

Up-407/14
14 December 2016

DECISION

At a session held on 14 December 2016 in proceedings to decide upon the constitutional complaints of the company MLADINA Press Undertaking, d. d., Ljubljana, represented by Zakonjšek Law Firm, d. o. o., Ljubljana, the Constitutional Court

decided as follows:

The constitutional complaint against Judgment of the Supreme Court No. II Ips 97/2015, dated 10 September 2015, in conjunction with Judgment of the Higher Court in Ljubljana No. I Cp 3057/2013, dated 12 February 2014, and the constitutional complaint against point I/1 of the operative provisions of Judgment of the Higher Court in Ljubljana No. I Cp 3057/2013, dated 12 February 2014, which refers to the scope of the protection of satire, are dismissed.

REASONING

A

1. In 2011, in Issue No. 9 of the weekly Mladina in the satirical section Mladinamit, the complainant (the defendant in the civil proceedings) published an article with the title "Not Every Dr G. is Dr Goebbels." In the article, a photograph of the family of the plaintiff [in the civil proceedings] was published, and beside it a photograph of the German Nazi politician and Nazi Minister of Propaganda Joseph Goebbels with his family.[1] In an editorial of the same issue and in three articles in the next issue of the magazine, the complainant wrote about a comparison of the methods of political propaganda of the two politicians and explained in more detail the reasons for publishing the disputed photographs. The plaintiff demanded, by an action, that an apology and the judgment be published in the weekly Mladina, as well as compensation for non-material damage in the amount EUR 40,001.00 and statutory default interest. The court of first instance dismissed both the plaintiff's claim for the payment of the compensation as well as the claim that the defendant must publish the judgment in the weekly Mladina and apologise to the plaintiff and his three children.

2. The Higher Court granted the plaintiff's appeal and in point I/1 of the operative provisions partly modified the judgment of the first instance, namely, it required the complainant to publish, within fifteen days, the judgment in the weekly Mladina and, when the judgment is published, to apologise in the same issue with the following text: "Mladina, d. d., apologises to Branko Grims for comparing a photograph of his family to a photograph of Joseph Goebbels with his family. Mladina, d. d." [2] The Higher Court considered the issue regarding the admissibility of the publication of the photographs of the plaintiff's family and of the Goebbels family differently than the court of first instance. According to the Higher Court, the publication of photographs interferes with one's integrity much more severely than words. Although the freedom of expression also encompasses publishing photographs, it is necessary, when the court balances between the opposing right to the freedom of expression and the right to one's honour and reputation, to distinguish text in articles from published photographs, and to carry out a separate balancing of the colliding rights in connection with photographs. In this respect, the Higher Court referred to the position of the European Court of Human Rights (hereinafter referred to as the ECtHR) in *Rothe v. Austria*, dated 4 December 2012. It stressed that a photograph has an extremely powerful documentary and communication function. According to the Higher Court's assessment, it is the issues of the substance, form, and consequences of the publication of the photographs that tipped the scales in favour of the decision that, in the circumstances of the case at issue, the plaintiff's right to one's honour and reputation had priority. In such context, the Higher Court stressed that the publication of the disputed photographs separately from the articles in another section and, taking into consideration the connotations of the Nazi regime that have developed since the Second World War, elicits in people a more multi-layered comparison than that expressly presented by the complainant (in the articles). Indeed, there is a politician in the photograph, but inseparably also in the role of the father of the family. A comparison with the second photograph, which depicts a commonly known symbol of evil, who in the past 70 years has gained, on the basis of historical facts, a metaphorical dimension of bestiality, has, in the assessment of the Higher Court, a different communication effect than serious text articles. The open nature of the content of communication by a non-verbal means of communication requires of journalists a higher degree of sensitivity. This open nature, which cannot be created unintentionally by an average person, let alone by an average journalist, is, in the assessment of the Higher Court, the element due to which in the case at issue the standard of due and responsible conduct of journalists was overstepped by the manner in which the disputed photographs were published.

3. The complainant submitted a motion to file an appeal before the Supreme Court against the judgment of the second instance. By Order No. II DoR 143/2014, dated 18 December 2014, the Supreme Court granted the motion as regards the question of whether it is necessary when balancing the right to the freedom of expression, on the one hand, and the right to one's honour and reputation, on the other, to consider the text in the articles and the published photographs as a whole or whether the text in the articles may be separated from the published photographs, and the balancing between

the right to the freedom of expression and the right to one's honour and reputation can be carried out separately only regarding the publication the of photographs, with regard to which the wider and narrower context of the publication thereof are not taken into consideration. The Supreme Court then proceeded to dismiss the appeal of the complainant. It stressed that the discussion of the cultural level of propaganda is in the public interest and that the text of the editorial did not exceed the admissible limit by comparing the methods of the Slovene Democratic Party (hereinafter referred to as the SDS) with the methods of political propaganda employed by the Nazis. Also the further discussion in the articles that followed the publication of the photographs is not disputable. The Supreme Court concurred with the assessment of the Higher Court that the articles published in the subsequent issues of Mladina cannot be considered together with the disputed publication [i.e. the published photographs and article] in Mladina No. 9/2011. The editorial and the disputed article in the satirical section that were both published in the same issue of Mladina also cannot be considered in direct connection with each other (i.e. the editorial at the beginning of the magazine and the section Mladinamit at the end of the magazine). The Supreme Court therefore concurred with the correctness of the assessment of the Higher Court, which considered the publication in the section Mladinamit separately. It stressed that not only the photograph must be taken into consideration in the assessment, but the entire context of the publication of the article in the section Mladinamit. Even taking such narrower context into consideration, the Supreme Court assessed that the published comparison of the photographs of the families exceeded the comparison of the methods of political propaganda employed, according to the journalists' assessment, by the plaintiff and his political party, SDS, and those employed by Goebbels and the German Nazi Party, which the caption above the photographs draws attention to. It underlined that the two photographs of the same dimensions and composition positioned next to each other become a multi-layered comparison of the plaintiff's family with the family of a Nazi criminal, thus giving rise to an independent whole. They incite considerations of the horrifying dichotomy between the family idyll depicted in the published photograph of the Goebbels family and the cruel historical details of the murder of the six children. In the assessment of the Supreme Court, it is precisely these horrifying historical facts regarding the Goebbels family that placed the comparison at issue in a completely different context, despite the fact that the plaintiff is a politician and that the purpose of the publication was criticism of his methods of political propaganda. Therefore, the published comparison of family photographs no longer entails a discussion of the appropriateness of the plaintiff's political propaganda, but a desire to elicit in the reader a shocking comparison due to the mentioned circumstances from the private life of the Goebbels family.

