

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

FOURTH SECTION

DECISION

Application no. 43579/09
Dalius MERTINAS and Laima MERTINIENĖ
against Lithuania

The European Court of Human Rights (Fourth Section), sitting on 8 November 2016 as a Chamber composed of:

András Sajó, *President,*
Angelika Nußberger,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Egidijus Kūris, the judge elected in respect of Lithuania, withdrew from sitting in the case (Rule 28 of the Rules of Court). On 13 October 2016, the President of the Section accordingly appointed Angelika Nussberger, the judge elected in respect of Germany, to sit as an *ad hoc* judge in his place (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court).

Having regard to the above application lodged on 17 July 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Dalius Mertinas and Ms Laima Mertinienė, are Lithuanian nationals who were born in 1961 and 1959 respectively and live in Vilnius. They were represented before the Court by Ms L. Meškauskaitė, a lawyer practising in Vilnius.

2. The Lithuanian Government ("the Government") were represented by their former Agent, Ms E. Baltutytė.

A. The circumstances of the case

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

4. The first applicant is a known Lithuanian actor. The second applicant is his wife. She is also the daughter of the former President of the Republic of Lithuania.

5. On 25 August 2007 a Lithuanian newspaper, "*L.T.*", published an article entitled "Naked Mertinas couple – a feast for the eyes. The Mertinas couple was showing off their beauty [private parts] in Nida (*Nuogi Mertinai – desertas akims/Mertinai Nidoje demonstravo savo grožybes*)". The article was printed on the front page and continued up to the fourth page of the newspaper, and was also published online on the newspaper's website. The front page of the newspaper had two half-page photographs of the applicants in the nude, which had been taken on the nudist beach at Nida, a seaside resort in Lithuania. Altogether, ten photos of the applicants in the nude on the beach were published.

6. On 24 October 2007 the Inspector of Journalistic Ethics concluded that the above-mentioned publication had breached the applicants' right to privacy.

7. The applicants instituted court proceedings, arguing a breach of privacy. They claimed that the publication had caused them great distress, given that two photographs had been printed on the front page of the newspaper and presented in a sensational manner to increase the sales of the newspaper. From the content of the article and the photographs, it was clear that journalists had secretly followed the applicants and photographed them. This had taken place in a specific secluded environment – a nudist beach – where no reasonable person would wish to be photographed (as regards the interpretation of the concept of a secluded place, the applicants relied on *Von Hannover v. Germany*, no. 59320/00, § 74, ECHR 2004-VI). After the humiliating publication of the photographs, which concerned very private aspects of their lives, the applicants and their family had been deeply psychologically affected and had also received a lot of unwanted attention. Furthermore, the photographs had been published on the newspaper's website, which meant that readers could comment on the applicants' appearance. Some of those comments were extremely insulting. The applicants also contended that, following the publication, the second applicant's health had deteriorated and the first applicant had lost a job on a television show which he had been promised.

8. The applicants asked the court to award each of them 75,000 Lithuanian litai (LTL – approximately 21,720 euros (EUR)) in compensation for non-pecuniary damage.

1. The first-instance court's decision

9. On 4 April 2008 the Vilnius Regional Court granted the applicants' claim in full. The court relied extensively on the Court's case-law as to the need to balance the right to privacy and the right to freedom of expression, as well on the Council of Ministers' Recommendation no. 428 (1970) to the effect that the right to privacy entailed avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, and prohibition to publish private photographs (see paragraph 35 below). The court noted that the applicants were well-known people in Lithuania and that, by publishing the photographs, the newspaper had blatantly damaged their honour, dignity and right to a private life. There was no public interest in publishing the photographs, given that they were private and did not concern matters which society had a legitimate interest in knowing. On the contrary, by such an act the newspaper was attempting to satisfy readers' curiosity by creating a sensation, and was pursuing its commercial interests. For that purpose, the newspaper had consciously placed their photographs on the front page, knowing that the nude photographs of the applicants, who were well-known people in Lithuania, would no doubt attract the readers' attention. The fact that the applicants had been photographed on a nudist beach did not diminish the breach of privacy, because nudity was an important part of private life, and publishing the applicants' nude photographs with inappropriate (*nekorektiškomis*) headlines was particularly offensive.

