



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

Communicated on 19 January 2015

FOURTH SECTION

Application no. 38940/13
Andrzej BUDA
against Poland
lodged on 16 May 2013

STATEMENT OF FACTS

The applicant, Mr Andrzej Buda, is a Polish national, who was born in 1974 and lives in Głogów.

A. The circumstances of the case

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

1. Background information

Nasza-klasa.pl (“Our-class.pl”) is a social media internet portal enabling users to connect with friends from their school and elsewhere. The portal is owned and administered by Nasza Klasa sp. o.o., a limited liability company with its seat in Wrocław. The users of the portal may store their data in it. The portal also hosts a number of thematic fora for discussion and exchange of opinions.

Discussions taking place on a forum are supervised by a moderator. The moderator is responsible for removing irrelevant or offensive content and for moderating a discussion. Moderators are not employees of the portal and their position is not regulated in the terms of service but they are appointed by the administrator of the portal. Moderators can remove posts of other users which are unlawful.

Following a notification by the user that the terms of service was breached an employee of the portal may remove a post. The user must indicate the address of the internet site where the breach took place as well as the date and hour of the post. An employee of the portal decides, using his discretion, whether a post should be removed.

The administrator of the portal does not verify the personal data of the users of internet fora and does not systematically follow discussions taking place on the fora.

There were several thousand internet fora concerning various subjects on the portal of *nasza-klasa.pl*. There was also a forum of the University of Wrocław in which students, graduates, PhD students and teaching staff of that university took part. The forum of the University of Wrocław started in 2008. Between February and March 2009 it was moderated by A.J.

2. *The specific facts of the case*

The applicant was a PhD student at the Institute of Theoretical Physics of the University of Wrocław.

He has participated in the forum of the University of Wrocław since 2008. On 3 March 2009 the applicant and another user T.B. took part in the discussion on the forum concerning abortion. At 11.35 p.m. T.B., commenting on the applicant's post, made the following comments: "Andrzej sucks ... We are talking about psychopaths who are cunts", "Andrzej: fuck off from the forum" ("*Andrzej ssie ... Rozmawiamy też o psychopatach, którzy są pizdami ... Andrzej: wypierdalaj z forum*")

The applicant asked T.B. to remove these comments. In response, T.B. put the following comment: "My dear Andrzej, ..., my schizophrenia, ... Compensation? Fuck, this you can only await from God..." ("*Andrzejku, mój najdroższy... Moja schizofrenia ... Zadośćuczynienie? To kurwa jedynie może przed Bogiem się doczekasz*").

Another user, T.S., made the following comment: "You are really an exceptional man Andrzej ... I feel like killing you like a dog. ... You are an evil man Andrzej, I am only consoled by the fact that you will never shag" ("*Jests narowed wyjątkowym człowiekiem Andrzej ... mam ochotę zjebać cię jak psa ... jesteś złym człowiekiem Andrzej, pociesza mnie jedynie to, że nigdy nie zaruchasz*"). The above comment was copied by moderator A.J. on 4 March 2009 at 9.21 a.m. The moderator A.J. added his comment: "I join in the wishes".

On 1 March 2009 the applicant wrote an email to the administrator of the portal entitled "I am receiving threats from other user abuses". He stated that A.J. from Legnica insulted him on the forum of the University of Wrocław and requested that the offensive posts be removed. In his email the applicant indicated the exact http link to the forum where the offensive comments of A.J. had been posted.

In her email reply sent on 5 March at 7.34 a.m. the administrator of the service thanked the applicant for his notice and asked him to indicate the content, date and time of the comment.

On 5 March 2009 at 6.35 p.m. the applicant replied enclosing the comment posted by A.J. with information about the time when it had been made. He also attached a screenshot of the post. The applicant requested that A.J. could no longer act as the moderator of the forum.

In an email sent on 6 March 2009 at 7.28 a.m. the administrator requested the applicant to send her a copy of the link to the posted comment. The applicant replied shortly with the link.

