

European Court of Human Rights judgments on the right to freedom of expression

Bulletin XXXIII: ROUND-UP OF JUDGEMENTS: MARCH 2014

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During March 2014, the European Court adopted judgments and decisions in the following freedom of expression cases:

- ***Dilipak and Karakaya v. Turkey*** (application nos. 7942/05 and 24838/05, 4 March 2014) (defamation conviction for criticism of deceased army commander violated the right to freedom of expression);
- ***Jelševar and Others v. Slovenia*** (application no. 47318/07, 11 March 2014) (book with alleged derogatory descriptions of characters did not constitute defamation);
- ***Yaman Akdeniz v. Turkey*** (application no. 20877/10, 11 March 2014) (individual who was denied access to blocked music sharing websites could not be considered a 'victim' of a human rights violation);
- ***Lolo v. Poland*** (application no. 11503/12, 11 March 2014) (defamation conviction for unfounded accusations against a judge did not violate the right to freedom of expression);
- ***Bartnik v. Poland*** (application no. 53628/10, 11 March 2014) (defamation conviction for unfounded allegations of corruption did not violate the right to freedom of expression);
- ***Bayar v. Turkey (no. 1 -8)*** (applications no. 39690/06, no. 40559/06, no. 48815/06, no. 2512/07, no. 55197/07, no. 55199/07, no. 55201/07, no. 55202/07, 25 March 2014) (conviction of newspaper editor for publishing statements by terrorist organisation violated the right to freedom of expression and right to a fair trial).

These cases concern the following issues:

- ***Dilipak and Karakaya v. Turkey*** (application nos. 7942/05 and 24838/05) 4 March 2014: defamation conviction for criticism of deceased army commander violated the right to freedom of expression

This concerned two journalists who had been found guilty of defamation for an article which was critical of a former commander-in-chief's political role at a meeting of the National Security Council in February 1997, which had been described by some observers as a "post-modern coup d'état". The journalists stated in the article that they "don't usually speak ill of the dead, but this doesn't apply to Hitler and Stalin", adding that they had not suggested that the commander was like Hitler but "has a 'special place' in the consciousness of the people". They also claimed that a number of Koran schools had been closed as a result of the commander's policy. The commander-in-chief's family brought legal proceedings against the journalists but were unable to locate them. Proceedings went ahead in their absence. In January 2003 judgment was delivered, and in June they were located and enforcement proceedings were started against both. Turkish courts deemed that the journalists had overstepped the mark and had been disrespectful towards someone who had "bravely served the nation". The journalists appealed on the basis that they had not been able to defend themselves but their appeals were dismissed. They then complained to the European Court of Human Rights, claiming a violation of their right to freedom of expression as well as their right to a fair trial.

The Court held that the journalists' right to freedom of expression had been violated as well as their right to a fair trial. It considered that the journalists had commented on the role of the former commander during a coup d'état, which was a matter of public interest. The commander was a well-known public figure whose family should tolerate criticism of his functioning as a public servant. While the journalists used a bitter and sarcastic tone that certainly offended the relatives of the deceased, they had remained within the limit of acceptable criticism. The Court noted in particular that the journalists commented on the poor functioning of the democratic regime, which was of the highest public interest. Furthermore, the Court considered that the amount of damages awarded did not take the financial status of the journalists into account, and that it had resulted in the seizure of one of the journalist's homes. This was likely to have a chilling effect on the entire journalistic profession. Finally, the Court considered that it had not been justified for the proceedings to have gone ahead in the absence of the journalists.

- ***Jelševar and Others v. Slovenia*** (application no. 47318/07) 11 March 2014: **book with alleged derogatory descriptions of characters did not constitute defamation**

This concerned a group of four women who alleged that they had been featured as characters in a book which had portrayed them and their family in a defamatory way. The main character in the book, Rozina, was depicted as a lively, ambitious and resourceful – but was also described as using sex to get her way with her husband, having illegally sold alcohol during the Prohibition in the United States, and as valuing money over the well-being of her children. The group of women alleged that the setting of the book was the area where the applicants' family had lived, and that the main characters had a name – Brinovc – that, although it was not their real name, was the name under which they were known in the community. They sued the author for defamation but their complaints were dismissed by the domestic courts on the ground that the average reader would not consider the events narrated in the book as facts about real people. Furthermore, the domestic courts considered that the events described were not defamatory, and that it had not been the author's intention to defame. The women then appealed to the European Court of Human Rights complaining that their right to respect for privacy had been violated.

The European Court dismissed the complaint as “manifestly ill-founded”. It emphasised that the artistic freedom enjoyed by authors of literary works was of importance in itself and required a high level of protection under the Convention. The Court noted that national courts had attached fundamental importance to the question of whether the applicants’ family could have been identified with the fictional characters of the book, and whether these characters had been depicted in an offensive way amounting to defamation. The Court found that the approach taken by the Slovenian Constitutional Court to the balance to be struck between the competing interests had been fair and in line with European case law. The Slovenian courts had considered whether an average reader would consider the story as real (non-fictional) and whether an average reader would consider it as offensive, given the context of the book as a whole. The European Court therefore found that the women’s right to privacy had not been violated.