10. The first-instance court also noted that that issue of the newspaper had had a large print run, and that the photographs had also been placed on the newspaper's website, thus giving a great many people access to them. The court observed that, following the decision of the Inspector of Journalistic Ethics, the newspaper had had the opportunity to apologise to the applicants for the photographs, which could have lessened the damage, but it had failed to do so. Nor had the newspaper attempted to settle the case before the Vilnius Regional Court, thus confirming its malicious behaviour.

11. As for the sum to be awarded to compensate for the non-pecuniary damage the applicants had sustained, the Vilnius Regional Court observed that neither Lithuanian nor international law set out criteria to determine such a sum. However, guidelines had been provided by the Supreme Court, which had underlined the need to take into account the situation of each particular case. Of relevance was whether society had an interest in making the relevant information public, the victim's reaction to the publication, and the actions of the media. In the case at hand, taking into account the particularly gross breach of the applicants' right to privacy by a newspaper which had been printed in "large volume", the Vilnius Regional Court

found it reasonable to award the requested sums in full, that is each of the applicants was to receive LTL 75,000.

The applicants were also awarded LTL 5,000 for legal costs and LTL 4,724 for court fees, the expenses they had incurred when lodging the civil claim. Those sums were to be paid to them by the newspaper.

12. The newspaper appealed, requesting, *inter alia*, that the above-mentioned sum in respect of non-pecuniary damage be lowered.

2. The appellate court's ruling

13. By a ruling of 23 September 2008 the Court of Appeal upheld the lower court's decision, noting that the published photographs had clearly been offensive and degrading to the applicants. The situation in which they had been photographed fell within the sphere of private life, and was one in which no reasonable person would wish to be photographed. There was no public interest whatsoever in publishing ten photographs of the sort published by the newspaper.

14. As to the question of the sum to be awarded as compensation for non-pecuniary damage, the Court of Appeal noted that the newspaper had assets with a value of LTL 1,416,007 (approximately EUR 410,100), and that in 2008 the newspaper's statutory capital had been increased. Therefore, the newspaper's plea for the award in respect of non-pecuniary damage to be lowered on the basis of its allegedly difficult financial situation was unfounded. In this connection, the appellate court also observed that the photographs had been widely distributed because the newspaper had been sold throughout Lithuania, and had been printed on the front page of Saturday's issue as the most "gossip-worthy" news of the week. To make matters worse, the photographs had been published on the internet. Following the publication, a television programme called "Super L.T." had been announced, which had been based on the photographs in question. The only reason the programme had not been broadcast was because of a court injunction. In such circumstances, the first-instance court had correctly found that the applicants had suffered following the publication. Also taking into account that the newspaper had been unwilling to acknowledge its transgression, the sum awarded by the Vilnius Regional Court was reasonable.

15. The Court of Appeal dismissed the newspaper's argument that the first-instance court had deviated from the Supreme Court's guidelines as to the sums to be awarded as compensation for non-pecuniary damage. In fact, according to the Court of Appeal, no case analogous or very similar to the applicant's case had [ever] been examined in Lithuania.

16. Lastly, the Court of Appeal ordered the newspaper to pay each of the applicants LTL 1,888 (EUR 545) in respect of lawyers' costs at the appellate court.

3. The Supreme Court's ruling

17. An appeal on points of law being lodged by the newspaper, on 13 February 2009 the Supreme Court varied the lower courts' decisions. It held that a nudist beach was not a public place. Accordingly, a person could reasonably expect privacy there. The applicants' behaviour on that beach had not been in breach of good morals. The Supreme Court entirely agreed with the lower courts' conclusion that the newspaper had gravely breached the applicants' right to privacy by abusing its right to impart information, by imparting information merely for readers' curiosity, and consequently to obtain pecuniary advantage.

18. The Supreme Court also observed that there were no legislative limits on the sum which could be awarded as compensation for non-pecuniary damage, thus giving the courts rather wide discretion in such matters. Nonetheless, it considered it important to follow its earlier case-law to the effect that, when assessing the sum to be awarded, the courts should take into account the value protected by law which had been compromised (*įstatymu saugoma vertybė/teisinis gėris*) (in the present case, the applicants' right to privacy), and also adhere to the sums that the courts had awarded in analogous cases (see also paragraphs 25 and 26 below). In the case at hand, each of the applicants had been awarded LTL 75,000, which was equal to or in excess of the awards of LTL 25,000 (EUR 7,240) – LTL 50,000 (EUR 14,480) made in cases concerning non-pecuniary damage caused by severe physical injury, where more important values (such as life and health) had been at stake (see paragraph 25 below). The Supreme Court also had regard to its case-law, where awards between LTL 5,000 and 10,000 had been granted in relation to breaches of the right to protection of one's image (*teisės į atvaizdą pažeidimas*) or the right to privacy (see paragraph 26 below).

