



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

FIFTH SECTION

CASE OF BOHLEN v. GERMANY

(Application no. 53495/09)

JUDGMENT
(Extracts)

STRASBOURG

19 February 2015

FINAL

19/05/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bohlen v. Germany,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

André Potocki,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 20 January 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 53495/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Dieter Bohlen (“the applicant”), on 7 October 2009.

2. The applicant was represented by Mr M. Nesselhauf, a lawyer practising in Hamburg. The German Government (“the Government”) were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice.

3. The applicant alleged in particular, that the refusal by the Federal Court of Justice to grant him a notional licence in compensation for the unlawful use of his forename in an advertisement had infringed his right to respect for his private life within the meaning of Article 8 of the Convention.

4. On 9 January 2012 the application was communicated to the Government.

5. The company British American Tobacco (Germany) GmbH was granted leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1954 and lives in Rosengarten. He is a musician and an artistic producer.

A. Background to the case

7. In autumn 2003 the applicant published a book entitled “Backstage” (*Hinter den Kulissen*). A number of passages in the book had to be redacted because of a series of urgent judicial proceedings which had been brought against him.

8. On 27 October 2003 a tobacco company, British American Tobacco (Germany) GmbH (“the company”), launched an advertisement showing two packets of Lucky Strike cigarettes in the foreground. There was a lit cigarette on top of one of the packets, with a thick black marker pen leaning against the other packet. The following text appeared at the top of the advertisement in large lettering:

“Look, dear Dieter, how easy it is to write super books.” (*Schau mal, lieber Dieter, so einfach schreibt man super Bücher.*)

The words “dear” (*lieber*), “easy” (*einfach*) and “super” (*super*) were blacked out but were still legible. At the bottom of the advertisement was the phrase “Lucky Strike. Nothing else.” (*Lucky Strike. Sonst nichts.*)

9. The full-page advertisement was published in the 17 October 2003 issues of the weekly magazine *Der Spiegel* and the popular national daily newspaper *Bild*, with a circulation of 1.42 million and 4.67 million respectively. It was part of an advertising campaign run by the company for the Lucky Strike brand; the campaign, launched in 1989, ran until September 2004 with more than 500 variants, showing one or more packets of cigarettes with a humorous slogan which often referred to a current event and the individual involved in that event.

10. At the applicant’s request the company gave a written undertaking to refrain from further publication of the advertisement in question with its heading referring to him, but refused to pay him the sum of 70,000 euros (EUR) which he had demanded for a “notional licence” (*fiktive Lizenz*).

B. Decisions of the German courts

11. The applicant applied to the Hamburg Regional Court for an order requiring the company to pay him EUR 100,000 for a notional licence.

1. Regional Court judgment

12. On 3 September 2004 the Regional Court allowed the applicant's application. It first of all noted that the use of the forename Dieter in the impugned advertisement was clearly a reference to the applicant's name. It further noted that although the forename Dieter was very common and several well-known public figures shared it, the advertisement was obviously referring to the applicant in view of its other component elements. The Regional Court observed that the company's advertising campaign regularly alluded to current events and the persons involved in them. It noted that there was no indication that at the time the advertisement had been published, another individual also called Dieter, like the applicant, had published a book that had had certain passages censored following court injunctions, or that any other book had prompted as much public debate upon publication as the applicant's book had.

13. The Regional Court added that the company was entitled to rely on the right to freedom of expression as safeguarded by Article 5 § 1 of the Basic Law (see "Relevant domestic law and practice" below), a right that also extended to commercial advertising provided that its content contributed to shaping public opinion. In the court's view, that applied to the impugned advertisement, which had commented humorously on the publication of the applicant's book and had apparently advised him on how to write "super books" by striking through certain passages before publication. Given that the company had in this way called for the contents of a book to be properly checked prior to publication, the advertisement had, in the Regional Court's view, raised a matter of public interest.

