

*Martin Eibach*¹

Case Note on *Nemtsov v. Russia* with Particular Focus on the Misuse of State Power: The European Court of Human Rights at a Crossroads

At first glance, the decision of the European Court of Human Rights in the case of *Boris Nemtsov v. Russia* seems to be a genuine success for the applicant, as a range of violations of the Convention were ascertained. However, a closer look reveals the wasted potential of this decision with a view to politically motivated criminal proceedings. Therefore, it must be feared that the verdict of the Court could turn into a pyrrhic victory. In order to illustrate this point, this note critically assesses the decision and shows the discontinuities of the Court's latest judicature regarding the role of Art. 18 of the European Convention on Human Rights.

Introduction

The case of *Boris Nemtsov*,² a former Russian statesman and politician, has received wide media attention. This is not only based on the legal scope of the decision of the European Court of Human Rights (hereinafter: ECtHR or the Court). On 27 February 2015, about half a year after the court's judgement, Nemtsov was assassinated in the heart of Moscow.³ His death led to widespread international dismay and drew attention to his political activities as one of the most influential leaders of the Russian opposition.⁴ Because of these very activities, Nemtsov came in conflict with the criminal law and the Russian authorities, which eventually led to his application to the ECtHR. Even though the Court held that there had been a violation of various rights of the Convention, it found no need to examine the complaint under Art. 18 of the Convention on Human Rights (hereinafter: ECHR or the Convention). By summaris-

1 Martin Eibach is a PhD candidate in the field of international criminal law under the supervision of Prof. Dr. Helmut Satzger at the LMU Munich and works as research assistant at the junior professorship of Prof. Dr. Paul Krell at the Bucerius Law School, Hamburg. I am especially grateful to *Katharina Künne* for her excellent linguistic support.

2 *Nemtsov v. Russia*, Application no. 1774/11, 31 July 2014.

3 *Kramer*, Boris Nemtsov, Putin Foe, Is Shot Dead in Shadow of Kremlin, <http://nyti.ms/1CdMisP> [01 July 2016].

4 *Ioffe*, After Boris Nemtsov's Assassination, "There Are No Longer Any Limits", <http://nyti.ms/1AonFsc> [01 July 2016].

ing the circumstances of the case (II) and the Court's judgement (III), this note will demonstrate that the rejection is partially not in accordance with former decisions of the Court regarding Art. 18 ECHR (IV). Finally, possible effects of this decision on the granted protection of the Court against politically motivated criminal proceedings are discussed by giving an outlook (V).

Summary of the circumstances of the case

On 10 January 2011, Boris Nemtsov, inter alia former deputy prime minister, minister for energy and later one of the best known leaders of the opposition,⁵ lodged an application against the Russian Federation under Art. 34 ECHR.⁶ He alleged that his arrest at a demonstration and his subsequent detention violated Art. 3, 5, 6, 10, 11, 13, 18 ECHR.

On 10 December 2010, Nemtsov took part in a public and authorised demonstration at Triumphalnaya Square in Moscow. During this demonstration, he gave a speech in which he criticised the criminal conviction of Mikhail Khodkovskiy, former owner of Yukos Oil company, and Platon Lebedev, his associate.⁷ He also chanted slogans against Vladimir Putin and demanded an end to the corruption in the state's administration.⁸ At the end of the assembly, Nemtsov was arrested, put into a police vehicle and taken to a police station,⁹ where he remained for nearly one month. He claimed that the conditions of his detention in the police cell were extremely poor, while the government rejected this accusation.¹⁰

He also claimed he had to stand during his five hour long trial hearing before the Justice of the Peace, which caused fatigue and prevented him from participating effectively in the proceedings.¹¹ Furthermore, all his motions regarding the admittance of existing video footage were dismissed.¹² The applicant called and examined thirteen witnesses who exonerated him.¹³ Nevertheless, the Justice of the Peace found that Nemtsov had disobeyed police orders and resisted lawful arrest, based on the statements and reports of both policemen that had arrested him.¹⁴ Nemtsov's appeal against the judgement was dismissed, though the Tverskoy District Court admitted one video recording and two photographs as evidence and decided to call and examine one of the

5 Nemtsov v. Russia (Fn. 2), para 5.

6 Nemtsov v. Russia (Fn. 2), para 1.

7 Concerning the national criminal proceedings against Khodkovskiy and Lebedev in detail see: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 91, 97.