19. In the light of the above, the Supreme Court concluded that the award of LTL 75,000 to each applicant was excessive. It was therefore reasonable to grant each of the applicants LTL 15,000 (EUR 4,350) in compensation for non-pecuniary damage. Such sums would not contradict established case-law, and would be adequate compensation for the damage which the applicants had suffered and sufficient in respect of both defending the applicants' right to privacy and deterring the abuse of press freedom, thus balancing two competing values which were equal in weight – privacy and the freedom to impart information.

20. The Supreme Court also decided that the applicants were to bear some of the newspaper's litigation costs (Article 93 § 4 of the Code of Civil Procedure, see paragraph 34 below), because only 20% of the sum which the applicants had claimed had been awarded to them. The Supreme Court also noted that the sums which both the applicants and the newspaper had paid to their respective lawyers in connection with the proceedings concerning the appeal on points of law were higher than those

recommended by the Lithuanian Bar Association, and thus not entirely justified. As a result, the applicants were together ordered to pay the newspaper LTL 10,839 for litigation costs and the State LTL 423 for court fees. The applicants thus received LTL 18,748 (EUR 5,429) in total, or LTL 9,374 (EUR 2,714) each.

4. Other relevant information

21. In December 2006 the magazine *Žmonės* published an article about the applicant Laima Mertinienė, where she explained how she had lost 70 kg in weight. In May 2007 the same magazine published a story where the applicant Dalius Mertinas gave an interview about his family life, also answering questions put by a journalist about the other applicant's (his wife's) plastic surgery, and giving details about her weight loss.

B. Relevant domestic law and practice

22. Article 22 of the Constitution of the Republic of Lithuania reads:

> "A person's private life shall be inviolable...
>
> The law and the courts shall protect everyone from arbitrary or unlawful interference in his private and family life, or from encroachment upon his honour and dignity."

23. Article 30 of the Constitution provides that compensation for pecuniary and non-pecuniary damage suffered by a person must be established by law.

24. The relevant provisions of the Civil Code read:

Article 2.22. Right to protection of one's image

> "1. A photograph (or part thereof), or some other image of a person may be reproduced, sold, exhibited, or published, and the person may be photographed, only with his consent. Such consent following a person's death may be given by his spouse, parents or children.
>
> 2. Where such acts [using a person's image] are related to a person's public activities, his official post, or requests from law-enforcement agencies, or where a person is photographed in public places, a person's consent shall not be required. However, a person's photograph (or part thereof) produced under the above-mentioned circumstances may not be exhibited, reproduced or sold if such an act were to debase a person's honour or dignity, or damage his professional reputation.
>
> 3. A person whose right to protection of his image has been infringed has the right to ask a court to require the discontinuance of an act and to award compensation for pecuniary and non-pecuniary damage..."

Article 2.23. Right to privacy and secrecy

> "1. A person's privacy shall be inviolable. Information regarding a person's private life may be made public only with his consent...

2. Unlawful invasion of a person's dwelling or other private premises, including fenced private territory; keeping the person's private life under observation ..., publication of data relating to the state of his health, in violation of the procedure prescribed by law; and other unlawful acts shall be deemed to violate the person's private life.

3. The creation of a file on another person's private life, in violation of the law, shall be prohibited. A person may not be denied access to the information contained in the file, except as otherwise provided for by law. Dissemination of the information collected on the person's private life shall be prohibited unless, taking into consideration the person's official post and status in society, dissemination of the said information is in line with a lawful and well-grounded public interest in being aware of that information.

4. The public announcement of facts concerning a person's private life, however truthful they may be; making private correspondence public, in violation of the procedure prescribed in paragraphs 1 and 3 of this Article; invasion of a person's dwelling without his consent, except as otherwise provided for by law; keeping his private life under observation; or gathering information about him in violation of the law; and other unlawful acts infringing the right to privacy shall form the basis for bringing an action for compensation for pecuniary and non-pecuniary damage sustained as a result of those acts..."

