Kirkorov v Lithuania: Reflections on the Blurred Lines between Manifestly Ill-founded decisions and No Violation judgments

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By Theresa Lanzl and Harriet Ní Chinnéide

On the 18th of April, the ECtHR rejected a complaint from Russian musician, Philip Kirkorov, concerning the Lithuanian authorities' decision to ban him from entering the country. After engaging in a full proportionality assessment, the Court found that his complaint was manifestly ill-founded and proportionate to the legitimate aim pursued. In doing so, it focused very much on the quality of the domestic courts' review of the ban, finding that the case file provided no reason to call their assessment into question.

The aim of this blog post is not to question the proportionality of the ban either. Rather, it seeks to highlight the nebulous distinction between (certain) complaints which are declared manifestly ill-founded and others which lead to a no-violation judgment on the merits due to the proportionality of the impugned measure. The ambiguity in this area is highlighted by the Kirkorov decision as the Court engages in quite a detailed process-based proportionality assessment before dismissing the applicant's complaint as inadmissible.

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Facts

In January 2021, the Lithuanian migration authorities imposed a five-year entry ban on Bulgarian-Russian singer Filip Bedros Kirkorov. The decision was based on a directive from the Ministry of Foreign Affairs, which considered Kirkorov a potential threat to national security. As a prominent singer and music producer, the applicant had considerable influence in Russia and in the states of the former USSR.

According to the Ministry, his influence was used by Russia as an instrument of "soft power" to justify its aggressive foreign policy. Furthermore, his regular concerts on the Crimean Peninsula were seen as supporting Russian aggression. Despite his appeal, in which he asserted that his art was apolitical and focused on themes such as love and nature, the ban was upheld by the Supreme Administrative Court in September 2021.

The applicant claimed that the ban was a form of political censorship under Article 10 (freedom of expression). He also invoked Article 1 of Protocol No. 1 (protection of property) claiming that he had lost income and had to reimburse tickets from cancelled concerts in Lithuania in 2021.

Judgment

The Court, by a majority, declared the complaint under Article 10 inadmissible as manifestly ill-founded. The Court found that the ban on Kirkorov entering Lithuania had interfered with his right to freedom of expression under Article 10, but that the interference had a legal basis in national and EU law and pursued a legitimate aim, namely the protection of national security and public order.

With regard to the necessity of the ban, the Court stressed that it was not for it to take the place of the States Parties to the Convention in defining their national interests, a sphere which traditionally forms part of the inner core of State sovereignty. The Court noted that the Migration Department's decision to impose the ban was based on objective and reasoned data. The applicant did not deny his support of the Russian Federation's actions in the Crimean Peninsula. Furthermore, the domestic courts had referred to the migration authorities' submission that various forms of propaganda, including famous singers, like the applicant, had been used by Russia against the Baltic States. Indeed, both the Lithuanian and the European Parliament had issued resolutions acknowledging the need to expose Russian disinformation and propaganda warfare.

The Court continued to find that the Lithuanian authorities' assessment that the applicant posed a real and present danger to national security and public order was not arbitrary or without basis. There was nothing in the case file to suggest that they had erred in their assessment of the facts and the Court was satisfied that the Migration Department's assessment underwent meaningful scrutiny by the national courts at two levels of jurisdiction. Moreover, the proceedings met the requirements of a fair trial, ensuring that the applicant's position was heard.

Lastly, in assessing the proportionality of the entry ban, the Court found no reason to diverge from the national authorities' assessment, which had been upheld by the national courts. It recognized that the domestic authorities had weighed the competing interests at stake and saw no reason to depart from the conclusion they reached – namely that the measure had not been disproportionate, considering the fact that Mr. Kirkorov did not have any family, social or economic ties in Lithuania and that, as expressly noted by the domestic courts, the applicant's rights as an EU citizen had been restricted only in so far as it concerned his entering Lithuania.

Thus, 'the Court [was] satisfied that the domestic authorities credibly demonstrated that the entry ban imposed on the applicant was necessary' (para 67). Accordingly, his complaints under Article 10 of the Convention were found manifestly ill-founded and thus, declared inadmissible. The applicant's complaint regarding Article 1 of Protocol No. 1 was also declared inadmissible for failure to exhaust domestic remedies, as he had not brought an action for damages before the Lithuanian civil courts.