8 Nemtsov v. Russia (Fn. 2), para 11.

9 Nemtsov v. Russia (Fn. 2), para 11.

10 Nemtsov v. Russia (Fn. 2), para 24 et seqq.

11 Nemtsov v. Russia (Fn. 2), paras 31 et seq.

12 Nemtsov v. Russia (Fn. 2), paras 34 et seqq.

13 Nemtsov v. Russia (Fn. 2), para 38.

14 Nemtsov v. Russia (Fn. 2), para 39.

photographers.¹⁵ His attempts to challenge the acts of the judiciary involved in his case before the Judiciary Qualification Board of Moscow were also unsuccessful.¹⁶

The Court's Judgement

The ECtHR holds that there has been a violation of the following rights and freedoms of the Convention: Freedom of assembly and association (Art. 11 ECHR), right to a fair hearing (Art. 6 § 1 ECHR), right to liberty and security (Art. 5 § 1 ECHR), prohibition of torture (Art. 3 ECHR) and right to an effective remedy (Art. 13 ECHR).¹⁷ The findings of the court regarding the violation of Art. 3 ECHR and 13 ECHR will not be examined in more detail. This is due to the fact that the focus of this note is set on the political dimension of the state's measures. For this purpose, and recalling the limited extent of this note, the violation of both provisions is negligible.¹⁸ Regarding the other abovementioned violations of the Convention, a distinction is to be drawn between the factual findings (1) and the legal assessment (2).

Factual Findings

First, the Court emphasised that the domestic fact-finding proceedings are to be respected and cannot simply be disregarded.¹⁹ However, the Court also determines that it is not bound by these findings, although under normal circumstances, it requires cogent elements to lead it to depart from the finding of fact reached by those courts.²⁰ It found those "unavoidable circumstances"²¹ mainly in consideration of the fact that the finding of the domestic court was based solely on the statements and written reports of the two policemen. The Court could not find any justification for affording their testimonies stronger evidentiary value. Therefore, there appears to be no reason why they outweighed the testimonies of all other witnesses, especially as Nemtsov's allegations are found to be sufficiently convincing and corroborated by evidence. As a result, the Court held that Nemtsov did not resist the arrest.²²

15 *Nemtsov v. Russia* (Fn. 2), paras 42 et seq.

16 *Nemtsov v. Russia* (Fn. 2), para 55.

17 *Nemtsov v. Russia* (Fn. 2), pp. 31 et seq.

18 Nevertheless, it should be pointed out that Art. 18 ECHR could also be applied (by analogy) to absolute rights of the convention such as Art. 3 ECHR, see concerning this question in detail: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 248, 260 et seq. and: SSW-StPO/*Satzger* Art. 18 para 9; different view: Pabel/Schmahl/*Steiger* IntKomm EMRK Art. 18 para 29.

19 *Nemtsov v. Russia* (Fn. 2), paras 63 et seq.; see to the limited standard of scrutiny of the ECtHR: *Satzger*, International and European Criminal Law, § 9 para 21.

20 With reference to *Klaas v. Germany*, Application no. 15473/89, 22 September 1993, pp. 17-18, paras 29-40, and *Avşar v. Turkey*, Application no. 25657/94, 10 July 2001, para 283.

21 *McKerr v. the United Kingdom*, Application no. 28883/95, 4 April 2000, and *Khashiyev and Akayeva v. Russia*, Application nos. 57942/00 and 57945/00, 24 February 2005, para 135.

22 *Nemtsov v. Russia* (Fn. 2), paras 70 et seq.