4. In the first constitutional complaint (No. Up-407/14), the complainant challenges the decision of the Higher Court in the part where the Court imposes on it the obligation to publish the judgment and the apology due to the disputed publication of the photographs. It alleges a violation of the right determined by Article 39 of the Constitution. It is in particular opposed to two positions of the Higher Court, namely (1)

the position that the court, when balancing the opposing right to the freedom of expression and the right to the protection of one's honour and reputation, must separate the text of the articles from the published photographs and carry out a separated balancing of the competing interests relating to the photographs; and (2) the position that, if satire is at issue, "it only serves to entertain the public," and hence, "due to the protection of one's honour and reputation, the level of protection of the freedom of expression is lower than if the exercise of the principles of democracy were at the forefront via the freedom of journalistic expression." Due to erroneous positions regarding whether the context of the publication of the photographs should be taken into consideration and regarding the degree of protection satire enjoys, the Higher Court allegedly inadmissibly interfered with the complainant's right to the freedom of expression. According to the complainant, the reference of the Higher Court to the ECtHR judgment in *Rothe v. Austria* is inappropriate, as the mentioned judgment allegedly referred to the balancing of the right to privacy and the right to the freedom of expression. According to the applicant, the judgment important for the considered case is that of the ECtHR in *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H (No. 3) v. Austria*, dated 12 December 2005, which allegedly deals with the connection between a photograph and the text of the article and in which the ECtHR allegedly considered the context in which the photograph was published, and at the same time took into consideration what was published as the title of the photograph and the short caption next to the photograph.

5. In the second constitutional complaint (No. Up-987/15), the complainant challenges the judgment of the Supreme Court. It alleges a violation of the right determined by Article 39 of the Constitution. It is in particular opposed to the position of the Supreme Court that the published photographs are open to interpretation in terms of content. It faults the Supreme Court for considering the published comparison of photographs out of context and for attributing such publication a meaning that it certainly did not have. As an important factor that allegedly tips the scales in favour of its freedom of expression, the complainant underlines the fact that the plaintiff is one of the most recognised politicians in the Republic of Slovenia and one of the most influential members of the SDS, and that therefore he must be willing to be subject to public criticism that can be much sharper and harsher than if he were an ordinary person. According to the complainant, also the plaintiff (alone or via his political party) sharply, negatively, and harshly criticises the functioning of others, using the expression 'fascism' and comparisons with Nazism. Furthermore, the complainant underlines that the publication of the article Not Every Dr G. is Dr Goebbels entails satirical criticism of the politician's conduct and not a comparison of the two families. Since it entails criticism of the politician's conduct and not an attack on his personality, the position of the Supreme Court that the publication entailed an unlawful interference with the plaintiff's honour and reputation is erroneous. The complainant underlines that when assessing the admissibility of the publication of the disputed photographs both the wider and narrower context of the publication must be taken into consideration. The Supreme Court allegedly erroneously decided that in the assessment of which

message the publication of the article Not Every Dr G. is Dr Goebbels conveys it must not take into consideration the broader context of the publication (i.e. the editorial in the same issue of Mladina and the articles published in the next issue of the magazine). In the opinion of the complainant, the Supreme Court should have in particular taken into consideration the narrower context of the publication, i.e. the title and the caption above the two photographs, which it did not do. The caption above the photographs allegedly communicated the purpose of the publication of the photographs, i.e. that the plaintiff exposes his family in public as a method of political propaganda, which is also what Joseph Goebbels did. The complainant is opposed to the position of the Supreme Court that the publication of the disputed photographs goes beyond a discussion of the appropriateness of the plaintiff's political propaganda but above all entails a desire to provoke in the reader a shocking comparison between the plaintiff as a father and Joseph Goebbels as a father who agreed that his wife kill all their children. If one accepted the interpretation of the Supreme Court (and of the Higher Court before it) as to the open nature of the photographs in terms of content, it would mean, in the opinion of the complainant, that expression by publishing photographs is never admissible, as it can raise all sorts of associations and considerations in people. The complainant also faults the Supreme Court for overlooking the fact that, in the framework of the right to the freedom of expression, it is not only the content that is protected but also the form of expression. In its opinion, courts must not impose on journalists the technique and form of reporting. According to the complainant, the journalist's text comparing the political propaganda methods of the two politicians – both of whom allegedly exposed their families to win voters' approval – would be significantly less notable and plausible if the photographs of the two families had not accompanied the article. The complainant proposes that both the judgment of the Higher Court in the challenged part and the judgment of the Supreme Court be abrogated.

6. By Order No. Up-407/14, Up-987/15, dated 21 June 2016, the Constitutional Court panel accepted the two constitutional complaints for consideration. At the same time, it decided to join the two constitutional complaints for joint consideration and decision-making. In accordance with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court notified the Supreme Court and the Ljubljana Higher Court of the acceptance thereof. In accordance with the second paragraph of Article 56 of the CCA, it sent the constitutional complaints to the opposing party in the civil proceedings, i.e. the plaintiff Branko Grims, to reply thereto.

7. In his reply, the plaintiff in the civil proceedings proposes that both constitutional complaints should be dismissed. He states that the pretence of the complainant, i.e. that by publishing the comparison of photographs, which it explained in the text and in the editorial of the same issue, it only wanted to draw attention to the fact that the methods of political propaganda employed by the plaintiff (as a politician) and his party are equal to the methods used by the politician Joseph Goebbels and his party, and that therefore the publication of the photographs cannot be understood as an attack

on the plaintiff as a father, is insulting. In the opinion of the plaintiff, this is an obvious instance of hate speech and its publication cannot be justified in any manner. By publishing the photographs, the complainant allegedly also pursued (exclusively, in the opinion of the plaintiff) the objective of inciting consideration of the horrifying dichotomy between the family idyll depicted in the photograph of the Goebbels family and the cruel historical details of the murder of the six Goebbels children. Allegedly, this is indicated by the fact that for the comparison the complainant used a photograph from the family album of the Goebbels family and not a photograph that depicts the participation of the Goebbels family in public events, such as depicted in the photograph of the plaintiff's family, i.e. a photograph that would in fact demonstrate the claimed method of political propaganda. This allegedly communicates that the comparison of the methods of political propaganda, which is what the complainant refers to, was not at all at the forefront (and the publication of the photographs did not pursue it at all), as what was at issue was an insulting and disgraceful attack on the plaintiff for the purpose of dishonouring his personality, degrading him, and inflicting pain. In the opinion of the plaintiff, the complainant could have used photographs that show different methods of political propaganda (for instance, the plaintiff's and Goebbels's participation at the opening of an exhibition or during religious activities, by which it could also have achieved the pursued objective, i.e. a public discussion on the appropriateness of the plaintiff's political propaganda. As the plaintiff claims, in the case at issue, the publication of the photographs does not only represent a form of expression of the content written in the title and in the caption above the photographs, but *vice versa*: the comparison of the photographs represents the content of the conveyed information. Even if this is satire, where more exaggeration and even provocation is admissible, it is still necessary, in order to exclude unlawfulness, to pursue criticism of a person's conduct such that the reader understands sharp, savage, and brutal statements as criticism of a person's conduct or position, and not as an attack on his or her personality or as shaming, degradation, contempt, or ridicule.

