – that is, the time a person is suspected of having committed an offence – through to conviction or acquittal.⁷¹

According to the ECtHR, the presumption of innocence requires “that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.”⁷² The UN Human Rights Committee has likewise stated that the presumption of innocence “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt.”⁷³

The Committee has also noted that while it is “generally for the relevant domestic courts to evaluate facts and evidence in a particular case,”⁷⁴ it may find a violation where “it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.”⁷⁵

In this case, Mr. Pichugin was not afforded the presumption of innocence from the beginning. In an interview documented in the indictment Mr. Pichugin states that he did not intend to spread false information because “he did not reference reliable sources, did not quote politicians or other public figures, did not use fake documents...”⁷⁶ However, the investigator who gathered the evidence and drafted the indictment dismissed Mr. Pichugin’s explanation and concluded that “the testimonies of A. V. Pichugin should be treated critically, because they are aimed at avoiding prosecution and are refuted by the evidence collected in the case.”⁷⁷ But the indictment refers to no such evidence. Moreover, it is

⁷¹ European Court of Human Rights, *Poncelet v. Belgium*, App. No. 44418/07 (Mar. 30, 2010) ¶ 50; European Court of Human Rights *Garycki v. Poland*, App. No. 14348/02 (Feb. 6, 2007) ¶ 66; European Court of Human Rights, *Minelli v. Switzerland*, App. No. 8660/79 (Mar. 25, 1983) ¶ 30..

⁷² European Court of Human Rights, *Barberà, Messegué and Jabardo v. Spain*, App. No 10588/83 (Jun. 13, 1994) ¶ 77.

⁷³ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ¶ 30 [hereinafter, “General Comment No. 32”].

⁷⁴ UN Human Rights Committee, *Pustovoit v. Ukraine*, U.N. Doc. CCPR/C/110/D/1405/2005 (Mar. 20, 2014) ¶ 8.11.

⁷⁵ UN Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005 (Apr. 2, 2007) ¶ 6.7 (“There is no information before the Committee that, despite their having being raised by Ashurov and his defence, these matters were taken into account either during the second trial or by the Supreme Court. In the absence of any explanation from the State party, these concerns give rise to reasonable doubts about the propriety of the author’s son’s conviction.”); See also: UN Human Rights Committee, *Larranaga v. Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005 (July 24, 2006) ¶ 7.4; UN Human Rights Committee, *Iskandarov v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006 (Apr. 28, 2011) ¶ 6.6; UN Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006 (Dec. 3, 2009) ¶¶ 7.2-7.3.

⁷⁶ Indictment, 2.

⁷⁷ *Id.*, 24.

fundamentally inconsistent with the presumption of innocence to suggest that defense claims should be discounted because they reflect an effort to defend against prosecution.

In his opening remarks Mr. Pichugin stated, “I do not see any clear arguments, what is the deliberate falsity, where I lied, and what information may pose a public danger?”⁷⁸ And in his closing remarks Mr. Pichugin concluded “I never heard what the falsity of the text, which formed the basis of the case, is, moreover, it is not clear where the evidence of the ‘knowingness’ of this allegedly false information is. As far as I understand, the investigation, and then the prosecution, had to prove that I, realizing that I was writing a lie, nevertheless wrote it.”⁷⁹ These comments reflect the fact that the prosecution failed to meet its burden of proof and provide evidence of Mr. Pichugin’s intent. And yet the court convicted him. In this respect, Mr. Pichugin’s case is similar to the treatment of the applicant in *Ashurov v. Tajikstan*: In that case, the UN Human Rights Committee found that the state had violated Article 14(2) of the ICCPR because the court failed to consider gaps in in the case, which meant that the accused was “not afforded the benefit of the doubt.”⁸⁰

