Olivier G v. Le Soir

Belgian Supreme Court, C.15.0052.F, 29 April 2016

The Belgian Supreme Court has confirmed the existence of a right to be forgotten online under Belgian law in a case involving a doctor's request for anonymisation of his identity in an online newspaper article first published in 1994.

In a ruling dated 29 April 2016[1], the Belgian Supreme Court ('Cour de Cassation'/'Hof van Cassatie') confirmed the existence of a right to be forgotten online under Belgian law by upholding a decision of the Court of Appeal of Liège dated 25 September 2014[2].

This case more largely addresses the balance between two fundamental rights, namely the freedom of expression (here in the form of the freedom of the press) and the right to privacy, from which the right to be forgotten is derived.

Facts and decision of the Court of Appeal

The case before the Court of Appeal of Liège was brought against Belgian newspaper Le Soir by a doctor. The latter objected to the fact that since 2010, the newspaper had made available in its online archive a non-anonymised copy of an article published in 1994 about his conviction for a serious drink-driving car accident in which two people died. The doctor, who had in the meantime been criminally convicted, served his sentence and obtained the expunging of his criminal record ('réhabilitation'/'eerherstel'), requested the anonymisation of his identity in the article in question by the newspaper, invoking his right to be forgotten. As the newspaper denied his request, the doctor subsequently sued the newspaper to obtain the same.

Relying upon the existing body of Belgian case law in relation to the right to privacy enshrined in the Belgian Constitution, the European Convention on Human Rights and other international treaties, the Court of Appeal first considered that a right to be forgotten indeed exists as part of the right of privacy. Building on this finding, the Court ruled that, next to the more traditional right to be forgotten which prevents the republication of someone's judicial past, the right to be forgotten should also extend to online information.

The Court went on to consider that the following conditions would have to be collectively fulfilled for an online right to be forgotten to apply: (i) the initial publication was legitimate, (ii) the initial publication reported judicial facts, (iii) the current divulgation thereof serves no interest, (iv) the reported facts have no historic interest, (v) a long time has elapsed between the initial publication and the publication online, (vi) the individual does not occupy a public function, (vii) the non-divulgation of the publication is in the interest of the re-socialisation of the individual and (viii) the individual has paid his/her debt to society.

Applying the above criteria, the Court of Appeal concluded that the above conditions were fulfilled in the case at hand. It saw no public interest in the doctor's name remaining available online, while this continued availability led to the creation of a 'virtual criminal record' causing serious reputational damage to the affected individual. In particular, the Court underlined the fact that due to the indexing of the newspaper's archive by search engines such as Google, a simple search on the individual's first and last name would bring up the article in question.

The Court of Appeal therefore held that the doctor was entitled to request that the newspaper withdraw his name from the online version of the newspaper article in question and that the newspaper's refusal to do so constituted a tort.

Decision of the Supreme Court

The newspaper subsequently filed an appeal with the Belgian Supreme Court against the ruling of the Court of Appeal sentencing it to anonymise the article in its online archive.

In its decision, the Supreme Court first highlights that the online publication of the archives amounts to a new disclosure of the judicial past of the affected individual. It observed in particular that by this online archiving, Le Soir had enabled the article to become "front page news" again through the search engine on its own website and through third party search engines such as Google.

Before the Supreme Court, the newspaper repeated its objections to the requested anonymisation of the article already raised with the lower court. It argued in particular that this would violate the freedom of the press by limiting the right of information of the public, who would not be able to access complete online archives. The Supreme Court did not however follow the newspaper's argument, considering that the right to publish archives online and the right for the public to access such archives are not absolute, but need to be balanced against other fundamental rights, such as the right of privacy in the case at hand.

In weighing these rights against one another, the Supreme Court took into account in particular the traditional criteria to evaluate whether an interference with a fundamental right is acceptable under the European Convention on Human Rights, namely (i) the legality, (ii) the legitimate purpose and (iii) the necessity and proportionality of the interference in a democratic society. The interference in the case at hand is the alteration of an archived newspaper article to protect the fundamental right to privacy of an

individual having exercised his right to be forgotten. Following the reasoning of the lower court in this respect, the Supreme Court concluded that the right to be forgotten exercised in the manner requested by the affected individual in this particular case is indeed (i) provided by law, (ii) serves a legitimate purpose and (iii) is necessary and proportionate in a democratic society. While the second and third point are the result of an analysis of the specific facts of this case, the confirmation by the Supreme Court that the right to be forgotten in an online context is "provided by law" is the key learning of this decision.

The Supreme Court thus confirmed the ruling of the Court of Appeal, following its reasoning that the identity of the doctor remaining available in the online archive of the newspaper accessible via search engines more than 20 years after the accident occurred, is causing the affected individual a disproportionate amount of damage which legitimates an interference with the freedom of the press of the newspaper. The newspaper consequently commits a tort by refusing to anonymise the disputed article and will thus have to replace the first and last name of the defendant with an 'X' in the online version of the article and pay him €1 as moral damages.

The context of this decision

The existence of a right to be forgotten online was also recently recognised at European Union ('EU') level in the 2014 decision of the Court of Justice of the European Union in the *Google Spain* case[3], which has similarities with the above case and was referred to in both of the above decisions as an additional consideration (both cases focus however on the applicable Belgian and international legal norms). In the *Google Spain* case, the Court of Justice considered that a 'right to be forgotten' applies to irrelevant and outdated information about individuals published online even if the content was initially lawfully published, unless there is a public interest in this information remaining available (e.g. because the person has a public function).

The above decision of the Court of Justice relied upon the current EU data protection framework (the Data Protection Directive[4]), which does not explicitly provide for a right to be forgotten. Under the General Data Protection Regulation, which will replace the current data protection framework and will apply in all EU Member States, including Belgium, as of 25 May 2018[5], individuals are explicitly granted a right to be forgotten. The relevant provision allows individuals to whom the information relates to request the deletion of inaccurate or outdated information about them, which it is no longer necessary to retain or which the individual no longer consents to having retained.

The Belgian Supreme Court's decision is particularly interesting as it addresses the difficult balance between the right to be forgotten, which derives from the right of privacy, and another fundamental right, namely the freedom of expression through the freedom of the press. It emphasises that while a case-by-case analysis is required in each balancing exercise, the right to be forgotten may under certain circumstances trump the freedom of the press in the online world.

Conclusion

The Supreme Court attempted to establish a fair balance between the right to privacy and the freedom of the press by concluding that the anonymisation of a newspaper article without deleting it entirely does not exceed the acceptable restrictions to the freedom of the press. This is consistent with the position of the Court of Justice of the EU in the *Google Spain* case.

Nevertheless, the right to be forgotten will remain a hot topic in the data protection field for years to come. It is expected that the highest national and supranational courts will continue to play a key role in shaping the right to be forgotten online and determining the conditions for its exercise, taking into account in particular how it may affect other fundamental rights, in particular the freedom of the press.

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1. Court of Cassation, C.15.0052.F, 29 April 2016.
2. Court of Appeal of Liège, 25 September 2014, RG n°2013/RG/393.
3. C-131/12 *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (ECJ, 13 May 2014).
4. Directive 95/46 EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281), hereinafter 'Directive 95/46.'
5. Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016 L 119.