

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

Bulletin LXIV: SUMMARY OF EUROPEAN COURT DECISIONS ON THE RIGHT TO FREEDOM OF EXPRESSION: February - March 2016

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During February-April 2016, the European Court of Human Rights decided the following noteworthy cases involving the right to freedom of expression and related topics:

- ***Erdener v. Turkey***, application no. 23497/05, 2 February 2016 (defamation conviction for remarks about prime minister violated right to freedom of expression)
- ***Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary***, application no. 22947/13, 2 February 2016 (defamation conviction for website for comments left by user violated the right to freedom of expression)
- ***Ärztchamber für Wien and Dorner v. Austria***, application no. 8895/10, 16 February 2016 (injunction on medical association from making derogatory statements about a company offering medical services did not violate right to freedom of expression)
- ***Société de Conception de Presse et d'Édition v. France***, application no. 4683/11, 25 February 2016 (order requiring the anonymization of photographs of a young man held captive and tortured did not violate right to freedom of expression)
- ***Bilen and Çoruk v. Turkey***, application no. 14895/05, 8 March 2016 (conviction for distributing political party leaflets without authorization violated right to freedom of expression)
- ***Rusu v. Romania***, application no. 25721/04, 8 March 2016 (conviction for failing to retract incorrect allegations did not violate the right to freedom of expression)
- ***Pinto Coelho v. Portugal (no. 2)***, application no. 48718/11, 22 March 2016 (conviction for publishing court recordings without permission violated right to freedom of expression)
- ***Sousa Goucha v. Portugal***, application no. 70434/12, 22 March 2016 (refusal to prosecute for joke about a homosexual celebrity referred to as a "female" did not violate the right to private life)
- ***Bédat v. Switzerland***, application no. 56925/08, 29 March 2016 (fine for publishing documents from criminal investigation did not violate right to freedom of expression)

These cases concerned the following issues:

- ***Erdener v. Turkey***, application no. 23497/05, 2 February 2016 (defamation conviction for remarks about prime minister violated right to freedom of expression)

This concerned an MP who had spoken with a journalist about the health problems of the then-prime minister of Turkey, saying that he had discontinued his treatment at Başkent University

Hospital because he was unhappy about the quality of the medical care there. She said, ““They nearly drove him to his death”. The hospital sued for defamation and, in civil proceedings, was awarded compensation for damage to reputation. The MP’s appeals were dismissed.

The European Court of Human Rights held that the defamation judgment violated the right to freedom of expression. The health of the prime minister was clearly a matter of public interest and the events giving rise to this case had received broad media coverage in Turkey. The manner in which the Prime Minister had been treated had been criticised not only by the media but also among parliamentarians. The applicant had made her remarks in her capacity as an MP, in a political capacity in which she should be given wide leeway. Furthermore, the Court held that as a public entity, the hospital did not have a moral ‘right’ to a reputation, unlike private individuals. It noted that the domestic courts had not verified whether there had been any actual damage to the university’s reputation. Even though the compensation awarded was a relatively low amount (€1,200) this nevertheless had a chilling effect on the right to freedom of expression.

- ***Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary***, application no. 22947/13, 2 February 2016 (defamation conviction for website for comments left by user violated the right to freedom of expression)

This concerned a news website and an association of internet content providers who had been sued for defamation over comments which had appeared underneath an article on real-estate management websites, and which were very critical of these sites. The company operating the real estate websites sued for defamation and won, despite the applicants having immediately removed the offending user comments.

The European Court of Human Rights held that the defamation judgment violated the right to freedom of expression. Applying the criteria established in the case of *Delfi v. Estonia*, the Court held:

- a) Context in which the comments were posted: The comments concerned a matter of public interest, and the article itself had a clear factual basis – consumer protection proceedings against the real estate website had already begun;
- b) The content of the comments: none of the comments constituted hate speech. Although some used vulgar language, this was to be expected bearing in mind the different ‘style of communication’ on websites (one commenter had said that “people like this should go and shit a hedgehog and spend all their money on their mothers’ tombs until they drop dead”).
- c) Liability of the authors of the comments: The domestic courts had not made any effort to ascertain whether the actual authors of the comments could be held liable. The Court recalled that “particularly strong reasons” are required before envisaging the punishment of a journalist or a website for statements made by a third party.
- d) Measures taken by the applicants and conduct of the injured party: the applicants had removed the comments in question as soon as they were notified of the initiation of civil proceedings. They also had general measures in place to prevent or remove defamatory comments on their portals, including a disclaimer, a team of moderators, and a notice-and-take-down system. Despite this, the domestic courts held them liable for allowing unfiltered comments to be posted. The Court held that this was excessive, particularly

bearing in mind that the real estate company had not requested the applicants to remove the comments but went directly to court.

