

IN THE EUROPEAN COURT OF HUMAN RIGHTS

MAC TV v. Slovakia

Application No. 13466/12

WRITTEN COMMENTS OF THE MEDIA LEGAL DEFENCE INITIATIVE

INTRODUCTION

1. These Written Comments¹ advance the position that an individual's right to a reputation under the European Convention on Human Rights (the "Convention") does not survive the death of that individual.
2. In common law countries within the jurisdiction of the Council of Europe, a cause of action in defamation dies with an individual. As a consequence of this long standing principle, significant public interest stories that may otherwise have never come to light have been reported by a media no longer cowed by the threat of defamation proceedings. To demonstrate the significance for press freedom of the principle that a cause of action in defamation dies with an individual, we draw the Court's attention to two examples from one of those jurisdictions. In the United Kingdom, the media has cited that it was deterred from reporting that a high profile television personality was a prolific paedophile and that a prominent businessman had misappropriated his business's funds because these two individuals threatened potentially costly defamation proceedings against them.² The media could only report on these stories after the deaths of the two public figures as only then did the threat of defamation proceedings fall away.
3. It is our submission that the Court should not consider the reputation of a deceased person when balancing the rights under article 8 against article 10, on the basis that such an approach would subsume protections for reputations of deceased persons into the article 8 framework. Should the Court decide that protecting the reputations of deceased persons is a "legitimate aim" under article 10(2), the Intervener would urge the Court to conclude that pursuing such an aim would only be "necessary in a democratic society" in exceptional circumstances given the fundamental importance of the right to freedom of expression to a democratic society and the fact that there is no Convention right to reputation afforded to deceased persons.
4. The Court is respectfully invited to clarify the Convention case law by affirming that:
 - a. The Convention does not confer upon deceased persons a *right* to reputation under either article 8 or article 10(2);
 - b. Exercising the right to freedom of expression in relation to deceased persons will only engage article 8 where such expression directly affects the article 8 rights of a close family member *and* attains the requisite level of seriousness in its prejudicing the enjoyment of that person's article 8 rights; and
 - c. Should the Court find that the reputation of a deceased person can be protected as a

¹ These written comments are submitted under article 36(2) of the Convention and pursuant to the Section Registrar's letter of 7 February 2017, granting the Intervener (MLDI) leave to intervene as a third party.

² Press Gazette, *Savile story dropped by Sunday Paper because paper could not afford to lose libel battle* (15 July 2013), available at: <http://www.pressgazette.co.uk/savile-story-dropped-sunday-mirror-because-paper-could-not-afford-lose-libel-battle/>; The Guardian, *Jimmy Savile: transcript reveals 'policy' used to halt abuse claims* (16 October 2013), available at: <https://www.theguardian.com/media/2013/oct/15/jimmy-savile-boasted-police-abuse>; The Bureau of Investigative Journalism, *British libel laws help rich villains escape the scrutiny of the press* (16 January 2012), available at: <https://www.thebureauinvestigates.com/blog/2012-01-16/british-libel-laws-help-rich-villains-escape-the-scrutiny-of-the-press>.

“legitimate aim” (as opposed to a right) under article 10(2), such a “legitimate aim” should not be given the same weight as a Convention right when it is balanced against the fundamental right to freedom of expression.

COMPARATIVE LAW ON DEFAMATION OF THE DECEASED

5. This section will set out a comparative overview of the well-established common law principle that a cause of action will not exist in defamation to protect the reputation of a deceased person. Broadly speaking, the maxim of *actio personalis moritur cum persona* (a personal cause of action dies with the person) applies across the common law world. The Intervener recognises that civil law jurisdictions have adopted differing approaches in relation to defamation of deceased persons. However, these Written Comments are provided to the Court in order to highlight the approach of common law jurisdictions in striking a balance between the right to freedom of expression and the rights of others under the Convention.
6. In England and Wales, a deceased person cannot be defamed because reputation is personal. Relatives of the deceased also have no right of action unless the words used harm their own reputation. That reflects the central principle in civil proceedings generally that a claim for damages can be brought only by the person who has suffered the injury, loss or, so far as defamation is concerned, damage to his or her reputation as a result of an act or omission of another person.³ In *R v Ensor*, Mr Justice Stephen noted the rationale that “[t]he dead have no rights and can suffer no wrongs. The living alone can be the subject of legal protection, and the law of libel is intended to protect them, not against every writing which gives them pain, but against writings holding them up individually to hatred, contempt or ridicule.”⁴
7. The application of the principle that a personal cause of action dies with the person in English law has been further demonstrated by the fact that if a claimant dies in the course of a defamation claim, then the claim dies with them. In *Smith v Dha*, when the claimant died after the hearing of the case but before judgment had been delivered, the judge ruled that the death meant there was no legal basis for judgment to be delivered.⁵
8. Whether relatives of deceased persons should be able to sue in libel or not has been the subject of recent debate in England and Wales: the UK parliament considered amendments to the Defamation Bill 2012 (which became the Defamation Act 2013) that would allow close relatives of an individual to bring defamation proceedings on that individual’s behalf where they had died “within the year prior to the defamatory statement being made”. Arguments were presented against such an amendment on the basis that *inter alia* it would set a precedent for further extension of defamation law that could impact the media and publishing industries, it would present problems for historical commentators, and it would create practical difficulties in testing evidence in court due to the absence of the allegedly defamed person. The UK parliament rejected the proposed amendments.⁶

