



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

FIFTH SECTION

DECISION

Application no. 47318/07
Marta JELŠEVAR and others
against Slovenia

The European Court of Human Rights (Fifth Section), sitting on 11 March 2014 as a Chamber composed of:

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ann Power-Forde,

Vincent A. De Gaetano,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 16 October 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mrs Marta Jelševar, Mrs Ana Ložar, Mrs Marija Piškur and Mrs Štefka Mežnar, were born in 1930, 1927, 1915 and 1922 respectively, and live in Slovenia. They were represented before the Court by Mr M. Bergant, Mr P. Volgemut, Mr Z. Hajtnik and Mr P. Brišnik, lawyers practising in Mengeš.

2. The Slovenian Government (“the Government”) were represented by their Agent, Mrs A. Vran, State Attorney.

A. The circumstances of the case

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

4. In 1998, B.M.Z. self-published a novel titled 'Ko se tam gori olistajo breze' (When the Birches Up There are Greening) and subtitled 'From the Golden Tales of Depala Vas', in which she described the life story of a woman from the Slovenian countryside who emigrated to the United States of America at the beginning of the 20th century, married a fellow Slovenian by the name of Brinovc and subsequently returned home to take over the family farm, trade in fruit and vegetables and raise a family. The main character, Rozina, was depicted as a lively, ambitious and resourceful woman. However, the book also described that she used sex to get her way with her husband, brewed and sold illegal alcohol during Prohibition in the United States, and valued money over her children. Rozina was a devoted Catholic, often conversing with the Virgin Mary, and the book concluded with the depiction of her death as a surreal allegory of her assumption into heaven, assisted by the Virgin Mary.

5. The book, while focusing on Rozina, also depicted some other characters, among whom was Minka, one of Rozina's daughters, who was imprisoned during the Second World War for stealing.

6. The applicants were made aware of the existence of the book by one of their sisters, who had recounted many details from her parents' lives to B.M.Z., and by their acquaintances, who recognised the story and the characters depicted in the book as the story of the applicants' family. The setting of the book was the area where the applicants' family had actually lived, and the name Brinovc, although not the actual surname of the family, was the name under which they were known in their local community. The applicants also recognised a number of other similarities between the story in the book and their own family story. For instance, the applicants' parents had been married in the United States and had come back to take over the father's family farm, they had traded in fruit and vegetables, selling their merchandise door to door and at county fairs, and the applicants' mother had gone back to the United States after their father's death. There were also other details, such as the applicants' mother's pleadings with the Gestapo during the war for the life of her daughter, whom the family called Minka, and afterwards for the life of another young political prisoner.

7. The applicants lodged a civil action against B.M.Z for violation of personality rights, also claiming non-pecuniary damages for distress suffered on account of the publication, as well as a public notice of apology. They claimed that B.M.Z. had painted a negative and defamatory portrayal of their mother, which humiliated them in the eyes of their local community. Moreover, the third applicant asserted that she had not been

imprisoned on account of any criminal activity, but because she was married to a partisan.

8. On 25 January 2001 the Ljubljana District Court dismissed their claims. The applicants appealed against the judgment before the Ljubljana Higher Court which, on 13 March 2002, set aside the impugned judgment and remitted the case to the first-instance court for fresh consideration.

9. In the new set of proceedings, on 18 December 2003 the Ljubljana District Court heard the first applicant, who related the similarities and differences between the life of her family and the events and characters described in the book. According to the first applicant, her mother and father actually met in Chicago and not New York, their American trade consisted of making straw hats, and not brewing illegal alcohol, and the family was nowhere near as wealthy as their literary counterparts. Moreover, the first applicant was convinced that the sexual life of her parents had been different from that described in the book.

10. The first applicant alleged that the story of her parents was well known in the local community and that their description in the book belittled them. In reply to the question whether their neighbours and acquaintances who knew the family story also knew that all these events, which she claimed had not happened, were untrue, the first applicant replied that they were in fact well aware of that, so they were asking questions to the applicants about what was going on and where these stories came from. The second and the fourth applicant gave similar statements.

11. At the second hearing, on 22 December 2003, the respondent B.M.Z. was heard. She called the court's attention to the importance of her freedom of artistic expression. She further stated that she had drawn inspiration for her book from many different stories, including the stories of her own family, but had not intended to write a biography or to depict any particular person. B.M.Z. also explained that certain events described in her book, such as brewing alcohol during Prohibition, were based on the history of her own family, and that she had been collecting stories of Slovenian immigrants as preparation for the book. She added that it had not been her intention to hurt anybody with the book.