Legal analysis

Secondly, the Court considers that Nemtsov's arrest, detention and ensuing administrative charges constituted an interference with his right to peaceful assembly.²³ It holds that such interference is a breach of Art. 11 ECHR unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2, and is "necessary in a democratic society" for the achievement of those aims.²⁴ The Court not only found that the interference was not prescribed by law, due to the fact that Nemtsov had not disobeyed any orders from the police.²⁵ Furthermore, it notes that the administrative proceedings against the applicant and his ensuing detention had serious potential to deter Nemtsov, other supporters of the opposition, and the public at large from attending demonstrations and participating in open political debate.²⁶ Therefore, the Court holds that this concludes a violation of Art. 11 ECHR.²⁷

According to its factual findings, the ECtHR also finds that the domestic decisions were not based on an acceptable assessment of the relevant facts. It furthermore holds that the domestic courts placed an extreme and unattainable burden of proof on Nemtsov, which ran contrary to the fundamental principle *in dubio pro reo*.²⁸ Hence, the Court found a violation of Art. 6 § 1 ECHR. Moreover, a detention following a conviction imposed in manifestly unfair proceedings automatically implies a breach of Art. 5 § 1 ECHR.²⁹

Finally – and most importantly regarding this note – the Court had to decide whether the state measures also violated Art. 18 ECHR. Under the heading "Limitation on use of restrictions on rights", the wording of this article states:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

Due to the fact that Art. 18 ECHR is a very unusual provision in the Convention and still not well known, the following section will provide a brief overview. In a nutshell: Art. 18 ECHR, according to a traditional reading, imposes a limitation on the limitations and thus prohibits a misuse of the possibilities to legally restrict guarantees of the

23 *Nemtsov v. Russia* (Fn. 2), para 74.

24 *Nemtsov v. Russia* (Fn. 2), para 72; see in detail to the requirements for justification: *Grabenwarter*, European Convention on Human Rights: Commentary, Art. 11 paras 17 et seqq.

25 The relevant legal basis for Nemtsov's arrest and the subsequent charges was Art. 19.3 of the Code of Administrative Offences, which prescribed an administrative penalty for disobeying the lawful orders of a police officer, see: *Nemtsov v. Russia* (Fn. 2), para 76.

26 *Nemtsov v. Russia* (Fn. 2), paras 77 et seq.

27 *Nemtsov v. Russia* (Fn. 2), para 80.

28 *Nemtsov v. Russia* (Fn. 2), paras 91 et seq. with reference to *mutatis mutandis*: Barberà, Messegueé and Jabardo v. Spain, Application no. 10590/83, 6 December 1988, para 77.

29 *Nemtsov v. Russia* (Fn. 2), paras 101 et seqq. with reference to *Stoichkov v. Bulgaria*, Application no. 9808/02, 24 March 2005, paras 51 and 58 et seq. and *Shulgin v. Ukraine*, Application no. 29912/05, 8 December 2011, para 55.

Convention.³⁰ Moreover, this provision gained new significance as the ECtHR had to examine several claims relating to criminal proceedings, which had been allegedly initiated for political reasons. In such cases, Art. 18 ECHR serves as a safeguard against politically motivated criminal proceedings. If the ECtHR finds a violation of Art. 18 ECHR, this ascertains that an intentional misuse of power has taken place. Therefore, such a judgement entails a considerable stigmatising effect as it reveals that the state concerned has infringed upon the fundamental principles common to all democratic and pluralistic societies.³¹

Regarding this role of Art. 18 ECHR, Nemtsov complained that his arrest and detention had pursued the aim of undermining his right to freedom of assembly and freedom of expression. The Court notes that this specific complaint is linked to the complaints examined above under Art. 5, 6 and 11 ECHR.³² As it already assessed the purpose of the state's violations of these provisions, the ECtHR finds it sufficient to merely reiterate the improper motivation.³³ Having said that, the Court holds that Nemtsov's complaint under Art. 18 ECHR raises no separate issue.³⁴ Therefore, it considers it unnecessary to examine whether Nemtsov's arrest and detention on administration charges violated Art. 18 ECHR.³⁵