14. The Regional Court then pointed out that both the right to freedom of expression and the right to protection of personality rights were protected under the Basic Law and that, in principle, they deserved equal respect. Where a person was used for advertising purposes without his or her consent, the right to protection of personality rights prevailed as a general rule. As everyone had the right to decide whether or not to allow his or her name to be used for advertising purposes, personality rights protected individuals against the unlawful use by third parties of their names in the context of advertising. Inasmuch as the company had argued that the applicant had himself caused the event to which the advertisement referred, that fact was not capable of depriving the applicant of protection, but it could result in a lesser degree of interference and a higher level of protection of freedom of expression.

15. The Regional Court held that when balancing the competing interests in the case, more weight was to be attached to the protection of the applicant's personality rights than to the company's right to freedom of expression. It noted in particular that the advertisement had primarily pursued commercial aims, that is to say increasing the sales of a cigarette brand, and that it had above all been intended to entertain the public,

without providing any real contribution to shaping public opinion. Lastly, it noted that neither the content of the advertisement (*Aussagegehalt*) nor the applicant himself had any direct link with the product advertised. It concluded that the applicant was entitled to claim compensation for exploitation of his fame for commercial purposes, having regard, *inter alia*, to the judicial decisions given in cases concerning a tennis player (Boris Becker) and a politician (Oskar Lafontaine).

16. The Regional Court further held that the damage suffered by the applicant corresponded to what the company and the applicant would reasonably have agreed on as the cost of the licence if a contract had been signed. The purpose of a notional licence was to ensure that anyone using someone else's personality without permission would not be in a more advantageous position than if he or she had obtained the person's consent. The Regional Court explained that the cost of such a licence should be freely determined on the basis of all the relevant circumstances, including the following criteria: the person's fame and brand image (*Imagewert*), the attention attracted by the advertisement, the extent of its distribution and the role assigned to the person in the advertisement. Applying those criteria and taking account of the amounts awarded in similar cases concerning persons as well known as the applicant had been at the time of publication of the advertisement relating to them (see paragraph 14 above), the Regional Court considered it appropriate to award the applicant EUR 100,000. To that end it took into consideration the fact that the advertisement mocking the applicant had taken up a full page in publications such as *Der Spiegel* magazine, and had been seen by more than six million readers. However, it also had regard to the fact that the advertisement had included neither a picture of the applicant nor his surname, so that a number of people would have been unable to make a connection between the advertisement and the applicant.

2. Judgment of the Court of Appeal

17. On 29 November 2005 the Hamburg Court of Appeal upheld the findings of the Regional Court as to the existence of unlawful interference and the outcome of the balancing exercise between the competing rights, while pointing out that the fact that the company had used the applicant's forename for commercial purposes, in order to increase sales of its cigarettes, meant that the protection of the applicant's personality rights prevailed from the outset. However, it reduced the fee to be paid for the notional licence in accordance with the principle of unjust enrichment to EUR 35,000. The advertisement had not been designed to debase the applicant and, on account of its humorous approach had not had any negative impact on him. Moreover, in publishing his book the applicant had deliberately sought the limelight. The Court of Appeal concluded that there had been an unlawful interference with the applicant's right to protection of his personality rights, adding that no other conclusion could be reached

from the standpoint of the right to freedom of expression in artistic matters, on which the company had relied.

18. As regards pecuniary damage, the Court of Appeal noted that the peculiar aspect of the case was that the impugned advertisement had, in a humorous manner, used only part of the applicant's name without his consent, and that it had only been published once in two periodicals. Endorsing the findings of the expert whom it had commissioned to assess the damage suffered by the applicant, it deemed it appropriate to set the amount of damages at EUR 35,000.

19. The Court of Appeal did not grant leave to appeal on points of law, holding that the case was not of fundamental importance, given that a decision was not required from the Federal Court of Justice in the interests of either the development of the law or consistency in its application.

3. The judgment of the Federal Court of Justice

20. The company applied for leave to appeal on points of law. On 26 October 2006 the Federal Court of Justice granted the application.

