European Court of Human Rights: Magyar Kétfarkú Kutya Párt v. Hungary

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On 23 January 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Magyar Kétfarkú Kutya Párt v. Hungary, concerning a mobile application ("app") which allowed voters to anonymously share photographs of their ballot papers. Notably, the Court held that a fine imposed on a political party for distributing the app had violated the party's right to freedom of expression. The applicant in the case was the Hungarian political party Magyar Kétfarkú Kutya Párt. Three days before Hungary's 2016 referendum on the EU's migrant relocation plan, the applicant made the mobile app available to voters. The app allowed voters to upload and share photographs taken of their ballots, and also enabled voters to give the reasons for how they cast their ballot. The posting and sharing of photographs was anonymous. Following a complaint about the app, the National Election Commission issued a decision, finding that the app had infringed the principles of fairness of elections, voting secrecy, and the proper exercise of rights, and ordered the applicant to refrain from further breaches of section 2(1)(a) and (e) of the Act on Electoral Procedure and Article 2(1) of the Fundamental Law. The Commission also imposed a fine of EUR 2,700. On appeal, the Kúria (the Hungarian Supreme Court) upheld the Commission's decision regarding the infringement of the principle of the proper exercise of rights. The Kúria held that the purpose of the ballots had been to enable voters to express their opinion on the referendum question, and that taking photographs of ballots and subsequently publishing them had not been in line with this purpose. The Kúria overturned the remainder of the Commission's decision on the infringement of the secrecy of the electoral process. It found that there was no regulation prohibiting voters from taking photographs of their ballot papers in the voting booths and that their identity could not have been revealed through the mobile app. The Kúria reduced the fine to EUR 330.

The applicant made an application to the ECtHR, claiming a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The first question for the Court was whether there had been an interference with the applicant's right to freedom of expression. The Court noted that the app had been developed by the applicant precisely in order that voters could share, via information and communication technologies, opinions through anonymous photos of invalid ballot papers. The app therefore possessed a communicative value, and constituted expression on a matter of public interest,

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as protected by Article 10 of the ECHR. What the applicant was reproached for was precisely the provision of the means of transmission for others to impart and receive information within the meaning of Article 10. Thus, there had been an interference with the applicant's right to freedom of expression.

The main question for the Court was then whether the interference had had a legitimate aim. Notably, the Court rejected both arguments put forward by the Government. Firstly, the Government argued that the measure had been aimed at ensuring the orderly conduct of the voting procedure and ensuring the proper use of ballot papers, and that these aims could fall under "the protection of the rights of others" (Article 10 § 2 of the ECHR). However, the Court held that the Government had not pointed to any other actual rights of "others" that would or could have been adversely affected by the anonymous publication of images of marked or spoiled ballots. The Government had not provided any elements showing that there had been a resultant deficiency in the voting procedure, facilitated by the posting of images of those ballot papers, which should have been addressed through a restriction on the use of the mobile app.

The Government's second argument focused on the violation of the principle of the proper exercise of rights, as laid down in section 2(1)(e) of the Act on Electoral Procedure, which, in their estimation, would also entail a violation of the rights of others. However, the Court held that it was not persuaded by this suggestion. The Court stated that while it was true that the domestic authorities had established that the use of the ballot papers for any other purpose than that of casting a vote infringed that provision, the Government had not convincingly established any link between this principle of domestic law and the aims exhaustively listed in paragraph 2 of Article 10. The Court concluded that the foregoing considerations were sufficient to enable the Court to conclude that the sanction imposed on the applicant political party for operating the mobile app did not meet the requirements of Article 10 § 2. There had therefore been a violation of Article 10.

Judgment by the European Court of Human Rights, Fourth Section, case of Magyar Kétfarkú Kutya Párt v. Hungary, Application no. 201/17 of 23 January 2018

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