Европейски омбудсман

Решение по случай 3133/2004/JMA - Оценката на Комисията за испанското законодателство относно излъчването на борби с бикове

Решение
Случай 3133/2004/JMA - **Открит на** 21/12/2004 - **Решение от** 12/01/2006

Жалбата касае решението на Комисията да прекрати действията си по официална жалба, в която подателят твърди, че испанският закон в изпълнение на Директива 89/552/ЕИО [1] , а именно Постановление 22/1999, не съдържа задължението, определено в член 22 на директивата, по силата на което телевизионните предавания не следва да включват програми, които могат сериозно да увредят физическото, умственото или моралното развитие на непълнолетните, по-конкретно програми, в които има безпричинно насилие, например борби с бикове, по мнението на жалбоподателя.

Комисията оспорва това, като твърди, че всички задължения по силата на директивата са правилно транспонирани чрез Постановление 22/1999 и че член 17 на постановлението напълно отразява задълженията, определени с член 22 на директивата. Тя смята, че въпреки че в испанското законодателство не се споменава за безпричинното насилие, тази концепция, както и концепцията за порнографското съдържание, са посочени в директивата само за илюстрация на съдържанието на телевизионни програми, които биха могли сериозно да увредят развитието на непълнолетните. По мнението на Комисията обаче обхватът на тази разпоредба не се ограничава единствено до тези два конкретни аспекта и може да включва и други ситуации.

Омбудсманът отбелязва, че член 22 на директивата изрично забранява на държавите-членки да допускат телевизионните предавателни компании под тяхната юрисдикция да излъчват програми, които могат сериозно да увредят развитието на непълнолетните. Въпреки това директивата не съдържа дефиниция на конкретния вид програми, които държавите-членки трябва да смятат за увреждащи развитието на непълнолетните, независимо че споменава порнографските програми и програмите с безпричинно насилие като примери, спадащи към тази категория. Като се позовава на член 249, параграф 3 на Договора за ЕО и на съдебната практика на съдилищата на Общността Омбудсманът твърди, че транспонирането на една директива в националното законодателство не налага непременно разпоредбите на тази директива да бъдат разписани в точно същата формулировка в конкретни изрични законови разпоредби от националното законодателство, тъй като общият правен контекст може да бъде достатъчен за това, ако действително осигурява пълното прилагане на директивата по

ясен и точен начин.

Омбудсманът отбелязва, че член 22 на директивата и разпоредбите от испанското законодателство за нейното прилагане, а именно член 17 на Постановление 22/1999 са почти идентични, с тази разлика, че испанският закон не споменава конкретно програмите с порнографско съдържание или безпричинно насилие. Както се подчертава в анализа на Комисията за адекватността на това транспониране, всяка програма с порнографско съдържание или безпричинно насилие със сигурност би увредила развитието на непълнолетните, поради което попада в обхвата на испанските прилагащи разпоредби. Като отчита формулировката и обхвата на цитираните по-горе разпоредби Омбудсманът смята, че позицията на Комисията е основателна. Поради това заключението на Омбудсмана е, че решението на Комисията да не предприема процесуални действия за нарушение срещу испанските органи и съответно да прекрати своите действия по официалната жалба на подателя е основателно.

[1] Директива 89/552/ЕИО на Съвета от 3 октомври 1989 г. относно координирането на някои разпоредби, формулирани в действащи закони, подзаконови и административни актове на държавите-членки, отнасящи се до упражняване на телевизионна дейност, ОВ 1989 L 298, стр. 23.

Strasbourg, 12 January 2006
Dear Mr C.,

On 18 October 2004, you lodged a complaint with the European Ombudsman against the European Commission, on behalf of the organisation “Asociación Nacional para la Protección y el Bienestar de los Animales”(ANPBA). Your complaint concerned the alleged failure on the part of the Commission to consider properly the allegations made in a formal complaint you had lodged with that institution and which had been registered under file number 2003/5164.

On 21 December 2004, I informed the President of the Commission of this complaint and I asked him to submit an opinion. On 1 April 2005, the Commission sent me its opinion, which I forwarded to you with an invitation to make observations. On 31 May 2005, you sent me your observations.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with the case.

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into your complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission.

