European Court of Human Rights: Sinkova v. Ukraine

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On 27 February 2018, the European Court of Human Rights (ECtHR) delivered its judgment in Sinkova v. Ukraine concerning a conviction for a performance-art protest at a war memorial, which had been filmed and published online. The performing artist was prosecuted and convicted of the "desecration of the Tomb of the Unknown Soldier". The ECtHR held, by four votes to three, that the interference by the Ukrainian authorities with the protestor's right to freedom of expression did not amount to a violation of Article 10 of the European Convention of Human Rights (ECHR).

The case concerns Anna Olegovna Sinkova, acting as a member of the artistic group the Brotherhood of St. Luke. In December 2010, Sinkova and three group members decided to protest "against the wasteful use of natural gas by the State while turning a blind eye to the poor living standards of veterans," and staged an artistic performance at a war memorial in central Kyiv. The performance involved Sinkova frying eggs over the Eternal Flame at the Tomb of the Unknown Soldier. A member of the group also filmed the performance. Two police officers approached the group and remarked that their behaviour was "inappropriate," but they undertook no further interference.

Sinkova posted the video of her performance online as an act of protest, with the commentary that "precious natural gas has been burned, pointlessly, at the Memorial of Eternal Glory in Kyiv for fifty-three years now. This luxury costs taxpayers about 300,000 hryvnias per month." Following the video's publication, a number of complaints were made to the police. In late March 2011, Sinkova was arrested and charged with the "desecration of the Tomb of the Unknown Soldier," which is an offence under Article 297 of Ukraine's Criminal Code. The District Court granted a request for Sinkova's pre-trial detention, as she was accused of a "serious offence punishable by imprisonment of between three and five years." Following three months in pre-trial detention, Sinkova was convicted of the offence. The District Court held that Sinkova's argument that her performance had not been meant to desecrate the tomb "had no impact on the legal classification of her actions" and the "deliberate acts" had shown "disrespect for the burial place of the Unknown Soldier." The District Court imposed a three-year prison sentence, which was suspended for two years. The conviction was upheld on appeal, with the Kyiv City Court of Appeal rejecting Sinkova's argument that

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there had been a violation of her right to freedom of expression, ruling that her conviction was “in accordance with the law and pursued a legitimate aim.” Sinkova subsequently made an application to the ECtHR, claiming that her pre-trial detention had violated her right to liberty under Article 5 ECHR and that her conviction had violated her right to freedom of expression under Article 10 of the ECHR. In respect of Article 5, the ECtHR unanimously found three separate violations concerning her pre-trial detention, including a violation arising from the fact that the courts “had maintained her detention on grounds which cannot be regarded as sufficient,” and finding that her detention in June 2011 “was not covered by any judicial decision.” However, in respect of Article 10, the ECtHR, by four votes to three, found that there had been no violation of Sinkova’s freedom of expression.

The ECtHR judgment noted that the interference with Sinkova’s Article 10 right to freedom of expression had been based on the sufficiently precise criminal code provision on “desecration;” and that the conviction had the legitimate aim of “protecting the morals and the rights of others.” The main question was whether the conviction had been “necessary in a democratic society.” The ECtHR held that Sinkova had been prosecuted and convicted “only” on account of her frying eggs over the Eternal Flame. The ECtHR pointed out that she had not been charged over the video, nor the content of the “rather sarcastic and provocative text” in the video. Thus, the applicant “was not convicted for expressing the views that she did”; rather, her conviction “was a narrow one in respect of particular conduct in a particular place” and based on a “general prohibition on contempt for the Tomb of the Unknown Soldier, [which formed] part of ordinary criminal law.” Secondly, while the ECtHR stated that the domestic courts “paid little attention to the applicant’s stated motives, given their irrelevance for the legal classification of her actions,” it noted that the courts “did take into account the applicant’s individual circumstances in deciding on her sentence.” Thirdly, the ECtHR rejected Sinkova’s argument that her conduct could not be reasonably interpreted as contemptuous towards those the memorial honoured, with the Court noting that “eternal flames are a long-standing tradition in many cultures and religions most often aimed at commemorating a person or event of national significance.” The ECtHR held that there were many “suitable” opportunities for Sinkova to express her views, or participate in “genuine” protests, without breaking the criminal law, and without “insulting the memory of soldiers who perished and the feelings of veterans.” Lastly, the ECtHR examined the “nature and severity of the penalty,” and noted that “peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence.” The ECtHR, however, found Sinkova’s conviction acceptable and proportionate, as she was only “given a suspended sentence and did not serve a single day of it.” The majority thus held there had been no violation of Article 10.

By contrast, the dissenting ECtHR judges found a violation of Article 10, partly in the light of the domestic courts’ failure to address the “purpose of the applicant’s

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performance" and the courts' disregard of the performance's satirical nature. Furthermore, the dissenting judges noted an "inconsistency" in the majority's position and the Court's prior case-law that a suspended prison sentence is "likely to have a chilling effect on satirical forms of expression." Given "the lack of adequate assessment by the national authorities of the applicant's performance from the standpoint of Article 10 of the Convention," and the "complete disregard of its satirical nature," in addition to the "disproportionate nature of the sentence," the dissenting judges found that Article 10 was violated in the present case.

Judgment by the European Court of Human Rights, Fourth Section, case of Sinkova v. Ukraine, Application no. 39496/11 of 27 February 2018

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