12. The court also heard a number of other witnesses who recognised the story in the book as the story of the applicants' family. They were generally most indignant at the descriptions of the main character's sexual life and brewing of illicit alcohol. One of the witnesses stated that after reading the book she had been left with the impression that the events described in the book had also happened in reality, but she now wondered what was true and what was not. Three other witnesses, however, were convinced that the controversial parts of the story were not true, having known the applicants' mother as an honest and honourable woman.

13. On 22 December 2003 the Ljubljana District Court rendered its judgment. The first, second and fourth applicants were awarded non-

pecuniary damages in the amount of 100,000 Slovenian tolar (SIT, approximately 400 euros (EUR)), while the third applicant was awarded SIT 500,000 (approximately EUR 2,000). The district court also ordered B.M.Z. to publicly apologise to the applicants for the false statements and for dishonouring the memory of their parents, and to remove the book from printing and distribution, under penalty of SIT 50,000 (approximately EUR 200) for each day of continuing sale. It dismissed the remainder of the applicants' claims.

14. In its reasoning, the district court acknowledged that fictional characters could, as a rule, not be assessed through the prism of reality and that there was a risk of self-censorship if the authors of literary works were to be made responsible for every potential insult. However, the court remarked that the freedom of artistic expression, as with all rights, was limited by the rights of others, in the case at issue by the personality rights of the applicants. Pointing to the many similarities between the events depicted in the story and the actual lives of the applicants' family members, as well as to the statements of witnesses who recognised the applicants' mother in the character of Rozina, the district court concluded that the story in the book was not recreated in a fictional, imaginary setting to an extent which would prevent the applicants and other people from their local community from identifying the applicants' family, and in particular their mother.

15. Furthermore, the district court found that certain traits and actions of the literary characters – the parents' brewing of alcohol during Prohibition, Rozina's ridiculing of the Holy Virgin, her boasting to sailors, conflicts with the market vendors, use of sex to get her way with her husband, Minka's imprisonment for theft, and so on – were considered generally unacceptable in the applicants' local community, but all the more so when attributed to a Christian mother of seven children living in the countryside in the early twentieth century. The court considered that the offensive portrayal of the applicants' mother and, indirectly, their father, dishonoured their memory and interfered with the applicants' own emotional well-being to such an extent that it violated their psychological integrity.

16. B.M.Z. appealed against this judgment before the Ljubljana Higher Court.

17. On 23 February 2005 the Ljubljana Higher Court rendered its judgment, allowing the appeal in part regarding the costs of proceedings and dismissing the remainder of the complaints.

18. B.M.Z. lodged a constitutional complaint against this judgment before the Constitutional Court.

19. On 12 April 2007 the Constitutional Court allowed her constitutional complaint and, deciding on the merits of the case, dismissed the applicants' claims. The court, pointing out that it was not its task to examine the factual questions, accepted the lower courts' findings to the effect that the

applicants' mother and the third applicant were clearly identifiable from the book. It then proceeded to weigh the interference with the applicants' personality rights against B.M.Z.'s right to artistic freedom, using two main criteria: the degree of offensiveness of the writing, and the applicants' feelings of being offended. Focusing first on the question whether the actions and stories of literary characters could amount to defamation, the Constitutional Court took the view that, regard being had to the concept of the literary work at issue, an average reader, a notion encompassing a wide variety of readers from different backgrounds, would not perceive what was depicted in the book as factual. Neither would such reader be inclined to interpret the actions and events described in the book in their literal meaning. Moreover, the court assessed that there were no sufficient arguments to support the lower courts' conclusion that the traits and actions of the book's characters were to be considered unacceptable and shameful, even though the applicants perceived them as such. The court considered that from an objective viewpoint, the main character Rozina appeared determined and self-confident, which could not be considered offensive. As regards the character of Minka, the Constitutional Court established that her character was only mentioned in passing, in connection to the story of another prisoner whom the main character Rozina saved from a German prison during the Second World War. In the Constitutional Court's opinion, neither the writing itself nor the aim pursued by the author, which was to create a story of fiction, revealed any intention to offend on her part.

20. As regards the applicants' feelings of being offended, the Constitutional Court took the view that the subjective feelings of the applicants had to be objectified, in the sense that it had to be assessed whether such a portrayal was able to cause the same level of distress in an average reader. In this respect, the court added that the law could not protect any individual who was oversensitive. It concluded that an average reader would not feel the same degree of distress as the applicants, and that therefore the lower courts had placed too much weight on the applicants' subjective feelings of distress, thereby failing to strike the right balance between the applicant's right to reputation and B.M.Z.'s freedom of artistic expression.