Here, the closest the prosecution came to seeking to prove Mr. Pichugin’s intent was through the expert report and testimony of linguistic specialist Koltunova E.A (the prosecution’s first expert) who stated that the “information contained in the text [was] presented in the form of statements” that were made in “a real modality,” meaning that they were meant to reflect reality.⁸¹ According to the expert:

the main means of [identifying this] modality is the category of the indicative mood, which contains the meaning of danger and temporary certainty, that is, all actions that are described in this text, they are perceived as existing in reality... the author takes full responsibility for what he writes. This follows from the fact that in this text there are no markers of doubt, assumption or subjective opinion.⁸²

To the extent this were reliable, it goes only to the question of whether the post was a statement of fact, not Mr. Pichugin’s intent. The idea that the “author takes full responsibility for what he writes” cannot suffice to overcome an uncontradicted contrary explanation of intent.

And in any event, the defense had pointed out the flaws in this analysis. First it was based on the assumption that Mr. Pichugin’s comments were made on a Telegram *news* channel, not an anonymous feed. Second, the expert did not receive the full text of the message as the final part of the text – “For reference: Criminal Code of the Russian Federation, Art. 205 ‘Act of Terrorism’” and the text of the provision with the author’s emphasis on certain phrases - was excluded from the material she was provided, which had it been included might have shed further light on the communicative goal of the message. Third, the expert did not take account of the timing of the message (i.e., that it was posted on Palm Sunday and Easter was celebrated a week after that); this would have been relevant to understanding the critical import of the imagery. Fourth, the analysis failed to contextualize this message alongside previous messages posted by Mr. Pichugin nor did it take into

⁷⁸ Trial Monitor’s notes July 10, 2020 hearing.

⁷⁹ Trial Monitor’s notes November 9, 2020 hearing.

⁸⁰ Id.

⁸¹ Trial Monitor’s notes August 24, 2020 hearing.

⁸² Id.

account how the message related to the name of the channel, “Sorokin’s Hvost,” which connotes the unreliable nature of the information. And finally, the expert did not take into account the potential figurative meaning of the text, basing her analysis simply on grammatical indicators.⁸³

Yet, rather than addressing this gap in the prosecution’s case the court seemingly ignored the defense’s argument that the prosecution had failed to establish intent. Instead, the court simply assumed intent when it concluded: “that the information disseminated by the defendant...informed the reader about circumstances that did not take place in reality, about which the distributor of this information *could not but know*, in connection with which this information is *qualified by the court as knowingly false*.”⁸⁴

Despite the failure by the prosecutor to prove necessary elements of the crime charged, the court nevertheless found Mr. Pichugin guilty. When taken together, it is clear that from the moment he was indicted to the moment he was convicted Mr. Pichugin was not afforded the right to be presumed innocent.

Right to an Impartial, Independent, and Competent Tribunal

Article 14(1) of the ICCPR provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 6(1) of the ECHR likewise protects this right, stating that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁸⁵

The right to a competent, independent and impartial tribunal is “an absolute right that is not subject to any exception.”⁸⁶ The requirement of impartiality has both a subjective and objective element. The subjective element requires that “judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.”⁸⁷ The ECtHR has made clear that the impartiality of judges will be presumed unless there is proof to the contrary and has stated that examples of the type of proof required include displays of “hostility” or “ill will” from the judge.⁸⁸ The objective element requires that “the tribunal must also appear to a reasonable observer to be impartial.”⁸⁹ The ECtHR has held that “[w]hen it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.”⁹⁰ The Court has also made clear that “there is no watertight division between subjective and objective impartiality

⁸³ Defense Counsel’s Petition to Conduct Supplementary Linguistic Examination, September 4, 2020.

⁸⁴ Sentence, *supra* note 49, 10 [emphasis added].

⁸⁵ ECHR, Art. 6.

⁸⁶ Human Rights Committee, General Comment No. 32, ¶ 17.

⁸⁷ *Id.*, ¶ 21. See also: Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, (Mar. 20, 2007) ¶¶ 2.8, 6.6; Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, (Nov. 5, 1992) ¶ 7.2.

