EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 29297/18
Carl Jóhann LILLIENDAHL
against Iceland

The European Court of Human Rights (Second Section), sitting on 12 May 2020 as a Chamber composed of:

Marko Bošnjak, *President,*
Robert Spano,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli,
Peeter Roosma, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 12 June 2018,

Having deliberated, decides as follows:

# THE FACTS

1. The applicant, Mr Carl Jóhann Lilliendahl, is an Icelandic national, who was born in 1946 and lives in Reykjavik. He was represented before the Court by Mr Ásgeir Þór Árnason, a lawyer practising in Reykjavik.

## A. The circumstances of the case

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

3. On 15 April 2015, the municipal council of the town of Hafnarfjörður, Iceland, approved a proposal to strengthen education and counselling in elementary and secondary schools on matters concerning those who identify themselves as lesbian, gay, bisexual or transgender. This was to be done in cooperation with the national LGBT association, *Samtökin '78*.

4. The decision was reported in the news and led to substantial public discussion, *inter alia* on the radio station Ú.S., where listeners could phone in and express their opinions on the decision of the municipal council. In a subsequent online news article, one of the initiators of the proposal, Ó.S.Ó., criticised the radio show for what he described as allowing people to phone in and express "clear prejudice and hate speech" without criticism from the show's host. Ó.S.Ó. furthermore expressed his wish to come on the show and answer criticism of the municipal council's decision.

5. The applicant was one of those who took part in the public discussion. He wrote comments below the above-mentioned article on 21 April 2015, stating the following:

> We listeners of [Ú.S.] have no interest in any [expletive] explanation of this *kynvilla* [derogatory word for homosexuality, literally 'sexual deviation'] from [Ó.S.Ó.]. This is disgusting. To indoctrinate children with how *kynvillingar* [literally 'sexual deviants'] *eðla sig* ['copulate', primarily used for animals] in bed. [Ó.S.Ó.] can therefore stay at home, rather than intrude upon [Ú.S.]. How disgusting.

6. Subsequently, *Samtökin '78* reported the applicant's comments to the Reykjavík Metropolitan Police, claiming it violated Article 233 (a) of the General Penal Code No. 19/1940 (see paragraph 20 below). The case was dismissed by a police prosecutor on 8 September 2015, but that decision was annulled on 6 November 2015 by the Director of Public Prosecution, who instructed the Metropolitan Police to carry out an investigation.

7. The subsequent investigation led to the applicant's indictment on 8 November 2016. According to the indictment, his comments, quoted above, were considered to constitute 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.

8. By a judgment of 28 April 2017, the District Court of Reykjavík acquitted the applicant. Citing the applicant's freedom of expression, the District Court considered that the comments did not reach the threshold required for them to fall within the scope of Article 233 (a) and that it had not been shown that the applicant had had the intent of violating that provision.

9. The judgment was appealed against by the Director of Public Prosecution to the Supreme Court of Iceland.

10. By a judgment of 14 December 2017, the Supreme Court overturned the District Court's judgment and convicted the applicant.

11. The Supreme Court's judgment first discussed the origins of Article 233 (a) of the General Penal Code, noting that it had originally been introduced following Iceland's ratification of the United Nations' Convention on the Elimination of All Forms of Racial Discrimination and subsequently amended *inter alia* to extend its protection to sexual orientation and gender identity. These amendments had been made with

reference to Nordic developments, to the Additional Protocol to the Council of Europe's Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, to the Recommendation of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, and to the Parliamentary Assembly's Resolution on Discrimination on the basis of sexual orientation and gender identity.

12. The Supreme Court then discussed the charges against the applicant, noting at the outset that although the applicant enjoyed freedom of expression under the Constitution of Iceland and the European Convention on Human Rights, that freedom was subject to some limitations. Such limitations could notably be those necessary to protect the rights of others, including the right of homosexual persons to respect for private life and to enjoy human rights equally to others, irrespective of their sexual orientation. Establishing that Article 233 (a) of the General Penal Code constituted one such limitation of the freedom of expression clearly established by law, the Supreme Court furthermore reasoned that the limitation established by the provision was clearly necessary, in general, in order to safeguard the rights of social groups which had historically been subjected to discrimination. It noted that the protection afforded to such groups by Article 233 (a) was compatible with the national democratic tradition, reflected in Article 65 of the Constitution, of not discriminating against persons based on their personal characteristics or elements of their personal lives, and that it was in line with international legal instruments and declarations to protect such groups against discrimination by way of penalization.

