

Helga Pedersen
Moot Court Competition



THE CASE OF THE

HELGA PEDERSEN

MOOT COURT COMPETITION

12TH EDITION - 2023

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

elsa

The European Law Students' Association

David Borg against Zemland

Facts

1. The applicant, Mr David Borg, was born in 1970. He is a national of Zemland, a Council of Europe Member State and lives in Terapolis, Zemland's capital.

Controversies surrounding the applicant's previous public engagements

2. The applicant is a researcher and an influencer known for holding and promoting views often seen as controversial. He has published a number of books and regularly posts on social media. The applicant has 10 million followers on social media from Zemland but also many other Council of Europe Member States. His posts and books are in Zemlandic, English and French. He also frequently features in traditional media, mostly tabloids.
3. In 1992, the applicant's book questioning climate change was published in Zemland. The applicant argued against the recently adopted United Nations Framework Convention on Climate Change as a futile exercise backed by "green terrorists". He proposed a series of public lectures denying climate change to various universities and libraries across Zemland, however, they were rejected as unscientific and never took place. Years later, with the proliferation of social media, the applicant had a chance and platforms - and used them - to share his opinions. He nevertheless was persistent in trying to share his views at public events as well.
4. In 2015, in the context of a large-scale influx of refugees and migrants to Europe, the Terapolis city hall – as the organiser of a festival - cancelled the applicant's public speech on "Illegal migration and Islamisation of Zemland " originally scheduled to take place during the festival. Nevertheless, the applicant proceeded with the speech, as originally planned, and delivered it in a small square at the outskirts of Terapolis. Around one hundred supporters of the applicant gathered to hear his speech. The speech did not lead to any public disturbance.
5. In 2020, excerpts from the applicant's forthcoming book against vaccinations were leaked to the public and shared on the social platform Friendzone. Following protests, the applicant's publisher decided to cancel the print of the book. The publisher based the decision on the protests received from readers and the need to protect public health. The applicant published a video on social media, implicating big pharmaceutical companies in the decision to cancel the print. He also stated that his freedom of expression was continuously violated. As a result, the applicant's supporters organised a large-scale online campaign protesting the decision as an unacceptable curtailing of the applicant's freedom of speech. The applicant did not find any other publisher willing to publish his book in Zemland. Therefore, he proceeded to sell his book on his website in an online format.

6. In 2021, two of the applicant's posts were deleted by Friendzone, as the latter considered that they amounted to misogynistic hate speech and as such contrary to Friendzone's community standards. While confirming the importance of freedom of speech and freedom to hold an opinion, the platform considered that the posts had violated its policies. Even though the applicant's posts were deleted, screenshots of them were widely shared by his followers.

Events preceding the applicant's scheduled public appearance at the Copernicus University

7. A professor at the Copernicus University of Natural Science and Environmental Studies, the largest public university in Zemland (the University), invited the applicant to give two public lectures at the campus of the University in May and June 2022. The lectures were organised under the broad title "What are they not telling us? Critical thinking, research, and practice." The first lecture focused on criticism of climate change and was scheduled to take place on 2 May 2022. The second lecture scheduled for 16 May 2022 focused on the "dangers of feminism".
8. The applicant and the Rector of the University, acting on behalf of the University, signed a contract on 2 April 2022. The contract was a model agreement that had been prepared by the University and used for external lecturers. The applicant was to receive EUR 1,000 per lecture. According to the contract, the University had the right to terminate the agreement with or without cause for up to 72 hrs before the lecture. In such a case, the lecturer was not entitled to any payment for their lecture. The applicant signed the agreement without requesting any modifications.
9. The applicant's invitation was met with divergent views among students and the faculty. While part of the student body was interested in attending the applicant's lectures, including students who wished to intellectually challenge the applicant, a significant portion of students strongly disagreed with his presence on the campus. The students argued that the applicant's views were not backed by science, were based on misogyny and should therefore not be legitimised by the University. Even if the idea behind the invitation was to promote dialogue and encourage students to academically challenge and disprove the applicant's theories, the latter were not worth discussing in the 21st century.
10. While sympathetic to the students' arguments, the Rector did not wish to retract the invitation, as she believed that the academic freedom and the freedom of speech had a historical place at the University. The Rector encouraged students in a public appeal to think critically of the applicant's lectures, to ask questions, and approach the applicant's presentations and views with a scientific mind.
11. Some students did not agree with the explanation and organised a wide protest campaign. As part of the campaign, a protest was organised via Friendzone and scheduled to take place on the University campus on 26 April 2022.

12. The protest started on 26 April 2022, at 10 a.m. Approximately three hundred students turned up, requesting the University to withdraw the applicant's invitation.
13. As the protesters were demanding cancellation of the lectures, the applicant's supporters (also University students) arrived unannounced in large groups and tensions ran high. After half an hour of protesting, the two groups clashed, forcing the University to call the police to intervene. From 11.30 a.m. to 12.30 p.m., students from both groups demolished the interior of the University main hall, which included a number of historical statues and paintings of great value. One of the campus' gardens, including all garden furniture, was burnt down. A mass fight took place, causing severe injuries to twenty persons.
14. On 27 April 2022, the Rector, acting on behalf of the University, cancelled the applicant's lectures in a public statement shared on the University's website. Relying on the need to protect the students' health, lives, morals as well as the University's reputation and property, the Rector stated that the applicant's presence had potential to incite further violence. The Rector also remarked that the applicant's views were discriminatory, based on hate, and not backed by science. Upon the applicant's written request to reconsider the decision, the Rector reiterated the University's position, noting that the applicant had a right to seek redress through local courts, should he wish to do so.