THE COMPLAINT

The facts of the case according to the complainant are, in summary, as follows:

Complaint 1770/2004/JMA

On 9 June 2004, the complainant had lodged a previous complaint with the European Ombudsman, which was registered under file number 1770/2004/JMA. In his complaint, the complainant explained that, on 16 October 2003, he had submitted a complaint to Mrs Vivian Reding, Commissioner responsible for culture, on behalf of the organisation “Asociación Nacional para la Protección y el Bienestar de los Animales”(ANPBA). In his complaint, the complainant alleged that the Spanish authorities were allowing bullfighting shows to be broadcast at times when children were likely to be watching television, in violation of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (1) [“Directive 89/552/EEC”]. The complainant referred to the obligations enshrined in Article 22 of the Directive which requires Member States to take measures to ensure that television broadcasts do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve gratuitous violence. This ban also extends to other programmes which are likely to impair the development of minors, except where it is ensured that minors in the area of transmission will not normally hear or see such broadcasts. The complainant noted that, following an amendment of the original Spanish rules implementing the Directive -Statute 22/1999, which modified Statute 25/1994- the applicable Spanish rules do not make any explicit reference to gratuitous violence.

Following Mrs Reding's reply of 28 October 2003, the Commission's Secretariat-General informed the complainant on 17 November 2003 that his complaint had been registered under file number 2003/5164. On 18 March 2004, the complainant sent a letter to the Commission containing additional information. He did not receive an acknowledgement of receipt of this letter. Having learnt that the Spanish authorities were asking the Commission not to pursue its inquiry into the complaint, the complainant wrote to the institution on 16 April 2004. In the absence of a reply to his e-mail to the Commission's Secretariat-General, the complainant lodged a complaint with the Ombudsman in which he alleged that the Commission had failed to reply to his requests for information concerning the handling of his complaint.

In view of the nature of the problem, the Ombudsman informally contacted the responsible Commission services which, on 29 June 2004, informed him that a reply had been sent to the complainant on 28 June 2004. The Ombudsman therefore considered that the Commission had taken steps to settle the matter, and closed the case on 20 July 2004.

Complaint 3133/2004/JMA

On 18 October 2004, the complainant wrote again to the Ombudsman. In this letter, he explained that, on 28 June 2004, the Commission had asked him to submit any supporting

evidence he might have, so that its services could review all available information and take a final decision on the case. The complainant responded to this request by letter of 22 July 2004. On 20 August 2004, the Commission informed him by letter that it did not consider the situation to be contrary to EU law. The Commission's letter, signed by Mr van der Pas, Director-General for Education, stated that the Spanish authorities had justified the broadcast of bullfighting shows on the grounds that events of this type were part of the Spanish cultural tradition. The Commission considered that this explanation was reasonable, since the cultural exception was recognised in Article 151 EC and in the pertinent recitals to Directive 89/552/EEC. As regards the Spanish implementing legislation, the Commission took the view that the text of the Spanish Statute 22/1999 appeared to have correctly implemented the obligations of the Directive. On 16 September 2004, the Commission services informed the complainant of their intention to propose that the Commission close the case unless he could submit additional evidence.

The complainant argued the Commission's position was unreasonable and not supported by a proper legal analysis of the provisions of the Spanish implementing legislation in the light of the Directive. He underlined that the most recent Spanish legislation for the implementation of Directive 89/552/EC, namely Statute 22/1999, had not correctly transposed Article 22 of the Directive because it failed to include the notion of "gratuitous violence". By contrast, the previous national legislation (Statute 25/1994) had specifically included this concept. The complainant argued that the Directive, in particular Article 3 (1), only allows Member States to lay down more detailed or stricter rules, but does not contemplate the inclusion of less stringent provisions.

The complainant alleges, in summary, that the Commission's decision to close his formal complaint failed properly to consider his allegation that the Spanish legislation for the implementation of Directive 89/552/EEC did not contain the obligation for television broadcasts not to include any programme which might seriously impair the development of minors, in particular programmes that involve gratuitous violence.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first explained the background of the case, and described its exchange of correspondence with the complainant. It referred, in particular, to the arguments made in the letters of its services of 20 August and 16 September 2004.