B. Relevant domestic law and practice

1. The Constitution

21. The relevant constitutional provisions read as follows:

Article 15**(Exercise and Limitation of Rights)**

“... Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution ...”

Article 34**(Right to Personal Dignity and Safety)**

“Everyone has the right to personal dignity and safety.”

Article 35**(Protection of the Right to Privacy and Personal Rights)**

“The inviolability of the physical and mental integrity of every individual, his privacy, and personal rights shall be guaranteed.”

Article 39**(Freedom of Expression)**

“Freedom of expression of thought, freedom of speech and public appearance, freedom of the press and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive, and disseminate information and opinions ...”

2. Applicable civil law

22. According to Article 179 of the Code of Obligations, which constitutes the statutory basis for awarding compensation for non-pecuniary damage, such compensation may be awarded in the event of infringement of a person’s personal rights, provided that the circumstances of the case, and in particular the level and duration of the distress and fear caused thereby, justify an award. Moreover, where a personal right such as reputation is infringed, under Article 178 of the Code a court may order that the judgment be published at the respondent’s expense or that the impugned statement be corrected or retracted.

COMPLAINT

23. The applicants complained that the Constitutional Court had failed to strike a fair balance between their own right to respect for their private and family life and their respondent’s freedom of artistic expression. They relied on Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others.”

THE LAW

A. The parties' submissions

24. The applicants complained that the portrayal of their family, and in particular their mother, in the literary work ‘When the Birches Up There Are Greening’ inadmissibly interfered with their right to respect for their private and family life. The story was described in a manner allowing recognition of the applicants’ family members; the entire storyline was offensive to their family, distorted the truth and blemished their family name in their local community. According to the applicants, this biography of their mother had had a negative effect on all the members of their family, living and deceased.

25. The applicants were of the view that freedom of artistic expression should not allow for such an obvious connection between an individual’s life and a literary character which would make it possible to recognise the actual people concerned, unless the literary work involves a depiction of historical persons or events or those known in public life. In the light of this perceived connection, the applicants believed that their right to privacy ought to be given precedence over B.M.Z.’s freedom of artistic expression. Therefore, the applicants were convinced that the Constitutional Court had failed to establish a fair balance between their own rights under Article 8 and B.M.Z.’s right under Article 10 of the Convention.

26. The Government pointed out that freedom of expression could be restricted only in exceptional cases, where convincing reasons existed for such restrictions. It further emphasised that the Constitutional Court, in its assessment of B.M.Z.’s constitutional complaint, applied the method of weighing her own right to free artistic expression against the applicants’ right to respect for their private life. In its balancing exercise, the court had taken account of the fact that artistic endeavour was typically based on the intertwining of intuition, imagination and artistic skills, the primary emphasis not being the message but the expression of the artist’s personality.

27. The Government further pointed out that the Constitutional Court, which in accordance with its jurisdiction had not examined the factual question of whether the applicants’ family and their story were recognisable from the disputed book, had assessed the proportionality of the interference with the applicants’ rights on the basis of two criteria: the level of offensiveness of the disputed book and the seriousness of the distress the

book had caused to the applicants. As regards the first issue, the court had established that the personal characteristics attributed to the character of Rozina could not be considered offensive. In this connection, while the first- and second-instance courts had fully accepted the applicants' subjective feelings that certain passages in the book were offensive, the Constitutional Court had examined the issue according to the objective criteria of what was considered offensive in contemporary society. Moreover, the court had held that the very concept of the author's narrative and its subtitle 'From the Golden Tales of Depala Vas' indicated to an average reader that the book did not contain a description of reality. Also the applicants' feelings of distress had been assessed according to an objective criterion of whether the work was capable of causing a similar level of distress in an average reader. The Constitutional Court had taken the view that the law could not protect any individual who was oversensitive and that this meant that the lower courts had placed too much emphasis on the subjective feelings of the applicants.

28. In the light of the Constitutional Court's reasoning, the Government took the view that the application was inadmissible or, in the alternative, that there had been no violation of Article 8 of the Convention.

B. The Court's assessment

1. Applicable principles

29. The Court notes that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which extends to a number of aspects relating to personal identity, such as a person's name or image, and furthermore includes a person's physical and psychological integrity; (see *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI, with further references). It has also been accepted by the Court that a person's right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life (see *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-XII).

30. In cases of the type being examined here what is in issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicants' private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the

applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests; and in both contexts the State enjoys a certain margin of appreciation (see, among many authorities, *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 72, ECHR 2012, and the references cited therein).

31. However, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009, and *Axel Springer AG v. Germany* [GC] (no. 39954/08, § 83, 7 February 2012).

