Carl Jóhann Lilliendahl v. Iceland

**Case Summary and Outcome**

The European Court of Human Rights found that the conviction of applicant, Carl Johann Lilliendahl and imposition of fine for homophobic comments made by the applicant did not amount to breach of his freedom of expression. The Supreme Court of Iceland had convicted the applicant and sentenced him to fine for publicly making “serious, severely hurtful and prejudicial” comments regarding sexual orientation and gender identity. The applicant complained that upon such conviction, his freedom of expression under Article 10 of the European Convention of Human Rights was violated. The Court found that since the applicant’s comments did not constitute a call for violence, they don’t fall under gravest form of hate speech. However, the Court considered that the comments were extremely prejudicial falling to be examined under Article 10 of the Convention. The Court noted that the applicant’s usage of the terms such as sexual deviation and sexual deviants especially coupled with the clear expression of disgust amounts to promotion of intolerance of homosexual persons. The Court found the applicant’s complaint inadmissible and held that applicant’s conviction and the fine was not excessive in the circumstances. Thus, Article 10 of the European Convention of Human Rights was not breached.

 **Facts**

The applicant, Carl Johann Lilliendahl is a national of Iceland. The application has been brought by the applicant for alleged violation of his right to freedom of expression under Article 10 (freedom of expression) and Article 14 (prohibition of discrimination) of the European Convention of Human Rights. On April 15, 2015, the municipal corporation of Hafnarfjörður, a town in Iceland had approved a proposal to strengthen education and counselling in elementary and secondary schools on the matters concerning sexual orientation and gender identity in cooperation with *Samtökin ’78*, a national LGBT association. The said approval led to substantial public discussion on different media platforms. The applicant participated in one such discussion on the radio station, U.S. and wrote comments below an article, on April 01, 2015 describing homosexuality as disgusting using derogatory terms “*kynvilla*” [literally ‘sexual deviation’] and “*kynvillingar*” [literally ‘sexual deviant’].

*Samtökin ’78* reported the applicant’s comments to the Police claiming violation of Article 233 (a) of the General Penal Code No. 19/1940. Upon subsequent investigation, his comments were found to be in violation of Article 233(a). His comments were considered to be publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity. On April 28, 2017, the District Court of Reykjavik acquitted the applicant on the ground that the comments of applicant did not meet the threshold as required under Article 233 (a) of the General Penal Code. The said judgement was appealed before the Supreme Court of Iceland.

In its judgement of December 14, 2017, the Supreme Court majorly focused on the origin and substance of Article 233 of the General Penal Code. It took into account the Iceland’s ratification of the UN’s Convention on the Elimination of All Forms of Racial Discrimination extending its protection to sexual orientation, Additional Protocol to the Council of Europe’s Convention on Cybercrime concerning criminalisation of acts of racist and xenophobic nature and the Recommendation of the Committee of Ministers to Member States on measures to combat discrimination on ground of sexual orientation or gender identity. The Supreme Court analysed the charges against applicant and noted the necessity of limiting the applicant’s freedom of expression under Article 233 (a) of the General Penal Code, to protect the right of homosexual persons to respect for private life and enjoy human rights equally to others, irrespective of their sexual orientation. Supreme Court noted that the limitation is clearly established by law under Article 233 (a) of the General Penal Code as well as under Article 65 of the Constitution. It stated that the derogatory terms used by the applicant “constitute prejudicial slander and disparagement of those against whom they are employed.” [para. 14]

The Supreme Court held that it was justified and necessary to limit the applicant’s freedom of expression in order to counteract the prejudice, hatred and contempt and protect the rights of social groups which have historically been subjected to discrimination. It convicted the applicant and sentenced him to fine of 100,000 Icelandic *krónur* (approx. 800 Euros). [para. 17]

**Decision Overview**

Judge Marko Bošnjak delivered the judgment of unanimous seven-judge bench. The central issue for the Court’s determination was whether the applicant’s conviction and imposition of fine regarding homophobic comments made by him, amounted to breach of the applicant’s freedom of expression under Article 10 of the Convention.

The applicant complained under Article 10 of the Convention that his conviction amounted to violation of his freedom of expression, and under Article 14, stating that his right to enjoy the freedom of expression equally to other persons was curbed.

The Court referred to the applicability of Article 10 as provided under paragraph 2, and noted that Article 10 is applicable not only to the “information” or “ideas” that are regarded as inoffensive but also the ones that offend, shock or disturb owing to demands of pluralism and tolerance. The Court also referred to Article 233 (a) of the General Penal Code No. 19/1940, Chapter XXV entitled “Defamation of character and violations of privacy.” The Court while analysing the necessity of restricting the right of the applicant, also discussed the right of homosexual persons to private life as reflected in Article 71 of the Icelandic Constitution and Article 8 of the Convention alongside Article 73 of the Constitution guaranteeing right to freedom of opinion and belief.

