European Court of Human Rights: Arlewin v. Sweden

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On 1 March 2016 the European Court of Human Rights (ECtHR) found Sweden in breach of the European Convention on Human Rights (ECHR) because it had denied access to court to a person who wanted to bring defamation proceedings in Sweden arising out of the content of a trans-border television programme service (TV3), suggesting that they resort to the jurisdiction of the United Kingdom. The European Court is of the opinion that requiring a Swedish national to bring defamation proceedings in the UK courts following an alleged defamatory TV programme broadcasted by the London-based company Viasat Broadcasting UK, but targeting mostly, if not exclusively, a Swedish audience, was not reasonable and violated Article 6 paragraph 1 of the Convention, which guarantees access to a court.

The programme in question had been broadcast live in Sweden and had accused Mr Arlewin, the applicant, of organised crime in the media and advertising sectors. Mr Arlewin brought a private prosecution for gross defamation against X. X was the anchorman of the television show and the CEO of Strix Television AB, the company that produced the TV3 programme. The Swedish courts subsequently found it did not have jurisdiction to examine Mr Arlewin's complaint, finding that the UK-based company under jurisdiction of the UK authorities, which broadcasted the TV3 programme, was responsible for its content. Mr Arlewin appealed to the Supreme Court, alleging that the Swedish courts' position ran contrary to EU law. He also requested that a question concerning the interpretation of the Brussels I Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters be referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling. According to him, the regulation entitled a person claiming non-contractual damages to bring actions in the territory where the harm had actually occurred, namely in Sweden, in his case. The Supreme Court rejected Mr Arlewin's referral request, and refused leave to appeal in the case. Finally in Strasbourg, Mr Arlewin complained that the Swedish courts refused to examine the defamation case brought by him against X on the merits, and thereby failed to provide him with an effective remedy to protect his reputation. The Swedish Government argued that in application of the Audiovisual Media Services Directive 2010/13/EU, Viasat Broadcasting UK was a company established in the UK and that the editorial decisions about their audiovisual media service were taken in the UK. Therefore the UK, through its Office of Communication ("Ofcom"), had supervisory

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jurisdiction over TV3's broadcasts.

According to the Strasbourg Court, the jurisdiction over broadcasters vested in one State under the AVMS Directive did not have general application, extending to matters not regulated therein. It also referred to Article 28 of the Directive, addressing the situation where a person's reputation and good name have been damaged by incorrect facts presented in a programme. This provision however only discusses a right of reply or equivalent remedies, and does not deal with defamation proceedings and an appurtenant claim for damages. The European Court was thus not convinced that the AVMS Directive determines, even for the purposes of EU law, the country of jurisdiction in which an individual brings a defamation claim and wishes to sue a journalist or a broadcasting company for damages. Rather, jurisdiction under EU law is regulated by the Brussels I Regulation No. 44/2001. According to Articles 2 and 5 of the Regulation, both the UK and Sweden appear to have jurisdiction over the present matter: X is domiciled in Sweden whereas Viasat Broadcasting UK is registered and established in the UK, and the harmful event could be argued to have occurred in either country, as the television programme was broadcast from the UK and the alleged injury to the applicant's reputation and privacy manifested itself in Sweden. The CJEU has earlier had the occasion to interpret and apply Article 5(3) of the Brussels I Regulation No. 44/2001, allowing courts assuming jurisdiction in a member State, not only in the place where the defendant has his residence, but also in the "place where the harmful event occurred" or where the centre of the alleged victim's interests is based. Hence three options were available to hear an action for damages caused by the publication of a defamatory newspaper article or an Internet publication, according to EU law (CJEU in eDate Advertising and Martinez (Joined Cases C-509/09 and C-161/10)) (see IRIS 2012/1: Extra). According to the European Court it may be assumed that the same would apply to a broadcast via satellite.

While leaving open the question of whether a binding provision of EU law could justify the Swedish position, the ECtHR found that the Swedish Government had not shown that Swedish jurisdiction was barred in the case due to the existence of such a provision. Rather, jurisdiction was excluded by virtue of the relevant provisions of domestic law. The European Court found in particular that the programme and its broadcast were, for all intents and purposes, entirely Swedish and that the alleged harm to Mr Arlewin had occurred in Sweden. In those circumstances, the Swedish State had an obligation under Article 6 paragraph 1 ECHR to provide Mr Arlewin with an effective access to court. However, Mr Arlewin had been put in a situation in which he could not hold anyone responsible under Swedish law for his allegation of defamation. Requiring him to take proceedings in the UK courts could not be said to have been a reasonable, effective and practical alternative for him. In the European Court's view, the limitations on Mr Arlewin's right of access to court had therefore been too far-reaching and could not, in his

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particular case, be considered proportionate.

The Court is unanimous in finding a violation of Article 6 paragraph 1 of the Convention and ordered Sweden to pay Mr Arlewin EUR 12,000 in respect of non-pecuniary damage and EUR 20,000 in respect of costs and expenses.

Judgment of the European Court of Human Rights, Third Section, case of Arlewin v. Sweden, Application no. 22302/10 of 1 March 2016

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