

Volume 13, Issue 1, Winter 2012-2013

Court: European Court of Human Rights
Case: Yordanova and Toshev v. Bulgaria
Date: October 2, 2012
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This case presents a conflict between two fundamental rights within the Bulgarian Constitution: the right to freedom of expression and the right to protection against attack on a person's honor and reputation. Further, the case approaches how the European Court of Human Rights is to balance the rights codified in the Convention and the rights codified by sovereign nation-states.

The European Court of Human Rights found a judgment against the Bulgarian State for having breached Article 10 of the Convention because, while it was prescribed by law and done in pursuit of one or more legitimate aims, it was not necessary in a democratic society to achieve that aim or aims.

Procedural History:

Bulgarian nationals, Ms. Svetlana Stoilkova Yordkanova and Mr. Toshko Nikolov Toshev, ("the Applicants"), filed against the Republic of Bulgaria ("the Government") under Article 34 of the Convention for the Protection of Human rights and Fundamental Freedoms ("the Convention").

The Applicants were journalists employed at *Trud*, a leading national daily newspaper in Bulgaria. Ms. Yordkanova ("First Applicant") was a journalist and deputy editor in *Trud's* criminal department. Mr. Toshev ("Second Applicant") was *Trud's* editor-in-chief. On May 30, 1996 the press service of the Ministry of International Affairs ("the Ministry") announced the arrest of N.T., a former employee of the Ministry and of the National Investigation Service. He was charged with "abusing his office with a view to obtaining pecuniary gain" under Article 387 of the Criminal Code 1968. Specifically N.T. was charged with misappropriating, concealing, and using secret official documents. The Ministry made clear the investigation against him was ongoing. This information was disseminated to many newspapers by the Bulgarian Telegraph Agency.

After learning of this, First Applicant went to the Sofia Regional Military Prosecutor's Office per established practice at the time. Many journalists attended the press release, at which time the prosecutor said that a bag of secret documents containing information about the State-owned metallurgical plant Kremikovtzi was found at N.T.'s home. N.T.'s wife was implicated in the affair and thought to have used those documents to engage in lucrative business ventures involving metals.

The next day, *Trud* and several national papers ran stories about the information the prosecutor gave regarding N.T.'s arrest. First Applicant's article was captioned "Private company's shady iron business discovered" with the headline "Former police officer arrested over bag with secret documents," and included her byline. In the article, First Applicant included the information regarding N.T.'s wife from the prosecutor's office and information about N.T.'s father, who was head of a different district police department. The article referred

to N.T.'s father stating, "...it is unclear whether he was aware of his son's deeds." On August 22, 1996, *Trud* reported that N.T.'s detention was upheld in the case.

Prosecutors attempted to try N.T. six times, but each time the Sofia Military Court referred the case back due to procedural errors. In October of 2003, the case against N.T. was discontinued under a new rule that allowed accused persons to seek discontinuance of proceedings against them if the case had not proceeded to trial for more than two years after bringing charges.

N.T.'s suit against the Applicants:

On May 27, 1999, N.T. sued the Applicants and *Trud's* publisher, Media Holding AD for defamation claiming the May 31 and August 22 articles in 1996 made "untrue and injurious allegations" not based on "a proper journalistic enquiry." He sought compensatory damages and costs plus interest. On July 21, 2000, the case was dismissed. The court found First Applicant's article was based on reliable official sources without any wrongful conduct. Therefore, Second Applicant could not be liable either.

N.T. appealed, but the Sofia Court of Appeals upheld the lower court's judgment on February 13, 2001. The Court of Appeals found that there were not statutory rules at the time the articles were published governing journalistic enquiries and the *de facto* rules of profession allowed First Applicant to rely on the information of the Ministry of Internal Affairs, the Bulgarian Telegraph Agency, and the public prosecutor's statements.

N.T. then appealed his case to the Supreme Court of Cassation. On August 14, 2002, the Supreme Court quashed the Court of Appeal's decision and remitted the case. The Court of Cassation reasoned that in order to determine whether the Applicants were liable in tort, the Court of Appeals should have ascertained the truth or falsity of the assertions made in the two articles because the right to freedom of expression could not be used to infringe the reputation of others. On May 19, 2003, the Court of Appeals agreed to stay the proceedings until N.T.'s criminal case was decided. The case was resumed April 19, 2004 and decided on July 27th of that year. The Sofia Court of Appeal held the Applicants acted tortiously because First Applicant had not followed the customary rules that any information must be checked against at least two independent sources. Therefore, the writing and publishing of the "unverified defamatory allegations" was a breach of general duty under Section 45 of the Obligations of Contracts Act 1951 and Article 39 of the 1991 Constitution for damaging N.T.'s reputation. Because the information was not independently verified by two sources, First Applicant had acted negligently. Second Applicant was under a duty to check, as well, as editor in chief. Media Holding AD was therefore vicariously liable.

