

IRIS 2020-3:1/18 European Court of Human Rights (Grand Chamber): *Magyar Kétfarkú Kutya Párt v. Hungary*

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The Grand Chamber of the European Court of Human Rights (ECtHR) has confirmed the conclusion of the chamber judgment in the case *Magyar Kétfarkú Kutya Párt v. Hungary* (23 January 2018, see IRIS 2018-3/2). The case concerns the use and promotion by a political party of a mobile application (app) which allowed voters to anonymously share photographs of their ballot papers. The Grand Chamber found that a fine for distributing the app had violated the political party's right to freedom of expression because the interference with the applicant's right was not 'prescribed by law'. It emphasised that restrictions on the freedom of expression of political parties in the context of an election or a referendum call for rigorous supervision from the scope of Article 10 of the European Convention of Human Rights (ECHR).

The applicant is the Hungarian political party *Magyar Kétfarkú Kutya Párt* (MKKP). Its political stance is largely conveyed through satire directed at the political elite and governmental policies and disseminated through its website, campaigns, street art and performances. In the run-up to Hungary's 2016 referendum on the European Union's migrant relocation plan, the MKKP made a mobile app available to voters to enable them to upload and share anonymously photographs taken of their ballots, while encouraging them to cast an invalid ballot. The app also enabled voters to give the reasons for their voting. The National Election Commission (NEC) issued a decision finding that the app had infringed the principles of fairness of elections, voting secrecy and the proper exercise of rights. It ordered the MKKP to refrain from further breaches of section 2(1)(a) and (e) of the Act on Electoral Procedure (EPA) and Article 2(1) of the Fundamental Law and also imposed a fine of EUR 2 700. This decision was upheld by the *Kúria* (the Hungarian Supreme Court), albeit with a different motivation, and it reduced the fine to EUR 330. The MKKP made an application to the ECtHR, which found in its chamber judgment of 23 January 2018 a violation of the MKKP's right to freedom of expression under Article 10 ECHR (see IRIS 2018-3/2). In essence, the chamber found unanimously that the government had failed to demonstrate which interest or legitimate aim under Article 10, section 2 ECHR the ban had served.

In its judgment, the Grand Chamber confirmed that Article 10 applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information. It accepts that providing voters with a mobile application and calling on them to upload and publish photographs of ballot papers, as well as encouraging them to cast an invalid ballot, thus involved the exercise of the

MKKP's right to freedom of expression in relation to both aspects. With regard to the question of whether the interference with the MKKP's rights fulfilled the conditions of Article 10, section 2, the Grand Chamber found that there was no sufficient foreseeability and hence that the interference by the NEC was not 'prescribed by law'. According to the ECtHR, rigorous supervision of this issue not only serves to protect democratic political parties from arbitrary interferences by the authorities, but also protects democracy itself. It emphasized that any restriction on freedom of expression in an electoral context without sufficiently foreseeable regulations could harm open political debate, the legitimacy of the voting process and its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law. The Grand Chamber was of the opinion that the legal provisions in the EPA which the NEC had relied on, lacked clarity, while the potential risk inherent in its interpretation for the enjoyment of voting-related rights, including the free discussion of public affairs, called for particular caution by the domestic authorities. The ECtHR took note of the NEC's argument that the MKKP's conduct jeopardised the fairness of elections and the secrecy of the voting process, while the *Kúria* explicitly dismissed this line of argument. The *Kúria* found that the secrecy of the ballot had not been infringed as the mobile application had not allowed access to the personal data of the users and had thus been incapable of linking a cast ballot to a voter. Furthermore, the MKKP's conduct had had no material impact on the fairness of the national referendum and had not been capable of shaking public confidence in the work of the electoral bodies. Referring to the particular importance of the foreseeability of the law when it comes to restricting the freedom of expression of a political party in the context of an election or a referendum, the ECtHR found that 'considerable uncertainty existed about the potential effects of the impugned legal provisions' applied by the domestic authorities. Therefore, the Grand Chamber is not satisfied that the Hungarian law applicable in the present case, on the basis of which the MKKP's freedom to impart information and ideas was restricted, was formulated with sufficient precision, for the purposes of Article 10 section 2 ECHR, so as to rule out any arbitrariness and enable the MKKP to regulate its conduct accordingly.

The Grand Chamber found a violation of Article 10 ECHR by sixteen votes to one and ordered Hungary to pay damages to the MKKP and to reimburse its costs and expenses. The Russian judge Dedov dissented, arguing in essence that the MKKP's campaign was 'disrespectful in relation to the democratic institution designed for the purpose of decision-making by society'. He referred to the fact that the MKKP sought to influence voters to invalidate their ballots intentionally in order to express their disagreement with the whole idea of the referendum and to encourage voters to draw amusing pictures on ballot papers, while there were many other suitable opportunities for MKKP members, and for those voters who invalidated their ballots, to express their views.

ECtHR Grand Chamber, Magyar Kétfarkú Kutya Párt v. Hungary, Application no. 201/17, 20 January 2020

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