⁸⁸ European Court of Human Rights, *Kyprianou v Cyprus*, App. No. 73797/01 (15 Dec. 2005) ¶ 119; European Court of Human Rights, *Hauschild v Denmark*, App. No. 10486/83 (24 May 1989) ¶ 47.

⁸⁹ Human Rights Committee, General Comment No. 32, ¶ 21.

⁹⁰ European Court of Human Rights, *Kyprianou v Cyprus*, App. No. 73797/01 (15 Dec. 2005) ¶ 118.

since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).⁹¹

The judgment in Mr. Pichugin's case raises serious questions about the court's impartiality. Throughout, the court selectively picks and chooses parts of witnesses' testimonies that support the prosecution's case while dismissing evidence that supports Mr. Pichugin's defense.

First, the court unquestioningly treats one of the prosecution's witnesses as credible, without considering defense arguments regarding potential reasons to doubt their credibility. In *Nechiporuk and Yonkalo v. Ukraine*, the ECtHR held that there had been a violation of Article 6(1) in circumstances where the court convicted the defendant on the basis of statements made by a witness and ignored "specific and pertinent facts [that had] a potential to undermine their reliability and accuracy"⁹² without explaining why the testimony was credible. In this case, Mr. Savinov (the person who said he had been scared by the message) testified to being a subscriber to Sorokin Hvost, that he took information from the channel as leaks, that Mr. Pichugin wrote on serious topics, and that the message in question "scared" him as he took it seriously.⁹³ The court in its judgment relies on the fact that Mr. Savinov knew that Sorokin Hvost was run by Mr. Pichugin and "characterize[d] [Mr. Pichugin] as a serious person, not inclined to joke on serious matters."⁹⁴ The judgement also refers to the fact that this witness took Mr. Pichugin's message as a warning about a planned terrorist attack.⁹⁵ But the court does not address Mr. Pichugin's argument, advanced during cross-examination, that Mr. Savinov had previously asked him to publish information about a journalist,⁹⁶ which Mr. Pichugin had refused to do (instead he warned the journalist of Mr. Savinov's actions).⁹⁷ This is, of course, a potential reason for Mr. Savinov to hold a grudge against Mr. Pichugin. On this basis, Mr. Pichugin asked the court "to be as critical as possible [regarding] testimony of Mr. Savinov."⁹⁸ Yet while the judge very briefly questioned Mr. Savinov about his association with Mr. Pichugin, he appeared to completely accept Mr. Savinov's statement that he had "no prejudice towards [Mr. Pichugin]"⁹⁹ and relied on his testimony in convicting Mr. Pichugin.

Second, the judgement refers to testimonial evidence that was not actually adduced at trial or reframes evidence in ways belied by the record. For example, at trial, defence witness and fellow journalist Ms. Skugarevskaya testified that she knew the message was "a warning about Palm Sunday" and that Mr. Pichugin's audience would have understood his message as referring to the religious holiday. However, in the judgement the court states

⁹¹ European Court of Human Rights, *Micallef v Malta*, App. No 17056/06, (15 Oct. 2009) ¶ 95.

⁹² European Court of Human Rights, *Nechiporuk and Yonkalo v. Ukraine*, App. No. 42310/04 (Apr. 21, 2011) ¶ 279

⁹³ Trial Monitor's notes July 10, 2020 hearing.

⁹⁴ Sentence, *supra* note 49, 3

⁹⁵ *Id.*

⁹⁶ Irina Slavina died on October 2, 2020 "after setting herself on fire outside a regional branch of the interior ministry building in the Russian city of Nizhny Novgorod... She posted that same day on her Facebook page, "For my death, please blame the Russian Federation." Committee to Protect Journalists, "Russian journalist Irina Slavina dies of self-immolation after harassment by authorities" (October 26, 2020) available at: <https://cpj.org/2020/10/russian-journalist-irina-slavina-dies-of-self-immolation-after-harassment-by-authorities/>.

⁹⁷ Trial Monitor's notes July 10, 2020 hearing.