Article 6.250. Non-pecuniary damage

"1. Non-pecuniary damage shall be deemed to be a person's suffering, emotional experiences, inconvenience, mental shock, emotional depression, humiliation, damage to reputation, diminution of opportunities to associate with others, and so on, evaluated by a court in terms of money.

2. Non-pecuniary damage shall be compensated for only in cases provided for by law. Non-pecuniary damage shall be compensated for in all cases where it has been sustained as a result of crime, health impairment or deprivation of life, as well as in other cases provided for by law. The courts, in evaluating the non-pecuniary damage, shall take into consideration the consequences of the damage sustained, the degree of fault on the part of the person who caused the damage, his financial status, the amount of pecuniary damage sustained by the aggrieved person, and any other circumstances important to the case, as well as the criteria of good faith, justice and reasonableness."

1. Cases concerning non-pecuniary damage referred to by the Supreme Court in the present case

(a) Cases concerning compensation for injury at work

25. In case no. 3K-3-450/250, decided on 6 September 2006, which concerned an injury at work, the Supreme Court held that, when evaluating non-pecuniary damage, it was important to consider the values being protected and their interrelationship (*turi būti atsižvelgta į ginamų vertybių specifiką ir jų tarpusavio santykį*), because the right to life and the right to health were absolute rights, whereas the right to privacy and the right to dignity were conditional rights (*santykinės teisės*) which could not be equally valued as regards damages (*vertinamos vienodai neturtinės žalos dydžio aspektu*). A worker who had fallen off a building platform and

cracked his skull was thus awarded LTL 25,000 for non-pecuniary damage sustained as a result of that injury.

On 18 April 2007 the Supreme Court gave a ruling in civil case no. 3K-3-157/2007 concerning an accident at work following which the plaintiff in question had become handicapped. The Supreme Court noted that the worker was partly to blame for his injury, because he had not followed safety instructions at work. Accordingly, although the plaintiff had asked for LTL 150,000 and the first-instance court had awarded him LTL 100,000, the Supreme Court considered that a sum of LTL 50,000 would be sufficient to compensate for the non-pecuniary damage suffered.

On 20 October 2008 the Supreme Court examined case no. 3K-3-529/2008, which also concerned an accident at work. The plaintiff in that case was awarded LTL 50,000 for non-pecuniary damage suffered as a result of physical injury.

(b) Cases concerning breaches of the right to protection of one's image or the right to privacy

26. On 16 March 2007, in civil case no. 3K-3-113/2007, the Supreme Court held that there had been a violation of the plaintiff's right to privacy and reputation, owing to a publication about his allegedly fraudulent manner of conducting business and his alleged debts to his business partners, and the printing of the plaintiff's photograph. For the Supreme Court, LTL 5,000 was sufficient to compensate for the non-pecuniary damage sustained.

On 14 August 2008, in civil case no. 3K-3-393/2008, the Supreme Court considered that an award of LTL 10,000 was sufficient to compensate for a breach of the plaintiff's right to privacy, when information which alleged that he had had a child out of wedlock was printed.

On 23 September 2008, in civil case no. 3K-3-394/2008, the Supreme Court agreed that an award of LTL 5,000 in a civil case was sufficient to compensate for the plaintiff's mental suffering where a local television station had wrongfully accused the plaintiff of having committed a traffic violation.

2. Subsequent cases concerning breaches of the right to privacy (that is, cases not relied on by the courts in the instant case)

(a) Civil case no. 3K-3-136/2010

27. On 23 March 2010 the Supreme Court gave a ruling in civil case no. 3K-3-136/2010 concerning a civil claim by a woman, J.G., for breach of privacy in respect of an article in a daily newspaper, *Respublika*, entitled "A date with a lesbian" ("*Pasimatymas su lesbiete*"). The case concerned an article which had included eight photographs. J.G. was in one of those photographs, which was in a large format. She had been photographed from