- e) Consequences for the injured party and the applicants: what was at stake was the commercial reputation of a private company rather than the reputation of a natural person, which enjoys greater protection under ECHR law. The comments were unlikely to have an impact on the real estate company's reputation, particularly since consumer protection proceedings against it had already begun. The domestic courts had failed to evaluate whether the comments actually caused any prejudice.

- ***Ärztammer für Wien and Dorner v. Austria***, application no. 8895/10, 16 February 2016 (injunction on medical association from making derogatory statements about a company offering medical services did not violate right to freedom of expression)

This concerned the Vienna Association of Medical Doctors and its president, who had been prohibited from referring to a company that provided radiology services as being "ruthless" towards medical professionals and describing it as a "locust" company. In addition, the association was ordered to publish the injunction on its website, for a period of 30 days, as well as in its newsletter. The courts found that while the statements in question did not constitute defamation, they had been in violation of the Unfair Competition Act.

The European Court of Human Rights held that the injunction did not violate the association's right to freedom of expression. The Court held that on the one hand, large public companies inevitably lay themselves open to close scrutiny of their acts, and that they should tolerate greater criticism. However, the Court also emphasised that there is a competing interest in protecting the commercial success and viability of companies, for the wider economic good. The Court particularly took into account that the term "locust" had very negative connotations and that its use led to an unethical general vilification of a competitor. There was no factual basis in making the allegation that the company had behaved unethically, or like a locust. The Court also noted that no other penalties had been imposed.

- ***Société de Conception de Presse et d'Édition v. France***, application no. 4683/11, 25 February 2016 (order requiring the anonymization of photographs of a young man held captive and tortured did not violate right to freedom of expression)

This concerned a magazine which had been ordered to withdraw one of its issues from sale and to pay compensation to the family of a man whose photograph they had published on the cover. The man had been kidnapped, tortured and had eventually died, and the photo showed him wearing shackles and bearing visible signs of ill-treatment. On appeal, the order to withdraw the magazine from sale was replaced with an order requiring the photograph in question to be blacked out.

The European Court of Human Rights held that this order did not violate the right to freedom of expression. It noted that the article as a whole, which concerned a court case against the kidnappers, had contributed to a debate of general interest. However, the photograph had not been intended for public viewing. It had been published without the permission of the young man's relatives and with a grave disregard for their grief. In merely ordering the photograph to be blacked out and not restricting any of the text of the report or the other photographs

accompanying it, the Paris Court of Appeal had ensured respect for the publication as a whole, and the measure was unlikely to have a chilling effect on freedom of expression.

- ***Bilen and Çoruk v. Turkey***, application no. 14895/05, 8 March 2016 (conviction for distributing political party leaflets without authorization violated right to freedom of expression)

This concerned the conviction of two members of the Youth Movement of the Turkish Labour Party, who had been fined for distributing the party's leaflets without prior authorisation. The leaflet had criticised the Government's policy vis-à-vis the Kurds and the two were fined €50.

The European Court of Human Rights found that their conviction had not been "prescribed by law" because the law in question did not meet the requirements of sufficient precision and foreseeability. At the relevant time, two provisions governing the distribution of leaflets were in force, one prohibiting the distribution of leaflets without such authorisation (Article 534 of the Criminal Code), and the other exempting political parties from that obligation (section 44 of the Associations Act). This had created a situation of legal uncertainty.

- ***Rusu v. Romania***, application no. 25721/04, 8 March 2016 (conviction for failing to retract incorrect allegations did not violate the right to freedom of expression)

This concerned a journalist who had published an article about a criminal investigation into a burglary, naming the main suspect and reporting that he was on the run. The suspect's father immediately wrote to the newspaper, explaining that it was impossible that his son had committed the burglary as he had been in Italy at the time. The newspaper published the letter. Subsequently, the suspect lodged a criminal complaint for defamation, complaining that, even though his father's letter had been published, the article had not been retracted as requested. The courts ultimately – in a final judgment of January 2004 – cleared the journalist of defamation, finding that the information he had published had been provided by the local police department. However, they considered that the article should have been retracted as soon as it had become clear that the information had been wrong, and ordered the journalist to pay approximately €270 in compensation.