⁹⁸ *Id.*

⁹⁹ *Id.*

that Ms. Skugarevskaya “is a faithful believer and understood that [the event] involved Palm Sunday”¹⁰⁰ as if to attribute her knowledge to her faith. But no evidence regarding her religiosity or lack thereof was presented at trial. The court likewise reframes the testimony of an anonymous prosecution witness who, at trial, testified that while at first, he did not realize the text was about the Russian Orthodox Church, he subsequently “realized this was an insult to the feelings of believers.” However, in the judgement the court ignores this and states that the “Russia Orthodox Church did not enter at all in his mind when he read the message, and even to this date he does not think that the message has anything to do with the church or the meetings organized by it, believing that Pichugin A.V. is only trying excuse his actions this way.”¹⁰¹

Third, the court gives a selective reading to the views of the supplementary experts. The court states that the experts found that: “the specified information – about the actual actions of a particular organization to intentionally infect citizens – was presented in the message disseminated by Pichugin A.V., as factual information and not as an opinion, an assumption or a subjective assessment of certain events by the author.”¹⁰² However, the supplementary experts’ report itself breaks down each part of Mr. Pichugin’s message to determine whether it is a fact (i.e., a statement that can be verified) or a value judgement and determined that these phrases could be interpreted both as statements of fact and as an opinion.¹⁰³ Further, the report concludes that overall, the communicative goal of the message was to “inform about a personal opinion.”¹⁰⁴ But the court selectively focuses on those parts of the expert report that favour the prosecution’s case.

Fourth, the court seemingly dismisses defense evidence related to Mr. Pichugin’s telegram channel that contradicted the prosecution’s account of it as a credible source of fact. The court states that “[t]he quotes from the ‘Sorokin Hvost’ telegram channel, which the defense relies on as confirmation of the sarcastic nature of the message in question”¹⁰⁵ are irrelevant as they are not related to the message posted. However, the court unquestionably accepted testimony from prosecution witnesses alleging that the channel would have been deemed credible because it contains “leaks of semi-official information”—without further evidence to establish this. The characterization of the channel was critical. The court acknowledged that the message did not bear the indicia given as examples in the Supreme Court Advisory Opinion of ways messages may be given the appearance of credibility—i.e., using sources that seem legitimate or forging documents. But it nevertheless relied on the nature of the forum—according to the court, “a source often used by the author to convey ‘insider’ information, received from official sources, but has not yet become public”¹⁰⁶—as the basis for finding that the message was presented as credible fact.

Finally, the court gave little to no consideration to the opinion of the defense expert, who testified that Mr. Pichugin’s message was a value judgement or opinion and that it was meant metaphorically.¹⁰⁷ The court instead dismissed this testimony, “since [it] contradict[s]

¹⁰⁰ Sentence, supra note 49, 5.

¹⁰¹ Id., 4.

¹⁰² Id., 10.

¹⁰³ Report by the Federal State-Funded Institution, supra note 35.

¹⁰⁴ Id.

¹⁰⁵ Sentence, supra note 49, 13

¹⁰⁶ Id., 11

¹⁰⁷ Trial Monitor’s notes July 16, 2020 hearing.

the conclusions and testimonies of two examinations conducted on similar issues.”¹⁰⁸ However, the supplementary experts and the defense expert actually agreed that the text was metaphorical and that much of it expressed the author’s value judgement.¹⁰⁹ The court does not acknowledge these areas of agreement, but instead makes much of what it calls “inconsistencies” in the defense expert’s testimony: while the expert determined that the text was about Palm Sunday she also indicated that the message was not specific and therefore could not be considered a statement of fact. But the court’s analysis does not take into consideration the fact that both could be true: the text could be a general criticism, but because of the date when it was posted, readers might be able to understand it as referring to the events of Palm Sunday, even if the text was not specific to those events. Rather than trying to understand the expert’s perspective, the court appears to seek to use the purported inconsistency to undermine the expert’s credibility.