the front, although her name had not been disclosed. The first-instance court considered that, "taking into account society's negative opinion about people of non-traditional sexual orientation" ("*teismas, įvertinęs susidariusią neigiamą visuomenės nuomonę apie netradicinės seksualinės orientacijos žmones*"), the publication of J.G.'s photograph in such a context could cause her to be evaluated oddly (*galėjo sukelti prieštaringų ieškovės vertinimų*). The court also noted that the newspaper's financial situation was good, it had a large print throughout Lithuania. The newspaper had not apologised to the plaintiff or paid her damages, even though it had initially promised to do so. However, the sum claimed by the plaintiff, LTL 65,000, was clearly excessive. It was therefore reasonable to award her LTL 10,000 in respect of non-pecuniary damage. That sum was upheld by the appellate court, which underlined that the article "A date with a lesbian" was conflicting (*vertinamas prieštaringai*) in a homophobic society, and people whose photographs were linked to that article could therefore experience negative consequences, as indeed in J.G.'s case. She had had to explain herself to her parents, colleagues at work and friends from times of studies. The award of LTL 10,000 would also not impede the daily commercial activity of the defendant.

28. The newspaper lodged an appeal on points of law, arguing that the award for non-pecuniary damage was too high. The Supreme Court noted that it was important to adhere to the principle of non-discrimination, which meant that similar cases should be decided similarly, and which also meant that, in analogous situations, awards for non-pecuniary damage should be comparable. The Supreme Court also relied on its earlier ruling to the effect that courts should not only follow the criteria established in legal norms and court practice, but should also take into account the awards already granted in analogous cases.

29. The Supreme Court thus distinguished three categories of cases.

Firstly, there were cases where a plaintiff's privacy had been breached on account of the arrangement of his or her nude photographs with offensive text and headlines (the Supreme Court referred to the instant case of Dalius Mertinas and Laima Mertinienė), or where information regarding "family secrets" or health had been made public (the Supreme Court referred to its ruling of 14 August 2008 in Žvagulis' case), or where information about private life had been published together with photographs, which had amounted to a breach of the right to a private life. The awards in those cases were, respectively, LTL 15,000, LTL 10,000 and LTL 8,000.

As to the second category, the Supreme Court referred to some cases where the press had used plaintiffs' private photographs without permission, or had accused them of crimes, where the non-pecuniary damage awards were LTL 5,000.

The third category concerned cases where photographs of plaintiffs who were well-known people in society had been published without their

consent, and for the purpose of a newspaper gaining financial benefit from advertisement, where the awards for non-pecuniary damage were LTL 1,500.

30. The Supreme Court then held that, in the case of J.G., the award of LTL 10,000 was too high, because it did not correspond to the above-mentioned court practice. J.G.'s photograph had been published only as an illustration of the article, and neither her personal data nor information about her private life had been made public. Moreover, the photograph had been taken at a public event when J.G. was posing (*viešame renginyje, ieškovei pozuojant*). In the view of the Supreme Court, an award of LTL 5,000 would be fair and adequate in respect of the non-pecuniary damage sustained by J.G. in relation to the breach of her right to protection of her image, and to prevent the abuse of freedom of expression by the press.

(b) Civil case no. 3K-3-481/2012

31. On 15 November 2012 the Supreme Court adopted a ruling in civil case no. 3K-3-481/2012, which concerned R.C.'s civil claim for defamation against a television channel, Tele-3. In particular, R.C., who is a singer, had complained that in May 2009, during a television broadcast, a presenter had made statements about someone else allegedly being the father of R.C.'s child, had made allegations about R.C.'s actual sexual orientation, and, in the latter context, had also claimed that R.C. had been operated on in clinics in Kaunas several months ago after "he had sustained trauma to his anus from a blunt object".

32. The Supreme Court held that information about R.C.'s fatherhood, his sexual orientation, and his unverified operation concerned his private life, notwithstanding R.C. being well-known because he was a singer. Moreover, disseminating such information had no public interest. On the contrary, having had regard to the manner in which the information had been presented, the Supreme Court held that the only aim in disseminating it had been to spread gossip to satisfy the curiosity of a certain category of television viewers. The fact that R.C. had communicated with the media before did not mean that he had lost his right to privacy. Having examined the case in the light of the Court's case-law (*Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012), the Supreme Court held that there had been a breach of R.C.'s right to privacy.

33. Although R.C. asked the courts to award him LTL 80,000 to compensate for the non-pecuniary damage, the Supreme Court found that the lower courts had correctly applied Article 6.250 of the Civil Code, and had had a proper basis for their decision to award R.C. LTL 10,000 in compensation.