Critical Assessment

In many respects, the Court's decision in the case of Boris Nemtsov deserves approval. Although the ECtHR primarily had to deal with factual findings regarding the circumstances of Nemtsov's detention, it did not exceed its standard of review. The Court did not generally take on the role of a first-instance tribunal of fact. It rather extensively stated the cogent elements that lead to a departure from the fact-findings of the domestic court. Taking these grounds into consideration, the Court's decision seems to be very reasonable and in line with its prior judicature.³⁶ Furthermore, both Art. 5 ECHR and Art. 11 ECHR refer to the domestic law ("prescribed by law"). In respect thereof, the Court inevitably has to take the correct application of the domestic law into account.³⁷ Therefore, the Court was right to assess and challenge the factual findings of the Russian court.

Based on these facts determined by the Court, it is also comprehensible to subsequently find a violation of Art. 11 ECHR, as the detention of a peaceful and obeying

30 See in general to Art. 18 ECHR including drafting of the provision, analysis and interpretation: *Schabas*, *The European Convention on Human Rights: A Commentary*, Art. 18 ECHR (pp. 1985 et seqq.); see also: Pettiti/Decaux/Imbert/*Coussirat-Coustere*, *La Convention européenne des droits de l'homme*, Art. 18 (pp. 523 et seqq.).

31 *Satzger/Zimmermann/Eibach*, *EuCLR* 2014, pp. 91, 113.

32 *Nemtsov v. Russia* (Fn. 2), para 128.

33 *Nemtsov v. Russia* (Fn. 2), para 129.

34 *Nemtsov v. Russia* (Fn. 2), para 130.

35 *Nemtsov v. Russia* (Fn. 2), para 130.

36 See for the references Fn. 20 and 21.

37 *Satzger*, *Internationales und Europäisches Strafrecht* § 11 para 21.

participant in an authorised demonstration is not prescribed by law.³⁸ The same holds true for the violation of the principle *in dubio pro reo* (Art. 6 § 1 ECHR). The obvious discrepancies between the testimonies of thirteen (!) witnesses and those of the two policemen called at least for an increasingly careful assessment.³⁹ In particular, taking into consideration that nearly all other evidence such as video footage was dismissed, it seems reasonable to suppose the domestic court failed to fulfil this obligation in every respect. Finally, it is convincing and according to the former relevant judicature of the Court that a detention based on an unfair trial implies a violation of Art. 5 § 1 ECHR, as well.⁴⁰

Nevertheless, and as mentioned above, the Court missed a great opportunity regarding the political dimension of the Nemtsov case by not deeming it necessary to examine a violation of Art. 18 ECHR. This would hold true if Art. 18 ECHR could be regarded as having a purely auxiliary function.⁴¹ Such an interpretation, however, is not consistent with the aforementioned change in the Court's judicature in recent years. In particular, the judgements in the cases of Vladimir Gusinskiy⁴², Mihail Cebotari⁴³, Yuriy Lutsenko⁴⁴ Yulia Tymoshenko⁴⁵, Mikhail Khodorkovskiy and Platon Lebedev⁴⁶ and Ilgar Mammadov⁴⁷, refer to Art. 18 ECHR. On the contrary, it is not the first time the Court deemed Art. 18 ECHR, expendable. Apart from earlier judgements,⁴⁸ the Court also took this approach in the more recent case of *Georgia v. Russia*.⁴⁹

This raises the question whether there is any compelling reason for this inconsistency. In all named cases, the Court found violations of other guarantees than Art. 18 ECHR. The state's measures in every single case that lead to the applications before the Court were closely related to political backgrounds in the respondent state. This is not only the case regarding the obvious political cases of prominent members of the

38 In line with established law practice and considering the different scope of these provisions, the ECtHR regarded Art. 10 ECHR as a *lex generalis* in relation to Art. 11 ECHR as a *lex specialis* with reference to: *Kasparov and Others v. Russia*, Application no. 21613/07, 3 October 2013, paras 82 et seq.; concerning the close relation between Art. 10 and 11 ECHR see also: *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention § 23 para 64.

