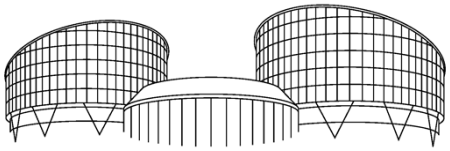

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 18748/10
Albrecht KIESER and Peter TRALAU-KLEINERT
against Germany

The European Court of Human Rights (Fifth Section), sitting on 2 December 2014 as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 1 April 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Albrecht Kieser and Mr Peter Tralau-Kleinert, are German nationals, who were born in 1949 and 1937 respectively and live in Cologne. They were represented before the Court by Mr E. Reinecke, a lawyer practising in Cologne.

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

A. The background of the case

3. The publishing company M. DuMont Schauberg, registered in Cologne, publishes daily newspapers including *Kölner Stadtanzeiger*, *Kölner Rundschau* and *Express*. The chairman of the supervisory board of the publishing company is Mr Alfred Neven DuMont, son of

Mr Kurt Neven DuMont and Ms Gabriele DuMont, who died in 1968 and 1978 respectively.

4. In February 2006 the applicants, journalists for the online magazine *Neue Rheinische Zeitung*, published an article concerning the so-called "aryanisation profits" *("Arisierungsprofite")* of Germans during the Nazi regime and the role of the DuMont family in these activities. The article, which contained some six pages and photos, entitled "Discoveries about the publishing family Neven DuMont in Nazi times: No resistance, but aryanisation profits" read in part as follows:

> "The publishing family Neven DuMont, which has declared itself every now and then for years .... as being haunted by the Nazi regime and being a member of the resistance, profited from aryanisation...."
>
> "Last Friday a congress took place in the adult evening school covering the topic of "aryanisation". There the journalist and historian Niebel sowed doubts. Niebel, who had no access to files of the tax offices, cited in his speech parts of the denazification file of Kurt Neven DuMont, publisher of *Kölnische Zeitung* during the Nazi period and father of the present publisher Alfred Neven DuMont. There the former publisher confessed to an unlawful appropriation of Jewish real estate in 1941..."
>
> "As a matter of fact the Neven DuMont family took possession of three houses in Breite Straße....The houses, respectively the real estate, belonged to the Jewish merchant Fritz Brandenstein and his wife, Sofie. In 1939 they were forced to emigrate, the Nazis confiscated their fortune and the Gerling company interim-purchased the real estate for 6 weeks. Afterwards Gabriele DuMont, wife of Kurt Neven DuMont, purchased the real estate. The price is not known....."
>
> "Following the inquiries of Ingo Niebel, already in 1938 the DuMont publishing company grabbed a house of the merchant Emil Lippmann in Luxemburger Straße via its mutual insurance company. Lippmann was accused of "racial defilement" and died shortly afterwards...."
>
> "In the fifties the publishing company DuMont and the widow Brandenstein reached an out-of-court settlement concerning compensation. This is the reason why the amount of money paid is not generally known. The same applies to the daughters of M. E. Lippmann...."

5. These parts of the article referred to the following three real estate purchases:

6. In 1938 a mutual insurance company situated in Cologne, and which insured the employees of the M. DuMont Schauberg company, purchased real estate situated at 301 Luxemburger Straße in Cologne from Mr Lippmann, a German Jew who was persecuted and died shortly afterwards. In 1951 the legal heirs of Mr Lippmann renounced any restitution claims after having primarily lodged such claims.

7. According to the denazification file of Mr Kurt Neven DuMont, in 1941 Ms Gabriele DuMont bought real estate in Leyboldstraße in Cologne, which was owned by a Mr A. Ottenheimer. Mr Ottenheimer was a German Jew who had emigrated in 1937. Therefore his property was liquidated by a curator. In 1949 Ms DuMont and Mr Ottenheimer (now known as Otten)

reached a settlement concerning the structural condition of the property in 1941 (price, size, value and cultivation) and restitution claims. In this settlement the property was declared as being in essence undeveloped except for cellar walls and concrete foundations.