As to the alleged violation of freedom of expression under Article 10, the Court first began by evaluating the nature of the comments made by the applicant. To endorse this question, the court referred to the concept of ‘hate speech’ and its two categories. The first category as discussed by the Court is the hate speech that is comprised of ‘gravest form’, which is entirely excluded from the protection of Article 10 of the Convention. The Court did not consider the applicant’s comments to fall under this category. [para 26] Next, the court deliberated on the second category that is comprised of ‘less grave’ forms of hate speech. Unlike the first category, the second category of hate speech is not entirely excluded from the protection of Article 10. The Court undertook a detailed analysis of jurisprudence regarding the protection of second category i.e. less grave hate speech under Article 10. To assess the statements that do not call for violence or other criminal act, the Court referred to [Féret v. Belgium](http://hudoc.echr.coe.int/eng-press?i=003-2800730-3069797#{"itemid":["003-2800730-3069797"]}), whereby Court found no violation of Article 10, concerning conviction of applicant for publicly inciting discrimination and hatred. Similarly, in [Vejdeland and Others v. Sweden](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109046%22]}), the Court found no violation of Article 10 for applicant’s conviction for distributing pamphlets that were considered by courts to be offensive to homosexual persons. Thus, the Court upheld the Supreme Court’s assessment that the comments made by applicant were “serious, severely hurtful and preducial” as they “promoted intolerance and detestation of homosexual persons.” [para. 37]

The Court analysed the interference with the applicant’s freedom of expression under three grounds, first, whether it was prescribed by law, second, whether the interference was in pursuance of legitimate aim and third, whether it was necessary in the democratic society.

The Court relied on Article 233 (a) of the General Penal Code that penalises “publicly mocking, defaming, denigrating or threatening a person or group of persons for certain characteristics, including their sexual orientation or gender identity.” In consonance with the Supreme Court’s decision, the Court held that that the application of Article 233 was reasonably foreseeable in the applicant’s case and thus, it was prescribed by law. [paras. 41- 42]

With regards to interference in furtherance of legitimate aim, the Court held that the interference was in line with the purpose of Article 233 (a) i.e. to protect the right of homosexual persons to respect for private life and right to enjoy the human rights equally to others. [para. 43]

The Court noted the Supreme Court’s observation that the applicant’s comments were “serious, severely hurtful and prejudicial”. In consideration of the facts and circumstances of the case, the Court found that the there were sufficient reasons for interfering with the applicant’s freedom of expression. Further, against the fact that the applicant was not sentenced to imprisonment, but a fine of approximately EUR 800 was imposed on him, the Court did not find the penalty to be excessive, rather held it to be adequately balanced in congruence with the circumstances. [para. 47]

Lastly, with regards to applicant’s complaint on the violation of Article 14 of the Convention, the Court found that there is no appearance of a violation of the provision. [para. 49]

The Court unanimously declared the application inadmissible. The Court upheld the assessment of Supreme Court of Iceland and found that the interference with the applicant’s freedom of expression was not unreasonable, rather held it to be apposite, considering the applicant’s personal interests against the more general public interest.

**Decision Direction**

Mixed Outcome

The Court in its judgment in Carl Jóhann Lilliendahl v. Iceland, limited the expression of the applicant for making statements that were homophobic and highly prejudicial in nature. The Court aimed to develop jurisprudence regarding its approach concerning hate speech directed at sexual minorities or hate speech engaging homophobic statements. The Court noted that although the comments were not directed at the vulnerable person or group, but owing to the fact that comments were made expressing clear and severe intolerance through a prominent platform, denigrating a group of person for their sexual orientation and gender identity, the restriction imposed on applicant was appropriately balanced. The imposed restriction on the applicant’s freedom of expression was thus justified.

**Global Perspective (International Perspective)**

Bédat v.Switzerland [GC], no. 56925/08, 2016

Ceylan v. Turkey [GC], no. 23556/94 1999

Egill Einarsson v. Iceland, no. 24703/15, 2017

Féret v.Belgium, no. 15615/07, §§ 54-92, 2009

Garaudy v. France (dec.), no. 65831/01, 2003

Molnar v. Romania (dec.), no. 16637/06, 2012

Norwood v. the United Kingdom (dec.), no. 23131/03, 2004

Schimanek v. Austria (dec.), no. 32307/96, 2000

Steel and Morris v. the United Kingdom, no. 68416/01, 2005

Stoll v. Switzerland [GC], no. 69698/01, 2007

Vejdeland and Others v.Sweden, no. 1813/07, 2012

Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08 2012

Witzsch v. Germany (no. 1) (dec.), no. 41448/98, 1999

Witzsch v. Germany (no. 2) (dec.), no. 7485/03, 2005