

Court of First Instance

Pleading brief

Lodged by

M. Abdul Hameed Abass Dashti

Defendant

Versus

Public Prosecution

The defendant is indicted for various messages he allegedly published (which is formally contested) on social media.

Defendant lives since March 2015 in forced exile, more particularly in Europe ¹ where he conducts human rights work at the United Nations Human Rights Council in Geneva (Switzerland) and with the European Parliament in Brussels (Belgium).

It is therefore relevant to examine whether the sending of the messages under scrutiny of the Court in the present proceedings could possibly be considered as a criminal offence under the law of European countries.

The matter is ruled in all countries that belong to the Council of Europe by art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter European Convention) adopted in Rome on 4 November 1950 which reads:

“Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

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It is noted that this provision is very similar to art. 19 of the International Covenant on Civil and Political Rights to which both Kuwait and all states of the Council of Europe are parties, and which reads:

“1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

¹ This results from unjust convictions imposed upon him for publishing messages and opinions on various issues related to the international and internal policies conducted by the authorities of Kuwait. These decisions violated defendant's right to freedom of expression. See inter alia the Decision adopted by the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union at its 152nd session (Geneva, 23 January to 3 February 2017) K UW/04 which can be accessed at <http://archive.ipu.org/english/issues/hrdocs/comm152/KUW04.pdf>

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Art. 10 of the European Convention, which has direct effect in countries like Belgium and Switzerland has resulted in abundant case law of the European Court of Human Rights. In the light of that case law it is undisputable that the messages under scrutiny of the Court are protected by the right to freedom of expression and could under no circumstances lead to prosecution.

The relevant case law of the European Court of Human Rights will be discussed hereafter.

The case law of the ECHR is based on one principle: freedom of expression

The architecture of art. 10 clearly indicates that the principle is the freedom of expression which suffers only exceptions in restricted and well-defined situations.

The European Court of Human Rights Court has repeatedly stated that freedom of expression “constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.²

Limitations to the freedom of expression are only in conformity with art. 10 of the European Convention when “**necessary** in a democratic society”. Furthermore, such restrictions must aim to protect “*the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*”

The protection given by Article 10 extends to any expression, notwithstanding its content, disseminated by any individual, group or type of media. The only content-based restriction applied by the Court has dealt with the dissemination of ideas promoting racism and incitement to hatred and racial discrimination. Freedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are

² Lingens v. Austria, 8 July 1986; Şener v. Turkey, 18 July 2000; Thoma v. Luxembourg, 29 March 2001; Marônek v. Slovakia, 19 April 2001; Dichand and Others v. Austria, 26 February 2002.

the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.³

Limitations of the freedom of expression only admitted when "necessary in a democratic society"

The condition of "necessity in a democratic society" requires the determination of whether the interference sought corresponds to a "pressing social need" and whether it is "proportionate to the legitimate aims pursued" ⁴

Under the European Convention of Human Rights, the interference sought by the complainant and the Prosecution would not meet either of these two requirements.

In the context of the examination of the respect of this condition of necessity and in the case that the action balances Article 10 with the right to a person's reputation, the case-law of the European Court of Human Rights has established a strict framework of interpretation and has identified the following criteria ⁵:

- The contribution of the expressions in question to a debate of general interest;
- The notoriety of the person concerned and the purpose of the expression;
- The previous behaviour of the person concerned and the previous release of similar content;
- The method of obtaining the information and its veracity;
- The content, form and impact of the publication
- The gravity of the penalty imposed.

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The most important of these criteria for the present case will be discussed hereafter.

Special protection for press and other participants in public debate.

Article 10 guarantees freedom of expression to "everyone". No distinction is made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom. It 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. ⁶

For many years the European Court of Human Rights has decided that the press can benefit from an enhanced protection of the freedom of expression while it is to be considered as a "watchdog" or a guardian of democracy.

In several recent decisions the Court has extended its caselaw regarding an enhanced protection to actors of civil society. *"The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned."*⁷

³ Handyside v. the United Kingdom judgment of 7 December 1976, § 49.

⁴ Erla Hlynisdottir v. Iceland, 21 October 2014,

⁵ Axel Springer AG v. Germany, 7 February 2012.

⁶ Çetin and Others v. Turkey, judgment of 13 May 2003

⁷ Magyar Helsinki Bizottság v. Hungary, 8 November 2016

When the expression relates to a subject of general interest and the words are entered into the public space, the person who expresses himself must be granted enhanced protection. This is the case here.

Criteria set by the case law of the European Court of Human Rights

The contribution of the expressions in question to a debate of general interest;

To the extent that expressions are not of a purely personal nature but relate to matters of public interest they benefit from an enhanced protection. The litigious messages criticize various aspects of the plaintiff's actions as holder of a public office in particular in his capacity as Speaker of the National Assembly. The lack of democracy, the weakening of the Parliament, dubious agreements, dubious enrolment of voters are by definition matters of public interest.

It must also be noted in this regard that the defendant is former MP and was unduly prevented from participation in the general elections. He continued however to comment political developments in Kuwait in various for a and on social media even if the Prosecution does not establish that the litigious messages were actually send by the defendant. But even if that were so the former position of the defendant makes him by excellence a voice in the public debate in Kuwait. In relation to this matter the European Court of Human Rights considered that *"There is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interference with the freedom of expression of a member of parliament calls for the closest scrutiny on the part of the Court"*⁸

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The notoriety of the person concerned and the purpose of the expression;

According to the well-established case law of the European Court, the role or the function of the person concerned and the nature of the activity which are the subject of the expression in question constitute another important criterion. One should make a distinction between private persons and persons acting in a public context, as political personalities or public persons. Thus, while a private person unknown to the public can claim special protection of his right to privacy, the same is not true of public persons.⁹

The Court distinguishes between private individuals and persons acting in a public context, as political figures or public figures. A fundamental distinction needs to be made between reporting details of the private life of an individual and reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example.¹⁰ The limits of acceptable criticism are accordingly wider as regards a politician as such than as regard a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close

⁸ Otegi Mondragon v. Spain, 15 March 2011

⁹ Giniewski c. France, 31 January 2006

¹⁰ Couderc et Hachette Filipacchi Associés v. France, 10 November 2015

scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.¹¹

All litigious messages criticize the actions of a public office holder in his official capacity as Speaker of the Parliament. None of the messages relate to matters of the private life of the plaintiff.

The gravity of the penalty imposed.

In relation to this question the European Court has stated: *“The Court reiterates that in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature. Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions.”*¹²

The Court has previously held that the imposition of a prison sentence for an offence in the area of political speech will be compatible with freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.¹³

Conclusion

It is therefore clear that the publication of the litigious messages could under no circumstances lead to a criminal conviction in any of the European countries were the defendant is actually residing and deploying his activities.

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¹¹ Lingens v. Austria, 8 July 1986

¹² Couderc et Hachette Filipacchi Associés v. France, 10 November 2015 ; See also Roseiro Bento v. Portugal, 18 April 2006.

¹³ Otegi Mondragon v. Spain, 15 March 2011