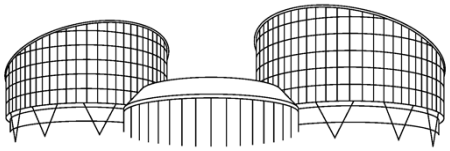

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

# CASE OF EGILL EINARSSON v. ICELAND (No. 2)

*(Application no. 31221/15)*

JUDGMENT

STRASBOURG

17 July 2018

**FINAL**

17/10/2018

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of Egill Einarsson v. Iceland (No. 2),**

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

Paul Lemmens, *President,*
Robert Spano,
Ledi Bianku,
Işıl Karakaş,
Nebojša Vučinić,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 26 June 2018,

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

# PROCEDURE

1. The case originated in an application (no. 31221/15) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Mr Egill Einarsson ("the applicant"), on 16 June 2015.

2. The applicant was represented by Mr Vilhjálmur H. Vilhjálmsson, a lawyer practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Agent, Mr Einar Karl Hallvarðsson, the State Attorney General.

3. The applicant complained, under Article 8 of the Convention, that the domestic courts' judgments had entailed a violation of his right to respect for his private life.

4. On 14 November 2016 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Kópavogur. At the material time he was a well-known personality in Iceland who for years had published articles, blogs and books and appeared in films, on television and other media, under pseudonyms.

6. Some of the applicant's published views attracted some attention, as well as controversy. These included, *inter alia*, his views about women and their sexual freedom. In some instances his criticism had been directed towards named individuals, often women, and in some cases his words could have been construed to mean that he was in fact recommending that they should be subjected to sexual violence. The applicant had often justified such conduct by stating that the material had been meant in jest and that those who criticised him lacked a sense of humour (see *Egill Einarsson v. Iceland*, no. 24703/15, § 16, 7 November 2017).

7. In November 2011, an 18-year-old woman reported to the police that the applicant and his girlfriend had raped her. In January 2012 another woman reported to the police that the applicant had committed a sexual offence against her a few years earlier. Upon the completion of the police investigation the Public Prosecutor, on 15 June and 15 November 2012, dismissed the cases in accordance with Article 145 of the Act on Criminal Procedures, because the evidence which had been gathered was not sufficient or likely to lead to a conviction. The applicant submitted a complaint to the police about false accusations made against him by the two women. This case was also dismissed.

8. On 22 November 2012 Monitor, a magazine accompanying *Morgunblaðið* (a leading newspaper in Iceland), published an interview with the applicant. A picture of the applicant was published on the front page, and in the interview the applicant discussed the rape accusation against him. The applicant stated several times that the accusations were false. He stated, *inter alia*, that it was not a priority for him for the girl's name to be disclosed and that he was not seeking revenge against her. He accepted that, having placed himself in the media spotlight, he had to tolerate publicity which was not always "sunshine and lollipops" but criticised the way the media had covered his case. When asked about the girl's age, he responded that the girl had been in a club where the minimum age had been 20 years and that it had been a shock to find out later that she had been only 18 years old. When asked about his complaints against the girl for allegedly wrongful accusations, he stated again that he was not seeking revenge against those who had reported him to the police, but that it was clear that they had had ulterior motives. He hoped that the police would see that it was important to have a formal conclusion in the case and that the documents in the case were "screaming" conspiracy.

9. On the same day a Facebook page was set up for the purpose of protesting about the interview and encouraging the editor of Monitor to remove the applicant's picture from its front page. Extensive dialogue took place on the site that day. Later that day, X posted a comment on the above-mentioned Facebook page which stated, *inter alia*: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl

... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ...".

10. On 28 November 2012, the applicant's lawyer sent a letter to X requesting that she withdraw her statements, admit they were unfounded, apologise in the media and pay the applicant punitive damages, which would be donated to charity. By letter the following day, X's lawyer opposed the applicant's claims and submitted that the impugned statements were not defamatory. Furthermore, the lawyer informed the applicant's lawyer that X had removed the statement in question from Facebook.

11. On 17 December 2012, the applicant lodged defamation proceedings against X before the District Court of Reykjavík and asked for her to be punished, under the applicable provisions of the Penal Code, for publishing the statements in question. The applicant further requested that the statements "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ..." and "It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ..." be declared null and void. Moreover, the applicant requested that X be ordered to pay him 1,000,000 Icelandic *krónur* (ISK; approximately 8,800 euros (EUR)) in non-pecuniary damages under the Tort Liability Act, plus interest, ISK 150,000 (approximately 1,300 EUR) for the cost of publishing the main content and the reasoning of the final judgment in the case in the media under Article 241 of the Penal Code, and the applicant's legal costs.