³ See Law Reform (Miscellaneous Provisions) Act 1934, section 1(1). This provides that any cause of action existing at the date of an individual’s death survives either for the benefit of, or against his estate but this does not apply to defamation actions where an individual’s death will cause the claim to abate.

⁴ Cardiff Assizes, *R v Ensor* (1887) 3 T.L.R. 366, p. 367

⁵ High Court of England and Wales, *Smith v Dha* [2013] EWHC 838.

⁶ House of Commons Research Paper 12/49, Defamation Bill Committee Stage Report, 31 August 2012, p.4 to 5, available at: <http://www.parliament.uk/business/publications/research/briefing-papers/RP12-49/defamation-bill-committee-stage-report>; Constitution Committee, Defamation Bill 17 December 2012, Col GC434-7, available at: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121217-gc0001.htm#1212173000100>.

9. In Scotland, there is similarly no right for an action for compensation for distress to be brought on behalf of, or in relation to, a deceased person who has been defamed, unless the defamatory statement by necessary implication also defames the living complainant or affects their financial interests (the example given by the Scottish courts of “his children were bastards”).⁷ In the 1904 case *Broom v Ritchie*, the court noted the problems with recognising a cause of action in defamation of the dead, and observed the implications of such a cause of action for historical discussion. In his judgment, the Lord Ordinary reasoned that “[a]bout the half of history consists of what might be called defamation of the dead, and there may be many cases where vindication of the character of the dead might be a very sacred and urgent duty indeed. But such a duty could be performed without calling in the aid of Courts of law, and the exercise of it might assume a somewhat questionable aspect if it were coupled with a conclusion for payment of money as a solatium for wounded feelings.”⁸
10. In 2011, the Scottish government consulted on the possibility of changing the law to permit defamation claims to be brought in respect of recently deceased persons. This did not result in any change in the law, with the Scottish government concluding that an extension of defamation law was not the most appropriate way of protecting reputations of the deceased.⁹ During the consultation process, observations were raised to the effect that the defamed person would usually be the primary witness of fact in defamation trials, and therefore it would be unfair on defendants seeking to assert their article 10 rights as the deceased would not be in court and their evidence could not be properly challenged. This, in turn, could result in fundamental imbalance and infringements to their article 6 rights.¹⁰
11. In Australia, the common law position is that a defamation claim cannot be brought on behalf of a deceased person. This position has been codified in all states and territories with the exception of Tasmania, where the common law position likely still applies despite the absence of codification.¹¹ The wording common to the statutes codifying the position provides that no person can assert or continue to enforce a cause of action for defamation in relation to the publication of defamatory matter about a deceased person regardless of whether that material was published before or after their death. In New Zealand, the estate of a deceased person is prohibited from bringing *or* continuing an action for defamation.¹²
12. In the United States, defamation is a matter for state (rather than federal) law. The general position at common law is that: (a) publishing material which is defamatory of a deceased person does not give rise to civil liability to either the deceased’s estate or his surviving relatives, and (b) a cause of action for defamation, commenced before the person died, does not survive the death of a plaintiff.¹³

⁷ *Broom v Ritchie* (1904) 6F 942.

⁸ *Id.*

⁹ See the summary of the position in: Scottish Law Commission, *Discussion Paper on Defamation*, discussion paper 161 (2016), par. 12.4 to 12.6.

¹⁰ *Id.*, par. 12.18.

