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

Information Note on the Court's case-law 241

June 2020

Baldassi and Others v. France - 15271/16, 15280/16, 15282/16 et al.

Judgment 11.6.2020 [Section V]

Article 10

Article 10-1

Freedom of expression

Militant action to boycott products from Israel was considered as a discriminatory crime without relevant and sufficient reasons: *violation*

Article 7

Article 7-1

Nullum crimen sine lege

Existence of a case-law precedent rendering a criminal conviction foreseeable:
no violation

Facts – The applicants, who were members of a local collective supporting the Palestinian cause as part of the international campaign "Boycott, Divestment and Sanctions" (BDS) launched by NGOs in 2005 in the wake of an opinion issued by the International Court of Justice, were prosecuted for calling on customers in a hypermarket not to purchase products from Israel, under a subsection of the Law on Freedom of the Press prohibiting incitement to discrimination against a group of persons on account, *inter alia*, of their origin or belonging to a specific nation. The applicants were acquitted at first instance – on the grounds that the subsection on which the prosecution had been based did not apply to the facts of the case – but on appeal a suspended fine of one thousand euros was imposed on them, and they were ordered to pay damages to the associations appearing as civil parties.

Law

Article 7: Clearly, the subsection of the law in question did not explicitly refer to incitement to economic discrimination, which was covered by a different subsection of the section applied, solely mentioning discrimination on account of sex, sexual orientation or disability, and not on grounds of origin or belonging to a particular nation.

However, as case-law stood at the material time, the applicants ought to have known that they were likely to be convicted on that basis for their call to boycott products imported from Israel, since the Court of Cassation had already convicted an applicant for similar acts in the case of Willem.

Conclusion: no violation (six votes to one).

Article 10: In the light of the above conclusion regarding Article 7 of the Convention, the interference had indeed been "prescribed by law". It followed from the reasoning of the judgments delivered against the applicants that their conviction had been intended to protect the right of market access of producers or suppliers of products from Israel; the conviction had therefore been a means of protecting the "rights of others", which aim Article 10 § 2 recognised as legitimate. It remained to be seen whether the interference had been "necessary in a democratic society" in the light of the principles set out in *Perinçek v. Switzerland* [GC] (27510/08, 15 October 2015, Information Note 189).

Considerations on the call for a boycott – A boycott is primarily a means of expressing a protest. Therefore, a call for a boycott, which is aimed at communicating protest opinions while calling for specific protest actions, is in principle covered by the protection set out in Article 10 of the Convention.

However, a call for a boycott constitutes a very specific mode of exercise of freedom of expression, in that it combines the expression of a protesting opinion with incitement to differential treatment, so that, depending on the circumstances, it may amount to a call to discriminate against others.

Incitement to discrimination is a form of incitement to intolerance, which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in exercising freedom of expression. Nevertheless, incitement to differential treatment is not necessarily the same as incitement to discrimination.

Judgment in the case of Willem v. France – The Court's finding in this case (10883/05, 16 July 2009, Information Note 121) was mainly based on the following factors: the fact that in announcing his decision to ask the municipal catering services to boycott Israeli products Mr Willem had been acting in his capacity as mayor and using mayoral powers regardless of the concomitant duties of neutrality and discretion; and the fact that he had made the announcement without a prior debate or vote in the municipal council, which meant that he could not claim to have encouraged free discussion of a subject of public interest.

The present case – The present case was different in that the applicants here were ordinary citizens who were not restricted by the duties and responsibilities arising from a mayoral mandate and whose influence over consumers was not comparable to that of a mayor over his municipal services. Moreover, the reason why the applicants had issued the calls for a boycott which had led to the criminal proceedings of which they complained before the Court had been to trigger or stimulate debate among supermarket customers.

Moreover, the applicants had not been convicted of making racist or antisemitic remarks or inciting to hatred or violence, or of being violent themselves or causing damage. Nor had the hypermarket claimed damages before the domestic courts.

The Court did not wish to call into question the interpretation of the law on which the applicants' conviction was based. Nonetheless, French law as interpreted and applied in the present case prohibited any call for a boycott of products on account of their geographical origin whatever the tenor, grounds and circumstances of that call.

In fact, in convicting the applicants, the domestic court had failed to analyse the actions and remarks prosecuted in the light of those factors, but had concluded, broadly, that the call for a boycott had amounted to incitement to discrimination and "was in no way covered by the right to freedom of expression". In other words, the court had failed to

establish that the applicants' conviction on account of their call to boycott products from Israel had been necessary in a democratic society to attain the legitimate aim pursued.

Yet the court had been under an obligation to give detailed reasons for its decision in this case. First of all, the actions and remarks imputed to the applicants had concerned a subject of public interest (compliance with public international law by the State of Israel and the human rights situation in the occupied Palestinian territories), and had been part of a contemporary debate, in France as throughout the international community.

Secondly, the actions and remarks in question had fallen within the ambit of political or militant expression. It was in the nature of political speech to be controversial and often virulent. That did not diminish its public interest, provided that it did not cross the line and turn into a call for violence, hatred or intolerance. That was the limit that should not be overstepped – it was also, as regards the call for a boycott, the position taken by the Special Rapporteur on freedom of religion or belief in his report to the members of the United Nations General Assembly in 2019.

Thus the applicants' conviction was not based on relevant grounds sufficient to show that the domestic court had applied rules consonant with the principles set out in Article 10 and had conducted an appropriate assessment of the facts.

Conclusion: violation (unanimously).

Article 41: EUR 380 in respect of pecuniary damage and EUR 7,000 in respect of non-pecuniary damage awarded to each of the applicants.
