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Europees Hof voor de Rechten van de Mens

4 december 2018, nr. 11257/16, ECLI:CE:ECHR:2018:1204JUD001125716

(Yudkivska (president), Pinto de Albuquerque, Vehabović, Kūris, Ranzoni, Bošnjak, Paczolay

Noot: T. McGonagle

Roma. Smaad. Aansprakelijkheid. Vrijheid van meningsuiting. Internet. Hyperlinks.

[EVRM art. 10]

In 2013 stopte een bus vol dronken voetbalsupporters voor een basisschool in een plaatsje in Hongarije, waar vooral Romakinderen onderwijs volgden. De supporters beledigden en bedreigden hen en gingen pas weg toen de politie arriveerde. Naar aanleiding hiervan heeft de leider van de Romagemeenschap in het plaatsje een interview gegeven, in aanwezigheid van een leerling en zijn moeder, voor een mediabedrijfje dat zich richt op Roma-issues. In dat interview vermeldde de betrokkene dat ‘Jobbik binnenkwam’ en benadrukte hij dat Jobbik de school had aangevallen, en dat hij er zeker van was dat de supporters leden van Jobbik waren. Naar aanleiding van het incident heeft klager, die een populair online nieuwsplatform exploiteert, een bericht op de website 444.hu gezet waarin het rapporteerde over het incident en waarin het een weblink opnam naar het YouTube-kanaal waarop het interview met de leider van de Roma-gemeenschap was gepubliceerd. Ook andere nieuwsberichten linkten door naar dit interview. Vlak hierna startte Jobbik een smaadprocedure tegen onder meer de leider van de Roma-gemeenschap, het mediabedrijfje waarmee hij het interview had gehad en de nieuwsmedia (waaronder klager) die links naar het interview hadden opgenomen. Jobbik werd daarbij in het gelijk gesteld, waarbij de nationale rechters oordeelden dat ook het linken naar een smadelijk interview een geval van smaad oplevert. Voor het EHRM stelt klager dat daarmee de vrijheid van meningsuiting is aangetast. Het EHRM heeft enige twijfels over de voorzienbaarheid van deze inbreuk op de vrijheid van meningsuiting, maar geeft daarover geen eindoordeel omdat het van oordeel is dat de zaak beter onder het noodzakelijkheidsvereiste kan worden bekeken. Het herhaalt vervolgens een aantal punten uit zijn eerdere rechtspraak ten aanzien van vrijheid van meningsuiting op het internet en de wat bijzondere verantwoordelijkheid die daarbij kan bestaan voor een exploitant van een nieuwssite ten opzichte van de informatie die op die site wordt geplaatst. Het merkt vervolgens op dat deze zaak specifiek draait om de ‘duties and responsibilities’ die een internetmedium heeft als in een artikel een hyperlink wordt opgenomen naar een ander bericht of andere informatie die beschikbaar is op het internet en waarvan later blijkt dat sprake is van smaad. Het Hof wijst daarbij op het bijzondere belang van hyperlinks als het gaat om het navigeren van en naar informatie op het internet en het doorzoeken van de immense hoeveelheid beschikbare informatie. Hyperlinks dragen bij aan de soepele werking van het internet door die informatie aan elkaar te verbinden. Hyperlinks zijn daarnaast als rapportagemedium duidelijk anders van andere publicatiehandelingen, in die zin dat ze eigenlijk alleen doorverwijzen naar content die elders op het web beschikbaar is. De persoon