3. Other relevant domestic law

34. As concerns the division of legal costs, the Code of Civil Procedure states:

Article 93. Division of legal costs

"1. A court orders the legal costs of the party to the proceedings in whose favour a court decision has been adopted to be paid by the other party to the proceedings ...

2. If a civil claim is granted in part, the plaintiff's legal costs are awarded proportionately in relation to which part of the civil claim is granted, and the defendant's legal costs are awarded proportionately in relation to which part of the civil claim is rejected.

3. The rules set out in this Article also apply to court fees ...

4. If the appellate court or court of cassation, without referring the case for fresh examination, changes a lower court's decision or ruling, or adopts a new ruling, it accordingly changes the division of legal costs. If the appellate court or court of cassation does not change the division of legal costs, it is the court of first instance which has to resolve this question."

C. Relevant international law

35. On 23 January 1970 the Parliamentary Assembly of the Council of Europe adopted Resolution 428, containing a Declaration on Mass Communication Media and Human Rights, the relevant parts of which read:

"15. There is an area in which the exercise of the right of freedom of information and freedom of expression may conflict with the right to privacy protected by Article 8 of the Convention on Human Rights ... Everyone has the right to respect for his private and family life, his home and his correspondence ... The exercise of the former right must not be allowed to destroy the existence of the latter.

16. The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially. Those who, by their own actions, have encouraged indiscreet revelations about which they complain later on, cannot avail themselves of the right to privacy.

17. A particular problem arises as regards the privacy of persons in public life. The phrase 'where public life begins, private life ends' is inadequate to cover this situation. The private lives of public figures are entitled to protection, save where they may have an impact upon public events. The fact that an individual figures in the news does not deprive him of a right to a private life.

...

20. In order to counter these dangers, national law should provide a right of action enforceable at law against persons responsible for such infringements of the right to privacy.

21. The right to privacy afforded by Article 8 of the Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media. National legislations should comprise provisions guaranteeing this protection."

36. The relevant passages of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy, adopted on 26 June 1998, read:

"1. The Assembly recalls the current affairs debate it held on the right to privacy during its September 1997 session, a few weeks after the accident which cost the Princess of Wales her life.

2. On that occasion, some people called for the protection of privacy, and in particular that of public figures, to be reinforced at the European level by means of a convention, while others believed that privacy was sufficiently protected by national legislation and the European Convention on Human Rights, and that freedom of expression should not be jeopardised.

...

4. The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as 'the right to live one's own life with a minimum of interference'.

5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition.

6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed in the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

..."

COMPLAINTS

37. Relying upon Article 8 of the Convention, the applicants argued that the Lithuanian State had failed to effectively protect their right to respect for their private lives.

38. The applicants further complained under Articles 6 and 13 of the Convention that they had been precluded from effectively defending their interests in court. They contended that the Supreme Court had incorrectly evaluated the laws regulating questions of non-pecuniary damage. Moreover, the Supreme Court had erred when deciding the issue of litigation costs.

THE LAW

39. In the Court's view, the applicants' complaints under Articles 6 and 13 as to the erroneous application of the domestic law and the absence of an effective domestic remedy are subsidiary to their complaint under Article 8 of the Convention, that the State did not ensure respect for their private life.

Therefore, the Court finds it appropriate to examine the applicants' complaints solely 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. The parties' submissions

1. The Government

40. The Government argued that the applicants could no longer be held to be victims of a violation of Article 8. The domestic courts had clearly

acknowledged a breach of the applicants' right to privacy and had also made good the loss sustained. On this last point, the Government asserted that the domestic courts had a broad margin of appreciation as to the sums to be awarded at domestic level. According to the Supreme Court's guidelines, those sums had to follow established case-law, thereby not exceeding the sums usually awarded. In the instant case, the award had not been derisory and, according the Supreme Court's practice, had reflected not only the circumstances of a concrete case but also the need to differentiate the amount of compensation according to the value being protected.

41. The Government also argued that the applicants in the present case were well-known people who had previously communicated with the press about the details of their private lives. Although the publication in question had no doubt provoked negative feelings and caused them stress, the article's consequences on the applicants were not irreversible, because they had continued to communicate with the press about personal details of their lives (see paragraph 21 above).