13. The Supreme Court went on to discuss the substance of the provision, and stated:

> "Article 233 (a)'s description of the conduct which it penalizes is worded in a clear and comprehensible manner. The provision does not mention the concept of 'hate speech', although it is used in the indictment at the beginning of the description of the charges against the [applicant], as well as in the aforementioned preparatory works of the Bill which became Act No. 13/2014 [amending Article 233 (a), see paragraph 19] and the international recommendations and resolutions concerning legislation in this area. This concept can be seen as the common denominator for the mocking, defaming, denigrating or threatening behaviour which the provision criminalizes, and simultaneously as a threshold of the requisite severity of the expression necessary for it to fall under the provision. The expression must thus convey such disgust, antipathy, contempt or condemnation that it can be considered to amount to hate speech towards the subject of the expression. This substance of the provision must be considered clear and foreseeable to the public."

14. Turning to the applicant's comments, the Supreme Court noted the following:

> "Considering the discussion in which the [applicant] made the comment, it is evident that it referred to homosexual men and homosexuality as such, in relation to

> the idea of introducing education on homosexuality in elementary and secondary schools. Although the words *kynvilla* [sexual deviation] and *kynvillingar* [sexual deviants] may in the past have been considered appropriate, by some, to describe homosexuality and homosexuals, it is beyond any doubt that today, these words constitute prejudicial slander and disparagement of those against whom they are employed. This was aggravated by the applicant's expression of disgust at such conduct and orientation. His conduct thus falls under Article 233 (a) of the General Penal Code."

15. The Supreme Court added that the comments had been made publicly, fulfilling the public forum requirement of Article 233 (a). On the subject of the applicant's intent to commit the crime, the Supreme Court stated:

> "According to the wording of Article 233 (a) of the General Penal Code, cf. Article 18, the provision entails a requirement of intent. Such intent must apply to the action of expressing oneself with words, symbols, pictures or in another manner, but whether such expression constitutes mocking, defaming, denigrating or threatening a person for their nationality, colour, race, religion, sexual orientation or gender identity must be assessed in an objective manner. In that assessment, account should not be taken of the motives which the person in question claims were behind their expression. Thus, the [applicant's] conduct must be considered intentional, as he has not claimed that the comment was made negligently or by accident."

16. Having established that the applicant's comments fell under Article 233 (a) of the General Penal Code, the Supreme Court went on to assess whether it was necessary to restrict the applicant's freedom of expression under Article 73 of the Constitution. It noted that according to established case-law, restrictions on that freedom were only justified if they addressed a pressing social need and that caution should be employed when accepting any such restrictions; speech which was merely insulting or hurtful did not reach the applicable threshold. The Supreme Court went on to note that the applicant's comments had been made in the context of a public discussion on the important topic of the raising and schooling of children, and that the discussion had already become heated and vituperative to some extent. Although the comments had not been directly aimed at children, seeing as the discussion had taken place in a public forum and concerned the interests of youth, it was to be expected that children might take part in the discussion and read the applicant's comments. Considering that the decision which was the subject of the discussion had merely intended for *Samtökin '78* to act as an advisor to those in charge of writing the educational material and providing the counselling, the applicant's comments had had little connection with the subject of the discussion. The Supreme Court then stated:

> "The [applicant's] comment was serious, severely hurtful and prejudicial, none of which was necessary for him to express his opposition to such education. Within such a discussion, a reasonable purpose for the [applicant's] comment can hardly be discerned."

17. The Supreme Court thus found that the private life interests protected by Article 71 of the Constitution and Article 233 (a) of the General Penal Code outweighed the applicant's freedom of expression in the circumstances of the case and that curbing that freedom was both justified and necessary in order to counteract the sort of prejudice, hatred and contempt against certain social groups which such hate speech could promote. It convicted the applicant and, referring to his age and clean criminal record, sentenced him to a fine of 100,000 Icelandic *krónur* (ISK, approximately 800 euros (EUR) at the time).

18. One of the three Supreme Court judges sitting on the panel in the applicant's case dissented. In his opinion, the applicant's comments did not reach the threshold of Article 233 (a) of the General Penal Code. The minority reasoned that although the comments had been derogatory, they had constituted neither a call for violence nor accusations of criminal behaviour. Considering that the comments had been part of a public discussion and not particularly forced upon anyone, the minority found that the applicant's comments should be protected by the freedom of expression and his acquittal confirmed.

## B. Relevant domestic law

19. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands*) read as follows:

**Article 65**

"Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.

Men and women shall enjoy equal rights in all respects."

**Article 71**

"Everyone shall enjoy freedom from interference with privacy, home, and family life.

...

