European Court of Human Rights: Egill Einarsson v. Iceland (No. 2)

IRIS 2018-9:1/2

Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

In Iceland, a person (hereafter, X) posted a critical and defamatory comment on a Facebook page, commenting on a recent interview given by Egill Einarsson, against whom complaints had been formulated concerning the rape of women. At the material time, Einarsson was a well-known personality in Iceland who, for years, had published articles, blogs and books and had appeared in films, on television and other media, under pseudonyms. Upon completion of the police investigation, the public prosecutor dismissed all cases against Einarsson because the evidence which had been gathered had not been sufficient or likely to lead to a conviction. The interview, with a photo of Einarsson on the cover of the magazine, initiated many reactions and a Facebook page was set up to encourage the editor of the magazine to remove Einarsson's picture from its front page. Extensive dialogue took place on the site that day, and X posted the comment: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ...". A district court found X's comment on Facebook defamatory and declared the statements null and void. However, it dismissed Einarsson's claim for the imposition of a criminal punishment on X under the Penal Code, and it rejected the claim to have X carry the cost of publishing the main content and reasoning of the judgment in a newspaper. Furthermore, the district court did not award Einarsson non-pecuniary damage and concluded, finally, that each party should bear its own legal costs. These findings were confirmed by the Supreme Court of Iceland.

Einarsson complained to the European Court of Human Rights (ECtHR) about a violation of his right to respect for his private life and reputation, as provided in Article 8 of the European Convention on Human Rights (ECHR). The starting point for this was indeed that the right to protection of one's honour and reputation is encompassed by Article 8 ECHR of the Convention as part of the right to respect for private life, even if the person is criticised in a public debate. In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life. The ECtHR pointed out that the choice of the means to secure compliance with Article 8 in the sphere of inter-individual relationships is, in principle, a matter that falls within the contracting states' margin of appreciation, and that the

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nature of the state's obligation to potentially restrict to some extent the rights secured under Article 10 for another person depends on the particular aspect of private life that is at issue. The Court reiterated that where the balancing exercise between the rights under Article 8 and 10 ECHR had been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the ECtHR would require strong reasons to substitute its view for that of the domestic courts. It also recalled that the member States of the Council of Europe may regulate questions of compensation for non-pecuniary damage differently. The ECtHR also recalled that domestic courts have a margin of appreciation in assessing how to remedy a finding at national level that a violation of the right to private life had occurred.

With regard to the concrete circumstances of the case, the ECtHR referred to the fact that the district court, confirmed by the Supreme Court, had taken into account Einarsson's previous behaviour; the public reputation he had made for himself; the material produced by him and its substance, which was often ambiguous and provocative and could be interpreted as an incitement to sexual violence; the dissemination of the comment: on a Facebook page amongst hundreds or thousands of other comments; and the fact that the statements were removed by X as soon as Einarsson had so requested. The Icelandic courts found that Einarsson had received "full judicial satisfaction" by the comments being declared null and void. The ECtHR found that it could not be held that the protection afforded to Einarsson by the Icelandic courts - finding that he had been defamed and declaring the statements null and void - was not effective or sufficient with regard to the state's positive obligations or that the decision not to grant him compensation deprived Einarsson of his right to reputation and, thereby, emptied the right under Article 8 ECHR of its effective content. The ECtHR further noted that although the domestic courts had accepted to declare the impugned statements null and void, they had not accepted all of Einarsson's claims. Against this background, it could not be said that the domestic courts had handled the issue of legal costs in a manner that appeared unreasonable or disproportionate. These elements were sufficient for the ECtHR to conclude that the national authorities had not failed in their positive obligations and had afforded Einarsson sufficient protection. Accordingly, there had been no violation of Article 8 ECHR.

Judgment by the European Court of Human Rights, Second Section, case of Egill Einarsson v. Iceland (No. 2), Application No. 31221/15, 17 July 2018

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