12. By a judgment of 1 November 2013, the District Court found that X's comment on Facebook had been defamatory and declared the statements null and void. However, the court dismissed the applicant's claim for the imposition on X of a criminal punishment under the Penal Code, as well as rejecting the claim to have X carry the cost of publishing the main content and reasoning of the judgment in a newspaper. Furthermore, the District Court did not award the applicant non-pecuniary damage and concluded, finally, that each party should bear its own legal costs.

13. The judgment contained the following reasons:

> "... The [applicant] claims damages in the amount of ISK 1,000,000 and bases his demand on the general rules of tort law and on Article 26 of Act no. 50/1993 [Tort Liability Act]. According to the aforementioned, it is clear that [X] made defamatory insinuations about [the applicant]. However, when assessing the damage suffered by [the applicant], it has to be taken into account how [the applicant] has built a certain reputation by his conduct in public. Notwithstanding the extensive disputes about his comment made under the name of Gillz, it cannot be seen that he took a clear stand against sexual violence until complaints against him materialised. Nevertheless [the applicant] had full reason to clarify his situation in this respect, taking into account that material stemming from him is often very ambiguous and provocative, and could easily be interpreted as an incitement to this type of violence.

> When assessing the possible damage to [the applicant], the distribution of the comments which was, as stated before, limited to the distribution entailed in publications on the said Facebook page, together with hundreds or thousands of other comments, has to be taken into account. Additionally, the comments were removed from the website when [the applicant] so requested.
>
> Lastly, it should be considered that by declaring the comments null and void, as this judgment concludes, [the applicant] has received full judicial satisfaction.
>
> In light of all the above-mentioned considerations there is no reason to order [X] to pay non-pecuniary damages.
>
> Furthermore, [the applicant's] claim to have [X] carry the cost of publishing the main content and the reasoning of the judgment in a newspaper will not be accepted. The impugned comment was published on a Facebook page and therefore it is not necessary to incur the costs of publishing the judgment in any other way.
>
> In light of the conclusion of the judgment, and taking account of all the facts, it is appropriate that each party bears its own legal costs [*er rétt að málskostnaður falli niður*]."

14. By judgment of 18 December 2014 the majority of the Supreme Court (two out of three judges) upheld the District Court's decision to declare the statements null and void. Furthermore, the Supreme Court upheld the District Court's decision not to award damages to the applicant and that each party should bear its legal costs. In its assessment regarding that issue the Supreme Court referred to Article 73 (3) of the Constitution, the principle of proportionality and the reasoning of the District Court.

15. The dissenting judge agreed with the majority to declare the impugned statements null and void. However, the judge found that the criteria set out in the Tort Liability Act for the granting of non-pecuniary damages were fulfilled in the case and the applicant should be awarded 200,000 ISK in non-pecuniary damages as well as his legal costs before the District Court and the Supreme Court.

## II. RELEVANT DOMESTIC LAW

16. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands*) read as follows:

**Article 71**

> "Everyone shall enjoy freedom from interference with privacy, home and family life.
>
> ...
>
> Notwithstanding the provision of the first paragraph above, freedom from interference with privacy, home and family life may be otherwise limited by statutory provisions if this is urgently necessary for the protection of the rights of others."

**Article 73**

"Everyone has the right to freedom of opinion and belief.

Everyone shall be free to express his thoughts, but shall also be liable to answer for them in court. The law may never provide for censorship or other similar limitations on freedom of expression.

Freedom of expression may only be restricted by law in the interest of public order or the security of the state, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions."

17. The Penal Code No. 19/1940 (*Almenn hegningarlög*), Chapter XXV, entitled "Defamation of character and violations of privacy", sets out the following relevant provisions:

**Article 235**

"If a person alleges against another person anything that might be harmful to his or her honour or spreads such allegations, he shall be subject to fines or to imprisonment for up to one year."

**Article 236**

"Anyone who, against his or her better knowledge, makes or disseminates a defamatory insinuation shall be liable to up to two years' imprisonment.

Where such an insinuation is published or disseminated publicly, even though the person publishing or disseminating it has no reason to believe it to be correct, the sentence shall be a fine or up to two years' imprisonment."

**Article 241**

"In a defamation action, defamatory remarks may be declared null and void at the demand of the injured party. A person who is found guilty of a defamatory allegation may be ordered to pay to the injured person, on the latter's demand, a reasonable amount to cover the cost of the publication of a judgment, its main contents or reasoning, as circumstances may warrant, in one or more public newspapers or publications."

**Article 242**

"The offences referred to in the present Chapter shall be subject to indictment as follows:

...