Commentary

Setting aside the Court's dismissal of the Article 1 Protocol 1 complaint, it is interesting to consider how it addressed the complaint under Article 10. The decision highlights the practice of the ECtHR, which often treads a rather blurred line between declaring cases inadmissible as 'manifestly ill-founded' and issuing judgments finding that there was no violation on the merits (see for example, Ciuvică v. Romania (dec.) (2013) discussed here; Gulamhussein and Tariq v. the United Kingdom (dec.) (2018) discussed here; and Gribben v. the United Kingdom (dec.) 2022) discussed here). The Court's application of process-based review in this case also bears mention.

There are several reasons why a complaint before the ECtHR may be declared inadmissible (Art. 34, 35 ECHR). At the admissibility stage the Court examines if a case is compatible with the Court's jurisdiction and meets all formal admissibility requirements. Whereas jurisdiction is defined as 'the outer limits of the ECtHR's power to examine a case' submitted to it, 'admissibility' refers to the formal or substantive requirements that limit the ECtHR's exercise of its jurisdiction. In cases where questions arise about the Court's jurisdiction, particularly its jurisdiction *ratione materiae*, there can be some overlap between the Court's assessment of whether the case falls within its jurisdiction (its admissibility) and an assessment of the merits. This is because as assessment of the former may help to define the scope of the right in question. A recent example of this overlap can be seen in Dian v Denmark, which concerned the criminalization of begging and the scope of Article 8 in this context. This blurring of lines is perhaps most striking where a complaint is deemed inadmissible as it is manifestly ill-founded, however. Such a categorization means that despite all jurisdictional and formal admissibility requirements being met, there are insufficient grounds for the Court to examine the merits of the case.

Decisions that are deemed 'manifestly ill-founded' are usually made by single judges or a three judge committee, who do not provide (detailed) reasoning for their decisions (see, recent posts by Brems here and here). Thus, it is difficult to fully grasp how a decision in such cases is reached and the justifications behind it. This is not the case in Kirkorov v Lithuania, however. Instead, this is a thoroughly reasoned decision by the majority of a Chamber. Indeed, based on its form and length, one could easily mistake it for a regular judgment on the merits. And yet, it ends with a – mere – declaration that the applicant's complaint is 'manifestly ill-founded', highlighting that such a classification as 'manifestly' is not always as obvious as the terminology implies. The Admissibility Guide (§§ 349-350), citing Mentzen v Latvia (dec.), 2004, asserts that neither detailed reasoning nor the composition of the Court, as a Chamber or even as a Grand Chamber, serves to alter the 'manifestly' ill-founded nature of an application. It specifies that in instances where there is an evident lack of a violation – particularly, a lack of proportionality between the aims and the means – the reasons given for a decision may mirror those the Court would use in a judgment on the merits concluding no violation occurred (Admissibility Guide, § 370).

Firstly, it could be argued that branding an applicant's complaint manifestly ill-founded when in practice a detailed assessment is required to determine the proportionality of the contested measure, minimizes the *prima facie* legitimacy of their complaint. It may well be the case that a measure which interferes with an individual's rights and freedoms under

the ECHR is ultimately found to be proportionate to the legitimate aim pursued and compatible with the Convention after a detailed review has been carried out. However, on the surface, dismissing a complaint as manifestly ill-founded suggests that it is so obviously ECHR-compliant that no such reasoning could ever be required. While this may be the Court's common practice, it may nonetheless merit further reflection.