The Commission noted that the complainant's main allegation in his complaint to the Commission of 16 October 2003 was that the broadcast of bullfighting shows by Spanish television channels at times when children were likely to be watching the programme, constituted a breach of Article 22, paragraph 2 of Directive 89/552/EEC, which obliges Member States to take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts. This provision makes no reference to gratuitous violence, which is only

contemplated in the first paragraph of Article 22.

As regards the correspondence between the Directive and the Spanish implementing legislation, namely Statute 22/1999, the Commission took the view that all the obligations of the Directive had correctly been transposed in the Spanish legislation. It argued that Article 17 of the Spanish Statute 22/1999 fully reflected the obligations set out in Article 22 of the Directive. The Commission argued that, even though the Spanish legislation did not include a reference to gratuitous violence, this concept, as well as that of pornography, are mentioned in Article 22, paragraph 1 of the Directive only to illustrate the contents of a television programme which might seriously impair the physical, mental or moral development of minors. In the Commission's view, however, the scope of this provision is not limited to these two specific aspects, but could also encompass other situations. As stated in its letter of 20 August 2004, the Commission took the view that, in line with the subsidiarity principle, it is for the Member States to define the situations in which the obligations of Article 22, paragraph 1 of the Directive should apply. In use of that power, the Spanish authorities concluded that bullfighting shows do not trigger the application of the above provision, since these events constitute a part of the Spanish cultural tradition. The Commission noted that, if other Member States disagreed with the point of view of the Spanish authorities, they could restrict the broadcast of the programme in question to their territory by using the procedure set out in Article 2 *bis* of the Directive.

In view of the above considerations, the Commission argued that its services had acted correctly when they proposed that the Commission should close the complaint and that, therefore, there had been no maladministration.

The complainant's observations

In his observations, the complainant repeated the allegations made in his complaint.

He underlined that the Commission's interpretation of the Directive was not correct, and that the references made in Article 22, paragraph 1, of the Directive were binding on the Member States. Accordingly, the Spanish legislation for the implementation of the Directive could not ignore the concept of gratuitous violence laid down in the above provision.

THE DECISION

1 The Commission's evaluation of the allegation made by the complainant

1.1 In his complaint to the Ombudsman, the complainant alleges that the Commission’s decision to close his formal complaint failed properly to consider his allegation that the Spanish legislation for the implementation of Directive 89/552/EEC did not contain the obligation for television broadcasts not to include any programme which might seriously impair the development of minors, in particular programmes that involve gratuitous violence.

The complainant notes that the most recent Spanish legislation for the implementation of Directive 89/552/EEC, namely Statute 22/1999, had not correctly transposed Article 22 of the Directive by excluding a reference to the notion of "gratuitous violence". The complainant argued that the Directive, in particular Article 3 (1), only allows Member States to lay down more detailed or stricter rules, but does not contemplate the inclusion of less stringent provisions.

1.2 The Commission argues that all the obligations of the Directive have been correctly transposed by the Spanish legislation, and that Article 17 of the Spanish Statute 22/1999 fully reflects the obligations set out in Article 22 of the Directive. The Commission considers that, even though the Spanish legislation did not include a reference to gratuitous violence, this concept, as well as that of pornography, are mentioned in Article 22, paragraph 1 of the Directive only to illustrate the contents of a television programme which might seriously impair the physical, mental or moral development of minors. In the Commission's view, however, the scope of this provision is not limited to these two specific aspects, but could also encompass other situations.

The Commission also took the view that, in line with the subsidiarity principle, it is for the Member States to define the situations in which the obligations of Article 22, paragraph 1 of the Directive should apply. In use of that power, the Spanish authorities concluded that bullfighting shows do not trigger the application of the above provision, since these events constitute a part of the Spanish cultural tradition.

1.3 As a preliminary remark, the Ombudsman wishes to point out that the correspondence between the Commission and the complainant deals both with the question of whether Spanish legislation adequately transposes the provisions of Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (2) , and with the question of how the relevant law should be applied to the broadcasting of bullfighting. However, the complainant's allegation to the Ombudsman concerns only the first of these questions, i.e., the adequacy of transposition. Accordingly, the Ombudsman's inquiry has only addressed this last issue.

