Guido Raimondi
President
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
France

25 May 2018

Re: Grand Chamber referral in *Sinkova v. Ukraine* (Application no. 39496/11)

Dear President Raimondi and Members of the Panel:

We, the undersigned 22 organisations involved in the study, protection or exercise of the rights to freedom of expression, freedom of peaceful assembly and artistic freedom, are writing to support the request for referral to the Grand Chamber that we understand has been submitted by the applicant in the case of *Sinkova v. Ukraine* (Application No. 39496/11). Signatories to this letter include 12 European organisations working primarily or significantly on civil liberties in their home countries (Bulgaria, Croatia, Czech Republic, Hungary, Ireland, Italy, Lithuania, Netherlands, Northern Ireland, Romania, Spain and Sweden); the Civil Liberties Union of Europe, a network of civil liberties organisations; the European Centre for Not-for-Profit Law; and eight global organisations and academic centres working to defend, *inter alia*, the freedoms of expression, peaceful assembly and artistic freedom in Europe and around the world. Most of these organisations and centres have participated in litigation before this Court, many of them multiple times.

In its judgment of 27 February 2018, the Chamber held, by four votes to three, that there had been no violation of Article 10 of the Convention. The reasoning of the four-judge majority of the Fourth Section in several important ways departs from what were thought of as well-established principles in the Court's case-law.

Moreover, the judgment raises a significant question of practical import. As stated by the dissent: the judgment gives rise to the question of "how far a contracting State may criminalise insults to memory" and poses a "real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means." This erosion is all the more serious given the current context of increased penalties for non-violent protests in states across Europe. If the Chamber's judgment is allowed to stand, national authorities in some member states could interpret the judgment as a signal to be allowed to apply criminal penalties to non-violent demonstrations, provocative art performances and satirical expressive conduct on the ground that they offend national sentiments or values.

The case involves a performance artist and political analyst who fried eggs over the eternal flame at the Tomb of the Unknown Soldier in Kyiv. She was arrested for desecrating the Tomb, held for three months in pre-trial detention, convicted, and sentenced to three years in prison, suspended for two years.

The Fourth Section unanimously found three separate violations of Article 5 concerning the applicant's detention before trial. However, that part of the ruling does not diminish the need to address the serious questions raised by the Chamber's reasoning under Article 10.

The majority's ruling diverges from established precedent in at least four respects.

First, the majority held that the applicant was convicted "only on account of frying eggs over the Eternal Flame" (§ 107) and not "for expressing the views that she did" (§ 108). The Court has previously rejected such distinctions as artificial, and emphasised that restrictions on the manner in which ideas are expressed have an impact on their content – in particular in cases of symbolic protest. In *Women on Waves and Others v. Portugal*, for example, the Court disagreed with the Government's argument that banning a campaign vessel from territorial waters had little impact on the applicants' right to freedom of expression, as they could freely advocate legalisation of abortion on land without the use of their ship. It stated:

> [D]ans certaines situations le mode de diffusion des informations et idées que l'on entend communiquer revêt une importance telle que des restrictions … peuvent affecter de manière essentielle la substance des idées et informations en cause. Tel est notamment le cas lorsque les intéressés entendent mener des activités symboliques de contestation à une législation qu'ils considèrent injuste.[1]

In *Tatár and Fáber v. Hungary*,[2] as in the present case, the applicants had staged a political performance, consisting of the hanging of dirty laundry on the fence of the Hungarian parliament "to hang out the nation's dirty laundry" (§ 6). The Government argued that the sanctions subsequently imposed on the applicants did not relate to their expression of political views, but only to the 'regulatory offence' of failing to give prior notice of an assembly (§ 23). The Court rejected this view, holding that "an administrative sanction, however mild, on the authors of … expressions which qualify as artistic and political at the same time can have an undesirable chilling effect on public speech" (§ 41).

Second, the majority suggested that the applicant should have instead used one of the "many suitable opportunities … to express her views or participate in genuine protests … without breaking the criminal law and without insulting the memory of soldiers who perished and the feelings of veterans" (§ 110). This statement runs directly counter to several well-established principles.

The Court has repeatedly affirmed that demonstrators have "the right to choose the time, place and manner of conduct of the assembly"[3] and has expressly rejected the notion that individuals forfeit the protection of Article 10 by choosing controversial, symbolic means of protest when more conventional forms of expression are available. In *Murat Vural v. Turkey*, a case in which the applicant had poured paint on a statue of Atatürk, the Court stated:

> [T]he Court has held in cases concerning freedom of the press that it is neither for the Court nor for the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists because … Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, inter alia, Jersild v. Denmark, 23 September 1994, § 31, Series A no. 298). The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of

[1] Judgment of 3 February 2009, § 39. The quote could be translated into English as: "In certain situations the mode of dissemination of the information and ideas to be communicated is of importance such that restrictions … may substantially affect the substance of the ideas and information in question. This is particularly the case where the persons concerned intend to carry out symbolic activities in protest against legislation which they regard as unjust."
[2] Judgment of 12 June 2012.
[3] *Lashmankin and Others v. Russia*, Judgment of 7 February 2017, § 405; *Sáska v. Hungary*, Judgment of 27 November 2012, § 21.

> expression, and it thus rejects the Government's argument that "[a]lthough the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other mediums without recourse to violence, he had chosen not to do so".[4]

Furthermore, it is a long-standing tenet that the protection of Article 10 extends not only to expressions that are "favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[5] In the same vein, the Court has held that "the Convention protects a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote."[6] The Chamber majority in *Sinkova* departs in an unfortunate way from these principles by faulting the applicant for "insulting the memory of soldiers who perished and the feelings of veterans."

