European Court of Human Rights: Endy Gęsina-Torres v. Poland

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A recent decision by the European Court of Human Rights (ECtHR) confirms that journalists who are found guilty of a criminal offence during newsgathering activities cannot invoke robust protection based on their rights to freedom of expression and information, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Following the decisions in the cases of Diamant Salihu and others v. Sweden (IRIS 2016-8/1), Brambilla and others v. Italy (IRIS 2016-9/1) and Boris Erdtmann v. Germany (IRIS 2016-9/1), the Court on this occasion dismissed a complaint lodged by an undercover television journalist who was fined for using forged documents and giving false testimony in court during proceedings concerning his placement in a refuge detention centre on the Polish border.

In 2013 Endy Gęsina-Torres was working as a journalist for Polish public television. Alarmed by the number of reports about the alleged ill treatment of aliens in a detention centre for refugees run by the Border Guard Service near the town of Białystok and about the conditions there, he decided to draw the attention of the public to the issue by making an undercover documentary about conditions in the refugee centre. Arriving at the border near Bialystok he was stopped by police officers who wanted to check his identity papers. Gęsina-Torres told the police officers that he had crossed the Polish border illegally after losing his documents. He gave them a fictitious name and was arrested. By a subsequent judicial decision, he was placed in the Border Guard Service's closed centre for aliens in Białystok. Gęsina-Torres stayed at the centre for three weeks, making recordings with a device placed in his watch. When his real identity was discovered, criminal proceedings were instituted against the journalist, and he was found guilty of using forged documents (by virtue of his having signed documents relating to his arrest and detention under a false name) and of giving false testimony (by making false statements about how he had illegally crossed the Polish border prior to his arrest). The Polish court was also of the view that Gęsina-Torres' conduct had jeopardised the administration of justice, as the court that had decided to place him in the detention centre for aliens had been misled about his identity. The fine was set at PLN 2,000, with the court noting that Gęsina-Torres did not have any criminal record; he was furthermore ordered to pay court costs of PLN 300.

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Gęsina-Torres alleged before the ECtHR that finding him criminally responsible for the use of forged identity documents and giving false testimony in the context of investigative journalism had amounted to an interference with his right to freedom of expression, in breach of Article 10 ECHR. His arguments were supported by "Article 19", a non-governmental organisation intervening as a third party. According to "Article 19", it had been long recognised that in order to bring important information to the public notice, journalists might have to resort to unconventional forms of information gathering (such as undercover reporting, when undercover reporting was the only way to report on situations that public authorities were trying to cover up).

Although the domestic authorities did not interfere with the content of the programme, the ECtHR finds that Gęsina-Torres' criminal conviction may be regarded as interfering with his rights under Article 10 of the ECHR. The crucial question is whether this interference could be justified as being "necessary in a democratic society" under the terms of Article 10 § 2 of the ECHR.

The ECtHR reiterates that the protection afforded by Article 10 ECHR to journalists "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism", and that the concept of responsible journalism also embraces "the lawfulness of the conduct of a journalist, including, and of relevance to the instant case, his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly". The ECtHR refers to "the vital role played by the media in a democratic society", but it especially emphasises that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions".

Applying these principles to the facts of the case, the ECtHR noted that the investigation carried out by Gęsina-Torres had concerned a matter of public interest, given that allegations of harsh treatment in closed detention camps for refugees and of breaches of fundamental rights by staff clearly fell within the ambit of that notion. However, as a journalist, Gęsina-Torres knew that by using forged documents and a false identity he would be acting in breach of the law. The ECtHR was of the opinion that the breach (namely lying about his identity) was the very foundation of his modus operandi and was not merely an accessory element of his actions in gathering information. The ECtHR furthermore did not find the journalist's argument that this was the only manner that he could have used to gather information about the situation in the detention centres

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convincing, as by then this kind of information was already in the public domain. In the ECtHR's view, this showed that other means of gathering information had proved effective for disclosing and establishing facts concerning allegations of the ill-treatment of foreigners in the detention centres. The ECtHR was of the view that the domestic courts had been meticulous and that they had balanced the journalist's freedom of expression against another important interest - namely the interest that a democratic society had in preserving the authority of the judiciary. According to the ECtHR, the Polish courts had not overstepped their margin of appreciation and had made use of it in good faith, carefully and reasonably. Finally, the fine imposed on the journalist had certainly not constituted a "harsh sentence". Therefore, the ECtHR concluded that the domestic authorities, when justifying the interference concerned in the present case, had relied on grounds which had been both relevant and sufficient. The ECtHR found that there was no appearance of a violation of Article 10 ECHR and accordingly, it declared the journalist's application manifestly ill-founded, and therefore inadmissible.

Decision by the European Court of Human Rights, First Section, case of Endy Gęsina-Torres v. Poland, Application no. 11915/15, notified in writing on 15 March 2018

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