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

FOURTH SECTION

DECISION

Application no. 27329/21
Jerzy TENDERA
against Germany

The European Court of Human Rights (Fourth Section), sitting on 3 October 2023 as a Committee composed of:

Faris Vehabović*, President*,
Anja Seibert-Fohr,
Sebastian Răduleţu*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 27329/21) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 10 May 2021 by a Polish national, Mr Jerzy Tendera, who was born in 1974 and lives in Kraków ("the applicant") and was represented by Mr L. Obara, a lawyer practising in Olsztyn;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the refusal of the Federal Court of Justice to enforce a Polish court judgment ordering a German television channel to publish an apology.

2. The applicant is the son of Mr K., born in 1921, who was a Polish national and former prisoner of the Auschwitz extermination camp. On 15 July 2013 *Zweites Deutsches Fernsehen* (hereinafter "ZDF"), a national public broadcaster in Germany, released an announcement about an upcoming documentary on its website which referred to "Polish extermination camps in Majdanek and Auschwitz". Upon being notified of the error by the Polish Embassy on 19 July 2013, ZDF amended the text within 30 minutes after receiving the notification to state "German extermination camps on Polish territory".

3. On the same day K. contacted ZDF, stating that he felt personally insulted by the reference to Polish extermination camps and demanded that ZDF publish an apology on its website. Subsequently, ZDF issued a written apology to K. Furthermore, on 11 April 2016 it published a statement on its website, apologising for the incorrect wording.

4. In 2014 K. had already filed a lawsuit before the Kraków Regional Court, demanding, notably, that ZDF publish a statement on its website, which, insofar as relevant, read as follows:

> "ZDF [...] expresses its regret that in the announcement dated 15 July 2013 [...] incorrect wording was used which distorted the history of the Polish people by alleging that the Majdanek and Auschwitz extermination camps had been built and operated by Poles and apologises to Mr K., a former prisoner of a German concentration camp, for violation of his personality rights, notably his national identity (sense of belonging to the Polish people) and his national dignity."

5. The lawsuit was dismissed by the first-instance court, but upon K.'s appeal on 22 December 2016 the Kraków Court of Appeal ordered ZDF to publish the statement on its website for a duration of one month.

6. Subsequently, from 23 December 2016 until 23 January 2017 ZDF displayed a banner on its website saying "apology to K.", which directed visitors to the text of the statement (see paragraph 4 above).

7. On 9 January 2017 K. contacted ZDF, stating that it had not properly complied with the court order. He criticised, in particular, the publication of the requested statement with an introductory note stating that the erroneous announcement had been based on a translation error, and complained that only the banner with the hyperlink had been published on the main page of ZDF's website, but not the statement itself.

8. When ZDF refused to comply with K.'s request the latter filed enforcement proceedings before the German courts. He was successful before the first-instance court and the decision was upheld on appeal. However, upon ZDF's appeal on points of law, on 19 July 2018 the Federal Court of Justice reversed the lower courts' decisions and found against K. The court stressed that a statement alleging that the Majdanek and Auschwitz extermination camps had been operated by Poland was factually inaccurate. However, it found that the requested statement was not limited to rectifying this factual error, but also contained a value judgment, asserting that the incorrect wording of the announcement had constituted a distortion of historical facts and violated K.'s personality rights. The court further elaborated that under the right to freedom of expression, as protected by the German Constitution, no one could be compelled by law to express a value judgment that had been imposed on them by another person. The enforcement of the Polish judgment would thus manifestly run counter to the German *ordre public*. Lastly, the Court considered that enforcement of the decision would be disproportionate, given that the error in the original announcement had been corrected

immediately after notification and that ZDF had already published the requested statement for the duration of one month (see paragraph 6 above).

9. On 20 September 2018 K. lodged a constitutional complaint with the Federal Constitutional Court. He died on 1 October 2019. On 28 October 2020 the Federal Constitutional Court ruled that with K.'s death his constitutional complaint had become devoid of purpose and that, due to the inherently personal nature of the claim, it was not deemed appropriate to continue the proceedings.

10. The applicant complained before the Court that the decision of the Federal Court of Justice allowing ZDF to disregard the Polish judgment had violated K.'s rights under Articles 6, 8 and 10 of the Convention since the court had not properly taken into account the suffering the erroneous statement had caused his father and, furthermore, that the Federal Constitutional Court's decision to discontinue the proceedings upon K.'s death had violated his own rights as K.'s close relative under Article 6 of the Convention.