21. In a judgment of 5 June 2008 (no. I ZR 223/05) the Federal Court of Justice quashed the Court of Appeal's judgment. It held that the applicant's claim was ill-founded because the company had not unlawfully interfered with his right to protection of personality rights or his right to his name, given that the use of his name in the impugned advertisement was covered by freedom of expression as guaranteed by Article 5 § 1 of the Basic Law. While upholding the findings of the Court of Appeal as regards the existence of an interference and the possibility of granting a notional licence in accordance with the principle of unjust enrichment, the Federal Court of Justice held that the Court of Appeal had not had sufficient regard to the fact that the pecuniary components of the right to protection of personality rights and the right to one's name were only protected by ordinary law, whereas freedom of expression enjoyed protection under constitutional law.

22. The Federal Court of Justice explained at the outset that the case before it related solely to interference with the pecuniary components of the rights relied upon, since no infringement of the non-pecuniary components of those rights had been alleged. It pointed out that the rights to protection of personality rights were among the fundamental rights safeguarded by the Basic Law to the extent that they protected non-pecuniary interests, but that the pecuniary components were only protected by civil law and therefore did not prevail over freedom of expression. The Federal Court also observed that the protection conferred by Article 5 § 1 of the Basic Law also covered advertising whose content contributed to shaping public opinion, while specifying that that was not only the case where the advertisement referred to a political or historical event, but also where it dealt with questions of general interest. Furthermore, reports with an entertainment purpose could also play a role in shaping public opinion, or indeed, in certain

circumstances, could stimulate or influence the shaping of public opinion more effectively than strictly factual information.

23. The Federal Court of Justice noted that the impugned advertisement referred humorously to the fact that the applicant had published a book. It considered that even though the company had merely referred to that event as part of an advertising campaign, it could still rely upon the specific protection of freedom of expression. It held that the fact that the advertisement – by using the applicant’s forename and alluding to the book which he had published – had been mainly intended to increase sales of a cigarette brand by capturing the attention of the general public did not mean, as the Court of Appeal had maintained, that the right to protection of personality rights prevailed in general.

24. The Federal Court of Justice continued as follows:

“In weighing up the competing interests the Court of Appeal failed to take adequate account of the fact that the only issue at stake in this case was the protection of the pecuniary components of the right to protection of personality rights, such protection being based solely on civil law and not constitutional law. In the case of interference with the pecuniary components of the right to protection of personality rights because a well-known person’s name has been used in an advertisement without his consent, it cannot simply (*ohne weiteres*) be maintained that the person’s right to protection of his personality rights will always prevail over the advertiser’s right to freedom of expression. On the contrary, it might be appropriate to tolerate an interference with protection of personality rights resulting from reference to a person’s name if, on the one hand, the advertisement alludes in a derisive, satirical manner to an event involving the person and forming the subject of public debate and if, on the other hand, it does not exploit the person’s brand image (*Imagewert*) or advertising value (*Werbewert*) by using his name, and if it does not give the impression that the person identifies with the product advertised or advocates its use (reference to the Federal Court of Justice judgment of 26 October 2006, no. I ZR 182/04).”

25. The Federal Court of Justice held that the impugned advertisement had not given such an impression. It had concerned a subject of public interest in so far as it referred in a humorous fashion to the events surrounding the publication of the applicant’s book, shortly after that event and in the context of the ensuing debate in the media. The advertisement had therefore been part of the ongoing public debate on the circumstances surrounding the applicant’s publication of his book. The Federal Court of Justice emphasised that above and beyond the derisive, satirical allusion to that event, which was already known to the public, the advertisement had been devoid of any degrading or negative content in relation to the applicant. Furthermore, given the absence of any suggestion that the applicant identified in any way with the product advertised, there were no grounds for considering that the advertisement was disparaging towards the applicant simply because it was promoting a brand of cigarettes.

26. The Federal Court of Justice agreed, moreover, with the Court of Appeal that the applicant had sought public attention for his own publicity needs. It found that the applicant’s interest in not being mentioned in the

advertisement without his consent carried less weight than the tobacco company's freedom of expression. There were therefore no grounds for examining whether the company could also have relied on the right to freedom of expression in the artistic field.