On an unspecified date on or before 9 March A.J. removed his post "I join in the wishes" under the comment posted by T.B. However, his and

T.B.'s comments were still accessible as they had been copied by others users. This content was removed only in January of 2010 on an order from the Głogów District Prosecutor.

In an email sent on 9 March 2009 at 8.36 a.m. the administrator informed the applicant that the comment he complained about could not have been found under the date and time indicated. In an email sent on the same day at 12.10 p.m. the applicant indicated that he had already enclosed a screenshot with the relevant address. He further requested that A.J. be discharged from the position of the moderator. Otherwise, the applicant would sue the portal for infringement of his personal rights.

In an email sent on 10 March 2009 at 8.43 a.m. the administrator again requested the applicant to provide her with the link to the impugned comment. On 11 March 2009 she again requested the applicant to inform her about the date and time of the impugned comment since under the date of 4 March 2009 indicated by the applicant there had been no comment infringing the terms of service of the portal. In reply of 11 March at 3.05 p.m. the applicant again enclosed the screenshot. In a reply of 12 March 2009 the administrator of the portal claimed that the screenshot did not include the date and time.

3. Civil action

On 13 March 2009 the applicant brought a civil action against Nasza Klasa sp. z o.o. for infringement of his personal rights under Articles 24 and 448 of the Civil Code. He sought an order requiring the defendant company to publish an apology on its website and to remove offensive comments. The applicant further sought an award of 8,000 Polish zlotys (PLN) in compensation for non-pecuniary damage. He claimed that the offensive comments were read by the faculty of the Institute and his friends.

The Regional Court held that the applicant's action was partly justified. It ordered the defendant company to publish an apology on its internet site for failure to remove content infringing the applicant's reputation between 1 March 2009 and January 2010. It also awarded the applicant PLN 2,000 in compensation and dismissed the remainder of the claim.

The court established that the applicant participated in discussions on many internet fora, including the forum of the University of Wroclaw at the portal of Nasza klasa. The applicant had also his own blog. In his blog and during discussions at various internet fora the applicant expressed himself on anti-Semitism, holocaust, abortion, presented controversial views on public figures, and expressed radical pro-Catholic views. The applicant's comments were formulated firmly but he did not use offensive language. Others users of the internet fora perceived him as a controversial person provoking strong reactions.

The court established that during discussion on the forum of the University of Wroclaw on 3 and 4 March 2009 the users of the forum, including the moderator A.J. had posted offensive comments about the applicant. The administrator of the portal failed to remove the offensive comments. The moderator A.J. removed his comment. However, the offensive comments made by A.J. and T.B. in the discussion were copied by other users and remained accessible for almost a year. They were removed only on an order of the Glogow District Prosecutor.

The court agreed that the defendant company did not create the impugned comments but this fact did not exclude its liability. The liability of the defendant consisted in providing a tool for the user whose comments violated the personal rights, dignity and reputation of the applicant.

The court further noted that the terms of service indicated that the internet portal was aware of the need to protect users against offensive and vulgar comments made by other users. Paragraph 6.7 of the terms of service prohibited posting content which infringed the personal rights and dignity of other persons. Paragraph 7.7 authorised the administrator to remove content which was illegal or offensive and to block access to the account of a user.

The Regional Court dismissed the arguments of the defendant company that its liability was excluded in the present case. It noted that the defendant company was the provider of hosting services, i.e. it made available to users its host servers in order to store various types of data. This data did not originate from the provider of hosting services but from third parties (the users). The court found that section 14 § 1 of the Act was applicable to the defendant company as the provider of hosting services. This provision excluded the liability of the provider of hosting services on the condition that it did not have knowledge of illegal information stored by a user, and in the case of obtaining such knowledge or official notification thereof it expeditiously disabled access to illegal information.