¹¹ Civil Law (Wrongs) Act 2002 (Australian Capital Territory) s.15; Law Reform (Miscellaneous Provisions) Act 1944 (New South Wales) s.2; Law Reform (Miscellaneous Provisions) Act 1956 (Northern Territory) s.5; Succession Act 1981 (Queensland) s.66; Survival of Causes of Action Act 1940 (South Australia) s.2; Administration and Probate Act 1958 (Victoria) s.29; Law Reform (Miscellaneous Provisions) Act 1941 (Western Australia) s.4. For the position in Tasmania, see D Rolph, *A critique of the national, uniform defamation laws* (2008) 16 *Torts Law Journal* 207 at 221.

¹² Law Reform Act 1936, section 3(1).

¹³ Restatement (Second) of Torts (1979) § 560; 50 *Am Jur 2d Libel and Slander* § 339. See for example, New York

13. Indian civil law of defamation is governed by common law. The maxim *actio personalis cum moritur persona* applies. Libel and slander (the two causes of action collectively referred to as defamation) are personal wrongs, meaning that the right to sue for defamation does not survive the death of a claimant regardless of whether proceedings are ongoing at the time of death.¹⁴
14. Hong Kong law provides that defamation claims are an exception to the general position that civil claims vested in a deceased person survive for the benefit of their estate.¹⁵ Similarly, Singaporean civil law prevents the estate of a deceased person from bringing or continuing a claim for the defamation of the deceased. This is done through a statutory provision which disapplies the general rule that causes of action vested in the deceased survive for the benefit of their estate.¹⁶
15. The position in Ireland is similar to the common law jurisdictions considered above. Before the abolition of the common law offence of criminal libel in 2009, the High Court held in *Dennehy v Independent Star Ltd* that, where the impugned article referred to a deceased person, “there must be some defamation of living persons and [...] the material published must have been published with the malevolent purpose of vilifying the deceased with a view to injuring such persons”.¹⁷ It was, therefore, not enough that the article defamed only the deceased person. Recent reforms in Ireland’s Defamation Act 2009 do not provide for defamation claims where the defamed person is dead at the time of publication. Nevertheless, the Act does recognise that where the defamed person died after the publication complained of, then “a cause of action for defamation is vested in him immediately before his death [and] shall survive for the benefit of his estate.”¹⁸ However, the estate cannot recover compensation for pain and suffering to the defamed individual. Instead, the estate is limited to recovering pecuniary loss sustained from the defamation (which can be demonstrated with evidence of actual financial loss). This approach implicitly recognises that the moral harm caused by damage to an individual’s reputation, such as distress, pain, and suffering, is difficult to prove following the death of an individual and any compensation for such harm following their death would result in an unjustified enrichment of the deceased’s estate.
16. Taking into account the common law approach set out above, it is clear that the right to reputation is personal to an individual, and therefore dies with that individual. In these common law jurisdictions, there has been an acknowledgment of the practical difficulties in providing a legal remedy in defamation to protect the reputation of the deceased, and the resulting chilling effect such a remedy would have on historical discussion. It is noteworthy that this is the position in the United Kingdom and Ireland, which are both state parties to the Convention. Therefore, a finding by the Court that reputational rights of the deceased are afforded protection under the Convention could place a positive obligation on these states to recognise a cause of action that is contrary to the traditional

state: *Meeropol v Nizer*, 381 F. Supp. 29, p. 35 (S.D.N.Y. 1974); *Sylvester v City of New York*, 385 F. Supp. 2d 431, p. 439 (S.D.N.Y. 2005). Even in those few states, e.g., California and New Jersey, in which a cause of action for defamation survives death (by the operation of so-called “survival statutes”), this will only be the case if the defamation took place while the subject was alive. See *Hidalgo v. YRC Logistics Servs.* 2010 U.S. Dist. LEXIS 128408, p. 4 to 5 (C.D. Cal. Nov. 22, 2010).

¹⁴ Supreme Court of India, *M. Veerappa v Evelyn Sequira and Others* [1988] 1 SCC 556; Supreme Court of India, *Puran Singh v State of Punjab*, (1996) 2 SCC 205, par. 4; B.N. Mehrotra, *Commentary on Law of Defamation Damages Malicious Prosecution*, 7th Edn, 2013, Delhi Law House, p. 61 to 62.

¹⁵ Law Amendment Reform Consolidation Ordinance (Cap 23), section 20(1).