27. The Federal Court of Justice concluded that in the absence of a violation of the pecuniary components of his right to protection of his personality rights, the applicant could not claim an entitlement to a notional licence.

4. Decision of the Federal Constitutional Court

28. On 7 April 2009 the Federal Constitutional Court declined to accept for adjudication a constitutional appeal by the applicant (no. 1 BvR 3143/08), adding that no reasons would be given for its decision. The applicant received the decision on 24 April 2009.

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THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. The applicant complained that the refusal by the Federal Court of Justice to grant him a notional licence in compensation for the unauthorised use of his name in the impugned advertisement had breached his right to respect for private life as laid down in Article 8 of the Convention, the relevant part of which provides:

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

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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

32. The Government contested that argument.

A. Admissibility

33. The Government submitted that the applicant's complaint did not fall within the scope of Article 8 of the Convention because the impugned advertisement only mentioned his forename, which was very common and could not on its own have suggested any connection with him. Only the allusion to the circumstances surrounding the publication of the applicant's book – which, indeed, were attributable to him – had linked the

advertisement to the applicant. The Government asserted that the only option available to the applicant was to seek an injunction, under Article 8 of the Convention, against any further public reference to the incidents in question. However, the company had agreed to the applicant's request to refrain from further publication of the advertisement. The Government took the view that although Article 8 protected an individual's reputation, it did not confer any right to compensation in the form of a notional licence where the individual's reputation had been damaged by his own behaviour.

34. The applicant submitted in reply that a person's name was part of his private life. Article 8 of the Convention conferred on an individual the right to decide whether and under what conditions third parties could use his name for advertising purposes. He emphasised that such protection also covered an individual's forename where its use would make it possible to identify the individual concerned, as in the present case, because otherwise the company would not have confined itself to using his forename. He further pointed out that in the instant case he was relying not so much on his right to protection of his reputation as on his right to his own name and the freedom to make his own decisions as to who should be allowed to use it for advertising purposes. Moreover, he had not forfeited his right to protection of his reputation simply because he had published his book. Therefore, the applicant contended that this complaint fell within the scope of Article 8 of the Convention.

35. The Court reiterates that Article 8 of the Convention does not contain any explicit provisions on forenames. However, since they constitute a means of identifying persons within their families and the community, forenames do concern private and family life (see *Guillot v. France*, 24 October 1996, § 21, *Reports of Judgments and Decisions* 1996-V; *Mentzen v. Letvia* (dec.), no. 71074/01, ECHR 2004-XII, and the references cited therein; and *Henry Kismoun v. France*, no. 32265/10, § 25, 5 December 2013). The Court notes in the present case that although the applicant's forename is common and frequently used, the fact that it was mentioned in connection with the publication of his book made it possible to identify him, so that it cannot be maintained that the applicant's right to respect for his private life has not been affected.

36. The Court therefore considers that this complaint falls within the scope of Article 8 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The Government

37. The Government took the view that there had been no unjustified interference with the applicant's right to respect for his private life, because the requisite level of severity had not been attained. Since the advertisement in issue had not used the applicant's full name or a photograph of him, he had not suffered any pecuniary damage or any physical or psychological consequences, given that the advertisement had not suggested that the applicant was personally promoting the cigarettes or was in any way linked to them.

38. The Government emphasised that even supposing that there had been interference, the German legal system guaranteed sufficient protection. They observed that the present application did not concern the applicant's right to seek an injunction against the advertisement (*Unterlassungsanspruch*), which the company had recognised and which had therefore not been the subject of any proceedings in the domestic courts. The question was not whether but how the German courts should have intervened. On that point the Government took the view that the possibility provided for in German law of applying for an injunction provided adequate protection against advertising. The applicant had not in fact made any attempt to seek protection against the advertisement, but rather had hoped to derive a pecuniary advantage, even though Article 8 of the Convention did not provide for any such compensation.