The European Court of Human Rights held that this order did not violate the right to freedom of expression. The Court held that although the report concerned a matter of public concern, after it was published the police had revoked the 'wanted' notice, realising the name of the suspect to be wrong. Merely publishing the father's letter was not the same as retracting the newspaper report. The Court emphasised "the importance of the right of a person who feels aggrieved by a press article to a rectification, with a corresponding obligation on the journalist or newspaper" and held that by failing to publish a retraction, "the [journalist] has failed to act in accordance with the principles governing journalistic ethics, requiring of him to clearly and explicitly correct any published information which has proved to be erroneous or defamatory." The Court also took into account the relatively low damages that had been imposed.

There was a strongly worded dissenting judgment by two judges, including the President of the Chamber, Judge Sajo.

- ***Pinto Coelho v. Portugal (no. 2)***, application no. 48718/11, 22 March 2016 (conviction for publishing court recordings without permission violated right to freedom of expression)

This concerned a journalist who had been fined for including sound recordings from a court hearing in a news broadcast. The recordings had been obtained without permission from the judge. The broadcast reported on the criminal conviction of an 18-year-old for theft and raised concerns of a miscarriage of justice. The journalist had interviewed several lawyers and had included in her report shots of the courtroom as well as extracts of sub-titled sound recordings and the questioning of prosecution and defence witnesses, in which their voices and those of the three judges were digitally altered. The judges lodged a complaint and the journalist was convicted of non-compliance with a legal order and ordered to pay a fine of €1,500.

The European Court of Human Rights considered that the conviction violated the journalist's right to freedom of expression. The Court considered that the report concerned an issue of public interest and emphasised the importance of the right of the public to receive information about court proceedings and the activities of the police through the media. The Court also emphasised that the question whether the recording had been lawfully obtained was only one factor, and not decisive in assessing whether a journalist had fulfilled his or her professional duties and responsibilities. In any event, the Court considered that the voices of judges and witnesses had been distorted to prevent their identification. The Court did not agree that the broadcast could have had a negative impact on the administration of justice, or that it impinged on the right to privacy of those involved in the trial. Finally, the Court held that although the penalty had been relatively low, "the very fact of the conviction is more important than the minor nature of the sentence" and would have a chilling effect on the right to freedom of expression.

- ***Sousa Goucha v. Portugal***, application no. 70434/12, 22 March 2016 (refusal to prosecute for joke about a homosexual celebrity referred to as a "female" did not violate the right to private life)

This concerned a well-known TV host who is gay and who had jokingly been included in a list of "best female television hosts" during a late night satirical TV show. He lodged a criminal complaint for defamation and insult against the TV production company, arguing that this joke had harmed his reputation as it had mixed his gender with his sexual orientation. The local courts dismissed his complaint and refused to prosecute the TV production company. The TV host complained to the European Court of Human Rights, arguing that the refusal to prosecute had been discriminatory and in violation of his right to reputation.

The European Court of Human Rights held that the TV host's right to reputation had not been violated. Article 8 of the Convention did apply to the case, because sexual orientation is a profound part of a person's identity. Furthermore, the Court held that even public persons have a "legitimate expectation" of protection and respect for their private life. However, noting that the joke had been satirical, the Court held that satire is a form of artistic expression and social commentary which aims to provoke and agitate. The Court reiterated that the joke had been about the TV host's behaviour and feminine way of expressing himself, rather than about him personally. The Court also considered that the applicant's sexual orientation was not a causal

factor in the domestic courts' refusal to prosecute; there was nothing to suggest that the Portuguese authorities would have arrived at different decisions had the applicant not been gay.

- ***Bédard v. Switzerland***, application no. 56925/08, 29 March 2016 (fine for publishing documents from criminal investigation did not violate right to freedom of expression)

This concerned a journalist who had published an article about legal proceedings against a motorist who had rammed his car into a group of pedestrians, killing three of them and injuring eight, before throwing himself off the Lausanne Bridge. The article described the events and then summarised the questions put to him by the police officers and the investigating judge, and the motorist's responses. It mentioned that the motorist had been charged with murder and suggested that he had and that he had shown no remorse. The article quoted from the case file, which had been lost in a shopping centre by one of the parties claiming damages against the motorist. Criminal proceedings were brought against the journalist for having published documents from court proceedings covered by investigative secrecy, and he was convicted and fined 4,000 Swiss francs (CHF).

The Grand Chamber of the European Court of Human Rights held that the conviction did not violate the right to freedom of expression. It considered that when the article was published, the investigation was still ongoing. This meant that there was an inherent risk of influencing the conduct of proceedings, justifying the prohibition of disclosing confidential information. The Court specifically noted the sensationalist nature of the report. The Court also considered that the State had been under a duty to act in order to protect the right to privacy of the accused, and it took into account that the penalty which had been imposed had not been disproportionate.

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



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