¹⁶ Civil Law Act (Cap 43, 1999 Rev Ed), section 10(2)

¹⁷ High Court of Ireland, *Dennehy v Independent Star Ltd* [2009] IEHC 458, par. 27.

¹⁸ Defamation Act 2009, section 39(2).

common law approach on this issue.¹⁹

ECHR CASE LAW

17. The issue of defamation of the deceased has only been considered by the Court on a few occasions. The cases that have dealt with this issue fall into two broad categories:
 - a. complaints brought (or reframed by the Court) under article 8 of the Convention for alleged failures of respondent states to comply with positive obligations to protect the rights of surviving family members in respect of material published about deceased persons.²⁰
 - b. complaints brought under article 10 of the Convention in respect to:
 - i. the imposition of criminal liability for defamation following a private prosecution brought by a relative of a deceased person;²¹
 - ii. the imposition of civil liability for defamation for remarks made about a deceased person following proceedings brought by a relative.²²
18. There is a clear distinction to be drawn from the Court's case law between: (a) restricting article 10 rights on the basis that words published/spoken interfere with the article 8 rights of the surviving relatives of the deceased, and (b) restricting article 10 rights on the basis of the article 8 rights of the deceased. The Intervener submits that a substantial majority of the Court's jurisprudence supports the conclusion that the Convention does *not* protect the reputational rights of deceased persons under article 8. Consequently, states cannot rely on the concept of a deceased person's Convention right to reputation as a lawful basis for restricting the right to freedom of expression under article 10(2). This approach would be in line with the case law of the common law jurisdictions considered above, and would not place an obligation on those countries that are party to the Convention to amend defamation laws in order to protect the reputational rights of the deceased.

The Court's case law supports the proposition that the Convention does not protect reputational rights of the deceased

19. The conclusion that article 8 of the Convention does not protect the reputational rights of the deceased flows from how the Court has approached cases involving allegedly defamatory comments made about deceased persons. On a number of occasions, the Court has considered these cases through the prism of the rights of the living. It is submitted that this is, in itself, a strong indication that the Convention does not confer reputational rights upon the dead.
20. The Court accepted in *Putistin v Ukraine*, an article 8 case concerning remarks alleged to mean that the applicant's grandfather had collaborated with occupying German forces, that: "*the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8*".²³ In doing so, the Court required that the article 8 rights of living family

¹⁹ On article 8 positive obligations, see European Court of Human Rights (ECtHR), *Marckx v Belgium* (1979), application no. 6833/74.

²⁰ See for example, ECtHR, *Putistin v Ukraine* (2013), application no. 16883/03; ECtHR, *Jelsevar v Slovenia* (2014), application no. 47318/07; ECtHR, *Dzhugashvili v Russia* (2014), application 41123/10.

²¹ ECtHR, *Genner v Austria* (2016), application no. 55495/08.

²² ECtHR, *Mizzi v Malta* (2010), application no. 17320/10; ECtHR, *Kunitsyna v Russia* (2016), application no. 9406/05.

²³ ECtHR, *Putistin v Ukraine* (2013), application no. 16883/03, par. 33.

members be “directly affected” by the publication before an interference with article 8 could be found.²⁴ This would suggest that reputational rights of the deceased are not protected by article 8 *per se*.

