

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

FIFTH SECTION

CASE OF PUTISTIN v. UKRAINE

(Application no. 16882/03)

JUDGMENT

STRASBOURG

21 November 2013

FINAL

21/02/2014

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



In the case of Putistin v. Ukraine,

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

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 22 October 2013,

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

PROCEDURE

1. The case originated in an application (no. 16882/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Vladlen Mikhaylovich Putistin ("the applicant"), on 12 May 2003.

2. The applicant was granted leave to present his own case under Rule 36 § 2 *in fine* of the Rules of the Court. The Ukrainian Government ("the Government") were represented by their Agent, Mr Nazar Kulchytskyy.

3. The applicant complained of a breach of the right to protection of his reputation as a result of the domestic courts' refusal to rectify defamatory information about his father that had been published in the newspaper *Komsomolska Pravda*. He invoked Article 10 of the Convention.

4. On 16 November 2010 the Court decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Vladlen Mikhaylovich Putistin, was born in 1934 and lives in Kyiv.

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

A. Background to the case

7. The applicant is the son of Mr Mikhail Putistin, a former Dynamo Kyiv football club player who competed in the 1936 USSR football championship when the club took second place in the competition. On 9 August 1942 the applicant's father participated in the legendary "Death Match" between FC Start – a team mostly composed of professional football players of FC Dynamo Kyiv who were working in a bakery in Kyiv at that time - and a team of pilots from the German Luftwaffe, air defence soldiers and airport technicians ("Flakelf"). The match is known for the humiliating defeat of Flakelf (FC Start defeated Flakelf by a score of 5 - 3), despite the Flakelf players' alleged display of lack of sportsmanship, which included physical challenges on their opponents, threats of sanctions against them and unfair refereeing by an SS officer. The victory of FC Start in that match allegedly resulted in serious repercussions for its players, who were arrested and sent to a local concentration camp where four of the players were eventually executed.

8. In 2002 the Kyiv authorities commemorated the 60th anniversary of that match. The commemorations received wide media coverage.

B. Proceedings instituted against *Komsomolska Pravda* newspaper

9. On 3 April 2001 the newspaper *Komsomolska Pravda* published an article named "The Truth about the Death Match" (original title: "Правда о Матче Смерти") and was written by O.M., a journalist from that newspaper. In the article she recounted a plan to make a film based on the events surrounding the match of 1942. The article contained an interview with the future director and producer of the film, A.S. and D.K. It also featured a picture of the match poster from 1942 which included the names of all of the footballers who had played in that match. The article mentioned the names of four Dynamo Kyiv players who had been executed (Kuzmenko, Klimenko, Korotkikh and Trusevych), but did not name the applicant's father. It also stated that A.S. intended to involve Mila Jovovic, Jean Reno and Andriy Shevchenko in the production of the film. The name of the applicant's father was not legible on the picture of the 1942 match poster. In one paragraph of the article, D.K. stated that, according to his sources:

> "... Actually, there were only four Dynamo players in the Start team created by the director of the local bread factory. And these [were the players who] were executed. And other [football] players worked in the police, collaborated with the Gestapo."

Original text in Russian: "...Собственно, динамовцев в команде «Старт», которую создал директор местного хлебозавода, было лишь четверо. Их и расстреляли. А остальные игроки работали в полиции, сотрудничали с гестапо."

10. In July 2001 the applicant instituted proceedings against the newspaper *Komsomolska Pravda* and the above-mentioned journalist on the grounds that they had disseminated untrue information about his father contained in the article above (see paragraph 9 above). He sought rectification of this information. He also wished to receive compensation for non-pecuniary damage.

11. In particular, the applicant claimed that the article suggested that the applicant's father had collaborated with the occupying police force and the Gestapo in 1942. In support of his claims, he supplied copies of documents of the State Security Service of Ukraine, which revealed that the archives held no information about the applicant's father's alleged collaboration with the occupying police force or the Gestapo and that no criminal proceedings had ever been instituted against the applicant's father in that respect. The archives also confirmed that the applicant's father had been detained at the Syrets concentration camp. The same information was held in the Kyiv Regional State Archives, which confirmed that the applicant's father had participated in the "Death Match" and had thereafter been detained at the Syrets concentration camp.

