

ANNOTATIE

Behar and Gutman v. Bulgaria (ECtHR, no. 29335/13) – General anti-minority hate speech: speaker versus victims

J. Montero Regules

Annotatie bij Europees Hof voor de Rechten van de Mens, 16-02-2021, ECLI:CE:ECHR:2021:0216JUD002933513 (EHRC-2021-0072)

1. On 16 February 2021, the ECtHR delivered two twin judgments developing its case law on hate speech. *Behar and Gutman* and *Budinova*^[1] both originated in a collective litigation in the domestic Romanian courts, and concern anti-Semitic and anti-Roma speech by a xenophobic politician. The judgments contribute to the development of the ECtHR's hate speech jurisprudence in cases brought by victims of hate speech, which is thus far underdeveloped compared to jurisprudence in cases brought by hate speakers. Important questions are raised concerning admissibility requirements, gravity thresholds, applicability of Art. 17, and, mostly, overall different and asymmetric treatment of hate speech cases brought by the speaker and by the victims. This case note focuses on *Behar and Gutman*.

2. The applicants are Bulgarian nationals of Jewish ethnic origin. They took politician Mr. Siderov to Court over his extreme messages towards Jewish people. Mr. Siderov, leader of a far-right party, had been using various platforms, such as newspaper articles, books, a TV program hosted by him and election rallies, to campaign against national minorities – or, as the applicants described, to engage in extreme anti-minority propaganda. In civil discrimination proceedings, the applicants argued that a number of public statements made by him had constituted harassment and incitement to discrimination against Jews on the basis of their Jewish ethnicity or religion, and that each of them, as members of the Jewish minority, had been personally affected by those statements. The domestic courts dismissed their claims, prioritizing Siderov's right to freedom of expression. The applicants brought the case before

the ECtHR under Art. 8, right to private life, and Art. 14, prohibition of discrimination.

3. The victim status in cases of general anti-minority stereotyping, such as *Behar and Gutman*, has proved difficult to be recognized by the ECtHR. Before the present case, the Court had heard five cases of impersonal hate speech victims[2]. All of them were unsuccessful. In three of them, the applications were declared inadmissible because the complaints amounted to *action popularis*[3]; in *Aksu*, the discriminatory intent or effect of the negative stereotyping and insults were not deemed to discriminate the applicants; and in *Lewit*, Art. 14 was not invoked.

4. In the present case, the ECtHR avoided the standing issue by shifting the question of admissibility to compatibility *ratione materiae*. The Court relied on the consequences of the domestic courts' decisions: 'the complaint concerns solely the Bulgarian courts' refusal to accord the applicants redress with respect to those statements'[4]. The applicants' victim status vis-à-vis community othering is therefore not explicitly recognized. As Ilieva has stated[5], this non-recognition of victim status in cases brought by the alleged victims of community othering deepens the asymmetry with abusive speakers' cases, where it is settled that abusive speech affects the 'rights of others'.

5. Assessing the admissibility of the case *ratione materiae*, the ECtHR faces the issue of in which instances general anti-minority stereotyping can harm community members and thus trigger application of Art. 8. In previous cases[6], the ECtHR had established that negative stereotyping of ethnic or social groups had to reach a certain level to be decided on the basis of all the circumstances of the case[7]. The stereotyping had to reach a certain level, to be assessed on a case-by-case basis and owing to the circumstances of the case. In *Behar and Gutman*, the Court introduces another requirement for the application of Art. 8 to negative stereotyping of persons pertaining to a minority group: a threshold of severity, derived from *Denisov*[8], must be reached following a set of non-exhaustive criteria: '(a) the characteristics of the group (...), (b) the precise content of the negative statements regarding the group (...), and (c) the form and context in which the statements were made, their reach (...), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity'[9]. With the introduction of this severity threshold requirement, the Court makes it more stringent to appreciate the seriousness of the harm infringed by a public statement to a social or ethnic group, and thus to trigger application of Art. 8.

6. Following these criteria, the threshold of severity is attained in both cases. The ECtHR admits that the statements in question, which were emitted against a vulnerable minority[10], and which were virulently anti-Semitic[11], amounted to extreme negative stereotyping meant to vilify Jews and to stir up prejudice and hatred towards them, exacerbated by the negationist

nature of the statements[12]. Their spread and impact are deemed limited, because the two books in which the most virulent statements appeared, did not seem to have been in massive circulation. However, the fact that Mr. Siderov was a prominent politician added strength and notoriety to his statements[13]. The statements are extremely virulent, and clearly reach the threshold level required by the Court through the abovementioned criteria. At the outset, this precedent may reinforce the difficulty of attaining the threshold requirement established by the Court with these new criteria. Would this level of virulence be needed for the activating of Art. 8 in hate speech victims' cases, their right to dignity may not find effective protection by the ECtHR.