21. In the subsequent case of *Dzhugashvili v Russia*, the First Section confirmed that the relevant question in cases concerning publications affecting the reputations of deceased persons is whether a living applicant’s own right to respect for his private and family life is at stake. This position is manifestly distinct from any suggestion that a deceased person enjoys an enduring right to reputation which could be relied upon to restrict the article 10 rights of the media or any other publisher.²⁵
22. Further support for this position comes from the Court’s approach to the *locus standi* of relatives of deceased individuals who allege violations of those individuals’ rights before the Court. Beyond article 2 cases concerning deaths and disappearances, the Court has taken a “restrictive” approach to standing. This is especially true of the approach to claims under article 8, which is regarded as forming part of a category of “non-transferable” rights.²⁶ It is apparent from the Grand Chamber’s analysis in *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* that relatives of the deceased are not granted standing in cases in which the rights concerned are of a personal nature (e.g. denial of a right to assisted suicide and pre-death restrictions on rights to publish particular material).²⁷ Significantly, in *Dzhugashvili v Russia*, the First Section applied this reasoning in the specific context of an application seeking to assert the reputational rights of a deceased person under article 8.²⁸ The inevitable implication of reputational rights being non-transferable is that the right to reputation does not survive the death of its holder.
23. It is submitted that the Court’s approach to standing is pertinent to the correct analysis of the protections afforded to the reputation of the deceased under the Convention. Given that relatives and descendants do not generally have standing to bring claims to vindicate the article 8 rights of the deceased, it stands to reason that it is unlikely that the Convention places a positive obligation on state parties to restrict article 10 rights on the basis of such rights.
24. On this point, the Court’s approach to the right to reputation of deceased persons has seemed consistent. However, the recent decision of the Fourth Section in *Genner v Austria* has introduced an element of uncertainty.²⁹ The Court in that case acknowledged that the article 8 rights of the deceased’s relatives may be engaged by remarks made about the deceased.³⁰ However, the Court appears to have ventured further by finding that Mr Genner’s remarks caused considerable damage to a deceased person’s reputation and were an attack on that person’s “core of personality rights”.³¹ No reference was made to the test requiring that the article 8 rights of the deceased’s immediate family member(s) be directly affected, putting it at odds with the decision in *Putistin*.
25. By accepting that a state had acted in compliance with article 10 when imposing a criminal

²⁴ *Id.*, par. 37.

²⁵ ECtHR, *Dzhugashvili v Russia* (2014), application 41123/10, par. 26.

²⁶ See ECtHR, *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* (2014) [GC], application no. 47848/08, par. 100; ECtHR, *Sanles Sanles v Spain* (dec) application no.48335/99.

²⁷ ECtHR, *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* (2014) [GC], application no. 47848/08, par. 100.

²⁸ ECtHR, *Dzhugashvili v Russia* (2014), application 41123/10, par. 24 to 25.

²⁹ ECtHR, *Genner v Austria* (2016), application no. 55495/08.

³⁰ *Id.*, par. 35.

³¹ *Id.*, par. 44 to 45.

penalty on Mr Genner for comments made about a deceased person, the Court appeared to have countenanced the possibility that the deceased enjoy reputational rights under the Convention. Similarly, in its recent judgment in *Madaus v Germany*, the Court appeared to endorse the position that a deceased person has a “civil right” to a good reputation.³² These decisions are inconsistent with the previous jurisprudence of the Court, and the Intervener submits that they should not be followed.

Defamatory statements about deceased individuals will engage article 8 rights only in limited circumstances

26. In its case law, the Court has emphasised that strict conditions apply before a family member’s article 8 rights will be interfered with by allegedly defamatory statements made about their relative(s). The court has reasoned:

- a. in *Kunitsyna v Russia*, that it is highly unlikely that it is compatible with the Convention for private individuals to be permitted to bring claims against the publisher of a statement about a deceased person if that statement does not reflect directly upon him/her:

*“The Court further reiterates that, for an interference with the right to freedom of expression to be proportionate to the legitimate aim of the protection of the reputation of others, **the existence of an objective link between the impugned statement and the person suing in defamation is a requisite element.** Mere personal conjecture or subjective perception of a publication as defamatory does not suffice to establish that the person in question was directly affected by the publication. There must be something in the circumstances of a particular case to **make the ordinary reader feel that the statement reflected directly on the individual claimant, or that he was targeted by the criticism**”;*³³

- b. in *Putistin*, that the interference with the living person’s article 8 right to a reputation must attain a sufficient level of seriousness.³⁴ The requisite level of seriousness was addressed by the Grand Chamber in *Axel Springer v Germany*, in which it held that “an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life”.³⁵ In *Putistin*, where the statements related to the applicant’s grandfather, the Court held that the applicant’s right to a private life was not violated because it was only affected “marginally”.³⁶

27. In his concurring opinion in *Putistin*, Judge Lemmens emphasised that the Court’s judgment made it “very clear” that publications affecting the reputation of deceased persons will be regarded as affecting the private life of surviving family members only in “relatively exceptional circumstances.”³⁷

28. The limited circumstances under which the article 8 rights of family members will be affected by defamatory statements made about a relative were further observed in the concurring opinion of Judge Bratza in *Mizzi v Malta*.³⁸ This application was brought by a journalist alleging that his article 10 rights had been violated by the imposition of civil

³² ECtHR, *Madaus v. Germany*, application no. 44164/14, par. 15.