die de hyperlink plaatst is ook niet verantwoordelijk voor die content, die bovendien ook nog kan veranderen nadat de hyperlink op een website is opgenomen. Ten aanzien van het plaatsen van hyperlinks op nieuwswebsites moeten volgens het Hof dan ook bijzondere criteria gelden, namelijk (1) heeft de journalist in zijn bericht de informatie waarnaar hij doorlinkt omarmd; (2) heeft hij de informatie herhaald, zonder die te omarmen; (3) heeft hij alleen maar een hyperlink geplaatst, zonder de informatie te herhalen of te omarmen; (4) wist of had de journalist kunnen weten dat de informatie smadelijk of anderszins onrechtmatig was; (5) handelde de journalist te goeder trouw, respecteerde hij de ethische normen van de journalistiek en leefde hij de eisen van zorgvuldigheid voldoende na? In het onderhavige geval oordeelt het Hof dat het artikel alleen maar vermeldde dat er een interview was met de leider van de Roma-gemeenschap, zonder melding te maken van de politieke partij Jobbik en zonder te alluderen aan de juistheid of aanvaardbaarheid van de uitingen die deze leider in het interview deed. Van omarming van de inhoud van het interview was dan ook geen sprake. Het Hof merkt vervolgens op dat het ook niet van de klager kon worden verlangd dat hij zich expliciet zou distantiëren van de inhoud van het interview, zoals dat ook in meer traditionele gevallen van interviews alleen nodig is in bijzondere omstandigheden. Weliswaar kan het Hof zich voorstellen dat dergelijke bijzondere omstandigheden zich voordoen en dat er sprake kan zijn van enige verantwoordelijkheid voor de uitingen die elders zijn gedaan, maar in het onderhavige geval was daarvan geen sprake. De vraag of de klager wist of had moeten weten van de smadelijke aard van de uitingen is moeilijk te beantwoorden voor het Hof, omdat de nationale rechters zich daarover niet hebben uitgesproken. Gelet op zijn eigen criteria neemt het Hof niettemin aan dat de klager redelijkerwijs kon aannemen dat de inhoud van het interview binnen de grenzen van de aanvaardbare kritiek zou blijven en dat het daarmee niet onrechtmatig zou zijn om er naar door te linken. Zou het hierover anders oordelen, dan zou dit bovendien een problematisch chilling effect kunnen opleveren. Schending art. 10 EVRM.

Magyar Jeti Zrt
tegen
Hongarije

1. The European Court of Human Rights has written a new chapter in its so-called ‘Internet’ case-law (for overviews, see: ‘Internet: case-law of the European Court of Human Rights’, Research report, 2015 https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf; ‘New technologies’, Fact sheet, 2019 https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf). In the case of *Magyar Jeti Zrt v. Hungary*, it had to consider the role of hyperlinks in the architecture of the internet, and in particular how they influence the free flow of information online.

2. The case originated in an incident in a rural village in Hungary in 2013. A bus bringing a group of apparently drunk football supporters to a football match stopped at a primary school in the village. The children at the school were mainly Roma. The football supporters got out of the bus and sang and shouted racist chants and remarks and threatened the children in the playground of the school. They also engaged in other intimidating behaviour, such as waving flags and throwing beer bottles. The teachers called the police and brought the children inside in order to protect them and made some of them hide under tables and in the bathroom.

3. J.Gy., the leader of the Roma minority local government in the village, gave an interview to a media outlet and attributed blame for the attack to members of Jobbik, a right-wing political party. The applicant company published an article about the incident on the 444.hu website (an internet news portal) and mentioned and hyperlinked to the interview with J.Gy. Jobbik successfully brought defamation proceedings against the applicant company (and others, including J.Gy. and the media outlet that interviewed him and other media outlets which provided links to the impugned video) on the basis of reputational damage.

4. The Court recalled its general principles that shape the right to freedom of expression in the online environment (paras. 63-68). In an age of informational abundance, the internet's capacity to store and communicate vast amounts of information makes it an important enabler and facilitator of the public's access to news and information. Internet news portals cannot simply be equated with traditional publishers, which would make them responsible for third-party comments disseminated via their portals. However, responsibility for user-generated content may arise under specific sets of circumstances; considerations such as a failure to act expeditiously to remove or disable access to illegal third-party content upon becoming aware of its illegality, may be relevant (see, for example, *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015 and *Tamiz v. the United Kingdom* (dec.), no. 3877/14, 19 September 2017).

5. The Court is slowly but progressively consolidating its approach to the specific nature and dynamics of freedom of expression and information online. In this case, the question of liability for a hyperlink to impugned content required the Court to address the specific, distinctive features of hyperlinks in the online ecosystem. Its observations are consistent with, and largely a synthesis of, the wider array of arguments and insights provided by the numerous third-party interveners in the case about how hyperlinks work and why they are so important (paras. 50-55). The Court's observations can be summarized in three main points, each of which has implications for future doctrinal development.

6. First, the "very purpose" of hyperlinks is to direct to other webpages and resources and thus "to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information" (para. 73). Hyperlinks therefore contribute "to the smooth operation of the Internet by making information accessible through linking it to each other" (*ibid.*). This appreciation of the functional value of hyperlinks is important because the Court strives to interpret the right to freedom of expression in such a way as to ensure that it is practical and effective in contemporary society (see, for example, *Airey v. Ireland*, 9 October 1979, Series A no. 32). Without hyperlinks, it would be very difficult to access information *effectively* in a vast and complex system characterized by the networked distribution of information.

