ECtHR: *Khadija Ismayilova (no. 3) v. Azerbaijan*

IRIS 2020-7:1/20

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After finding various violations of the European Convention on Human Rights (ECHR) in the case of *Khadija Ismayilova (no. 1) v. Azerbaijan* (see Iris 2019-3/1) and in *Khadija Ismayilova (no. 2) v. Azerbaijan*, the European Court of Human Rights (ECtHR) has found a new violation of the ECHR by the Azerbaijani authorities, of which Khadija Ismayilova, a well-known investigative journalist, was the victim. The ECtHR is of the opinion that the domestic courts have not sufficiently protect Ismayilova against a smear campaign by a newspaper which exploited a breach of her private life using offensive and derogatory language.

The case goes back to the problems Ismayilova experienced as a journalist reporting mainly on the website of Radio Free Europe/Radio Liberty about corruption and human rights violations in her country. After publishing a series of articles on government corruption involving the president of Azerbaijan and his family, she began receiving threats and intimidations designed to prevent her from pursuing her journalistic work. In particular, a video recorded with a hidden camera featuring bedroom scenes of a sexual nature involving her and her then boyfriend was posted on the Internet. In its judgment of 10 January 2019 (IRIS 2019-3/1), the ECtHR found that the Azerbaijani authorities had failed to conduct an effective criminal investigation into such a serious, flagrant and extraordinarily intense invasion of her private life. The ECtHR also found that the state authorities had breached their obligations under Article 10 ECHR to guarantee the right to freedom of expression, emphasising that the acts of a criminal nature committed against Ismayilova were apparently linked to her journalistic activity and that the authorities have acted “contrary to the spirit of an environment protective of journalism.” Ismayilova has also been arrested, detained, and charged with a series of criminal offences, such as tax evasion and abuse of power in connection with her activity as the director of a radio station. The events relating to this arrest and detention were the subject of the Court’s judgment of 27 February 2020 in *Khadija Ismayilova (no. 2) v. Azerbaijan*, in which the ECtHR found violations of Article 5 (unlawful deprivation of her liberty, lack of judicial review), Article 6, section 2 (breach of presumption of innocence) and Article 18 ECHR (misuse of power). The ECtHR concluded that the authorities’ actions were driven by “improper reasons” and that the purpose of the impugned measures was to silence and punish Ismayilova for her journalistic activities.

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In its judgment of 7 May 2020, the ECtHR reached a decision on another complaint filed by Ismayilova in connection with the hidden camera recordings and a smear campaign against her. The complaint more specifically concerned an article in the newspaper Səs that associated Ismayilova with a porn star; it mockingly hinted that various opposition-oriented journalists should engage in sexual acts with her or had already done so and gave examples of various hypothetical newspaper headlines that could be written on the subject, all of them clearly suggestive of various sexual acts. Ismayilova brought an action against the newspaper before the civil court, claiming that the article was insulting and damaging to her honour and dignity, her right to respect for her private and family life, and her right to freedom of expression. She also alleged that the article had caused her to experience significant mental suffering and had tarnished her reputation in the eyes of her colleagues, friends, relatives and readers. Her claim was dismissed by a district court, which, in essence, referred to the newspaper's freedom of thought and expression and the Səs journalist's independent opinion. The district court also took into account the fact that Ismayilova had not provided any evidence of the alleged physical and mental suffering she had experienced. This approach was confirmed by the Baku Court of Appeal and finally by the Supreme Court.

The ECtHR accepted Ismayilova's submissions that the article at issue commented on a series of events relating to a breach of her privacy, and that it had caused her serious moral distress and harm to her personal relationships and social reputation. Therefore, the Court considered Article 8 (right to privacy) applicable, while this right had to be balanced against the right of the newspaper to critically comment on issues of public interest, as guaranteed by Article 10 ECHR (right to freedom of expression). The ECtHR referred to some of its earlier judgments (such as *Von Hannover (no. 2) v. Germany* and *Axel Springer AG v. Germany,* IRIS 2012/3-1), reiterating that the balancing of the rights provided for under Articles 8 and 10 is based on a number of relevant criteria, such as: a contribution to a debate of general interest; the degree to which the person affected was well known and the subject of the report; the prior conduct of the person concerned; and the content, form and consequences of the publication. According to the Court, there is a fundamental distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life. Although Article 10 offers a degree of protection to the publication of news about the private life of public figures, such protection may cede to the requirements of Article 8, where the information at stake is of a private and intimate nature and there is no public interest in its dissemination. Moreover, offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example, where the sole intent of the offensive statement is to insult someone.

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Applying these principles and standards to the present case, the ECtHR was of the opinion that the article did not contribute to any issue of legitimate public interest. The article contained a series of allegations and insinuations, but it did not amount to the reporting of topical news or current events, and neither did it appear to be intended as part of a genuine historical or political debate. While responsible reporting on matters of public interest in accordance with the ethics of journalism is protected by Article 10 ECHR, there can be no legitimate public interest in exploiting an existing breach of a person's privacy for the purpose of satisfying the prurient curiosity of a certain readership, publicly ridiculing the victim and causing them further harm. Furthermore, it could not be argued that the discussion of Ismayilova's private life was the result of her previous conduct, as her privacy had been invaded without her knowledge and against her will. As to the content, form and consequences of the publication, the ECtHR noted that Ismayilova's portrayal in the article was not a joke made in a satirical, playful and irreverent style without any intent to criticise, but that it was published by a newspaper that positioned itself as a serious socio-political newspaper and was a self-professed "media trumpet" of the ruling party. The only discernible intent behind the statements made in respect of Ismayilova was to attack her or set her up for attack on grounds of morality. By further exploiting the previous breach of her privacy, the article in question sought, by using offensive and derogatory language, to attribute to Ismayilova characteristics and behaviour in a manner calculated to negatively and radically influence how she was viewed in society. Finally, the ECtHR was of the opinion that the domestic courts had not duly examined whether the statements made about Ismayilova were compatible with the ethics of journalism and whether they had overstepped the permissible bounds of freedom of expression. The domestic courts had neither carried out an adequate assessment of all the relevant factual circumstances, nor had they duly considered the importance and scope of Ismayilova's right to respect for her private life. As the domestic courts had not conducted an adequate balancing exercise between Ismayilova's rights under Article 8 and the newspaper's right to freedom of expression, the ECtHR concluded that the respondent state had not complied with its positive obligation to take adequate measures to secure the protection of Ismayilova's right to respect for her private life and her reputation. Accordingly, there has been a violation of Article 8 of the Convention.

Judgment by the European Court of Human Rights, Fifth Section, case of Khadija Ismayilova (no. 3) v. Azerbaijan, Application no. 35283/14.

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