8. Furthermore in 1941 Ms Gabriele DuMont purchased real estate, located in Breite Straße in Cologne for 255,000 Reichsmark. The vendor was the Gerling company, which had purchased the real estate three years before at auction for 46,000 Reichsmark. The former owner of the property was a company belonging to a Jewish couple who had fled Germany in 1939.

9. The chairman of the supervisory board of the publishing company, Mr Alfred Neven DuMont, instituted an action for an interim injunction with the Cologne District Court after the applicants' article was published, in which he precisely indicated the parts of the article which he considered not to be true.

10. The Cologne District Court and afterwards the Cologne Court of Appeal issued an interim injunction and ordered the applicants to refrain from disseminating certain parts of the article.

B. The proceedings at issue

1. The judgment of the Cologne Regional Court

11. On 19 September 2007 the Cologne Regional Court prohibited in particular any further publication of the following elements of the published article, subject to penalty ("*strafbewährte Unterlassungserklärung")* of up to 250,000 euros for each contravention, under Articles 1004 § 1, 823 § 2 of the Civil Code taken in conjunction with Article 186 of the Criminal Code, read in the light of the right to protection of personality rights ("*Allgemeines Persönlichkeitsrecht*", see §§ 23 seq., below):

> "...to refrain from giving the impression that the plaintiff's family unlawfully enriched itself during the Nazi regime with foreign fortune, in particular by statements such as "the plaintiff's family DuMont made aryanisation profits when purchasing the real estate in Leyboldstr. 19, Breite Straße 82, 86, 88 and Luxemburger Straße 301".

12. According to the Regional Court, the relevant passages of the article in question amounted to a serious interference with Mr DuMont's right to the protection of his personality rights. The Regional Court considered that the impugned statements had to be classified as statements of fact. A statement of fact had to be assumed when a passage of an article or an article as a whole led the reader to draw a peremptory conclusion from it. In the Regional Court's view, the article in question mainly made statements of fact because the term "aryanisation profit", used in the context of the purchase of real estate, created the impression that the DuMont family had enriched itself unlawfully during the Nazi regime with foreign fortune by

abusing the predicament in which the Jewish population found itself. The veracity of that statement could be proved. The Cologne Regional Court found that, the impugned statement being a statement of fact and not a value judgment, the burden of proof concerning the veracity of the statement lay with the applicants. However, the applicants had failed to prove the veracity of the allegations.

13. In particular, regarding the real estate in Leyboldstraße, the Cologne Regional Court stated that the mere claim that the purchase price had been below the current market value was insufficient, because this was a general assumption due to the political situation in Germany at that time and the fact that German Jews were persecuted and expropriated. The applicants' statement that the property was a built-up area was contradicted by statements and proof provided by the plaintiff, Mr DuMont. He had stated that an old building had been demolished in 1937 and a subsequent settlement between Ms DuMont and Mr Otten expressly declared that the property had not been developed in 1941, apart from concrete foundations and cellar walls. As a consequence, the applicants' reference to an address book of Cologne (the "Greven's address book") as proof was considered to be too imprecise und therefore insufficient.

14. Concerning the real estate in Breite Straße the Cologne Regional Court found that the applicants had failed to substantiate that the DuMont family had exploited the Jews' plight, firstly because the DuMont family had purchased the real estate some three years after the Gerling company had purchased it at auction for 46,000 Reichsmark and secondly because the price paid by the DuMont family had exceeded the auction price by 209,000 Reichsmark. As this purchase did not indicate a clear exploitation of the Jews' plight, the statements were to be classified as false. As far as the applicants offered a statutory declaration by the historian Niebel as proof of this allegation, the court held that in view of this finding there was no need to pursue the proof provided by the applicants.

15. With regard to the real estate in Luxemburger Straße the Cologne Regional Court held that no profit had been made by the DuMont family because it had not been the DuMont family who had purchased the real estate, but a legally independent mutual insurance company situated in Cologne and which insured the DuMont company's employees. Furthermore, other real estate, comparable to that in Luxemburger Straße, had been sold for similar prices around the same time.

