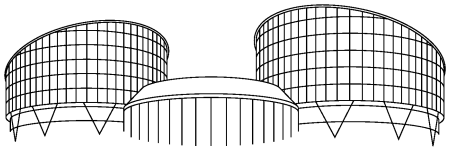

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ERNST AUGUST VON HANNOVER v. GERMANY

(Application no. 53649/09)

JUDGMENT
(Extracts)

STRASBOURG

19 February 2015

FINAL

19/05/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ernst August von Hannover v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 20 January 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 53649/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Ernst August von Hannover ("the applicant"), on 5 October 2009.

2. The applicant was represented by Mr M. Prinz, a lawyer practising in Hamburg. The German Government ("the Government") were represented by their Agent, Ms K. Behr, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the refusal by the Federal Court of Justice to grant him a notional licence in compensation for the unlawful use of his forename in an advertisement had infringed his right to respect for his private life within the meaning of Article 8 of the Convention.

4. On 15 December 2011 the application was communicated to the Government.

5. The company British American Tobacco (Germany) GmbH was granted leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1954 and lives in Monaco.

A. Background to the case

7. In 1998 the applicant was involved in an altercation with a cameraman outside his property, "Gut Calenberg", during which he struck the cameraman with an umbrella. In January 2000 the press reported on another scuffle between the applicant and the manager of a discotheque on Lamu Island off the Kenyan coast, as a result of which the applicant was convicted of assault.

8. On 27 March 2000 the company British American Tobacco (Germany) GmbH ("the company") launched a ten-day advertising campaign with full-page advertisements in magazines and on posters at bus stops and other busy locations showing, on the lower half, a crumpled packet of Lucky Strike cigarettes lying on its side. The top half read, in large lettering: "Was it Ernst? Or August?" At the bottom of the advertisement was the phrase "Lucky Strike. Nothing else." ("*Lucky Strike. Sonst nichts.*") The campaign covered eighteen towns and cities and 6,364 billboards, which meant that it had a potential reach of approximately 2.97 million people. It was also reported in the media.

9. The applicant asked the company that had commissioned the advertisement and the advertising agency that had designed it to discontinue the campaign. The agency agreed to do so in writing, but the company refused. The applicant then made an urgent application to the Hamburg Regional Court.

10. On 31 March 2000 the Regional Court granted an interim injunction against any further distribution of the advertisement at issue, and confirmed the injunction on 14 April 2000. The company subsequently announced that it was discontinuing the advertisement, but refused to reimburse the costs incurred by the applicant for the official notice served on it.

11. On 8 March 2001 the applicant asked the company to pay him damages of 250,000 euros (EUR). The company did not respond to that request.

B. Decisions of the German courts

1. Judgment of the Regional Court

12. On 23 December 2003 the applicant applied to the Hamburg Regional Court for an order requiring the company and the advertising agency that had designed the advertisement to pay him EUR 100,000 for a "notional licence" (*fiktive Lizenz*) and at least EUR 500 in compensation for infringing his right to protection of personality rights, and also to reimburse the costs incurred in serving the official notice.

13. On 21 January 2005 the Regional Court allowed the applicant's application as regards the notional licence and costs, and dismissed it as regards compensation. It pointed out that although everyone had the right to

decide whether or not to allow his or her name to be used for advertising purposes, the general right to protection of personality rights (*allgemeines Persönlichkeitsrecht*) protected a person against the unlawful use by third parties of his or her name, including in the context of advertising. The Regional Court went on to observe that although the forenames "Ernst" and "August" were fairly common, the combination of the two was not. Moreover, since entering into a relationship with Princess Caroline of Monaco the applicant had become well known and the crumpled cigarette packet was a clear allusion to his scuffles. The Regional Court explained that advertising was also protected by freedom of expression in so far as it contributed to shaping public opinion; this applied, in its view, to the impugned advertisement. It further pointed out that both the right to freedom of expression and the right to protection of personality rights were protected under the Basic Law and that, in principle, they deserved equal respect. Where a person was used for advertising purposes without his or her consent, the right to protection of personality rights prevailed as a general rule. The Regional Court added that the company's argument that as a result of his scuffles, the applicant had himself caused the event to which the advertisement referred did not deprive him of protection but it did affect the degree of the interference and the level of protection of freedom of expression. In conclusion, the Regional Court held that when balancing the competing interests, more weight was to be attached to the protection of the applicant's personality rights than to the company's right to freedom of expression regarding an advertisement which was essentially humorous in nature and pursued commercial aims.

