

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

### Bulletin XXIII: ROUND-UP OF JUDGEMENTS: DECEMBER 2013

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In December 2013, the European Court adopted judgments and decisions in the following freedom of expression cases:

- ***Ungváry and Irodalom Kft v. Hungary*** (application no. 64520/10), 3 December 2013 (defamation conviction for article alleging that a Constitutional Court judge had been an informer for the security service violated right to freedom of expression);
- ***Yavuz et Yaylali v. Turkey*** (application no. 12606/11), 17 December 2013 (criminal conviction for promoting a terrorist organisation violated the right to freedom of expression);
- ***Perincek v. Switzerland*** (application no. 27510/08), 17 December 2013 (criminal conviction for challenging the legal characterisation of the Armenian genocide violated the right to freedom of expression);
- ***Mika v. Greece*** (application no. 10347/10), 19 December 2013 (criminal defamation conviction and suspended prison sentence for allegation of corruption in mayoral office violated right to freedom of expression).

In addition, the Court has started proceedings in the application lodged by members of the Russian punk band, Pussy Riot, who were imprisoned for their attempted performance of protest songs in the Cathedral of Christ the Saviour, in Moscow (***Alekhina and others v. Russia***, application no. 38004/12, communicated on 2 December 2013).

These cases concern the following issues:

- ***Ungváry and Irodalom Kft v. Hungary*** (application no. 64520/10), 3 December 2013: defamation conviction for article alleging that a Constitutional Court judge had been an informer for the security service violated right to freedom of expression

This concerned a defamation case against a historian and a magazine publisher who had published an article written by the historian. In the article, the historian discussed the relationship between

civil society and the security services during the communist era, and as part of this he stated that a Constitutional Court judge had been an active party member and an “official contact” for the state security services. The judge complained and although the magazine printed a rectification, the historian repeated his allegation in interviews and in a book. The Constitutional Court judge then sued for defamation and won a judgment awarding him damages. The historian and the magazine publisher complained to the European Court of Human Rights arguing that this violated their right to freedom of expression.

The Court held that there had been a violation of the right to freedom of expression. The Court first recalled its general principles on freedom of expression, including that while civil servants should tolerate criticism of their functioning, it may be necessary to protect judges from offensive and abusive verbal attacks in order to preserve public faith in the functioning of the judiciary. Applying these general principles to the first applicant, the historian, the Court noted that the article had a strong basis in fact. The Court held that the term “official contact” could be understood to have a number of different meanings, including that the judge had written reports and provided information which had contributed to the work of the security services – even though the security service had not instructed the judge to do so. The Court particularly considered that the domestic courts had failed to take into account the overall context of the article, which had argued that there was a close relationship between various civil society organisations and the state security service. The Court therefore concluded that the domestic courts had interpreted the meaning of the term “official contact” too restrictively; they should have looked at it in light of the broader context of the article. The Court also emphasised that the subject matter of the article, the role of the security services during the communist era, was an issue of strong public interest; and that the judge, as a senior civil servant elected to the highest judicial office in the country by parliament, should tolerate criticism. The Court also noted that it was undisputed that the judge had been an active party member during the communist era.

As regards the magazine publishers, the Court held that it had exercised sufficient responsibility. The Court held, in particular, that

“[p]ublishers are understandably motivated by considerations of profitability and (...) holding them responsible for publications often results in proprietary interference in the editorial process. In order to enable the press to exercise its ‘watchdog’ function, it is important that the standards of liability of publishers for publication [should] be such that they shall not encourage censorship of publications by the publisher ...”

The Court concluded that given the reputation of the first applicant as a well-respected historian, the magazine publisher had no reason to call into question the accuracy of the article. There was no evidence that the article had been published with the intention to denigrate the judge. The Court therefore concluded that the publishers had acted in accordance with journalistic ethics.

- ***Yavuz et Yaylı v. Turkey*** (application no. 12606/11), 17 December 2013: **criminal conviction for promoting a terrorist organisation violated the right to freedom of expression**

This concerned two individuals who had been imprisoned for their participation in a demonstration against the security forces which took place in the aftermath of another demonstration, organised by the Maoist Communist Party, at which the security services had shot and killed 17 people. The Maoist Communist Party is regarded as a terrorist organisation in Turkey, and the two were convicted for “promoting a terrorist organisation”.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that while States may take measures to safeguard national security and prevent terrorism, they must strike a fair balance between the right to freedom of expression and the need for a democratic society to protect itself against terrorism. The Court emphasised that national laws should in this regard give a precise definition of what is “terrorism”, warning that

“the concept of terrorism should be carefully specified by the national authorities in order to avoid ... a charge of terrorism-related crimes in cases where [a statement] is simply critical of government policy.”