8. The complainant responded to the reply of the opposing party in the civil proceedings in a submission dated 30 September 2016. It persisted in its allegations from the constitutional complaints. According to the complainant, the disputed publication of the photographs in the satirical section Mladinamit was not criticism of the plaintiff's personality but criticism of his political activities. The purpose of the complainant was to clearly show to the public, by publishing the photographs and the caption above the photographs, that the plaintiff, like Joseph Goebbels, uses his family for political promotion and that, therefore, the comparison of the plaintiff as a politician with Joseph Goebbels, which was initiated by Denis Sarkič on his Facebook profile, is not without grounds. The title and caption above the photographs published in the section Mladinamit allegedly informed every reader of the purpose of the comparison of the photographs.

B – I

The Scope of the Constitutional Review

9. In the case at issue, the publication of the text articles in the weekly Mladina is not disputable (neither is the editorial that was published in the same issue of the weekly Mladina as the disputed comparison of the photographs, nor are the three text articles published in the following issue of the weekly Mladina). There is also no dispute between the complainant and the plaintiff regarding whether the publication of the photograph of the plaintiff's family in the weekly Mladina is *per se* (in itself) admissible. For the plaintiff, the matter of dispute is the simultaneous publication of the photograph of his family and the photograph of the family of Joseph Goebbels, and the consequent visual comparison of the two families in the complainant's satirical section Mladinamit. The Higher Court and the Supreme Court assessed the issue of the admissibility of the published comparison of the photographs of the plaintiff's family and of the Goebbels family differently than the court of first instance. Therefore, the constitutional assessment is focused on the decisions of the Higher Court and the Supreme Court on the inadmissibility of the publication of the disputed comparison of the photographs, with regard to which the court imposed a civil sanction on the complainant, namely the duty to publish the judgment and the apology to the plaintiff in the complainant's weekly Mladina (Article 178 of the Code of Obligations, Official Gazette RS, No. 97/07 – official consolidated text). The complainant is in particular opposed to the position of courts in accordance with which it is necessary when balancing rights in collision (i.e. the right to the freedom of expression determined by the first paragraph of Article 39 of the Constitution, on the one hand, and the right to the protection of one's honour and reputation determined by Article 35 of the Constitution, on the other), to distinguish the text in the articles from the published photographs and to carry out a separate balancing in connection with the published photographs. With regard thereto, it faults the courts for having carried out the balancing without taking into account the broader and narrower contexts of the disputed comparison of photographs. With regard to such claims of the complainant, the Constitutional Court must assess the acceptability of the positions of the Higher Court and Supreme Court on which the challenged decision is based, namely from the viewpoint of the complainant's right determined by the first paragraph of Article 39 of the Constitution.

The General Starting Points of the Constitutional Review

10. The first paragraph of Article 39 of the Constitution guarantees freedom of expression of thought, freedom of speech and public appearance, freedom of the press, and other forms of public communication and expression. Everyone may freely collect, receive, and disseminate information and opinions. The position that a free individual capable of rational decision-making is the foundation of a democratically organised political system is well established in the constitutional case law.[3] In addition to the fact that it is a direct expression of the individual's personality in society, freedom of expression is also the founding constitutive element of a free democratic society. Therefore, the first paragraph of Article 39 of the Constitution protects, as a

special aspect, the freedom of journalistic expression, which ensures not only the right of the individual (the journalist), but also entails exercise of the democratic right of the public to be informed of matters of public interest.[4] An indispensable component of such system is public and open discussion of matters of general interest. Freedom of expression protects not only the dissemination of opinions that are well received, but also extends to satirical and sharp statements.[5] In accordance with the established constitutional case law, the limits of acceptable criticism depend to a significant degree on the social role of the person to whom it refers. A person who chooses a public function or to appear in public is subject to greater public interest.[6]

11. In accordance with the third paragraph of Article 15 of the Constitution, human rights and fundamental freedoms are limited only by the equal rights and freedoms of others. From this mutual co-dependency of rights it follows that, given their substantively open nature, the holder thereof has the duty to exercise them in a manner such that his or her conduct does not exceed the limit that allows others to exercise their respective rights in the same qualitative scope.[7] The same also applies to the right to the freedom of expression, which often comes into collision with the right to the protection of personal dignity (Article 34 of the Constitution) and the right to the protection of personality rights (Article 35 of the Constitution), among which also falls the right to the protection of one's honour and reputation. The right to personal dignity ensures individuals recognition of the value they have as persons and from which follows their ability to independently make decisions. From this human attribute there also follows the guarantee of personality rights.[8]

12. In view of the protection enjoyed by the right to the freedom of expression, any limitations of the exercise of this human right must be carefully balanced and convincingly justified. The Constitutional Court attributes special significance to the freedom of the press and journalistic reporting. The wide limits of the freedom of the press are one of the foundations of a modern democratic society; they contribute to the establishment and formation of an impartially informed public.[9] This holds true in particular for reporting on matters concerning which there is a general public interest in being informed. The Constitutional Court has already adopted the position that the finding of the special importance of the freedom of expression when journalistic reporting is concerned entails that when balancing interests and values in a conflict of human rights the freedom of expression must be attributed greater weight and the mentioned circumstances must be deemed as strongly tilting the balancing of the mentioned rights towards the freedom of expression.[10] Therefore, in cases where there is a limitation of the freedom of expression, it must be particularly meticulously verified whether there exist constitutionally acceptable reasons for such a limitation.

13. The first paragraph of Article 39 of the Constitution does not expressly state the reasons for a limitation of the freedom of expression. Such reasons are stated in the second paragraph of Article 10 of the Convention for the Protection of Human Rights and Freedoms (Official Gazette RS, Nos. 33/94, MP, No. 7/94 – hereinafter referred to

as the ECHR), which, in accordance with Article 8 and the fifth paragraph of Article 15 of the Constitution, is binding.[11] Therefore, when interpreting indeterminate legal terms, courts must also take into account the grounds determined by the second paragraph of Article 10 of the ECHR and the related case law of the ECtHR.