14. As regards the pecuniary damage sustained, the Regional Court pointed out that the aim of a "notional licence" was to ensure that anyone using someone else's personality without permission would not be in a more advantageous position than if he or she had obtained the person's consent. It explained that the cost of such a licence was determined on the basis of the amount of a fee that would have been reasonable (*angemessen*). Having regard in particular to the applicant's high profile, the billboards and advertising media used, and the fact that the advertisement had only used the applicant's forenames, the Regional Court assessed the pecuniary damage at EUR 60,000. It also awarded the applicant the costs incurred in serving the official notice because they had resulted from the actions of the company and the agency.

15. On the other hand, the Regional Court did not award the applicant compensation in respect of non-pecuniary damage on the ground that there had been no serious interference with the protection of his personality rights. It emphasised that the applicant had struck the cameraman in public and that the advertisement had simply referred back to that event. Furthermore, the fact that the advertisement was merely derisive meant that there was no unavoidable need (*unabwendbares Bedürfnis*) to award

pecuniary compensation, and the award of a notional licence should be deemed sufficient redress.

2. Judgment of the Court of Appeal

16. On 15 May 2007 the Hamburg Court of Appeal upheld most of the Regional Court's judgment, varying it solely as regards the order for the company to reimburse the costs incurred in serving the official notice.

17. The Court of Appeal observed that the company and the agency had interfered with the applicant's right to his own name without his permission. In that context, it pointed out that even though the advertisement had only used the applicant's forenames, those names were well known to the general public because of the relationship between the applicant and the daughter of Prince Rainier III of Monaco and the repeated press reports on the applicant's altercations in 1998 and 2000. It further noted that the company had derived a pecuniary advantage from using the applicant's forenames. In cases such as the present one, where the impugned advertisement was designed to enhance the recognition and sales of a brand of cigarettes, freedom of expression generally took second place to the protection of personality rights. The Court of Appeal considered that the impugned advertisement had made very little contribution, if any, to shaping public opinion, that the applicant's scuffles had been neither a political nor a societal event, and that the incidents had only been exploited for the purpose of entertaining a general public curious about the behaviour of famous people.

18. The Court of Appeal further pointed out that the impugned advertisement had infringed the pecuniary aspect of the right to protection of personality rights by depriving the applicant of his right to make his own choice as to whether and how his name could be used for advertising purposes. Clearly, the advertisement had not given the impression that the applicant identified with the product advertised or that he recommended it, nor was it offensive or degrading in nature, but with the sole aim of increasing sales of a brand of cigarettes it publicly mocked the applicant by suggesting that he even crumpled up cigarette packets.

19. As regards the cost of the notional licence, the Court of Appeal pointed out that the unauthorised use of a person's name for commercial purposes was tantamount to unlawfully using a person's image and infringed the pecuniary aspect of the right to protection of personality rights. It held that in using the applicant's name without his consent the company and the agency had shown that they had attached economic importance to that name. The company and the agency were therefore under an obligation to pay the applicant the amount corresponding to the use of his name, and this obligation existed irrespective of whether the person in question would have been prepared to consent or not.

20. The Court of Appeal further stated that the cost of the notional licence had to be freely determined on the basis of all the relevant circumstances. It noted that the particular feature of the impugned advertisement was that it mocked the applicant, which made it unlikely that the applicant would have authorised it. However, it considered that the amount of the fees agreed between advertising companies and famous people who consented to the use their names might provide an indication for determining the cost of the notional licence. It noted in that connection that the company was one of the largest tobacco companies in Germany and that the impugned advertisement had been part of a very successful advertising campaign which the company had launched in 1989. The advertisement in question had taken up a full page in several national magazines and also, from 27 March 2000 onwards, in the form of posters at bus stops and other busy locations. Lastly, emphasising that the applicant was a well-known figure, it found that the advertising campaign had indeed attracted extensive public attention, thus justifying the award made by the Regional Court.