16. The Cologne Regional Court therefore concluded that the applicants had not proved the veracity of their statements as there had either been no profits made by the DuMont family or the evidence produced by the applicants had not been sufficient. As far as the applicants argued that the term "aryanisation" had to be classified as a value judgment, the court was of the opinion that, even when classified as a value judgment, it still had to be considered as ambivalent. It was necessary with ambivalent expressions

to examine their admissibility on the basis of the interpretation which caused the most serious interference. Against this background the statements had to be regarded as untrue and thus were not protected by freedom of speech. Moreover, the court held that there had not been a legitimate interest in publishing the statements. It was true that the publication of untrue statements of fact could be justified. However, this was only the case if the person disseminating the information had tried sufficiently to verify the facts prior to publication and if any remaining doubts as to the truth of the facts had been made sufficiently clear. In the case at hand, the applicants had not even come close to exhausting all possibilities of establishing the facts and the article was far from being balanced coverage that also indicated doubts as to the truth of the statements.

17. As far as the plaintiff wanted the publication of other parts of the article to be prohibited, the Cologne Regional Court allowed the action for one part. For other parts the applicants made a declaration of discontinuance subject to penalty (*strafbewährte Unterlassungserklärung*).

2. The judgment of the Cologne Court of Appeal

18. On 21 September 2008 the Cologne Court of Appeal dismissed an appeal by the applicants against the judgment and refused to grant the applicants leave to appeal on points of law. It endorsed the reasoning of the Regional Court. It expressly confirmed the Regional Court's finding that the statements were to be classified as statements of fact as they were open to objective verification and proof. Even if parts of the statements comprised value judgments, these were based on documented incidents like the denazification file of Mr Kurt Neven DuMont, address books or files of the competent tax authority. As it was primarily these documents which were supposed to prove the conclusion that the DuMont family had participated in aryanisation profits, the main focus of the statements was not the expression of an opinion but a statement of facts.

3. The decision of the Federal Court of Justice

19. On 3 February 2009 the Federal Court of Justice rejected the applicants' complaint about the refusal to grant them leave to appeal on points of law (*Nichtzulassungsbeschwerde)*, without giving further reasons.

4. The decision of the Federal Constitutional Court

20. On 4 March 2009 the applicants lodged a constitutional complaint with the Federal Constitutional Court. The applicants claimed a violation of their right to freedom of expression insofar as the Cologne Regional Court and the Cologne Court of Appeal had ordered them to refrain from giving the impression that the plaintiff's family had unlawfully enriched itself

during the Nazi regime with foreign fortune, in particular by statements such as "the plaintiff's family DuMont made aryanisation profits when purchasing the real estate in Leyboldstr. 19, Breite Straße 82, 86, 88 and Luxemburger Straße 301". The applicants claimed that the Cologne Regional Court and the Cologne Court of Appeal had omitted to clarify whether these passages of the article in question were to be classified as statements of facts or value judgments. The classification as "ambivalent expressions" was an oversimplification contravening the Federal Constitutional Court's case-law.

21. On 24 September 2009 the Federal Constitutional Court declined to consider the constitutional complaint without providing reasons.

C. Relevant domestic law

22. The claim underlying the injunction was based on an analogy to Article 823(1) and (2), read in conjunction with the second sentence of Article 1004 § 1 of the German Civil Code taken together with Article 186 of the Criminal Code. It is the well-established case-law of the German courts that a person whose personality rights are jeopardised by another individual may – under certain specified conditions – lodge a claim against the latter pursuant to these provisions.

COMPLAINT

23. The applicants complained under Article 10 § 1 of the Convention that the domestic courts' decisions ordering them to refrain from publishing statements referring to unlawfully enrichments of the DuMont family during the Nazi regime with foreign fortune had violated their right to freedom of expression.

THE LAW

24. The applicants alleged that by ordering them to refrain from conveying the impression that the DuMont family had enriched itself unlawfully during the Nazi regime with foreign fortune by abusing the predicament in which the Jewish population found itself, the domestic courts' decisions had violated Article 10 of the Convention, the relevant part of which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others ..."

