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THE PECULIARITIES OF PRIVATE AND FAMILY LIFE PROTECTION: THE EXPERIENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Oksana MELENKO¹

Abstract

One of the most vulnerable spheres of life of any individual is his / her private and family life. Therefore, this issue could not slip the attention of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter - the Convention) (Council of Europe, 1950). In fact, there have always been some prejudices within this issue, as it is not a secret that accusations of violating an individual's right to privacy often provoke discussion in the public sphere. For example, when the UK Special Forces eliminated three terrorists (who were no longer resisting) on the territory of Gibraltar (Case of McCann and Others v. the United Kingdom, 1995), the media did not particularly intend to protect the right to life of these criminals. On the other hand, quite a few liberal media sources have resonantly responded to the interference with private life, when a group of stockbrokers and bankers were prosecuted for sadomasochism in a private residence. A similar behavior of the press was observed when discussing the mandatory use of seat belts.

However, when considering the issues related to the violation of Article 8 of the Convention (Council of Europe, 1950), it is important to find answers to a few rather essential questions:

- 1. Has there been an interference with private life under Article 8 § 1 of the Convention (Council of Europe, 1950)? If so, then –*
- 2. Is this interference sufficiently justified in the light of Article 8 § 2 of the Convention (Council of Europe, 1950), namely:*

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3. *Was the interference lawful? If yes, then –*
4. *Did the interference have a lawful purpose? If yes, then –*
5. *Was the interference necessary for a democratic society (can it be regarded as an adequate response to socially urgent necessity)?*

In case there arises a question concerning state's positive obligations, it will no longer belong to the jurisdiction of paragraph 2, but will touch upon the analysis of the issue whether state's positive obligation exists at all.

Key words:

Human rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Court of Human Rights; private life; family life; rights protection; state's positive obligations.

I. Introduction

Article 8 of the Convention (Council of Europe, 1950) includes, in addition to the right to respect for private life, also the right to respect for family life, housing and correspondence. In order to define the very concept of "family life", the respective decisions of the ECHR contain a requirement to determine the degree of consanguinity between persons acting as subjects of litigation, as well as to find out whether family ties between them still exist. The very term "family life", in compliance with its definition in Article 8 of the Convention (Council of Europe, 1950), suggests the existence of stable ties between relatives, in particular between father, mother and children within single marriage, as well as between grandparents and grandchildren. It is interesting that in this case, no distinction is made between a "legitimate" and an "illegitimate" families.

Homosexual relations belong to the sphere of private, but not family life. Article 8 of the Convention (Council of Europe, 1950) implies *de facto* rather than *de jure* family life between individuals of the opposite sex, but this concept does not currently apply to *de facto* family life between same-sex entities, which is characterized by the duration and stability of the relationship.

Article 8 of the Convention (Council of Europe, 1950) ensures the right to respect for family life. Nevertheless, at the same time, this provision does not give individuals the right to claim family life by marriage or by having the opportunity to have children. For example, this right does not oblige the state to grant a foreigner the right to enter its territory in order to establish family ties there. On the other hand, the expulsion of a person from the state,

where close members of his family reside, may constitute a violation of Article 8 of the Convention (Council of Europe, 1950).

In relation to the notion of “housing”, it is necessary to point out that this term usually means the place where a person lives. In order to decide whether a place corresponds to the concept of “housing” in accordance with Article 8 of the Convention (Council of Europe, 1950), the ECHR has identified a number of questions:

1. Does the law define the premises as a place of residence?
2. Does its resident have the right of ownership over it?
3. Did such a resident aim to turn the premises into a permanent place of residence?
4. Does this individual have another “housing”?

Taking into consideration some ECHR decisions, Article 8 of the Convention (Council of Europe, 1950) may also include offices.

The right to respect for “correspondence” is the right to communicate with other people, which is neither continuous nor uncensored. However, this right loses its validity as long as the message reaches its addressee. The term “correspondence” covers at least letters and telephone communications. The protection concerns the means of communication, but does not cover the content of the message, which normally falls within the competence of Article 10 of the Convention (Council of Europe, 1950).

II. Theoretical Background

In case there arises a question as to whether there has been an interference with the human rights, guaranteed by the content of Article 8 of the Convention, it would be reasonable to emphasize that not all actions committed by the state and affecting the life of an individual can be considered as interference by article 8 of the Convention (Council of Europe, 1950). Quite often, state officials do not deny that certain actions of state bodies are a direct interference - for instance, in cases of legal deprivation of parental rights, deprivation of prisoners of the right to correspondence, conducting authorized searches of housing. In such cases, it is the plaintiff who must establish the fact of the unlawful interference.

The very requirement of respect for private life is reduced in the case when the individual is actively engaged in public activities. That is why, the most complicated part of observing the rights, ensured by Article 8 of the Convention (Council of Europe, 1950), is to ascertain whether there has been an interference with an individual’s “private” life.

The ECHR has not yet given a clear definition of “private” life. It becomes clear that it deliberately avoids such attempts and prefers (as a rule) to focus on a specific issue in each case. Particular emphasis should be laid on the

fact that the number of cases, related to the protection of the individual's right to privacy, is relatively small. In addition, the issue under studies closely intersects with other areas of individual's social life, which are protected by Article 8 of the Convention (Council of Europe, 1950), in particular - the areas of family life, housing, and correspondence.

In the cases "Mentes and others v. Turkey" (1998) and "Cyprus v. Turkey" (2014), the ECHR ruled that the deliberate destruction of the plaintiffs' homes and property by the secret services includes the entire field of individual rights protected by Article 8 of the Convention: family life, private life and housing. The ECHR has decided that there is no need to differentiate between these concepts. It also identified the expulsion of persons, who had lived in the country for a long time, as an interference with the privacy of an individual under Article 8 of the Convention (Council of Europe, 1950).

