



Slovenian courts struck a fair balance between right to respect for private life and right to artistic freedom in a case concerning fictional literary work

In its decision in the case of [Jelševar and Others v. Slovenia](#) (application no. 47318/07) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned the applicants' complaint that their reputation had been affected owing to the publication of a book depicting the life of a fictional character whose story had been inspired by their late mother.

The Court considered that the Slovenian courts' approach – consisting in assessing whether the story would have been perceived as either real or offensive by an average reader – had been reasonable and consistent with its own case-law. Therefore, it concluded that a fair balance had been struck between the competing interests at stake, namely the applicants' right to respect for private and family life and the author's right to freedom of expression.

The case is of particular interest as it reaffirms the importance of artistic freedom in the context of fictional literary work. It also applies and adapts the Court's case-law to a common literary practice, that is, the use of a real person as a model for a fictional character in a novel.

Principal facts

The applicants, Marta Jelševar, Mrs Ana Ložar, Mrs Marija Piškur and Mrs Štefka Mežnar, were born in 1930, 1927, 1915 and 1922 respectively, and live in Slovenia.

In 1998, a writer, B.M.Z. self-published a novel describing the life of a woman from the Slovenian countryside who emigrated to the United States of America at the beginning of the 20th century, married a fellow Slovenian named Brinovc and subsequently returned home to take over the family farm, trade in fruits and vegetables and raise a family. The main character, Rozina, was depicted as a lively, ambitious and resourceful woman. However, the book also described that she used sex to get her way with her husband, sold illegal alcohol during Prohibition in the United States, and valued money over her children.

The applicants recognised the story depicted in the book as that of their family – including of their late mother. In particular, the setting of the book was the area where the applicants' family had lived, and the name Brinovc, although not the actual surname of the family, was the name under which they were known in their local community.

The applicants lodged a civil action against B.M.Z for violation of personality rights, also claiming non-pecuniary damages for distress suffered on account of the publication, as well as a public notice of apology. They claimed in particular that B.M.Z. had painted a negative and defamatory portrayal of their mother, which humiliated them in the eyes of their local community. During the proceedings, acquaintances of the applicants' family were heard as witnesses and testified that they had easily made the connection between the story depicted in the book and the applicants' family. However, albeit shocked by the description of the main character's sexual life, they were mostly convinced that the controversial parts of the story were not true.

Ultimately, in April 2007, the Constitutional Court dismissed the applicants' claims, stating that the average reader would not consider the events narrated in the book as facts about real people. Furthermore, in the Constitutional Court's opinion, the descriptions of the applicants' mother were not in any way derogatory and it had not been B.M.Z.'s intention to cause offence.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 October 2007.

Relying on Article 8 (right to respect for private and family life), the applicants complained that the Constitutional Court had failed to strike a fair balance between their own right to respect for their private and family life and B.M.Z.'s right to freedom of expression.

The decision was given by a Chamber of seven, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Ann **Power-Forde** (Ireland),
Vincent A. **de Gaetano** (Malta),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic), *Judges*,

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 8

The Court pointed out that artistic freedom enjoyed by authors of literary works was a value in itself, thus requiring a high protection under the Convention.

In this case, the Court examined whether the Slovenian authorities had achieved a fair balance between the applicants' reputation and B.M.Z.'s right to freedom of expression. It noted that national courts had attached fundamental importance to the question of whether the applicants' family could have been identified with the fictional characters of the book, and whether these characters had been depicted in an offensive way amounting to defamation. In its judgment of 2007, the Constitutional Court had assessed the literary portrayals according to an objective criterion. Indeed, it had held that the story described in the book would neither have been perceived as real nor considered offensive by an average reader.

The Court found that the approach taken by the Slovenian Constitutional Court to the issue of the balance to be struck between the competing interests – namely, whether an average reader would consider the story as real (non-fictional) and whether an average reader would consider it as offensive, given the context of the book as a whole – was a reasonable one, in line with its own case law. It found it particularly important that the witnesses had mostly denied the possibility that the main character of the book represented a truthful depiction of the applicants' late mother.

Therefore, the Court concluded that the applicants' reputation had not been seriously affected and rejected their application as manifestly ill-founded (Article 35 § 3 (a)).

The decision is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.