European Court of Human Rights : *Biancardi v. Italy*

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While the case of *Hurbain v. Belgium* (IRIS 2021-8:/27) on the right to be forgotten and the accessibility and integrity of online news archives is pending before the Grand Chamber of the European Court of Human Rights (ECtHR), the ECtHR has delivered a new judgment on this matter. In *Biancardi v. Italy* the ECtHR found no violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) in a case where the editor-in-chief of an online newspaper was held liable under civil law for not having de-indexed an article despite the request by the private individuals named in the article to remove it from the Internet.

The applicant in the case, Mr Biancardi, was the editor-in-chief of an online newspaper. In 2008, he had published an article concerning a fight, followed by a stabbing, which had taken place in a restaurant. The article mentioned the names of the persons involved (amongst them V.X. and W) and the fact the police had closed the restaurants of the owners who had been involved in the fight. The article also mentioned the possible motive for the fight, which probably related to a financial quarrel about the ownership of a building. Two and a half years later V.X. and W sent a formal notice to Mr Biancardi asking that the article be removed from the Internet, but to no avail. A few weeks later V.X. and W lodged two claims with the District Court of Chieti against, respectively, Google Italy S.r.l. and Mr Biancari, pursuant to Article 152 the Personal Data Protection Code. At the court hearing in 2011, Mr Biancardi indicated that he had de-indexed the article in question, with a view to settling the case. The court excluded Google Italy S.r.l. from the proceedings following V.X.'s withdrawal of his claim towards this party and it decided that, in the light of the information that Mr Biancardi had supplied there was no need to examine the part of V.X.'s complaint regarding the request for the article to be removed from the Internet. However, as for the remainder of the complaint, concerning the breach of the claimants' right to respect for their reputation, the court awarded to each claimant EUR 5 000 in compensation for non-pecuniary damage and EUR 2 310 for costs and expenses. The court noted in particular that the information concerning the claimants had been published on 29 March 2008 and had remained accessible on the Internet until 23 May 2011, notwithstanding V.X.'s formal notice to the applicant asking that the article in question be removed from the Internet in September 2010. In the court's view, the public interest in the right to provide information had by then been satisfied and, at least as from the date of V.X. sending the above-mentioned formal notice,

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the processing of his personal data had not been in compliance with the Personal Data Protection Code. The court concluded that there had been a breach of the claimants' reputation and right to respect for their private life. The court also noted that the information at issue was easily accessible by simply inserting the claimants' names into the search engine, and that the nature of the relevant data, as regards judicial proceedings, was sensitive. The Supreme Court upheld this judgment.

Under Article 10 ECHR Mr Biancardi argued before the ECtHR that the interference in his freedom of expression and his right to inform the public had been unjustified. He also complained that the financial penalty imposed on him in terms of compensation for non-pecuniary damage had been excessive. Mr Biancardi's claim was also supported by several third-party interveners, such as the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, the Reporters' Committee for Freedom of the Press, the Media Lawyers Association and Media Legal Defence. They argued that journalistic articles should not be de-listed and that the erasure of accurate information from online news records ran directly contrary to the values protected by Article 10 ECHR and amounted to press censorship. They also submitted that individuals should not be empowered to restrict access to information concerning themselves and published by third parties, except when such information had an essentially private or defamatory character or when the publication of such information was not justified for other reasons.

Referring to its judgments on personal data and Internet archives in Węgrzynowski and Smolczewski v. Poland (IRIS 2013-9/1) and M.L. and W.W. v. Germany (IRIS 2018-8/1) the ECtHR observed that the present case did not relate to the content of an Internet publication, nor to the way information was published. The essence in this case was Mr Biancardi's failure to de-index the article concerning V.X. and his restaurant and his decision to keep the article easily accessible, despite the fact that the claimant had asked that the article be removed from the Internet. The finding of Mr Biancardi's liability had more precisely been a consequence of the failure to de-index from the Internet search engine the tags to the article at issue, which would have prevented anyone accessing the article by simply typing out the name of V.X. or of his restaurant. An obligation to de-index material could be imposed not only on Internet search engine providers, but also on the administrators of newspaper or journalistic archives accessible through the Internet. The ECtHR noted that a clear distinction is to be made between, on the one hand, the requirement to de-list or "de-index" and, on the other hand, the permanent removal or erasure of news articles published by the press. In the instant case Biancardi was found to be liable solely on account of the first requirement. There was no requirement to permanently remove the article, nor was there any intervention regarding the anonymisation of the online article in this case. The ECtHR acknowledged that the strict application

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of the six criteria set out in Axel Springer AG v. Germany (IRIS 2012-3/1) would be inappropriate in the present circumstances. In this case special attention was paid to (i) the length of time for which the article was kept online; (ii) the sensitiveness of the data at issue and (iii) the gravity of the sanction imposed on the editor-in-chief of the online newspaper. The ECtHR observed inter alia that the relevance of the right to disseminate information decreased over the passage of time, compared to V.X.'s right to respect for his reputation, that it concerned sensitive data related to criminal proceedings and that Mr Biancardi was held liable under civil and not criminal law. The ECtHR is also of the view that the severity of the sentence and the amount of compensation awarded for non-pecuniary damage could not be regarded as excessive, given the circumstances of this case. The ECtHR concluded that the finding by the domestic jurisdictions that Mr Biancardi had breached V.X.'s right to respect for his reputation by virtue of the continued presence on the Internet of the impugned article and by his failure to de-index it constituted a justifiable restriction of his freedom of expression. The ECtHR emphasised in particular the fact that no requirement was imposed on Biancardi to permanently remove the article from the Internet. Therefore the ECtHR, unanimously, found that there has been no violation of Article 10 ECHR.

European Court of Human Rights, First Section, in the case of Biancardi v. Italy, Application no 77419/16, 25 November 2021

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