32. In cases where a person's reputation is affected by the publication of a book, the Court has established that the right to respect for private life has to be balanced against the right to freedom of expression (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; see also *John Anthony Mizzi v. Malta*, no. 17320/10, § 32, 22 November 2011), States having a positive obligation to protect individuals' right to reputation, as an element of their "private life" under Article 8 of the Convention (see *Pfeifer*, cited above, § 38). In this regard, where the balancing exercise has been undertaken by the domestic courts in conformity with the criteria laid down in the Court's case law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). The scope of the Court's supervisory role in balancing the two competing interests is set out in more detail in *Von Hannover (no. 2)* (cited above, §§ 104-107) and *Axel Springer AG* (cited above, §§ 85-88).

2. Application of these principles in the present case

33. The Court is called upon to examine whether the State, in the context of its positive obligations under Article 8, achieved a fair balance between the applicants' reputation and the respondent party's right to free artistic expression. In examining this question, the Court considers it important to point out, first of all, that artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention. In this connection, the Court has already held that a novel is a form of artistic expression covered by Article 10 (as to the recognition and importance of the freedom of artistic expression in a democratic society, see *Karataş v. Turkey* [GC], no. 23168/94, § 49, ECHR 1999-IV, and *Alınak v. Turkey*, no. 40287/98, §§ 41-43, 29 March 2005).

34. Written in a variety of styles, novels may involve a degree of exaggeration and make use of colourful and expressive imagery. In such cases, style, as a form of expression, is protected together with the substance of the expression (see *Karataş*, cited above, § 49). Moreover, the Court has given special consideration to the fact that literary works appeal to a relatively narrow public (see *Karataş*, cited above, § 52, and *Alinak*, cited above, § 45). The limited impact criterion has also been applied in the context of the potential damage that literary creations were capable of causing to a person's reputation (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 47, ECHR 2007-IV).

35. Turning to the circumstances of the present case, the Court observes that in considering the conflicting interests of the parties, the domestic courts attached fundamental importance to the question whether the members of the applicants' family could be identified with individual characters in the disputed book and whether these characters had negative traits attributed to them capable of defaming the people on which they were based. The Constitutional Court, whose findings regarding this latter point differed from those of the lower courts, assessed the literary portrayals according to an objective criterion of how their depictions would be understood by an average contemporary reader, and held that the events described in the book would not be regarded as facts about actual people.

36. Moreover, according to the Constitutional Court, the controversial passages describing the main character's sexual life and her illegal business exploits would not be regarded as offensive by a person of average sensitivity. The court considered the character of Rozina as a whole and concluded that she was portrayed in a positive light as a woman of strong will and ambition. Neither did it regard the imprisonment of the character of Minka in wartime circumstances as offensive to the third applicant, pointing out that the character was only mentioned in the book in passing. Lastly, the Constitutional Court analysed the tone and expressions used by the author, concluding that they were not insulting or in any way derogatory, and that the author had not intended to offend anybody with the book.

37. The Court does not see any reason to call these findings into question, noting that in balancing the conflicting rights arising from Articles 8 and 10 of the Convention, the reasons put forward by the Constitutional Court in support of its conclusions were consistent with the principles arising from the Court's case-law. Like the Court in the case of *Putistin v. Ukraine* (no. 16882/03, § 33, 21 November 2013), the Constitutional Court accepted that an attack on the reputation of the applicants' deceased mother could affect the applicants' own personality rights (see paragraph 19 above). It proceeded to examine whether the portrayals of the two characters at issue were capable of defaming the applicants' mother and the third applicant, assessing their controversial features in the context of the book as a whole. This approach is consistent

with the criteria applied by the Court in similar cases (see *Lindon, Otchakovsky-Laurens and July*, cited above, §§ 48-60, and *Aksu v. Turkey*, cited above, § 72). Moreover, the Court does not find unreasonable the Constitutional Court's view that the portrayals at issue were not objectively offensive.

38. Lastly, the Court finds it important to note, as did the Constitutional Court, that the book at issue was written not as a biography but as a work of fiction and, as such, would not be understood by most readers as portraying real people. In this connection, the Court would emphasise that even the applicants' family acquaintances, which perceived certain similarities between the literary characters and, in particular, the applicants' mother, mostly denied the possibility that the character in the book represented a truthful depiction of the actual person concerned (see paragraphs 10 and 12 above).

39. Having regard to the foregoing considerations, the Court does not consider that the applicants' reputation was seriously affected by the book at issue. Accordingly, it finds that in balancing the conflicting interests at stake, the Constitutional Court did not overstep the margin of appreciation afforded to the State in this area.

40. In these circumstances, there is no appearance of a violation of Article 8 of the Convention. The application is therefore manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President