Notwithstanding the provisions of the first paragraph above, freedom from interference with privacy, home and family life may be otherwise limited by statutory provisions if this is urgently necessary for the protection of the rights of others."

**Article 73**

"Everyone has the right to freedom of opinion and belief.

Everyone shall be free to express his thoughts, but shall also be liable to answer for them in court. The law may never provide for censorship or other similar limitations to freedom of expression.

> Freedom of expression may only be restricted by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions."

20. Article 233 (a) of the General Penal Code No. 19/1940 (*Almenn hegningarlög*), which forms a part of Chapter XXV entitled "Defamation of character and violations of privacy", reads as follows:

> "Anyone who publicly mocks, defames, denigrates or threatens a person or group of persons by comments or expressions of another nature, for example by means of pictures or symbols, for their nationality, colour, race, religion, sexual orientation or gender identity, or disseminates such materials, shall be fined or imprisoned for up to 2 years."

According to the preparatory works of the provision, it was introduced due to Iceland's ratification of the United Nation's International Convention on the Elimination of All Forms of Racial Discrimination. It was later amended also to include sexual orientation and gender identity. This was done *inter alia* with reference to the Additional Protocol to the Council of Europe's Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, to the Recommendation of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, and to the Parliamentary Assembly's Resolution on Discrimination on the basis of sexual orientation and gender identity.

## C. Relevant international material

21. The Recommendation adopted by the Council of Europe's Committee of Ministers on 31 March 2010 (CM/Rec(2010)5) on measures to combat discrimination on grounds of sexual orientation or gender identity provides, in so far as relevant:

> "6. Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such "hate speech" should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court."

22. The Resolution adopted by the Council of Europe's Parliamentary Assembly on 29 April 2010 (Resolution 1728 (2010)) on discrimination on the basis of sexual orientation and gender identity provides, in so far as relevant:

> "7. Hate speech by certain political, religious and other civil society leaders, and hate speech in the media and on the Internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance. The boundary between hate speech inciting to crime and freedom of expression is to be determined in accordance with the case law of the European Court of Human Rights.
>
> ...
>
> 16. Consequently, the Assembly calls on member states to address these issues and in particular to:
>
> ...
>
> 16.4. condemn hate speech and discriminatory statements and effectively protect LGBT people from such statements while respecting the right to freedom of expression, in accordance with the European Convention on Human Rights and the case law of the European Court of Human Rights; ..."

# COMPLAINTS

23. The applicant complained under Article 10 of the Convention that his conviction had violated his freedom of expression. Furthermore, he complained under Article 14 in conjunction with Article 10 that he did not enjoy freedom of expression equally to persons with other opinions.

# THE LAW

## I. APPLICATION OF ARTICLE 17 OF THE CONVENTION

24. At the outset the Court is called upon to examine whether the application should be dismissed as incompatible *ratione materiae* with the Convention by reference to Article 17, which provides:

> "Nothing 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."

25. The decisive point under Article 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it (*Perinçek v. Switzerland* [GC], no. 27510/08, §§ 113-115, 15 October 2015). If applicable, Article 17's effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the

proceedings before the Court. As the Court held in *Perinçek*, 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 (*ibid.*, § 114).

26. The Court finds that the applicant's statement cannot be said to reach the high threshold for applicability of Article 17 as set out in the above-mentioned judgment in *Perinçek* (*ibid*.). Although the comments were highly prejudicial, as discussed further below, it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention (compare *Witzsch v. Germany (no. 1)* (dec.), no. 41448/98, 20 April 1999; *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Norwood v. the United Kingdom* (dec.), no. 23131/03, 16 November 2004; *Witzsch v. Germany (no. 2)* (dec.), no. 7485/03, 13 December 2005; and *Molnar v. Romania* (dec.), no. 16637/06, 23 October 2012). The applicant is thus not barred from invoking his freedom of expression in this instance. What remains to be decided is whether his conviction complied with Article 10 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. Having established that Article 17 is not applicable in the present case, the Court will turn to the question of whether there has been a violation of the applicant's right to freedom of expression under Article 10 of the Convention, which reads as follows:

> "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."

28. The Court has consistently held 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". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, *inter alia*, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012, and *Bédat v. Switzerland* [GC], no. 56925/08, § 48, 29 March 2016).

29. The principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well-established in the Court's case-law (see, among other authorities, *Delfi AS*, cited above, §§ 131-132, with further references). The Court must examine the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts. Furthermore, an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed (see, *inter alia*, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV, and *Vejdeland and Others v. Sweden*, no. 1813/07, § 58, 9 February 2012).

