ANNOTATIE

Panioglu t. Roemenie (EHRM, nr. 33794/14) – Strasbourg judges take a dim view of one judge's criticism of another

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Annotatie bij Europees Hof voor de Rechten van de Mens, 08-12-2020, ECLI:CE:ECHR:2020:1208JUD003379414 (EHRC-2021-0018)

1. The European Court of Human Rights has developed a sizeable body of case-law on freedom of expression and the judiciary. Two major strands in that case-law concern expression *by* judges and expression *about* judges.[1] Both strands come together in the *Panioglu v. Romania* case, in which a judge was disciplined for an article she wrote that contained critical remarks about a fellow judge's integrity. The European Court of Human Rights found no violation of her right to freedom of expression under Article 10 of the European Convention on Human Rights.

2. The facts of the case are rather context-specific and the Court's engagement with them raises few - if any - big issues in terms of its existing principles on freedom of expression and the judiciary. The case arose from an article written by the applicant in which she was very critical of previous (professional) behaviour of a group of prosecutors, including and specifically, Judge L.D.S., who had recently been appointed President of the Court of Cassation. The criticism included unsubstantiated allegations calling into question the moral and professional integrity of Judge L.D.S. The article was published in the applicant's own name, mentioning her title as a judge attached to the Bucharest Court of Appeal.

3. The applicant was disciplined after being found to have breached Article 18 § 2 of the Code of Conduct for Judges, which reads: "The judges and prosecutors were prohibited from

expressing their opinion with regard to the moral and professional integrity of their colleagues." The disciplinary decision was permanently included in the applicant's professional file and it is taken into account when assessing applications for promotion, although this does not prevent her from participating in promotion competitions.

4. The applicant submitted that the formulation of Article 18 § 2 of the Code of Conduct for Judges does not meet the "prescribed by law" criteria of precision and foreseeability, as developed by the European Court of Human Rights, in particular because the concepts of "opinion expressed on the moral and professional integrity" and "colleague" were not precisely defined. The Court recalled and applied the key principles of its relevant case-law and took the view that: i) the applicant, as a professional and experienced judge, could not but have been aware of the content of the provision, and ii) that the possibility of a code-of-conduct penalty must have been foreseeable for her. It added: "had she had doubts about the exact scope of the provision in question, she could have refrained from publishing the article" (para. 106).

5. The Court accepted that the impugned comments did not concern the private life of Judge L.D.S., but "her professional activity and rise to the highest judicial position in the country" (para. 112). The Court noted that these questions were matters of public interest as they concerned "the functioning and the reform of the justice system" (*idem.*), but it did not dwell on the point. In other case-law, the Court has stressed that matters of public interest "undoubtedly [include] questions concerning the functioning of the system of justice, an institution that is essential for any democratic society".[2] It has also recognised "the special role of the judiciary in society" as "the guarantor of justice" (*idem.*).[3] That role requires that the judiciary be subject to scrutiny and that they may be subject to wider limits of acceptable criticism than ordinary citizens when acting in an official capacity. In the present case, that was "especially true", given the "visible public office" of Judge L.D.S. (para. 113).

6. Nevertheless, criticism should not be gratuitous or undermine the authority and impartiality of the judiciary. In the present case, the Court found that the applicant, as a judge, "should have been aware and mindful of the risks involved in publishing her article and the impact it could have had [...] both on Judge L.D.S.'s professional life and on the authority of the judiciary" (para. 119).

7. As to the consequences of the code-of-conduct proceedings and the proportionality of the sanction, the Court noted that the proceedings "did not entail any concrete and imminent loss of judicial office or any pecuniary penalty" for the applicant (para. 120). It noted that the decision of the proceedings was permanently recorded in her professional file and taken into account in her professional appraisal and applications for promotion (but not as the only

factor). This did not preclude the applicant from participation in competitive promotion procedures. All in all, the Court did not find these measures to be disproportionate.

