

Willem v France

European Court of Human Rights (“ECtHR”)

16 July 2009

Application 10883/05

NB: this ruling is now likely to be reviewed by the Grand Chamber of the ECtHR

1. Opening remarks on *Willem v France*

The impact of this decision is extremely limited.

The ECtHR found that the criminalisation of a junior state official for publicly encouraging/inciting discrimination against economic producers on the basis of nationality is an interference with his right to freedom of expression. It further found that the interference could be justified under Article 10(2) of the European Convention on Human Rights (‘ECHR’) thereby concluding that France was not in violation of the ECHR.

The case therefore turns on very specific and unique facts; it cannot be used as authority for a general proposition that calling for a boycott of goods originating from a specific state is a criminal offence. Furthermore, the case does not support the proposition that the ECtHR permits the criminal prosecution of anyone who calls for a boycott of goods from a specific state. Rather, it considers such criminalisation an interference with Article 10 ECHR that must be justified under Article 10(2) or the state will find itself in breach of the Convention. In the case of *Willem v France*, specific facts led the ECtHR to the conclusion that the requirements of Article 10(2) were satisfied.

Whether the application of this decision will have any practical impact in the future will therefore depend heavily on the prevailing domestic law and specific facts of any future case, to be assessed in accordance with ECHR principles at the level of the national courts and, failing that, at the ECtHR.

2. Factual Background

The applicant is a French national who was born in 1934 and lives in Seclin (France), a municipality of which he was mayor (for the Communist party) at the relevant time (2002-2003).

On 3 October 2002, during a session of the town council and in the presence of journalists, Mr Willem announced that he intended to call on Seclin catering services to boycott Israeli products in the municipality. Following numerous protests, he reiterated his intention in a communiqué posted on the website of the city of Seclin.

He stated that he had taken that decision to protest against the policies of repression, invasion and military occupation of the then Israeli Prime Minister, Ariel Sharon. Representatives of the Jewish community in the département of the “Nord” filed a complaint with the public prosecutor, who decided to prosecute the applicant for provoking discrimination on national, racial and religious grounds, under Articles 23 and 24 of the Freedom of the Press Act of 29 July 1881.

Mr Willem was acquitted by the Lille Criminal Court. The Attorney General appealed this decision. The appeal was successful and on 11 September 2003, Mr Willem was sentenced by the Court of Appeal of Douai for inciting discrimination on grounds of nationality and infringing the normal exercise of an economic activity (pursuant to articles 23 and 24 of the Freedom of the Press Act 1881, and articles 225-1 and 225-2 of the French Criminal Code) and given a 1,000 Euro fine.

Mr Willem lodged a cassation appeal against the decision at the Cour de Cassation (the highest court in France for civil and criminal cases) but he was ultimately unsuccessful.

Mr Willem took the view that his call to boycott Israeli products was part of a political debate concerning the Israeli-Palestinian conflict and was without doubt a matter in the general interest. He brought a case against France in the ECtHR, in which he argued that his conviction violated his right to freedom of expression within the meaning of Article 10 ECHR.

Article 10 ECHR states:

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3. Relevant French laws

Articles 23 and 24 of the Freedom of the Press Act 1881

Articles 225-1 and 225-2 of the French Criminal Code

The prosecution decided to charge the mayor with “incitement to discriminate” on grounds of nationality, race or religion, contrary to Articles 23 and 24 of the Freedom of the Press Act 1881, which criminalises such an act (in this instance, incitement – or provocation - to discriminate on grounds of nationality). Articles 225-1 and 225-2 of the French Criminal Code provide that to hinder the normal exercise of any economic activity by making a distinction between persons, notably in relation to whether or not they belong to a specific nation, constitutes punishable discrimination. Under the Freedom of the Press Act 1881, there is no need to prove actual damage to the group targeted in the “provocative discourse” in order to convict someone on grounds of incitement (or provocation) to discriminate. The same is true for "infringement of economic activities" under the French Criminal Code.

4. Findings of the European Court of Human Rights

The Court found the criminal prosecution of Mr Willem did interfere with his freedom of speech (satisfying Article 10(1) ECHR). However, after considering Article 10(2) ECHR,

the Court decided that there had been no breach of Article 10 of the Convention because the interference:

- Was lawful; **and**
- Pursued a legitimate aim; **and**
- Was proportionate

The Court observed that the interference with Mr Willem's freedom of expression had been provided for by law, being based on Articles 23 and 24 of the Freedom of the Press Act 1881 and Articles 225-1 and 225-2 of the French Criminal Code, and that it pursued a legitimate aim, namely to protect the rights of Israeli producers.

The Court reiterated that for interference with freedom of expression, especially with that of an elected representative, to be permissible under Article 10 of the Convention, it had to be "necessary in a democratic society". In this context, the Court emphasized that it was fundamental to democracy to defend free political debate, which was at the heart of the notion of a democratic society. Hence, previous case-law acknowledged the right of participants in debate to engage in a certain amount of 'acceptable' exaggeration or provocation – see *Mamère v France* (12697/03), judgment of 7 November 2006.

The Court stated that the applicant's status as a mayor was an important factor in the case. On the one hand, the intrusion on his freedom of speech required very strict control by the Court. On the other hand, a Mayor had a duty of reserve and neutrality in adopting acts for his municipality.