The court found that the defendant company had had knowledge of illegal activities of the users of the portal *nasza-klasa.pl* in the course of discussion at the University of Wrocław forum. It noted that the offensive comments of T.B. and A.J. addressed to the applicant had not been removed shortly after they had been posted. In addition, despite the fact that moderator A.J. had removed his own post, the offensive comments were still accessible on the forum for a long time since they had been copied by others users. These comments were removed at the order of the prosecutor and not by decision of the internet portal.

The court further noted that the moderator A.J. had not supervised the discussion and had not removed the offensive comments, but had even signed up to the comment posted by T.B. It observed that the moderator of the forum had commented on the post made by T.B. on 4 March 2009 at 9.21 a.m. This was the moment when the administrator of the portal had learnt at the latest that the content violating the terms of service had been posted. The fact that the moderator was not an employee of the internet portal was irrelevant, since the moderator had been verified and appointed by the administrator.

In his notice to the administrator of 5 March 2009 the applicant did not indicate a link to the page where the offensive comments had been posted. However, he included in the notice the screenshot of the relevant page. This, in the court's view, should have been sufficient for the administrator to establish that the terms of service had been violated and to take appropriate measures in response. The court noted that the applicant had indicated the date and time, the content of the offensive comments and the identity of the moderator. In addition, on 1 March 2009 the applicant had sent an email to the administrator about the threats received from another user. The administrator reacted only on 5 March 2009 by asking for further information.

The court further found that the defendant company (the internet portal) should have reacted when it had established that the terms of service had been breached. In the present case, notwithstanding the fact that the applicant had objected only to the specific comments of A.J. and T.B., the defendant company should have checked the discussion on the forum and removed the same comments from all posts on the forum.

The court dismissed the defendant company argument that section 15 of the Act did not impose on it an obligation to monitor the information which it transmitted or stored. It found that this provision did not affect its earlier finding that the defendant company's liability was engaged since it had had knowledge of the illegal content of the comments.

In conclusion, the Regional Court found that the defendant company had been liable for the infringement of the personal rights of the applicant and that the comments complained of had transgressed the permissible limits of public discussion. It noted that persons with a certain level of education should not use this type of language, especially on the forum addressed to the students, graduates and the teaching faculty of a university. It was true that the language of the internet users was blunt, concise and different from generally accepted standards; however, this factor did not permit breaching the minimum standards of decency. In the court's view, the impugned comments did not concern exclusively the statements made by the applicant on the forum but reflected on him personally. The applicant, who participated in an online discussion, should have been aware of the language prevailing on the Internet; however, there was nothing in the manner of formulating his views that could justify the use of vulgar comments.

The court held that the applicant's dignity and reputation had been violated. It ordered the defendant company to publish an apology on its internet portal and awarded the applicant PLN 2,000 (EUR 500) in compensation.

4. Proceedings before the Court of Appeal

The defendant company appealed. It submitted, *inter alia*, that the Regional Court erred in finding the defendant liable for the infringement of personal rights in that it had failed to remove promptly the comments posted by users of the portal *nasza-klasa.pl* on the University of Wrocław forum. The defendant company argued that its liability was excluded pursuant to section 14 § 1 of the Act because having received the notice of abuse the defendant had promptly verified whether the impugned comments had been posted on the portal and having established that they had been already removed by the moderator no further action was necessary. The defendant company further argued that the Regional Court had found, contrary to section 15 of the Act, that the defendant had been required to regularly moderate and monitor content posted by the users of the portal. It also claimed that the Regional Court had wrongly interpreted the provisions of the terms of service.

The Court of Appeal allowed the appeal but did not agree with many of the arguments raised by the defendant company. It amended the Regional Court's judgment and dismissed the applicant's action. It also ordered the applicant to pay the costs of the defendant company.

The Court of Appeal found that the argument based on the erroneous interpretation of section 15 of the Act was manifestly ill-founded since the lower court had not ruled that the defendant company was obliged to regularly monitor the content of posted information.