- ***Yaman Akdeniz v. Turkey*** (application no. 20877/10) 11 March 2014: individual who was denied access to blocked music sharing websites could not be considered a ‘victim’ of a human rights violation

This concerned the blocking of the Internet domains myspace.com and last.fm on the grounds that these sites violated copyright. The applicant, a user of the sites, complained that the wholesale blocking of these domains rendered thousands of webpages inadmissible, many of whom did not violate copyright. The local courts dismissed his complaints, and the applicant appealed to the European Court of Human Rights arguing that his right to receive information had been violated.

The European Court of Human Rights dismissed the complaint, holding that the applicant could not be considered to be a ‘victim’ of a violation of his rights under European Convention on Human Rights case law. While the Court recognised the paramount importance of the Internet as a tool for the exercise of the right to freedom of expression, the mere fact that the applicant had suffered the ‘side effects’ of the blocking of a web domain did not in itself render him a victim. He was only an occasional user of the last.fm domain, and did not have a myspace.com account that had been affected. Furthermore, the applicant could easily access the music he wanted to listen to via other means.

- ***Lolo v. Poland*** (application no. 11503/12) 11 March 2014: defamation conviction for unfounded accusations against a judge did not violate the right to freedom of expression

This concerned a fine for defamation of a man who had complained that a local judge had “manufactured evidence” and “regularised an illegal situation”. The complaint had been made in a letter to the court in which he asked for the judge to be recused from a case in which the man was involved. The man complained to the European Court of Human Rights.

The European Court dismissed the complaint as “manifestly ill-founded”. It agreed with the domestic courts that while there must be room for legitimate criticism of the functioning of public officials, included judges, the man had no evidence for the accusations he had made against the judge. The remarks were likely to undermine the authority of the judge. The European Court also took into account that the penalty had been at the lower end of the scale and that it had been suspended for a period of two years because of the complainant’s financial situation.

- ***Bartnik v. Poland*** (application no. 53628/10) 11 March 2014: **defamation conviction for unfounded allegations of corruption did not violate the right to freedom of expression**

This concerned the defamation conviction of a man who had published several articles on a website in which he accused the managers of a housing cooperative of having mismanaged the cooperative and diverted funds. He was sentenced to a fine of EUR125. He complained to the European Court of Human Rights arguing that his articles had been satirical in nature, and that he was a citizen journalist and had commented on an issue of public interest.

The European Court dismissed the complaint as “manifestly ill-founded”. While the Court accepted that the topic of criticism was indeed an issue of public interest, and it acknowledged the importance of ‘citizen journalism’ such as the web articles in question, it also noted that the Internet is different from the written press and that it posed a greater risk to privacy and reputational interests. The Court noted furthermore that the applicant had no evidence of the truth of various of the allegations he had made, particularly as regards the diversion of funds from the housing trust, and that the use of words such as “bandits, thieves, racketeers, thieves” to describe the managers could not be justified even if the articles were intended to be satirical. Bearing in mind the low amount of the fine imposed, the Court therefore found that the defamation conviction did not violate the right to freedom of expression.

- ***Bayar v. Turkey*** (no. 1 -8) (applications no. 39690/06, no. 40559/06, no. 48815/06, no. 2512/07, no. 55197/07, no. 55199/07, no. 55201/07, no. 55202/07, 25 March 2014) **conviction of newspaper editor for publishing statements by terrorist organisation violated the right to freedom of expression and right to appeal**

This concerned the editor of a daily newspaper, Ülkede Özgür Gündem, who was convicted of publishing terrorist propaganda. He had published a series of articles which reported the position of the Kurdistan Workers’ Party on various issues, as well as statements made by its leaders. The Kurdistan Workers Party is considered a terrorist organisation by the Turkish government and the editor along with the proprietor of the newspaper was fined for spreading terrorist propaganda and publishing material from an illegal armed organisation. The newspaper proprietor appealed and some of his convictions were squashed (others remained pending); but the editor was not allowed to appeal the fines to the Constitutional Court on the grounds that they did not exceed 2,000 Turkish liras (the newspaper proprietor had been fined more than that). The editor appealed to the European Court of Human Rights.

The European Court found that the convictions for publishing statements made by the Kurdistan Workers’ Party and its leaders violated the right to freedom of expression, while the inability to appeal the convictions to the constitutional court violated the right to appeal. The Court noted that the articles concerned did not incite violence or hatred, and that they did not constitute a ‘call to arms’ or promoted terrorist acts. They could therefore not be considered hate speech. The inability to appeal the convictions to the Constitutional Court constituted a violation of the right to appeal, which was all the more striking since the newspaper proprietor had been allowed to appeal his convictions and had won.

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