Private life and reputation – right to a fair trial – defamation – free speech – public domain – truth

McCann and Healey v Portugal (application no. 57195/17), decision of the European Court of Human Rights, 20 September 2022

European Court of Human Rights

Facts and domestic proceedings

The applicants, Gerald Patrick McCann and Kate Marie Healy, are British nationals. In May 2007, while the applicants were on holiday with their three children in southern Portugal, their daughter Madeleine McCann, then aged three, disappeared. On the following day an investigation was opened by the prosecutor's office, whose lines of enquiry focused on a probable abduction. The investigation was entrusted to Inspector G.A. from the criminal investigation department. Biological and blood samples were subsequently detected by British sniffer dogs inside the holiday apartment and in the trunk of a vehicle that the applicants had rented a few days after their daughter's disappearance. As a result, in September 2007 the parents were placed under investigation; they were suspected of having hidden their daughter's body following her death, possibly as a result of an accident inside the apartment, and of having staged an abduction. Those proceedings were discontinued in July 2008.

In the meantime, in October 2007, Inspector G.A. was removed from the investigation and retired in July 2008. In the same month, he published a book in which he alleged, among other claims, as follows:

> Madeleine McCann died inside the apartment; an abduction was staged; death could have occurred following a tragic accident; evidence proved negligence on the part of the parents with regard to the care and safety of the children.

G.A. also gave a newspaper interview in which he repeated his theory. The book was subsequently adapted as a documentary programme, which was made commercially available from April 2009.

In consequence, the applicants brought interlocutory civil proceedings in Portugal, seeking an injunction to have the book and documentary banned, in addition to the seizure of G.A.'s assets. They then lodged civil actions against G.A, the publisher, the production company that had made and marketed the documentary, and the television channel which had broadcast it. These were dismissed by the Portuguese courts. On 31 January and 21 March 2017 respectively, the Supreme Court delivered two judgments, in which it considered that there had been no unlawful interference with the applicants' right to their reputation and that the principle of the presumption of innocence was not relevant to the case. It also noted that the statements made by G.A. had not been new, since they were set out in a police report of 10 September 2007, itself contained in the investigation file, to which the press had been given access. It further held that these statements, which had thus already been widely commented and discussed, represented a subject of public interest, and that the applicants,

who had deliberately sought media coverage, had to be regarded as "public figures", who were as a result inevitably subjected to more attentive scrutiny of their every word and deed.

Decision of the European Court of Human Rights

The applicants applied to the European Court of Human Rights, relying on Article 6 (the right to a fair hearing), Article 8 (the right to respect for private and family life), and Article 10 (freedom of expression) of the European Convention. They alleged first that the statements made by G.A. had damaged their reputation, their good name and their right to be presumed innocent, and complained that they had been unsuccessful in the proceedings before the national civil courts in establishing those allegations. The European Court decided to examine this complaint under Article 8 of the Convention, and more specifically in terms of the positive obligation of the state to respect private and family life arising from that provision. Secondly, the applicants alleged that the reasoning contained in the Supreme Court's decisions of 31 January and 21 March 2017 at the close of their civil claims had breached their right to be presumed innocent. The Court thus decided to examine this complaint under Article 6(2) of the Convention - presumption of innocence. The application was lodged with the European Court of Human Rights on 28 July 2017. Judgment was given by a Chamber of seven judges

With respect to the claim under Article 8, the Court noted that the contested statements made by G.A. in the book, documentary programme and interview concerned the applicants' alleged involvement in hiding their daughter's body, based on an assumption that they had staged an abduction and on a presumption of negligence towards her. In the Court's view, these statements were sufficiently serious to render Article 8 of the Convention applicable. It further noted that the book, the documentary based on it and the interview given by G.A. to a daily newspaper concerned a debate of public interest. It considered that the contested statements constituted value judgments which had a sufficient "factual basis", and that the elements on which the scenario advanced by G.A. was based were those which had been gathered during the investigation and had been brought to the public's attention. Additionally, this theory had been entertained in the context of the criminal investigation and had even led to the applicants being placed under investigation in September 2007. Furthermore, the criminal case had attracted extensive public interest both nationally and internationally and had given rise to considerable discussion and controversy. As the Lisbon Court of Appeal and the Supreme Court had noted, the disputed statements had undeniably formed part of a debate of public interest, and G.A.'s theory had accordingly been one of several opinions on the events.

