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

11 February 2011

FIRST SECTION

Application no. 64569/09
by DELFI AS
against Estonia
lodged on 4 December 2009

STATEMENT OF FACTS

THE FACTS

The applicant, Delfi AS, is a public limited company registered in Estonia. It is represented before the Court by Mr V. Otsmann, a lawyer practising in Tallinn.

A. The circumstances of the case

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

1. Background of the case

The applicant company is the owner of Delfi, an internet news portal that publishes up to 330 news articles a day. Delfi is one of the largest news portals on the internet in Estonia. It publishes news in Estonian and Russian in Estonia and also operates in Latvia and Lithuania. At the end of the body of the news articles there is a text "add your comment" and fields for comments, commentator's name and email address (optional). Below these fields there are buttons "publish the comment" and "read comments". The comments are uploaded automatically and are, as such, not edited or censored by the applicant company. The articles receive about 10,000 readers' comments daily, the majority posted under pseudonyms.

Nevertheless, there is a system of notify-and-take-down in place: any reader can mark a comment as *leim* (from the English word "flame") and the comment will be removed expeditiously. Furthermore, there is a system of automatic deletion of comments that include certain stems of vulgar words. In addition, a victim of a defamatory comment may directly notify the applicant company and the comment will be removed immediately.

The applicant company has taken efforts to advise users that the comments are not its opinion and that the authors of comments are responsible for their content. There is a text on Delfi's internet site: "The Delfi message board is a technical medium allowing users to publish comments. ... Authors of comments are liable for their comments."

2. Article and comments published on the internet news portal

On 24 January 2006 the applicant company published an article on the Delfi portal under the heading 'SLK Destroyed Planned Ice Road'. Ice roads are public roads over the frozen sea opened between the Estonian mainland and some islands in winter. The abbreviation *SLK* stands for AS Saaremaa Laevakompanii (Saaremaa Shipping Company, a public limited company). SLK provides a public ferry transport service between the mainland and some islands. L. is a member of the supervisory board of SLK and the company's majority shareholder.

On 24 and 25 January 2006 the article attracted 185 comments. Some of them contained personal threats and offensive language directed against L.

On 9 March 2006 L.'s lawyers requested the applicant company to remove the offensive comments and claimed 500,000 kroons (EEK) (approximately 32,000 euros (EUR)) for non-pecuniary damage. The request concerned twenty comments.

On the same day the offensive comments were removed by the applicant company.

On 23 March 2006 the applicant company responded to the request from L.'s lawyers. It informed L. that the comments had been removed according to the notice-and-take-down obligation, and refused the claim for damages.

3. Civil proceedings against the applicant company

On 13 April 2006 L. brought a civil suit against the applicant company with Harju County Court. By a judgment of 25 June 2007 the claim was dismissed. The County Court found that the applicant company's responsibility was excluded under the Information Society Services Act (*Infoühiskonna teenuse seadus*), based on the Directive on Electronic Commerce (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). The court considered that the comment environment in the applicant company's news portal was to be distinguished from the portal's journalistic area. The administration of the former by the applicant company was essentially of a mechanical and passive nature. The applicant company could neither be considered the publisher of the comments, nor did it have any obligation to monitor them.

On 22 October 2007 the Tallinn Court of Appeal granted L.'s appeal. It considered that the County Court had erred in finding that the applicant company's responsibility was excluded under the Information Society Services Act. The County Court's judgment was quashed and the case referred back to the first-instance court for new consideration.

On 21 January 2008 the Supreme Court declined to hear the applicant company's appeal.

On 27 June 2008 Harju County Court, having re-examined the case, found for L. In accordance with the Court of Appeal's instructions it relied on the Obligations Act (*Võlaõigusseadus*) and deemed the Information Society Services Act inapplicable. It observed that the applicant company had placed a note on its internet site that comments were not edited, that it was prohibited to post comments that were contrary to good practice and that the applicant company reserved to itself the right to remove such comments. A system was put in place whereby users could notify the applicant company of any inappropriate comments. However, the County Court considered that this was insufficient and did not allow adequate protection for the personality rights of others. The court found that the applicant company itself was to be considered the publisher of the comments, and it could not avoid responsibility by publishing a disclaimer that it was not liable for the content of the comments.