Finally, the weight attached to the fact that the applicant broke domestic criminal law is striking since, in the Court's previous words, "classification in national law has only relative value and constitutes no more than a starting-point."[7] The majority appears to have lost sight of the Court's long-standing approach that it is the Government which bears the burden of proving the necessity for the restriction, rather than the applicant bearing the burden to prove the necessity of the manner in which she expressed herself.

Third, the Chamber majority approved of the fact that "the domestic courts paid little attention to the applicant's stated motives", in light of their "irrelevance for the legal classification of her actions" (§ 109). This stands in sharp contrast to other cases where the Court has faulted domestic authorities for failing to take the applicant's motive into account. In the recent judgment in *Butkevich v. Russia*,[8] the applicant was a journalist who had been convicted of disobeying lawful orders to stop participating in an unlawful demonstration. The Court was persuaded that the applicant "intended to collect information and photographic material relating to the public event and to impart them to the public" (§ 131) and therefore, "it should have … become pertinent for the authorities … to delve into whether his alleged actions were excusable or otherwise mitigated, given his argument that he had been acting as a journalist" (§ 133). There are numerous other examples of cases where the Court explicitly took into consideration the intention of the applicant, rather than the mere fact of the criminal offence (see e.g. *Thorgeir Thorgeirson v. Iceland*, [9] *Jersild v. Denmark*,[10] *Morice v. France*[11] and *Perinçek v. Switzerland*[12]).

Fourth, while the Chamber majority acknowledges the Court's long-standing position that "peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence" it considers the measures taken against the applicant to nevertheless be proportionate because she "was given a suspended sentence and did not serve a single day of it" (§ 111). This is striking, since the Court has previously found that the mere fact of deploying criminal charges in response to peaceful protest can be enough to give rise to

[4] Judgment of 21 October 2014, § 53.
[5] See, among many others, *Handyside v. United Kingdom*, Judgment of 7 December 1976, § 49; *Stomakhin v. Russia*, Judgment of 9 May 2018, § 88.
[6] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of 2 October 2001, § 86; *Barankevich v. Russia*, Judgment of 26 July 2007, § 32.
[7] Judgment of 12 June 2012, § 38.
[8] Judgment of 13 February 2018.
[9] Judgment of 25 June 1992.
[10] Judgment of 23 September 1994.
[11] Judgment of 23 April 2015.
[12] Grand Chamber Judgment of 15 October 2015.

a violation of the right to peaceful assembly under Article 11, even if no conviction follows. In *Pekaslan v. Turkey*,[13] the applicant had been acquitted by domestic courts of contravening the Meetings and Demonstration Marches Act. The Court nevertheless held that the "prosecution of the applicants for their participation in a peaceful demonstration, was disproportionate and not necessary for preventing disorder" (§ 82).

Even more difficult to explain is the fact that the Chamber majority flatly ignores the fact that the applicant spent effectively three months in prison prior to her conviction. In *Taranenko v. Russia*,[14] the Court, in considering a suspended three-year prison sentence, also took into account the "period of detention pending trial" (§ 95) in finding a violation of Article 10. Very recently, it took the same approach in *Angirov and Others v. Russia*,[15] a case arising from the same demonstration as *Taranenko*.

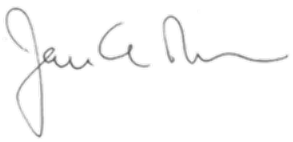
For all these reasons, we strongly urge the Court to accept the applicant's request for a referral that would allow the Grand Chamber to reconsider these issues, taking into account the points raised by the signatories in this letter. There is no question in our minds that the current case raises "a serious question affecting the interpretation" of Article 10 of the Convention as well as "a serious issue of general importance" (Art. 43).

Yours sincerely,

- Article 19
- Association for the Defence of Human Rights - the Helsinki Committee (APADOR-CH) – Romania
- Bulgarian Helsinki Committee, Български хелзинкски комитет
- Centre for Law and Democracy
- Centre for Peace Studies – Croatia (CMS – Centar za Mirovne Studije)
- Civil Liberties Union for Europe (Liberties)
- Civil Rights Defenders - Sweden
- Committee on the Administration of Justice (CAJ) - Northern Ireland
- European Centre for Not-for-Profit Law (ECNL)
- Freemuse
- Greenpeace International
- Human Rights Monitoring Institute (HRMI) – Lithuania (Žmogaus Teisių Stebėjimo Institutas)
- Hungarian Civil Liberties Union (HCLU) – (Társaság a Szabadságjogokért, TASZ)
- Irish Council for Civil Liberties (ICCL)
- Italian Coalition for Civil Liberties and Rights (Coalizione Italiana Liberta e Diritti civili – CILD)
- League of Human Rights - Czech Republic (Liga lidských práv)
- Legal Human Academy
- Media Legal Defence Initiative (MLDI)
- Open Society Justice Initiative (OSJI)
- Public Interest Litigation Project of the Dutch Section of the International Commission of Jurists (Nederlands Juristen Comité voor de Mensenrechten –NJCM)
- Rights International Spain
- Human Rights Centre, University of Ghent

[13] Judgment of 20 March 2012.
[14] Judgment of 15 May 2014.
[15] Judgment of 17 April 2018, § 31.

For the signatories:



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