



## Right to privacy of famous football player's children was sufficiently protected by German courts

In today's **Chamber** judgment<sup>1</sup> in the case of **Kahn v. Germany** (application no. 16313/10) the European Court of Human Rights held, unanimously, that there had been:

**no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.**

The case concerned the repeated publication of photos of the children of Oliver Kahn, former goalkeeper of the German national football team in two magazines aimed at the general public, in spite of a blanket ban on publication ordered by a court.

Following the publication of several photos the applicants had applied to the Hamburg Regional Court, which held, in 2005, that their right to their own image had been breached and banned all future publication of photos showing the applicants. When the publisher of the magazines printed further photos in spite of the ban, the Regional Court ordered it to pay financial penalties.

The European Court of Human Rights (ECtHR) noted that, as a result of the actions brought by the applicants, the publisher had been ordered to pay fines totalling approximately 68% of the amount they had claimed. The Federal Court of Justice had found that the applicants – whose faces had not been visible or had been pixelated – could only be identified on the photos through the presence of their parents and the accompanying text and had not been the main subject of the reports, which had focused on their parents' relationship following their divorce. The ECtHR accepted the finding of the German courts that, in view of the nature of the photos, there had been no call to award additional compensation as the applicants had requested.

### Principal facts

The applicants, Katharina-Maria Kahn and David Kahn, are two German nationals who were born in 1998 and 2003 and live in Strasslach. They are the children of Oliver Kahn, former goalkeeper of the German national football team, and his ex-wife Simone Kahn.

Between July 2004 and June 2009 the magazines *Neue Woche* and *Viel Spass*, owned by the same publisher, printed several photos of the applicants with their parents.

Following the publication of several photos in 2004, the applicants applied to the Hamburg Regional Court seeking a ban on publication of the photos in which they appeared. In two judgments of 21 January 2005 the Regional Court ordered the publisher to refrain from printing any of the photos or risk a fine for non-compliance.

Following the publication of another set of photos in 2007, the applicants obtained three orders against the publisher requiring it to pay successive fines of 5,000 euros (EUR), EUR 7,500 and EUR 15,000. In December 2007 the applicants applied to the Hamburg Regional Court for an order

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

requiring the publisher to pay them at least EUR 40,000 each by way of pecuniary compensation on account of the publication of photographs without their consent.

In two judgments of 11 July 2008 the Regional Court found in the applicants' favour and awarded them the sums claimed. The court considered that there had been a serious breach of their right to protection of their personality rights, as all the photos showed them in situations that were protected against interference, namely in the company of their parents or on holiday. The court noted that the requests to refrain from publication had proved ineffective as the publisher had printed the photos on several occasions in spite of the blanket ban on publication ordered by the court in January 2005. The court held that it was necessary in the circumstances to make an award in respect of pecuniary damage that contained both a preventive and a compensatory element.

In two judgments delivered on 4 November 2008 the Hamburg Court of Appeal quashed the judgments of 11 July 2008. It accepted that the publisher had persistently breached the applicants' right to their own image and the blanket ban ordered by the Regional Court on 21 January 2005, despite the fines that had already been imposed. Nevertheless, the Court of Appeal held that it was not necessary to award pecuniary compensation, as the Regional Court had ordered a blanket ban on publication under the terms of which the applicants could request that the publisher be ordered to pay fines. The court found that the right to pecuniary compensation was of a subsidiary nature and that no such award should be made where other options existed for protecting individuals' personality rights. Furthermore, the Code of Civil Procedure provided for fines of up to EUR 250,000 and for prison terms of up to two years in default of payment. Hence, the applicants had had access to effective means protecting them against future breaches of their right to their own image. The Court of Appeal refused the applicants leave to appeal on points of law.

The Federal Court of Justice rejected the applicants' requests to the same effect, and subsequently dismissed the appeals they had lodged claiming that they had not had sufficient opportunity to make submissions. It found that the photos that had been published had not entailed a serious breach of the applicants' right to their own image, as the applicants could only be identified through the photos of their parents and the text accompanying the photos. Moreover, the subject of the reports had not been the applicants themselves, but rather their parents' relationship, the consequences for the family of the breakdown of their parents' marriage, and their father's career.

On 23 September 2009 a three-judge formation of the Federal Constitutional Court declined to entertain the constitutional appeals lodged by Katharina-Maria and David Kahn (file nos. 1 BvR 1681/09 and 1742/09).

## Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicants alleged a violation of their right to respect for their private and family life.

The application was lodged with the European Court of Human Rights on 22 March 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Ganna **Yudkivska** (Ukraine), *President*,  
Angelika **Nußberger** (Germany),  
André **Potocki** (France),  
Faris **Vehabović** (Bosnia and Herzegovina),  
Síofra **O'Leary** (Ireland),  
Carlo **Ranzoni** (Liechtenstein),  
Mārtiņš **Mits** (Latvia),

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

## Decision of the Court

### Article 8

The ECtHR noted that the question in this case was not whether the applicants had been afforded protection against the undisputed breaches of their right to respect for their private life. The issue to be determined was whether, from the standpoint of Article 8, the protection afforded to them – namely the possibility of having fines imposed on the publisher – had been sufficient, or whether only an award of financial compensation could afford the necessary protection of their right to respect for their private life. The applicants maintained that the amount of the fines imposed had been inadequate and that the German courts should have awarded them the financial compensation they had sought.

The ECtHR noted at the outset that the amount of the fines had been increased each time. It further observed that it had been open to the applicants to bring proceedings before the Court of Appeal to contest the amount of the fines imposed by the Regional Court. However, they had not appealed against any of the three orders imposing fines, nor had they explained why such a remedy would have been bound to fail.

The ECtHR observed that, as a result of the actions brought by the applicants, the publisher had been obliged to pay fines totalling approximately 68% of the amount claimed by them. Furthermore, the procedure for imposing the fines had been speedy and straightforward on each occasion, in so far as the Regional Court had confined itself to finding that the publisher had breached the blanket ban on publication and to setting out a few additional considerations in order to determine the appropriate amount, which had been increased each time. In this context the ECtHR also deemed it necessary to take into consideration the nature of the material found by the courts to have been published unlawfully. It noted that the Court of Appeal had found that, although publication of the photos had breached the applicants' right to their own image, the interference had not been sufficiently serious to justify or necessitate an award of financial compensation. The Federal Court of Justice had specified that the applicants – whose faces had not been visible or had been pixelated – could only be identified on the photos through the presence of their parents and the accompanying text, and that the main subject of the reports had not been the applicants themselves but rather their parents' relationship following their divorce. The ECtHR accepted the finding of the German courts that, in view of the nature of the photos, there had been no call to award additional compensation.

The ECtHR concluded that the German authorities had not failed in their positive obligation towards Katharina-Maria and David Kahn and had afforded them sufficient protection. There had therefore been no violation of Article 8 of the Convention.

*The judgment is available only in French.*

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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.