12. On 25 December 2001 the Obolonskyy District Court of Kyiv rejected the applicant's claim. It held that the applicant:
- was not a person who was directly affected by the publication;
- the article was about a film script and contained neither the name of the applicant's father nor the applicant's name and it also made no allegation of the applicant's father having collaborated with the Gestapo.

13. On 13 March 2002 the Kyiv City Court of Appeal upheld that judgment. In particular, the court of appeal found that the judgment of the first instance court was lawful and well-substantiated.

14. On 15 November 2002 the Supreme Court rejected an appeal by the applicant on points of law.

C. Proceedings against other newspapers

1. Proceedings against Dzerkalo Tyzhnia (Mirror Weekly) newspaper

15. On 27 April 2000 the Moskovskyy District Court of Kyiv ordered the newspaper *Dzerkalo Tyzhnia* to rectify information published about the applicant's father on 8 October 1999. On 29 April 2000 the newspaper published the following text:

"Mr Putistin played for Dynamo [Kyiv]. In the summer of 1942 he and other players were arrested and sent to the Syrets concentration camp. In October 1942 he escaped."

2. Proceedings against Argumenty i Fakty (Arguments and Facts) newspaper

16. In May 2002 the newspaper *Argumenty i Fakty* (in issue no. 19), published an article titled "Our Football Players Withstood Death" about the "Death Match", which stated that only four football players from the "Death Match" had been arrested and sent to the Syrets concentration camp. The article did not contain any reference to the applicant's father.

17. The applicant requested the newspaper to rectify this article. In one of the following issues (issue no. 27), the newspaper published the names of all eight football players who had been arrested after the match, including the applicant's father.

18. The applicant, dissatisfied with the refusal of the newspaper to publish the information he himself had proposed, instituted proceedings before the Shevchenkivskyy District Court of Kyiv against the newspaper, seeking the rectification of its published material and damages. The proceedings ended on 28 December 2004 with a final ruling of the Supreme Court upholding the lower courts' decisions against the applicant.

3. Proceedings against Fakty i Komentari (Facts and Commentaries) newspaper

19. On 12 May 2003 the Shevchenkivskyy District Court of Kyiv ordered the newspaper to rectify information published about the applicant's father on 12 July 2002. The article was written by a journalist (K.) with the headline "The Myth about the 'Death Match'". It stated that the "Death Match" story had been created as propaganda by Soviet ideologists, and that the execution of four football players had been provoked by the NKVD (Peoples' Commissariat of Internal Affairs, i.e. the Soviet police, predecessor of KGB, functioning as State security service).

20. In particular, the order obliged the newspaper to publish the following:

> "Mykhaylo Fedorovych Putistin played for Dynamo Kyiv and in the summer of 1942, after playing football matches with German teams, was arrested together with other members of his team and sent to the Syrets concentration camp."

21. The court also rejected the applicant's remaining claim for damages. The order of rectification was upheld on appeal on 21 October 2003 and later, in cassation proceedings, on 31 August 2005.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The relevant domestic law on defamation and judicial practice on that issue can be found in the case of *Melnychuk v. Ukraine* ((dec.), no. 28743/03, ECHR 2005-IX; see also *Ukrainian Media Group v. Ukraine*

(no. 72713/01, §§ 23-32, 29 March 2005) and *Gazeta Ukraina-Tsentr v. Ukraine* (no. 16695/04, §§ 18-20, 15 July 2010)).

23. The relevant extracts from the Constitution of Ukraine of 28 June 1996 read as follows:

Article 32

"... Everyone is guaranteed judicial protection of the right to rectify incorrect information about himself or herself and members of his or her family, and of the right to demand that any type of information be rectified, and also the right to compensation for pecuniary and non-pecuniary damage inflicted by the collection, storage, use and dissemination of such incorrect information."