39 See to a similar case regarding the discrepancies in the statements of witnesses: *Ajdaric v. Croatia*, Application no. 20883/09, 13 December 2011, para 51.

40 SSW-StPO/*Satzger* Art. 5 ECHR para 18.

41 See in detail to the different possibilities of interpreting Art. 18 ECHR with an auxiliary function: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 91, 105 et seqq.

42 *Gusinskiy v. Russia*, Application no. 70276/01, 19 May 2004, paras 73 et seqq.

43 *Cebotari v. Moldova*, Application no. 35615/06, 13 November 2007, paras 49 et seqq.

44 *Lutsenko v. Ukraine*, Application no. 6492/11, 3 July 2012, paras 100 et seqq.

45 *Tymoshenko v. Ukraine*, Application no. 49872/11, 30 April 2013, paras 289 et seqq.

46 *Khodorkovskiy v. Russia*, Application no. 5829/04, 31 May 2011, paras 254 et seqq.; *Khodorkovskiy and Lebedev v. Russia*, Application nos. 11082/06 and 13772/05, 25 July 2013, paras 886 et seqq.

47 *Mammadov v. Azerbaijan*, Application no. 15172/13, 22 May 2014, paras 133 et seqq.

48 For detailed information on this jurisprudence with further references: *Pabel/Schmahl/Steiger* IntKomm EMRK Art. 18 paras 11 et seq.; *van Dijk/van Hoof/van Rijn/Zwaak*, Theory and Practice of the ECHR, pp. 1097 et seq.

49 *Georgia v. Russia* (I), Application no. 13255/07, 3 July 2014, para 67.

opposition and critics of the political systems such as Khodorkovskiy, Tymoshenko or Nemtsov. Also in cases that are *prima facie* affected merely by economic facts like the cases of Cebotari or Gusinskiy, the state's interests were concerned as well.⁵⁰ Eventually, the political dimension of the detention and expulsion of Georgian nationals in the course of the political tensions between Russia and Georgia are evident. Therefore, there is at least no obvious reason why the respective decisions differ to such an extent. This fact in turn leads to great legal uncertainty. Already on this ground, it is suggested that the ECtHR changes its approach regarding Art. 18 ECHR.⁵¹ Finally, the Court has to decide whether Art. 18 ECHR fulfils more than a purely auxiliary function or not. Depending on this fundamental decision, it has to align its findings in relation to this question in order to establish an urgently needed consistent judicature.

Lastly, it is not only submitted that the Court eventually find a consistent line regarding politically motivated criminal proceedings and Art. 18 ECHR. Moreover, it is to be hoped that the Court recognises the potential of this specific provision. A conviction of a country for a violation of Art. 18 ECHR differs from an "ordinary" conviction. It shows that the state and its representatives deliberately disregarded elementary principles of a modern and democratic society. In this case, the state did not accidentally violate certain rights of the Convention, but intentionally perverted its criminal justice system into being an instrument of suppression. Therefore, a breach of Art. 18 ECHR entails a specific stigmatising effect.⁵² In this respect, the decision of the Court in the case of *Nemtsov* is disappointing. The specific function of Art. 18 ECHR was not even mentioned. This is even more surprising as such an interpretation would oppose the absorption of Art. 18 ECHR by the violation of other guarantees. Therefore, the Court missed the chance that arose from the *Nemtsov* case to further consolidate the scope of Art. 18 ECHR. One can only speculate as to why the Court was so reluctant to use Art. 18 ECHR in this case. Possibly, this approach can be explained by the above-mentioned new role of said provision. A judgment which signals that the respondent state has misused its criminal justice is one of the most serious reproaches imaginable.⁵³ On this account, it appears possible that the Court got "cold feet" and therefore tried to avoid a closer examination of Art. 18 ECHR. If so, it has to be noted that this approach cannot be the solution. Even if there were good reasons for not holding a violation of Art. 18 ECHR, the Court should not evade its responsibility by a sole reference to other breaches of the Convention. If the applicant claims a violation of Art. 18 ECHR, the Court should rather examine this provision in detail. Subse-

