COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS
THIRD SECTION

Application no. 16535/18
By Inge Fernanda Jozef VAN BALLAER
against Belgium

Observations Submitted by the International Senior Lawyers Project Media Law Working Group (ISLP-MLWG) As Third-Party Intervenor

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Application no. 16535/18
VAN BALLAER -v.- BELGIUM

OBSERVATIONS OF THE INTERNATIONAL SENIOR LAWYERS PROJECT (ISLP) ON THE PRINCIPLES RAISED BY THIS APPLICATION

Pursuant to leave granted on _ September 2020 by the President of the Chamber, acting under Rule 44(2) of the Rules of the Court, International Senior Lawyers Project (ISLP) hereby submits its observations on the legal principles that should govern the resolution of the issues presented by this case.

1. This case arises out of the applicant's circulation of a publication concerning a government youth policy in a juvenile court in Mechelen. A judge who was not named in the applicant's documents commenced a criminal prosecution against the applicant for harassment. The criminal conviction of the applicant raises two important principles: (1) that permitting unnamed public officials to punish critics of government contravenes fundamental principles of Article 10, and (2) that when public officials punish criticism of government, Article 10 requires strict application of the identification requirement.

RELEVANT PRINCIPLES

A. PERMITTING UNNAMED PUBLIC OFFICIALS TO PUNISH CRITICS OF GOVERNMENT CONTRAVENES FUNDAMENTAL PRINCIPLES OF ARTICLE 10 OF THE CONVENTION.

2. Reduced to its essentials, in the instant case the applicant, a civilian critic, wrote and distributed documents critical of courts' policy on youth as a whole. A judge who was not named in any of these documents succeeded in obtaining a criminal conviction against the applicant critic for harassment arising out of the documents.

3. We invite this Court to consider the prominent case of *New York Times, Co. v. Sullivan*, where, reduced to its essentials, a group of civilian critics wrote and published criticism of racist misconduct by police. A community police commissioner who was not named in the published criticism succeeded in obtaining a very sizable award of damages for defamation arising out of the published criticism.

4. The U.S. Supreme Court overturned the state courts, holding a broad right for critics to publish criticism of public officials. The decision addressed the first issue, whether government agencies may punish their critics on account of their criticism, saying, "No court of last resort in this country has ever held or even suggested that prosecutions for libel on government have any place in the American system of jurisprudence."

5. The *Sullivan* Court then considered this issue of whether a public official who was not named in the published criticism has standing to punish those responsible for publishing the criticism. The Court totally rejected this proposition. Since prosecutions for libel on government are barred, to allow the public official to sue "would sidestep this obstacle by transmuting criticism of government, however

impersonal it may seem on its face, into personal criticism, and potential libel of the officials of whom the government is composed ... There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied ... Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama court strikes at the very center of the constitutionally protected area of free expression."

6. The *Sullivan* decision determined that the evidence failed to support the jury's finding that the criticism was "of and concerning the commissioner." The value of protecting freedom of expression elevated the importance of the identification – the "of and concerning" – requirement. The Court rejected the idea that "an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations."

7. We respectfully submit that the analysis by the *Sullivan* Court may assist this Court to determine whether the judges in Belgium violated the rights of freedom of expression of the applicant guaranteed by Article 10 of the Convention.

B. WHEN PUBLIC OFFICIALS PUNISH CRITICISM OF GOVERNMENT, ARTICLE 10 REQUIRES STRICT APPLICATION OF THE IDENTIFICATION REQUIREMENT.

8. To permit harassment claims by unnamed public officials would stretch beyond all recognition of the salutary requirement that a libel or insult claimant must be specifically identified. The common law in Britain, the United States, and elsewhere has long protected against claims for defamation brought by unnamed members of a group based upon criticisms voiced about the group under the "group libel" doctrine.[1] This doctrine holds that an allegedly false statement about a group is not "of and concerning" any individual member of the group.[2] Under this doctrine, members of large groups are routinely barred from asserting individual defamation claims based on reports that do not specifically identify them, in order to prevent "the unwarranted proliferation of litigation and its attendant cost to free expression."[3] Even elected leaders of an organization are barred by the group libel doctrine from asserting defamation claims based on statements critical of the group.[4]