Article 34

"Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right freely to collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial integrity or public order, with the purpose of preventing disorder or crime, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or maintaining the authority and impartiality of justice."

24. The relevant extracts from the Civil Code of 1963 read as follows:

Article 7

Protection of honour, dignity and reputation

"A citizen or an organisation shall be entitled to demand in a court of law that information be retracted if it is false or presented in a misleading way, denigrates their honour and dignity or reputation, or damages their interests, unless the person who disseminated the information can prove that it is true.

... False information disseminated about a citizen or an organisation which damages their interests, honour, dignity or reputation shall be subject to rectification, and redress may be afforded for pecuniary and non-pecuniary damage ..."

25. The relevant extracts from the Data Act of 13 November 1992, as in force at the relevant time, read as follows:

Section 47

Liability for the infringement of data legislation

"... Liability for the infringement of data legislation shall be borne by the persons found guilty of infringements such as:

... the dissemination of incorrect information;

... the dissemination of information which is false or which defames a person's honour and dignity; ..."

26. The relevant extracts from the Print Media (Press) Act of 8 December 1992, as in force at the material time, read as follows:

Section 37

Correction of material

"Citizens, legal entities and State bodies and their legal representatives have the right to demand from the editorial board of the print media rectification of material published about them which is incorrect or which defames their honour and dignity.

If the editorial board does not have any evidence that the information published by it is correct, it must rectify this material at the request of the plaintiff in the next issue of the printed media or do so on its own initiative. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (PROCEEDINGS AGAINST *KOMSOMOLSKA PRAVDA*)

27. Although invoking Articles 6 § 1 and 10 of the Convention, the applicant complained, in substance, of a breach of the right to protection of his and his family's reputation as a result of the domestic courts' refusal to order the rectification of the allegedly defamatory information about his father published in the *Komsomolska Pravda* newspaper.

28. The Court, as the master of the characterisation to be given in law to the facts of the case, considers that this complaint falls to be considered under Article 8 of the Convention, which reads as follows:

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

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

A. Admissibility

29. The Government raised no objection as to the admissibility of this complaint. The Court notes that the applicant's complaint in respect of the proceedings instituted against the *Komsomolska Pravda* newspaper 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 of the applicant's complaints

1. Parties' submissions

30. The applicant asserted that the Ukrainian courts had failed to intervene to rectify defamatory information about his father published in the *Komsomolska Pravda* newspaper. He emphasised that the information published on his father's alleged collaboration with the Gestapo had discredited his father's memory, honour and reputation as well as compromising the applicant's own reputation. In his view, the only conclusion that could be reached from the article by an average reader was that the applicant's father had either worked for the police or collaborated with the Gestapo and had not been executed as had four other Dynamo football players. The applicant further contended that the domestic courts had wrongly rejected his arguments and had refused to find that there had been any dissemination of untrue information about his father.

31. The Government accepted that the right to respect for the honour and dignity of a deceased relative was an element of the right to respect for private life guaranteed by Article 8. They went on to say that the decisive factor was whether the domestic courts had struck a fair balance between the applicant's right to respect for his private life under Article 8 and the journalist's right to freedom of expression. They asserted, however, that, given that the article in question was presented in the form of the journalist's interview with a film director and producer, it reflected and reported the film makers' perception of certain events and a description of characters created by them. Furthermore, the article did not mention the name of the applicant's father and made no allegations of his having collaborated with the Gestapo. Consequently, the Ukrainian courts had not

breached the applicant's rights under Article 8 as there was no dissemination of untruthful information.

