Diffamazione: gestore del blog non responsabile dei commenti se li elimina prontamente

CORTE EUROPEA DEI DIRITTI DELL'UOMO
SEZIONE TERZA

Sentenza 9 marzo 2017, n. 74742/14
Application no 74742/14

[redacted]
against Sweden

The European Court of Human Rights (Third Section), sitting on 7 February 2017 as a Chamber composed of:
Branko Lubarda, President,
Helena Jäderblom,
Luis López Guerra,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, judges,
and Stephen Phillips, Section Registrar,
Having regard to the above application lodged on 22 November 2014,
Having deliberated, decides as follows:

THE FACTS
1. The applicant, [redacted] is a Swed[redacted] [redacted] who was born in 1[redacted] [redacted].
A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On 29 September 2011, a blog post was published accusing the applicant of being involved in a Nazi party. The blog on

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which the post appeared was a small one run by a non-profit association. Although the blog allowed comments to be posted, it was clearly stated that such comments were not checked before publication and that commentators were responsible for their own statements. Commentators were therefore requested to “display good manners and obey the law”.

4. The day after publication of the post, an anonymous person using the name “björnpeder” posted a comment stating that “that guy pihl is also a real hash-junkie according to several people I have spoken to” (“han där pihl är ju dessutom en rejäler hasch pundare enligt flera jag snackat me”).

5. On 8 October 2011 the applicant posted a comment on the blog in reply to the above comment and blog post about him, stating that the information there was wrong and should immediately be removed.

6. The following day the blog post and the comment were removed and a new post was added on the blog by the association – stating that the earlier post had been wrong and based on inaccurate information – and it apologised for the mistake. However, according to the applicant, it was still possible to find the old post and the comment on the Internet via search engines.

7. On 11 October 2011, the applicant sued the association and claimed symbolic damages of 1 Swedish krona (SEK), approximately 0.10 euro (EUR). He submitted that the post and the comment constituted defamation and that the association was responsible for both – for the latter because the association had failed to remove it immediately.

8. On 11 November 2011 Linköping District Court (tingsrätt) rejected his claims but, on 10 July 2012, Göta Court of Appeal (hovrätt) found that a procedural error had been committed. It quashed the lower court’s judgment and referred the case back to it.

9. The Linköping District Court subsequently dismissed the claim relating to the publication of the blog post on the grounds that it was covered by a regulation in the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen

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(1991:1469)) and that the court competent to examine that part of the claim was therefore Stockholm District Court. However, it found that it was competent to examine the applicant's claim in so far as it related to the comment posted on the blog.

10. The applicant argued before the District Court that the comment on the blog was untrue and constituted defamation. The association had received an email when the comment was posted and, on the basis of an analogous interpretation of Section 5 of the Act on Responsibility for Electronic Bulletin Boards (lag [1998:112] om ansvar för elektroniska anslagstavlor; see paragraph 18 below), was obliged to remove the comment immediately since it was defamatory. It was unacceptable that the comment had been allowed to remain on the blog for nine days, as it had been spread and was searchable. Moreover, the applicant submitted that since it had been impossible to find the person who had written the comment – the last trace being a French IP-address – the association could be held responsible for failing to remove the defamatory comment immediately.

11. The association admitted that the comment constituted defamation and that it had received an email when it was published. However, it stressed that comments posted on the blog were not reviewed before they were published and it was expressly stated on the webpage that everyone was responsible for their own comments. The association was therefore not responsible for the comment. Moreover, it had not been obliged to remove the comment under the Act on Responsibility for Electronic Bulletin Boards since defamation was not one of the offences listed in the Act for which such an obligation existed.

12. On 11 March 2013, the District Court rejected the applicant's claim. It found the comment constituted defamation based on the content and the context in which it had been made. However, it found no legal grounds on which to hold the association responsible for failing to remove the comment sooner than it had done. It noted that Section 5 of the Act on Responsibility for Electronic Bulletin Boards did not include defamation, for which reason the association, or its legal representative, could not be accused of defamation, either as the principal or as an accomplice, according to the Penal

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Code or Section 5 of the Act.

13. The applicant appealed against the judgment to the Court of Appeal, which granted leave to appeal. On 28 November 2013, it upheld the District Court's judgment in full, finding no reason to divert from the lower court's conclusions.

14. On 19 March 2014 the Supreme Court (Högsta domstolen) refused the applicant leave to appeal.

15. On 11 April 2014 the applicant lodged an application with the Chancellor of Justice (Justitiekanslern) for payment of damages on the basis that the State had failed in its positive obligations under Article 8 of the Convention through the national courts' decision not to hold the association responsible for the defamatory comment against him.

