

MAYA ENGEL v. ARTEMIDIA

Facts

1. The applicant, Ms Maya Engel, is a national of Artemidia, a Council of Europe member state. She was born in 1980, lives in Keleb, the capital of Artemidia, and is an employee of a local branch of the oil company “DOV”, which engages in exploration, production, refinement, and distribution of oil and is one of five largest oil companies in the world.
2. The applicant was in a relationship with Mr B from 2014 until 2016. Mr B was born in 1970, lives in Keleb and is a national of Artemidia. Mr B is a renowned professor of anthropology and a popular activist for the preservation of the environment with thousands of followers on social media in the region. He often speaks at public events. In the mid-2000s he was one of the hosts of a popular radio programme related to environmental issues.
3. In 2016, the applicant decided to end the relationship with Mr B following a series of disagreements as well as jealous and controlling behaviour of Mr B.
4. Mr B did not agree with the separation and engaged in various forms of cyber harassment of the applicant. Mr B sent the applicant e-mails, text messages and made a number of phone calls, some of which included threats to her life. In an e-mail sent on 4 August 2017 Mr B also stated that he was in possession of photographs depicting Ms Engel naked. He threatened to send the photographs to the applicant’s employer should she not change her mind and renew the relationship with him. Ms Engel does not have information about the existence of any such photographs, but from Mr B’s e-mail she inferred that there was a possibility that he had created them using photo editing software.
5. On 5 August 2017 Mr B published a post on his public Friendzone profile, a leading social media platform, in which he criticised the negative environmental impact of the oil company the applicant was working for. The post was accessible not only to his “friends” on the social network, but also to general public. As a part of the criticism he stated that the company employed persons such as the applicant, providing her full name and surname. With regard to the applicant, the post stated: “DOV is polluting the environment with the help of individuals such as the ‘angelic’ Maya Engel, a deranged man-hating woman who does not hesitate to pose naked in front of a camera and lobbies for her feminist propaganda.” The post contained a hyperlink to the applicant’s Friendzone profile.
6. The post was shared over 2,000 times and a number of offensive comments were posted on Mr B’s profile by his followers. The applicant herself also received several negative messages from Mr B’s followers through Friendzone’s messenger application. Comments were made by Mr B’s followers from Artemidia and other countries in the region. They included, for example, “death to man-hating feminists who are destroying our planet”, “whoever Maya Engel is, she should pay for what she has done, all of us in the region must join forces to track her down”, “we need to protect the environment at all costs, I don’t care if it means that she will have to disappear in the process”, and “who wouldn’t want to be in a relationship with a man like B? This woman must really have some serious issues”.

Criminal complaint concerning cyber harassment

7. On 10 August 2017 the applicant lodged a criminal complaint against Mr B, complaining about the cyber harassment, his emails and phone calls with direct threats to her life. She also requested compensation for moral damage suffered due to Mr B's behaviour. She stated, inter alia, that Mr B's behaviour had led her to undergo treatment by a psychiatrist and counselling with a psychologist. The pre-trial investigation was dealt with by the local police authority. On 15 August 2017, upon request of the police authority and the prosecutor's office, the first-instance court issued a temporary restraining order, enjoining Mr B, until the investigation is concluded, to refrain from contacting the applicant by any means, including electronic means and social media, or in person.
8. The investigation confirmed that Mr B was indeed the author of the threatening emails and that he had repeatedly contacted the applicant by telephone with the same threats. It further uncovered an element previously unknown to the applicant, that Mr B had searched the applicant's name on Google over 10,000 times in the course of almost two years. However, the police authority considered it unnecessary to examine the veracity of Mr B's claims to possess a naked photograph of the applicant. On 20 August 2017 the criminal proceedings were discontinued. The police authority concluded that Mr B's acts did not fall under the definition of any crime prescribed by the Criminal Code. As for the crime of cyberstalking and cyber harassment under Article 532 of the Criminal Code, the police authority explicitly noted that the intensity and the means employed by Mr B had not reached the threshold required.
9. Upon the applicant's motion, the prosecutor's office examined the conclusions of the police authority and upheld the decision on discontinuation of the investigation. The decision was adopted on 25 August 2017.
10. The applicant lodged an appeal against this decision. On 10 May 2018, the first-instance court upheld its earlier restraining order and ordered Mr B to refrain from contacting the applicant by any means for a period of two years. Mr B's e-mail threats were considered as a misdemeanour against public order and Mr B was ordered to pay a 200 EUR fine. The court held that Mr B had never acted on his threats, he was a respected, well-known public person fighting for the general good. Mr B's overall behaviour must have been a result of his disappointment and emotional distress following his separation from the applicant. The court also heard Mr B's two former partners who did not mention any similar behaviour towards them in the past. The court did not respond to the applicant's argument that Mr B's social media post, for which separate proceedings were initiated, was also a part of the cyber harassment she was subjected to. The court nevertheless noted that in case Mr B breached the restraining order by contacting the applicant in any form or approaching her physically, he might be subject to a one-month imprisonment.
11. Following the applicant's appeal, the decision was upheld by the court of appeal. The decision became final on 1 September 2018. After the adoption of this decision, Mr B did not approach the applicant directly, however, he wrote a post on his Friendzone profile stating that the applicant "continued to poison his life by dragging him to courts".