3. Lawsuits on account of other offences may be brought by the injured party alone."

18. Section 26(1) of the Tort Liability Act No. 50/1993 (*Skaðabótalög*) reads:

"A person who

a. deliberately or through gross negligence causes physical injury or

b. is responsible for an unlawful injury against the freedom, peace, honour or person of another party may be ordered to pay non-pecuniary damages to the injured party."

19. Section 130 (3) Act on Civil Procedure No. 91/1991 (*Lög um meðferð einkamála*) reads:

"...

In the instance of a party winning the case to some extent and losing it in part, or if there exists a significant factor of doubt in the case, the court may order a party to the case to pay the other party's legal costs, or have each of them bear their own costs in the case. The same may apply if the party losing a case neither knew nor could have known about the circumstances that were determining factors until after a case was filed.

..."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The applicant complained that the Supreme Court judgment of 18 December 2014 entailed a violation of his right to respect for his private life as provided in Article 8 of the Convention. The relevant parts read as follows:

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

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 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."

21. The Government contested that argument.

### A. Admissibility

22. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 applicant

23. The applicant maintained that the domestic courts' decision not to grant him compensation and legal costs violated his right under Article 8 of the Convention. He submitted that he should not have to accept being called a rapist without having been convicted of such a crime. In the applicant's opinion, the domestic courts' conclusions meant that anyone could call him a rapist in speech or in writing without him being able to defend himself.

24. The applicant further claimed that he did not have an effective remedy to protect his rights without suffering considerable financial loss, which resulted in him not enjoying the minimum protection of the right set out in Article 8 of the Convention. The applicant contested the Government's submissions that the Supreme Court's decision not to award damages and legal costs had been foreseeable, viewed in the light of the practice in this type of case, where statements are declared null and void.

#### (b) The Government

25. The Government maintained that the domestic courts applied standards that were in conformity with the principles embodied in Article 8 of the Convention as interpreted in the Court's case-law and that the balancing test, between the competing rights protected under Articles 8 and 10 of the Convention, was based on principles developed in the Court's case-law. In the light of that and the fundamental principles of subsidiarity and the margin of appreciation, the Government submitted that there had not been an interference with the applicant's rights within the meaning of Article 8 of the Convention by the Supreme Court's decision not to award him damages and legal costs.

26. The Government argued that the applicant had been given sufficient protection of his right to private life since the remarks had been declared null and void. The interference had not been serious enough to justify or necessitate an award of damages or legal costs. Furthermore, the comments had been removed from the website upon the applicant's request.

27. The Government submitted that damages were not always awarded under Article 26 (1) of the Tort Liability Act in cases where there had been deemed to be a violation of the rights in question and, when they were, the amount was in general small. As regards legal costs, the Government maintained that the Supreme Court's decision, in the light of the outcome of the case, had been in full conformity with Article 130 (3) of the Act on Civil Procedures.

28. The Government pointed out that the circumstances in the present case were different from those in the case of *Kahn v. Germany,*

no. 16313/10, 17 March 2016. The latter concerned the repeated publication of photographs of the children of a famous football player, in spite of a blanket ban on publication ordered by a court. However, in the present case the comments had not been undertaken by media, reporters or as a part of a journalistic operation: it was one individual participating in a public debate about the applicant, who is a well-known person, and posting comments on a Facebook page along with hundreds or thousands of other comments. The Government were of the opinion that the applicant had, in his own capacity, and in particular as his very public alter ego, maintained a discourse on topics regarding equality that had caused a stir, discussion and controversy in the public sphere.

*2. The Court's assessment*

**(a) The issue to be determined**

29. The Court observes that in its judgment of 18 December 2014, the Supreme Court confirmed the District Court's conclusion, finding X's statements about the applicant to be defamatory, and declared them null and void as they violated the applicant's right to respect for his private life. However, the court did not award the applicant compensation or legal costs.

30. Therefore, the issue to be determined in the present case is not whether the applicant was protected against undisputed infringements of his right to respect for private life but whether, in the light of Article 8 of the Convention, the protection afforded to him, namely declaring the impugned statements null and void, was sufficient, or whether only an award of non-pecuniary damages and legal costs could afford the necessary protection of his right to respect for his private life under Article 8 of the Convention.

**(b) General principles**

31. The right to protection of reputation is encompassed by Article 8 of the Convention as part of the right to respect for private life, even if the person is criticised in a public debate (see *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-XII, and *Petrie v. Italy*, no. 25322/12, § 39, 18 May 2017). The same considerations apply to a person's honour (*Sanchez Cardenas v. Norway*, no. 12148/03, § 38, 4 October 2007, and *A. v. Norway*, no. 28070/06, § 64, 9 April 2009).

32. 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, *inter alia*, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012 and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no 17224/11, § 76, ECHR 2017).