30. Finally, the Court recalls that it has consistently held that in assessing whether an interference with a right protected by Article 10 was necessary in a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of appreciation (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II and *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V). However, as the State's margin of appreciation goes hand in hand with European supervision, the Court is empowered to give the final ruling on whether an interference is reconcilable with Article 10 (*ibid.*).

31. The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the proportionality assessment afresh. On the contrary, in Article 10 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of

proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012).

*1. Existence of an interference*

32. The applicant's conviction undoubtedly constituted an interference with his freedom of expression. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in Article 10 § 2 and whether it was "necessary in a democratic society" in order to achieve those aims. However, the Court will first address the nature of the applicant's comments, in particular whether the comments amounted to 'hate speech' as this concept has been construed in the Court's case-law.

*2. Did the applicant's comments amount to 'hate speech' within the meaning of the Court's case-law?*

33. 'Hate speech', as this concept has been construed in the Court's case-law, falls into two categories. As discussed above, the Supreme Court held that although the term 'hate speech' was not used in Article 233 (a) of the General Penal Code, it was clear from the provision's preparatory works and the international legal instruments by which it was inspired that the concept of 'hate speech' was simultaneously a synonym for the sort of expression which the provision penalized and a threshold for the severity which such expression had to reach in order to fall under the provision (see paragraph 13 above).

34. The first category of the Court's case-law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10 (see paragraphs 25-26 above and the cases cited therein). As explained above, the Court does not consider the applicant's comments to fall into this category (see paragraph 26 above).

35. The second category is comprised of 'less grave' forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict (see, *inter alia*, *Féret v. Belgium,* no. 15615/07, §§ 54-92, 16 July 2009; *Vejdeland and Others v. Sweden*, cited above, §§ 47-60; *Delfi AS v. Estonia*, cited above, §§ 153 and 159; and *Beizaras and Levickas v. Lithuania*, cited above, § 125). In the last-mentioned case, the Court found a violation of Article 14 taken in conjunction with Article 8, and of Article 13, on account of the authorities' refusal to prosecute authors of serious homophobic comments on Facebook, including undisguised calls for violence. In *Delfi AS*, the Court found no

breach of Article 10 as regards the domestic courts' imposition of liability on the applicant company, notably due to the insufficiency of the measures taken by the applicant company to remove without delay after publication comments on its news portal amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable.

36. Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression (see *Beizaras and Levickas v. Lithuania*, cited above, § 125; *Vejdeland and Others v. Sweden*, cited above, § 55, and *Féret v. Belgium*, cited above, § 73). In cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery.

37. Thus, for example, in *Féret*, the Court found no violation of Article 10 of the Convention in respect of the conviction of the applicant, chairman of the political party "Front National", for publicly inciting discrimination or hatred. The Court considered it significant that the applicant's racist statements had been made by him in his capacity as a politician during a political campaign, where they were bound to be received by a wide audience and have more impact than if they had been made by a member of the general public (*Féret v. Belgium*, cited above, § 75). Similarly, in *Vejdeland and Others*, the Court found no violation of Article 10 in respect of the applicants' conviction for distributing leaflets considered by the courts to be offensive to homosexual persons. It emphasized that the leaflets had been distributed in schools, left in the lockers of young people at an impressionable and sensitive age (*Vejdeland and Others v. Sweden*, cited above, § 56).

38. In the present case, the Court sees no reason to disagree with the Supreme Court's assessment that the applicant's comments were "serious, severely hurtful and prejudicial". As reasoned by the Supreme Court, the use of the terms *kynvilla* (sexual deviation) and *kynvillingar* (sexual deviants) to describe homosexual persons, especially when coupled with the clear expression of disgust, render the applicant's comments ones which promote intolerance and detestation of homosexual persons.

39. The Court has already found (see paragraph 26 above) that the comments in question did not constitute a manifestation of the gravest form of 'hate speech' thus falling outside the scope of protection of Article 10 of the Convention by virtue of Article 17. However, the Court considers it clear that the comments in issue, viewed on their face and in substance, fell

under the second category of 'hate speech' (see paragraphs 35-36 above) falling to be examined under Article 10 of the Convention. The manner of delivery of the comments does not alter this conclusion, although it is true that the comments, which were made publicly, were expressed by the applicant as a member of the general public not expressing himself from a prominent platform likely to reach a wide audience. Moreover, viewing the severity of the comments, as correctly assessed by the Supreme Court, it does not detract from the Court's finding above that the comments were not directed, in particular, at vulnerable groups or persons (compare and contrast *Vejdeland*).