Thus, by repeatedly dismissing evidence provided by the defense and selectively focusing on evidence that supports the prosecution’s case against Mr. Pichugin, the court gave an objectively-justifiable impression of partiality, and thus violated Mr. Pichugin’s right to an independent and impartial tribunal.

Right to Prepare a Defence: Right to be Informed of the Charges

Article 14(3)(a) of the ICCPR guarantees that “in the determination of any criminal charge against him, everyone shall be entitled... [t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”¹¹⁰ The UN Human Rights Committee has confirmed that the right “to be informed of the charge promptly requires that the information be given as soon as the person concerned is formally charged with a criminal offence under domestic law” and that “[t]he specific requirements ... may be met by stating the charge either orally – if later confirmed in writing – or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.”¹¹¹

Article 6 of the ECHR likewise provides for the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.¹¹² In the case of *Mattoccia v. Italy*, the ECtHR stated for instance that while “the ‘detailed’ information referred to in this provision varies depending on the particular circumstances of each case, the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence” and that “the adequacy of the information must be assessed in relation to ... the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing.”¹¹³ As Article 6 makes clear, a defendant must be provided with information both about the facts underlying the allegation against them as well as the law under which they are charged. While the extent of the information to be provided will be assessed on a case-by-case basis, defendants are entitled to understand the alleged acts or omissions on which

¹⁰⁸ Sentence, supra note 49, 12.

¹⁰⁹ Trial Monitor’s notes November 9, 2020 hearing.

¹¹⁰ ICCPR, Art 14(3)(a).

¹¹¹ Human Rights Committee, General Comment 32, ¶ 31.

¹¹² ECHR, Article 6(a)

¹¹³ European Court of Human Rights, *Mattoccia v. Italy*, App. no. 23969/94 (25 Jul. 2000) ¶ 60.

the accusation is based.¹¹⁴ The ECtHR has stated that for this purpose, “[a]n indictment plays a crucial role ... in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him.”¹¹⁵

Here, the indictment does not make clear the general facts upon which the prosecution intended to rely to show that Mr. Pichugin intended to disseminate false information. As the Russian Supreme Court has made clear, intent is a critical element of the offense and intent includes knowledge that the information being disseminated was false. But the indictment simply assumes intent. At the first hearing, Mr. Pichugin’s defense counsel raised this issue, stating that the indictment does not make clear “[w]hat exactly is the falsity of the text, which elements of this post are false?”¹¹⁶ arguing that due to these deficiencies, “it is not clear what to defend against. In this part, we insist that the accusation is not specific and is incomprehensible to us.”¹¹⁷

By failing to provide sufficient information in the indictment to give the defendant notice of the general acts on which the prosecution intended to rely to prove a key element of the offense, the state violated Mr. Pichugin’s right to be informed of the charges against him.

Right to Appeal: Duly Reasoned Judgment

Article 14(5) of the ICCPR provides for the right to appeal, which the UN Human Rights Committee has made clear “can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court.”¹¹⁸ The ECtHR has also interpreted Article 6 of the ECHR to require that courts must “indicate with sufficient clarity the grounds on which they based their decision.”¹¹⁹ For example, in *Suominen v. Finland*, the ECtHR held that there had been a violation of the right to appeal where a trial court did not explain its reasoning for refusing to admit much of the defendant’s evidence.¹²⁰

In this case, the court failed to provide its reasoning on a key element of the crime: namely the intent of the defendant. As discussed above, the court simply held that “the information disseminated by the defendant was unreliable . . . about which the distributor of this information could not but know, in connection with which this information is qualified by the court as knowingly false.”¹²¹ The court also contradicted itself when determining the appropriate sentence for Mr. Pichugin, stating that “the court takes into account the nature of the crime committed and the direction of intent of the defendant, who, by placing deliberately false information, proceeded from misunderstood public interests, mistakenly believing that by his actions he was assisting the official authorities...”¹²² A “misunderstood public interest” does not raise to the level of “direct intent,” as required under Article 207.1.

