European Court of Human Rights: Herbert Haupt v. Austria

IRIS 2017-9:1/2

Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

In a case against Austria, the European Court of Human Rights ("ECtHR") decided that a satirical report aired during a comedy show on television that allegedly tarnished the reputation of a high-ranking and controversial politician had not violated the politician's right to private life, as guaranteed by Article 8 of the European Convention on Human Rights (ECHR). The ECtHR is of the opinion that the Austrian courts struck a fair balance between the competing interests in the case, in finding that the broadcaster's right to freedom of expression under Article 10 ECHR had outweighed the politician's right to private life under Article 8 ECHR.

The applicant in this case is Mr Herbert Haupt, who was the Chairperson of the Austrian Freedom Party (Freiheitliche Partei Österreichs, or FPÖ) from 2002 to 2004; in 2003 he was Vice-Chancellor of the Federal Government. In September 2013 a comedy show was aired on the television channel ATV+ called "The Worst of the Week" (Das Letzte der Woche). One of the reports concerned the fact that Mr Haupt, then the Vice-Chancellor of Austria, had become "godfather" to a baby hippopotamus at Vienna Zoo, as part of a fundraising incentive designed to encourage people to become sponsors of the zoo. The report contained blatant mockery and satirical comments, mentioning, inter alia, that there were many similarities between Mr Haupt, as the leader of the FPÖ, and his godchild, the baby hippopotamus, as both were usually surrounded by a lot of brown rats. Mr Haupt lodged a claim for compensation for non-pecuniary damage under section 6 of the Media Act (Mediengesetz), in conjunction with Article 115 of the Criminal Code (Strafgesetzbuch), against ATV Privat TV GmbH & Co KG (hereinafter "ATV"), the owner of ATV+, alleging that he had been insulted by the expression "brown rats". In a first set of proceedings the Austrian courts ruled in favour of Mr Haupt, ordering ATV to pay him compensation of EUR 2,000, as the statement about the brown rats had amounted to defamation under Article 111 of the Criminal Code. After the Supreme Court annulled the Vienna Regional Court's and the Vienna Court of Appeal's judgments, it allowed the extraordinary reopening of the proceedings against ATV. In the reopened proceedings the Austrian courts dismissed Mr Haupt's claim for compensation and also ordered him to bear the costs in respect of the proceedings incurred by the opposing party. As regards the alleged defamatory statement and its examination of evidence, the Regional Court listed a number of extreme right-wing or neo-Nazi statements made by high-ranking politicians belonging to the Freedom Party, while it found that Mr

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Haupt had not publicly dissociated himself from these statements. The impugned remark made during the broadcast about brown rats did not concern Mr Haupt's private and personal sphere but rather his professional, public position as a politician. The Court of Appeal confirmed the findings by the Regional Court, including the observation that the statement about the brown rats had constituted political criticism of the attitude and statements of FPÖ politicians. Before the ECtHR Mr Haupt complained that there had been a violation of Article 8 of the ECHR because the Austrian courts had failed to strike a fair balance between freedom of expression and his interest in protecting his reputation. His interest in the protection of his reputation should have outweighed ATV's interest in disseminating on its television channel a statement which was of a lurid and degrading nature.

Firstly, the ECtHR reiterates that according to its case-law the right to reputation is an independent right guaranteed by Article 8 of the ECHR, as part of the right to respect for private life, which the State has a positive obligation to protect. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life. The ECtHR refers to its earlier case law in which it identified the relevant principles which must guide its assessment within the context of balancing Article 8 and 10 as competing rights. The relevant criteria thus defined are: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where appropriate, the circumstances in which the statement was made. The ECtHR also considers that, notwithstanding the fact that the Mr Haupt claims a violation of Article 8 ECHR, it is the task of the ECtHR to determine whether the principles inherent in Article 10 ECHR were properly applied by the Austrian courts when examining Mr Haupt's actions. Next the ECtHR emphasises that the most careful scrutiny under Article 10 ECHR is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern. Furthermore, the limits of acceptable criticism are drawn more widely as regards a politician than they are as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. The ECtHR reiterates 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. Accordingly, any interference with an artist's or social commentator's right to such expression must be examined with particular care.

The ECtHR considers important, inter alia, the fact that Mr Haupt was a well-known politician and that he thus has to display a greater degree of tolerance in the face of such provocation in a satirical television programme. Furthermore, the

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ECtHR finds that the report dealt with an issue of legitimate public concern - namely, statements made by high-ranking members of the FPÖ which were criticised in the media as expressing extremist right-wing positions and the question of whether Mr Haupt (in his position as Chairperson of that party) had distanced himself sufficiently from such statements. The ECtHR is also satisfied that there was a sufficient factual basis for the reference to the brown rats around the FPÖ, having regard to the detailed findings reached by the Regional Court in which it quoted various problematic statements made by politicians of the FPÖ. For these reasons, the ECtHR is satisfied that the judgment of the Vienna Regional Court, as upheld by the Vienna Court of Appeal, struck a fair balance between the competing interests in the present case. Consequently, the ECtHR concludes unanimously that there is no appearance of a violation of Article 8 ECHR. Therefore the complaint by Mr Haupt is rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 ECHR, and consequently Mr Haupt's application is declared inadmissible.

Decision by the European Court of Human Rights, Fifth Section, case of Herbert Haupt v. Austria, Application no. 55537/10 of 2 May 2017, communicated on 1 June 2017

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