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

Bulletin LX: FREEDOM OF EXPRESSION JUDGMENTS FROM AROUND EUROPE: Spring/Summer 2015

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The European Court of Human Rights has not issued any freedom of expression judgments in August. This bulletin will instead summarise recent freedom of expression judgments by Irish, Dutch and English courts:

- ***Pretium v. BNN*-Vara**, Court of Appeal of Amsterdam (case no. 200.144.473-01), 24 April 2015: broadcast reporting on poor service by telephone company not defamatory even if aspects were in bad taste;
- ***O'Brien v RTÉ***, High Court [2015] IEHC, 21 May 2015: broadcast of confidential financial information not in the public interest;
- ***CCCP and KRO-NCRV v. Media Markt***, Court of Appeal of Amsterdam (case no. 200.157.976-01), 28 April 2015: broadcast of illegally obtained footage could not be stopped;
- ***Gulati & Ors v MGN Limited,*** [2015] EWHC 1482 (Ch): high level of damages awarded to victims of 'phone hacking' by journalists did not violate right to freedom of expression;

These cases concerned the following issues:

- ***Pretium v. BNN*-Vara**, Court of Appeal of Amsterdam (case no. 200.144.473-01), 24 April 2015: broadcast reporting on poor service by telephone company not defamatory even if aspects were in bad taste

The Dutch Court of Appeal of Amsterdam ruled that a report about the failure of a telephone company to provide a good service to a pensioner might have been in bad taste, but it was not unlawful. The report devoted attention to various complaints about the telecom provider Pretium and started its report with an item that told the story of an old lady who had been unable to use her telephone line in the final weeks of her life, because of a failure of her telephone company. The opening scenes showed the old lady's niece visiting her grave, set to sober music – providing a dramatic introduction to the report. The telephone company sued for defamation, arguing that it had provided a good service and that its responses to the broadcaster had not been fully included in the broadcast. The company won at first instance, but the broadcaster appealed.

The Court of Appeal held that the broadcaster had not defamed the telephone company. It considered that while the item was unduly dramatic and perhaps even in bad taste insofar as its introduction focused in on the death of the old lady, this was irrelevant to the question whether or not the report was defamatory. It found that the facts supported the item – the

telecommunication company had indeed failed in large part to provide an acceptable service. The Court considered the important role of the broadcaster in providing information on issues of public interest, and the public's right to receive that information. The Court of Appeal expressly disagreed with the company's contention that the broadcaster should do an exhaustive investigation into all the facts of the story before reporting, holding that this would damage the broadcaster's ability to provide news reports, and it disagreed that the broadcaster should have included the company's entire – very lengthy – response. Instead, it held that broadcasters have editorial freedom to decide what to include and what to exclude, so long as the report as a whole remains truthful and the company's response is not misrepresented.

- ***O'Brien v RTÉ***, High Court [2015] IEHC, 21 May 2015: broadcast of confidential financial information not in the public interest

This concerned the question whether the Irish public broadcaster, RTÉ, could broadcast confidential information concerning the financial affairs of prominent Irish businessman, Denis O'Brien (the richest person in Ireland). O'Brien had a major debt to the bank that was owned by the Irish state, RTÉ had written to both him and the bank informing them that they would broadcast a news report which included confidential banking information concerning them and asking for comment. Their report suggested that there had been a failure of management at the bank which, because it was state-owned, had cost the taxpayer money. O'Brien's lawyers applied to the High Court attempting to stop the broadcast of the confidential information.

The Court held that the information could not be broadcast, with the exception of parts that had already been revealed to the public by a member of parliament. It noted that O'Brien was a businessman of national and international renown and undoubtedly a public figure. It also considered that under the law, anyone seeking to stop the media from publishing should "demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press". O'Brien's right to privacy should be balanced against the broadcaster's right to freedom of expression. In this case, the Court noted that "very little, if any, connection has … been established between the public interest in alleged failures of corporate governance at [the bank] and O'Brien's personal dealings with IBRC." So long as this could not be shown, the bank had therefore "established a convincing case" that the broadcast of the confidential information should be stopped. If not, the Court held, "significant details of the private banking affairs" of O'Brien would become public and this would cause him "incalculable loss".

- ***CCCP and KRO-NCRV v. Media Markt***, Court of Appeal of Amsterdam (case no. 200.157.976-01), 28 April 2015: broadcast of illegally obtained footage could not be stopped

This concerned the broadcast of a consumer TV programme parts of which had been filmed in a retail store. The journalists wanted to test whether someone dressed in cloths that resembled an official uniform would be allowed to work in several companies. They filmed segments on a building site, on public transport, and in a retail store, amongst other locations. The manager of the store where they filmed objected to the experiment and demanded that the footage should be handed over, arguing that it was unlawful to film inside their stores (there was a sticker on the door saying 'no filming'). The journalists refused and the store brought a lawsuit. At first instance, the Court granted an injunction, ordering the broadcasters not to broadcast any of the footage, but on appeal this was overturned.

The Court of Appeal acknowledged that the footage had been shot without the consent of the store owner, and therefore constituted a possible infringement of its rights. However, this in itself was not sufficient to justify banning the broadcast – such a rule would amount to censorship. Relying on the European Court of Human Rights' decision in *Mosley v. UK*, the Court held that the assessment of any possible infringement of rights should take place after a broadcast. In the case before it, the Court emphasised that the journalists had not intended to place the store owners or its employees in a bad light. There was no indication of reputational damage for the store or its visitors.

- ***Gulati & Ors v MGN Limited,*** [2015] EWHC 1482 (Ch): high level of damages awarded to victims of 'phone hacking' by journalists did not violate right to freedom of expression

This judgment was one of a number of long-running 'phone hacking' cases, in which journalists had illegally accessed into the voicemails of various people in the United Kingdom. The claimants in this case were eight 'celebrities' or people who worked with them (their agents, for example), who had argued that their privacy rights had been infringed: by listening in on the voicemails, the journalists had learned intimate details about the celebrities' private lives and had subsequently published about them. The defendant was the publisher of three newspapers. While the newspaper publisher had agreed that it was liable for the actions of its journalists, it had objected to the amount of damages that should be payable for the intrusion of privacy.

The Court held that the damages should take into account that the intrusion had taken place over a very long period of time, holding that "the defendant [newspaper] will have helped itself, over an extended period of time, to large amounts of personal and private information and treated it as its own to deal with as it thought fit. There is an infringement of a right which is sustained and serious". Furthermore, the Court held that the victims should receive compensation for every individual instance of 'hacking' – although the overall compensation to be paid should be proportionate. The Court considered that invasion of privacy was a serious issue and should be treated as such. The scale of the invasion in these cases was on without precedent and had taken place on an almost daily basis, and the Court took into account the fact that the journalists and newspapers involved had initially denied any wrongdoing. Overall, the Court awarded each of the victims damages ranging from £85,000 (€116,450) to £260,250 (€356,540). This eclipsed the previous highest damages awarded for invasion of privacy by the media, which had been £60,000 (€82,175) in a case in which the head of Formula 1 car racing had been filmed during an orgy.

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