21. The Court of Appeal granted leave to appeal on points of law, on the grounds that the question whether the use of a famous person's name for advertising purposes was justified where the advertisement referred to an event in contemporary history which was of no, or virtually no, interest except from an entertainment perspective had not yet been determined by the case-law of the Federal Court of Justice, and that a decision was required from that court in order to develop and maintain a standard line of authority.

3. Judgment of the Federal Court of Justice

22. In a judgment of 5 June 2008 (no. I ZR 96/07) the Federal Court of Justice quashed the Court of Appeal's judgment. It held that the applicant's claims were ill-founded because the company and the agency had not unlawfully interfered with his right to protection of personality rights or his right to his name, given that the use of his name in the impugned advertisement was covered by the right to freedom of expression as guaranteed by Article 5 § 1 of the Basic Law (see "Relevant domestic law and practice"). While upholding the findings of the Court of Appeal as regards the existence of an interference and the possibility of granting a notional licence in accordance with the principle of unjust enrichment, the Federal Court of Justice held that the Court of Appeal had not had sufficient regard to the fact that the pecuniary components of the right to protection of personality rights and the right to one's name were only protected by ordinary law, whereas freedom of expression enjoyed protection under constitutional law.

23. The Federal Court of Justice explained at the outset that the case before it related solely to interference with the pecuniary components of the rights relied upon, since the applicant's contention that the advertisement

had also infringed the non-pecuniary components of his rights had already been dismissed by the Regional Court. It pointed out that the rights to protection of personality rights were among the fundamental rights safeguarded by the Basic Law to the extent that they protected non-pecuniary interests, but that the pecuniary components were only protected by civil law and therefore did not prevail over freedom of expression. The Federal Court also observed that the protection conferred by Article 5 § 1 of the Basic Law also covered advertising whose content contributed to shaping public opinion, while specifying that that was not only the case where the advertisement referred to a political or historical event, but also where it dealt with questions of general interest. Furthermore, reports with an entertainment purpose could also play a role in shaping public opinion, or indeed, in certain circumstances, could stimulate or influence the shaping of public opinion more effectively than strictly factual information.

24. The Federal Court of Justice noted that the impugned advertisement provided a satirical, derisive slant on the applicant's scuffles outside his "Gut Calenberg" property and on Lamu Island. The media had reported on these events, mentioning the applicant's name and publishing photographs of him, because there was a particular public interest in information about the incidents on account of the applicant's relationship with the daughter of Prince Rainier III of Monaco. The Federal Court of Justice considered that even though the company had merely alluded to the applicant's scuffles as part of its advertising campaign, it could still rely on the specific protection of freedom of expression. It held that the fact that the advertisement – by using the applicant's forenames and alluding to his propensity for picking fights – had been mainly intended to increase sales of the cigarette brand by capturing the attention of the general public did not mean, as the Court of Appeal had maintained, that the right to protection of personality rights prevailed in general.

25. The Federal Court of Justice continued as follows:

> "In weighing up the competing interests the Court of Appeal failed to take adequate account of the fact that the only issue at stake in this case was the protection of the pecuniary components of the right to protection of personality rights, such protection being based solely on civil law and not constitutional law. In the case of interference with the pecuniary components of the right to protection of personality rights because a well-known person's name has been used in an advertisement without his consent, it cannot simply (*ohne weiteres*) be maintained that the person's right to protection of his personality rights will always prevail over the advertiser's right to freedom of expression. On the contrary, it might be appropriate to tolerate an interference with protection of personality rights resulting from reference to a person's name if, on the one hand, the advertisement alludes in a derisive, satirical manner to an event involving the person and forming the subject of public debate and if, on the other hand, it does not exploit the person's brand image (*Imagewert*) or advertising value (*Werbewert*) by using his name, and if it does not give the impression that the person identifies with the product advertised or advocates its use (reference to the Federal Court of Justice judgment of 26 October 2006, no. I ZR 182/04)."