7. After declaring the case admissible, the Court turns to the merits of the case. The issue is framed as a conflict between Art. 8 and Art. 10, between which a proper balance must be struck. Considering the vehemence of the statements, the ECtHR concludes that the domestic courts did not properly weigh the importance of the two rights in the circumstances of the case. More specifically, 'by in effect ascribing considerable weight to Mr Siderov's right to freedom of expression in relation to the statements impugned by the applicants, and by playing down the effect of those statements on the applicants as ethnic Jews living in Bulgaria, the Bulgarian courts failed to carry out the requisite balancing exercise in line with the criteria laid down in the Court's case-law"[14]. The Court thus found a breach of Art. 8 of the Convention in conjunction with Art. 14.

8. In its assessment of the merits, the ECtHR assumed the applicability of Art. 10. It is simply stated that 'the national authorities must, however, also have regard to the rights of the author of the statements under Art. 10 of the convention'[15]. This way, Mr. Siderov's hateful statements fall under the scope of the right to freedom of expression with no further assessment. This contrasts with the detailed examination of the applicability of Art. 8 to the victims, explained above. The asymmetry in this sense is stark: the hate speaker's right to be entitled to protection is presumed, while the victims' rights are tested for admissibility. The Court further states that both rights are in principle entitled to equal respect[16].

9. The absence of assessment of the hate speaker's statements is even more striking considering their anti-Semitic and negationist nature. It is established case-law that anti-Semitic attacks, and especially Holocaust denial, are excluded from the scope of protection of Art. 10. This is done through the application of the abuse of rights clause (Art. 17), either directly ('guillotine effect') or indirectly (as an interpretative tool when analyzing the interference on the right to freedom of expression)[17]. Considering this established jurisprudence, the question arises, first, as to why Mr. Siderov's statements were directly afforded protection under Art. 10, and second, as to whether his statements would qualify for such protection would an assessment have been made.

10. The effect of applying Art. 17 is to negate the exercise of the Convention right, in this case freedom of expression, and thus is only applicable on an exceptional basis and in extreme cases[18]. The decisive point for Art. 17 is ‘whether the applicant’s statements sought to stir up hatred or violence, and whether by making them (s)he attempted to rely on the Convention to engage in any activity or perform acts aimed at the destruction of the rights and freedoms laid down in it’[19]. Mr. Siderov’s statements were ‘extreme’ and ‘meant to vilify and to stir up prejudice and hatred’, as recognized by the ECtHR[20]. Some of the statements made in his book clearly amount to Holocaust denial[21]. The statements are easily comparable to those in cases where the protection of Art. 10 was denied to statements amounting to anti-Semitism and Holocaust denial, either by direct application of Art. 17[22] or by declaring the complaint manifestly ill-founded using Art. 17 as aid in interpreting Art. 10[23]. It is also difficult to classify the statements as ‘not prejudicial enough’, considering their ECtHR’s description as vilifying and stirring up hatred and prejudice. They are therefore excluded from the cluster ‘less grave’ forms of hate speech where hate speech is deemed as not prejudicial enough and Art. 17 is declared inapplicable[24].

11. The direct affordance of protection to Mr. Siderov’s statements under Art. 10 is therefore at odds with the ECtHR’s previous case-law on hate speech concerning anti-Semitic and Holocaust denial. *Behar and Gutman* is an outsider case in terms of Art. 17 (in)applicability and lack of examination of the expressive content; and it sets a worrying precedence which stands in the way of an uniform applicability of the abuse of rights clause, which may be specially damaging for victims’ cases.