14. Within the framework of Article 10 of the ECHR, the ECtHR underlines the special importance of the freedom of the press in a democratic society. Freedom of expression is one of the essential foundations of a democratic society and one of the key conditions for its progress and for the self-realisation of each individual. Although the press must not overstep certain boundaries, in particular in relation to protection of the reputation and rights of others, it is the duty of journalists to disseminate information and ideas on matters of public interest in accordance with their obligations and responsibilities. Not only does the press have the task of imparting such information and opinions, but the public also has the right to be informed thereof.[13] Otherwise, the press would not be able to play its key role of “public watchdog”. The freedom of the press also includes the possibility to use a certain degree of exaggeration or even provocation.[14] In accordance with the established position of the ECtHR, freedom of expression as determined by Article 10 of the ECHR encompasses not only information and ideas that are well-received and considered non-insulting and neutral, but also those that insult, shock, or disturb. Such are the requirements of pluralism, tolerance, and open-mindedness, without which can be no democratic society.[15] In such context, it is the task of neither the ECtHR nor national courts to assess and replace the views of the press concerning the reporting techniques that must be applied in a particular case.[16]

15. In accordance with the established position of the ECtHR, freedom of expression also includes publishing photographs.[17] A decision of national courts that limits or prohibits the publication of photographs entails an interference with the right determined by Article 10 of the ECHR. Such an interference violates the Convention if it does not fulfil the requirements set out in the second paragraph of Article 10 of the ECHR. It follows from the case law of the ECtHR that when assessing cases such as the case at issue courts must distinguish between text articles and the publication of photographs and that they must carry out a separate balancing of the competing interests related to the published photographs.[19] Although the Convention-based protection of freedom of expression also includes publishing photographs, this is an area where, according to the ECHR, the protection of the rights and reputation of others is particularly important, as photographs may include very personal or even intimate information about the individual and about his or her family.[20] In such context, the ECHR underlines that a picture (an image) is one of the main attributes of a person’s personality, as it reveals unique characteristics of a person’s personality by which that person differs from other persons. The right to the protection of one’s image is thus one of the key components of personal development. It in particular presupposes the right of an individual to decide on the use of his or her image and to control it, including the right to reject the publication thereof.[21]

16. In instances where due to the protection of the reputation or rights of others there is a limitation or prohibition of the publication of photographs and thus an interference with Article 10 of the ECHR, the ECtHR assesses the necessity of such interference by taking into account the following key criteria:[22]

(i) the contribution to a discussion in the public interest;

(ii) how well-known the person is to whom the publication refers, and what the subject of the publication is; in this context, a distinction must be made between anonymous individuals and persons acting in public life, such as, for instance, political or other public personalities; at the same time, the assessment depends on whether the case is about reporting on facts that can contribute to a discussion in a democratic society (for instance, in cases that refer to politicians carrying out their official duties), or whether the case concerns the publication of details on the personal life of an individual who does not carry out such a function;[23] the assessment of how well-known the person is to whom the discussion refers is primarily the task of national courts, in particular if it concerns a person known above all at the national level;[24]

(iii) the prior conduct of the person to which the publication refers;

(iv) the method of gathering information, the veracity thereof, and the circumstances in which the photographs were taken (e.g. did the person agree with the taking and publication of the photographs, or was such done without his or her knowledge or even under pretext or by other unlawful means);[25]

(v) the substance, form, and consequences of the publication (in the framework of this criterion, the manner of the publication of the photograph or the article must be ascertained and evaluated, as well as the manner in which the person is presented in the photograph or in the article);[26]

(vi) the weight of the imposed sanctions.

In accordance with the case law of the ECtHR, every interference must be assessed in light of the case as a whole, considering whether it was proportionate to the pursued legitimate objective and whether the reasons stated by the national courts to justify the interference were relevant and sufficient.[27]

B – II

Application of the Mentioned Assessment Criteria in the Case at Issue

17. Considering the above, the Constitutional Court must assess whether the Higher Court and Supreme Court carried out a balancing of the rights in collision (i.e. the complainant's freedom of expression determined by the first paragraph of Article 39 of the Constitution and the plaintiff's right to the protection of one's honour and reputation determined by Article 35 of the Constitution) when assessing the admissibility of the publication of the disputed comparison of photographs, namely by taking into consideration the mentioned assessment criteria of the Constitutional Court and of the ECtHR, whether they took into account all the constitutionally decisive circumstances,

and whether they attributed appropriate weight to each of the conflicting rights when attributing weight to the individual criteria and circumstances.

18. One of the main allegations of the complainant is directed towards the position of the Higher Court and Supreme Court according to which it is necessary in the case at issue to carry out a separate balancing of the opposing rights and interests in relation to the published photographs. Taking into consideration the above-presented positions of the ECtHR, such a starting point cannot be disputable; on the contrary, in cases such as the case at issue, such an approach to balancing rights in collision is even imposed by the case law of the ECtHR (cf. Para. 15 of the reasoning of this Decision). The requirement to carry out a separate balancing with regard to the publication of photographs is namely based on the fact that the publication of a photograph can entail a much more severe interference with the personality rights of the affected person than a text article.[28] Such a starting point also cannot be disputable from the constitutional point of view. A separate balancing is all the more justified in the case at issue, as neither the publication of text articles nor the publication of a photograph of the plaintiff's family is disputable in and of itself, but merely the simultaneous publication and comparison of the two family photographs in the complainant's satirical section Mladinamit. With regard thereto, the complainant is of the erroneous opinion that a separate balancing entails that the wider and narrower context of the disputed publication of the photographs were not taken into account. Conversely, the requirement to carry out a separate balancing of conflicting rights with regard to the publication of the photographs does not mean that the court, when separately assessing the admissibility of the publication of the text article and of the publication of the photograph, does so out of the context in which each of them was published.

19. When balancing rights in collision, courts must take into account the circumstances of the case as a whole. In such balancing, it does not suffice to only take into account the content of the disputed publication, but in particular the context in which the disputed publication was made must also be taken into consideration.[29] The complainant justified the disputed publication of the photographs by referring to the wider and narrower contexts of the matter it reported on. The wider context was the text articles published in the same and in the following issue of the weekly Mladina. The narrower context is apparent from the title and the caption above the photographs published in the satirical section Mladinamit. The Higher Court and the Supreme Court took into consideration and assessed the importance of the wider and narrower contexts for [the assessment of] the disputed publication of the photographs. They took into account that the disputed publication of the photographs was made within the broader context of a discussion on the methods of political propaganda that the plaintiff and his political party employ, and of a comparison of such methods with those used by Goebbels and the German National Socialist party. According to the two Courts, in the text articles the complainant addressed a topic of public interest and thus contributed to a discussion in the general interest. With regard to the disputed comparison of photographs, the Courts decided, after carrying out a meticulous and

detailed balancing, that their publication exceeded both the wider and narrower contexts of the mentioned discussion. The narrower context of the publication of the photographs also encompassed the textual part (i.e. the title and the short caption that were published just above the photographs), in which the complainant satirically compared the plaintiff and Joseph Goebbels as manipulative politicians, and the visual part, in which the complainant compared their families by publishing the disputed photographs next to each other. Hence, the message of the pictorial (visual) part of the comparison is the comparison of the two families, not the two politicians. Therefore, the Constitutional Court accepts as justified the assessment of the Higher Court and Supreme Court that the publication of the photographs of the two families exceeded a comparison of the methods of political propaganda employed by the plaintiff and his political party with those employed by Goebbels and the German Nazi party. The publication of the photographs thus did not (further) contribute to a discussion in the public interest, but exceeded it. The Constitutional Court adds to the above that the photographs of the plaintiff and Goebbels were published in a separate section and not next to the text article as is usual when the author of the text article wishes to illustrate the message with a photograph. Therefore, the reference of the complainant to the wider context of the disputed publication cannot be accepted as well founded. Namely, an average reader of the weekly Mladina might not have read or known of the content of the text articles, therefore he or she did not necessarily link them with the photographs in the satirical section and *vice versa*.