2. The applicants

42. The applicants admitted that States enjoyed a certain margin of appreciation in deciding what "respect" for private life required in particular circumstances. States could also regulate questions of compensation for non-pecuniary damage with case-law. However, compensations must not be such as to make individuals' right to privacy empty of substance. The Court had already acknowledged that, in cases of outrageous abuse of press freedom, severe legislative limitations on judicial discretion with regard to compensation for non-pecuniary damage had failed to provide victims with sufficient protection (the applicants relied on the Court's judgments in *Biriuk v. Lithuania* (no. 23373/03, 25 November 2008) and *Armonienė v. Lithuania* (no. 36919/02, 25 November 2008)). Domestic law had to provide appropriate safeguards to discourage such publications.

43. As to the applicants' case, there was no precedent in Lithuania where the right to a private life had been breached in "such an impiety way". As the applicants were well-known people in Lithuania, it was reasonable for the tabloid newspaper to expect that their nude pictures would be a huge sensation, which would draw readers' attention and thus increase the newspaper's sales. The applicants submitted that, at the material time, the tabloid newspaper's print had been 34,547 units, and the sale price of one newspaper had been LTL 1. This was also separate from the income the newspaper had generated from advertisement. The Supreme Court's guidelines to the effect that, even in cases concerning the most egregious breaches of privacy, the sums to be awarded should follow established case-law – thus not exceeding the sums usually awarded – could therefore not be considered as having had a deterrent effect in relation to the breaches of their right to respect for their private life. Such case-law had created a

situation whereby the media could disregard an individual's rights because expected profits outweighed any sums that could possibly be awarded by a court as compensation. To make matters worse, and notwithstanding the already low award for non-pecuniary damage, the applicants had also been ordered to pay some of the tabloid newspaper's litigation costs. All this was incompatible with the requirements of Article 8 of the Convention, and had not provided the applicants with an effective domestic remedy. The applicants therefore submitted that they had retained victim status under Article 34 of the Convention.

44. The applicants lastly noted that the pictures had been taken secretly, as they had been sunbathing in a remote location, a nudist beach. Publishing such photographs in the tabloid newspaper, but also on the internet, had been extremely humiliating not only for them, but also for their family. The compensation awarded was not adequate and therefore incapable of redressing the damage they had sustained.

B. The Court's assessment

45. The Court does not find it necessary to examine the Government's objection as regards the applicants' victim status since the application is in any event inadmissible for the reasons set out below.

46. The Court recalls that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private or family life. These obligations may involve the adoption of measures designed to secure the right even in the sphere of the relations between individuals (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 75, ECHR 2007-I).

47. The Court has previously held that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8, or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI). Furthermore, in striking this balance, the aims mentioned in the second paragraph of Article 8 may be of a certain relevance (see *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A no. 106).

48. The Court reiterates that, as regards such positive obligations, the notion of "respect" is not clear-cut. In view of the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is

an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, account being taken of the needs and resources of the community and of individuals (see *Johnston and Others v. Ireland*, 18 December 1986, § 55, Series A no. 112). The Court nonetheless recalls that Article 8, like any other provision of the Convention or its Protocols, must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Shevanova v. Latvia*, no. 58822/00, § 69, 15 June 2006; also see *Biriuk*, cited above, §§ 35-37).

49. In the circumstances of the instant case, the Court notes that Lithuanian law does provide a right of action against persons responsible for breaches of privacy (see paragraphs 23 and 24 above, and points 20 and 21 in paragraph 35 above). Moreover, the Lithuanian courts at all three levels acknowledged that publishing nude photographs of the applicants had amounted to a grave invasion of their privacy, thus seriously prejudicing their honour and reputation, and harming their psychological integrity (see paragraphs 9, 13, 14 and 17 above; contrast *Ion Cârstea v. Romania*, no. 20531/06, §§ 34 and 38, 28 October 2014). The courts held that, despite the applicants' being well-known in Lithuania, they nevertheless retained the right to privacy (see paragraph 9 above, and the case-law cited in paragraph 50 above). This was true notwithstanding the location – the nudist beach – where the applicants had secretly been photographed, because there was nothing in their behaviour which had been in breach of good morals (see paragraphs 7, 9, 13 and 17 above, point 16 *in fine*, cited in paragraph 35 above). The courts underlined that there was no public interest in publishing such photographs. On the contrary, the newspaper had only sought to satisfy the readers' curiosity and hence gain pecuniary advantage (see paragraphs 9, 14 and 17 above; also see point 6 in paragraph 36 above). Both the Inspector of Journalistic Ethics and the courts also underlined that the manner in which the photographs had been taken and the actual publication of the photographs had been in breach of the requirements of fair journalism (see paragraphs 6, 7, 9 and 10 above, and contrast *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 135, ECHR 2015 (extracts)). The Court is therefore convinced that the national courts attached the required importance to the questions of whether the article contributed to a debate of general interest and whether the applicants should be regarded as public figures. It considers therefore that the national courts carefully balanced the journalist's right to freedom of expression against the applicants' right to respect for their private life (see paragraph 19 above, and points 10 and 11 cited in paragraph 36 above).