Referring to section 14 § 1 of the Act, the Court of Appeal agreed with the Regional Court that the defendant company's liability in the present case had not been excluded. It held that the defendant company was liable because it had not complied with its obligation stemming from section 14 § 1 to remove promptly the content indicated by the applicant. It accepted the finding that the defendant company had had knowledge of the existence and nature of the posted information. It was highly relevant to establish when the defendant company learnt or when it could have learnt about the notice of abuse filed by the applicant. The date established by the Regional Court was correct, but even an earlier date could have been accepted.

However, the Court of Appeal did not accept the finding that the applicant's personal rights had been infringed. It agreed that the actions of T.B. and A.J. were reprehensible and should be deplored. However, the finding that personal rights were infringed required not only to establish that vulgar and subjectively offensive statements had been made with regard to the person concerned but it also required that other persons would objectively perceive those statements as degrading. Such assessment had to be made with reference to concrete circumstances and place. In the circumstances of applicant's case, the Court of Appeal found that the use of vulgarities by T.B. and A.J. was not aimed at denigrating the applicant in the eyes of those participating in the discussion on the forum but at expressing in this simple, but undoubtedly inappropriate manner, their disapproval of the applicant's views.

The Court of Appeal also noted that a person regularly participating in internet discussion fora should be considered a person involved in public life (*osoba uczestnicząca w życiu publicznym*). Furthermore, it was not unlawful to judge the actions and statements of public figures provided that such a judgment did not exceed the limits accepted by the society. The Court of Appeal, referring to the *Lingens v. Austria* judgment, noted that the differentiation of the scope of protection of personal rights with regard to public figures was one of the principles of the Court's jurisprudence under Article 10 of the Convention.

The Court of Appeal found that the principle established in *Lingens* was also applicable to persons engaged in a kind of debate open to an unlimited number of participants. In addition, the applicant, as every participant in a public discussion taking place on Internet, by having expressed his views consented to them being assessed by other participants. A person participating in such a discussion on the Internet should expect that some comments might be negative and critical. It was not possible to set the exact limits and those always had to be determined individually by reference to the social perception of the impugned comments as well as the individual characteristics of the discussants (their education, culture etc.).

Having regard to the above, the Court of Appeal found that the comments at issue did not exceed the limits applicable to this type of public discourse. The assessment of the impugned comments had to make allowance for the fact that the language of Internet users was blunt, curt and

different from socially accepted standards. Accordingly, even the vulgarities, used to underline the expressiveness of a statement, were accepted and commonly used. The Court of Appeal found that the comments complained of by the applicant were not related to him personally but to the content and the manner in which he had formulated his views in the course of a public debate. Accordingly, the Court of Appeal held that they had not infringed the personal rights of the applicant.

5. Proceedings before the Supreme Court

The applicant filed a cassation appeal. He disagreed with the finding of the Court of Appeal that he should be considered a person involved in public life. He did not hold any public office, was not widely known and was not involved in any public activity having a significant impact on the life of the community. He used the Internet for a as a tool of communicating with other users. He also objected to the finding that the use of offensive and vulgar comments in Internet discussions could be justified.

On 8 November 2012 the Supreme Court refused to entertain the cassation appeal.

B. Relevant law

1. Directive 2000/31/EC

The relevant parts of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) were set out in *Delfi AS v. Estonia*, no. 64569/09, §§ 41-42, 10 October 2013, currently pending before the Grand Chamber.

2. The Law on Electronic Services

Sections 14 and 15 of the Law on Electronic Services of 18 July 2002 (*Ustawa o świadczeniu usług drogą elektroniczną*), modelled on the provisions of the Directive 2000/31/EC, are reproduced in the case of *Jeziór v. Poland*, no. 31955/11, communicated on 24 September 2012.

COMPLAINT

The applicant alleges a violation of Article 10 of the Convention. He complains about the domestic court's finding that users of the Internet are public figures and are not entitled to protection. He is a private person who expressed his private point of view in an online discussion forum. The applicant complains that he was not protected against insults and threats published on the relevant portal.

QUESTION TO THE PARTIES

Has there been a violation of the applicant's right to respect for his private life, contrary to Article 8 of the Convention (cf. *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012)?