When analyzing the judicial precedents of the ECHR, it is possible to trace up a certain peculiarity, according to which the concept of "private" life belongs to the field of direct personal autonomy. The aspects of individual's physical and moral inviolability also belong here. The concept of "private life" extends beyond the narrow boundaries of ensuring individual's life, free from unwanted publicity. Besides, it provides a certain field of activity, within which any individual can freely and effectively engage in the development of his / her own personality. This area also includes the human right to self-identification, as well as the right or opportunity to develop relationships with other individuals, even in emotional and sexual aspects.

Taking into account the essence of the above concept, the ECHR has formulated a rule, in compliance with which the right to respect for "private" life includes physical and psychological inviolability of a person. The guarantees, prescribed in Article 8 of the Convention, are, above all, intended to ensure the harmonious development of the individual without external interference. The sexual life of any person, no doubt, should be attributed to the sphere of private life. Apart from that, the range of Article 8 of the Convention (Council of Europe, 1950) contains the right to a surname and first name since the latter are a means of identifying a person within the family, as well as within a society.

The protection of personal data that are associated with private life, as well as the protection of individual's medical data, also fall under the jurisdiction of Article 8 of the convention (Council of Europe, 1950).

It is of great significance that the issue of "privacy" must be correlated with the sphere of rights belonging to other individuals, as well as society as a whole. The ECHR has presented its own interpretation of the content of Article 8 of the Convention (Council of Europe, 1950), which contains a prohibition on unjustified interference, together with a positive obligation to provide protection against interference in this area by other persons.

III. Argument of the paper

Having ascertained that a certain case contains aspects of an interference with individual's private life, prescribed by Article 8 of the Convention, the ECHR considers whether the interference with the rights, ensured by Article 8 of the Convention (Council of Europe, 1950), complied with the regulatory-legal acts of the plaintiff-state. This procedure is carried out in order to determine whether the powers of the executive branch (in relation to arbitrary interference in the sphere of individual's rights by the legislative or judicial bodies of the country) are limited in this particular case. Hereby, the concept of "legislation" is not restricted to domestic legal norms, but includes more abstract and generalized ideas about the requirements for the concept of "legitimacy".

In order to determine whether the interference was really a lawful one, we have to answer the following questions:

1. Was this interference allowed by the current regulatory-legal acts of the country?
2. Is a correspondent normative decision available to the individual?
3. Is the above legal norm clear enough to allow a citizen to predict the possible consequences of his own actions?
4. Does the law provide a sufficient amount of guarantees to the individual for protection against arbitrary interference with his rights?

In this case, the ECHR believes that interference cannot be considered lawful if the legal powers of the executive branch are expressed in terms of unlimited authority. The law must specify the limits of any powers of the competent authority and the means of exercising them. The law must ensure individual's protection against arbitrary interference, with a due regard to the legitimate purpose of the specific measure. On the other hand, the conclusion that the interference does not meet the requirements of the law are sufficient to speak about a violation of Article 8 of the Convention (Council of Europe, 1950).

IV. Arguments to argue the thesis

The mandatory rule is that the state is obliged in each case to indicate the purpose, for which it has interfered with the plaintiff's rights, ensured by Article 8 of the Convention. The list of exceptions, mentioned in Article 8 § 2 of the Convention, is generally similar to the exceptions in Articles 9 to 11 of the Convention (Council of Europe, 1950), except for the "interests of the economic well-being of the country". The latter criterion is not very strict, therefore, the defendant-state has quite often succeeded in convincing the ECHR that it had acted for lawful purposes, even if the plaintiff denied it.

V. Conclusions

Although the main objective of Article 8 of the Convention is to protect individuals from arbitrary interference by state authorities, it not only contains a requirement for the state to refrain from such interference. In addition to this negative obligation to respect individual's "private" life, there may be positive ones. Case Law indicates that a state, which has acceded to the Convention, must not only limit its own interference, according to Article 8 of the Convention (primarily negative obligations), but may also be required to protect these rights, as well as to ensure respect for them in its national legislation. The above-mentioned obligations may require measures that are directly or indirectly aimed at ensuring respect for privacy, even in the field of interpersonal relationships. However, the notion of "respect" has not yet been accurately defined. In order to determine whether such an obligation exists, the state has to keep to a fair balance between the general interest and the interests of the individual. Anyway, the state is restricted in deciding whether it should comply with such an obligation and, if so, how (Council of Europe, 1950).

The degree of state's positive obligations in the course of introducing amendments into numerous regulatory-legal acts or taking certain measures depends on the conditions of the individual nature of a particular country. States have a wide margin of discretion when deciding on the steps to be taken to ensure that the legal framework of the Convention is in line with the needs and resources of both society as a whole and individual citizens. The ECHR pointed out that the state has obligations of this kind in cases, where a direct and immediate connection was established between the measures proposed by the plaintiff on the one hand, and his private and / or family life – on the other. The volatility of this approach is illustrated by the terminology used by the ECHR. With regard to positive obligations, the ECHR believes there is no precise definition of "respect" for private life. Nevertheless, the ECHR clarifies situation when it comes to striking a balance between the interests of the individual and society. Furthermore, the legitimate aims referred to in Article 8 § 2 of the Convention may be relevant in establishing such a balance (Council of Europe, 1950).

Another vivid example of a State's positive obligation, which has to comply with Article 8 of the Convention, is the one to provide a person with information that is vitally important to effectively exercise the rights, ensured by Article 8 of the Convention (Council of Europe, 1950).

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