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Conviction of journalist for reporting about sex abuses in a Christian rehabilitation centre violated Article 10 ECHR

By *Flutura Kusari** and *Dirk Voorhoof***

In *Erla Hlynsdottir v. Iceland (no. 2)*, an Icelandic journalist had been convicted for defamation after reporting that the director of a Christian rehabilitation centre and his wife had been involved in sex games with patients of the centre. The European Court of Human Rights found a violation of Article 10 of European Convention on Human Rights, arguing that the national courts did not pertinently balance the right to freedom of expression with the right to reputation. According to the Court “*the most careful scrutiny*” is called for when the measures taken by national authorities are capable of discouraging the participation of the press in debates over matters of legitimate public concern. The Court also refers to “*the essential function the press fulfils in a democratic society*” as a central factor for its determination in the present case.

The facts and the findings by the domestic courts

The applicant is Erla Hlynsdottir, a journalist working in Reykjavik for the newspaper *DV*. In 2007 she published an article involving a high profile criminal case of Mr. Y, the director of the Christian rehabilitation centre called *Byrgið* (the Shelter), and his wife Mrs. X. The centre dealt with treatment of people with drug, alcohol and gambling addictions. The article contained an interview with one of the sexually abused women (Ms. A) who pressed charges against the director, alleging that he and his wife had been involved in sex games with the female patients of the centre, while also criticizing that Mrs. X was working as a teaching assistant in a school. Also Mr. B, the financial manager of *Byrgið* and close friend of the couple, was quoted saying that the couple had sexually abused several patients and considered strange the fact that Mrs. X was allowed to teach in a primary school.

The director’s wife brought proceedings before the Reykjavik District Court claiming that fourteen statements published in the article (ten from Ms. A and four from Mr. B) amounted to defamation. The District Court decided that only one quote was defamatory and it ordered the journalist to pay 550 euro for non-pecuniary damages. As the involvement of Mrs. X in sex games was proven in the criminal case against her, and although only Mr. Y had been convicted for that, the Icelandic courts found no reason to consider the other statements by Ms. A and Mr. B. and the rest of the article published by Erla Hlynsdottir defamatory.

The judgment was confirmed by the Supreme Court, further reducing the defamatory character of the journalist’s article. The only defamatory statement about Mrs. X, that was attributed to Ms. A, but for which the journalist was held liable, reads as follows : “...*not appropriate that the one who hunts for him works in primary schools*”. The Supreme Court emphasized that this defamatory allegation “*contained a coarse*

insinuation against Mrs. X about a criminal act” and was likely to affect her dignity and professional reputation.

The judgment of the Court

Erla Hlynsdottir lodged an application with the European Court claiming a violation of Article 10. She argued, among other arguments, that the statement could not be interpreted as insinuating that Mrs. X was guilty of a criminal act and that the Supreme Court judgment lacked reasoning on why the remark was considered defamatory and why the interference was considered necessary in a democratic society.

The European Court maintains that “*the most careful scrutiny*” is called for when the measures taken by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (para. 61). According to the Court

“it must examine whether relevant and sufficient grounds were adduced by the national authorities as a basis for finding that the applicant did not act in good faith and in compliance with an ordinary journalistic obligation to verify factual allegations. That obligation required that the factual basis on which she relied be sufficiently accurate and reliable and be considered proportionate to the nature and degree of the allegation, given that the more serious the allegation, the more solid the factual basis has to be” (para. 64).

The Court finds that the domestic courts did not explain in their judgments how the word “hunt” could be perceived by an ordinary reader as an innuendo for a criminal act, as it did not contain any reference to a legal provision or any description of an alleged criminal offence. According to the European Court, the assessment of the national courts that the meaning of the defamatory statement contained a coarse insinuation about a criminal act did not derive explicitly from the sentence of the article. Indeed, the judgments by the domestic courts contained no reference to any legal provision under which the act could have been objectively subsumed, nor did they offer any clarification or description of the alleged criminal offence.

Referring to the distinction between factual assertions and value judgments, the Court is of the view that part of the disputed sentence, that it was “not appropriate” that Mrs. X “worked in a primary school”, should have been considered as a value judgment, while the remaining part of the sentence, “one who hunts for”, had a sufficient factual basis, namely that she participated in sexual activities with members of the rehabilitation centre. The Court also finds that the journalist in this case must

“be considered to have sought to achieve a balance in her reporting. It should be recalled that the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists” (para. 73).