The Court also noted that the criminal case had been discontinued by the prosecutor's office on 21 July 2008, before the publication of the book. In this respect, the Court held that, had the book been published before the decision by the prosecutor's office to discontinue the proceedings, the statements in question could potentially have undermined the applicants' right to be presumed innocent, guaranteed by Article 6(2) of the Convention, by prejudging that entity's assessment of the facts. However, given that the statements were in fact made after the case had been discontinued, it had been the applicants' reputation, guaranteed by Article 8 of the Convention, and the public's perception of them, which had been at stake, rather than any presumption of innocence or damage to their right to a fair criminal trial.

In the present case, the Court held that, even supposing that the applicants' reputation had been damaged, this had not been on account of the hypothesis put forward by G.A., but as a result of the suspicions expressed against them, which had led to their being placed under

investigation in the course of the proceedings and had given rise to extensive media attention and much controversy. Thus, the information had been brought to the public's attention in some detail even before the investigation file had been made available to the media and the book in question had been published.

With regard to the applicant's allegations of bad faith on G.A.'s part, the Court noted that the book had been published three days after the proceedings had been discontinued, which implied that it had been written, then printed, while the investigation had still been underway. In this respect, the Court held that, in choosing to make the book available for sale three days after it had been decided to discontinue the case, G.A. could, *as a matter of prudence*, have added a note informing the reader about the outcome of the proceedings. However, the failure to insert any such note could not, in itself, prove bad faith on his part. The Court noted that the documentary referred to the fact that the case had been discontinued, and that the applicants had continued their media campaign after the book's publication. In particular, they had cooperated in a documentary programme about their daughter's disappearance and continued to give interviews to the international media.

While the Court understood that the book's publication had undeniably caused anger, anguish and distress to the applicants, it did not appear that the book, or the broadcasting of the documentary, had had a serious impact on the applicants' social relations or on their legitimate and ongoing attempts to find their daughter. The Court also specified that while, admittedly, the statements in question were based on G.A.'s in- depth knowledge of the case file as a result of his role, there was no doubt that their content had already been known to the public, given the extensive media coverage of the case and the fact that the investigation file had been subsequently made available to the media after the investigation had been closed. For that reason, it held that the contested statements were merely the expression of G.A.'s interpretation of a high-profile case which had already been widely discussed. In addition, it did not appear that G.A. had been motivated by personal animosity towards the applicants.

Finally, the Court shared the Government's opinion as to the chilling effect that a ruling against G.A. would have had, in the present case, for freedom of expression with regard to matters of public interest. It further noted that, although the Supreme Court had been assessing the case at final instance, it had carried out a detailed analysis of the balance to be struck between the applicants' right to respect for their private life and G.A.'s right to freedom of expression, assessing them in the light of the criteria identified in its case-law and referring at length to the Court's case-law. Thus, having regard to the discretion ("margin of appreciation") afforded to the national authorities in the present case, the Court saw no strong reason to substitute its own view for that of the Supreme Court. It could not therefore be stated that the national authorities had failed in their positive obligation to protect the applicants' right to respect for their private life within the meaning of Article 8 of the Convention. It followed that there had been no violation of Article 8 of the Convention.

With respect to the claim under Article 6(2), the Court noted that the civil proceedings in this case related to two claims lodged by the applicants: the first claim had sought compensation on account of the alleged damage to their reputation and their right to the presumption of innocence, resulting, in their view, from the statements made about them by G.A.: the second had sought an injunction banning the sale of the contested book and documentary. In the Court's view, the civil proceedings had not therefore related to a "criminal charge" against the applicants. Further, they had not been linked to the criminal

proceedings opened after the disappearance of their daughter in such a way as to fall within the scope of Article 6(2) of the Convention. However, even supposing that Article 6(2) was applicable to the civil proceedings in issue in this case, it did not appear that, in its judgments of 31 January 2017 and 27 March 2017, the Supreme Court had made comments implying any guilt on the part of the applicants, or even suggesting suspicions against them with regard to the circumstances in which their daughter had disappeared. In consequence, the Court concluded that the applicants' complaint under Article 6(2) on account of the reasoning in the Supreme Court's judgments was manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention and, as such, inadmissible.

Commentary

The decision of the Court in this case was reasonably straightforward in terms of the law and any human rights principles, despite the high profile nature of the parties to the action and the sad background to the case. The applicants had based their action in the Portuguese courts in defamation: that the publication of the book had damaged their reputation, rather than in privacy, where they would have argued that the publication of the book encroached on their reasonable expectation of privacy. The latter action, it is suggested, would be difficult to prove given the applicants high public profile in publicising the campaign for their daughter's return.