9. The group libel bar is not only a common law principle; it is also recognized as a constitutional mandate flowing from the protection of freedom of expression. The United States Supreme Court in *New York Times v. Sullivan* held, on constitutional grounds, that "an impersonal attack on government operations" could not be transmuted into a defamation claim by an unnamed government

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[1] See, e.g. *Abramson v. Pataki*, 278 F.3d 93 (2d Cir. 2001) (no libel claim for unnamed union members based on statement accusing some employees of criminal behavior); *Anyanwu v. Columbia Board Sys., Inc.*, 887 F. Supp. 690 (S.D.N.Y. 1995) (no libel claim for a Nigerian doing business in the U.S. based on defamatory reference to all Nigerians doing business in the U.S.); *Church of Scientology Intern. v. Time Warner, Inc*, 806 F. Supp. 1157 (no libel claim by an individual church for statements critical of religion to which it belonged).
[2] See, e.g., 1 Sack on Defamation (3d ed.) 2.9 at 2-121 (2003); Restatement (Second) of Torts 564A, cmt. a (1977-2004).
[3] Sack on Defamation at 2-122.
[4] See, e.g., *McMillen v. Arthritis Foundation*, 432 F. Supp. 430, 432 (S.D.N.Y 1977) (chairman board and principal shareholder cannot sue for statement critical of the corporation); *Provisional Government of the Republic of New Afrika v. American Broadcasting Cos.*, 609 F. Supp. 104, 104 (D.D.C. 1985) (statements about an organization do not implicate its officers).

official responsible for those operations. Allowing a public officer to pursue such libel claims creates too great a risk "that a good faith critic of government will be penalized for his criticism."[5]

10. In the context of actions challenging a criticism of government, the issue of who has standing to assert such a claim is thus no mere procedural nicety – freedom of political expression hangs in the balance. In order to give effect to the protection of political expression – that "matrix, the indispensable condition of nearly every other form of freedom"[6] – the United States and a growing number of other jurisdictions limit libel standing. They impose on courts an obligation to ensure that any challenged statement makes unmistakably clear that the claimant is specifically named or directly accused of misconduct. The alternative, permitting ostensibly aggrieved public officials to assert harassment claims for statements in which they are not named, would invite abusive and ill-founded litigation, with its attendant chilling effect on political expression.

11. The facts that gave rise to the U.S. Supreme Court's opinion in *Sullivan* were unexceptional and not dissimilar to the facts in the instant case. A political advertisement was published in The New York Times which complained of excessive use of force by the police of the city of Montgomery, Alabama in breaking up and suppressing a non-violent demonstration against official racial segregation. The Montgomery city official, L.B. Sullivan, was responsible for the police, but was nowhere named, described or referred to by name or title in the advertisement. Nonetheless, he brought a civil libel suit against the newspaper and several alleged signatories of the advertisement. Witnesses at the trial testified that they concluded that the criticism related to and applied to Mr. Sullivan.

12. The verdict for Mr. Sullivan and a very large award of damages were overturned by the U.S. Supreme Court in a decision that established significant protections for the mass media. Among these protections is the requirement, mandated by the First Amendment to the U.S. Constitution, that a public official who sues for libel must prove that the offending statements were unambiguously of and concerning him. Rejecting the Alabama court's holding "that in measuring the performance or deficiencies of groups, praise or criticism is usually attached to the official in complete control of the body,"[7] the U.S. Supreme Court found that Mr. Sullivan's supervisory role with the police was insufficient to find the critical advertisement to be of and concerning him.

13. Granting Mr. Sullivan standing, solely on the presumption that criticism of the body under his purview damaged his reputation, would have effectively permitted prosecutions for criticism of government.[8] Standing to bring a defamation claim consequently would have been afforded to any public official in Alabama who led a criticized government body. Allowing purportedly injured public officials to assert harassment claims for statements in which they are not named would have unleashed floodgates of abusive litigation and chilled political expression. In planning how to proceed if the Supreme Court were to grant Mr. Sullivan standing, even the established New York Times decided that in fear of risking its own bankruptcy from defamation suits brought by future unnamed public officials, it would halt its coverage of official racial segregation in Alabama.[9]

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[5] 376 U.S. 254, 292 (1964). See also *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (evidence must show that a false and defamatory statement was "*specifically directed at the plaintiff*" in order for a public official to pursue a libel claim) (emphasis added).

