European Court of Human Rights: Zöchling v. Austria

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A judgment of 5 September 2023 of the European Court of Human Rights (ECtHR) dealt with a complaint under Article 8 of the European Convention on Human Rights (ECHR) about the refusal to hold the publisher of an Internet news portal liable for hate speech in users' comments against a female journalist. With reference to its earlier Grand Chamber case law in the context of freedom of expression under Article 10 ECHR, as in *Delfi AS v. Estonia* (IRIS 2015-7/1) and more recently *Sanchez v. France* (IRIS 2023-6:1/15), the ECtHR reiterated that when comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of society as a whole may entitle states to impose liability on Internet news portals if they have failed to take measures to remove clearly unlawful comments without delay. According to the ECtHR, a minimum degree of subsequent moderation or automatic filtering is required in order to identify clearly unlawful comments as quickly as possible and to ensure their deletion within a reasonable time, even where there has been no notification by an injured party.

The applicant in this case is a journalist, Christa Zöchling, working for the Austrian news magazine *Profil*. An Internet news portal belonging to the media company Medienvielfalt Verlags GmbH, allows users registered with an email address to post comments relating to the online articles on the portal, without the content of the comments being checked before or after their publication. Users are given notice that unlawful comments are undesirable. The comments are technically cleared for publication by an employee and are visible on the portal under the relevant article. On 11 September 2016 the news portal published an article about Christa Zöchling, along with an image of her. On 12 September 2016 a user posted that he had printed out Christa Zöchling's image and had successfully shot her in the face and encouraged others to do the same. Another user posted a comment calling the applicant a "plague", a "dumb person" and a "larva" and stated that he regretted that gas chambers no longer existed. On 23 September 2016 the applicant asked the company to delete the comments and to disclose the users' data. The news portal deleted the comments within a few hours after receipt of the request and informed the applicant of the users' email addresses on 29 September 2016. The comments had been visible on the portal for 12 days. The users in question were blocked, but Zöchling subsequently failed to obtain the names and postal addresses of the users because their email providers refused to share those data with her.

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Zöchling lodged an application with the Vienna Regional Criminal Court against the Internet news portal claiming damages for the publication of insulting statements. The Vienna court granted Zöchling's request, referring to the content of the initial article, which intentionally stirred up antipathies against Zöchling, the content of the comments, which contained incitements to violence against her, and the fact that offensive comments about Zöchling had repeatedly been posted under articles published on the portal. But in 2017 the Court of Appeal quashed this decision, stating that media owners did not have the obligation to monitor all comments posted on their website, and that they were exempted from liability when they had removed alleged illegal content upon request without delay. The Court of Appeal found that the Internet news portal had acted with the due diligence required under the Austrian Media Act by deleting the impugned comments immediately at Zöchling's request. It was therefore not liable for the damages claimed by Zöchling. Zöchling lodged an application with the ECtHR under Article 8 ECHR, with the complaint that Austria had not fulfilled its positive obligation to protect her private life and reputation when rejecting her claims.

The ECtHR first clarified that it would apply the criteria as developed by the Grand Chamber in the Delfi case. In that judgment the ECtHR identified the following criteria for the assessment of liability for third-party comments on the Internet: the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company. In striking a fair balance between an individual's right to respect for his or her private life under Article 8 and the right to freedom of expression under Article 10, the nature of the comment must be taken into consideration, in order to ascertain whether it amounted to hate speech or incitement to violence. The ECtHR focussed in particular on the question whether or not the removal upon request by Zöchling was a sufficient reason to exempt the Internet news portal from liability. The ECtHR observed that the Court of Appeal did not examine the possibility for the Internet portal to operate a notice-and-take-down system which could have been a useful tool for balancing the rights and interests of all those involved. The ECtHR emphasised that a minimum degree of subsequent moderation or automatic filtering would be desirable in order to identify clearly unlawful comments as quickly as possible and to ensure their deletion within a reasonable time, even where there has been no notification by an injured party. It also noticed that the Court of Appeal did not have regard to the Regional Criminal Court's finding that offensive comments about Zöchling had repeatedly been posted under articles published on the Internet news portal at issue and that the news portal could have anticipated further offences. Furthermore, the Court of Appeal did not consider the Regional Criminal Court's finding that the article the comments were based on intentionally stirred up antipathies against Zöchling, nor did it refer to the content of the comments, despite the fact that they clearly amounted to hate speech and

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contained incitements to violence. The ECtHR also referred to the fact that although Zöchling pursued claims against the anonymous authors of the comments, she was refused access to the authors' data by their email providers.

The ECtHR confirmed that there is no obligation for internet platforms to generally monitor stored information, but it reiterated that a certain balancing is needed between the interests of an applicant claiming damages and thus relying on Article 8, and those of a media owner in protecting his or her rights under Article 10 ECHR. The Austrian Government conceded that such a balancing exercise was necessary and the Court of Appeal explicitly referred to the case of *Delfi AS*, but subsequently did not apply the relevant criteria. The ECtHR found that in the absence of any balancing of the competing interests at issue the Court of Appeal did not satisfy its procedural obligations to safeguard Zöchling's rights to respect for her private life and reputation. The ECtHR therefore found a violation of Article 8 ECHR.

Judgment by the European Court of Human Rights, Fourth Section, sitting as a Committee, in the case of Zöchling v. Austria, Application No. 4222/18, 5 September 2023

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