

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

Bulletin L: ROUND-UP OF FREEDOM OF EXPRESSION JUDGEMENTS: February 2015

26 March 2015

The European Court of Human Rights decided the following freedom of expression cases during February 2015:

- ***Bayar and Gürbüz v. Turkey (no 2)***, (application no. 33037/07), 3 February 2015: conviction for reporting New Year address by representative of PKK violated right to freedom of expression
- ***Yoslun v. Turkey***, (application no. 2336/05), 10 February 2015: fine for “unauthorised” political comments violated right to freedom of expression
- ***Cojocar v. Romania***, (application no. 32104/06), 10 February 2015: defamation conviction for provocative article calling for mayor’s resignation violated right to freedom of expression
- ***Guseva v. Bulgaria***, (application no. 6987/07), 17 February 2015: refusal to release information on animal rights violated right to freedom of expression
- ***Bohlen and Von Hannover v. Germany***, (application no. 53495/09), 19 February 2015: use of names of celebrities in satirical advertisements did not violate right to respect for private life
- ***Haldimann and others v. Switzerland*** (application no. 21830/09), 24 February 2015: use of hidden cameras legitimate tool in consumer journalism

These cases concerned the following issues:

- ***Bayar and Gürbüz v. Turkey (no 2)***, (application no. 33037/07), 3 February 2015: conviction for reporting New Year address by representative of PKK violated right to freedom of expression

This concerned the owner and editor of a newspaper which had been fined for an article in which they had quoted a representative of the PKK, which is classified as a terrorist organisation. This fell afoul of a law that prohibits publishing statements by terrorist organisations. They appealed and had the fine lowered slightly, to approximately €230. A further appeal was rejected on grounds that the fine imposed fell below the amount required to allow any further appeals.

The European Court took into consideration that the statement by the PKK representative merely thanked those who had come to a party to celebrate the traditional Kurdish/Iranian New Year (Newroz). Taking into account the context in which this statement had been made, the Court held that there was nothing to suggest that it incited terrorism, violence or hatred. The conviction therefore constituted a violation of the right to freedom of expression. Furthermore, the failure to allow a final appeal constituted a violation of the right to a fair trial.

- ***Yoslun v. Turkey***, (application no. 2336/05), 10 February 2015: fine for “unauthorised” political comments violated right to freedom of expression

This concerned a singer who had been fined for a speech which he had given during a concert. He had criticised the Turkish government and had said that modern Turkey was neither free nor democratic. He also made comments in support of the Kurdish nationalist movement. The fine was imposed on the grounds that authorisation given for the concert by the municipality precluded any political speeches. He appealed the fine and also requested a hearing to argue his case. His appeal was refused and a hearing was denied.

The European Court of Human Rights noted that this case was different from other Turkish cases in that an administrative law had been used to impose the fine, rather than the often-used anti-terrorism laws. The Court noted that the speech in question was political in nature and that political speech should not be restricted lightly – it is the most strongly protected category of expression under the European Convention. It is a fundamental criterion under Convention law that expression should be restricted only on the basis of legislation that is clear and the use of which is ‘foreseeable’, so that individuals know whether something they might say is prohibited. This prevents the authorities from using the law arbitrarily. The Court considered that the law on the basis of which the singer was convicted made it a criminal offence to fail to comply with “an order from a competent authority or a preventive measure taken by it”. The Court considered that this formulation was not sufficiently clear to enable the applicant to realize that just making comments, as a singer, as part of a previously authorized concert would constitute disobedience to an administrative order. Therefore, the Court concluded that the domestic courts had extended the scope of the provision beyond what could have been reasonably foreseeable in the circumstances of the case; this constituted a violation of the right to freedom of expression.

- ***Cojocaru v. Romania***, (application no. 32104/06), 10 February 2015: defamation conviction for provocative article calling for mayor’s resignation violated right to freedom of expression

This concerned a Romanian journalist who had been convicted of defamation for an article in which he questioned a local mayor’s professional activities and called for his resignation. The article was headlined “Resignation of honour” and had listed ten

reasons why the mayor should resign. It referred to the mayor's work with descriptions such as "Twenty years of local dictatorship"; "[the mayor] at the peak of the pyramid of evil"; "in Paşcani, only those who subscribe to [the mayor]'s mafia-like system can still do business"; "we have been ruled for over twenty years by a former communist who still has the reflexes of a county chief secretary"; and "[the mayor] does not represent the interests of the [local community]". On the same page, the journalist had also written a news piece about an official investigation into the mayor's activities. This article included a statement by another politician as well as the mayor's point of view on the investigation.

