European Court of Human Rights: Oleg Balan v. the Republic of Moldova

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The European Court of Human Rights (ECtHR) found a violation of a high-ranked politician's right to reputation under Article 8 of the European Convention on Human Rights (ECHR) because the highest Moldovan court had refused to interfere with a defamatory Facebook post by another politician.

The Moldovan Supreme Court of Justice had found that the Facebook message, based on an unverified Note allegedly from the Security and Information Service (SIS), was posted by a politician of the opposition who, in a double capacity of "journalist", in the sense of informing the public via social media, and of a "public person", was entitled to a robust protection of freedom of expression under Article 10 ECHR.

The ECtHR, however, found that the Supreme Court of Justice had failed to strike a fair balance between the competing rights, as it did not carry out a careful analysis of the elements of the case file. The ECtHR referred in particular to the refusal to publish any follow-up information about the Note on the politician's Facebook page, even after both the SIS and the President's office had denied its authenticity and after having been informed of those denials.

In 2015 Renato Usatîi, the leader of an opposition political party in Moldova, published a statement on his personal Facebook page that contained serious allegations of misconduct by the then Minister of the Interior, Oleg Balan. The statement was based on a note with the letterhead of the SIS, and was addressed to the then-President of the Republic of Moldova.

The news of Usatîi's publication of the note, including its text or a summary of it, was published by several news portals and other media in Moldova. One such news portal noted that several months earlier it had also received by post a yellow envelope with a copy of the note inside. However, having been unsuccessful in verifying its authenticity, it had decided not to publish it.

The SIS promptly published a press release declaring that it did not produce such a note, nor did it send a letter with that content to the President. Also, the President's office published a press release in which it denied having received the note or any other information similar to that included in it. A few weeks later, Oleg Balan wrote to Usatîi and his party, informing them of the press releases of SIS

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and the President's office and asking them to formally declare that the information in the note was false. He also asked for a public apology and compensation for the non-pecuniary damage caused to him in the amount of EUR 23 280 . As he did not receive any reaction, Oleg Balan lodged a court action claiming compensation for the damage caused by the defamatory statements.

After proceedings in which the courts found in favour of Oleg Balan, finally the Supreme Court of Justice in 2019 quashed the lower courts' judgments and adopted a new one, rejecting Oleg Balan's claims. It found that publishing on the Internet could amount to journalistic activity, that there was a clear public interest in investigative journalism, especially when aimed at revealing acts of corruption and preventing crime, and that Usatîi by posting the Facebook message had acted as a "public watchdog".

According to the Supreme Court, the lower courts had focused on the note's authenticity, but had failed to take into account the approach of the ECtHR to freedom of expression cases. In particular, they had not weighed the extent of the "chilling effect" on the media and journalists. It noted that Usatîi had circulated information coming from a third party (the SIS), and that restricting the right to report on what others said gravely affected journalistic freedom.

The ECtHR, however, unanimously, disagreed with this finding by the Moldovan Supreme Court. The ECtHR first reiterated that, in instances where the interests of the "protection of the reputation or rights of others" bring Article 8 ECHR into play, it may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the ECHR, namely, on the one hand, freedom of expression as protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8. In such cases, the ECtHR applies the criteria and the general principles as developed in its earlier case law, especially since Von Hannover v. Germany (no. 2) and Axel Springer AG v. Germany (IRIS 2012-3:1/1). The relevant issues are the subject of the publication and its contribution to a debate of public interest; how well-known the person concerned is; the prior conduct of the person concerned; the content, form and consequences of the publication; and, where appropriate, the manner in which the relevant information was obtained.

The ECtHR confirmed that the Facebook post about the allegedly improper conduct by a minister concerned an issue of public interest and it referred to the importance of the freedom of political debate. It also considered Oleg Balan as a public figure, who as a politician had to submit to a high degree of criticism of his actions, and that Usatîi, as a politician and leader of an opposition party could claim a high level of freedom of expression. That the Supreme Court of Justice expressly treated Usatîi as an investigative journalist covering an issue of public interest was, however, not clearly explained according to the ECtHR. It noted that it was not substantiated how speech emanating from a leader of an opposition

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party, published on a social media platform, could be classified as investigative journalism attracting the special protection offered by the ECHR to journalists in the exercise of their activity. And while the Facebook-statement, based on the Note, contained serious allegations of misconduct on the part of Oleg Balan, it did not appear that Usatîi made the effort to corroborate in any manner the contents of the note and its authenticity. Instead of warning the readers of his Facebook page about the unknown source and the doubts concerning the authenticity of the document, he presented it as being indisputably genuine. In such circumstances, warning potential readers can help them to decide whether to trust information obtained from an anonymous source about a topic of public interest. The ECtHR reiterated that politicians using social media are not released from their "duties and responsibilities" under Article 10 § 2 ECHR, and it observed that a news portal had also received the same Note but, failing to establish its authenticity, had decided not to publish it. Usatîi furthermore did not warn the readers on his Facebook page or elsewhere about the possibility that the Note was fake even after both the SIS and the President's office had denied its authenticity, or after he had been informed of those denials by Oleg Balan. The ECtHR concluded that although the Supreme Court of Justice relied on the applicable ECHR principles and the Court's case law, it was not convinced that the Supreme Court struck a fair balance between the competing rights involved under the ECHR. In particular, it treated Usatîi as an investigative journalist, and decided to apply the presumption of good faith applicable to investigative journalists in his case. An important factor was Usatîi's failure to warn the readers of his Facebook post of the unverified source and content of the note and his refusal to publish any follow-up information about the note. Therefore, the ECtHR found that dismissing Oleg Balan's claim by the Moldovan Supreme Court of Justice violated his rights under Article 8 ECHR.

Judgment by the European Court of Human Rights, Second Section, in the case Oleg Balan v. the Republic of Moldova, Application no. 25259/20, 14 May 2024

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