CASE ANALYSIS

Ristivojević v. The Commissioner for Protection of Equality;

Country: Serbia;

Judical body: The Supreme Court of Cassation of Serbia;

Year: 2020;

Date of decision: 29.01.2020;

Case no. **Rev 195/2019;**

**Type of law: Civil law;**

**Themes:** discrimination, freedom of expression, academic expression

**Case Summary and Outcome**

The Supreme Court of Cassation of Serbia confirmed the judgment of the Court of Appeal, which overturned the decision of the High Court in Novi Sad, Serbia, which determined that the professor of the Faculty of Law in Novi Sad, Serbia, had committed an act of discrimination against women and LGBT persons, when he expressed his opinion on the new Law on Prevention of Domestic Violence. The Commissioner for Protection of Equality reacted to the views expressed by the professor and filed a lawsuit to the competent court, claiming that professor expressed ideas and attitudes that are disturbing and humiliating. At the final instance, the Supreme Court of Cassation of Serbia considered that the second-instance court has correctly concluded that in the views expressed by the professor in the contested text, he did not insult members of the other sex or members of a different sexual orientation. He has just presented his value judgment on the quality of the Law on the Prevention of Domestic Violence, while criticizing the manifestation of the sexuality of the LGBT group that was expressed during the public walk of LGBT members during the held parade.

**Facts**

The defendant is a known professor of law and after coming into force the Law on Prevention of Domestic Violence from 2016, he wrote an author's text that was published in the media, in which he presented the weaknesses and shortcomings of the said Law in ten parts, primarily in terms of its expediency. He wrote the following:

 *Does the Law serve to protect the weaker persons in the family? No, it serves to protect women regardless of whether they are strong or weak, loved or unloved, nervous, musical or in a good mood, whether they have a lover or not, whether they earn money or are supported, whether they brought some property into the marriage or moved into her husband's house, etc. If the law serves to protect the weak, then I guess it would at least mention children who are the weakest and most vulnerable to domestic violence or elderly parents… perhaps the increase in the volume of domestic violence is (partially or mostly) due to the state's manic display of the so-called reality show programs on television channels with national coverage, in which acts of violence in relationships between people living in the same household are most directly encouraged, or police protection with a ceremonial parade of homosexuals on city streets, which openly celebrates primitive violent, and vulgar sexuality?*

The applicant argued that the defendant grossly insulted and inspired hatred towards women and the LGBT population in his text, stating that the defendant, as a university professor was obliged to take special care of his public appearances.

The court of first instance accepted the claim and determined that the professor committed an act of discrimination, based on the provision of Art. 15, 21, 46, 48, 68 of the Constitution of the Republic of Serbia, provision of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as provision of Article 2, paragraph 1, Article 4, paragraph 1, Art. 8, 9, 11, 12, 20, 21 and 45, paragraph 2 of the Law on Prohibition of Discrimination). The court stated that the defendant expressed ideas and attitudes that are disturbing and humiliating and that he insulted the dignity and incited discrimination and hatred against two groups of people, only because of their personal, inherent characteristics, At the same time, the first-instance court found that statements from the disputed text, advocates wider stereotypes about the patriarchal organization of the family, according to which principle the man puts woman in an unequal position.

The defendant appealed to the Court of Appeals, which overturned the decision of the first-instance court. The court of second instance reiterated well-established standard according to which, when applying the discrimination test, it was necessary to examine whether there is an objective-reasonable justification for making a difference/unequal treatment, in terms of pursuit of a legitimate aim and if such aim exists, whether there was a required proportionality.

**Decision Overview**

Dissatisfied with the decision of the Appellate Court, the Commissioner for Protection of Equality - the prosecutor, filed a review – extraordinary legal remedy before The Supreme Court of Cassation. While it aligned with the Appellate Court, the Supreme Court of Cassation further observed that in the views expressed by the defendant in the disputed text, he did not insult members of the other sex or members of a different sexual orientation. He presented his value judgment on the quality of the Law on Prevention of Domestic Violence, while criticizing the manifestation of the sexuality of the LGBT group that was expressed during the public walk of LGBT members during the parade.

The Supreme Court started from the fact that the defendant in his analysis of the Law did not raise the issue of the difference between the sexes in terms of their equal status, but only underlined the dysfunctionality of the law's provisions, emphasizing its ineffectiveness.

The Supreme Court particularly pointed out the fact that in order to correctly based the decision, it is necessary to analyze the context of the entire text, and not only its separate parts – sentences, at the same time indicating that it is obvious that the defendant's goal, by expressing a certain value judgment, was not to insult members of the other sex or members of another sexual orientation, but rather to express his value judgment when it comes to the issue of general interest.

The Court took the stance that not every negative evaluation of a certain social phenomenon in the form of a value judgment can be considered as a discrimination and that the veracity of the defendant's value judgment is generally not discussed in the case because since it needs to be done only when it comes to the factual allegations. The defendant was allowed to publicly state his value judgment on the issue in question since it represents his right to freedom of expression, which is necessary for the survival and development of a democratic society and which cannot constitute discrimination just because of harshly used words. *A priori* considering such expression as a discriminatory would lead to the chilling effect when it is necessary to discuss issues of general importance.

Finally, the Court clarified that whit an objective assessment of the average reader, it could be concluded that the goal of the defendant's text was to challenge the quality of the Law, not to insult the targeted groups.

DECISION DIRECTION

The Court essentially applied the standard established in the ECHR decision (Handyside v. the United Kingdom from 1976) that the protections for freedom of expression extend to content that might be offensive, shocking and disturbing to someone. The court also clarified the application of the discrimination test, which aims to ensure that not every single expressed difference will be interpreted as illegal, and that the justification of the aim and proportionality must be examined previously.

CASE SIGNIFICANCE

The decision establishes a persuasive precedent within its jurisdiction.