2. The Court's assessment

(a) Applicable principles

32. The Court recalls that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which includes, *inter alia*, elements relating to a person's identity, such as a person's name (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), and a person's physical and psychological integrity (see *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI). It further notes that a person's reputation forms part of his or her personal identity and psychological integrity and, therefore, also falls within the scope of his or her "private life" (see *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; *A. v. Norway*, no. 28070/06, § 64, 9 April 2009; see, however, also *Karakó v. Hungary*, no. 39311/05, §§ 23, 28 April 2009, where a "clear distinction between personal integrity and reputation" is made).

33. The question of whether the damage to the reputation of an applicant's family can be considered an interference with the right to respect for the applicant's private life was raised, but not finally decided, in *Palade v. Romania* ((dec.), no. 37441/05, § 25, 31 August 2012). The Court can accept, as do the Government, that the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8.

34. In cases of the type being examined here what is in issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicant's private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (*von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 98 and 99, ECHR 2012, 7 February 2012). The question of whether an action is brought by the defamed person himself or by his heir may also be relevant for assessing the proportionality of an

interference (see, in a different context, *John Anthony Mizzi v. Malta*, no. 17320/10, § 39, 22 November 2011).

35. The present application requires an examination of the fair balance that has to be struck between the applicants's right to respect for his private life and the right of a newspaper and a journalist to freedom of expression guaranteed under Article 10 of the Convention.

(b) Application of the general principles to the present case

36. At the outset the Court notes that the article in issue was one of a series of reports in the Kyiv newspapers about the events of the "Death Match". The events which the article described were of general interest to the Ukrainian readers' community, which the newspaper addressed. In particular, the article concerned events which occurred during World War II and, more specifically, historical heritage of a famous football club and a football match in which Dynamo Kyiv players were involved. These events were a matter of great public attention in the context of the 60th anniversary of the match and contributed to the public debate on the issues relating to it. The article itself, entitled "The Truth about the Death Match", reproduced statements made by A.S., the film director, and D.K., the film producer, about a future possible film production based on the historical events surrounding the match. It included direct quotations from their interview, in which the latter expressed his knowledge of and personal attitude to this historical event. The applicant's father's name appeared in the historical match poster photo which was reproduced in the article. However, in the newspaper reproduction the print was too small to be legible (see paragraph 9 above).

37. The Court notes that the applicant alleged that the article seriously damaged his "family's reputation" as it could have been assumed from the content of the article that his late father had worked for the police and collaborated with the Gestapo. However, the Court notes that the conclusion of the Obolonskyy District Court of Kyiv given on 25 December 2001 was that the applicant "was not a person who was directly affected by the publication" (see paragraph 12 above). The Court agrees with this conclusion. Furthermore, whilst a suggestion that a person collaborated with the Gestapo is a serious matter, the article in the present case did not suggest that the applicant's father had collaborated with the Gestapo. It is true that the article recounts the words of the producer of the film that the team comprised just four Dynamo players and that the others who "worked in the police, collaborated with the Gestapo". However, neither the words of the producer nor anything in the article refers to the applicant's father. In order to interpret the article as claiming that the applicant's father had collaborated with the Gestapo, it would be necessary for a reader to know that the applicant's father's name had appeared on the original poster for the

match. What is clear, however, is that his father's name was not identifiable from the article that was published because the names appearing under the photograph of the poster as reproduced by the paper were illegible.

38. The Court can accept that the applicant was affected by the article, but only in an indirect manner, in the sense that a reader who knew that the applicant's father's name was on the 1942 poster might draw adverse conclusions about his father. The level of impact was thus quite remote.

39. The domestic courts were obliged to have regard to the rights of the newspaper and the journalist and had to balance these against the rights of the applicant. The Court notes that whilst the article did not purport to contribute directly to an historical debate, it nevertheless constituted a form of participation in the cultural life of Ukraine in that it informed the public of a proposed film on an historical subject. It was neither provocative nor sensationalist. Against the newspaper's right to freedom of expression, the remoteness of the interference with the applicant's Article 8 rights had to be weighed.

40. In these circumstances, that is, where the applicant's Article 8 rights were marginally affected and only in an indirect manner by an article which reproduced statements by the maker of a proposed historical film, the Court considers that the domestic courts did not fail to strike an appropriate balance between the applicant's rights and those of the newspaper and the journalist.

