

Ruling no 155 of 17 February 2021 (19-24.780) - Cour de cassation (Court of Cassation) - First Civil Chamber - ECLI:FR:CCASS:2021:C100155

Freedom of expression and right to respect for private life : balancing these rights under the case-law of the European Court of Human Rights – The recall of a criminal conviction, even if pronounced publicly, is likely infringing private life. Referral through a hypertext link of an obituary already published on another website does not exclude the existence of an infringement of privacy.

First civil chamber

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Partial quashing

Appellant(s) : Mr H... K...

Respondent(s) : Mrs V... T...

Facts and procedure

1. According to the ruling under appeal (Paris, 25 September 2019), Mr K..., legal representative of [...], specialised in nutritional supplements, was charged as guilty, according to the ruling of 18 March 2009, having become final, of illegal operations as a pharmacy, marketing of medications without a marketing authorisation, violation of advertising regulations for medications and, by the ruling of 4 May 2011, of tax fraud and omission of accounting entries, this charge being annulled by the ruling of 11 April 2019 of the Cour de révision et de réexamen des condamnations pénales (*Court of revision and review of criminal convictions*).

2. By act of 20 July 2016, Mr K..., stating that he had unexpectedly discovered that a page had been built in his name on the website located at www.psiram.com, stating these criminal convictions and inviting the reader, through a hypertext link, to consult the obituary of his father published at www.dansnoscoeurs.fr and maintaining that this publication was an invasion of his personal privacy, brought proceedings against Mrs T..., author of the disputed page, based on Article 9 of the Civil Code, for payment of damages he incurred, and for deletion of this web page.

Reviewing plea

On the second part of the plea,

Statement of plea

3. Mr K... objects to the ruling for dismissing his requests, whereas *"the law concerning the respect of private life of an individual and freedom of expression having the same normative value, it is up to the court receiving the referral to seek a balance between these rights, and, if necessary, to favour the solution that protects the most legitimate interest to the greatest degree. To carry out this effort to balance these rights, the court must consider the contribution of the incriminating publication to a debate in the general interest, the renown of the person who is the subject of the publication, the subject of the publication, the prior actions of the person concerned, the content, the form, and the consequences of the publication, and carry out a concrete examination of each of these criteria. By limiting, through demonstration of evidence that the disputed website claimed to serve the purpose of discussing "irrational beliefs" and dealt with subjects such as conspiracy theories, homeopathy, esoteric beliefs, spiritual healing or even electromagnetism, without identifying the subject of general interest that Mrs T...'s statements concerned which would be of a nature that justifies the publication of information regarding Mr K...'s private life, the cour d'appel (Court of Appeal) deprived its decision of a legal basis under Articles 8 and*

10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 9 of the Civil Code."

Court's response

In view of Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 9 of the Civil Code :

4. According to Article 8 of this convention, everyone has the right to the respect of their private and family life. If this text cannot be invoked in order to claim damage to reputation predictably resulting from the individual's own actions, such as a criminal offence, the mention of criminal charges made against a person that are presented in a publication, including during said person's professional activity, is an infringement of his right to personal privacy (ECHR, judgment of 28 June 2018, M.L. and W.W. v. Germany, nos. 60798/10 and 65599/10).

5. According to its Article 10, everyone has the right to freedom of expression, but this freedom can be subject to certain restrictions or sanctions provided for by law that constitute necessary measures in a democratic society, including the protection of reputation or the rights of others.

6. Since the right to personal privacy, also protected by Article 9 of the Civil Code, and freedom of expression have the same normative value, it is up to the court receiving the referral to determine the balance between them depending on the interests at play and to favour the solution that provides the most protection of the most legitimate interest.

7. This balance must be carried out by considering the contribution of the disputed publication to a debate in the general interest, the renown of the person in question, the subject of the publication, the prior actions of the person concerned, the content, the form, and the consequences of the publication, as well as, if applicable, the circumstances surrounding photos taken (ECHR, judgment of 10 November 2015, Couderc et Hachette Filipacchi associés v. France [GC] no. 40454/07, § 99, 100, and 102) and, even if the subject at the origin of the article is in the general interest, the content of the article still has to be of a nature as to contribute to public debate on the subject in question (ECHR, judgment of 29 March 2016, Bédat v. Switzerland [GC], no. 56925/08, § 64). It is the responsibility of the court to carry out a concrete examination of each of these criteria (1st Civil Chamber, 21 March 2018, appeal no 16-28.471, Bull. 2018, I, no 56).

8. To rule out the existence of an infringement of Mr K... 's personal privacy and to dismiss his claims, the ruling maintains that the criminal convictions were issued publicly and concern his professional activity, and that he cannot allege the facts to be old and to have the right that they be forgotten, while on the date of their publication on the disputed website, these convictions had not been subject to amnesty. It adds that Mrs T... mentioned the fact that the ruling of 4 May 2011 was annulled by the Cour de révision et de réexamen des condamnations pénales (*Court of revision and review of criminal convictions*).

9. In so ruling, without seeking, as is its responsibility concerning the infringement of Mr K... 's privacy, if the disputed publication consisted of a debate in the general interest, justifying the reproduction of the criminal convictions concerning him, the cour d'appel (*Court of Appeal*) did not provide a legal basis to its decision.

On the third part of the plea,

Statement of plea

10. Mr K... makes the same criticism of the ruling, whereas "*the fact that information considered of a private nature is already in the public domain does not exclude it from the protection of the respect of privacy. It cannot be used in a way or manner that goes beyond what the concerned party can reasonably expect. By ruling, in order to dismiss any infringement of the respect of Mr K... 's privacy, that his father's obituary was published by the family on an obituary website available to any internet user, including for several years following his death, even if such a circumstance did not authorise Mrs T... to publish it attached to the disputed article, the cour d'appel (Court of Appeal), ruling by improper motives to justify the infringement of Mr K... 's privacy, deprived its decision of a legal basis under Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 9 of the Civil Code.*"

Court's response

In view of Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 9 of the Civil Code :

11. The fact that the information is already in the public domain does not necessarily remove it from the protection of Article 8 of the Convention, the interest of publishing this information needing to be balanced against the consideration of aspects of personal privacy. These come into play in situations where information was gathered by a specific person, where data of a personal nature is processed or used and where the elements in question

were made public in such a way that exceeds what the parties concerned could reasonably expect (ECHR, ruling of 27 June 2017, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], no 931/13, § 134-136).

12. In order to dismiss Mr K...’s claims, the ruling maintains that his father’s obituary was published by the family on a website, available to all internet users, including for several years following the death and that Mr K... would have to have known.

13. In so ruling, while this sole circumstance would not allow for dismissal of the existence of an infringement of personal privacy following the use of the obituary in the disputed publication, the cour d’appel (*Court of Appeal*) did not give a legal basis for its decision.

ON THESE GROUNDS, and without having to rule on the other parts of the plea, the Court :

QUASHES AND SETS ASIDE, except on what it declares inadmissible, the exception based on the invalidity of the referral and rejects the objection of inadmissibility (*fin de non-recevoir*) based on "una via electa", the ruling of 25 September 2019, between the parties, by the cour d’appel (*Court of Appeal*) of Paris ;

RETURNS, except on these points, the case and the parties to the status existing prior to the said ruling and refers them to the cour d’appel (*Court of Appeal*) of Versailles ;

President : Mrs Batut

Reporting Judge : Mr Serrier, Judge Referee

Avocate-General : Mrs Legohérel, Advocate-General Referee

Lawyer(s) : SCP Piwnica et Molinié - SCP Waquet, Farge et Hazan

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