Criminal complaint concerning hate speech on Friendzone

12. On 10 August 2017, the applicant also lodged a criminal complaint against Mr B for hate speech with regard to his social media post about the applicant. The applicant argued that Mr B was also responsible for not removing the hateful comments published on his profile by his followers. Further, by sharing a hyperlink to the applicant's profile, he allowed his followers to contact her with threats and negative comments. As in the other criminal complaint, the applicant requested compensation for moral damage suffered as a result of the hate speech. The applicant stated, inter alia, that the harassment and hate speech had led her to undergo treatment by a psychiatrist and counselling with a psychologist.
13. The criminal investigation by the local police authority was discontinued on 20 September 2017 on the grounds that Mr B had published his private views which were protected under his freedom of speech. The offensive comments were not published by him and Mr B did not have resources of a media outlet to moderate the discussion on his Friendzone profile, even if his profile was accessible to the general public. There was no criminal offense identified in the behaviour and actions of Mr B. The applicant appealed the decision and argued that it was contrary to domestic law. She noted that the police had failed to establish that conduct of Mr B and his followers had amounted to hate speech based on gender.
14. Upon the applicant's appeal, the prosecutor's office upheld the decision of the police authority on 30 December 2017. The decision noted that Mr B's behaviour had been a mere overreaction to the end of his relationship and none of the threats constituted a real danger to the applicant or caused her any material or moral harm.
15. On 5 January 2018 the applicant lodged an appeal with the first-instance criminal court. She stressed that the way the case had been handled with by the police and the prosecutor's office was a blatant example of the institutional discrimination that women in Artemidia were facing on daily basis. She invoked reports of the local NGO Themis to corroborate her allegations.
16. The applicant's appeal against the decision to discontinue the criminal proceedings was rejected on 1 July 2018. The first-instance court found that the decision to discontinue criminal proceedings against Mr B for his Friendzone post or for not removing the comments of his followers had been reasonable. Further, Mr B had a considerable social media following and could not be held responsible for messages sent to the applicant by his individual followers. The court also added that any nude photographs flouted traditional values enshrined in the Constitution and, as such did not deserve protection. Lastly, the court held that there were no grounds to conclude that all elements of the crime of hate speech in the case at hand had been met. The court noted that break-ups were accompanied by a plethora of emotions and the applicant could perhaps be more sympathetic to the manner in which Mr B had dealt with his grief. While Mr B vented his sadness through the social media, the applicant did so before the courts and the time has come for both Mr B and the applicant to turn the page and start looking into the future. No further remedy was available for the applicant and in the absence of prosecutor's appeal, the decision became final on 11 July 2018.

17. The applicant lodged a constitutional complaint, arguing that the manner in which both of her criminal complaints had been dealt with discriminated against her as a woman. The authorities had failed to acknowledge the seriousness of the issue due to gender stereotypes prevalent in the Artemidian society and insufficient legal protection offered to victims of gender-based harassment. The applicant's constitutional complaint was declared inadmissible as being manifestly ill-founded on 10 September 2018.
18. On 15 September 2018 the applicant lodged an application with the European Court of Human Rights with regard to both sets of criminal proceedings initiated at domestic level. She stated that she had not been able to obtain redress at domestic level including before the Constitutional Court. She complained under Articles 6, 8, 13 and 14 of the Convention.