33. The object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an 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 (see, *inter alia*, *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32, and *Söderman v. Sweden* [GC], no 50786/08, § 78, ECHR 2013).

34. The Court notes that in order to fulfil its positive obligation to safeguard one person's rights under Article 8, the State may have to restrict to some extent the rights secured under Article 10 for another person. When examining the necessity of that restriction in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression as protected by Article 10 and, on the other, the right to respect for private life as enshrined in Article 8 (see, *inter alia*, *Bédat v. Switzerland* [GC], no. 56925/08, § 74, ECHR 2016).

35. The choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see, *inter alia*, *Petrie v. Italy*, no. 25322/12, § 41, 18 May 2017). Moreover, where the balancing exercise between the rights under Article 8 and 10 of the Convention 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, *Axel Springer AG*, cited above, § 88, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, 7 February 2012).

36. As to non-pecuniary damages in breach of privacy cases, the Court has held that a victim of a violation may not expect that a breach of Article 8 of the Convention follows unless he or she receives a certain amount of pecuniary compensation (see *Mertinas and Mertinienė v Lithuania* (dec.), no. 43579/09, § 51, 8 November 2016 and, mutatis mutandis, *Kahn v. Germany*, cited above, § 75). The member States of the Council of Europe may regulate questions of compensation for non-pecuniary damage differently, and the imposition of financial limits is not in itself incompatible with a State's positive obligation under Article 8 of the Convention (see *Mertinas and Mertinienė v Lithuania* (dec.), cited

above, § 51). However, such limits must not be such as to deprive the individual of his or her privacy and thereby empty the right of its effective content (see *Biriuk v. Lithuania*, no. 23373/03, § 45, 25 November 2008 and *Armonienė v. Lithuania*, no. 36919/02, § 46, 25 November 2008).

37. As regards legal costs, the Court has found that the decision to pay such costs must not be unreasonable or disproportionate (see *Frisk and Jensen v. Denmark*, no. 19657/12, § 78, 5 December 2017 and *MGN Limited v. the United Kingdom*, cited above, § 219; see also *Klauz v. Croatia*, no. 28963/10, § 97, 18 July 2013, albeit in a different context).

**(c) Application of those principles to the present case**

38. In the present case the domestic courts found that the statements were defamatory and declared them null and void. However, they did not find that the interference justified ordering X to pay the applicant non-pecuniary damages and the costs of publishing the judgment in a newspaper. In reaching its conclusion, the District Court, confirmed by the Supreme Court, took into account the applicant's previous behaviour, the public reputation he had made for himself, the material which had stemmed from him and its substance, which was often ambiguous and provocative and could be interpreted as an incitement to sexual violence, the distribution of the comment, on a Facebook page amongst hundreds or thousands of other comments, and the fact that the statements were removed by X as soon as the applicant so requested. The District Court, as confirmed by the Supreme Court, found that the applicant had received "full judicial satisfaction" by the comments being declared null and void (see paragraph 13 above).

39. As regards the refusal to grant the applicant compensation for non-pecuniary damage, the Court recalls that domestic courts have a margin of appreciation in assessing how to remedy a finding at national level that a violation has occurred of the right to private life (see *Mertinas*, cited above, § 51). In other words, the decision not to grant compensation does not in itself amount to a violation of Article 8 of the Convention. However, in its review, the Court will examine whether the national courts analysed the specific circumstances of the case, including the nature and gravity of the violation as well as the conduct of the applicant. On this basis, and in particular in light of the findings of the District Court, as analysed above (see paragraph 38), the Court finds that it cannot be held that the protection afforded to the applicant by the Icelandic courts, finding that he had been defamed and declaring the statements null and void, was not effective or sufficient with regard to the State's positive obligations or that the decision not to grant him compensation deprived the applicant of his right to reputation and, thereby, emptied the right under Article 8 of the Convention of its effective content.

40. As regards the legal costs, the Court notes that the domestic courts concluded, by virtue of Section 130 (3) of the Act on Civil Procedure, that each party should bear its own legal costs in the light of the outcome of the case and the facts as a whole. In this regard, the Court notes in particular that although the domestic courts accepted to declare the impugned statements null and void, they did not accept all of the applicant's claims. Against this background, it cannot be said that the domestic courts handled the issue of legal costs in a manner that appears unreasonable or disproportionate (see paragraph 37 above).

41. These elements are sufficient for the Court to conclude that the national authorities did not fail in their positive obligations towards the applicant but afforded him sufficient protection under Article 8 of the Convention. Accordingly there has been no violation of this article.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 17 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Stanley Naismith<br>Registrar | Paul Lemmens<br>President |