

European Court of Human Rights: *Anatoliy Yeremenko v. Ukraine*

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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 concerning defamation proceedings against a journalist following the publication of an article in a weekly newspaper on alleged judicial corruption. The journalist also complained about an injunction ordering to take down the article from the newspaper's website pending the examination of the defamation case. The ECtHR found that, in holding the journalist liable for defamation, the domestic courts had not performed the required balancing exercise between the conflicting interests of the right to reputation and the right to freedom of expression under Articles 8 and 10 of the European Convention on Human Rights (ECHR). The ECtHR found, however, that the interim injunction to remove the article from the newspaper's website had not constituted a disproportionate interference with the journalist's right to freedom of expression. It is this part of the judgment that is highlighted here.

The applicant in the case was a journalist, Anatoliy Yeremenko, who had published an article in the national weekly analytical newspaper *Dzerkalo Tyzhnya*. The article expressed criticism about the way cases were handled and decided at the Donetsk Regional Commercial Court and the Donetsk Commercial Court of Appeal. The article was also published on the newspaper's website. A few weeks later, six judges of Donetsk's courts applied to the Voroshylovsky District Court of Donetsk City (hereinafter the "District Court") for the application of preventive measures. They argued that the article had not been based on fact and breached the honour, dignity, and professional reputation of the above-mentioned courts, their management, and the judges. The claimants stated that they would lodge a defamation claim for damages against the newspaper and the journalist. They argued that their rights were being infringed while the article was still available online, and as such, they requested an order against the editorial board of the newspaper to remove the article from the newspaper's website. The following day, the District Court ordered the editorial board of *Dzerkalo Tyzhnya* to remove the article from the newspaper's website. In its one-and-a-half-page decision the court merely reiterated the content of the claimants' request and noted that the request for an injunction should be granted. Appeals against the injunction order were dismissed, and the impugned article was removed from the newspaper's website. The newspaper published a summary of the retraction requested by some of the judges of the Donetsk courts. However, the six judges were not satisfied with the partial retraction and lodged defamation claims

against the journalist and the board of the newspaper. They claimed that their professional reputation, honour and dignity had been damaged and that some statements in the article had undermined the authority of the judiciary. A local court allowed the judges' claim in part, finding some of the statements in the article to be defamatory. The court ordered the editorial board of Dzerkalo Tyzhnya to publish a retraction of the statements concerned. The journalist was ordered to pay EUR 331 for non-pecuniary damages, as well as legal and court fees. This judgment was upheld by a court of appeal, while the journalist's cassation appeal before the Kiev Court of Appeal was rejected. The journalist lodged an application with the ECtHR, complaining that the court decisions ordering the removal of the article from the website pending the examination of the defamation case and holding him liable for the publication of the impugned article had been in breach of Article 10 ECHR.

In its judgment, the ECtHR first referred to some general principles from its case law, in particular to its Grand Chamber judgment in *Morice v. France* (IRIS 2015-6/1), and reiterated that there was little scope under Article 10 § 2 ECHR for restrictions on debate on matters of public interest, including on remarks on the functioning of the judiciary. A degree of hostility and the potential seriousness of certain remarks did not obviate the right to a high level of protection of freedom of expression, given the existence of a matter of public interest.

Next, the ECtHR evaluated the order to remove the journalist's article from the newspaper's website. The journalist had, in essence, argued that the domestic courts had failed to conduct any preliminary analysis as to whether the published information was true and based on facts, or whether it had violated the rights of the judges who had requested the measure. The ECtHR found, with some hesitation, that the order to remove the article from the website found a legal basis in an article of the Code of Civil Procedure providing for the possibility for an interim injunction before the main claim was lodged. It also agreed that the aim of the injunction order had been to protect the reputation of others and most importantly the maintenance of the authority of the judiciary. With regard the necessity of the injunction, the ECtHR noted that interim injunctions, by their very nature, were temporary measures which merely aim to provide provisional protection to the party concerned pending the examination of the claim on its merits, in cases where the postponement of such measure until after a final decision on the merits would risk causing irreparable harm to the person seeking the injunction or where the judicial examination of the claim would otherwise be impeded. However, it also reiterated that while Article 10 ECHR did not prohibit interim injunctions, even where they entailed prior restraints on publication, the apparent dangers inherent in such measures called for the most careful scrutiny by the Court, which included a close examination of the procedural safeguards embedded in the system to prevent arbitrary encroachments upon the freedom of expression. The ECtHR observed that the injunction did not put an end to the

dissemination of the publication in all forms and was not of a sweeping nature. Therefore the fact that the publication had not been available on the newspaper's website pending the examination of the defamation case had not totally hampered the journalist's ability to disseminate information and ideas. The interference with the journalist's freedom of expression was not therefore of a significant magnitude. Furthermore, as the article had been only removed from the internet site after it had been available to the public for nearly a month, the ECtHR found that such removal did not undermine the very essence of the public debate, while also taking into consideration the need to protect the confidence in the judiciary against destructive attacks which were essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying. Although the ECtHR found it a matter of concern that the domestic courts had been very brief in their reasoning in respect of the injunction, which made it difficult for the ECtHR to assess whether the national authorities had duly balanced the parties' interests at stake, it was of the opinion that, by their very nature, rulings on interim measures were issued as a matter of urgency and could not always contain finely calibrated and detailed reasoning equivalent to that required in the main defamation proceedings. The ECtHR did not find it problematic that the interim injunction concerned the whole article despite the fact that the alleged damaging statements had been only in two paragraphs. In the particular circumstances of the case the ECtHR found, unanimously, that the interim injunction had been necessary and did not constitute a disproportionate interference with the journalist's right to freedom of expression. Accordingly, there had been no violation of Article 10 ECHR on account of the domestic courts' decisions in the injunction proceedings.

Finally the ECtHR evaluated the defamation proceedings in which Mr. Yeremenko was found liable for having published defamatory allegations about the claimants and the judiciary. The ECtHR found that the reasons the domestic courts had adduced to justify the interference with the journalist's rights were not "relevant and sufficient", in particular, due to their failure to address key elements of the case. It also noted that the domestic courts could not be said to have applied standards which were in conformity with the principles embodied in Article 10 ECHR or to have based themselves on an acceptable assessment of the relevant facts. In particular, the domestic courts had not provided relevant and sufficient reasoning demonstrating that the journalist had not acted with the due diligence expected of a responsible journalist reporting on a matter of public interest. Therefore the ECtHR found that the domestic courts had not performed a balancing exercise between the conflicting interests and that the interference with the journalist's right to freedom of expression was not "necessary in a democratic society". The ECtHR concluded, unanimously, that there had been a violation of Article 10 ECHR on account of the domestic courts' decisions in the defamation proceedings.

Judgment by the European Court of Human Rights, Fifth Section, in the case of Anatoliy Yeremenko v. Ukraine, Application no. 22287/08, 15 September 2022

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