³³ ECtHR, *Kunitsyna v Russia* (2016), application no. 9406/05, par. 41. [emphasis added]

³⁴ ECtHR, *Putistin v Ukraine* (2013), application no. 16883/03, par. 40.

³⁵ ECtHR, *Axel Springer v Germany* (2012) [GC], application no. 39954/08, par. 83.

³⁶ ECtHR, *Putistin v Ukraine* (2013), application no. 16883/03, par. 40.

³⁷ *Id.*, concurring opinion of Judge Lemmens, par. 2.

³⁸ ECtHR, *Mizzi v Malta* (2010), application no. 17320/10, concurring opinion of Judge Bratza.

liability for the defamation of a deceased prime minister arising from proceedings brought by the prime minister's son. The Court agreed that this was a violation of article 10. In his concurring opinion, Judge Bratza distinguished between defamation cases and cases concerning disclosure of private information relating to the deceased, such as in *Editions Plon v France*³⁹ and *Hachette Filipacchi Associés v France*.⁴⁰ Judge Bratza indicated that the latter cases concerned “a direct and immediate impact on the private and family lives of the immediate family of the deceased.”⁴¹ He then went on to explain that:

*“In the case of defamation, the situation appears to me to be different: the defamatory statement, while doubtless affecting the reputation of the deceased ancestor, has in my view no direct impact on the private or family life of the descendants. **The exposure of an individual in such a case to an action in damages for defaming the deceased ancestor of a family is likely to have a seriously chilling effect on the right of freedom of expression, particularly in a case where many years have passed since the death and the burden of proving the truth of the allegation lies on the defendant in any such action. In my view, even if such an action is in principle compatible with the requirements of Article 10, when striking the balance between the competing interests, the weight to be attached to the reputation of the deceased individual must diminish with the passing of the years and that attaching to freedom of expression must correspondingly increase.**”*⁴²

29. The Intervener respectfully concurs with this analysis of the distinction between publications defaming the deceased and those that might otherwise impact upon the article 8 rights of the living, as well as Judge Bratza's concerns about the chilling effect.
30. Consistent with the analysis provided above, the Court's case law suggests that defamation of a deceased individual will only interfere with the rights protected by article 8 of the Convention where:
 - a. the publication *directly affects* the article 8 rights of a living person who is an immediate family member;⁴³
 - b. there is an *objective link* between the words published or spoken about a deceased person and the living person;⁴⁴ and
 - c. the direct effect on the private and/or family life of the living person is *sufficiently serious* for it to engage their article 8 rights within the meaning of Convention case law.⁴⁵
31. The Intervener respectfully submits that this is the appropriate test that should be applied by the Court. In light of this, and given the nature of defamation, a publication that is allegedly defamatory of a deceased individual will only engage article 8 rights in limited circumstances. Consequently, it is not necessary for state parties to protect these rights in national law through providing for a cause of action in defamation on behalf of deceased persons.

³⁹ ECtHR, *Editions Plon v France* (2004), application no. 58148/00.

⁴⁰ ECtHR, *Hachette Filipacchi Associés v France* (2007), application no. 71111/01.

⁴¹ ECtHR, *Mizzi v Malta* (2010), application no. 17320/10, concurring opinion of Judge Bratza, par. 3.

⁴² *Id.*, par. 4. [emphasis added]

⁴³ See par. 20 above.

⁴⁴ See par. 26a above.

⁴⁵ See par. 26b above.

The pursuit of the “legitimate aim” in protecting the reputation of a deceased person will only be “necessary in a democratic society” in exceptional circumstances

32. It is accepted by the Intervener that state parties may enjoy a margin of appreciation under Article 10(2) to restrict the right to freedom of expression for the “legitimate aim” of protecting the reputation of a deceased individual. However, the Intervener submits that the “legitimate aim” of protecting the reputation of a deceased person under article 10(2) cannot be given the same weight as article 8 rights when balanced against the right to freedom of expression. In this regard, the Venice Commission has observed that “a persons’ [sic] interest about his/her reputation after death bears an insufficient normative weight that can justify assigning to it a status of a human right or the recognition of a right to sue for defamation. Arguably, the interests of the living (in the current context their freedom of expression) should prevail over the reputation of the dead.”⁴⁶ Accordingly, the aim of protecting the reputation of a deceased person under article 10(2) will only outweigh the right to freedom of expression in exceptional circumstances.

