



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

Bulletin XI: ROUND-UP OF JUDGEMENTS FROM JANUARY 2013

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During January 2013, the European Court adopted judgments in the following media freedom cases:

- *Ashby Donald and others v. France* (no. 36769/08), 10 January 2013
(penalty for copyright infringement did not violate the right to freedom of expression)
- *Bucur and Toma v. Romania* (no. 40238/02), 13 January 2013
(punishment of 'whistleblower' who disclosed illegal phone tapping to the media violated right to freedom of expression)
- *Ivpress and Others v. Russia* (nos. 33501/04, 38608/04, 35258/05 and 35618/05), 22 January 2013
(defamation conviction for statements of opinion violated the right to freedom of expression)
- *Güdenoğlu and Others v. Turkey* (nos. 42599/08, 30873/09, 38775/09, 38778/09, 40899/09, 40905/09, 43404/09, 44024/09, 44025/09, 47858/09, 53653/09, 54311/10 and 8571/10), 29 January 2013
(suspension of newspapers violated the right to freedom of expression)

These judgments concerned the following issues:

- ***Ashby Donald and others v. France*** (no. 36769/08), 10 January 2013
(penalty for copyright infringement did not violate the right to freedom of expression)

This concerned fashion photographers who had published, on their website, photographs taken at Paris fashion shows, without permission from the fashion houses concerned. They were sued for breach of copyright and ordered to pay fines and damages totalling €255.000.

The European Court held that this did not violate their right to freedom of expression. The Court took into account that the photographs concerned fashion and did not contribute to a debate on a topic of public interest. It qualified the pictures as "commercial speech", not "political speech", which enjoys a lesser degree of protection. The Court balanced the photographers' right to freedom

of expression to the right of copyright owners to protect their rights, and found that the restriction on the publication of the photographs was legitimate. While the Court acknowledged that the fines and damage award were very high, it stated that no evidence had been put forward to argue that this threatened the livelihood of the photographers.

- ***Bucur and Toma v. Romania*** (no. 40238/02), 13 January 2013
(punishment of 'whistleblower' who disclosed illegal phone tapping to the media violated right to freedom of expression)

This concerned the conviction and two-year prison sentence for a government employee who had disclosed to the media the practice of illegal interception of journalists' and politicians' phones by the military secret service.

The European Court held that this violated the right to freedom of expression. While the Court acknowledged that the issue concerned 'national security', which it described as being at the 'core of State sovereignty', the Court considered the following factors. First, it took into account that the 'whistleblower' had initially attempted to report his concerns to his superiors and others within government. However, there was no formal legislation protecting 'whistleblowers' or providing for official channels through which concerns can be reported. The Court examined the existing informal channels for reporting concerns within the government agency concerned and found that these were unsatisfactory, as was the potential option of making a direct report to parliament.

The Court considered furthermore that the information concerned was undeniably of public interest. It noted that the interception of telephone communications was of particular importance in a society that had experienced during the communist regime a policy of close surveillance by the secret services. The Court also took into account that the information had been disclosed in good faith, and that the domestic courts had failed to give due consideration to all arguments put forward by the whistleblower.

Finally, the Court considered that the disclosure had not caused "substantial prejudice" to the interests of the security service agency concerned. Any damage that might have been done to the agency's reputation was outweighed by the public interest in disclosing wrongdoing.

- ***Ivpress and Others v. Russia*** (nos. 33501/04, 38608/04, 35258/05 and 35618/05), 22 January 2013
(defamation conviction for statements of opinion violated the right to freedom of expression)

This concerned four convictions for defamation for a series of articles published in a Russian newspaper that had been critical of local officials and politicians, accusing them of not delivering on their political promises.

The Court held that the convictions constituted a violation of the right to freedom of expression, taking into account the position of the applicant newspaper, the position of the persons against whom their criticism was directed, the subject matter of the publications, the characterisation of the contested statement by the domestic courts, the wording used by the applicants, and the penalty imposed.

The Court took into account that the plaintiffs in all four defamation claims were State officials or employees, including two elected officials. The newspapers had published criticism of their public functioning. The Court reiterated that, in a democratic society, public officials must accept that they are subject to public scrutiny and criticism, particularly through the media, for their public functioning; and that the limits of permissible criticism are wider with regard to a government official in the course of performance of his or her functions than in relation to a private citizen. The Court stressed furthermore that some of the statements made in the newspaper articles were statements of opinion. The domestic courts had wrongly required some of the applicants to prove the 'truth' of their opinions, which was an impossible task. This was particularly the case with statements that one of the officials had performed their job "cynically, loudly, shamelessly"; that he had "created nothing, done nothing for [his] fellow townsmen", that his professional activity as a State official had "brought nothing but harm", and that he had lacked "wisdom, will, aspiration to promote unity in society by renouncing, at least temporarily, [his] ambitions and passion for wealth". Those expressions were examples of value judgments that represented the applicants' opinions.

Taking the above into consideration, and while acknowledging that the award made against the newspaper was "not significant even by the regional standard of living", the Court held that the convictions violated the right to freedom of expression.

- ***Güdenoğlu and Others v. Turkey*** (nos. 42599/08, 30873/09, 38775/09, 38778/09, 40899/09, 40905/09, 43404/09, 44024/09, 44025/09, 47858/09, 53653/09, 5431/10 and 8571/10), 29 January 2013
(suspension of newspapers violated the right to freedom of expression)

This concerned the owners, executive directors, editors-in-chief and editors of six weekly and three daily newspapers who had been prosecuted and whose publications had been suspended for allegedly publishing propaganda for illegal organisations. The Court held that the suspension of the newspapers constituted a violation of their right to freedom of expression. It recalled that in earlier cases (in particular, *Ürper and others v. Turkey*), it had already found that the practice of banning the future publication of entire periodicals goes beyond any notion of "necessary" restraint in a democratic society and, instead, amounts to censorship. The Court found no circumstances in the instant case, which would require it to depart from this jurisprudence.

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