The County Court found that news article itself published in the Delfi news portal was a balanced one. A number of comments, however, were vulgar in their form; they were humiliating and defamatory and impaired L.'s honour, dignity and reputation. The comments went beyond justified criticism and amounted to simple insults. The court concluded that freedom of expression did not extend to protection of the comments concerned and that L.'s personality rights had been violated. L. was awarded EEK 5,000 (EUR 320) in non-pecuniary damages.

On 16 December 2008 the Tallinn Court of Appeal upheld the County Court's judgment. It emphasised that the applicant company had not been required to exercise preliminary control over comments posted on its news portal. However, having chosen not to do so, it should have created some other effective system which would have ensured rapid removal of unlawful comments from the portal. The Court of Appeal considered that the measures taken by the applicant company were insufficient and that it was contrary to the principle of good faith to place the burden of monitoring the comments on their potential victims.

The Court of Appeal rejected the applicant company's argument that its responsibility was excluded on the basis of the Information Society Services Act. It noted that the applicant company was not a technical intermediary in respect of the comments, and that its activity was not of a merely technical, automatic and passive nature; instead, it invited users to add comments. Thus, the applicant company was a provider of content services rather than of technical services.

On 10 June 2009 the Supreme Court dismissed the applicant company's appeal. It upheld the Court of Appeal's judgment in substance but partly modified its reasoning.

The Supreme Court approved the lower courts' interpretation of the Information Society Services Act and reiterated that an information society

service provider, falling under that Act and the Directive on Electronic Commerce, had neither knowledge of nor control over the information which was transmitted or stored. Differently, a provider of content services governed the content of information that was being stored. In the present case, the applicant company had integrated the comment environment into its news portal and invited the users to post comments. The number of comments had an effect on the number of visits to the portal and on the applicant company's revenue from advertisements published on the portal. Thus, the applicant company had an economic interest in the comments. The fact that the applicant company did not write the comments itself did not imply that it had no control over the comment environment. It enacted the rules of comment and removed comments if the rules were breached. The users, on the contrary, could not change or delete the comments they had posted; they could merely report indecent comments. Thus, the applicant company could determine which comments were published and which not. The fact that it made no use of this possibility did not mean that it had no control over the publishing of the comments.

Furthermore, the Supreme Court considered that in the present case both the applicant company and the authors of the comments were to be considered publishers of the comments. In this context, it also referred to the economic interest of an internet portal's administrator which made it a publisher as entrepreneur, similarly to a publisher of printed media. The Supreme Court found that the plaintiff was free to choose against whom he brought the suit, and L. had chosen to bring the suit against the applicant company.

B. Relevant domestic law

The Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) provides:

Article 17

"No one's honour or good name shall be defamed."

Article 19

"(1) Everyone has the right to free self-realisation.

(2) Everyone shall honour and consider the rights and freedoms of others, and shall observe the law in exercising his or her rights and freedoms and in fulfilling his or her duties."

Article 45

"(1) Everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be restricted by law to protect public order, morals, and the rights and freedoms, health, honour and the good name of others. This right may also be restricted by law for state and local government public servants, to protect a state or business secret or information received in confidence, which has become known to them by reason of their office, and the family and private life of others, as well as in the interests of justice.

(2) There is to be no censorship."

Paragraph 2 of section 134 of the Obligations Act (*Võlaõigusseadus*) provides:

> "In the case of an obligation to compensate for damage arising from ... violation of a personality right, in particular from defamation, the obligated person shall compensate the aggrieved person for non-pecuniary damage only if this is justified by the gravity of the violation, in particular by physical or emotional distress."

Section 1045 of the Obligations Act stipulates that the causing of damage is unlawful if, *inter alia*, the damage is caused by violation of a personality right of the victim. The Obligations Act further provides:

Section 1046 – Unlawfulness of damaging personality rights

> "(1) The defamation of a person, *inter alia* by passing undue judgment, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person, is unlawful unless otherwise provided by law. Upon the establishment of unlawfulness, the type of violation, the reason and motive for the violation and the gravity of the violation relative to the aim pursued thereby shall be taken into consideration.
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> (2) The violation of a personality right is not unlawful if the violation is justified considering other legal rights protected by law and the rights of third parties or public interests. In such case, unlawfulness shall be established on the basis of the comparative assessment of different legal rights and interests protected by law."