7. It should be noted in passing that this approach is in line with emerging case-law in Europe, both at the regional and national levels. The Court of Justice of the European Union (CJEU) has observed, for instance, that "hyperlinks contribute to [the] sound operation [of the internet] as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information" (CJEU, Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV & others*, 8 September 2016, para. 45).

8. Second, "as a technique of reporting", hyperlinks "are essentially different from traditional acts of publication in that, as a general rule, they merely direct users to content available elsewhere on the Internet" (para. 74). They draw readers' attention to the existence of

material on another website, but do not communicate the content of the linked statements as such (*ibid.*).

9. This observation has echoes of the Court's famous *Jersild* judgment, in which it found a violation of the journalist's right to freedom of expression (*Jersild v. Denmark*, 23 September 1994, Series A no. 298). Mr. Jersild had been convicted by the Danish courts for aiding and abetting the dissemination of racist statements uttered by members of a group known as the "Greenjackets", whom he had interviewed in a television programme. Citing its *Jersild* judgment, the Court reiterated that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (para. 80). It added, again drawing on established case-law: "[a] general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas" (*ibid.*). These principles are subject to the proviso that the journalist acts in good faith, in accordance with the ethics of journalism, and that the reporting deals with a matter of public interest. In the present case, the applicant had merely hyperlinked to the interview and had not endorsed its content.

10. Third, the Court notes that "the person referring to information through a hyperlink does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link – a natural exception being if the hyperlink points to contents controlled by the same person" (para. 75). Moreover, "the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public" (*ibid.*). The Court has repeatedly found that the prior availability of particular information, or its availability through other channels, can render the necessity of a restriction on the dissemination of the information through a specific channel no longer necessary in a democratic society (*Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216).

11. Based on the above observations about the particular features and functionalities of hyperlinks, the Court proceeded to identify: "in particular the following aspects as relevant for its analysis of the liability of the applicant company as publisher of a hyperlink: (i) did the journalist endorse the impugned content; (ii) did the journalist repeat the impugned content (without endorsing it); (iii) did the journalist merely put an hyperlink to the impugned content (without endorsing or repeating it); (iv) did the journalist know or could reasonably have known that the impugned content was defamatory or otherwise unlawful; (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?" (para. 77).

12. These particular "relevant aspects" give welcome structure to the Court's assessment of liability for the publication of a hyperlink. If, as is likely, the Court will use the same structure in future cases dealing with similar subject matter, it can anticipate having to answer one big question. In its case-law, the Court has repeatedly stressed the importance of the contributions to public debate made by other actors than journalists, including, individuals, NGOs, academics and bloggers. While those groups of actors do make valuable contributions to public debate, not all of them are subject to well-established systems of professional ethics,

such as in the journalism sector. Bloggers are a case in point: blogging is not governed by a standard or standardized set of ethics. This is partly because the blogging community is disparate and it lacks organisational structures at the sectoral level. This means that aspect (v), above, will require careful reconsideration or adaptation for bloggers (see further, M. Oosterveld and M. Oostveen, ‘Van public watchdog naar public watchblog: het EHRM en journalistieke weblogs’, *Mediaforum* 2013-6, pp. 146-153).

13. To assess the necessity of the interference with the applicant’s right to freedom of expression, the Court still had to examine the significance of the Hungarian courts’ attribution of objective liability for hyperlinking to the impugned content. Objective or strict liability arises automatically from the commission of an act; intent is not relevant for determining liability. In this connection, the Court found that the utterances at the centre of the present case “could not be seen as clearly unlawful from the outset” (para. 82). Its observation about the inability to “exercise control over the content of the website to which a hyperlink enables access” is another relevant consideration in this regard.

14. The Court was also concerned about the broader – direct or indirect – chilling effect that such objective liability could have on freedom of expression on the internet. It warned, specifically, that “such objective liability may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control” (para. 83). Its concerns are well-founded and its unanimous finding of a violation of Article 10 represents a significant stance on an important issue.

15. A final take-away observation about this judgment is the extensive attention given to the arguments and insights about hyperlinks contained in the *amicus curiae* briefs, which were provided by a wide range of interested parties, including academics and leading NGOs such as ARTICLE 19, Electronic Frontier Foundation, Index on Censorship, Access Now and European Digital Rights. This appears to point to constructive engagement by the Court with the extensive submissions it received on very specialized and complex subject matter. It shows how the Court can benefit from external expertise on issues that it has not yet addressed in its case-law.

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