The Applicants appealed on points of law including that the Court of Appeal's judgment was a violation of Article 10 of the Convention. On November 11, 2004, a three-member panel of the Supreme Court of Cassation refused to hear the appeal, which was upheld by a five-member panel January 12, 2005 because the amount in controversy was too low.

Domestic Law:

Article 32 § 1 of 1991 Constitution:

“The private life of citizens shall be inviolable. All citizens are entitled to be protected against unlawful interference in their private or family life and against infringements of their honour, dignity and reputation.”

Article 39 of 1991 Constitution:

1. Everyone is entitled to express an opinion or to publicize it through words, whether written or oral, sounds or images, or in any other way.
2. That right shall not be exercised to the detriment of the rights and reputation of others, or for incitement to forcible change of the constitutionally established order, perpetration of a crime or enmity or violence against anyone.”

Issue:

This case presents a conflict between two fundamental rights within the Bulgarian Constitution: the right to freedom of expression and the right to protection against attack on a person’s honor and reputation, and how the European Court of Human Rights is to balance the rights codified in the Convention with those rights codified by sovereign nation-states.

The European Court of Human Right’s Assessment.

The Court found the Bulgarian State acted against the Applicants to constitute interference by a public authority to the right to freedom of expression. Such interference was a breach of Article 10 of the Convention because, while prescribed by law and done in pursuit of one or more legitimate aims, it was not necessary in a democratic society to achieve that aim or aims.

First, it is the duty of national courts to interpret and apply their own domestic law. While the Court can and should exercise a certain power of review, the scope of review is limited by the Convention. It cannot question the way in which the domestic courts have interpreted and applied national law except in cases of flagrant non-observance or arbitrariness. In this light, the Court cannot view the Sofia Court of Appeals’ judgment on the merits of the issue of negligence as arbitrary. The interference was therefore lawful in terms of Bulgarian law. The Court made note that the Applicants “have not sought to argue that the law was not sufficiently accessible or foreseeable.”

Second, the Court accepted the interference as lawful, and therefore, in pursuit of the legitimate aim of protecting N.T.’s reputation, a right codified by the Bulgarian Constitution. *See* Article 32 § 1.

Third, in determining whether the interference was “necessary in a democratic society,” the Court must determine whether the interference corresponds to a “pressing social need.” In order to do this, the Court is not limited only to ascertain if the respondent State exercised its discretion reasonably or in good faith, but must look to the case as a whole. The Court must determine whether the reasons given by the Government to justify the interference were “relevant and sufficient” and “whether the measure taken was proportionate to the legitimate

aims pursued.” The standard is whether the Government has acted in conformity with the principles of Article 10.

While balancing protection of freedom of expression and protection of reputation, the Court noted the “vital role of ‘public watchdog’” the press performs in a democratic society. Therefore, when scrutinizing alleged attacks on reputation, courts must not ignore matters of legitimate public concern by making the press fearful of reporting allegations that might not be proven in court. The articles in question concerned allegation of serious misconduct on the part of public officials in relation to the business of a State-owned enterprise, which are clearly issues of public concern. With respect to the “duties and responsibilities” that apply to Article 10’s freedom of expression, the Court must assess whether the journalist acted “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.” The Court emphasized that the factors bearing on this assessment must be examined as they appeared to the journalist “at the material time rather than with the benefit of hindsight.” The non-exclusive factors noted were as follows: whether the publication contributed to a debate of general interest; the nature of the activities reported; the way the information was obtained and published; the depiction of the person concerned; the source of the information; the urgency of the information; and the perishability of the information.

In light of such assessment, the Court disagreed that the Applicants were under a duty to check official statements made by prosecuting authorities. The inability of First Applicant to identify the prosecutor does not detract from that position. Also, because the courts never expressed any doubts as to whether prosecutor made such a statement, there was no reason to doubt it. Because the Ministry of Internal Affairs and the Bulgarian Telegraph Agency also published the information in question, there was no reason for the Court to question the veracity of the information. The inclusion of the information about N.T.’s wife and father was reasonable because she did not include irrelevant or private details. Their business and public official status were relevant to the story and to the public interest of the story.

The Court noted that when the Sofia Court of Appeals first heard the case, it found First Applicant had not failed to fulfill her professional duty, and that the Court of Appeals must be wary of deterring journalists from fulfilling their function to inform the public.

The Court therefore found the Government’s reasons for its interference relevant, but not sufficient to show necessity. Therefore, the Government violated Article 10 of the Convention.

Damages under Article 41 of the Convention:

The Court awarded First Applicant 4,500 EUR for distress and frustration because of the breach of her right to freedom of expression, and 1,518 EUR for legal costs. The Court did not award Second Applicant any damages as he did make a claim for damages.