16. On 25 July 2015 the Chancellor of Justice rejected the application. The Chancellor noted that protection against defamatory statements fell within the scope of Article 8 of the Convention but that, in situations like the present one, the applicant's rights under that Article had to be balanced against the right to freedom of expression under Article 10. Referring to the Court's reasoning in the case of Delfi AS v. Estonia (no. 64569/09, 10 October 2013) and noting that the case had been referred to the Grand Chamber, the Chancellor found that it could not be deduced from the Court's case-law that there was an absolute obligation on States to have legislation in place, in each individual case, enabling the person responsible for a blog to be held accountable for comments made on it. Instead, the rights under Article 8 and Article 10 had to be balanced against each other in each individual case and, in doing so, the State had a margin of appreciation. Having regard to the above, the Chancellor found that the circumstances of the case in question did not support the conclusion that Article 8 had been violated.

B. Relevant domestic law

17. Defamation is criminalised under Chapter 5, Section 1 of the Penal Code (Brottsbalken(1962:700)) which reads as follows:

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“A person who points out someone as being a criminal or as having a reprehensible way of living or otherwise furnishes information intended to cause exposure to the disrespect of others, shall be sentenced to a fine for defamation.

If he was duty-bound to express himself or if, considering the circumstances, the furnishing of information on the matter was defensible, or if he can show that the information was true or that he had reasonable grounds for it, no punishment shall be imposed.”

18. Section 5 of the Act on Responsibility for Electronic Bulletin Boards, concerning the obligation to erase certain messages, states:
“If a user submits a message to an electronic bulletin board, the supplier of the service must remove the message from the service, or in some other way prevent its further dissemination, if

1. the message content is obviously such as is referred to in the Penal Code, Chapter 16, Section 5, about inciting rebellion, Chapter 16, Section 8, about agitation against a national ethnic group, Chapter 16, Section 10a, about child pornography crime, or Chapter 16, Section 10b, about unlawful depiction of violence, or

2. it is obvious that the user has, by submitting the message, infringed the copyright or other right protected by Section 5 of the Copyright (Artistic and Literary Works) Act (1960:729).

In order to be able to fulfil the obligation under the first paragraph, the supplier is allowed to review the content of messages in the service.

The obligation under the first paragraph and the right under the second paragraph also apply to those who have been appointed by the supplier to supervise the service.”

19. According to Section 7 of the Act, a person who intentionally or through gross negligence violates Section 5, paragraph 1, of the Act will be sentenced to a fine or a maximum of six months’ imprisonment or, if the crime is aggravated, to a maximum of two years’ imprisonment. In

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cases of minor violations, the person will not be held responsible. Moreover, paragraph 2 of Section 7 provides that the first paragraph will not be applied if the offence is subject to criminal liability under the Penal Code or the Copyright Act.

20. Section 4 of the Act states that, in order to be able to fulfil the obligations under Section 5 of the Act, the supplier of an electronic bulletin board must supervise such monitoring of the service as can reasonably be demanded, taking into consideration the extent and focus of the service.

COMPLAINT

21. The applicant complained under Article 8 of the Convention that the fact that Swedish legislation prevented him from holding the association responsible for the defamatory comment had violated his right to respect for his private life.

THE LAW

22. The applicant complained that his right to privacy had been violated, contrary to Article 8 of the Convention, which in the relevant parts, reads:
“1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

23. The Court reiterates that the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which extends to a number of aspects relating to personal identity, such as a person’s name or image, and furthermore includes a person’s physical and psychological integrity (see Von Hannover v. Germany, no. 59320/00, § 50, ECHR 2004-VI, with further references). It has also been accepted by the Court that a person’s right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life (see Magyar Tartalomszolgáltatók

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Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, § 57, 2 February 2016, and Pfeifer v. Austria, no. 12556/03, § 35, ECHR 2007-XII).

24. However, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see Delfi AS v. Estonia [GC], no. 64569/09, § 137, ECHR 2015, and Axel Springer AG v. Germany [GC], no. 39954/08, § 83, 7 February 2012).

25. In the present case, the Court notes that the comment made about the applicant was found by the national courts to constitute defamation because of the context in which it had been made. While the Court considers that the comment, although offensive, certainly did not amount to hate speech or incitement to violence (contrast Delfi AS, cited above, §§ 18, 114 and 162), it accepts the national courts' finding and, consequently, that the comment falls within the scope of Article 8.

26. The Court next observes that what is at issue in the present case is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicant's private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may also involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests; and in both contexts the State enjoys a certain margin of appreciation (see Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, §§ 98-99, ECHR 2012).