Law

19. Artemidia is a Council of Europe member state and has ratified most of its conventions, including the European Convention on Human Rights and all of its Protocols. The European Convention on Human Rights is a part of the Artemidian Constitution. Artemidia has signed but not ratified the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). It has ratified all core United Nations human rights treaties, with the exception of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). CEDAW was, however, signed by Artemidia in 1990.
20. Family and family values are enshrined in the Artemidian Constitution. Reports by national and international NGOs show widespread discrimination against women and members of minority groups. A 2017 report of the local NGO Themis noted that hate speech, although criminalised, is routinely tolerated by the authorities creating an environment of impunity. This was particularly applicable to instances of hate speech on social media platforms. A 2016 report of international NGO Human Rights International noted that women in Artemidia are victims of discrimination in all areas, including access to justice. Criminal complaints lodged by women are treated through the lens of family values and the role of a woman in the society, despite legislation explicitly prohibiting discrimination on the grounds of gender. It also transpires from this report that the perpetrators of such acts do not seem to receive dissuasive punishments by the courts, which do not consider such offences to be of real gravity.
21. Artemidia's judicial system consists of two levels of courts which have jurisdiction to consider civil, criminal, and administrative matters - the courts of first instance and the courts of appeal. After the adoption of a final judgment by a court of appeal, no further appeal is possible.
22. The recently adopted 2017 Anti-discrimination Act in conjunction with the Constitutional Court Act empowers individuals to raise issues of alleged discrimination by the State authorities before the Constitutional Court. Except for discrimination complaints, the Constitutional Court does not have the authority to examine any other alleged human rights violations. The Constitutional Court may find a violation of the individual's right not to be

discriminated against, order the respective State organ to abstain from further violation, and award just satisfaction for pecuniary and non-pecuniary damage suffered. When rejecting a case as manifestly ill-founded, the Constitutional Court is not required to provide reasoning. The European Court of Human Rights has not yet declared whether this remedy is considered effective.

23. Criminal investigations are initiated and conducted by local police authorities, acting either on their own initiative or on the basis of a criminal complaint lodged by an alleged victim or a third person.
24. In case of discontinuation of criminal investigation at the pre-trial stage, the alleged victim may request that the prosecutor's office examine the police authority's decision to discontinue the criminal proceedings. In case of a negative decision, the alleged victim may lodge an appeal against the prosecutor's decision with the first-instance criminal court. If the first-instance court upholds the decision to discontinue the investigation, no further appeal is available for the alleged victim. In these situations, the prosecutor's office may, at its own discretion, lodge an appeal with the court of appeal (for example, in situations where additional evidence against the alleged perpetrator has come to light).
25. When finding a perpetrator guilty, the criminal courts can also decide on claims for non-pecuniary damage. The victims may submit their just satisfaction claims at any time during the pre-trial or trial proceedings, but at latest during the final court hearing.
26. Article 78 of the Criminal Code – Misdemeanours against public order:

A person is guilty of a misdemeanour against public order, and shall be punished by a fine of maximum 300 EUR or an imprisonment of up to one month, if he or she has:

- a. engaged in a disorderly conduct;
 - b. caused harm to another person's dignity by ridiculing him or seriously offending him in another manner;
 - c. threatened to cause serious harm to another person; or
 - d. otherwise harshly treated another person.
27. Article 397 of the Criminal Code - Intolerance and incitement to hatred
 - a. A person who publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of people or a person belonging thereto on the grounds of sex, sexual orientation, race, nationality, language, social status, religion or other grounds as set out in Article 14 of the ECHR, is guilty of a crime of intolerance and incitement to hatred and shall be punished by a fine of 1,000 EUR or by imprisonment of up to two years.
 - b. A person who publicly incites violence or the physically violent treatment of a group of people or a person belonging thereto on the grounds of sex, sexual orientation, race, nationality, language, social status, religion, or other grounds as set out in Article 14 of the ECHR, who otherwise supports such activities shall be punished by a fine or by imprisonment of up to three years.

- c. The above provisions apply to offences committed using the computer systems

28. Article 532 of the Criminal Code – Cyber stalking and cyber harassment:

- a. Whoever transmits any communication by computer or other electronic device to any person or causes any person to be contacted for the sole purpose of harassing that person is guilty of a criminal offence, and shall be punished by a fine of not more than EUR 5,000, by imprisonment for not more than one year, or both. “Harassing” means any knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, or bothers the person, and which serves no legitimate purpose. The course of conduct must be of a kind that would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury. “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, evidencing a continuity of purpose. Constitutionally guaranteed freedom of speech does not fall under the prohibited course of conduct.
- b. A second or subsequent conviction is punishable by imprisonment for not more than two years and by a fine of not more than EUR 10,000.
- c. For the purpose of protecting the victim of a conduct defined in this Article, the competent court may render a restraining order. The order can prohibit the defendant from doing anything described therein and may have effect for a specified period or until further order.

29. Article 81 of the Law on Internet Communications

Where an offence under Article 397 of the Criminal Code is committed by electronic means, the author and/or co-author of the publication will be prosecuted as the principal offender. Where such an offence is committed by means of a social media platform, those responsible for the individual social media profile shall not be prosecuted as the author of the publication if they can establish that they were unaware of the offence at the moment of its publication or if prompt action had been taken to remove the offending material as soon as they had become aware of it.

Social media platform is defined in Article 71 of the same law as a web-based, interactive and participatory technology enabling users to create and share content and to communicate online, including through messaging services.