50. The Court reiterates that, where the balancing exercise has been undertaken by 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 *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012, with further references). In the instant case, the Court finds nothing that would require it to disagree with the Lithuanian courts' analysis.

51. The Court further observes that the statutory ceiling on non-pecuniary damages in breach of privacy cases, which was the main issue in the *Biriuk* and *Armonienė* judgments, has been lifted (see paragraphs 18, 23 and 24 above). Nevertheless, as the Government acknowledged in *Biriuk* (cited above, § 32 *in fine*) and *Armonienė* (cited above, § 33), and as pointed out by the Supreme Court in the present case, current awards rarely exceed the previous maximum of LTL 10,000 (see paragraph 26 above). That finding appears to be supported by the more recent practice of the Supreme Court (see paragraphs 27-33 above). That notwithstanding, the Court has also held very recently that States have a margin of appreciation in deciding how to effectively protect the right to privacy, and that a victim of a violation may not expect that a breach of Article 8 follows unless he or she receives a certain amount of pecuniary compensation (see, *mutatis mutandis*, *Kahn v. Germany*, no. 16313/10, § 75, 17 March 2016). The Court also acknowledges that certain financial standards based on the economic situation of the State are to be taken into account when determining the measures required for the better implementation of the foregoing obligation. 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 *Biriuk*, cited above, § 45, and, *mutatis mutandis*, *Cocchiarella v. Italy* [GC], no. 64886/01, § 80, ECHR 2006-V).

52. Regarding the sum of LTL 15,000 (EUR 4,350) awarded to each of the applicants, the Court is cautious to note that the Supreme Court made its decision having carefully taken into account the awards made in different types of cases. That sum also appears to be bigger than the usual award in breach of privacy cases (see paragraphs 25 and 26 above). Moreover, and in accordance with the subsidiarity principle and the margin of appreciation left to the States, the Court does not find the Supreme Court's reasoning in this case to be arbitrary.

53. Lastly, the Court observes that the sum of LTL 15,000 (EUR 4,350) awarded to each applicant in respect of non-pecuniary damage does not appear to have been derisory, at least at the time of their award in February 2009, taking into account the award of EUR 6,500 granted by the Court in both *Biriuk* (cited above, § 51) and *Armonienė* (cited above, § 52) in November 2008. It cannot fail to observe that, in those two cases, a breach of the right to privacy was found not only because of disclosure by the press of information of a private nature, but also because the Court attached particular significance to the fact that information about,

respectively, an applicant's and an applicant's husband's illness was disclosed to journalists by doctors at State medical institutions, which made that violation particularly grave (see *Biriuk*, § 43, *Armonienė*, § 44, both cited above; also see *Mitkus v. Latvia*, no. 7259/03, § 133, 2 October 2012). Even taking into account that the applicants had to pay some of the newspaper's litigation costs (see paragraph 20 above), that was in accordance with the Lithuanian rules on civil procedure, as explained by the Supreme Court, and, in the Court's view, did not make the final award received by the applicants insignificant (contrast *Klauz v. Croatia*, no. 28963/10, §§ 94 *in fine*, 95 and 96, 18 July 2013).

54. That being so, the Court is not ready to hold that the sums awarded by the Supreme Court to the applicants in the instant case deprived them of their right to privacy, thereby rendering that right ineffective.

55. In the light of the foregoing considerations, the Court concludes that the State has fulfilled its positive obligation to take measures to protect the applicants' right to privacy. It follows that the application must be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 1 December 2016.

Marialena Tsirli
Registrar

András Sajó
President