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Guest Post: Budinova and Chaprazov v Bulgaria – A guide to public statements degrading minorities

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Introduction

The *Budinova and Chaprazov v Bulgaria* judgment, issued on 16 February 2021, concerns anti-Roma statements made by a politician in Bulgaria. Another judgment issued on the same day, *Behar and Gutman v Bulgaria* is about the anti-Semitic nature of the same statements. In this post the focus is on the former case, for the reasoning is more complex in this one. The question that the European Court of Human Rights (the Court or Strasbourg Court) had to address in these cases, is not whether the statements were directly attributable to the state, but instead, whether the refusal of the Bulgarian courts to accord redress to the applicants regarding the statements was in breach of positive obligations under Article 8 in conjunction with Article 14. The reasoning provides the reader with a crystal-clear guidance on how the context and severity of such statements are to be considered.

The facts of the case

Ataka ('Attack') is a political party, which, since its foundation in 2005, has steadily held around twenty seats in Bulgaria's two-hundred-and-forty seat parliament, and since 2017 is part of the coalition forming the government. The party leader, Volen Siderov, is an author and journalist by profession and as such, he hosts a regular program on *Ataka*'s very own TV channel. As a politician he delivers various public speeches and is a regular interview subject.

In the months leading up to the 2005 elections Mr Siderov has, on at least 10 occasions, talked about 'Gypsy-terror' in his television program. Among others he talked about reverse racial bias describing a '*huge wave of external and internal factors, which wish, which categorically wish and work to de-Bulgarianise Bulgaria. Work to destroy the Bulgarian nation as a nation. Work*

for its Gypsification (...)' And he insisted that '*this terror must be brought to a halt. This terror must be resisted. And I promise you that work is being done in that respect. Hard work is being carried out by Bulgarians who can no longer bear the terrorising of their compatriots and will do all they can for this to cease.*' (See excerpts in paragraph 11)

The applicants - themselves journalists and Bulgarian citizens of Roma origin - sought orders from the domestic courts to stop Mr Siderov from making these statements and to publicly apologise.

In the first hearing, the Sofia District Court listened to audio recordings of Mr Siderov's statements. However, the minutes of the hearing did not include certain key passages, for example the quotes above. The applicants complained that the minutes were not complete and requested for rectification. The first instance court dismissed their claims. It argued that the statements, negative as they might be towards Roma, did not place them as a group in a less favourable position, nor did they constitute incitement to discrimination. Since the case, according to the domestic court, turned on the content of the statement, rather than its form of wording, Mr Siderov's right to express an opinion prevailed over the claims brought under the 2003 Protection from Discrimination Act.

In their appeal the applicants argued that the District Court's approach was formalistic and itself racially biased by turning a blind eye to the effect the statements had on society. However, the City Court upheld the judgment, and subsequently, the Supreme Court of Cassation declined to accept the appeal for examination.

The Strasbourg Court judgment

The European Court of Human Rights was concerned with the manner in which the domestic courts reviewed the applicants' complaints. This way the Court could look at the context in which the statements were made and assess their implication beyond their harm on the applicants as the individual victims. Acknowledging that the applicants were personally and directly affected by the domestic courts' dismissal of their case, it examined whether the Bulgarian authorities properly discharged their obligations to respond adequately to discrimination on account of the applicants' ethnic origin. (See § 41-42)

Another important aspect before delving into the reasoning is looking at third party submissions. The intervenors, The Greek Helsinki Monitor and the European Roma Rights Centre brought several arguments to point out the importance of countering stereotypes and the corresponding wide practice in various United Nations and Council of Europe bodies. The intervenors also emphasized the standpoint of the Committee on the Elimination of Racial Discrimination, namely that individuals may be seen as victims even in cases when offensive remarks are directed not against them personally, but the entire ethnic group of which they are members. And finally, the intervenors highlighted that however well developed the Court's case-law regarding hate speech was under Article 10, protection from it under Article 8 has not yet been brought in line with the international trends just described.

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Previous case-law and emerging principles

In its present judgment, the Court reviewed its previous case-law and distilled the essential guiding principles. The first two cases in which the Court was confronted with similar issues were declared inadmissible. They raised the question whether discriminatory statements were attributable to the State. In *Pirali v Greece* they were not and they concerned a large group, namely all immigrants in Greece, therefore the applicant could not be seen as personally affected. In *L.Z. v Slovakia* the measures were attributable to the State, but the complaints were of a public interest nature rather than showing a negative effect on the applicant's private life.