The applicant's civil claim against the University

15. On 10 June 2022, the applicant filed an action for defamation against the University, alleging violation of his rights to freedom of expression and of opinion, as well as discrimination against him on the ground of expressing his opinions. In the same motion, he sued the University for the damage suffered – his claim covered pecuniary damage of EUR 50,000, including loss of earnings from two lectures scheduled to take place at the University as well as other cancelled projects, and non-pecuniary damages of EUR 1,000,000 due to the humiliation, stress and anxiety caused.
16. Before the Terapolis Court, the applicant argued that his views had been very well known to the University. The University had signed a binding contract with him based on which he was to present his views in a public forum. The protest, albeit with a regrettable outcome, should be seen as a part of the debate and not leading to his public ban and humiliation. He argued that he bore no responsibility for the unfortunate events at the campus and should not be punished for acts of third parties, including his supporters. The University was an academic and a scientific institution and should not succumb to the modern “political over-correctness” and the “woke” generation's “cancel culture”. By cancelling his lectures – and on top of that in a public statement - the University's actions amounted to censorship, damaged his reputation, and discriminated against him. As a result, organisers of some of his other planned projects had backed down.
17. The Terapolis Court heard statements from witnesses, human rights and constitutional law experts and examined various documentary evidence. On 9 January 2023, the Terapolis Court rejected the applicant's claim. It found that the University had been obliged to react in

order to avoid violence in a tense atmosphere. Given that it had signed a contract with the applicant, it obviously did not have an intent to restrict his freedom of expression or discriminate against him. The University never made any discriminatory or defamatory statements against the applicant. The applicant's views, including those on climate change, had no value of public interest. Further, they were of such nature that they could have led to gender-based violence and misogyny at the University and, as such, were not worthy of respect in a democratic society of the 21st century. Consequently, the applicant's views did not fall under the protection of the European Convention on Human Rights (the Convention). The applicant appealed on 29 January 2023.

18. On 12 April 2023, the Meganissian Regional Court reversed the first-instance judgement. It held that the University, in its public statement of 27 April 2022, had damaged the applicant's reputation, professional image and career. By cancelling the planned lectures, the University had violated the applicant's right to freedom of expression. The Regional Court held that the University should have taken a timely action to prevent violence and allow both groups to express their opinions peacefully and, even more so, to create conditions for the applicant to give his lectures as planned. The role of the courts was to examine whether the applicant had suffered damage as a result of the University's actions. Rather than restricting the applicant's freedom of expression, the University should have promoted dialogue and sharing of divergent opinions. The Regional Court granted the applicant's claim for damages in full. The University filed an appeal on 30 April 2023.
19. On 14 July 2023, the Supreme Court granted the University's appeal and reversed the Regional Court's judgement. It fully agreed with the Terapolis Court's reasoning and concluded that the applicant's rights had not been violated. It further held that it was not proven that the University had deliberately spread untrue facts in order to harm the applicant. Rather, the University had acted reasonably, aiming to prevent further violence and spreading views that did not qualify as protected speech. Lastly, the applicant was not discriminated against in any way.
20. On 1 September 2023, the applicant submitted an application before the European Court of Human Rights alleging violation of his rights under Article 10 of the Convention and Article 14 in conjunction with Article 10.

Law

21. Zemland is a Council of Europe Member State. It is not a Member State of the European Union. It has ratified all major Council of Europe and United Nations human rights treaties and all additional protocols to the Convention.

Constitution

22. The Zemlandic Constitution guarantees all rights envisaged in the Convention and its Protocols and makes explicit references to them.

23. Article 25 of the Constitution stipulates that art and science, research, and teaching shall be free and their development and promotion shall be an obligation of the State. The Constitution prohibits private universities. Each Zemlandic university is headed by a rector, who acts on behalf of the university.

Civil Procedure

24. Decisions of city courts may be challenged before the competent regional courts within 30 calendar days from the date when the decision was served on the party. The regional courts' decisions may be further appealed to the Supreme Court within 30 calendar days from the date when the regional court's decision was served on the party. The decisions of the Supreme Court are final and not subject to a further appeal.

Defamation

25. Defamation was decriminalised by Zemland in early 2001. In June 2001, the Parliament of Zemland adopted the Law on Defamation. According to Article 5 of the Law, a natural or a legal person who presents or conveys to a third party untrue facts about another natural or legal person harming their honour and reputation and who knew, was obliged to and/or could have known that such facts were not true, shall be liable for defamation.
26. Since 2001 the procedure for defamation cases has been an ordinary civil proceedings (see paragraph 24 above). The plaintiff may request damages which should be proportionate to the damage suffered (Article 32 of the Code of the Civil Procedure). The defendant is obliged to prove the veracity of their statements.
27. The applicant's case was the first case in which Zemlandic courts were called upon to rule on defamation in context of the recent phenomenon of "cancel culture". Prior to the applicant's case, the Government was aware of similar cases from other universities as well as other Council of Europe Member States and was working on a draft law addressing this phenomenon in more detail (see below).

Draft Law on "Cancel Culture"

28. Following several decisions by Zemlandic public universities to "cancel" a number of academics and researchers for their unorthodox or unpopular opinions, and in view of the latter's corresponding complaints of censorship and restrictions of freedom of speech, the Zemlandic Government started drafting a law defining cancel culture. The draft law envisages fines for universities that cause damage to students, teachers, members of academia or the public by unlawfully interfering with their freedom of speech and/or their opinions. The alleged victims would need to be able to prove the damage caused. Due to wide public disagreements on the matter, the bill has not been passed by the Parliament.