The Court found that by communicating his intention during a meeting of the city council and through the website of the city without any debate or vote taking place, Mr Willem could not contend that he had favoured a free discussion on a topic of general interest. Further, the Court noted that during the proceedings in the national courts, the Attorney General stated that the mayor could not substitute his own policy for the policy of the government of the country by ordering a boycott of products from a foreign country.

Like the French courts, the ECtHR took the view that Mr Willem had not been convicted for his political opinions *per se* but for inciting the commission of a discriminatory act that was punishable under French law. The Court found that the message posted on the website of

the municipality of Seclin aggravated the discriminatory character of the position of the applicant, which was confirmed by the use of polemical terms.

Finally, the Court found that the penalty imposed on him had been relatively moderate. It therefore found that the interference had been proportionate to the legitimate aim pursued and that there had been no violation of Article 10 of the Convention.

5. Dissenting opinion of Judge Jungwiert

Judge Jungwiert adopted a more rigorous approach to the above issues in his dissenting opinion. Underlying his dissent with the majority judgment was a concern that the French Government had failed to establish imperative reasons for restricting freedom of speech. According to Judge Jungwiert, the actions and words of Mr Willem (and similar situations that may occur in the future) should be considered as part of a debate of public interest, where it is acceptable for there to be a certain degree of exaggeration and provocation (see: *Mamère v France* (12697/03), judgment of 7 November 2006). He was firmly convinced that a democratic society must tolerate and even permit such debates or incitements.

Judge Jungwiert considered the extensive use of the Freedom of the Press Act 1881 before the French national courts, as upheld by the Court of Appeal. He noted that the majority in the Court of Appeal condemned the applicant for 'provocation to discrimination' on the basis of the 1881 Act, which refers to the French Criminal Code. However, the French Criminal Code does not refer to discrimination based on economic motives.

Moreover, Judge Jungwiert noted that the national courts did not take into consideration the general context of this case: the escalation of the Israeli-Palestinian conflict which gave rise to several resolutions from different international bodies. The declarations of the mayor took place in a peculiar international context and they relate to a question of general public interest and, at a local level, to several activities organized by Seclin. The declarations were upheld during a meeting of the city council which is a privileged place for public debate. For Judge Jungwiert, it was essential to take into consideration the place where Mr Willem made his declaration, because it gave the opportunity to elected members of the city council to protest against the decision and for the applicant to explain himself.

Judge Jungwiert considered that the most important question the Court addressed was whether the infringement was “necessary in a democratic society”. However, even though the majority of the Court recognised that this question must be examined, in Judge Jungwiert's opinion no relevant justification had in fact been provided in this case.

Judge Jungwiert concluded by stating that it seemed obvious to him that Mr Willem's conviction was a disproportionate and unnecessary infringement of his freedom of speech.

6. Comment and analysis

The implications of this decision for individuals in France

Elected officials calling for boycott of Israeli products in the "public sphere" can be prosecuted on the basis of French law, without such action constituting a violation of Article 10 of the Convention.

Thus, Article 10 of the Convention does not permit the prosecution of any individual who publicly calls for boycotts during a political debate, even if such boycotts are considered to be discriminatory against economic producers on the basis of nationality. Although French law does criminalise such conduct, it is not criminalised at the European level or in all European states. Furthermore, given the fact-specific nature of this case, it is likely that both the French domestic courts and the ECtHR reach a different conclusion on the “necessity” and “proportionality” requirements of Article 10(2) ECHR when dealing with private citizens or when dealing with public officials in a different context.

It is important to note that the domestic law decision against Mr Willem was a departure from previous French case-law on the infringement of the normal exercise of economic activity (articles 225-1 and 225-2 of the French Criminal Code). Previously, the Cour de Cassation upheld such convictions only when there was actual implementation of the intention to boycott, for example the inclusion of a clause in a contract. In this case, the question of the impact of any boycott was not discussed.

Cour de Cassation (Criminal Chamber), 9 November 2004.

Cour de Cassation (Criminal Chamber), 18 December 2007.

The implications of this decision for individuals in other Council of Europe countries

The impact of this decision beyond France is extremely limited because it relates to the specific facts of the case and to specific French laws.

The ruling **does not** lay down a principle that it is a permissible interference with Article 10 of the Convention for any Council of Europe country to criminalise the incitement to boycott the goods of a particular nation, still less does the ruling operate as legislation across Europe to pass any such laws. Whether states criminalise such acts depends on the legislature of each country.

In the UK, for example, there is no existing statutory legal provision which provides for an offence of encouraging/inciting/provoking national discrimination against economic producers. Other states may provide in their domestic law for the criminalisation of such conduct. Whether the application of such laws will constitute a violation of Article 10 of the Convention will have to be considered as each case arises; *Willem v France* does not provide a precedent making such laws automatically compatible with Article 10 ECHR. As the Court itself noted, the French laws did indeed interfere with Mr Willem's Article 10 rights; it was the specific and unique facts of this case that justified this interference.

For example, if,

1. a prosecution was against a private individual; *or*
2. there were alternative means of preventing national discrimination against economic producers; *or*
3. the punishment was more severe than the 1,000 Euro fine imposed on Mr Willem.

then the ECtHR may reach a different conclusion on the question of whether the state's interference with an individual's freedom of expression under Article 10 of the Convention was lawful.