1.4 The Ombudsman notes that this case raises questions of interpretation pertaining to the scope of a number of provisions of the Directive. As set out in recital number 13 of its preamble, the Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting within the EU. The recitals to the Directive, however, also recognise that the independence of cultural developments in the Member States and the preservation of cultural diversity in the Community remain unaffected.

Article 2 (2) of the Directive establishes that Member States must ensure the freedom of reception of television broadcasts and restrain from restricting retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the Directive. Member States may, however, suspend retransmission of television broadcast provided that they meet the conditions and follow the procedure laid down in Article 2 (3).

In those areas covered by the Directive, Article 3 (1) allows Member States to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules.

Chapter V of the Directive concerns the protection of minors. It contains a single provision,

Article 22, which reads as follows:

"Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."

1.5 The Ombudsman notes that the above provision explicitly prohibits Member States from allowing broadcasters under their jurisdiction to broadcast television programmes which might seriously impair the physical, mental or moral development of minors. The Directive does not contain, however, a definition of the specific types of programmes which Member States ought to consider as impairing the physical, mental or moral development of minors, even though it mentions those involving pornography or gratuitous violence as examples to be included in that category.

It is therefore at issue whether the references made in the Directive to pornography or gratuitous violence constitute specific obligations which Member States are bound to transpose literally in their implementing legislation.

1.6 The nature of a directive and the obligations derived thereof are spelled out in Article 249 (3) EC:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

As Community courts have consistently held, transposing a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law, since the general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (3) . Moreover, the Member States have a discretionary power to choose the form in which they can implement a directive, provided that they ensure that the directive functions effectively, account being taken of its aims (4) .

1.7 On the basis of the information provided in the course of the inquiry, it appears that the Spanish authorities transposed the provisions of the Directive through Statute 25/1994 of 12 July, which was subsequently amended by Statute 22/1999 of 7 June. The obligations contained in Article 22 of the Directive are transposed into Spanish law by Article 17 of Statute 22/1999 of 7 June. This provision states that:

"(1) Television broadcasts shall not include any type of programmes, views or messages which might seriously impair the physical, mental or moral development of minors, or programmes which contain any incitement to hatred on grounds of race, sex, religion, nationality, opinion or any other personal or social circumstance. (2) The broadcast of programmes likely to impair the physical, mental or moral development of minors shall only be possible between 22h00 and 06h00 of the following day, and must be preceded by visual and acoustic warnings about their content."

1.8 The Ombudsman notes that Article 22 of the Directive and its implementing provision into Spanish law, namely, Article 17 of the Spanish Statute 22/1999 of 7 June, are almost identical as regards the provisions concerning minors, except that the Spanish law does not specifically mention programmes that involve pornography or gratuitous violence. The Ombudsman notes that the Commission's analysis of the adequacy of transposition, as set out in point 1.2 above, implies that any programme involving pornography or gratuitous violence would certainly impair the physical, mental or moral development of minors and would therefore fall within the scope of the Spanish implementing provision. Taking into account the wording and scope of the above-mentioned provisions, the Ombudsman considers that the Commission's position appears to be reasonable.

In view of the above findings, the Ombudsman takes the view that the Commission's decision not to pursue infringement proceedings against the Spanish authorities and, accordingly, to close the formal complaint submitted by the complainant appears to be reasonable.

1.9 From the information submitted in the course of the inquiry, it appears that the Commission referred in detail to the above arguments in order to justify its position, not only in its opinion to the Ombudsman, but also in its letter to the complainant of 20 August 2004, in which it announced the position of its services in regard to the case.

1.10 In the view of the findings in points 1.8 and 1.9 above, the Ombudsman concludes that the Commission acted within the limits of its legal authority in deciding not to pursue infringement proceedings against the Spanish authorities, and that it gave the complainant a reasonable justification for its decision. The Ombudsman therefore finds no evidence of maladministration.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to be no maladministration by the Commission. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) 1989 OJ L 298 p. 23.

(2) 1989 OJ L 298 p. 23.

(3) Case C-58/02 *Commission v Kingdom of Spain* [2004] ECR 0000, par. 26 (see case law mentioned therein, Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 9, and Case C-217/97 *Commission v Germany* [1999] ECR I-5087, paragraph 31).

(4) Case 48/75 Reference for a preliminary ruling Jean Noël Royer [1976] ECR 00497 par. 518.