20. The complainant faults the Supreme Court for attributing the disputed comparison of photographs a message (content) that it did not have. Ascertaining the meaning or message of disputed textual or pictorial content is undoubtedly an important step in such an assessment. In such context, the comprehensive, most commonly understood, and central meaning of the message borne by the disputed publication must be taken into consideration. The criterion in the assessment of the content and meaning of the message is the understanding of an average reader.[30] If a court inappropriately assesses the message (for instance by providing an unacceptable assessment that the assessed textual or pictorial content contains a certain message that it does not contain), it may cause that one of the two rights (which abstractly enjoy equal legal protection) that are balanced in the relevant case is disadvantaged by being assigned a worse starting point in balancing *in concreto*. In the assessment of the Constitutional Court, in the case at issue, an average reader of the weekly Mladina was aware of the comparison of the two families, namely the Grims and Goebbels families, when the two photographs of the families were published. Even if an average reader was not aware of the comparison of the two families in all its horrifying proportions (as the Supreme Court attributed to such a reader with regard to the murder of the Goebbels children by their parents), he or she was certainly aware of the comparison between the Grims family and the Goebbels family. Such follows already from the reasoning of the Higher Court, which assessed that the comparison with the photograph depicting the family of a Nazi criminal who is a commonly known symbol of evil and who in the past 70 years has gained, on the basis of historical facts, a

metaphorical dimension of bestiality, has a broader and thus a different communicative effect than a serious text article.

21. In the case at issue, another important circumstance must be taken into consideration, namely the fact that in the photograph the plaintiff is also (even primarily) in the role of the father of a family. The photograph of the plaintiff's family was taken during a public religious ceremony. There is no doubt that in the concrete situation at issue the plaintiff agreed to publicly expose his family. However, such does not mean that he also agreed that the family photograph may be published in any context. Also the plaintiff as a politician must be recognised and enabled judicial protection against inadmissible interferences with his honour and reputation, in particular when he is protecting the reputation of his family as a family member. Both aspects follow from the reasoning of the Higher Court, which stressed that "in the photograph, the plaintiff is indeed a politician, however he is inseparably also playing the role of the father of his family." The Constitutional Court accepts such assessment and considers it justified.

22. The complainant's allegation that the courts assessed the disputed comparison of photographs outside of the (broader and narrower) context thus proves to be unfounded. The complainant's reference to the judgment of the ECtHR in *Wirtschafts-Trend Zeitschriften- Verlagsgesellschaft m.b.H (No. 3) v. Austria*, in which the ECtHR allegedly assessed the context of the publication of a photograph and at the same time also took into account the title of the photograph and the short caption next to the photograph, also cannot lead to a different assessment. In the mentioned case, the subject of the assessment was the publication of a photograph of a deputy of the Austrian parliament and of his spouse, with whom he fled to Brazil and where he was arrested for being involved in criminal offences involving fraud and abuse of trust. The mentioned case is not comparable to the case at issue already due to the fact that in the mentioned case the deputy's spouse herself was involved in the fleeing and thus entered the public's field of interest.[31] Furthermore, it was not the photograph that hinted at the comparison with a well-known criminal pair, as such a comparison was only included in the text article, which was published on another page of the magazine. In the case at issue, the situation was different: while the text articles indicated that the plaintiff was willing to expose his family to the public to win the approval of the public, it is the published comparison of the photograph of the plaintiff and his family with a photograph of the Goebbels family that not only illustrates the opinions and criticisms written in the articles, but also exceeds the content of the text articles due to the open nature of its content.

23. As an important factor that allegedly tips the scales in favour of its freedom of expression, the complainant underlines the fact that the plaintiff is one of the most recognised politicians in the Republic of Slovenia and one of the most influential members of the SDS, and that therefore he must be willing to be subject to public criticism that can be much sharper and harsher than if he were an ordinary person.

With respect to this allegation it must be stressed that both the Higher Court and the Supreme Court took into account and assessed the plaintiff's social role and how well he is recognised when balancing the rights in collision. As the Higher Court underlined, the plaintiff is a deputy of the National Assembly and a well-recognised politician who has to be willing, as an (absolutely) public person and public office holder, to be subject to more critical remarks than others. Also the Supreme Court concurred therewith, and it also underlined that the plaintiff is a politician, a member of the opposition party SDS, and that, as a politician, he must be more tolerant of public criticism than ordinary individuals. This also applies as regards the publication of his family photographs if and insofar as they contribute to a discussion in the public interest. As follows from the reasoning above, there was no such contribution in the case at issue.

24. When balancing rights in collision, the courts also took into consideration and assessed the question of the prior conduct of the person to whom the publication refers.[32] As follows from the reasoning of the Higher Court, the plaintiff exposed his family to the public by himself (in general and in the concrete situation at issue) and thus to the highest possible degree exposed himself to public opinion and public criticism, which can be, by the nature of the matter, anything from exceptionally favourable to exceptionally unfavourable, sharp, negative, and even harsh. The Higher Court therefore assessed that the response of the complainant, which has a factual basis in the plaintiff's behaviour, is criticism of the plaintiff's behaviour. In addition, the complainant underlined throughout the proceedings that the plaintiff himself also sharply, negatively, and harshly criticised the actions of others, whereby he used sharp expressions and comparisons (including with fascism and Nazism). With regard thereto, the Supreme Court nonetheless explained that the fact that the plaintiff (similarly as numerous other politicians) tries to win voters' approval by appearing in public with his family, by which he tries to demonstrate his affinity with traditional family values, and the fact that the SDS party, who the plaintiff is a notable member of, publishes on its website harsh value judgments regarding the actions of others and also resorts to comparisons with Nazism and fascism, cannot justify such a harsh comparison of the plaintiff's family with the family of Joseph Goebbels. The mentioned position could be different in certain circumstances, as also distinctly sharp and harsh value judgments and opinions can prove to be admissible.[33] A comparison with a symbol of Nazism is undoubtedly a sharp value judgment. Such a sharp value judgment may only be justified in the event there exist special circumstances, namely a sufficient factual basis, in particular if a connection is established between such a value judgment and the prior conduct of the person at issue (i.e. if the person's prior actions triggered such sharp criticism or opinion).[34] The complainant did not demonstrate such a factual basis or connection.

