European Court of Human Rights: Instytut Ekonomichnykh Reform, TOV v. Ukraine

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In a judgment of 2 June 2016 the European Court of Human Rights (ECtHR) found that Ukraine had violated the right to freedom of expression by convicting a media company of the defamation of a political public figure. Although the impugned article had a highly sarcastic and offensive tone, the Court confirmed that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation, especially in the context of a public debate and discussions in the media on important features of political life.

The case concerns defamation proceedings brought in 2007 against the editorial company (Instytut Ekonomichnykh Reform - IER) of one of the nationwide newspapers in Ukraine, the Evening News. At the time, the newspaper was closely associated with Yuliya Tymoshenko, a political leader in Ukraine and the then major rival of Prime Minister Mr Victor Yanukovych's. In May 2007, the newspaper published an article critical of Ms Ganna German, one of the main spokespeople for Mr Yanukovych. Ms German was also elected as a Member of Parliament on the list of the Party of Regions, led by Mr Yanukovych. At the material time she frequently presented the views of both her party and Mr Yanukovych on various television and radio programmes and debates. The article in the Evening News especially criticised the way Ms German, in an interview on the BBC, had commented on the institutional and political crisis in Ukraine, defending Mr Yanukovych's and the Party of Regions' policy. The article also suggested that Ms German had become a Member of Parliament for the sole purpose of obtaining a flat in Kyiv.

In July 2007, Ms German brought a defamation claim against IER and the author of the article. The Kyiv Pecherskyy District Court found that some of the statements in the article constituted statements of fact that had not been verified or proved by either of the defendants, and were negative about and insulting to Ms German. Therefore, IER was ordered to retract the information about the acquisition by Ms German of the flat in Kyiv, by publishing the operative part of its judgment. IER was also ordered to pay the plaintiff UAH 1,700, approximately EUR 300, in compensation for non-pecuniary damage. After exhaustion of all remedies at the domestic level, IER lodged an application with the ECtHR, complaining of a violation of its right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR).

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The Ukraine Government agreed that the judgments of the domestic courts had constituted an interference with the applicant company's freedom of expression. However, it considered that the interference had been prescribed by law, being based on the relevant provisions of the Civil Code and the Information Act, and it had pursued the legitimate aim of protecting the reputation or rights of others. The Government also referred to the ECtHR's decision in Vitrenko and Others v. Ukraine (no. 23510/02, 16 December 2008), which, according to the government, supported the principle that even during an election campaign an individual could not be subjected to unfair accusations by his opponent. Therefore, the interference was to be considered necessary in a democratic society. The government also submitted that the interference had been proportionate and had not put an undue burden on the applicant company's right to freedom of political comment.

In a unanimous decision the ECtHR disagreed with both the findings by the Ukrainian courts and the government's arguments as to the necessity of the disputed interference with IER's right to freedom of expression.

The ECtHR reiterated that Article 10 (2) of the ECHR allows little scope for restrictions on political speech or debate on matters of public interest. The Court stated that whilst a politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, in such cases the requirements of that protection have to be balanced with the interests of the open discussion of political issues. The Court also recalled that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. The Court observed that at the relevant time the struggle between Yulia Tymoshenko and Victor Yanukovych and their allies was an important feature of Ukrainian political life. The impugned article constituted the sarcastic reaction of the Evening News' journalist to Ms German's participation in a BBC radio programme, during which she had commented on the popularity of her party. The Court considered that the subject matter of the impugned article, namely the author's speculation as to Ms German's motives for making her statements and supporting the Party of Regions, was of significant public interest.

In contrast with the findings by the domestic courts, the ECtHR was of the opinion that the statements concerning the acquisition of the flat were value judgments, having a sufficient factual basis. In this perspective the Court observed that the impugned statements were not particularly serious in tone. They were also not particularly damaging in substance, given that the author did not accuse Ms German of specific illegal or immoral conduct, even though he ascribed to her less than admirable motives. Read in the context of a highly-charged political debate, and in the context of the article as a whole, the expressions found untrue by the domestic courts were supposed to illustrate the author's opinion that Ms German's expression of her political opinions was insincere and guided by

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considerations of material gain. The Court furthermore referred to the "highly sarcastic language" of the article, reaffirming that Article 10 also protects information and ideas that offend, shock, or disturb. In addition, the Court statetd that the extension of journalistic freedom to protect recourse to a degree of exaggeration, or even provocation, is an important principle, established in the Court's case law. According to the ECtHR, the domestic courts failed to explain why they considered that the impugned statements, satirical in tone as they were, went beyond the permissible level of exaggeration or provocation, given the impugned article's contribution to a debate of public interest and its subject's role as a prominent politician and the essential role played by the press in a democratic society. The domestic courts focussed on the a person's right to protection of their reputation, without sufficiently considering the right to freedom of expression of the applicant media company. Furthermore, while the sanction imposed on the applicant company was relatively modest, it nevertheless had symbolic value and could still have a chilling effect on the applicant company and other participants in the public debate. For all these reasons, the Court was not convinced that the balancing exercise had been undertaken by the national authorities in conformity with the criteria laid down in its case law. It thus concluded that the necessity of the interference with the media company's exercise of freedom of expression had not been demonstrated, and that, accordingly, there had been a violation of Article 10 of the ECHR.

Judgment by the European Court of Human Rights, Fifth Section, case of Instytut Ekonomichnykh Reform, TOV v. Ukraine, Application no. 61561/08 of 2 June 2016

https://hudoc.echr.coe.int/eng?i=001-163354

Decision by the European Court of Human Rights, Fifth Section, case of Vitrenko and Others v. Ukraine, Application no. 23510/02 of 16 December 2008

https://hudoc.echr.coe.int/eng?i=001-90636

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