¹¹⁴ European Court of Human Rights, *Pélissier and Sassi v. France*, App. No. 25444/94 (25 Mar. 1999) ¶ 51.

¹¹⁵ European Court of Human Rights, *Kamasinski v Austria*, App. No. 9783/82 (19 Dec. 1989) ¶ 79.

¹¹⁶ Trial Monitor’s notes July 10, 2020 hearing.

¹¹⁷ *Id.*

¹¹⁸ Human Rights Committee, General Comment 32, ¶ 49.

¹¹⁹ European Court of Human Rights, *Hadjianastassiou v. Greece*, App. No. 12945/87 (Dec. 16, 1992) ¶ 33.

¹²⁰ European Court of Human Rights, *Suominen v. Finland*, App. no. 37801/97 (July 1, 2003) ¶¶ 37–38. See also: *Hadjianastassiou v. Greece*, App. no. 12945/87 (Dec. 16 1992) ¶ 37 (found a breach of Art. 6(1), 6(3)(b) due to lack of reasoned decision to allow exercise of the right to appeal).

¹²¹ Sentence, *supra* note 49, 10.

¹²² *Id.*, 15.

The court's failure to provide a reasoned analysis on the question of Mr. Pichugin's intent violated Mr. Pichugin's rights under Article 14(5) of the ICCPR and Article 6 of the ECHR.

C. OTHER FAIRNESS CONCERNS

Right to Freedom of Expression

Mr. Pichugin's prosecution and conviction also violated his right to freedom of expression, protected under both international and domestic law. Article 19 of the ICCPR and Article 10 of the ECHR protect the right to freedom of expression, as does article 29 of Chapter 2 of the Russian Constitution. While this right is not absolute, any restrictions must: (1) be prescribed by law (the principle of legality); (2) serve a legitimate objective; and (3) be necessary to achieve and proportionate to that objective.¹²³

The principle of legality requires that the law at issue "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly" and "may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."¹²⁴ Further, any reason for restricting freedom of expression "must be established convincingly."¹²⁵ For instance, in *Tae-Hoon Park v. Republic of Korea*, the UN Human Rights Committee found that an invocation of national security by "reference to the general situation in the country and the threat posed by 'North Korean communists'" failed to "specify the precise nature of the threat which [the state] contend[ed] that the author's exercise of freedom of expression posed."¹²⁶ Finally, in order to meet the tests of necessity and proportionality, a restriction must be the "least intrusive instrument amongst those which might achieve their protective function."¹²⁷ This means that laws cannot be overbroad.¹²⁸

Public safety and the protection of health are among the potential justifications for limiting freedom of expression under both the ECHR¹²⁹ and the ICCPR. But Mr. Pichugin's prosecution and conviction failed each element of the test described above.

First, Mr. Pichugin's message was on a topic of public concern—COVID-19 and whether religious gatherings might spread the disease. As he put it, it "was a text largely conditioned by personal feelings ... [during a] period when the coronavirus just came to Russia" and prompted by the fact that it "look[ed] strange that people are told to stay at home if the temples are open."¹³⁰ He also explained that he had only posted the message after the governor of the province where he lived had gathered bloggers and specifically asked them "to find the most accessible, harsh words so that people understand the danger [of

¹²³ Human Rights Committee, General Comment 34, ¶ 22.

¹²⁴ *Id.*, ¶ 25.

¹²⁵ European Court of Human Rights, *Surek v. Turkey* (No. 1), App. No 26682/95 (Jul. 8, 1999) ¶ 58.

¹²⁶ Human Rights Committee, *Tae-Hoon Park v. Republic of Korea*, Communication No. CCPR/C/64/D/628/1995 (Nov. 3, 1998) ¶ 10.3.

¹²⁷ Human Rights Committee, General comment No. 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 9, 1999) ¶ 14.