25. As to the manner of acquisition of the photograph of the plaintiff's family that the complainant published in the section Mladinamit, it follows from the reasoning of the Higher Court that the published photograph depicts the plaintiff together with his family taking part in a mass on the occasion of the Assumption of Mary. In the assessment of

the Higher Court, it is important in such context that the plaintiff sat with his family in the first row at a mass that always receives significant media coverage, on an important holy day [a quasi national holiday], therefore he was simply not able to expect any privacy. The interference itself with privacy (the publication of the photograph of his family) and the interference with his right to the free exercise of religion (the publication of the photograph of the family at a mass on the occasion of the Assumption of Mary) were not disputable; the only disputable element was the interference with his honour and reputation caused by the comparison of his family with the Goebbels family. The Supreme Court did not adopt an express opinion on this criterion, which was actually not even necessary, given the indisputability of the circumstances concerning the acquisition of the photograph.

26. As follows from the challenged judgments (in particular from the reasoning of the Higher Court), the following criteria were decisive for the final result of the balancing in the case at issue: the content, the form, and the consequences of the publication. In assessing these criteria, the Higher Court stressed that the publication of the disputed photographs separately from the articles in another section, taking into consideration the connotations regarding the Nazi regime that have arisen since the Second World War, elicits in people a more multi-layered comparison than the one expressly offered by the complainant (in the articles). The comparison of the plaintiff's family with the family of a Nazi criminal who is a commonly known symbol of evil and who in the past 70 years has gained, on the basis of historical facts, a metaphorical dimension of bestiality, has, in the assessment of the Higher Court, a wider and thus a different communication effect than serious text articles. The Supreme Court also entirely concurred with the position of the Higher Court that the published photographs of the families exceeded a comparison of the methods of political propaganda employed, according to the journalists, by the plaintiff and his political party with those employed by Goebbels and the German Nazi party (which is what the caption above the photographs draws attention to). The Supreme Court added that the two photographs of the same format and composition positioned next to each other become a multi-layered comparison of the plaintiff's family with the family of a Nazi criminal, thus giving rise to an independent whole that applies a (negative) value judgment to the plaintiff's family, and thus to him as the father of the family. Therefore, the Supreme Court assessed that the published comparison of the family photographs went beyond the discussion on the appropriateness of the plaintiff's political propaganda, but rather primarily entailed a desire to elicit in the reader a shocking comparison and to underline the resemblance between the two families.

27. Hence, the key position from the challenged judgments is that photographs have a much greater documentary and communication power and that, precisely due to the open nature of the content of communication by a non-textual means of communication, journalists must act in a particularly sensitive and responsible manner when making such publications. There are no constitutional reservations as regards such position. A different legal assessment of textual and pictorial reporting

(*Wortberichterstattung* and *Bildberichterstattung*) is also established in other legal systems.[35] Images and pictures namely have a different effect than words and can much more intensively interfere with the personality rights of the affected person, which must also be taken into consideration in the case law within the framework of the criteria for balancing rights in collision.[36] One such particularity related to the publication of photographs is undoubtedly the tendency to attract the attention of readers by publishing such photos (i.e. eye-catchers). The power of a photograph is incomparably greater in particular as regards eliciting emotional effects and reactions in readers.[37] Therefore, the media have a great desire to use photographs, as they are an important tool for attracting attention, hence a tool that only creates interest in reading the possible text articles about the topic that is the subject of reporting.[38] Nevertheless, the complainant itself recognises the fact that photographs leave a much deeper mark on readers, as it stated in the constitutional complaint that “the journalist’s writing on the comparison of the methods of political propaganda of the two politicians, both of which allegedly exposed their families in public to win voters’ approval, would be significantly less credible were it not accompanied by the photographs of the two families. The mere textual writing of the journalist’s warning would also be significantly less noticeable [...]”[39] Also the Higher Court particularly underlined the fact that the complainant consciously decided to publish family photographs with the goal of achieving a special effect by comparing images; with regard to the open nature of the content of communication by a non-verbal means of communication, the Higher Court established that “this open nature, which cannot be created unintentionally by an average person, let alone by an average journalist, is the element due to which in the case at issue the standard of due and responsible conduct of journalists was overstepped by the manner in which the disputed photographs were published.” The position that journalists are bound by special standards of diligence and due and responsible conduct cannot be disputable from either the constitutional or Convention-based perspective of the protection of freedom of expression.

28. The allegation of the complainant that the positions of the Supreme Court (and, prior to that, of the Higher Court) on which the challenged decision is based lead to the conclusion that expression by publishing photographs is never admissible, as it can raise all kinds of associations and considerations, is unfounded. There is no doubt that freedom of expression includes not only the content of reporting, but also the form and the manner in which journalists wish to present to the public a topic in the public interest (be it by means of text, pictures, satire, etc.).[40] By adding photographs to their publications, they can always support their allegations regarding facts and value-based judgments (opinions), thus providing their claims and expressed opinion or criticism a factual basis and credibility. In every form of journalistic expression (e.g. textual, visual, etc.), journalists are also bound by certain duties and responsibilities. If they decide to present the selected topics by using photographs (either in combination with a text article or independently), they are bound to act with special diligence, namely the standard of due and responsible conduct, as follows from the positions explained above.

29. The complainant also faults the Courts (in particular the Higher Court) for inappropriately assessing the importance and the degree of protection that satire enjoys. Therefore, the Constitutional Court must also answer the question of the weight of the fact, for the case at issue, that the disputed comparison of photographs was published in the satirical section Mladinamit and that the title and the caption above the photographs informed the reader that the publication was satirical in nature. The satirical form of expression must undoubtedly be recognised special importance, as (political) satire has an important role in commenting on current social events.[41] Therefore, the limits of what is admissible are wider when the opinions and criticisms are expressed in a satirical manner. Also the Supreme Court follows such starting point and underlines that a satirical manner of commenting is based on exaggeration, distortion, taunting, and even provocation, whereby one strives to increase the power of communication, and this is precisely why the limit of what is admissible is positioned higher. From such a point of view, there is no doubt that the plaintiff must be willing to be subject to various criticisms, including those that are most unfavourable, sharp and taunting, concerning his political personality and participation. The complainant justified the disputed comparison of photographs by referring to the narrower context of the publication of the photographs and to the satirical tone of expression. As already stated, also the narrower context of the comparison of the photographs was composed of the textual part (i.e. the title and the short caption that were published just above the photographs), in which the complainant satirically compared the plaintiff and Joseph Goebbels as manipulative politicians, and the visual (pictorial) part in which the complainant compared their families. The allegations of the complainant regarding consideration of the narrower context of the publication of the photographs and the satirical tone of expression could have decisively influenced the result of the balancing (i.e. it could have tipped the scales towards its freedom of expression), had the complainant not gone any further than comparing the two political protagonists also in the visual (pictorial) part of the satirical publication.[42] This comparison could also be justified from the viewpoint of the position of the ECtHR, in accordance with which it is not *per se* inadmissible to use the term Nazi and such use does not automatically justify a conviction due to defamation.[43] However, the disputed photograph does not show only the plaintiff, who is otherwise the only object of the satirical comparison in the textual part of the section Mladinamit. The disputed photograph also depicts, in addition to the plaintiff, his wife and children, to which the satirical criticism in the textual part does not extend. Despite the fact that the plaintiff has to be willing to be subject to very harsh and provocative criticisms regarding himself as a politician,[44] he must be recognised legal protection from unjustified interferences with the reputation of his family. Taking the mentioned circumstances of the case at issue into consideration, it is evident, despite the starting point that a satirical style of expressing opinions and criticisms enjoys broader protection, that the fact that the disputed comparison of photographs was positioned in a satirical section of the publication does not entail a factor that would tip the scales towards the complainant's freedom of expression (the first paragraph of Article 39 of the Constitution).