50 These cases in detail: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 91, 93 et seqq.

51 See for the same result: *Pabel/Schmahl/Steiger* IntKomm EMRK Art. 18 para 54.

52 For details regarding the new autonomous role of Art. 18 and especially the stigmatising effect see: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 91, 111 et seqq.; SSW-StPO/*Satzger* Art 18 para 6; *Satzger*, Internationales und Europäisches Strafrecht § 11 para 98a; in this direction also: *Pabel/Schmahl/Steiger* IntKomm EMRK Art. 18 para 57; Tymoshenko v. Ukraine (Fn. 45) (concurring opinion of judges Jungwiert, Nußberger, Potocki), pp. 69 et seqq.

53 *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 248, 253.

quently, it must decide whether Art. 18 ECHR is violated or not. To avoid an excessive use of the provision and to undermine the conviction's special weight, the Court is justified to establish a high threshold for breaches.⁵⁴ In contrast to the approach in the *Nemtsov* Case, this would allow the Court to fulfil the new role of Art. 18 ECHR.

Summary and outlook

The case of *Nemtsov* opened up a broad topic, namely the misuse of state power against political opponents under the guise of criminal prosecution. The decision of the ECtHR barely scratched the surface. While the Court ascertained the chilling effects of *Nemtsov's* detention at the assembly of other opposition supporters and the public at large, it saw no reason to examine the complaint under Art. 18 ECHR. This could indicate a regression to former times when Art. 18 ECHR only played an auxiliary role. Such an interpretation is not in accordance with most of the other recent Court's judgements and wastes the great potential of Art. 18 ECHR. Concerning this matter, the decision of the Court in the case of *Nemtsov* is highly critical.

Nevertheless, it is not only the already mentioned case of *Mammadov* that gives reason to hope that Art. 18 ECHR will not fall into oblivion again. In *Georgia v. Russia*, judge Tsotsoria strongly disagreed with the Court's finding that it was not necessary to examine the complaints under Art. 18 ECHR.⁵⁵ She ascertained that Russia acted in blatant disregard of the Convention and that this needs to be adequately assessed under Art. 18 ECHR.⁵⁶ Taking the concurring opinion of the judges Jungwiert, Nußberger, Potocki in the *Tymoshenko* case into consideration as well,⁵⁷ it appears that the judges of the Court themselves disagree on the scope of Art. 18 ECHR.⁵⁸

The latter might not only explain the inconsistent judicature to date. Moreover, it illustrates that there is still a long way to go until the still relatively unknown Art. 18 ECHR is generally recognised as a provision with an autonomous role. In order to achieve this recognition and for the sake of legal certainty, the Court needs to change the *status quo*. Declaring the provision to be irrelevant in cases like *Nemtsov v. Russia* promotes the opposite. Furthermore, this approach impedes a further consolidation, which is particularly deplorable with regard to the many still unsolved questions concerning an application of Art. 18 ECHR.⁵⁹ It is therefore suggested that the ECtHR stops undermining the role and scope of Art. 18 ECHR. The next cases with political

54 See for the high threshold regarding the standard and burden of proof: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 248, 249 et seqq.

55 *Georgia v. Russia* (Fn. 47) (partly dissenting opinion of Judge Tsotsoria), p. 62.

56 *Georgia v. Russia* (Fn. 47) (partly dissenting opinion of Judge Tsotsoria), p. 67.

57 *Tymoshenko v. Ukraine* (Fn. 43) (concurring opinion of judges Jungwiert, Nußberger, Potocki), pp. 69 et seqq.

58 See also *Harris/O'Boyle/Warbrick* who would, therefore, welcome a Grand Grand Chamber ruling on Art. 18 ECHR, *Law of the European Convention on Human Rights*, p. 861.

59 See e.g. to the significant questions of evidence: *Satzger/Zimmermann/Eibach*, EuCLR 2014, pp. 248, 249 et seqq.

background will show if the Court is disposed to do the same. Until then, the Court's decision in the Nemtsov Case causes more uncertainty than clarity.