8. The Court briefly recalled that fear of a sanction can have a chilling effect on the freedom of expression of judges, but it did not deem the disciplinary decision excessive in the present case. The Court apparently did not see any need – in the circumstances of the case - to acknowledge that disciplinary measures can have a chilling effect not only on the individual judges directly affected by them, but also on the wider judicial community. In other cases, such as *Baka v. Hungary* and *Kudeshkina v. Russia*, the Court has been more wary of such a wider chilling effect.[4]

9. In order to position the present judgment in the broader case-law of the Court, it is useful to note what the Court did and didn't do. It *did* stress the need for judges to exercise self-restraint when engaging in criticism outside of the court-room. It *didn't* re-affirm how important it is for judges and society that judges can participate in public debate in the first place.

10. It is widely recognised that states have a legitimate interest in requiring civil servants or judges to show a "duty of discretion" on account of their status.[5] Indeed, the duties and responsibilities of judges "assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question".[6] The Court seemed to double down on this point in the present case. It underscored that "the judicial authorities are required to exercise maximum discretion and that discretion should dissuade them from making use of the press, even when provoked" (para. 114).

11. The Court has repeatedly recognised that judges speaking in a personal, or extra-judicial, capacity, can make valuable contributions to public debate, especially in relation to legal matters or the functioning of the legal or judicial system. Any restrictions on the freedom of expression of judges, especially high-ranking judges, calls for close scrutiny. That was the case, for instance, in *Wille v. Liechtenstein*, when the President of the Liechtenstein Administrative Court gave a lecture about constitutional law that included a focus on the competences of the Constitutional Court.[7] This led to the Prince of Liechtenstein subsequently rejecting his proposed re-appointment. In *Baka v. Hungary*,[8] the applicant had been dismissed from his position as President of the Supreme Court after he publicly criticized constitutional legislative reforms affecting the judiciary. The Strasbourg Court found that it was not only his right, but his duty, to comment on such matters – a crucial principle with great practical relevance in countries like Poland where recent judicial reforms have far-

reaching implications for the rule of law. The Court moreover found that his criticism did not go beyond a strictly professional perspective.

12. Given its context-specific nature, this judgment has very limited precedent-setting value. It is likely that similar issues will require fresh engagement by the Court in the future. The Romanian Code of Conduct for Judges prohibits members of the judiciary from expressing their opinions on the moral and professional integrity of their colleagues. Questions of judicial integrity are clearly matters of public interest insofar as they concern the functioning of the system of justice and the special role of the judiciary in society as guarantors of justice. In different circumstances, for example if relevant opinions were to have a strong factual basis, the Court might well reach a different conclusion.

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[1] See further: T. McGonagle, '*Much ado about judges*: perspectieven van het EHRM', *Mediaforum* 2020-1, p. 2-6.

[2] *Prager and Oberschlick v. Austria*, ECtHR 26 April 1995, no. 15974/90, ECLI:CE:ECHR:1995:0426JUD001597490, par. 34.

[3] *Idem.*

[4] *Baka v. Hungary* ECtHR (GC), 23 June 2016, no. 20261/12, par. 167, ECLI:CE:ECHR:2016:0623JUD002026112; *Kudeshkina v. Russia*, ECtHR 26 February 2009, no. 29492/05, par. 99-100, ECLI:CE:ECHR:2009:0226JUD002949205.

[5] *Vogt v. Germany*, ECtHR (GC) 26 September 1995, no. 17851/91, ECLI:CE:ECHR:1996:0902JUD001785191, par. 53.

[6] *Wille v. Liechtenstein,* ECtHR (GC) 28 October 1999, no. 28396/95, ECLI:CE:ECHR:1999:1028JUD002839695, par. 64.

[7] *Idem.*

[8] *Baka v. Hungary* ECtHR (GC), 23 June 2016, no. 20261/12, ECLI:CE:ECHR:2016:0623JUD002026112, par. 167.