Acquittal of Broadcaster for Criminal Defamation and Insult Violates Article 8

Rónán Ó Fathaigh

Following the *Mosley v. the United Kingdom* judgment delivered by the Fourth Section of the European Court some time ago, it would seem appropriate to highlight a very surprising judgment delivered by the Third Section recently which held that there had been a violation of Article 8 where the Romanian courts had acquitted a broadcaster in criminal defamation and insult proceedings concerning statements made in a press release.

The applicant in *Sipoş v. Romania* was a television presenter with the Romanian public broadcaster SRTV. Following her replacement as a presenter, the applicant made a number of statements to the press alleging that the public broadcaster was engaged in censorship. The broadcaster responded by issuing a press release, explaining that the presenter had been replaced due to audience numbers. However, the press release also made reference to the applicant’s emotional state due to family problems, questioned her discernment and suggested she was a victim of political manipulation.

The applicant initiated criminal proceedings for defamation and insult against the director of the public broadcaster. The broadcaster argued that it was merely responding to the allegations of censorship. The Romanian courts acquitted the defendants of defamation and insult, holding that there was no intention to defame or insult, and the defendants had acted in good faith.

The applicant made an application to the European Court claiming that the Romanian courts, by acquitting the defendant broadcaster, had failed in their positive obligations under Article 8 to adequately protect her right to reputation.

The Third Section framed the question before it as whether the domestic authorities had struck a fair balance between the right to reputation and freedom of expression, and noted that positive obligations under Article 8 come into play whenever statements could affect the reputation of a person beyond the limits of acceptable criticism.

The Court first noted the context of the issue: it recognised that the press release was in response to the allegation of censorship being restored at the broadcaster. It also noted that the press release was not written spontaneously, but by a specialised department of the broadcaster.

In relation to the specific statements in the press release, the Court considered that the claim of being a victim of political manipulation was devoid of any factual basis. It also considered that the claim regarding her emotional state was based on private elements of the applicant’s life, and such a disclosure did not seem necessary to the Court.

Finally, the Court noted that given the chilling effect of criminal sanctions, a civil action would have been it more appropriate. However, the Court nonetheless concluded that the statements had crossed the acceptable limit, and the Romanian courts had failed to strike a fair balance between protecting the right to reputation and freedom of expression. Thus, there had been a violation of Article 8, and the applicant was awarded 3000 EUR in damages.
Comment

It is worth pausing to consider this judgment: the Romanian courts acquit a broadcaster for criminal defamation and insult, holding that the crucial elements of the offence were not made out, namely intention or mala fides. Yet, the Third Section comes along, engages in a total reassessment of the facts, disregards the intention requirement, and holds that an acquittal does not adequately protect the right to reputation. This coupled with the fact that a civil action could have been initiated by the applicant. In light of this holding, criticism would seem warranted on a number of grounds:

Firstly, and most strikingly, is the apparent ease with which the Third Section thought it acceptable to interfere with the decisions of the domestic courts: it held that because the statements went beyond the “acceptable limit” (“limite acceptable”, para. 38), there had been a violation of Article 8. It must be asked whether it is legitimate for the Court to assess statements according to some amorphous test such as “acceptable criticism”. This would seem a questionable approach for the Court to take, as it would seem to be an arbitrary threshold, with the Court providing no guidance whatsoever as to what such a threshold entails.

This approach contrasts sharply with the approach of the Fourth Section in the recent case of Kasabova v. Bulgaria, where it considered that it would only interfere with the determination of domestic courts where it was “manifestly unreasonable”, this being quite a high standard. Moreover, the Third Section fails to engage with the long standing principle that the European Court is exercising a supervisory function, and is not to take the place of the national authorities but rather to review their decisions under Article 8, in light of the case as a whole (Fressoz and Roire v. France, Grand Chamber, para. 45).

Secondly, the Court only makes passing reference to the margin of appreciation; it neglects to properly discuss this principle. It is worth noting that the Grand Chamber has held that the choice of the means to secure compliance with Article 8 in the sphere of relation between individuals is in principle a matter that falls within the Contracting States’ margin of application (Odièvre v. France, Grand Chamber, para. 46), with the Court acknowledging the wide margin of appreciation in such circumstances in Armonienė v. Lithuania (para. 38).

Thirdly, and most surprisingly, the Court recognises that criminal sanctions have a chilling effect on speech, citing Cumpănă and Mazăre v. Romania, and further recognises that it would have been more appropriate to initiate civil proceedings available to the applicant. Cumpănă and Mazăre was a seminal Grand Chamber judgment not likely ignored, yet the Third Section passed over the chilling effect consideration without explanation. This would seem questionable, and it is also worth noting that the Court has stated that domestic courts must take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general (Kasabova, para. 55; ). Such a principle is equally applicable to the European Court, and the judgment in Sipoş sends a strange signal to domestic courts in relation to criminal sanctions.

Finally, it would seem curious that the Parliamentary Assembly of the Council of Europe is urging the decriminalisation of defamation and insult (see Resolutions 1123 and 1577), and yet
the Third Section of the Court is holding that a failure to secure a criminal conviction for such offences violates the (unenumerated) right to reputation, in circumstances where a civil remedy is available.

This judgment may be easily dismissed as irrelevant, and with no broader consequence; however, it is precisely such a judgment - with its lack of enunciation of basic principles, sparse reasoning (nine short paragraphs), and absolute dearth of case law citation (five judgments) - which certain sections of the Court will draw upon to continually develop the unenumerated “right” to reputation in a terribly unprincipled fashion.