As such, although reputation is part of a person's private life, thus engaging Article 8 of the Convention, a person suing in defamation cannot claim simply on the basis that the publication displays a lack of respect for their private and family life; or, as the European Court recognised the anger, anguish and distress caused by the book's publication and any further public discussion in the media. Instead, the person has to show that the publication was capable of damaging their reputation, and the court must be satisfied that the publication has caused that damage, or further damage to the person's reputation. In defamation law, the defendant can put forward the defence of truth, as if the statement or publication is true no action in defamation can lie; although the burden is on the defendant to prove the truth, or substantial truth of the statement (*McVicar v United Kingdom* (2002) 35 EHRR 22).

Thus, if this action had been brought in the UK courts, the defendant would have relied on s.2 of the Defamation Act 2013 to show that the book merely recorded the facts: that there was public and police suspicion surrounding the applicants' involvement in the case, and that the police had indeed investigated that possibility. The book, of course, went further than mere reportage, and ventured into allegations: that on the basis of such facts the author thought that: Madeleine died inside the apartment; an abduction *was* staged; death could have occurred following a tragic accident; evidence *proved* negligence on the part of the parents with regard to the care and safety of the children". In such a case, a defendant would rely on the defence of honest opinion, under s.3 of the Defamation Act 2013. This provides that it is a defence to an action for defamation for the defendant to show that the statement complained of was a statement of opinion; that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published.

In the present case the defendant would argue that the basis of their opinion (that the applicants were involved and negligent) was based on existing facts (that the applicants had been questioned) and existing public and police conjecture as to their involvement. Presumably, in the present case, the courts (domestic or European) did not regard the allegations to be an independent statement of the applicant's guilt so as to deny the defence

of honest opinion. Had the applicants still been under police suspicion, the decision may have been different, but not under Article 8, but under Article 6 with respect to the presumption of innocence; see below.

If the defences under both ss. 2 and 3 fail, a defendant may then rely on the defence of public interest under s.4 of the Act, which provides that it is a defence to an action for defamation for the defendant to show that (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant reasonably believed that publishing the statement complained of was in the public interest. The Supreme Court of Portugal considered the applicants as 'public figures' – because of their high profile campaigning on behalf of their daughter and thus the high level of public debate created by the event – and the European Court also considered this factor. Hence, the defence would be open to a defendant in these circumstances and the question would then be whether the defendant *reasonably believed* that publication was in the public interest. In this respect the domestic courts have given the publisher a relatively wide area of discretion (*Jameel v Times* [2007] 1 AC 359) and s.4 was intended to have a liberalising effect on free speech. Thus, in the absence of bad faith (private gain is not determinative of this) and clearly irresponsible journalism, the defence would have been likely to succeed in the UK, as it did before the Portuguese courts.

The applicants' claim under Article 6 was also dismissed by the European Court, as the Court found that at no stage was the applicants' presumption of innocence compromised by the domestic proceedings. First, the proceedings were civil in nature, rather than criminal, the rule against the presumption of innocence, under Article 6(2), applying only to criminal proceedings. Second, in the Court's view, at no stage of the civil proceedings was the issue of the applicants' criminal guilt at issue, or, during those proceedings, did the domestic courts imply that the applicants were culpable. Thus, the issue for the domestic courts had been whether the reportage of the story by the author was a true account of what was already conjecture in the public domain; and not whether there was any truth in the conjecture that the applicants had been involved in the disappearance of their daughter.

The decision provides no real surprises with respect to the relationship between the right to reputation and free speech. However, many might question whether individuals, and the press, should be allowed to publish allegations causing distress to individuals or families, particularly in such a sensitive case. The liberal interpretation of defamation laws by both the European Court of Human Rights (*Lingens v Austria* (1986 6 EHRR 407) and in (UK) domestic law will provide robust defence to free speech in most cases, but the growing trend to protect individual privacy from irresponsible journalism might provide stronger grounds for claimants in cases such as the present (*Bloomberg v* [2022] UKSC 5). However, under the facts of the present case, it is likely that at most the applicants suffered no more than the inevitable anger, anguish and distress of having such allegations made in the public domain. The author and other broadcasters might well indeed be guilty of base opportunism and imprudent journalism, but that alone is not the basis of liability in defamation or privacy laws.

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