Where a restriction is imposed in pursuit of the aim of protecting the reputation of a deceased person, or the article 8 rights of a living relative, it must be proportionate

33. Where an interference with the right to freedom of expression is for the purpose of protecting, to some degree, the reputation of a deceased individual, a number of factors fall to be considered when assessing the proportionality of that interference;

- a. *The fact that a claim is brought by heirs and not the person whose reputation was affected.* Where a claim is brought in defamation by an individual’s heirs, a finding in favour of those heirs will be a more disproportionate restriction on the right to freedom of expression than if the living individual had brought the claim himself;⁴⁷
- b. *The length of time since the deceased passed away.* The greater the length of time that has passed between the individual’s death and publication, the more disproportionate a restriction on the right to freedom of expression for the purpose of protecting that individual’s reputation will be;⁴⁸
- c. *Whether a less restrictive measure was available.* A less restrictive measure should be used where it is for the purpose of protecting the reputation of a deceased person, than for protecting the reputation of a living person, because there is less harm sustained. In *Mizzi v Malta*, the Court observed the harm usually sustained in defamation proceedings includes *inter alia* loss of opportunities, private or professional, or loss of standing in the eyes of the community.⁴⁹ This harm ceases with the death of an individual;
- d. *Whether the reputation is that of a public or private figure.* The Court has distinguished between criticism of private persons and criticism of public figures, who by taking up leadership roles expose themselves to outside scrutiny.⁵⁰ Where the reputation concerns the latter category, the article 10 rights will be stronger as it is an

⁴⁶ European Commission on Democracy Through Law (Venice Commission), *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased* (2014), CDL-AD(2014)040, par. 32.

⁴⁷ ECtHR, *Mizzi v Malta* (2010), application no. 17320/10, par. 39; ECtHR, *Putistin v Ukraine* (2013), application no. 16883/03, par. 34.

⁴⁸ ECtHR, *Mizzi v Malta* (2010), application no. 17320/10, par. 39; ECtHR, *Editions Plon v France* (2004), application no. 58148/00, par. 51.

⁴⁹ ECtHR, *Mizzi v Malta* (2010), application no. 17320/10, par. 39.

⁵⁰ ECtHR, *Dzhugashvili v Russia* (2014), application 41123/10, par. 30.

essential part of freedom of expression to scrutinise the activities of public figures;⁵¹

- e. *Whether the publication was of academic, literary, and/or historical importance, and/or of public interest.* If so, greater weight should be attached to the right to freedom of expression. In *Dzhugashvili v Russia*, the Court recognised that “[i]t is an integral part of freedom of expression, guaranteed under Article 10 of the Convention, to seek historical truth. It is not the Court’s role to arbitrate the underlying historical issues, which are part of a continuing debate between historians. A contrary finding would open the way to a judicial intervention in historical debate and inevitably shift the respective historical discussions from public forums to courtrooms.”⁵² These observations fall to be considered alongside the Court’s recent recognition of a right to the truth.⁵³ This encompasses a right of the public to know what has happened in regard to (historic) human rights violations and serious crimes.⁵⁴ Claims in relation to comments affecting the reputations of the dead threaten the search for and uncovering of the truth in relation to past events; and
- f. *Whether the publication was satirical.* If so, greater weight should be attached to the right to freedom of expression. The Court has observed that “[s]atire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist’s or social commentator’s right to such expression must be examined with particular care.”⁵⁵

CONCLUSION

34. This case presents the Court with an important opportunity to clarify and affirm the legal principles relating to the reputational rights of the deceased under the Convention. Restricting the right to freedom of expression on the basis of protecting the reputation of a deceased person poses a grave threat to investigative journalism, academic research, biographical works, and historical discussion. Measures protecting the reputation of deceased individuals, including laws permitting the estates, family members or descendants of these individuals to sue in defamation, can have a chilling effect on these activities.

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⁵¹ See also, ECtHR, *Axel Springer v Germany* (2012) [GC], application no. 39954/08, par. 85 to 95.

⁵² ECtHR, *Dzhugashvili v Russia* (2014), application 41123/10, par. 33.

⁵³ ECtHR, *El-Masri v Former Yugoslav Republic of Macedonia* (2012) [GC], application no. 39630/0, par. 191.

⁵⁴ ECtHR, *Al-Nashiri v Poland* (2014), application no. 28761/11, par. 495.

⁵⁵ ECtHR, *Instytut Ekonomichnykh Reform, TOV v. Ukraine* (2016), application no. 61561/08, par. 46.