Section 1047 – Unlawfulness of disclosure of incorrect information

> "(1) The violation of personality rights or interference with the economic or professional activities of a person by way of disclosure of incorrect information or by incomplete or misleading disclosure of information concerning the person or the activities of the person, is unlawful unless the person who discloses such information proves that, upon the disclosure thereof, the person was not aware and was not required to be aware that such information was incorrect or incomplete.
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> (2) The disclosure of defamatory matters concerning a person, or matters which may adversely affect the economic situation of a person, is deemed to be unlawful unless the person who discloses such matters proves that the statement is true.
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> (3) Regardless of the provisions of subsections (1) and (2) of this section, the disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has checked the information or other matters with a thoroughness which corresponds to the gravity of the potential violation.
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> (4) In the case of the disclosure of incorrect information, the victim may demand that the person who disclosed such information refute the information or publish a correction at the person's expense, regardless of whether the disclosure of the information was unlawful or not."

Section 1055 – Prohibition on damaging actions

> "(1) If unlawful damage is caused continually or a threat is made that unlawful damage will be caused, the victim or the person who is threatened has the right to demand that behaviour which causes damage be terminated or the making of threats of such behaviour be refrained from. In the case of bodily injury, damage to health, violation of inviolability of personal life or any other personality rights, it may be demanded, *inter alia*, that the tortfeasor be prohibited from approaching others (restraining order), the use of housing or communication be regulated, or other similar measures be applied.
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> (2) The right to demand that behaviour which causes damage as specified in subsection (1) of this section be terminated does not apply if it is reasonable to expect

that such behaviour can be tolerated in human coexistence or due to significant public interest. In such a case the victim has the right to make a claim for compensation for damage caused unlawfully.

..."

Information Society Services Act (*Infoühiskonna teenuse seadus*) provides as follows:

Section 8 – Restricted liability upon mere transmission of information and provision of access to public data communications network

"(1) Where a service is provided that consists of the mere transmission in a public data communication network of information provided by a recipient of the service, or the provision of access to a public data communication network, the service provider is not liable for the information transmitted, on condition that the provider:

1) does not initiate the transmission;

2) does not select the receiver of the transmission;

3) does not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access in the meaning of paragraph 1 of this section include the automatic, intermediate and transient storage of the information transmitted, in so far as this takes place for the sole purpose of carrying out the transmission in the public data communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission."

Section 9 – Restricted liability upon temporary storage of information in cache memory

"(1) Where a service is provided that consists of the transmission in a public data communication network of information provided by a recipient of the service, the service provider is not liable for the automatic, intermediate and temporary storage of that information, if the method of transmission concerned requires caching for technical reasons and the caching is performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service at their request, on condition that:

1) the provider does not modify the information;

2) the provider complies with conditions on access to the information;

3) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used in the industry;

4) the provider does not interfere with the lawful use of technology, widely recognised and used by the industry, to obtain data on the use of the information;

5) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court, the police or a state supervisory authority has ordered such removal."

Section 10 – Restricted liability upon provision of information storage service

"(1) Where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

1) the provider does not have actual knowledge of the contents of the information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

2) the provider, upon obtaining knowledge or awareness of the facts specified in subparagraph 1 of this paragraph, acts expeditiously to remove or to disable access to the information.

(2) Paragraph 1 of this section shall not apply when the recipient of the service is acting under the authority or the control of the provider."

Section 11 – No obligation to monitor

"(1) A service provider specified in sections 8 to 10 of this Act is not obliged to monitor information upon the mere transmission thereof or provision of access thereto, temporary storage thereof in cache memory or storage thereof at the request of the recipient of the service, nor is the service provider obliged to actively seek information or circumstances indicating illegal activity.

(2) The provisions of paragraph 1 of this section do not restrict the right of an official exercising supervision to request the disclosure of such information by a service provider.

(3) Service providers are required to promptly inform the competent supervisory authorities of alleged illegal activities undertaken or information provided by recipients of their services specified in sections 8 to 10 of this Act, and to communicate to the competent authorities information enabling the identification of recipients of their service with whom they have storage agreements."

COMPLAINT

The applicant company complains under Article 10 of the Convention that its freedom of expression (freedom to impart information) has been infringed.

QUESTION TO THE PARTIES

Has there been a violation of the applicant company's right to freedom of expression, in particular its right to impart information and ideas, contrary to Article 10 of the Convention?