European Court of Human Rights: *Beizaras and Levickas v. Lithuania*

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In a case about hate speech against homosexuals on Facebook, the European Court of Human Rights (ECtHR) delivered an important and well-documented judgment (61 pages). The ECtHR found that the Lithuanian authorities have violated the European Convention on Human Rights (ECHR) because they had not fulfilled their positive obligations to protect the targeted persons against discrimination (Article 14) and against breach of their privacy (Article 8). The ECtHR also came to the conclusion that Lithuania has not effectively responded to the applicants' complaints of discrimination on account of their sexual orientation, and that this amounted to a violation of Article 13 ECHR (right to an effective remedy). In this case the Lithuanian authorities had refused to initiate pre-trial investigations into the reported messages inciting to hatred and violence based on sexual orientation. The ECtHR builds its findings on the positive obligation by state authorities to secure the effective enjoyment of the rights and freedoms guaranteed under the ECHR, this obligation being of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation. According to the judgment, authorities are to combat hate speech and homophobic hate crimes by applying criminal law, considered in such cases as a justified and necessary interference with the right to freedom of expression.

In 2015, Pijus Beizaras posted a photograph on his Facebook page depicting a same-sex kiss between himself and his friend, Mangirdas Levickas. The picture, meant to announce the beginning of their relationship, went viral online, receiving more than 2 400 likes and more than 800 comments. The majority of the online comments incited to hatred and violence against LGBT people in general, while numerous comments directly threatened Beizaras and Levickas personally. Some of the comments stated that the kissing homosexuals 'should be castrated or burnt', while others expressed the hope that their heads would be 'smashed in and their brains shaken up' and that all 'faggots' would be shot, burned or exterminated. Beizaras and Levickas requested the Lithuanian Gay League (LGL), of which they were both members, to notify, in its own name, the Prosecutor General's Office of the hateful comments, as they considered that such comments were criminal and merited pre-trial investigation. They asked the LGL Association to act on their behalf, as this association was advocating for LGBT rights and because they feared retaliation by the authors of the online comments should

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they personally lodge a complaint with the prosecutor. A few days later, the LGL Association lodged a complaint with the Prosecutor General's Office, requesting that criminal proceedings be initiated regarding thirty-one comments posted on Facebook. However, the public prosecutor refused to launch a pre-trial investigation for incitement to hatred and violence against homosexuals, and the national courts confirmed this decision on all levels. In essence, the Lithuanian authorities were of the opinion that the comments, although vulgar and unethical, did not constitute a crime and that the posting of a picture depicting a same-sex kiss was, in itself, a form of provocative and eccentric behaviour, which, furthermore, did not contribute to social cohesion, as Lithuanian society, on the whole, very much appreciated traditional family values.

Beizaras and Levickas complained before the ECtHR that they had been discriminated against on account of their sexual orientation, which had been the reason underlying the domestic authorities' refusal to open a pre-trial investigation regarding the hateful comments posted on Facebook. The European Court's task, in particular was to determine whether the decision by the prosecutor to discontinue the criminal investigation, subsequently confirmed by the national courts, was motivated by a discriminatory attitude and stereotypes related to sexual orientation.

The ECtHR left no doubt that the comments at issue affected Beizaras and Levickas' psychological well-being and dignity, falling within the sphere of their private life under Article 8 ECHR. Given some express references to Beizaras and Levickas' sexual orientation, it was clear to the ECtHR that the domestic courts' disapproval of the couple demonstrating their sexual orientation was one of the reasons why they had refused to open a pre-trial investigation. The ECtHR agreed that Beizaras and Levickas have made a *prima facie* case showing that their "homosexual orientation" played a role in the way they were treated by the Lithuanian authorities.

Next, the ECtHR disagreed with the finding by the Lithuanian authorities that the offensive and hateful comments at issue did not reach the threshold for being qualified as hate crimes. It recalled that comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on the face of it, may in principle, require states to take certain positive measures. Furthermore, inciting hatred does not necessarily entail a call for an act of violence or other criminal acts (see also *Vejdeland a.o. v. Sweden*, IRIS 2012-5/2). The ECtHR stated that if comments such as those uttered in this case did not amount to inciting not only hatred but even violence on the basis of sexual orientation, it was hard to conceive what statements would. It found that the attitudes or stereotypes prevailing over a certain period of time among the majority of the members of society may not serve as justifiable grounds for discriminating against persons solely on the basis of their sexual orientation, or for limiting the right to the

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protection of private life. Therefore, the assessment made by the Lithuanian authorities, which had served as a basis for refusing a pre-trial investigation, was not in conformity with the fundamental principles in a democratic state governed by the rule of law.

The ECtHR also disagreed with the Lithuanian authorities' argument that the comments lacked a 'systematic character', since most of the negative comments had been written by different people. The ECtHR held that even the posting of a single hateful comment, inciting to violence against homosexuals on a Facebook page was sufficient to be taken seriously, while in reality the case was about more than just single hateful comments. Indeed, the photograph had gone viral online and had received more than 800 comments. The ECtHR also referred to a report by the European Commission against Racism and Intolerance (ECRI) on Lithuania which indicated that the country had a problem in this domain and that most of the hate speech took place on the Internet and on social networks.

Finally the ECtHR clarified that criminal sanctions, including those against the individuals responsible for the most serious expressions of hatred, that is, inciting others to violence, are justifiable or even necessary, and that this equally applies to hate speech against persons' sexual orientation and sex life. The Court observed that the case at hand concerns undisguised calls for an attack on the applicants' physical and mental integrity, which require protection by criminal law. However, due to the Lithuanian authorities' discriminatory attitude, the relevant provisions in the Lithuanian criminal law were not employed in the instant case, and the requisite protection was not granted to the victims.

For all these reasons, the ECtHR found it established, firstly, that the hateful comments, including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general, were instigated by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence. The ECtHR came to the conclusion that Beizaras and Levickas suffered discrimination on the grounds of their sexual orientation. Accordingly, it held, unanimously, that there has been a violation of Article 14, taken in conjunction with Article 8 ECHR. The ECtHR also found that Beizaras and Levickas have been denied an effective domestic remedy as guaranteed by Article 13 ECHR, in respect of their complaint concerning a breach of their right to private life, on account of their having been discriminated against because of their sexual orientation. Lithuania is ordered to pay a total of EUR 15 000 to Beizaras and Levickas as a form of just satisfaction.

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