The European Court held that the criminal conviction for defamation violated the journalist's right to freedom of expression. It noted that the case concerned matters of public concern, namely the activities undertaken by the mayor, a public figure, and referred strictly to the acts performed in his official capacity and not to his private life. It noted furthermore that the domestic courts had not distinguished between parts of the report that were factual and other parts that constituted the journalist's opinion, which was important in defamation cases (the truth of a factual statement can be established, but not that of an opinion). The Court also took into account that the journalist had relied on official reports which had revealed irregularities in the local administration. These should have been accepted as a reasonable basis for the statements the journalist had made. The Court noted that while some of the statements in the article were provocative, they were not "particularly excessive". The Court also held that the fact that the journalist had been convicted of defamation in the past did not mean that he did not act in "good faith" in this case. Finally, the Court found that the fact that the conviction meant the journalist had a criminal record was significant, as was the fact that the fine imposed constituted four times the average monthly income in Romania.

- ***Guseva v. Bulgaria***, (application no. 6987/07), 17 February 2015: **refusal to release information on animal rights violated right to freedom of expression**

This concerned a request for access to information from a local mayor. The applicant, an animal rights activist, had made several requests for information on the treatment of stray animals. Despite obtaining court orders for the release of the information, the mayor's office had refused to provide it.

The European Court held that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. Furthermore, the Court recalled that it has held that non-governmental organisations, like the press, may also be characterised as social "watchdogs"; and that their activities warrant similar protection to that afforded to the press. The information requested in this case was of public interest and had been requested in order to contribute to public debate on the topic of animal rights. The failure to release the information therefore constituted an interference with the right to freedom of expression which, in view of the domestic

court orders for the disclosure, had no legal basis. The Court also observed that under national law, there was no clear time-frame for the release of information ordered by the courts; this was left to the good will of the administrative body responsible for the implementation of the judgment. The Court found that this created unpredictability as to the likely time of enforcement, which in itself was a violation of the right to freedom of expression.

- ***Bohlen and Von Hannover v. Germany***, (application no. 53495/09), 19 February 2015: **use of names of celebrities in satirical advertisements did not violate right to respect for private life**

These cases concerned the use in tobacco advertising of the applicants' first names and of news items concerning them, without their consent. The first applicant, Dieter Bohlen, is a musician and producer. In 2003, passages in a book he had published had to be removed following court rulings. In October 2003, British American Tobacco (Germany) launched an advertising campaign referring to this, showing text which included the applicant's first name and which had been partly crossed out using black ink. The second applicant is the husband of Princess Caroline of Monaco. In 1998 and 2000 he was involved in two violent incidents, one with a cameraman and the other with a discotheque manager, and was subsequently convicted of assault.

In March 2000, British American Tobacco used these events in an advertisement which mentioned Mr von Hannover's first names and showed a picture of a crumpled cigarette packet. Bohlen and Von Hannover sought orders prohibiting the distribution of the advertisements in question, and the cigarette manufacturer complied immediately but refused to pay the €100,000 which the duo had demanded by way of licence payments for the use of their names. Following lengthy court proceedings, the Federal Court of Justice eventually held that despite their commercial nature, the ads had shaped public opinion; had not sought to exploit the applicants' good name; nor contained anything that was degrading to them. Bohler and Von Hannover complained to the European Court of Human Rights.

