EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 378 (2021)
07.12.2021

Der Standard should not have been forced to reveal online commenters' personal information

In today's **Chamber** judgment[1] in the case of Standard Verlagsgesellschaft mbH v. Austria (no. 3) (application no. 39378/15) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights

The case concerned court orders for the applicant media company to reveal the sign-up information of registered users who had posted comments on its website, derStandard.at, the website of the newspaper *Der Standard*. This had followed comments allegedly linking politicians to, among other things, corruption or neo-Nazis, which the applicant company had removed, albeit refusing to reveal the information of the commenters.

The Court found in particular that user data did not enjoy the protection of "journalistic sources", and there was no absolute right to online anonymity. However, the domestic courts had not even balanced the interests of the plaintiffs with the interests of the applicant company in keeping its users anonymous so as to help promote the free exchange of ideas and information as covered by Article 10. The court orders had thus not been necessary in a democratic society.

Principal facts

The applicant, Standard Verlagsgesellschaft mbH is a limited liability company based in Vienna. It publishes *Der Standard*, a newspaper, and runs an online news portal carrying articles and discussion forums on derStandard.at.

When registering as a user on the website, which allows commenting on the articles, individuals had to provide their names and email addresses and optionally their postal addresses. The website made clear that this information would not be seen publicly and that the applicant company would only disclose it if required to do so by law. The discussion forums were partly moderated. Rules were set out for commenting and for moderation. According to the applicant company, it reviewed 6,000 comments per day, deleting many, and it provided user data when it was clear that rights had been infringed.

Comments at issue

In 2012 an article was published on the website concerning, among other things, K.S., who was at that time a leader of *Die Freiheitlichen in Kärnten* (FPK), a regional political party. More than 1,600 user comments followed, one of which read:

"Corrupt politician-assholes forget, [but] we don't. ELECTION DAY IS PAYDAY!!!!!" (*Korrupte Polit-Arschlöcher vergessen, wir nicht WAHLTAG IST ZAHLTAG!!!!!*).

Another read:

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

"[It was] to be expected that FPOe/K, ...-opponents would get carried away. [That would] not have happened if those parties had been banned for their ongoing Nazi revival." (*War zu erwarten, dass FPOe/K, ... -Gegner ueber die Straenge schlagen. Waere nicht passiert, wenn diese Parteien verboten worden waeren wegen ihrer dauernden Nazi-wiederbelebung*).

K.S. and the FPK asked for the details of the commenters and the deletion of the comments. The applicant company deleted the comments but refused to reveal that information.

In 2013 an interview with H.K., a then member of the national assembly and general secretary of the Austrian Freedom Party (*Freiheitliche Partei Österreichs* – FPÖ) was published. The following comment was posted under the article:

"[I]f we did not perpetually misunderstand [the meaning of] freedom of expression and if undermining our constitution and destabilising our form of government were consequently to be made punishable – or at least, if [anti-mafia law] were for once to be applied to the extreme-right scene in Austria – then [H.K.] would be one of the greatest criminals in the Second Republic ..." (*würden wir nicht ewig meinungsfreiheit falsch verstehen und wäre das sägen an der verfassung und das destabilisieren unserer staatsform konsequent unter strafe gestellt, oder wäre wenigstens der mafiaparagraf einmal angewendet worden auf die rechtsextreme szene in österreich, dann wäre [H.K.] einer der größten verbrecher der 2ten republik ...*)

Again the applicant company deleted the comment but refused to disclose the user information.

Court proceedings

K.S. and the FPK and H.K. initiated separate proceedings against the applicant company with a view to obtaining the user data of the comments' authors in order to institute civil and criminal proceedings against them. In K.S.'s and the FPK's case, the Supreme Court finally ordered the user details to be given to the plaintiffs, holding that as there had been no connection with journalistic activity, there had been no unlawful interference with the applicant company's right to enjoy freedom of the press. The plaintiffs had demonstrated an overriding legal interest in the disclosure of the data. In H.K.'s case, the Supreme Court also ordered the release of the user data, giving much the same reasoning as in the former decision.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, the applicant company complained of the order to disclose the personal details of users of its news portal.

The application was lodged with the European Court of Human Rights on 7 August 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), *President*,
Tim **Eicke** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Armen **Harutyunyan** (Armenia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),

and also Andrea **Tamietti**, *Section Registrar.*

Decision of the Court

The applicant company argued that the user data in question constituted journalistic sources and were thus protected by editorial confidentiality in the same way as were data of authors of readers' letters published in a newspaper. It also argued that the Supreme Court had not considered the particular circumstances of the comments and not balanced the competing rights, as required by the Court's case-law.

The Government argued that the applicant company's role as a host provider offering a discussion forum on its website differed from its role as a publisher of articles. As a host provider, pursuant to the E-Commerce Act it had a duty to disclose certain data to individuals who credibly claimed an overriding legal interest.

The Court found that as the commenters had addressed the public and not a journalist, they could not be considered to have been journalistic "sources". However, there was a link between the applicant company's publication of articles and hosting comments on those articles on its news portal. According to the Court, the applicant company's overall function was to further open discussion and to disseminate ideas with regard to topics of public interest, as protected by freedom of the press. The Court also considered that an obligation to reveal user information would have a chilling effect on contribution to debate. It reiterated that the Convention did not provide for an absolute right to online anonymity. However, anonymity had long been a means of avoiding reprisals or unwanted attention. As such, it was capable of promoting the free flow of opinions, ideas and information including, notably, on the Internet. The Court observed that this anonymity would not be effective if the applicant company could not defend it by its own means. Its lifting had therefore interfered with the applicant company's right to freedom of the press. The Court held that that interference had had the legitimate aim of protecting the reputation of others, and had been lawful.

The Court pointed out that the cases had not concerned the applicant company's own criminal or civil liability. It considered that the comments at issue had been neither hate speech nor incitement to violence, and had been about two politicians and a political party in a political debate of public interest. It had been the job of the domestic courts in this case to balance the competing interests: they had failed to do so, with the Supreme Court, in particular, giving no reasons as to why the plaintiffs' interests had outweighed those of the applicant company's in keeping its users' identities secret. The Court found that for a balancing exercise in proceedings concerning the disclosure of user data, a prima facie examination may suffice which would however require at least some reasoning and balancing.

The Court considered that the domestic courts had overall failed to balance the rights at issue and had failed to give sufficient reasons to justify the interference with the applicant company's rights. The court orders had thus not been "necessary in a democratic society", and there had therefore been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court dismissed the applicant company's claim in respect of pecuniary damage. It considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage the applicant company may have sustained. It also held that Austria was to pay the applicant company 17,000 euros (EUR) in respect of costs and expenses.

Separate opinion

Judge Eicke expressed a partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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