[6] *Palko v. Connecticut*, 302 U.S. 319 (1937).

[7] § 6:9.Who may sue for defamation—The "of and concerning" requirement, 1 Rights and Liabilities in Media Content § 6:9 (2d ed.)

[8] *Id*.

[9] Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment. New York: Random House, 1991.

14. The of and concerning requirement is now considered a "basic cornerstone" of defamation doctrine in American law and has been adopted in a growing number of countries, including South Korea and the Philippines. The doctrine protects two equally paramount yet often competing societal interests by, on the one hand, protecting "individual reputation, an integral element of human dignity, honor, and respect," and on the other hand, protecting "the importance of freedom of expression and open debate on issues of public concern."[10] Curtailing the ability of public officials to punish critics of the institutions they represent protects freedom of expression in democracies both by preserving the critic's right to criticize government, and the public's right to receive and debate such criticism. By limiting standing to those who demonstrate that "in some definite and direct sense," they were the subject of the criticism and the subject by whom reputational injury was suffered, the requirement balances these two essential interests.[11]

15. The Philippines was the first country to adopt a variant of the "of and concerning" requirement. In 1999, the Philippine Supreme Court cemented the requirement in the libel context in *Borjal v. Court of Appeals*[12], in which the executive director of a government transportation conference brought a civil libel action against the publisher and chairman of a newspaper for writing and publishing allegedly defamatory articles. Though the coverage concerned solicitation letters sent by the executive director to private conference donors, the articles did not mention the director nor conference by name. Overruling the courts below, the Philippine Supreme Court found that in order to maintain a libel suit, it was imperative that the plaintiffs be identifiable to a third party as the object of the publication, whether by name or other indicators. The plaintiff in *Borjal* did not meet this bar.

16. ***

17. The judgments of this Court have consistently extended the protections of Article 10 to good faith criticisms of government, governmental institutions and public officials. Such criticism lies at the core of democratic self-governance. Public officials, this Court has written, by virtue of their assumption of office, lay themselves open to close scrutiny and must display greater degrees of tolerance for criticism. Nowhere is this more important than where critics comment on public officials' performance of their governmental duties.

18. Article 10 should require that a public official or public figure who sues for libel must prove that the critical statements were unambiguously of and concerning him. Standing in this Court, in a case concerning criticism of government that implicates freedom of expression, should be limited to plaintiffs of whom a criticism was of and concerning. Any other standard would facilitate legal attacks on the mass media and the engaged citizenry. The effect would be to thwart a key role of a properly functioning press, chill political debate and obstruct citizen participation in self-government.[13] The cost of such harassment actions by unnamed public officials is simply too high for a democratic society to pay.

CONCLUSION

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[10] § 6:9.Who may sue for defamation—The "of and concerning" requirement, 1 Rights and Liabilities in Media Content § 6:9 (2d ed.)

[11] *Id*.

[12] *Borjal v. Court of Appeals*, 301 SCRA 1, 28 (1999).

[13] See, e.g., *Talal v. Fanning*, 506 F. Supp. 186, 187 (N.D.Cal. 1980) (rejecting standing for unnamed members of the Islamic Faith to challenge false statements about their religious beliefs).

19. When politicians deploy libel and insult actions against the mass media ostensibly to vindicate their honor, dignity and reputation, a more realistic view holds that their purpose, and certainly their effect, is to intimidate and squelch their critics. Such actions raise the stakes against the prospect of future political coverage. What suffers is the free flow of information that is vital to vigorous political discourse. If the purpose of Article 10 is to be realized, and if political expression is to be protected effectively, the rules governing political litigation against the mass media are critically important. The needs of a functioning democracy suggest that the rules adopted in this case should be shaped to ensure that political discourse is advanced, not hindered.

Dated: _ September 2020

International Senior Lawyers Project (ISLP)