39. The Government explained that German law did not only provide for injunctions in the event of a violation of the right to respect for private life, but also granted pecuniary compensation in some cases. In the instant case the Federal Court of Justice had considered whether there were any reasons for granting the applicant a notional licence and, after weighing up the competing interests, had concluded that the interference had not been sufficiently serious to justify such action and that the company's freedom of expression prevailed. The Federal Court of Justice had noted that even statements made for a commercial purpose were protected by freedom of expression as guaranteed by the Basic Law, that contributions with the purpose of entertainment could also help shape public opinion, that the interference had not been particularly serious because it had been neither offensive nor scornful, and that the advertisement had not led to any identification of the applicant with the product advertised.

(b) The applicant

40. The applicant submitted that the interference had attained a sufficient degree of severity because, first of all, he was a non-smoker,

hated cigarettes and was involved in campaigning against addictions; secondly, society was increasingly critical of and intolerant of smoking, as attested by Directive 2003/33/EC of 26 May 2003; and thirdly, the right to one's name enjoyed the same protection as the right to one's image. Furthermore, the Court required the interference to attain a certain level of severity only in cases of attacks on a person's reputation (the applicant cited *A. v. Norway*, no. 28070/06, § 64, 9 April 2009), but not in cases of interference in private life.

41. The applicant contended that German law did not provide sufficient protection against unjustified interference in private life. He argued that an injunction was insufficient in that respect because it was aimed only at preventing future interference, whereas actions for unjust enrichment were designed to compensate for the consequent pecuniary transfers.

42. The applicant argued that by confining itself to prioritising the company's freedom of expression on the ground that the latter was safeguarded by constitutional law whereas the right relied upon by the applicant only came under ordinary legislation, the Federal Court of Justice had manifestly failed to weigh up the two competing legal situations. Moreover, even if one followed its opinion that the case had only concerned the pecuniary components of the applicant's personality rights, the Federal Court of Justice should nevertheless have weighed up the tobacco company's freedom of expression against the applicant's property rights. The possibility of third parties using the advertising value of public figures without their consent entailed the risk of unduly restricting those individuals' right to their names.

43. The applicant emphasised that the content of the advertisement had made no contribution to shaping public opinion and had merely served the tobacco company's commercial interests (increasing its turnover), notwithstanding the alleged link with a topical event. In his submission, the advertisement had only served as a reminder of the legal disputes surrounding the publication of the applicant's book for the limited number of people who were aware of those events. It had therefore not been capable of imparting information and ideas of general interest to the public.

2. Observations of the third party (British American Tobacco (Germany) GmbH)

44. The third party emphasised that, contrary to the applicant's allegations, there was nothing in the Court's case-law to suggest that statements made in an advertisement enjoyed a lower level of protection than statements made elsewhere. The impugned judgment of the Federal Court of Justice complied with the criteria established by the Court in *Axel Springer AG v. Germany* ([GC], no. 39954/08, 7 February 2012), and the applicant had mentioned no substantial grounds that could induce the Court to substitute its own view for that of the Federal Court of Justice. The third

party emphasised that the crux of the present case was not whether it should have used the applicant's forename without his consent but whether it had the right to comment on current events and the conduct of the applicant, who had been involved in those events. A company such as itself was indisputably entitled to make such comments in the same way as the press.

3. *The Court's assessment*

45. The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as his or her name, including the forename (see paragraph 35 above). It covers personal information which individuals can legitimately expect not to be published without their consent (see *Flinkkilä and Others v. Finland*, no. 25576/04, § 75, 6 April 2010, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010). The Court considers that while the dissemination of information about a person with reference to his or her full name is regularly a cause of interference with the right of the person concerned to respect for his or her private life, the unauthorised use of a person's forename alone may, in certain cases, also interfere with the person's private life. This applies, as in the present case, where the forename is mentioned in a context which enables the person to be identified and where it is used for advertising purposes.

46. The Court observes that the applicant did not complain of any State action, but rather of the State's failure to protect him against the company's use of his forename without his consent. The present application requires an examination of the fair balance that has to be struck between the applicant's right to respect for his private life from the angle of the State's positive obligations under Article 8 of the Convention, and the company's freedom of expression as guaranteed by Article 10 of the Convention, which also applies to statements made in the commercial field (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 26, Series A no. 165), because it guarantees freedom of expression for "everyone", with no distinction being drawn according to whether the aim pursued is profit-making or not (see *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013).

47. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. That margin of appreciation is in principle the same as that available to the States under Article 10 of the Convention in assessing whether and to what extent an interference with freedom of expression as protected by that Article is necessary (see *Von Hannover v. Germany* (no. 2), nos. 40660/08 and 60641/08, § 106, 7 February 2012, and *Axel*

Springer AG, cited above, § 87). The Court reiterates that States have a particularly broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 61, ECHR 2012 (extracts), and *Ashby Donald and Others v. France*, no. 36769/08, § 39, 10 January 2013).

48. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the Convention provisions relied on. Where the balancing exercise has been undertaken by the national authorities 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; *Von Hannover (no. 2)*, cited above, § 107; and *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, §§ 33 and 44, 16 January 2014).

49. In *Von Hannover (no. 2)* and *Axel Springer AG* (both cited above), the Court summarised the relevant criteria for balancing the right to respect for private life against the right to freedom of expression: contribution to a debate of general interest; how well known the person concerned is; the subject of the report; the prior conduct of the person concerned; and the content, form and consequences of the publication (see *Von Hannover (no. 2)*, cited above, §§ 108-113, and *Axel Springer AG*, cited above, §§ 89-95; see also *Tănăsoaica v. Romania*, no. 3490/03, § 41, 19 June 2012).

50. As regards the existence of a debate of general interest, the Court notes that the German courts found that the impugned advertisement concerned a subject of public interest in so far as it referred humorously to the case of the applicant's publication of a book, shortly after the event and in the context of the ensuing media debate on the subject. The Court can accept that the advertisement, considered in that context and viewed as satire – which is recognised in its case-law as a form of artistic expression and social commentary (see *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009, and *Eon v. France*, no. 26118/10, § 60, 14 March 2013) – contributed, to some extent at least, to a debate of general interest (see, *mutatis mutandis*, *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 45, ECHR 2004-X, and *Von Hannover v. Germany (no. 3)*, no. 8772/10, § 52, 19 September 2013).

51. As to how well known the applicant was, the Court notes that the German courts did not explicitly address this matter, but clearly indicated, by comparing the applicant's case to those of other public figures and considering whether his brand image or advertising value had been exploited, that the applicant was indisputably well known to the general

public. Furthermore, it is clear that the company would not have used the applicant's forename if the public had not been sufficiently familiar with it. The Court thus concludes that the applicant belonged to the group of public figures who cannot claim protection of their right to respect for their private life in the same way as private individuals unknown to the public (see *Von Hannover* (no. 2), cited above, § 110, and *Axel Springer AG*, cited above, § 91).

52. As regards the subject of the impugned advertisement, the Court notes that it only alluded to the publication of the applicant's book and the ensuing judicial proceedings, that is to say a public event which had been commented on in the media. The advertisement did not mention any details of the applicant's private life, nor did it even allude to the aspects of the latter which he himself had disclosed in his book (contrast *Hachette Filipacchi Associés* (ICI PARIS), no. 12268/03, § 53, 23 July 2009, and *Axel Springer AG*, cited above, § 101).

53. As far as the applicant's prior conduct is concerned, the German courts noted that in publishing his book the applicant had actively sought the limelight and had courted publicity to further his own interests. The Court can accept the findings of the German courts, so that, having regard to the degree to which he was known to the public, his "legitimate expectation" that his private life would be effectively protected was henceforth reduced (see, *mutatis mutandis*, *Hachette Filipacchi Associés* (ICI PARIS), cited above, § 53, and *Axel Springer AG*, cited above, § 101).

54. As regards the content, form and consequences of the advertisement, the Court observes that the German courts noted that it had been devoid of any degrading or negative content in relation to the applicant (see *Hachette Filipacchi Associés* (ICI PARIS), cited above, § 54), had not been disparaging simply because it was promoting a cigarette brand whereas the applicant claimed to be a non-smoker, and had not suggested that the applicant identified in any way with the product advertised. The Government pointed out in that connection that the advertisement had in no way suggested that the applicant personally wished to promote the cigarettes or had any link with them.