The Court then referred to the Grand Chamber judgment of *Aksu v Turkey*, in which it laid down that '*any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.*' (See § 58) With this the Court acknowledged for the first time that recognizing the applicant's victim status as a member of the group affected is an important element of effective protection against discrimination. For this recognition the judgment has been widely praised (eg. here and here). However, the judgment did not clarify any factors that influence the 'certain level' of the stereotyping.

It took three further similar cases (*Perinçek v. Switzerland* [GC], *Lewit v. Austria*, and *Panayotova and Others v. Bulgaria*) before the Court saw that, even though emerging principles could be derived from those previous judgments, it was worth spelling them out explicitly. (See § 61-62)

The Court listed the following considerations which may bear on the assessment of public statements about a social or ethnic group alleged to have affected the private life of its members within the meaning of Article 8 of the Convention (See § 63):

a) the characteristics of the group, including for instance its vulnerability and history of stigmatization
b) the content of the statement, in particular the degree of the negative stereotypes it conveys
c) the form and context of the statement, including the position of their author and their capacity to affect the core aspect of the group's identity and dignity
d) the overall prevailing social and political climate at the time of the statements

Application of principles to the facts, and the relevance of the case

Applying these principles in the case of *Budinova and Chaprazov* the Court boldly highlighted the interplay of different factors and how they may reinforce each other. The starting point was acknowledging the disadvantaged and vulnerable position of Roma in Bulgaria. In the Court's view the statements amounted to extreme negative stereotyping, which were enhanced by the fact that due to Mr Siderov's many channels, they have likely reached a wide audience. Furthermore, his anti-Roma stance was a core

element of his politics, which, seen in the light of the fact that shortly after the statements in question *Ataka* became the second largest party, amounted to a deliberate vilification of Roma. (See § 64-68) While emphasizing that each case has to be examined in light of its specific circumstances, it cannot but shine through the judgment that the Court affords great relevance to the precise implications of a statement, beyond its individual author and beyond the individual applicant. In this sense the 'certain level' requirement reveals to be very sensitive to the 'capabilities' of a statement, which demands careful consideration if the domestic authorities are to comply with their obligations under the Convention.

The very lengthy consideration – 13 out of the 18-page-long reasoning – determined whether or not the complaint fell within the ambit of Article 8. This assessment decides the relative weight ascribed to the two rights, freedom of speech and freedom from discrimination. With this in mind, the Court was short and unanimous in their conclusion about the domestic authorities' balancing exercise. Since the domestic courts essentially ignored any indicators that Mr Siderov's statements may justify hatred towards Roma and did not engage in meaningful assessment of the circumstances the Strasbourg Court found a breach of Article 8 in conjunction with Article 14.

Commentary

The Court in this judgment goes beyond the usual reiteration of previous case-law and relevant principles. It makes a gesture, on the one hand, of bringing the case-law in line with international 'best practice' as highlighted by the third-party intervenors. On the other hand, the gesture is to summarise, lay down and clarify in one place the 'how to' of assessing the context of discriminatory public remarks. The importance of this cannot be overemphasised.

First and foremost, in discrimination cases, the sheer number of applications may be indicative of a systemic issue, which in turn needs a systemic approach to remedying it. The Court itself has acknowledged this connection in its education segregation cases (see post on these eg. here, here and here) and has made some remarks to the alarming number of applications from Roma victims of ill-treatment in police custody in several of its judgments. By choosing this present case to summarily clarify how the context and severity of discriminatory attitudes are to be considered under Article 8, the Court conveys a strong message regarding the effectiveness of protection from discrimination. Second, it is extremely helpful for potential victims and their attorneys to understand what types of considerations the domestic courts are expected to carry out in accordance with the Convention. Being able to prepare evidence that fits into this framework will help strengthen their case and accordingly allow for stronger protection of their rights. Finally, clarifying the applicable principles may also be an attempt from the Court to ease its own case load, inasmuch as the accessibility and wider awareness of the Court's case-law has a strong effect on achieving this goal.

Whether we look at this judgment as a checklist for domestic courts, serving up the homework on a silver plate to legal

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practitioners, researchers and law students, or an attempt to ease the Court's case load, it is an absolute win-win scenario. This courteous gesture of putting precedent and principles in order would be definitely welcome in some other areas of discrimination where the Court has long been called to improve its case-law.

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