

Privacy of footballer's children sufficiently protected in Germany

The European Court of Human Rights has found that the Article 8 rights of the children of Oliver Kahn, former goalkeeper of the German national football team, were sufficiently protected by the German government.¹ This was despite repeated publication of photographs of their image by two German magazines, even after a court order was obtained ordering a blanket ban on such publication.

The European Court ruled that there had been no violation of the applicants' Article 8 right to respect for private and family life by the German government in refusing to grant additional compensation for the publisher's breaches of the ban, on top of the fines already offered. The German government had fulfilled their positive obligations towards the applicants by providing them with the possibility of having fines imposed on the publisher when in breach of the ban, and by providing an appeals procedure where the applicants felt that the fines imposed were inadequate. In the European Court's view, this amounted to sufficient and effective protection under Article 8 of the Convention, and the German courts were correct in ruling that additional compensation should not be awarded.

Background

The applicants, Katharina-Maria Kahn and David Kahn, are both German nationals and are the children of Oliver Kahn, former goalkeeper of the German national football team, and his ex-wife Simone Kahn.

Between 3 July 2004 and 3 June 2009 magazines *Neue Woche* and *Viel Spass*, both owned by the publisher Medien GmbH Innovation, published photographs of the children with their parents on nine separate occasions. On each occasion the pictures were accompanied by articles discussing the relationship of Oliver Kahn and Simone Kahn following their divorce.

The first four publications occurred in July 2004 and showed the children taking part in family activities while on holiday. Subsequently, the applicants applied to the Hamburg Regional Court seeking a ban preventing Medien from publishing photographs in which they appeared. In January 2005 the Hamburg Regional Court held that the applicants' right to their own image under Article 22(1) of the Copyright Act had been breached and imposed a ban on publication. The Hamburg Regional Court also held that failure to comply with the ban could cause the publisher to face fines of up to €250,000 for non-compliance under Article 890(1) of the Code of Civil Procedure.

In breach of the ban, both *Neue Woche* and *Viel Spass* published photographs of the applicants on five further occasions between July 2007 and June 2009. In 2007 the Regional Court ordered the publisher to pay fines of €5,000, €7,500 and €15,000. In December 2007 the applicants applied to the Regional Court requesting that the publisher pay at least €40,000 to each applicant as compensation for the use of their image without consent. In July 2009 the applicants also applied to the Regional Court requesting a new fine of at least €60,000 for further breaches of the ban by the publisher, but the applicants later withdrew this application.

Proceedings

In two judgments on 11 July 2008 the Regional Court awarded the applicants the €40,000 compensation requested. The Regional Court held that there had been a serious breach of the applicants' right to protection of their personality rights, as the photographs showed them in protected

¹ *Kahn v Germany* [2016] ECHR 276.

situations, such as enjoying time with their parents or away on holiday. The Regional Court noted that the publisher had repeatedly published pictures over the previous four years, despite the ban that had been ordered in January 2005. Consequently, the ban had been ineffective and it was necessary to grant pecuniary compensation that would be both compensatory and preventative.

In November 2008 the German Court of Appeal quashed both judgments made by the Regional Court. The Court of Appeal held that it was not necessary to grant compensation to the applicants when the terms of the ban imposed in 2005 by the Regional Court allowed for the applicants to request that the publisher pay fines for such breaches. The Court of Appeal found that pecuniary compensation aimed to compensate the victim and to prevent further breaches and the penalty payment procedure took both of these two aspects into account. The Code of Civil Procedure allowed for fines of up to €250,000 and a prison term of up to two years if a publisher defaulted in payment. Accordingly, it was not necessary for pecuniary compensation to be awarded when the applicants had at their disposal other effective means of protection against future violations of their image rights.

In June 2009 the German Federal Court of Justice dismissed the applicants' appeal on the same grounds. The Federal Court of Justice also highlighted that the pictures had been pixellated and so did not constitute a serious breach of the applicants' right to their own image. The applicants could only be identified in the pictures due to the presence of their parents and the text accompanying the photos. Furthermore, the focus of the articles had been the breakdown of the relationship between the parents as opposed to the applicants themselves.

In September 2009 the Federal Constitutional Court denied the applicants' constitutional appeal and held that the refusal to grant compensation following a breach of an individual's right to her or his own image was not incompatible with constitutional law where the individual has other options of compensation. The applicants appealed to the European Court of Human Rights.

Decision

For the European Court of Human Rights, the question to be considered was whether the applicants had been afforded effective protection by the German courts under Article 8 of the Convention and the right to privacy. The question was whether the German government had fulfilled its positive obligation under Article 8 by providing for the ban in 2005 and the possibility of subsequent fines, or whether the German government would need to allow for further pecuniary compensation to be granted to ensure adequate protection under Article 8.

The court highlighted that the penalty payment procedure had been both quick and simple, and that as a result of the actions brought by the applicants the publisher had already been ordered to pay fines that amounted to 68% of the amount now claimed. In addition, the applicants had the opportunity to challenge the amount of the fines awarded by the Regional Court on appeal to the Court of Appeal, but had chosen not to do so. The court noted that the Regional Court had provided for a steady increase in the amount of penalty fines as the publisher's breaches persisted. Accordingly, there was no reason to believe that such an appeal would have been bound to fail.

In the context of the application, the court found it necessary to take into account the nature of the disputed publications and, in doing so, supported the findings of the Court of Appeal and Federal Court of Justice. The court reiterated that the faces of the applicants had been pixellated, that the applicants could only be identified by the presence of their parents and that the focus of the articles was the marital breakdown of their parents. As such, the interference with the applicants' Article 8 right was not severe enough to justify or necessitate the grant of pecuniary compensation. In

conclusion, the ECtHR found that the possibility of obtaining fines was not a bar to compensation, but that it was to be considered in conjunction with an assessment of the severity of the infringement in all the circumstances of the case. As the breach in this case was not severe and the applicants had recourse to relief under the penalty payment procedure, the German government were not in breach of their positive obligations under of Article 8.

Comment

The case was decided on its specific facts. It is clear that the pixellation of the children's faces played a key part in the court's decision that there was no breach of Article 8.

In light of the UK Court of Appeal's decision in *Weller v Associated Newspapers Limited*,² it is uncertain what the outcome would have been if the same facts had been presented to the UK courts. In *Weller*, the Court of Appeal held that publication of unpixelated photographs of Paul Weller's children while out shopping and relaxing in a café constituted a breach of their Article 8 rights. Lord Dyson MR highlighted that a "child's reasonable expectation of privacy cannot be different from that of a child whose parents are not in the public arena, unless the parents have courted publicity for the child". He further noted that: "The fact that a child's parents are in the public eye means that the child is potentially exposed to a special vulnerability: it could put their safety and security at risk."

While the outcome of a similar case before the UK courts is uncertain, it remains clear that the principle in *ETK v News Group Newspapers Ltd*,³ as followed in *Weller*, still stands – namely that the Article 8 rights of children should be protected in the absence of any "countervailing reasons of considerable force displacing them".

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² [2015] EWCA Civ 1176.

³ [2011] EWCA Civ 439.