55. The Court notes that the fact of linking a public figure's name with a commercial product without his or her consent may raise issues under Article 8 of the Convention, particularly where the product advertised is not socially accepted or raises serious ethical or moral questions. In the present case, however, the Court can accept the findings of the domestic courts, particularly in view of the humorous nature of the impugned advertisement, which was part of an advertising campaign run by the company where a humorous link was made between a picture of a packet of its brand of cigarettes and a topical event involving a public figure (see, for example, *Ernst August von Hannover v. Germany*, no. 53649/09, 19 February 2015). Moreover, as the Regional Court noted, only a limited number of people

would have been able to make the connection between the advertisement and the applicant because it neither mentioned his surname nor included a photograph of him. Indeed the applicant did not contest this, acknowledging that only those who knew about the litigation surrounding the publication of his book could have understood the advertisement.

56. The applicant asserted in particular that the Federal Court of Justice had dismissed his claim primarily because the company's freedom of expression enjoyed a higher degree of legal protection than his right to respect for private life. This meant, in his submission, that it had failed to conduct a proper balancing exercise between the interests at stake. The Government submitted that the Federal Court had conducted such a balancing exercise when deciding whether there were any grounds for awarding the applicant the notional licence which he had sought.

57. The Court notes that some passages of the judgment of the Federal Court of Justice seem to suggest that in the present case the company's freedom of expression, simply because it was enshrined in constitutional law, carried more weight than the applicant's rights to protection of his personality rights and to his own name, which were safeguarded only by ordinary law. It observes that the Federal Court of Justice appears to have applied this principle of different levels of protection to reject the Court of Appeal's finding that the right to protection of personality rights always prevailed over the advertiser's freedom of expression in such cases (see paragraph 24 above).

58. The Court reiterates that its task is not to review the relevant domestic law and practice *in abstracto*, but to examine the manner in which they were applied in the applicant's specific case (see *Von Hannover* (no. 2), cited above, § 116; *Karhuvaara and Iltalehti*, cited above, § 49; and, *mutatis mutandis*, *Elsholz v. Germany* [GC], no. 25735/94, § 59, ECHR 2000-VIII). It notes first of all that the Federal Court of Justice specified that only the pecuniary components of personality rights enjoyed protection under ordinary law, whereas the rights to protection of personality rights formed part of the fundamental rights protected by constitutional law inasmuch as they protected non-pecuniary interests. The Court further notes that the Federal Court of Justice took the circumstances of the case into consideration, that is to say the commercial and also humorous nature of the impugned advertisement, the fact that it had been distributed shortly after the publication of the applicant's book and in the context of the media debate surrounding the book, the absence of any degrading or negative content in relation to the applicant or his brand image, and the applicant's previous behaviour towards the public.

59. The Court therefore finds that the Federal Court of Justice conducted a thorough balancing exercise between the competing rights at stake and reached the conclusion that, in the circumstances of the case before it, there were grounds for giving priority to the company's freedom of expression

and refusing to grant a notional licence to the applicant, who had already obtained an undertaking from the company to refrain from further publication of the advertisement.

60. In those circumstances, and having regard to the broad margin of appreciation available to the domestic courts in such matters (see paragraph 47 above) when weighing up divergent interests, the Court finds that the Federal Court of Justice did not fail to comply with its positive obligations in respect of the applicant under Article 8 of the Convention. There has accordingly been no violation of that provision.

...

FOR THESE REASONS, THE COURT

...

2. *Holds*, by six votes to one, that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 19 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zupančič is annexed to this judgment.

M.V.
C.W.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I regret that I am unable to join the majority in this case. Indeed, I believe that the German courts below the Federal Court of Justice were largely right in their assessment of the case.

I do not find the reversal of these lower decisions remotely persuasive.