30. Finally, the challenged decision of the courts must also be assessed from the viewpoint of the last relevant assessment criterion underlined by the ECtHR, namely the seriousness of the imposed sanction. The Constitutional Court found that the sanction imposed on the complainant (the publication of the judgment and of a public apology in the complainant's weekly) is a civil one and that it is not inconsistent with the principle of proportionality. The allegation of the complainant that due to the challenged judgments journalists will in the future be limited as to the choice of methods and forms of reporting on socially important topics and issues is unfounded. It clearly follows from the reasoning above that this is a borderline case and that, if certain circumstances had been different, the result of the balancing could have been different (i.e. in favour of freedom of expression). In the case at issue, only the detailed and conscientious balancing of all the circumstances of the case resulted in the decision that the plaintiff's right to the protection of one's honour and reputation outbalances the complainant's right to freedom of expression.

31. Considering all of the above, it is manifest that the Higher Court and Supreme Court took into account both of the human rights in collision and that they did not disregard either of them in the assessment. The Constitutional Court also assessed that the two courts carried out the balancing between the complainant's freedom of expression (Article 39 of the Constitution) and the plaintiff's right to the protection of one's honour and reputation (Article 35 of the Constitution) by taking into account the criteria adopted in the constitutional case law and the case law of the ECtHR, and they also took into consideration all the constitutionally relevant circumstances. Furthermore, in the assessment of the Constitutional Court, they attributed each of the two rights in collision appropriate weight when assessing the mentioned criteria. The balancing by the courts led to the result that due to the publication of the family photographs – unlike the text articles, whose publication was never disputed – there was an inadmissible interference with the plaintiff's right to the protection of one's honour and reputation. The courts also appropriately and sufficiently reasoned such result. Considering all of the above, the Constitutional Court has no grounds to interfere with the challenged judgments of the Higher Court and Supreme Court.

32. Since the challenged judgments of the Higher Court and Supreme Court did not violate the complainant's right determined by the first paragraph of Article 39 of the Constitution, the Constitutional Court dismissed the constitutional complaints.

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33. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Jadranka Sovdat, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Dr Etelka Korpič – Horvat, Dr Špelca Mežnar, Dr Ernest Petrič, Jasna Pogačar, Marko Šorli, and Jan Zobec. The Decision was

adopted by seven votes against two. Judges Jadek Pensa and Sovdat voted against. Judge Mežnar submitted a concurring opinion, and Judge Jadek Pensa submitted a dissenting opinion [joined by Judge Sovdat].

Dr Jadranka Sovdat
President

[1] The following text, in Slovene, was added above the photographs: “Not every Dr G. is Dr Goebbels. Our former colleague Sena Driski  compared Dr Grims to Dr Goebbels on his facebook (*sic*). The editorial board of Mladinamit joins the protest. Perhaps it appears that Dr G. is inspired by his role model, but he is still far from being like him, currently he is not even half as good. A lot of practice in manipulation is still needed. Sieg!”

[2] The Higher Court at the same time abrogated the judgment of the first instance in the part that referred to the payment of compensation and remanded the case in this part to the court of first instance for new adjudication (Point I/2 of the operative provisions). Furthermore, it dismissed the appeal against the decision of the court of first instance on the dismissal of the claim that the complainant has the duty to apologise to the plaintiff’s three children, and in this part upheld the judgment of the court of first instance (Point II of the operative provisions). In this respect, the Higher Court concurred with the position of the court of first instance on substantive law that the plaintiff cannot invoke a claim for his children and that, due to the lack of active standing, the claim has to be dismissed in this part. The decision of the Higher Court in the mentioned part was not challenged by constitutional complaint No. Up-407/14.

[3] *Cf.* Decision of the Constitutional Court No. U-I-226/95, dated 8 July 1999 (Official Gazette RS, No. 60/99, and OdlUS VIII, 174).

[4] *Cf.* Decision of the Constitutional Court No. Up-2940/07, dated 5 February 2009 (Official Gazette RS, No. 17/09, and OdlUS XVIII, 62).

[5] *Ibidem*.

[6] *Cf.* Decision of the Constitutional Court No. Up-462/02, dated 13 October 2004 (Official Gazette RS, No. 120/04, and OdlUS XIII, 86).

[7] This is stated by M. Pav nik, *Teorija prava: Prispevek k razumevanju prava* [Theory of Law: A Contribution to the Understanding of Law], 5th revised edition, IUS Software, GV Zalo ba (Zbirka Pravna obzorja), Ljubljana 2015, p. 178.

[8] *Cf.* Decision of the Constitutional Court No. U-I-226/95.

[9] This is stated by the Constitutional Court in Decision No. U-I-172/94, dated 9 November 1994 (Official Gazette RS, No. 73/94, and OdlUS III, 123).

[10] *Cf.* Decision of the Constitutional Court No. Up-2940/07.

[11] The second paragraph of Article 10 of the ECHR determines as follows: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,

territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

[12] *Cf.* Decision of the Constitutional Court No. Up-1128/12, dated 14 May 2015 (Official Gazette RS, No. 37/15).

[13] This is stated by the ECtHR in the Judgments in *Axel Springer AG v. Germany*, dated 7 February 2012, Para. 81 of the reasoning, and in *Verlagsgruppe News GmbH and Bobi v. Austria*, dated 4 December 2012, Para. 63 of the reasoning.

[14] This is stated by the ECtHR in the Judgment in *Axel Springer AG v. Germany*, Para. 81 of the reasoning.

[15] *Cf.* the Judgments of the ECtHR in *Oberschlick v. Austria*, dated 23 May 1991, and *Verlagsgruppe News GmbH and Bobi v. Austria*, Para. 63 of the reasoning.

