European Court of Human Rights: Niskasaari and Otavamedia Oy v. Finland

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An interesting judgment of the European Court of Human Rights (ECtHR) recently became final, in which the Court confirmed the right of journalists to express severe criticism in strong wording on matters of public interest. The judgment clarifies that this right is also protected under Article 10 of the European Convention on Human Rights (ECHR) when the criticism relates to journalistic reporting by other media, and focuses in casu on a journalist who produced two TV documentaries broadcast by the Finnish public service broadcaster.

In this case, the journalist, Mikko Veli Niskasaari, and the media company Otavamedia Oy, were found liable for defamation of a journalist who had been criticised for having manipulated a documentary. The criticism had been uttered in Seura magazine, and on two internet discussion forums, calling the journalists of the Finnish public service broadcaster who produced two documentaries on forest protection “liars”. According to Niskasaari, some figures and data in the documentary were fabricated, and one of the journalists who made the documentary was “lying cold-bloodedly and intentionally”. Niskasaari was convicted in Finland because there was no evidence that the journalist had disseminated wrong or misleading information in the documentaries in question. As a consequence, Niskasaari had not had strong reason or probable cause to hold his own accusations to be true, and to call the journalist a liar. Niskasaari was convicted under criminal law and was ordered to pay a fine (EUR 240) and damages (EUR 2000) to the complainant journalist. The media company was ordered, together with Niskasaari, to pay EUR 4000 in damages to the complainant, as well as the latter’s costs and expenses of EUR 25500. The criminal conviction and civil damages were based on Chapter 24, section 9, of the Penal Code (defamation) and Chapter 5, section 6, of the Tort Liability Act (dissemination of information that violates private life or reputation).

According to the ECtHR, there is no doubt that the measures against Niskasaari and Otavamedia Oy were prescribed by law, fulfilling the requirements of precision and clarity, and were pursuing the legitimate aim of protecting the reputation or rights of others. The Court, however, finds unanimously that the Finnish authorities have violated the right to freedom of expression of the applicant journalist and media company, as the interference with their rights under Article 10 of the European Convention is not considered necessary in a

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democratic society. According to the Court's case law a number of criteria are relevant when examining the necessity of an interference with the right to freedom of expression in the interests of the "protection of the reputation or rights of others", namely (i) contribution to a debate of general interest; (ii) how well-known the person concerned is and what the subject of the report is; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication; and (vi) severity of the sanction imposed.

In the case at issue, the ECtHR is of the opinion that it was not clear from the reasoning in the judgments of the domestic courts what "pressing social need" was taken to justify protecting the TV-journalist's right to reputation over the freedom of expression of Niskasaari and Otavamedia Oy, particularly as it concerned a debate between two professional journalists discussing the limits of critical and investigative journalism. The European Court considers that journalists who use strong expressions and pursue so-called investigative journalism in a TV-documentary could be expected to tolerate even severe criticism of their activities. It emphasises that it is relevant for the judicial balancing exercise, that the complainant TV-journalist, while entitled to benefit from the protection afforded to every individual's reputation by Article 8, was himself an investigative journalist involved in making TV documentaries on controversial issues for a public broadcasting company. Hence the journalist was engaged in an activity very much in the public domain in a manner and in circumstances "where he could himself expect to be the subject of robust scrutiny, comment and criticism regarding his professional conduct". The Court is of the opinion that the Court of Appeal did not pay sufficient attention to this "journalistic" hue of the case. The ECtHR also points out that Seura magazine provided the reporters who had made the TV-documentaries in question, including the complainant, with an opportunity to reply to the first applicant's criticism. In response to this reply, the magazine subsequently published a page-long counter-reply by Niskasaari. The Court notes that different statistical information existed as far as the conserved forest area in Finland was concerned and that it could not therefore be said that the figures given by the complainant TV-journalist were fabricated. However, the domestic courts did not, as required by Article 10 of the ECHR, proceed to a sufficient evaluation of the actual impact of Niskasaari's right to freedom of expression on the outcome of the case. In particular, the Appeal Court did not balance his right to freedom of expression under Article 10 of the European Convention, on the basis of the relevant criteria, in any considered way against the complainant's conflicting right to reputation, under Article 8 of the Convention. Nor is it clear whether, according to the Appeal Court, the resultant interference with Niskasaari's freedom of expression was proportionate to the legitimate aim pursued. The European Court regards the amount of compensation (EUR 4000) as substantial, given that the maximum compensation afforded to victims of serious violence varies between EUR 3000 and EUR 5000. Having regard to all the foregoing factors, and notwithstanding the margin of appreciation afforded to the

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State in this area, the Court considers that the domestic courts failed to undertake an assessment capable of striking a fair balance between the competing interests at stake under Articles 8 and 10 of the European Convention. Therefore the ECtHR concludes that the reasons relied upon by the domestic courts, although relevant, were not sufficient to show that the interference complained of was “necessary in a democratic society”. Accordingly, the Finnish authorities were found to have violated Article 10 of the ECHR.

Judgment by the European Court of Human Rights (Fourth Section), Niskasaari and Otavamedia Oy v. Finland, Application no. 32297/10 of 23 June 2015

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