The classification of a complaint as a no-violation judgment or as a manifestly ill-founded inadmissibility decision is not only a matter of optics, however. *De plano* inadmissibility decisions allow the Chambers of the Court to declare applications inadmissible before communicating the case to the respondent government (Rule 54 § 1 of the Rules of the Court). They represent a frequently used method for more rapidly disposing of cases deemed to be 'unmeritorious' in light of the Court's workload. Manifestly ill-founded inadmissibility decisions also vary in their legal effects from a 'no violation'- judgment. An inadmissibility decision of a Chamber is final – meaning that only where a judgement is issued can a case be referred to the Grand Chamber for review (Article 43 § 1, Article 44 § 2 ECHR). Moreover, when an admissibility decision is made by a majority, the specific vote count is not stated, i.e. in the present case, we cannot tell whether one or three judges dissented (Rule 56 § 1), and the minority judges are precluded from articulating the reasons for their dissent in a separate opinion (Article 45 § 2 ECHR, *a contrario*). In addition, manifestly ill-founded decisions attract a 'much lower public profile', which in an 'ever more hostile environment' may be a welcome side-effect for the Court – although perhaps less so for an applicant who is dissatisfied with the outcome. Indeed, it has recently been argued, using the example of the UK, which has repeatedly threatened to withdraw from the ECHR, that MIF decisions demonstrate an 'avoidance' or more cautious approach to dealing with nationally sensitive issues. Given these distinct (legal) outcomes, a sharper line between inadmissibility decision and 'no violation'-judgment would be called for in terms of procedural predictability. And indeed, during the discussions on Protocol No. 15, a proposal for a distinct admissibility criterion, which could have enhanced transparency and legal certainty at the admissibility stage, failed to gain consensus. Consequently, such cases fall under the somewhat nebulous catch-all clause of 'manifestly ill-founded' (hereafter: MIF).

The blurring of lines between a MIF decision and a no-violation judgment indicates that dynamics typically observed at the merits stage also permeate the admissibility level, an area which has traditionally attracted less scholarly focus. This is exemplified in the current case by the Court's application of a deferential, process-based style of review. According to Gerards, this approach is often seen in complex and sensitive cases, in particular those concerning moral issues, competing rights and interests or questions of domestic socio-economic policy where the domestic authorities are seen as better-place to adjudicate on the issue. This can be seen clearly in the Court's recourse to process-based review in politically sensitive cases concerning the expulsion of settled migrants, the banning of the face-veil and, recently, a ban on ritual slaughter in Flanders and Wallonia. When process-based review is applied, rather than directly assessing the proportionality of a measure itself by examining its substantive impact on the applicant, the Court's instead focuses on the quality of the proportionality assessment conducted by

national authorities. Intrinsically linked to the principle of subsidiarity and the margin of appreciation, process-based review allows the Court to 'defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations.' Such deference can be seen in the Kirkorov decision, where the Court's observation that 'there was nothing in the case file to suggest that the domestic courts erred in their assessment of the relevant facts or applied domestic law in an arbitrary or unreasonable manner' is central to its conclusion as to its proportionality.

Within the literature, the concept of process-based review and its application by the ECHR has been subject to significant debate. Its proponents argue that it can serve to incentivize domestic courts to engage more effectively with the Convention and the Court's case law and thereby improve the quality of human rights protection at home. On the other hand, more critical voices raise the concern that the quality of the process cannot serve to guarantee the quality of its outcome. There is a risk that if taken too far process-based review could render the Court's assessment something of a box-ticking exercise resulting in the substantive impact of the measure on the applicant being overlooked. While we do not wish to argue that this was the case in Kirkorov, the application of process-based review and the subsequent dismissal of the applicant's complaint as manifestly ill-founded suggests that such a risk arises at the level of admissibility too – here it must be noted that a process-based review is not the only approach which can lead to a complaint which required a full proportionality assessment being dismissed as manifestly ill-founded (see, Mikyas v Belgium). What is clear however, is that the application of full review of the domestic process in Kirkorov serves to further the impression that this could have been a judgment, creating further confusion about where exactly the distinction lies: if there is a need for such a thorough (albeit process-based) review of the proportionality of the measure, is the applicant's complaint really so *manifestly* ill-founded?

Conclusion

In conclusion, the ECtHR's decision to dismiss Mr Kirkorov's complaint as manifestly ill-founded, despite a thorough proportionality assessment, underscores the (at times) blurred line between inadmissibility decisions and no-violation judgments. The Court's approach suggests a potential overlap between detailed assessments typically reserved for merits judgments and those for inadmissibility rulings. Further reflection on the distinction on this practice is required, as it raises questions about transparency, legal certainty, and predictability of the Court's procedures.