27. In this respect, as concerns competing interests under

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Article 8 and Article 10 of the Convention, the Court has established the following, as summarised in Delfi AS (cited above, § 139):
“The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who has been the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see Axel Springer AG, cited above, § 87, and Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, with further references to the cases of Hachette Filipacchi Associés, cited above, § 41; Timciuc v. Romania (dec.), no. 28999/03, § 144, 12 October 2010; and Mosley v. the United Kingdom, no. 48009/08, § 111, 10 May 2011). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see Axel Springer AG, cited above, § 88, and Von Hannover (no. 2), cited above, § 107, with further references to MGN Limited, cited above, §§ 150 and 155, and Palomo Sánchez and Others v. Spain [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-I; Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III; and Ashby Donald and Others v. France, no. 36769/08, § 40, 10 January 2013).

28. In making this assessment, the Court has also identified the following specific aspects of freedom of expression in terms of protagonists playing an intermediary role on internet, as being relevant for the concrete assessment of the interference in question: the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary’s liability, and the

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consequences of the domestic proceedings for the company (see Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt, cited above, § 69, with reference to Delfi AS, cited above, §§ 142-143).

29. The question is thus whether, in the present case, the State has achieved a fair balance between the applicant's right to respect for his private life under Article 8 and the association's right to freedom of expression guaranteed by Article 10 of the Convention.

30. As regards the context of the comment, the Court notes that the underlying blog post accused the applicant, incorrectly, of being involved in a Nazi party. However, the post was removed and an apology published when the applicant notified the association of the inaccuracy of the post. The applicant sued the association in relation to this blog post before the national courts but the Court has not been informed about the outcome of these proceedings. Moreover, the Court observes that the comment about the applicant did not concern his political views and had nothing to do with the content of the blog post. It could therefore hardly have been anticipated by the association.

31. In relation thereto, the Court attaches importance to the fact that the association is a small non-profit association, unknown to the wider public, and it was thus unlikely that it would attract a large number of comments or that the comment about the applicant would be widely read (contrast Delfi AS, cited above, §§ 115-116). As the Court found in Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt (cited above, § 82), expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet.

32. As regards the measures taken by the association to prevent or remove defamatory comments, the Court notes that the blog had a function through which the association was notified when comments were posted on it. However, it was clearly stated on the blog that the association did not check such comments before they were published and that commentators

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were responsible for their own statements. Commentators were also requested to display good manners and obey the law. Moreover, the Court observes that the association removed the blog post and the comment one day after being notified by the applicant that the post was incorrect and that he wanted the post and the comment removed. The association furthermore posted a new blog post with an explanation for the error and an apology. The comment had been on the blog for about nine days in total (contrast Delfi AS, cited above, § 19, where the clearly unlawful comments were removed only about six weeks after their publication).

33. The Court also notes that, as concerns the alleged possibility of still being able to find the comment via search engines, the applicant is entitled to request that the search engines remove any such traces of the comment (see the Court of Justice of the European Union judgment of 13 May 2014, Google Spain and Google, no. C-131/12, EU:C:2014:317).

34. Turning to the liability of the originator of the comment, the Court observes that the applicant obtained the IP-address of the computer used to submit the comment. However, he has not stated that he took any further measures to try to obtain the identity of the author of the comment.

35. Furthermore, since the applicant's claim was rejected by the domestic courts, the domestic proceedings had no consequences for the association in the present case. However, the Court has previously found that liability for third-party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via internet. This effect could be particularly detrimental for a non-commercial website (see Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt, cited above, § 86).

36. Lastly the Court notes that the applicant's case was considered on its merits by two judicial instances at the domestic level before the Supreme Court refused leave to appeal. Moreover, the Chancellor of Justice examined that applicant's complaint under Article 8 of the Convention, referring to the Court's case-law and the need to balance the interests under Article 8 and Article 10 before finding that the

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case did not disclose a violation of the applicant's rights under Article 8. The Court further observes that the scope of responsibility of those running blogs is regulated by domestic law and that, had the comment been of a different and more severe nature, the association could have been found responsible for not removing it sooner (see paragraphs 18-20 above).

37. In view of the above, and especially the fact that the comment, although offensive, did not amount to hate speech or incitement to violence and was posted on a small blog run by a non-profit association which took it down the day after the applicant's request and nine days after it had been posted, the Court finds that the domestic courts acted within their margin of appreciation and struck a fair balance between the applicant's rights under Article 8 and the association's opposing right to freedom of expression under Article 10.

38. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 March 2017.

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