A. The applicants' arguments

25. The applicants emphasised the important role of the press in a democratic society. They stressed that the article mainly contained value judgments and that notably the expression "aryanisation profit" had to be classified as a value judgment. The national courts' classification of their statements concerning the DuMont family's real estate purchases and the role of the DuMont family during the Nazi regime as statements of fact infringed their right to freedom of expression. They further argued that the plaintiff's publishing company M. DuMont Schauberg occupied a form of monopoly position in Cologne and therefore was obliged to endure public criticism to a certain extent.

B. The Court's assessment

26. The Court finds that the judicial decisions given in the present case constituted an interference with the applicants' right to freedom of expression as guaranteed by Article 10 of the Convention.

27. Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims.

28. The Court notes at the outset that the interference with the applicants' right to freedom of expression was prescribed by law, namely by Articles 823 § 2 of the Civil Code taken in conjunction with Article 186 of the Criminal Code and that it pursued the legitimate aim of protecting the reputation or rights of others according to 1004 § 1 of the Civil Code, namely the personality rights of Mr Alfred Neven DuMont.

29. The Court must further determine whether the interference was necessary in a democratic society, which the applicants disputed.

1. General principles

30. The Court has repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of

public interest (*Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI).

31. However, Article 10 § 2 of the Convention states that freedom of expression carries with it "duties and responsibilities", which also apply to the media, even with respect to matters of serious public concern. These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals (see *Pedersen and Baadsgaard*, cited above, § 78; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 82, 7 February 2012).

32. In order to assess the justification for an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *Pedersen and Baadsgaard*, cited above, § 76). The Court reiterates that, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). Therefore, the difference between facts and value judgments lies in the degree of factual proof which has to be established (see *Europapress Holding D.O.O. v. Croatia*, no. 25333/06, § 54, 22 October 2009). In assessing the legitimacy of statements of fact it is not, in principle, incompatible with Article 10 to place on a defendant in injunction proceedings the onus of proving to the civil standard the truth of defamatory statements (compare *McVicar v. the United Kingdom*, no. 46311/99, § 87, ECHR 2002-III, and, as to libel proceedings, *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, no. 17550/03, § 68, 22 May 2008).

33. The way in which the information was obtained and its veracity are also important factors. If a statement of fact is untrue, the Court must examine whether the research conducted by the journalists before the publication of the untrue statement of fact was in good faith and complied with the ordinary journalistic obligation of properly verifying factual allegations (see, for instance, *Bergens Tidende and Others v. Norway*, no. 26132/95, § 53, ECHR 2000-IV; *Selistö v. Finland*, no. 56767/00, § 54, 16 November 2004; *Europapress Holding D.O.O.*, cited above, § 66). The more serious the allegation, the more solid the factual basis should be (see *Pedersen and Baadsgaard*, cited above, § 78 in fine, and *Europapress Holding D.O.O.*, cited above, § 66). Furthermore, the authority of the

source, whether the newspaper had conducted a reasonable amount of research before publication and whether the newspaper gave the persons defamed the opportunity to defend themselves in advance are factors to be taken into consideration when examining the impugned statements (*Effecten Spiegel AG v. Germany* (dec.), no. 38059/07, 4 May 2010).

34. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of the right to freedom of expression (see *Pedersen and Baadsgaard*, cited above, § 93).

2. Application of these principles to the present case

35. The Court notes at the outset that it is satisfied with the domestic courts' understanding of the relevant parts of the article here at issue, namely that the impugned passages of the article in question stated that the DuMont family had obtained private property in Breite Straße, Luxemburger Straße and Leyboldstraße by exploiting the German Jews' plight and therefore enriched itself unlawfully during the Nazi regime.

36. The Court observes that these statements consisted mainly of statements of fact susceptible of proof. In so far as these statements also contained elements of value judgments (for instance, the choice of words such as "grabbed" and "took possession", see paragraph 4 above), those were based upon the above-mentioned allegations of facts. The Court is satisfied with the result of the distinction the national courts made between statements of fact and value judgments, as the assumptions made by the applicants were all based on documents like the denazification file of Mr Kurt Neven DuMont and an address book.