¹²⁸ Human Rights Committee, General Comment 34, ¶ 34.

¹²⁹ ECHR, Article 10(2).

¹³⁰ Trial Monitor's notes October 22, 2020 hearing.

COVID].”¹³¹ As such, his message was protected speech. Indeed, the UN Human Rights Committee has made clear, “[t]he free communication of information and ideas about public and political issues . . . is essential.”¹³²

The fact that he used stark imagery does not result in any loss of protection for his message. Indeed, as pointed out by defense counsel in Mr. Pichugin’s case, freedom of speech guarantees are “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.”¹³³ For example, in *Jersild v. Denmark*, which involved the conviction of a journalist for allegedly aiding and abetting a xenophobic group, the ECtHR made clear that while some specific remarks made by the group and read out of context could be highly offensive, “the way in which they were presented and the objective pursued by the applicant were, in the circumstances, sufficient to outweigh the effect.”¹³⁴ Here, although he likewise used harsh language, Mr. Pichugin sought to use a technique of “sarcastic journalism” to “share[...] [his] assessment of what is happening and the forecast of what the current situation may lead to”¹³⁵ if religious celebrations were permitted during a global pandemic.

Turning to the test for restrictions on protected speech, Article 207.1 of the Russian Criminal Code fails the first prong because it is not clear as to the definition of “circumstances threatening life and safety of citizens and/or measures to ensure safety of the populace and areas, of ways and methods of protection from such circumstances.” Human rights organizations have expressed their concern about the vague and broad sweep of the provision, which “leaves the new legal provision open to wide interpretation and abuse.”¹³⁶ This concern seems justified given reports of criminal proceedings under the law being initiated as often as every two days in just the first two months.¹³⁷ The law also seems to be interpreted broadly by law enforcement agents charged with its execution. According to a local freedom of expression expert “[a]cross the country law enforcement considered it a matter of honor to find and disarm spreaders of ‘fake news,’ not only among journalists but among bloggers and even medical workers and ordinary Internet users.”¹³⁸ Moreover, even in this case, the court seemed unclear whether the “circumstances threatening life and safety” concerned the allegedly criminal message or its subject.

There has also been concern that the law is being used to punish critics of the government, with 17 out of the 42 criminal prosecutions in the first two months apparently being of activists, journalists, bloggers and politicians.¹³⁹ For example, in April 2020, a human rights activist’s home was allegedly searched by law enforcement agents after he shared a post

¹³¹ *Id.*

¹³² Human Rights Committee, General Comment No. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Jul. 12, 1996) ¶ 25.

¹³³ European Court of Human Rights, *Sokolowski v. Poland*, App. No. 75955/01 (Mar. 29, 2005) ¶ 41.

¹³⁴ European Court of Human Rights, *Jersild v. Denmark*, App. No. 15890/89 (Sep. 23, 1994) ¶ 25

¹³⁵ Trial Monitor’s notes November 9, 2020 hearing.

¹³⁶ Amnesty International, “Russian Federation: Fake news bill promoted by COVID-19 threatens freedom of expression”, (3 April 2020), available at: <https://www.amnesty.org/download/Documents/EUR4620932020ENGLISH.pdf>.

¹³⁷ Agora International Human Rights Group, “The fake news ‘infodemic’: the fight against coronavirus as a threat to freedom of speech”, available at: https://agora.legal/fs/a_delo2doc/196_file__ENG_final.pdf

¹³⁸ Radio Free Europe, Radio Liberty, “Interview: Media Lawyer Says Russia’s New Laws ‘Are Burying Civil Society’”, (Jan. 15, 2021), available at: <https://www.rferl.org/a/russia-foreign-agents-law-interview-media-lawyer-civil-societ-rfe/31048094.html> (Interview with Galina Arapova, head of Mass Media Defense Center).

¹³⁹ *Id.*

on social media claiming that officials were transferring prisoners with COVID-19 symptoms without taking appropriate precautions.¹⁴⁰

Taken together, the vague and broad language of the law, as well its application in practice, raise serious questions as to its compliance with the principle of legality and with Article 19 of the ICCPR and Article 10 of the ECHR.

