ECtHR: *Carl Jóhann Lilliendahl v. Iceland*

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In a highly topical decision on hate speech, the European Court of Human Rights (ECtHR) found that the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) can be limited when it is necessary to protect the right of homosexual persons to enjoy human rights to exactly the same extent as others, irrespective of their sexual orientation (see also *Beizaras and Levickas v. Lithuania*, IRIS 2020-3/21). It found that a criminal conviction in Iceland for hate speech against homosexuals, expressed via the Internet, had not violated Article 10 ECHR.

In reaction to an online news article about LGBT-education and counselling in elementary and secondary schools, the applicant in this case, Carl Jóhann Lilliendahl, expressed a series of negative statements about homosexuals and homosexuality, referring to "sexual deviation" and copulation by animals. He qualified the plan of introducing education and counselling on homosexuality in schools as "disgusting". Lilliendahl was prosecuted for publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity, in violation of Article 233 (a) of the General Penal Code. After first having been acquitted by the District Court of Reykjavík, Lilliendahl was convicted by the Supreme Court of Iceland. The Supreme Court reasoned that the limitation established by Article 233 (a) was clearly necessary in order to safeguard the rights of social groups that had historically been subjected to discrimination. Furthermore, the protection afforded to such groups by Article 233 (a) was compatible with the national democratic tradition, reflected in the Icelandic Constitution, of not discriminating against persons based on their personal characteristics or elements of their personal lives, and it was in line with international legal instruments and declarations to protect such groups against discrimination by way of penalisation. According to the Supreme Court, Lilliendahl's public statements constituted the "prejudicial slander and disparagement" of homosexuals. Lilliendahl was sentenced to a fine of ISK 100 000 (EUR 800), having also taken into consideration his age and clean criminal record.

Lilliendahl complained under Article 10 ECHR that his conviction had violated his right to freedom of expression. Furthermore, he complained under the non-discrimination provision of Article 14 ECHR in conjunction with Article 10 ECHR that he did not enjoy freedom of expression to the same extent as persons with

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other opinions. At the outset, the ECtHR was called upon to examine whether the so-called abuse clause of Article 17 ECHR was applicable. This article provides that “[n]othing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” If applicable, the effect of Article 17 would be to negate the exercise of the Convention right that Lilliendahl sought to vindicate in the proceedings before the ECtHR. As the Grand Chamber of the ECtHR held in *Perinçek v. Switzerland* (IRIS 2016-1/1), Article 17 is only applicable on an exceptional basis and in extreme cases. In cases concerning Article 10 of the Convention, it should only be resorted to "if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention." The ECtHR found the statements at issue highly prejudicial, but considered that it was not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the ECHR. Therefore, Lilliendahl was not barred from invoking his right to freedom of expression in this instance. What remained to be decided was whether his conviction complied with Article 10 ECHR, and in particular, whether it could be justified as being necessary in a democratic society.

The ECtHR reiterated its standard principle with regard to Article 10 ECHR, holding that "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. However, the ECtHR considered Lilliendahl's statements as a form of hate speech, as this not only includes speech which explicitly calls for violence or other criminal acts, but it can also include attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population (see also *Féret v. Belgium*, IRIS 2009-8/1; *Vejdeland v. Sweden,* IRIS 2012-5/2 and *Beizaras and Levickas v. Lithuania*, IRIS 2020-3/21). Although Lilliendahl's comments had not been expressed on a prominent Internet platform and were not specifically directed at vulnerable groups or persons, the ECtHR accepted the finding of the Icelandic Supreme Court that they were "serious, severely hurtful and prejudicial", also recalling that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour. The ECtHR referred to the 2010 Recommendation of the Committee of Ministers and the Resolution of the Parliamentary Assembly of the Council of Europe on discrimination on the basis of sexual orientation and gender identity, calling for the protection of gender and sexual minorities from hateful and discriminatory speech, and citing the marginalisation and victimisation to

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which they have historically been, and continue to be, subjected. Taking into account the prejudicial and intolerant nature of Lilliendahl's comments, the ECtHR found that the Icelandic Supreme Court had given relevant and sufficient reasons for his conviction: the Supreme Court had taken into account the criteria set out in the case law of the ECtHR and had acted within its margin of appreciation. Furthermore, the ECtHR noted that Lilliendahl had not been sentenced to imprisonment, although the crime of which he was convicted carries a penalty of up to two years imprisonment. It did not find the fine of EUR 800 excessive, given the circumstances. The ECtHR concluded that the Supreme Court's assessment of the nature and severity of Lilliendahl's comments were not manifestly unreasonable and that it had adequately balanced his personal interests and his right to freedom of expression against the more general public interest in the case encompassing the rights of gender and sexual minorities. Therefore, the ECtHR found Lilliendahl's complaint under Article 10, also in combination with Article 14 ECHR, manifestly ill-founded. The ECtHR decided, unanimously, to reject the complaint as inadmissible.

Decision by the European Court of Human Rights, Second Section, in the case of Carl Jóhann Lilliendahl v. Iceland, Application No. 29297/18, 11 June 2020

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