European Court of Human Rights: Einarsson v. Iceland

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On 7 November 2017, the European Court of Human Rights (ECtHR) delivered its judgment in Einarsson v. Iceland, concerning a public figure's claim that his right to reputation had been violated following an Icelandic Supreme Court decision that a post on the image-sharing platform Instagram was not defamatory. The applicant in the case was a well-known author and media personality in Iceland. On 22 November 2012, X published an altered picture of the applicant on his Instagram account, drawing an upside-down cross on the applicant's forehead, writing "loser" across his face, and with the caption "Fuck you, rapist bastard". The original picture of the applicant had been included in a newspaper interview with the applicant that same day in which the applicant had discussed a rape accusation made against him. A week earlier, the Public Prosecutor had terminated proceedings against the applicant that had been initiated after an 18-year-old woman had reported to the police in November 2011 that the applicant and his girlfriend had raped her.

On 17 December 2012, the applicant initiated defamation proceedings against X before the District Court of Reykjavík and asked for him to be punished, under the applicable provisions of the Penal Code, for altering the picture and for publishing it on Instagram with the caption "Fuck you, rapist bastard". However, the District Court found against the applicant, a decision that was ultimately upheld by the Supreme Court. The Supreme Court found that the applicant was a well-known person who had controversial views - "views which [included] his attitudes towards women and their sexual freedom", and that "there [had] been instances when his criticism had been directed towards named individuals, often women, and in some cases his words could be construed to mean that he was in fact recommending that they should be subjected to sexual violence." In this context, the Court found that the altered picture and comment 'Fuck you, rapist bastard' should be taken , and was a case of invective on the part of X against the applicant as part of a ruthless public debate, which the latter had instigated. It therefore constituted a value judgment regarding the applicant and not a factual statement that he was guilty of committing rape. Thus, X had expressed himself within the limits of freedom of expression, and should be acquitted.

The applicant made an application to the ECtHR, claiming that the Iceland Supreme Court's judgment had constituted a violation of his right to respect for his private life, as provided in Article 8 of the European Convention on Human

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Rights (ECHR). The ECtHR considered that the question was whether the domestic courts had struck a fair balance between the applicant's right to respect for his private life and X's right to freedom of expression, as protected by Article 10 of the ECHR. In this regard, the ECtHR considered it appropriate to consider the following criteria: how well-known was the person concerned, the subject matter of the statement and the prior conduct of the person concerned; and the contribution to a debate of general interest and the content, form and consequences of the publication (including the method of obtaining the information and its veracity).

Firstly, the ECtHR agreed that the applicant was well-known, and that the limits to acceptable criticism must thus accordingly be wider in the present case than in the case of an individual who was not well-known. Secondly, the Court agreed with the domestic courts that the publication of the picture had constituted a part of a general public debate: The applicant had participated in public discussions about his professional activities and the complaints against him of sexual violence, and was thus an object of general interest. Thirdly, the ECtHR examined whether the statement "Fuck you, rapist bastard" had constituted a statement of fact or a value judgment. The ECtHR admitted that the classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities - in particular the domestic courts. However, the Court may consider it necessary to make its own assessment of the impugned statements. In this regard, the Court held that the Supreme Court had not taken sufficient account of the relevant elements so as to be able to justify the conclusion that the statement had constituted a value judgment. In particular, the Supreme Court had failed to take adequate account of the important chronological link between the publication of the statement on 22 November 2012 and the discontinuance of the criminal proceedings against the applicant in respect of alleged rape. Moreover, the Supreme Court had failed to explain sufficiently the factual basis that could have justified deeming the use of the term "rapist" to constitute a value judgment, the Supreme Court "merely" referring to the applicant's participation in a "ruthless public debate" which he had "instigated". In conclusion, the Court found that the domestic courts had ailed to strike a fair balance between the applicant's right to respect for private life under Article 8 and X's right to freedom of expression, and that this had therefore constituted a violation of Article 8.

Judgment by the European Court of Human Rights, Second Section, case of Einarsson v. Iceland, Application no. 24703/15 of 7 November 2017

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