26. The Federal Court of Justice held that the impugned advertisement had not given such an impression. It had merely served as a reminder of the applicant's scuffles for anyone who already knew about them, while anyone who had never heard of those events would have been unable to understand the play on words, especially since the incidents had not been actually mentioned but had been hinted at in a particularly clever (*pfiffig*) way. The Federal Court of Justice therefore took the view that the advertisement had been part of the public debate on the applicant's aggressive attitude. Above and beyond the derisive, satirical allusion to the events already known to the public, it had been devoid of any offensive or seriously degrading content in relation to the applicant. Given the absence of any suggestion that the applicant identified in any way with the product advertised, there were no grounds for considering that the advertisement was disparaging towards him simply because it was promoting cigarettes. The Federal Court of Justice concluded that the applicant's interest in not being mentioned in the advertisement without his consent carried less weight than the tobacco company's freedom of expression, and that in the absence of a violation of the pecuniary or non-pecuniary components of his right to protection of his personality rights, the applicant could not claim an entitlement to a notional licence or to reimbursement of the costs incurred in serving the official notice.

4. Decision of the Federal Constitutional Court

27. On 6 April 2009 the Federal Constitutional Court declined to accept for adjudication a constitutional complaint by the applicant (no. 1 BvR 3141/08). It provided no reasons for its decision.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. The applicant complained that the refusal by the Federal Court of Justice to grant him a notional licence in compensation for the unauthorised use of his forenames in the impugned advertisement had violated his right to respect for his private life as laid down in Article 8 of the Convention, the relevant part of which provides:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

31. The Government contested that argument.

A. Admissibility

32. The Government submitted that the applicant's claim did not fall within the scope of Article 8 of the Convention because the impugned advertisement only mentioned his forenames, which were common and could not on their own have suggested any connection with him. Only the applicant's scuffles in 1998 and 2000, which had attracted extensive media coverage – and for which he himself been responsible – had brought him to the attention of the public at large and could thus have linked him with the advertisement. Previously, the general public and the media had shown interest in him solely in his capacity as the husband of Princess Caroline of Monaco. The Government asserted that the only option available to the applicant was to seek an injunction, under Article 8 of the Convention, against any further public reference to the incidents in question; and the Hamburg Regional Court had granted the applicant's application for an injunction prohibiting any further distribution of the advertisement. The Government took the view that although Article 8 protected an individual's reputation, it did not confer any right to compensation in the form of a notional licence where the individual's reputation had been damaged by his own behaviour.

33. The applicant submitted in reply that the right to respect for private life also covered the right to one's surname and forename (referring to, among other authorities, *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; *Mentzen v. Latvia* (dec.), no. 71074/01, ECHR 2004-XII; and *Burghartz v. Switzerland*, 22 February 1994, Series A no. 280-B). Article 8 of the Convention was thus indisputably applicable to the present case.

34. The Court reiterates that Article 8 of the Convention does not contain any explicit provisions on forenames. However, since they constitute a means of identifying persons within their families and the community, forenames do concern private and family life (see *Guillot v. France*, 24 October 1996, § 21, *Reports of Judgments and Decisions* 1996-V; *Henry Kismoun v. France*, no. 32265/10, § 25, 5 December 2013; and *Mentzen*, cited above, and the references cited therein). The Court notes in the present case that although, as the Government submitted, the applicant's forenames are common, the fact that both forenames were mentioned above a crumpled cigarette packet and that the advertisement had appeared shortly after the applicant's second altercation, which had been extensively commented on in the press, made it possible to link him to the advertisement. Accordingly, it cannot be maintained that the applicant's right to respect for his private life has not been affected.

35. The Court therefore considers that this complaint falls within the scope of Article 8 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

36. The Government took the view that there had been no unjustified interference with the applicant's right to respect for his private life, because the requisite level of severity had not been attained. Since the advertisement in issue had not used the applicant's full name or a photograph of him, he had not suffered any pecuniary damage or any physical or psychological consequences, given that the advertisement had not suggested that the applicant was personally promoting the cigarettes or was in any way linked to them.