The Court held that the applicants' rights had not been violated. It held, first of all, that States have a broad 'margin of appreciation' as far as conflicts between the right to freedom of expression and protection of privacy are concerned, and that this margin was particularly wide with respect to the regulation of commercial speech such as the ads concerned. The Court went on to reiterate the relevant criteria laid down in its case-law for assessing the manner in which the domestic courts had balanced the right to respect for private life against the right to freedom of expression. These were: the contribution to a debate of general interest, the extent to which the person in question was in the public eye, the subject of the report, the prior conduct of the person concerned and the content, form and impact of the publication. Firstly, regarding the issue of general interest, the Court held that the advertisements had been apt to contribute to some degree to a debate of general interest as they had dealt in a satirical

manner with events that had been the subject of public debate. Secondly, as to the extent to which the applicants had been in the public eye, the Court considered that they were already well known and therefore could not claim the same degree of protection of their private lives as persons who were unknown to the public at large. Thirdly, in the Court's view, the subject of the advertisements had been confined to specific events already known to the public, which had been covered in the media and were beyond dispute. Lastly, with regard to the content, form and impact of the advertisements, the Court noted that the image of the applicants that had been conveyed had not been degrading and that the indirect allusions made by the advertisements would have made it difficult to establish a connection with the events in question. The Court accepted in that regard that the use of a public figure's name in connection with a commercial product without his or her consent could raise issues under Article 8, especially where the product in question was not widely accepted socially. However, in this specific case the Court found it fitting to agree with the findings of the Federal Court of Justice, particularly in view of the humorous nature of the advertisements in question. Accordingly, the Court held that the Federal Court of Justice had struck a fair balance between freedom of expression and the right to respect for private life.

- ***Haldimann and others v. Switzerland*** (application no. 21830/09), 24 February 2015: **use of hidden cameras legitimate tool in consumer journalism**

This case concerned the conviction of four journalists for broadcasting an interview with an insurance broker that had been taped using a hidden camera. The interview was part of a television documentary that reported on misleading advice provided by life insurance brokers, an issue of public debate in Switzerland at the time. The broker filed for an injunction but failed and when the programme was broadcast, filed a police complaint for violation of privacy – a criminal offence under Swiss law. Although the journalists were acquitted at first instance and an injunction to prevent the broadcast failed, they were convicted on appeal and sentenced to a fine on the grounds that the use of a hidden camera had not been strictly “necessary” for the programme. The journalists appealed to the Swiss Federal Court, and from there to the European Court of Human Rights.

The Court first affirmed its “general principles” on freedom of expression and invasion of privacy, emphasising the importance of the right to freedom of expression as well as the duty on journalists to behave ethically. In cases concerning the invasion of privacy of public figures, six criteria in particular are relevant: (1) the extent to which the story contributed to a debate of general interest; (2) the reputation of the person concerned and the purpose of the report; (3) the past behaviour of the individual reported on; (4) the method by which the information was obtained; (5) the report's content, form and impact; and (6) the severity of the sanction imposed.

Applying these criteria to the case, the Court found that while the insurance broker was not a public figure, the journalists had clearly sought to report on an issue of general

interest: the mis-selling of insurance schemes. In this, their aim was not attack the broker individually but rather to use him as an example to illustrate the wider issue. The impact of the story on the reputation of the dealer was therefore limited and the Court took this into account in its assessment of the case.

At the same time, the Court held that the broker did have a reasonable expectation of privacy. He was not a public figure and he had not consented to being filmed. This was counterbalanced, however, by the fact the he was not the sole focus of the report, which instead focused on the mis-selling of insurance schemes generally, and that he had not been interviewed in his own offices. This meant that while the filming had constituted an 'interference' with his privacy, this interference was at the lower end of the scale.

The Court went on to consider the crucial element of the case from a jurisprudential perspective – the method by which the information had been obtained. It first reaffirmed that while journalists have considerable leeway in their reporting on issues of public interest, they must do so in good faith, on an accurate factual basis and they have to strive to provide "reliable and precise" information in accordance with the ethics of journalism. The Court then considered the way in which the report had been broadcast. It took into account that the broker's face had been pixelated and his voice disguised, that he had not been interviewed in his own offices and that his suit was nondescript. This meant that the level of interference with the broker's privacy was minimal and did not outweigh the public interest in the story. Finally, the Court took into account the severity of the sanction. While in financial terms the penalty was light, the Court held that the use of the criminal law had been disproportionate. For all these reasons, the Court found that the conviction violated the right to freedom of expression.

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