41. In view of the above considerations, the Court finds no violation of Article 8 of the Convention in the present case.

II. OTHER PROCEEDINGS BROUGHT BY THE APPLICANT

42. The applicant also complained of a violation of his rights under Articles 6 § 1, 8 and 10 of the Convention in respect of the proceedings he brought against the newspapers *Argumenty i Fakty* and *Fakty i Komentari*.

43. The applicant further complained under Article 6 § 1 and Article 10 of the Convention that the judgments of the domestic courts had been unfair and unfavourable. He further mentioned, with respect to the proceedings against *Komsomolska Pravda, Argumenty i Fakti* and *Fakty i Kommentari* that the domestic courts did not assess the facts of the cases correctly and have misapplied domestic procedural and substantive law. However, it is not the task of the Court to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts (see *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX).

44. In the light of the material in its possession and insofar as the matters complained of are within its competence, the Court finds that these

complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as well.

45. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applicant's complaint under Article 8 of the Convention concerning proceedings against "*Komsomolskaya Pravda*" newspaper admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 21 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Mark Villiger
Deputy Registrar	President

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

M.V.
J.S.P.

CONCURRING OPINION OF JUDGE LEMMENS

1. I agree with my colleagues that there has been no violation of Article 8 of the Convention.

This judgment is important in that it accepts that under certain conditions the damage to the reputation of a deceased person can affect the private life of that person's surviving family members. The judgment makes very clear, however, that such a situation will occur only in relatively exceptional circumstances. The present case is one where the applicant's private life was indeed affected, but only "marginally" (paragraph 40).

2. The Court concludes that the domestic courts did not fail to strike an appropriate balance between the applicant's rights and those of the *Komsomolska Pravda* newspaper and the journalist. It does so on the basis of a number of factors relating to the remoteness of the interference in the applicant's private life on the one hand and the newspaper's and the journalist's right to freedom of expression on the other hand (paragraphs 38 and 39).

In my opinion an additional element could be mentioned. The impugned article did not only contain statements made by the film director A.S. and the producer D.K. These statements were followed by comments from D.M., the deputy director of the Kyiv History Museum, and A.M., the director of a popular TV series. They were both critical of the film project. D.M. put the "Death Match" in its historical context:

> "I would not like to be a myth buster. However, while hailing the courage and patriotism of the sportsmen, we cannot disregard the historical truth. Photos taken after the match remained in private archives and depict our players and the losers, the German "*Flakelf*" team, together. Everyone is smiling, almost embracing each other ... On the field and after the game the atmosphere was absolutely sporting. The tragedy happened half a year later. It is true that the players of Dynamo were placed in a concentration camp, but not as a result of their victory. In the bakery where they used to work, the frequency of thefts increased. And on 23 February 1943 the members of the Kyiv-based underground movement set the mechanical plant on fire. The Nazis' answer was a punitive action, shooting hostages from the concentration camp. This included the football players ..."

The opinion of D.M. illustrates that the events surrounding the "Death Match" are subject to interpretation. It is of course not our task to give a judgment on the historical truth. What seems relevant for our case is that D.M.'s comments put into perspective the affirmative tone used by D.K. in his statement about the collaboration of some players with the Gestapo. I think that D.M.'s comments, while not at all sympathetic to the myth created around the match, can be understood as having a mitigating effect on the impact of D.K.'s allegation of collaboration by the players who were not executed.

I am aware of the fact that our Court should not act as a court of "fourth instance". And I am also aware of the fact that the domestic courts did not explicitly pay attention to D.M.'s comments. However, I think these comments belong to the wider context the Court may take into account when reviewing the decisions taken at the domestic level (see the reference to "the case as a whole" in, for instance*, Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 105, ECHR 2012). In this case they are an additional factor enabling the Court to conclude that the domestic courts did not fail to strike a fair balance.