37. The Government emphasised that even supposing that there had been interference, the German legal system guaranteed sufficient protection. They observed that the present application did not concern the applicant's right to seek an injunction against the advertisement (*Unterlassungsansruch*), which the Regional Court had recognised and which had therefore not been the subject of the impugned proceedings. The question was not whether but how the German courts should have intervened. On that point the Government took the view that the possibility provided for in German law of applying for an injunction provided adequate protection against advertising. The applicant had not in fact made any attempt to seek protection against the advertisement, but rather had hoped to derive a pecuniary advantage, even though Article 8 of the Convention did not provide for any such compensation.

38. The Government explained that German law did not only provide for injunctions in the event of a violation of the right to respect for private life, but also granted pecuniary compensation in some cases. In the instant case the Federal Court of Justice had considered whether there were any reasons for granting the applicant a notional licence and, after weighing up the competing interests, had concluded that the interference had not been sufficiently serious to justify such action and that the company's freedom of expression prevailed. The Federal Court of Justice had noted that even statements made for a commercial purpose were protected by freedom of expression as guaranteed under the Basic Law, that contributions with the purpose of entertainment could also help shape public opinion, that the interference had not been particularly serious because it had been neither offensive nor scornful, and that the advertisement had not led to any identification between the applicant and the product advertised.

(b) The applicant

39. The applicant submitted that there had indeed been an unjustified interference with his right to respect for his private life. He had not, as suggested by the Government, been attempting to obtain any financial advantage, but noted the lack of protection of his right to private life. Therefore, the question was not how the State should have intervened but whether the State was required to intervene. The applicant accepted that the Regional Court had issued an injunction prohibiting the advertising campaign, and the company had abided by it. However, the Federal Court of Justice had in fact deprived the injunction of any effect by finding that the advertisement was lawful, with the result that the applicant was no longer even entitled to have it discontinued. On the contrary, the company could apply to have the injunction lifted. The applicant thus inferred that the Regional Court's injunction had been insufficient to protect his right to private life.

40. The applicant further argued that in holding that the pecuniary components were only protected by ordinary law, the Federal Court of Justice had disregarded the fact that Article 8 of the Convention conferred on an individual the right to decide in person to whom and to what extent he or she wished to disclose personal information to others. The distinction drawn by the Federal Court of Justice between the pecuniary and non-pecuniary components of the right to protection of personality rights was in any case artificial because that right was indivisible.

41. The applicant asserted that the balancing exercise conducted by the Federal Court of Justice had been flawed because that court, like the Federal Constitutional Court, had automatically prioritised the company's commercial interests. Freedom of expression played a crucial role in a democratic society because it facilitated the permanent exchange of ideas, not because it enabled commercial companies to increase their sales through advertising. Freedom of expression only protected speech in the commercial field if it contributed to the formation of public opinion, which had not been the situation in the present case. Unlike the lower courts the Federal Court of Justice had ignored the fact that the impugned advertisement, which had been designed for a multinational tobacco company, had not been intended to transmit to the general public any kind of information on a significant event in contemporary history, but solely to attract consumer attention with a view to increasing cigarette sales. The applicant emphasised that his altercations referred to in the advertisement had not formed part of contemporary historical events, but had been mundane, everyday incidents. Moreover, the only reason why the press had previously reported on those events had been to satisfy their commercial interests and the curiosity of their voyeuristic readers.

42. In conclusion, the applicant noted that in ascribing a purported informative value to the impugned advertisement despite its obvious

insignificance, the Federal Court of Justice had subordinated the right to protection of personality rights to commercial interests, thus flouting, in a manner incompatible with the criteria established by the European Court's case-law, the obligation to draw a clear distinction between information which contributed to debate in a democratic society and information which was provided solely for entertainment or advertising purposes.

2. Observations of the third party (British American Tobacco (Germany) GmbH)

43. The third party submitted that the applicant had no grounds for challenging the distinction drawn by the Federal Court of Justice between the pecuniary and non-pecuniary components of protection of personality rights. It observed in that connection that in the domestic courts the applicant had claimed damages for infringement of the non-pecuniary components of his personality rights, that the Regional Court had dismissed his claim and that the applicant had not challenged that part of the Regional Court's judgment.