In addition, neither the prosecution nor the court fully articulated the alleged specific threat that Mr. Pichugin's message posed. It does not follow that the possibility of a handful of individuals feeling 'scared' is sufficient. This too violated international standards.

Finally, Mr. Pichugin's conviction was disproportionate and an unnecessary response to his speech. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously argued that only the most serious of speech offenses should be criminalized.¹⁴¹ The fact Mr. Pichugin was only fined, and no prison sentence was imposed is not dispositive. As the ECtHR has made clear in the case of *Stoll v. Switzerland*, "the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed."¹⁴²

Further, several international experts have raised concerns at potential disproportionate responses to alleged 'fake news.' In fact, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information have noted that "[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression... and should be abolished."¹⁴³

Given that his speech was protected, its restriction would need to have satisfied the three-part test described above. But Mr. Pichugin's prosecution and conviction fails along each dimension. The prosecution and conviction of Mr. Pichugin thus violated his right to freedom of expression under international law.

¹⁴⁰ The Irish Times, "Russia clamps down on coronavirus 'fake news,'" (Jun. 15, 2020), available at: <https://www.irishtimes.com/news/world/europe/russia-clamps-down-on-coronavirus-fake-news-1.4279751>

¹⁴¹ U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290 (Aug. 10, 2011) ¶ 40.

¹⁴² European Court of Human Rights, *Stoll v. Switzerland*, App. No. 69698/01 (Dec. 10, 2007) ¶ 154.

¹⁴³ United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, "Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda", FOM.GAL/3/17 (Mar. 3, 2017) ¶ 2(a).

CONCLUSION AND GRADE



TrialWatch Expert Oliver Wallasch's Findings:

For me it is completely incomprehensible that Mr. Pichugin was convicted on the basis of the known facts presented in this report.

A superficial examination of the available documents could give the impression that the court had conducted a particularly thorough review of the facts by hearing three “*experts*.”

But: the *classification* of the text in no way requires expert review. It would have been the task of the court to classify the text independently. The determination of the intention of the author is also the original task of a court, and not that of an expert witness.

However, the investigating authorities and the court appeared to me to want to give the proceedings the *apparent appearance* of the rule of law. It is in no way comprehensible that the text in question, which was forwarded to a manageable number of recipients, was classified as a fact-based statement.

The constitutional approach to the facts of the case would have been, on the one hand, to question the constitutionality of the law, which criminalises the alleged act of the accused, and on the other hand to identify the intention of the author independently.

It is clear that this law is intended and being used to suppress freedom of expression. This intention of the legislator, which lies outside the constitutional framework and outside the European Convention on Human Rights, is obvious from this case and from other data being gathered on its implementation. It is further confirmed by Russia's recent effort to use a similar law against those protesting or criticizing its invasion of Ukraine.

Added to this is the exorbitant penalty demanded by the public prosecutor's office in this case, which was obviously intended to have a deterrent character. The court tried to maintain a certain proportionality by assessing a fine. But the court's behaviour in this case, including the decision to convict at all, give rise to fear that it is prepared to adopt decision-makers' efforts to suppress free speech without criticism.

Thus Mr. Pichugin's right to a fair trial, including his right to be presumed innocent, his right to an impartial, independent, and competent tribunal, and his right to a duly reasoned judgment in order to facilitate the right to appeal was affected.

More broadly, the findings in this case, which are consistent with broader concerns about the judicial system in the Russian Federation, should be taken into account in related proceedings. For instance, I am firmly convinced that extradition proceedings with the Russian Federation can no longer be processed solely on the basis of mutual trust because of increasing violations of the principles of the rule of law. Moreover, this case shows just how dangerous the new 'fake news' laws Russia has recently adopted are likely to be.

GRADE:

D

ANNEX



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”² and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.