

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

Bulletin IX: ROUND-UP OF JUDGEMENTS FROM DECEMBER 2012

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During December 2012, the European Court adopted judgments in the following freedom of expression cases:

- *Verlagsgruppe News GmbH and Bobi v. Austria* (no. 59631/09), 4 December 2012
- *Constantinescu c. Roumanie* (no. 32564/04), 11 December 2012
- *Nenkova-Lalova v. Bulgaria* (no. 35745/05), 11 December 2012
- *Yildirim v. Turkey* (no. 3111/10), 18 December 2012

These judgments concerned the following issues:

- ***Verlagsgruppe News GmbH and Bobi v. Austria* (no. 59631/09), 4 December 2012 (injunction on publication of photographs invading privacy did not violate freedom of expression)**

This concerned the publication of newspaper articles, which reported allegations that the principal of a catholic seminary had been engaged in homosexual activities with some of his students. The article also reported a police raid on the seminary on suspicion that someone had downloaded child pornography from the Internet. According to the article, the existence of homosexual relations was well-known within the seminary and was even known to the bishop, who had tried to “hush up” the issue. Both articles were accompanied by photographs, including one taken at a party showing the principal with his hand on the crotch of a seminarian. The principal sued for defamation and invasion of privacy but lost. However, he obtained an injunction prohibiting the magazine from publishing further photographs of him.

The Court considered that what was at stake was not the reported allegations of homosexual relations, but rather the photographs accompanying the articles. It considered that while the articles concerned an issue of general public interest, which the newspaper was entitled to report on, this did not automatically justify the publication of photographs. The Court considered furthermore that the principal had not been a ‘public figure’ prior to the publication of the articles; that the photographs that had been published were taken at a private party and as such whereof an intrusive nature; and that the sanction imposed had been light. For these reasons, the injunction prohibiting the publication of further photographs did not violate the applicants’ rights.

- ***Ileana Constantinescu v. Romania*** (no. 32564/04), 11 December 2012
(defamation award over derogatory claims in biography violated freedom of expression)

This concerned the publication of a biography of a professor of economics and member of the Romanian national academy, written by his daughter, which mentioned another prominent economist. This second economist, who headed the national association of economists and edited a prominent magazine on economics, sued in defamation over passages that alleged that he had engaged in fraudulent activity and mismanaged the association's finances. The domestic courts found in the second economist's favour, awarding him damages and ordering the applicant to pay his legal costs. The domestic courts found that the applicant had failed to prove the truth of the allegations made.

The European Court noted that the remarks found to have been defamatory were made in the context of a debate of general interest to the community of Romanian economists, and that they partially concerned issues of copyright – in itself subject of a debate of public interest, particularly in the academic community. The Court noted furthermore that the economist who sued could be considered a public figure, albeit of a lesser order than a politician, and that he should therefore tolerate greater scrutiny and criticism than an ordinary person. The Court emphasised that the criticism and allegations concerned his public functioning, not his private life, and partly responded to statements made by the economist in a series of newspaper articles which were provocative in nature. The Court went on to emphasise the difference between statements of fact and statements of opinion, and held that the domestic courts had not sufficiently considered this in their reasoning. Considering also the severity of the fine as well as the requirement to reimburse legal costs, the Court held that the conviction violated the applicant's right to freedom of expression.

- ***Nenkova-Lalova v. Bulgaria*** (no. 35745/05), 11 December 2012
(dismissal of journalist did not violate freedom of expression)

The applicant, a radio journalist, complained about her disciplinary dismissal from work and about the alleged unfairness and the length of the proceedings in which she had challenged that dismissal. She was employed by the Bulgarian National Radio ("BNR"), and had broadcast an interview with another BNR journalist, discussing a journalistic investigation into corruption amongst other things, against the wishes of the editorial board. The interview had been such as to effectively let the second journalist take over the show and speak for most of it. As a result, the applicant was dismissed. Further appeals and domestic court proceedings lasted seven years, and upheld the dismissal.

The Court held that the applicant's dismissal on grounds related to her work as a journalist amounted to an interference with her right to freedom of expression. However, the Court was satisfied that applicant's dismissal was intended to ensure the obligation of the BNR to offer balanced and objective programming, in the interests of listeners. The Court considered furthermore the applicant's "duties and responsibilities" as a journalist in a public broadcasting organisation, and that journalists in a public broadcaster had a particular duty to adhere to editorial decisions. It noted that the applicant was dismissed for her wilful disregard of an editorial decision. Neither this decision nor the order for the applicant's dismissal mentioned any limitations on the topics to be discussed during her show. The Court held that applicant's capacity as such a journalist did not

automatically entitle her to flout editorial decisions which were intended to ensure balanced broadcasting, or to have unlimited access to BNR airtime. The Court held furthermore that employers generally enjoy a broad discretion in imposing disciplinary sanctions. While dismissal was a severe sanction, it had been prompted by concrete and deliberate actions on the part of the applicant, which showed that she could not be trusted to perform her duties in good faith. Therefore, the applicant's dismissal did not violate her right to freedom of expression.

- ***Yildirim v. Turkey*** (no. 3111/10), 18 December 2012
(blocking of website violated freedom of expression)

This concerned the blocking of a website. The applicant was an academic who published his work as well as opinion pieces on his website, which was hosted by Google Sites (a web hosting service that is separate from Google's search engine). Access to his website had been blocked because of a court order blocking access to all content hosted on Google Sites. This order had been requested by the national telecommunications regulator on the grounds that one page on Google Sites insulted the memory of the father of the nation, Atatürk, and that it was technically impossible to only block access to this one page. A criminal court had granted the request. The applicant was therefore unable to access his own site – even though it had nothing to do with the offending page.

The Court considered that the Internet was now one of the principal means of exercising the right to freedom of expression, restrictions on which are acceptable only under strict conditions. The first of these conditions is that any restriction must be imposed by law and that this law must be 'foreseeable' in its application. While applicant's website had been blocked as the result of a court order that had been granted under Turkish law, the Court emphasised that neither the applicant nor Google Sites were the subject of court proceedings in this case, and the Turkish law in did not authorise the blocking of entire domains. Google Sites had not been informed that content hosted by it had been held to be illegal, nor had it refused to comply with a court order to block access to the single offending web page subject of the criminal proceedings. The Court observed furthermore that the national courts had not considered whether a narrower blocking of access might have been possible, and nor had it weighed up the various interests at stake. For these reasons, the Court held that the blocking violated the right to freedom of expression.

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