At the centre of the controversy, as defined by the German Federal Court of Justice (see paragraph 24 of the majority judgment), is the balancing of the hierarchical position of Mr Bohlen's personality rights and the freedom of expression.

The German provisions governing Mr Bohlen's personality rights have their international equivalent in Article 8 of the Convention. To maintain, therefore, that the German legal order places them beneath the constitutional protection of the freedom of expression perhaps makes sense in the domestic legal order – although I find this an extremely formalistic opinion – but that is obviously not true at the international level. There can be no *a priori* predominance of the freedom of expression over the personality rights protected by Article 8 of the Convention.

True, the Federal Court of Justice referred to the pecuniary aspect, that is to say the damages for the violation of Mr Bohlen's personality rights. It held that it was this compensatory aspect which could not be maintained on a par with the constitutional protection of the freedom of expression. I find this surprising. How can the remedy (damages for the violation of personality rights) be divorced from the right? The right and the remedy are two sides of the same coin.

Also, the implication of the advertisement is clear enough. It insinuates that Mr Bohlen would not have committed the alleged mistakes in his writing if only he smoked "Lucky Strike" cigarettes. The lit cigarette on top of the cigarette box is a clear recommendation to this effect. The message is not even subliminal; it is assertive and suggestive.

Furthermore, we are speaking here of the freedom of expression of the British American Tobacco Company in mocking Mr Bohlen, for purely and recognisably commercial purposes.

There is no redeeming value in the tobacconist's message. This is not a message serving a social purpose of any kind – unless cigarette smoking is considered to be that redeeming social value.

On the contrary, in the valued social context of the efforts to prevent smoking – a recognised social goal! – tobacco advertising is certainly not a field in which freedom of expression should be protected. In my opinion, this would in principle be true even without Mr Bohlen's complaint.

Tomorrow we might encounter a case in which the limits imposed by the Contracting States on cigarette advertising will be raised as a matter of the freedom of expression. The case of Mr Bohlen might be cited as the relevant precedent.

Understandably, Mr Bohlen – a non-smoker – felt offended and protested that his name and his work had been abused in order to promote cigarette smoking.

As I wrote in my concurring opinion in *von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI), those who live in glass houses should not throw stones:

“And while I find the distinctions between the different levels of permitted exposure, as defined by the German legal system, too *Begriffsjurisprudenz*-like, I nevertheless believe that the balancing test between the public’s right to know on the one hand and the affected person’s right to privacy on the other hand must be adequately performed. He who willingly steps onto the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians, etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.

Here I intend to concentrate not so much on the public’s right to know – this applies first and foremost to the issue of the freedom of the press and the constitutional doctrine concerning it – but rather on the simple fact that it is impossible to separate by an iron curtain private life from public performance. The absolute incognito existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people.

Privacy, on the other hand, is the right to be left alone. One has the right to be left alone precisely to the degree to which one’s private life does not intersect with other people’s private lives. In their own way, legal concepts such as libel, defamation, slander, etc. testify to this right and to the limits on other people’s meddling with it. The German private-law doctrine of *Persönlichkeitsrecht* testifies to a broader concentric circle of protected privacy... The *Persönlichkeitsrecht* doctrine imparts a higher level of civilised interpersonal deportment.

It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.

The question here is how to ascertain and assess this balance... I would suggest a different determinative test: the one we have used in *Halford v. the United Kingdom* (judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III), which speaks of ‘reasonable expectation of privacy’.

The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in *Halford* do not prevent us from employing the same test in cases such as the one before us. The dilemma as to whether the applicant here was or was not a public figure ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case... Of course, one must avoid a circular reasoning here. The ‘reasonableness’ of the expectation of privacy could be reduced to the aforementioned balancing test. But reasonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones.”

It is a tautology to say that everybody who has ever published a book has sought publicity. This is what publishing anything is all about. However, for the Federal Court of Justice to maintain that Mr Bohlen himself courted publicity to further his own interests (see paragraph 26 of the judgment),

and was consequently hostage to adverse publicity because he had published a book, is going too far.