ECtHR: *Pendov v. Bulgaria*

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The European Court of Human Rights (ECtHR) has delivered a judgment in which it found, apart from a violation of Article 1 of the First Protocol to the European Convention on Human Rights (ECHR), a breach of the applicant's right to freedom of expression under Article 10 ECHR, due to the seizure of a server and the limitation of the functionality of a website. In this case, the applicant complained of the seizure and retention by the Bulgarian prosecution authorities of his computer server, in the context of criminal proceedings for a copyright infringement against third parties. The retention of the server and the information contained in it also led to the limited functionality for a significant period of time of a website run by the applicant and hosted on that server.

In 2010, a publishing house complained to the police that a book published by it had been made available on the Internet, in breach of copyright. It concerned, allegedly, an offence under Article 172a of the Bulgarian Criminal Code, which considers the unauthorised copying and distribution of an object of copyright as a criminal act, punishable by up to five years of imprisonment and a fine. The ensuing investigation showed that the site which had uploaded the book was partially hosted on a server owned by Mr Pendov. Pendov's server also hosted a number of other websites, including one dedicated to Japanese anime culture, owned and administered by Pendov himself. During a search of the premises where Pendov's server was being kept, the police officers seized and removed the server, in Pendov's absence. About a month later, Pendov started submitting requests for the return of his server. He pointed out that the information necessary for the criminal investigation of the third parties involved in the alleged breach of copyright could be copied and that the server could be returned to him. He explained that the server also hosted several other sites, including his own, and that the closure of his site had 'discredited' him in the eyes of the users and his colleagues. Pendov also argued that the unavailability of his site had caused him significant damage, including of a financial nature. He considered it unjust that he had had to suffer such harsh consequences, seeing that there had been no complaints of copyright infringement with regard to his own site. It took nearly eight months before Pendov's server was returned following a decision of the Sofia district public prosecutor. Pendov lodged an application with the ECtHR complaining about a violation of his property right under Article 1 of the First Protocol of the ECHR and of a violation of his right to freedom of expression under Article 10 ECHR, because of the seizure and retention of his server and the effects

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of the seizure and retention on the functioning of his website.

The ECtHR first reiterated that "in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general" (see also *Ahmet Yildirim v. Turkey* in IRIS 2013-2/1). It observed, next, that Pendov's website dedicated to Japanese anime culture constituted a means of exercising his freedom of expression and that the retention of the server had impeded his freedom of expression until it was eventually returned to him. The ECtHR found that there was indeed an interference by a public authority with Pendov's right to freedom of expression. This interference consisted of the retention of his server and the information contained on it by the prosecution authorities, and this led to the initial unavailability of Pendov's website, followed by the site's heavily limited functionality for a period of several months. As the interference was prescribed by law and pursued the legitimate aims of prevention of disorder and crime and protection of the rights of others, the salient question was whether this interference could be justified as necessary in a democratic society, and in particular whether the measures taken against Pendov's server were proportionate. In analysing that question, the ECtHR took into account the length of retention of Pendov's server, whether it was necessary, its consequences for Pendov, as well as the conduct of the relevant authorities. The ECtHR observed that it was not contested that a website suspected of breaching copyright had been partially hosted on Pendov's server, but at no point in time had the domestic authorities suggested that he bore any responsibility for the alleged copyright violations. The ECtHR pointed out that the retention of Pendov's server in the criminal proceedings proved to be unnecessary for the purposes of the investigation and that for some period of time the prosecution authorities made no effort to remedy the effects of their actions on Pendov's freedom of expression, despite having been informed of those effects on many occasions. The ECtHR considered that the fact that Penkov was neither a journalist nor a whistleblower or political activist, and that he did not enjoy the high level of protection attributed to political speech, were not sufficient reasons to tip the balance in favour of the domestic authorities. As the seizure and retention of Pendov's server was not a measure proportionate to the legitimate aims pursued, it was not "necessary in a democratic society" as required under Article 10, paragraph 2 ECHR. Accordingly, the ECtHR comes to the conclusion that Article 10 ECHR has been violated by the Bulgarian authorities. The ECtHR also found a breach of Pendov's property right under Article 1 of the First Protocol of the ECHR.

ECtHR, Fifth section, Pendov v. Bulgaria, Application no. 44229/11, 26 March 2020

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