European Court of Human Rights: Unifaun Theatre Productions Limited and Others v. Malta

IRIS 2018-7:1/3

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On 15 May 2018, the European Court of Human Rights (ECtHR) delivered a judgment regarding a peculiar application of the Maltese Cinema and Stage Regulations. A theatre group, Unifaun Theatre Productions, had been prevented from producing and performing the play Stitching, owing to a ban imposed by the Board for Film and Stage Classification ("the Board"). This interference with the theatre group's right to freedom of expression was subsequently confirmed by the domestic courts, including the Constitutional Court of Malta. According to the Constitutional Court, the play contained several scenes that affected the morality and decency of the entire production, and it was within the Board's authority to assess that in line with the Cinema and Stage Regulations. The Constitutional Court referred to phrases which constituted disparaging and insolent remarks in respect of more than one belief, towards women and towards the suffering of the Jews in the Second World War. In the Court's view, the limits of decency had been breached by the blasphemy (an offence under Maltese law) contained within the play and by the vilification of the dignity of a people, a woman, children, and human beings in general, as well by the extreme glorification of sexual perversion. In upholding the legitimate and justified character of the interference with the theatre group's freedom of expression, the Constitutional Court, inter alia, referred to the case law of the European Court of Human Rights (ECtHR) in Otto-Preminger-Institut v. Austria (see IRIS 1995-1/1).

The theatre group lodged an application with the ECtHR, arguing that the complete ban on the production of the play Stitching was contrary to Article 10 of the European Convention of Human Rights (ECHR) guaranteeing the right to freedom of expression. The application was joined by two directors of Unifaun Theatre Productions, the artistic director of the play and two actors engaged to perform in the above-mentioned production.

Firstly, the ECtHR noted that the Government had not rebutted the applicants' claim that the Guidelines for Film Classification (on which the ban was based) had only been cited for the first time in the domestic proceedings, and that the Guidelines did not meet the requisite standard of law in so far as they were not accessible to the public. Secondly, in so far as the domestic authorities had relied on the Cinema and Stage Regulations, the ECtHR was of the opinion that the criteria mentioned in the Regulations (such as levels of morality, decency and

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good general behaviour), left room for unfettered power, since the law did not indicate with sufficient clarity the scope of any discretion conferred on such authorities and the manner of its exercise. Thirdly, the ECtHR found that a total ban was only possible in the case of films; stage productions did not fall under category to which such a ban could apply. Thus, there was no legal basis for the impugned ban.

On the basis of these considerations the ECtHR found that the law relied on by the Maltese Government was not of a sufficient quality and that the interference had been the result of a procedure not prescribed by law. As the interference had not been lawful within the meaning of the ECHR, the ECtHR deemed that it was not necessary to further determine whether the interference had been necessary in a democratic society. The ECtHR unanimously concluded that there had been a violation of Article 10 of the ECHR.

The judgment also contained a specific interpretation with regard to just satisfaction and the awarding of damages to victims of a violation of the ECHR under Article 41 of the ECHR. The applicants claimed EUR 4 299.20 in respect of pecuniary damage, covering the fees for the classification exercise, the purchase of performance rights, theatre bookings, promotional material and advertisements, and EUR 30 000 in non-pecuniary damage. The Maltese Government submitted that the applicants had been well aware that they would have to obtain the requisite permit to perform the play; thus, the expenses that they had incurred in respect of the play had constituted a self-imposed business risk taken in the knowledge that the play might be banned. The Government also considered that a finding of a violation would constitute sufficient just satisfaction, and that in any event the ECtHR should not award more than EUR 3 500 in non-pecuniary damage.

The ECtHR was of the opinion that despite the lack of clarity in the law as to whether a total ban might be possible, the applicants should have waited for a decision on the specific classification of the play (and thus knowledge of the applicable audience) before venturing into theatre bookings and promotional material and advertisements. It also considered that performance rights are likely to be required before such a procedure is undertaken at a cost, no matter its outcome. Thus, the ECtHR did not discern any causal link between the violation found and the pecuniary damage alleged it therefore rejected this part of the claim.

On the other hand, making its assessment on an equitable basis, the ECtHR awarded the applicants EUR 10 000, jointly, in respect of non-pecuniary damage. In addition, the ECtHR considered it reasonable to also award the applicants the sum of EUR 10 000, jointly, covering the costs for professional legal fees and court expenses.

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Judgment by the European Court of Human Rights, Fourth Section, case of Unifaun Theatre Productions Limited and Others v. Malta, Application no. 37326/13, 15 May 2018

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