37. The Court is unable to agree with the applicants' view that the expression "aryanisation profit" had to be classified as a value judgment based on factual grounds. In the present case the allegations were of a very serious nature and were presented as statements of fact rather than value judgments. The applicants not only expressed a personal opinion and commented on events in the past, they gave the impression of revealing publicly unknown incidents concerning the role of the DuMont family during the Nazi regime. They alleged an unjust enrichment relying on proof, referring to the "results" of historical scientific studies of the historian Niebel. The core of the expression "aryanisation profit" therefore was a statement of fact and not, as the applicants claim, a value judgment.

38. The Court further notes that the domestic courts regarded the statements in question as untrue because the applicants had failed to provide sufficient proof.

39. Regarding the real estate in Leyboldstraße the domestic courts stated that the applicants' mere claim that the purchase price had been below the current market value was insufficient. The Court takes note of the findings of the domestic courts that this was a general assumption due to the political

situation in Germany at that time and the fact that German Jews were persecuted and expropriated. The Court observes that the applicants failed to provide reliable information in this regard. Therefore the applicants have neither verified their statements at any point, nor claimed that their research was in good faith.

40. Regarding the real estate in Breite Straße, the Court is satisfied with the domestic courts' finding that the applicants had not sufficiently proved that a "profit" had been made by the DuMont family. The lapse of time between the purchase of the real estate by the Gerling company and that by Ms DuMont, and the fact that the purchase price paid by Ms DuMont had been 206,000 Reichsmark higher than the price paid by the Gerling company, indeed required a proper justification of the allegation, which the applicants failed to provide.

41. Concerning the real estate in Luxemburger Straße the Court notes the national courts' findings that the applicants did not fulfil their journalistic obligations prior to publication. The real estate in that street had not been purchased by the DuMont family itself, but by the legally independent mutual insurance company which insured the employees of the DuMont company. Furthermore, other real estates in that street had been sold at comparable prices at the time.

42. The Court observes that the applicants were given the opportunity to prove the veracity of the published information. The standard of proof applied by the domestic courts in those proceedings did not make this task unreasonable or impossible in the circumstances (see *a contrario Brosa v. Germany*, no. 5709/09, § 48, 17 April 2014). Therefore the Court is satisfied that the findings of the domestic courts were based on acceptable assessments of the relevant facts. The incriminating passages in the applicants' publication thus amounted to the dissemination of incorrect information.

43. The domestic courts' decisions reveal moreover that they had carefully examined whether the applicants had fulfilled their journalistic obligation of properly verifying their statements of fact before disseminating them. They came to the conclusion that, having regard to the gravity of the allegations and the political sensitivity of the subject, the applicants failed to provide sufficient proof for the statements.

44. As to whether there were grounds for dispensing the applicants from their ordinary obligation to verify their statements, the Court first notes that the allegations raised in the article were of a serious nature. The Court underlines that the applicants not only failed to verify the authority of their source as far as the historian Niebel was concerned, but also failed to present their story in a reasonably balanced manner. Moreover it is not apparent that they gave the DuMont family the opportunity to defend themselves in advance. Therefore, there were no grounds for dispensing the applicants from their journalistic obligations. The DuMont Schauberg

company's alleged leading position in Cologne concerning the press does not alter that conclusion.

45. Finally, with regard to whether the measures taken against the applicants at domestic level were proportionate to the legitimate aim pursued, the Court points out that the applicants did not face criminal proceedings, nor were they ordered to pay damages. In fact, in the civil proceedings brought by Mr DuMont, the domestic courts only ordered the applicants to refrain from creating such impressions as those published in the article, subject to a penalty of up to 250,000 euros for each contravention, a reasonable measure where a person's reputation has been tarnished by published information.

3. Conclusion

46. In the light of the foregoing, the Court considers that the reasons given by the domestic courts in support of their decisions were "relevant and sufficient" within the meaning of its case-law and that the decisions ordering the applicants to refrain from disseminating the statements in question were not disproportionate to the legitimate aim pursued. Therefore, the interference with the applicants' right to freedom of expression was "necessary in a democratic society". The application discloses no appearance of a violation of Article 10 of the Convention. It follows that the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President