THE COURT'S ASSESSMENT

A. Alleged violation of K.'s rights under Articles 6, 8 and 10 of the Convention

11. In order to claim standing under Article 34 of the Convention, a person must be directly affected by the impugned measure or proceedings (see *Topallaj v. Albania*, no. 32913/03, § 65, 21 April 2016). Where the direct victim died before the application was lodged with the Court, the Court has usually declined to grant standing to any other person unless that person was able to either demonstrate a direct effect on his or her own rights or where the complaint(s) raised an issue of general interest pertaining to "respect for human rights" and the applicant(s) as heir(s) had a legitimate interest in pursuing the application (see *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, § 69, 15 October 2020). Such an interest exists, in particular, in cases where the main issue raised by it transcends the person and the interests of the applicant, notably where an application concerns the legislation or a legal system or practice of the respondent State (ibid., § 76). The Court has recognised the standing of the victim's next of kin to submit an application in their own right where the alleged violation of the Convention was closely linked to a disappearance or death giving rise to issues under Article 2, but has been more restrictive where other Convention rights were concerned (ibid., § 70). In cases concerning complaints under Articles 5, 6 or 8, the Court has granted victim status to close relatives, allowing them to submit an application where they have shown a moral interest in having the late victim exonerated of any finding of guilt or in protecting their own reputation and that of their family (ibid., § 71; see also *Centre for Legal Resources on behalf*

of Valentin Câmpeanu v. Romania [GC], no. 47848/08, § 100, ECHR 2014, and the case-law cited therein).

12. The Court has usually considered the above criteria cumulatively and made its assessment of whether close relatives had standing to submit an application having regard to all the circumstances of the case (see *Akbay and Others*, cited above, § 77).

13. Regarding the existence of a moral interest, the Court notes that the applicant's complaints were not aimed at exonerating K. or protecting his or his father's reputation. Rather, the applicant argued that the erroneous announcement had violated K.'s personality rights and had caused him significant suffering of which the Federal Court of Justice had failed to take proper account (see paragraph 10 above). However, the Federal Court of Justice had primarily held that the execution of the Polish decision conflicted with ZDF's right to freedom of expression (see paragraph 8 above) and thus, did not address a potential infringement of K.'s personality rights.

14. Turning to the question of whether the complaints raised an issue of general interest, the Court observes that it has on several occasions examined the questions pertaining to the recognition or enforcement of decisions rendered by foreign courts (see *Dolenc v. Slovenia*, no. 20256/20, §§ 55-58, 20 October 2022, and the case-law cited therein). In this context, the Court stressed that before enforcing a foreign decision the domestic courts are obliged to conduct some measure of review (ibid., § 59, and see also *Avotiņš v. Latvia* [GC], no. 17502/07, § 98, 23 May 2016). Furthermore, the Court would reiterate that in a case concerning the right to reply it has held that the primary objective of this right is to allow individuals to challenge false information published about them in the press (see *Axel Springer SE v. Germany*, no. 8964/18, § 34, 17 January 2023).

15. Moving on to the domestic decisions in the present case, the Court observes that the Federal Court of Justice, taking into consideration that ZDF had already published the requested statement, albeit with an introductory note (see paragraph 8 above), denied enforcement of the Polish judgment based on the particular nature of the requested statement. In this context, the Federal Court of Justice stressed that while the reference to Polish extermination camps did constitute a factual error, the further claims made in the impugned statement contained value judgments (see paragraph 8 above) which, according to the Federal Court of Justice, ZDF could not be compelled to publish in view of its right to freedom of expression (see, *mutatis mutandis*, *Axel Springer SE*, cited above, § 34).

16. It follows that the decision regarding the enforcement of a foreign judgement based on the particular nature of the requested statement lacks broader implications beyond the individual case and cannot be considered to concern the legal system or practice of the respondent State. In the light of the above, the Court considers that the applicant did not have the requisite

standing under Article 34 of the Convention to lodge a complaint about the alleged violation of K.'s rights.

17. Accordingly, the complaints are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

B. Alleged violation of the applicant's rights under Article 6 of the Convention

18. The Court has examined the complaint submitted by the applicant under Article 6 of the Convention regarding the Federal Constitutional Court's decision to discontinue the proceedings upon K.'s death. Having regard to all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. This part of the application must therefore be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 26 October 2023.

Ilse Freiwirth Deputy Registrar	Faris Vehabović President