The Court concludes that:

“in the concrete circumstances of the present case, (...) the Supreme Court did not base its judgment on relevant and sufficient grounds demonstrating convincingly that the applicant acted in bad faith or otherwise inconsistently with the diligence expected of a responsible journalist reporting on a matter of public interest. Moreover, and importantly, the Court reiterates that even assuming that the reasons adduced by the Supreme Court were relevant for the purposes of the interference in question, it has not been shown that the national court balanced the applicant’s rights to freedom of expression as a journalist and Mrs X’s rights to her reputation, in accordance with the established principles in the Court’s case-law, and thus examined thoroughly whether the measure imposed corresponded to a pressing social need. Consequently, the judgment of the Supreme Court was not based on sufficient grounds so as to constitute a proportionate measure under paragraph 2 of Article 10 of the Convention” (para. 75).

The Court finds a violation of Article 10 of the Convention and ordered Iceland to pay to applicant 2,500 euro for pecuniary damages and 5,500 for non-pecuniary damages.

Comment

In *Erla Hlynsdottir (no. 2)*, the European Court criticizes the Icelandic domestic courts for not conducting their own evaluation of the impugned statements and for not sufficiently motivating why an interference with the journalist’s right to freedom of expression corresponded to a pressing social need in the case at issue. Accordingly, the Court establishes that when national courts face claims for alleged defamatory statements published by media, they have to carry on their own assessment in order to verify if the journalist had sufficient factual proof to substantiate the allegations.

The Court situates the right of reputation protected under Article 8 of the Convention *“as part of the right to respect for private life”* which in other cases leads to a balancing test with the right to freedom of expression guaranteed by Article 10. The Court however continues by emphasizing that *“in cases such as the present one the national margin of appreciation is further circumscribed by the interest of democratic society in enabling the press to exercise its vital role of ‘public watchdog’ in imparting information of serious public concern”* (para. 57). According to the Court it also requires *“the most careful scrutiny”* when national authorities interfere with the right to freedom of expression and journalistic reporting in a manner that might discourage the participation of the press in debates over matters of legitimate concern for society.

In order to determine whether a journalist acted in compliance with an ordinary journalist’s obligation to verify a series of allegations, the Court pays close attention to the fact that in this case the journalist contacted all the relevant parties, including the director and his wife who never responded, their lawyer and the police in order to verify the facts of the case. Therefore the Court finds that the reporting was balanced and that the journalist had conducted responsible journalism and acted in good faith. However, while assessing the attempts of journalists to verify facts of the article, the Court pertinently reiterates that it is not up to the European Court, nor to the domestic judicial authorities to decide what techniques of reporting should be used by journalists (see also ECtHR 23 September 1994, [Jersild v. Denmark](#)). It is also to be kept in mind that an overly rigorous approach to the assessment of journalists’

professional conduct may lead to the press being unduly deterred from discharging their function to keeping the public informed (ECtHR 19 April 2011, [Kasabova v. Bulgaria](#) and [Bozhkov v. Bulgaria](#) and ECtHR 2 October 2012, [Yordanova and Toshev v. Bulgaria](#)).

The unanimous judgment and the reasoning by the second section of the European Court in this case reflect the awareness in Strasbourg of the importance of upholding high standards of critical, factually based, investigative reporting on matters of public interest, which inevitably may cause harm to the reputation of public figures involved in embezzlement of public funds or sexual abuse as in the case at issue. It is reassuring to notice that in case of a conviction for defamation of a journalist in such circumstances, the European Court applies the most strict scrutiny under Article 10 of the Convention, especially when interferences at national level are capable of discouraging the participation of the press in debates over matters of legitimate public concern.

One final observation. It is remarkable that in this case, as also in a few other recent judgments in defamation cases, the chamber judgment does not apply the well-structured format developed by the Grand Chamber in [Axel Springer AG v. Germany](#) (7 February 2012), evaluating step by step the six criteria to be considered in the balancing test of the right to reputation and the right to freedom of expression, namely (1) the contribution to a debate of general interest, (2) the subject of the report and if it concerned a public figure, (3) the prior conduct of the person concerned, (4) the method of obtaining the information and its veracity, (5) the content, form and consequences of the media content and (6) the severity of the sanction imposed.

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