12. The outcome of the ECtHR’s assessment of the necessity of the measure against Mr. Siderov is positive for the applicants in particular, and for victims of general hate speech targeting minorities. This is in fact the first time the Court has found violations in a case of general anti-minority hate speech, which is a relevant and positive development. However, several aspects of the judgment may entail negative consequences for minority victims of hate speech if followed and confirmed by future cases. The Court did not take the opportunity to rule on the issue of *locus standi* of victims concerning discrimination of members of a minority community. Victims’ right to access justice is still unclear. The criteria for appreciating a severity threshold of victims’ stereotyping is systematized, but it remains to be seen to what extent this is a positive development, depending on the ECtHR’s application. The unfortunate lack of assessment of the speaker’s statements under Art. 10 sets a dangerous precedence at odds with the Court’s case-law on anti-Semitic and Holocaust denial cases under Art. 17. This judgment deepens the asymmetry between hate speech cases brought by the speaker under Art. 10 and those brought by the victims under Art. 8 and 14 – the ECtHR should ensure consistency in this matter.

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[1] *Budinova and Chaprazov v. Bulgaria*, ECtHR, 16 February 2021, no. 12567/13, ECLI:CE:ECHR:2021:0216JUD001256713.

[2] *Pirali v. Greece*, ECtHR, 15 November 2007, no. 28542/05 (admissibility decision), ECLI:CE:ECHR:2007:1115DEC002854205; *L.Z. v. Slovakia*, ECtHR, 27 September 2011, no. 27753/06 (admissibility decision), ECLI:CE:ECHR:2011:0927DEC002775306; *Aksu v. Turkey*, ECtHR (GC), 15 March 2012, nos. 4149/04 and 41029/04, ECLI:CE:ECHR:2012:0315JUD000414904; *Lewit v. Austria*, ECtHR, 10 October 2019, no. 4782/18, ECLI:CE:ECHR:2019:1010JUD000478218; *Panayotova and Others v. Bulgaria*, ECtHR, 2 July 2009, no. 27636/04, ECLI:CE:ECHR:2009:0702JUD002763604.

[3] *Pirali; L.Z.; Panayotova*.

[4] *Behar and Gutman*, par. 46.

[5] Margarita S Ilieva, 'Behar and Budinova v. Bulgaria: The Rights of Others in Cases of Othering – Anti-Victim Bias in ECHR Hate Speech Law?' (Strasbourg Observers, 15 April 2021).

[6] See *Aksu; Perinçek; Lewit*.

[7] *Behar and Gutman*, par. 65.

[8] *Denisov v. Ukraine*, ECtHR, 25 September 2018, no. 76639/11, ECLI:CE:ECHR:2018:0925JUD007663911.

[9] *Behar and Gutman*, par. 67.

[10] *Behar and Gutman*, par. 68.

[11] *Behar and Gutman*, par. 69.

[12] *Behar and Gutman*, par. 70.

[13] *Behar and Gutman*, par. 72.

[14] *Behar and Gutman*, par. 105.

[15] *Behar and Gutman*, par. 100.

[16] *Behar and Gutman*, par. 100.

[17] See David Keane, 'Attacking Hate Speech under Art. 17 of the European Convention on Human Rights' (2007) 25 *Netherlands Quarterly of Human Rights* 641 <https://doi.org/10.1177/016934410702500404>; Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' (2011) 29 *Netherlands Quarterly of Human Rights* 54 <<https://doi.org/10.1177/016934411102900105>>

[18] *Paksas v. Lithuania*, ECtHR (GC), 6 January 2011, no. 34932/04, ECLI:CE:ECHR:2011:0106JUD003493204. Par. 87.

[19] *Perinçek v. Switzerland*, ECtHR (GC), 15 October 2015, no. 27510/08, ECLI:CE:ECHR:2015:1015JUD002751008. Par. 115.

[20] *Behar and Gutman*, par. 71, 104.

[21] See *Behar and Gutman*, par. 10-14.

[22] For example, *Garaudy v. France*, ECtHR, 24 June 2003, no. 65831/01 (admissibility decision), ECLI:CE:ECHR:2003:0624DEC006583101.

[23] *Gollnisch v. France*, ECtHR, 7 June 2011, no. 48135/08 (admissibility decision), ECLI:CE:ECHR:2011:0607DEC004813508; *Williamson v. Germany*, ECtHR, 8 January 2019, no. 64496/17 (admissibility decision), ECLI:CE:ECHR:2019:0108DEC006449617; *Pastörs v. Germany*, ECtHR, 3 October 2019, no. 55225/14, ECLI:CE:ECHR:2019:1003JUD005522514.

[24] See *Lilliendahl v. Iceland*, ECtHR, 12 June 2020, no. 29297/18 (admissibility decision), ECLI:CE:ECHR:2020:0512DEC002929718.