[16] This is stated by the ECtHR in the Judgment in *Axel Springer AG v. Germany*, Para. 81 of the reasoning.

[17] *Cf.* the Judgment of the Grand Chamber of the ECtHR in *Von Hannover v. Germany (No. 2)*, dated 7 February 2012, and the Judgment in *Verlagsgruppe News GmbH and Bobi v. Austria*.

[18] *Cf.* the Judgment of the ECtHR in *Verlagsgruppe News GmbH and Bobi v. Austria*, Para. 59 of the reasoning.

[19] In the Judgment *Rothe v. Austria*, the ECtHR deemed it to be disputable that the national courts did not distinguish between the text of the article and the publication of the photographs and that they did not carry out a separate balancing of the conflicting interests relating to the photographs. The ECtHR drew attention to the need for distinguishing a text article, on the one hand, and the publication of a photograph, on the other, also in the Judgment in *Verlagsgruppe News GmbH and Bobi v. Austria*. It underlined that it has already held that protection of the rights and reputation of others is specifically important in the case of the publication of photographs, as they may contain very personal or even intimate information. Therefore, the ECtHR had no reservations as regards differentiating between the publication of a text article (which was admissible, according to Austrian courts), and the publication of a photograph next to the text article (which the Austrian courts prohibited).

[20] *Cf.* the Judgments of the ECtHR in *Von Hannover v. Germany (No. 2)*, Para. 103 of the reasoning, and in *Verlagsgruppe News GmbH and Bobi v. Austria*, Para. 66 of the reasoning.

[21] *Cf.* the Judgments of the ECtHR in *Von Hannover v. Germany (No. 2)*, Para. 96 of the reasoning, in *Standard Verlags GmbH v. Austria (No. 2)*, dated 4 June 2009, Para. 48 of the reasoning, and in *Verlagsgruppe News GmbH and Bobi v. Austria*, Para. 68 of the reasoning.

[22] See the Judgments of the Grand Chamber of the ECtHR in *Von Hannover v. Germany (No. 2)*, Paras. 109 through 113 of the reasoning, and in *Axel Springer AG v. Germany*, Paras. 89 through 95 of the reasoning.

[23] See, e.g., the Judgment of the ECtHR in *Von Hannover v. Germany (No. 2)*, Para. 110 of the reasoning.

[24] See also the Judgment of the ECtHR in *Axel Springer AG v. Germany*, Para. 98 of the reasoning.

[25] Cf. the Judgment of the ECtHR in *Verlagsgruppe News GmbH and Bobi v. Austria*, Paras. 84 through 86 of the reasoning.

[26] See the Judgments of the ECtHR in *Von Hannover v. Germany (No. 2)*, Para. 112 of the reasoning, and in *Verlagsgruppe News GmbH and Bobi v. Austria*, Para. 87 of the reasoning.

[27] This is stated by the ECtHR in the Judgments in *Axel Springer AG v. Germany* and *Von Hannover v. Germany (No. 2)*.

[28] This is stated by the ECtHR in the Judgment in *Rothe v. Austria*, Paras. 73 and 74 of the reasoning.

[29] Cf. Decision of the Constitutional Court No. Up-584/12, dated 22 May 2014 (Official Gazette RS, No. 42/14, and OdlUS XX, 34), Para. 11 of the reasoning.

[30] Cf. Decision of the Constitutional Court No. Up-406/05, dated 12 April 2007 (Official Gazette RS, No. 35/07, and OdlUS XVI, 51), Para. 10 of the reasoning.

[31] The decisive element for the assessment of the ECtHR was the fact that that Ms G. was not only the spouse of Mr R., she also prepared everything for his flight and in fact departed with him. According to the ECtHR, by joining her fleeing spouse (a member of parliament, whose criminal proceedings attracted significant public attention), she entered the public field and thus had to bear the consequences of her decision.

[32] In decision No. Up-584/12 (Paragraph 11 of the reasoning), the Constitutional Court adopted the position that when balancing [rights], courts must also take into consideration whether the disputed publication was provoked by the prior conduct of the person to whom the publication refers.

[33] Cf. the Judgment of the ECtHR in *Mladina, d. d., v. Slovenia*, dated 17 April 2014.

[34] Cf. the Judgments of the ECtHR in *Scharsach and News Verlagsgesellschaft mbH v. Austria*, dated 13 November 2003, Paras. 43 and 44 of the reasoning, in *Karman v. Russia*, dated 14 December 2006, Paras. 38 and 40 of the reasoning, and in *Brosa v. Germany*, dated 17 April 2014, Paras. 43 *et seq.* of the reasoning.

[35] Cf. the decision of the German Federal Constitutional Court (BVerfG), dated 5 June 1973 in *Lebach I* (BVerfGE 35, 202).

[36] This is stated by A. Beater in: A. Beater and S. Habermeier (Ed.), *Verletzungen von Persönlichkeitsrechten durch die Medien*, Mohr Siebeck, Tübingen 2005, p. 108.

[37] *Ibidem*, p. 108.

[38] Cf. *ibidem*. Cf. C. Renner in: A. A. Wandtke and C. Ohst (Ed.), *Praxishandbuch Medienrecht*, Vol. 4: *Persönlichkeitsrecht und Medienstrafrecht*, de Gruyter, Berlin/Boston 2014, p. 177, which underlines the danger that photographs merely serve to attract attention (as an eye-catcher).

[39] See the last paragraph on page 8 of the second constitutional complaint.

[40] Cf. the Judgment of the ECtHR in *Mladina, d. d., v. Slovenia*, Para. 45 of the reasoning.

[41] Cf. the Judgment of the ECtHR in *Eon v. France*, dated 14 March 2013. In this Judgment, the ECtHR underlined that the admissibility of the limitation of political satire must be particularly diligently assessed, as it concerns a manner of discussing issues

in the public interest, and any sanctions could suppress the satirical manner of public expression, which is very important in modern democratic societies. *Cf.* Declaration of the Committee of Ministers of the Council of Europe on the freedom of political debate in the media, adopted on 12 April 2003 (accessible on the website of the Council of Europe), Para. V.

[42] According to the complainant, such comparison was also a catalyst for a wider political debate on the methods of political propaganda and also for the disputed publication of the photographs. The first to use this comparison was Denis Sarkić – the then spokesperson of the Social Democrats political party, who posted on his private Facebook profile a photograph of the complainant next to a photograph of Joseph Goebbels, which was reported by numerous media outlets.

[43] *Cf.* the Judgments of the ECtHR in *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Paras. 43 and 44 of the reasoning, and in *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H v. Austria*, Para. 39. of the reasoning.

[44] *Cf.* the Judgment of the ECtHR in *Mladina, d. d., v. Slovenia*.