The Court noted that Turkish law prohibited the “glorification” of terrorism. The Court agreed that the glorification of terrorism, the denigration of victims, calls for funding terrorist organizations or other similar behaviours could indeed be regarded as an incitement to violence and hatred and could therefore legitimately be restricted. However, in practice, such restrictions should be applied very carefully and with restraint. In the present case, the Court held that the applicants had been convicted merely for their participation in a demonstration against the use of excessive force by the security services. They had not encouraged violence or promoted a terrorist organization.

- ***Perincek v. Switzerland*** (application no. 27510/08), 17 December 2013: **criminal conviction for challenging the legal characterisation of the Armenian genocide violated the right to freedom of expression**

This concerned a Turkish national who was convicted in Switzerland for publicly challenging the characterisation of killings of Armenians by the Ottoman Empire as a “genocide”. The Swiss courts convicted him of racial discrimination, holding that the Armenian genocide was, like the Jewish genocide, a historical fact recognised as proven by the Swiss parliament. He complained to the European Court of Human Rights.

The European Court held that the conviction violated the right to freedom of expression. It held that the rejection of the legal characterisation as “genocide” of the 1915 events was not such as to incite hatred against the Armenian people. It stated that the question whether the events of 1915 and thereafter could be characterised as “genocide” was of great interest to the general public, and that the applicant had engaged in speech of a historical, legal and political nature which was part of a public debate. The Court noted furthermore that whether or not the 1915 events were indeed a “genocide” was not a matter of consensus within the academic community, and only about twenty States out of the 190 in the world had officially recognised the Armenian genocide as such. Finally, the Court distinguished the present case from those concerning the negation of the crimes of the Holocaust. In those cases, the applicants had denied the historical facts even though they were sometimes very concrete, such as the existence of the gas chambers; and the denying of the

holocaust was a means by which to incite hatred against Jews. In the present case, the applicant had not engaged in such conduct.

- ***Mika v. Greece*** (application no. 10347/10), 19 December 2013: criminal defamation conviction and suspended prison sentence for allegation of corruption in mayoral office violated right to freedom of expression

This case concerned the conviction for defamation of a local councillor who had published an article in a newspaper accusing a mayor of corruption and favouritism in the recruitment of officials. The councillor was found guilty of criminal libel and sentenced to a suspended eight-month prison sentence and payment of a fine of 50 euros. The councillor complained to the European Court of Human Rights arguing that the conviction violated her right to freedom of expression.

The European Court held that the conviction violated the councillor's right to freedom of expression. It emphasised that the article had been published by a local councillor and criticised the functioning of the local mayor; it therefore clearly concerned 'political speech' which was the most highly protected form of speech. While the Court noted the seriousness of the accusations, it also noted the political nature of the issue discussed and the disproportionate nature of the criminal penalty imposed.

#### **Communicated case**

- ***Alekhina and others v. Russia*** (application no. 38004/12), the "Pussy Riot" case

This application concerns the conviction for 'hooliganism', inciting religious hatred and publishing 'extremist' videos of three of the members of the Russian feminist punk band, Pussy Riot. Pussy Riot is a Russian punk band that wrote and performed songs that were highly critical of the Russian President, Vladimir Putin, as well as of the Orthodox Church in Russia. During 2011 and 2012, they performed songs such as "Death to Prison", "Freedom to Protest" and "Putin Wet Himself" in places such as a subway station, the roof of a tram, the roof of a prison, and the Red Square. The group always performed in disguise, wearing brightly coloured balaclavas and dresses. In 2012, in response to public support by Patriarch Kirill of the Russian Orthodox Church to the President, Mr Putin, members of Pussy Riot wrote the protest song "Punk Prayer – Virgin Mary, Drive Putin Away". This included the lyrics, "Virgin Mary, Mother of God, become a feminist ... Patriarch Gundayev believes in Putin. Bitch, better believe in God instead ... Mary, Mother of God, is with us in protest! Virgin Mary, Mother of God, drive Putin away." After performing the song at the Epiphany Cathedral in Moscow, they attempted to also perform it in Moscow's Christ the Saviour Cathedral. They had invited journalists and media to the performance to gain publicity. However, the attempt to perform was unsuccessful, as cathedral guards managed to quickly force the band out, with the performance only lasting slightly over a minute. A video containing footage of the band's performances of the song both at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral was uploaded to the Pussy Riot blog as well as to YouTube.

Complaints about the attempted performance were made to the police and the applicants were prosecuted for hooliganism and inciting religious hatred. Furthermore, the videos uploaded to the website were classified as “extremist” and the websites were blocked. Two of the applicants were convicted and sentenced to two years’ imprisonment; a third was sentenced to two years’ probation. Their complaint to the European Court of Human Rights states that their right to freedom of expression has been violated. They also complain that they have not received a fair trial and about the prison conditions. The Russian government now has to provide a formal answer to the Court.

***Prepared by Peter Noorlander, Director of Media Legal Defence Initiative, London in cooperation with HRA***



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