European Court of Human Rights: OOO Memo v. Russia

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

The European Court of Human Rights (ECtHR) has delivered a judgment in which, for the first time, it refers to the notion of SLAPP (Strategic Litigation Against Public Participation). In its judgment of 15 March 2022, in the case of OOO Memo v. Russia, the ECtHR expresses its concerns about the risk for democracy of court proceedings instituted with a view to limiting public participation. The case concerns a civil defamation suit brought by a Russian regional state body against a media company. The ECtHR found that allowing executive bodies to bring defamation proceedings against members of the media places an excessive and disproportionate burden on the media. This could have an inevitable chilling effect on the media in the performance of their task as purveyor of information and as public watchdog.

The applicant company, OOO Memo, is the founder of Kavkazskiy Uzel, an online media outlet registered under Russian law which is devoted to the political and human rights situation in the south of Russia, including the Volgograd Region. In 2008 Kavkazskiy Uzel published an article criticizing the executive authority of the Volgograd Region for suspending the transfer of funds, allocated as a subsidy, to the Town of Volgograd. The Volgograd Region commenced civil defamation proceedings against OOO Memo, seeking the retraction of a series of statements in the article at issue. The Ostankinskiy District Court of Moscow found that the statements were damaging for the reputation of the Administration of the Volgograd Region, as they could make numerous Internet users believe that the Administration has been involved in unclean and unethical - even if not unlawful and criminally punishable - activity condemned by society. It also found that OOO Memo had failed to provide any evidence to prove that the events referred to in the article did take place. Therefore OOO Memo was ordered to publish on the Kavkazskiy Uzel website a retraction to the effect that the statements at issue were false and tarnished the Administration of the Volgograd Region’s business reputation. The District Court also ordered OOO Memo to publish the operative part of its judgment on the website. This judgment was upheld on appeal by the Moscow City Court in 2009.

It was not in dispute before the ECtHR that the order by the domestic courts was an interference with the media company’s right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR accepted that the interference was prescribed by law, based on Article

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152 of the Russian Civil Code, as in force at the material time, conferring the right to bring civil defamation proceedings, inter alia, in order to protect the business reputation of a legal person. The ECtHR reiterated that the ambit of the "protection of the reputation ... of others" clause of Article 10 § 2 is not restricted to natural persons, as it has recognised in other judgments that there can exist a legitimate "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good". The ECtHR observed however that "these considerations are inapplicable to a body vested with executive powers and which does not engage as such in direct economic activities". But the ECtHR also reiterated that in several judgments it has earlier accepted that public bodies can also pursue a legitimate aim by seeking legal protection of their reputation by way of defamation proceedings. In such cases, the ECtHR focussed on the assessment of the proportionality of the interference as part of the test of necessity in a democratic society. Referring to a 2020 statement by the Council of Europe Commissioner for Human Rights highlighting the "growing awareness" about the dangers of SLAPPs for democracy and referring to the power imbalance between the claimant and the defendant in this case, the ECtHR found, nevertheless, it apt to establish, in this case, whether the interference complained of by OOO Memo, was in pursuance of the legitimate aim of "protection of the reputation of others" within the meaning of Article 10 § 2 ECHR.

First, the ECtHR considered that bodies of the executive vested with State powers are essentially different from legal entities, including public or State-owned corporations, engaged in competitive activities in the marketplace as the latter rely on their good reputation to attract customers with a view to making a profit and the former exist to serve the public and are funded by taxpayers. To prevent abuse of powers and corruption of public office in a democratic system, a public authority's activities of all kinds must be subject to close scrutiny, not only from the legislative and judicial authorities but also from public opinion.

The ECtHR also found that allowing executive bodies to bring defamation proceedings against members of the media "places an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task as purveyor of information and as public watchdog". By virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that compete in the marketplace. Therefore, civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation ... of others" under Article 10 § 2 ECHR. This however does not exclude that individual members of a public body, who could be "easily identifiable" in

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view of the limited number of its members and the nature of the allegations made against them, may be entitled to bring defamation proceedings in their own individual name.

Turning to the present case, the ECtHR noted that the claimant in the domestic defamation proceedings is the highest body of the executive of the Volgograd Region, while it is hardly conceivable that it had an "interest in protecting its commercial success and viability", be it for "the benefit of shareholders and employees" or "for the wider economic good". Its members were neither "easily identifiable", and in any event, the defamation case was brought on behalf of the legal entity as such, not any of its individual members. On this basis, the ECtHR reached the conclusion that the proceedings and the consequent interference with the right to freedom of expression of the applicant media company did not meet the requirement of a "legitimate aim" under Article 10 § 2 ECHR. There has accordingly been a violation of Article 10 ECHR. Three judges concurred arguing that they are not convinced that there were good reasons for the Chamber's majority to deviate in a radical way from numerous previous judgments that had accepted the applicability of the aforementioned legitimate aim to various public entities and authorities in different countries, in both criminal and civil contexts. The concurring opinion also states that while it cannot be excluded that defamation proceedings could be intended to have a chilling effect on those who criticise the authorities' activities, "the existence of such an illegitimate aim cannot be presumed, let alone taken for granted, without tangible evidence to that effect. In any event, the determination of the limits of acceptable criticism lends itself to be assessed through the balancing exercise under the proportionality test, in line with the Court's established case-law". As the domestic authorities failed to demonstrate that there was a reasonable relationship of proportionality between the interference in question and the legitimate aim pursued, also the concurring judges agreed with the finding of a violation of Article 10 ECHR in the present case.

Judgment by the European Court of Human Rights, Third Section, in the case of OOO Memo v. Russia, Application no. 2840/10, 15 March 2022

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