40. The Court finally notes that this conclusion, whilst relevant, is not, as such, conclusive for its assessment whether the applicant's conviction fulfilled the requirements of lawfulness, legitimate aim and necessity in a democratic society as required by Article 10 § 2 of the Convention.

*3. Lawfulness*

41. As to the requirement of the interference being 'prescribed by law', the Court has interpreted this requirement as entailing not only that the impugned measure should have a legal basis in domestic law, but also as referring to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, amongst many authorities, *Delfi AS*, cited above, § 120, with further references). As discussed at length in the Supreme Court's judgment, Article 233 (a) of the General Penal Code penalizes publicly mocking, defaming, denigrating or threatening a person or group of persons for certain characteristics, including their sexual orientation or gender identity.

42. The Court agrees with the Supreme Court that Article 233 (a) was worded in a sufficiently clear manner so as to render its application reasonably foreseeable in the applicant's case (see *Delfi AS*, cited above, §§ 120-122). The restriction on the applicant's freedom of expression thus complied with the requirement of being prescribed by law.

*4. Legitimate aim*

43. As the Supreme Court reasoned in its judgment, the purpose of Article 233 (a) is to protect the right to respect for private life and the right to enjoy human rights equally to others, as well as to safeguard the rights of social groups which have historically been subjected to discrimination (see paragraphs 12 and 20 above). The interference's purpose thus fulfils the legitimate aim of 'protecting the rights of others' envisaged by Article 10 § 2 of the Convention.

*5. Necessary in a democratic society*

44. At the outset, the Court observes that the Supreme Court of Iceland extensively weighed the competing interests at play in the case: on the one hand the applicant's right to freedom of expression, and on the other hand the right of homosexual persons to private life as guaranteed by Article 71 of the Icelandic Constitution, which reflects Article 8 of the Convention. The Supreme Court held that the applicant's comments, which were made publicly, were "serious, severely hurtful and prejudicial" and that protecting certain groups from such attacks to ensure their enjoyment of their human rights equally to others was compatible with the national democratic tradition. It also reasoned that the comments had little to no relevance to criticism of the municipal council's decision and that their prejudicial content was by no means necessary for the applicant to engage in the ongoing public discussion. It therefore found that the private life interests at play in the case outweighed the applicant's freedom of expression in the circumstances of the case and that curbing that freedom was both justified and necessary in order to counteract the sort of prejudice, hatred and contempt against certain social groups which his comments could promote (see paragraphs 16-17 above).

45. The Court accepts the finding of the Supreme Court that the applicant's comments were "serious, severely hurtful and prejudicial". In this context, the Court recalls that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" (see, *inter alia*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI). Furthermore, both statutory bodies of the Council of Europe have called for the protection of gender and sexual minorities from hateful and discriminatory speech (see paragraphs 21-22 above), citing the marginalization and victimization to which they have historically been, and continue to be, subjected.

46. As the Supreme Court noted, the prejudicial and intolerant nature of the comments – which were made publicly – does not seem to have been justified or triggered by the municipal decision which originally sparked the debate. Against this background, and in the circumstances of the case, the Court finds that the Supreme Court gave relevant and sufficient reasons for the applicant's conviction. Furthermore, the Court notes that the applicant was not sentenced to imprisonment, although the crime of which he was convicted carries a penalty of up to two years' imprisonment. Instead, a fine of approximately EUR 800 was imposed on him. The Court does not find this penalty excessive in the circumstances.

47. In view of the above, the Court finds that the Supreme Court took into account the criteria set out in the Court's case-law and acted within its margin of appreciation. The Court considers that the Supreme Court's assessment of the nature and severity of the comments was not manifestly unreasonable (see, *a contrario*, *Egill Einarsson v. Iceland*, no. 24703/15,

§ 52, 17 November 2017) and it adequately balanced the applicant's personal interests against the more general public interest in the case encompassing the rights of gender and sexual minorities. Therefore, in light of its existing case-law and the principle of subsidiarity (see paragraph 31 above), it is not for the Court to substitute its own assessment of the merits for that of the Supreme Court. Thus, no strong reasons militate in favour of the Court reaching a different conclusion.

48. The Court therefore finds the complaint under Article 10 of the Convention to be manifestly ill-founded and rejects it in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

49. As for the applicant's complaint under Article 14 in conjunction with Article 10, the Court finds, in the light of all the material in its possession, that there is no appearance of a violation of the provision. The Court therefore finds the complaint under Article 14 read together with Article 10 of the Convention to be manifestly ill-founded and rejects it 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 11 June 2020.

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|---|---|
| Stanley Naismith<br>Registrar | Marko Bošnjak<br>President |