The third party further asserted that there was nothing in the Court's case-law to suggest that statements made in an advertisement enjoyed a lower level of protection than statements made elsewhere. The impugned judgment of the Federal Court of Justice complied with the criteria established by the Court in *Axel Springer AG v. Germany* ([GC], no. 39954/08, 7 February 2012), and the applicant had mentioned no substantial grounds that could induce the Court to substitute its own view for that of the Federal Court of Justice. The third party emphasised that the crux of the present case was not whether it should have used the applicant's forenames without his consent but whether it had the right to comment on current events and the conduct of the applicant, who had been involved in those events. A company such as itself was indisputably entitled to make such comments in the same way as the press.

3. The Court's assessment

44. The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as the name, including the forename (see paragraph 34 above). It covers personal information which individuals can legitimately expect not to be published without their consent (see *Flinkkilä and Others v. Finland*, no. 25576/04, § 75, 6 April 2010, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010). The Court considers that while the dissemination of information about a person with reference to his or her full name is regularly a cause of interference with the right of the person concerned to respect for his or her private life, the unauthorised use

of a person's forename alone may, in certain cases, also interfere with the person's private life. This applies, as in the present case, where the forenames are mentioned in a context which enables the person to be identified and where they are used for advertising purposes.

45. The Court observes that the applicant did not complain of any State action, but rather of the State's failure to protect him against the company's use of his forenames without his consent. The present application requires an examination of the fair balance that has to be struck between the applicant's right to respect for his private life from the angle of the State's positive obligations under Article 8 of the Convention, and the company's freedom of expression as guaranteed by Article 10 of the Convention, which also applies to statements made in the commercial field (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 26, Series A no. 165), because it guarantees freedom of expression for "everyone", with no distinction being drawn according to whether the aim pursued is profit-making or not (see *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013).

46. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. That margin of appreciation is in principle the same as that available to the States under Article 10 of the Convention in assessing whether and to what extent an interference with freedom of expression as protected by that Article is necessary (see *Von Hannover v. Germany (no. 2)*, nos. 40660/08 and 60641/08, § 106, 7 February 2012, and *Axel Springer AG*, cited above, § 87). The Court reiterates that States have a particularly broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 61, ECHR 2012 (extracts), and *Ashby Donald and Others v. France*, no. 36769/08, § 39, 10 January 2013).

47. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the Convention provisions relied on. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011; *Von Hannover (no.2)*, cited above, § 107; and *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, §§ 33 and 44, 16 January 2014).

48. In *Von Hannover (no. 2)* and *Axel Springer AG* (both cited above), the Court summarised the relevant criteria for balancing the right to respect for private life against the right to freedom of expression: contribution to a debate of general interest; how well known the person concerned is; the subject of the report; the prior conduct of the person concerned; and the content, form and consequences of the publication (see *Von Hannover (no. 2)*, cited above, §§ 108-113, and *Axel Springer AG*, cited above, §§ 89-95; see also *Tănăsoaica v. Romania*, no. 3490/03, § 41, 19 June 2012).

49. As regards the existence of a debate of general interest, the Court notes that the German courts found that the impugned advertisement concerned a subject of public interest in so far as it referred humorously to the applicant's recent scuffles, which had been reported in the press and had, in the case of the incident in 2000, led to a criminal conviction for him. The Court can accept that the advertisement, considered in that context and viewed as satire – which is recognised in its case-law as a form of artistic expression and social commentary (see *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009, and *Eon v. France*, no. 26118/10, § 60, 14 March 2013) – contributed, to some extent at least, to a debate of general interest (see, *mutatis mutandis*, *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 45, ECHR 2004-X, and *Von Hannover v. Germany (no. 3)*, no. 8772/10, § 52, 19 September 2013).

50. As to how well known the applicant was, the Court notes that the German courts mentioned that because of his relationship with the elder daughter of Prince Rainier III of Monaco and his altercations as reported by the press, the applicant was well known to the general public. Furthermore, it is clear that the company would not have used the applicant's forenames if the public had not been sufficiently familiar with them. The Court thus concludes that the applicant belonged to the group of public figures who cannot claim protection of their right to respect for their private life in the same way as private individuals unknown to the public (see *Von Hannover (no. 2)*, cited above, § 110, and *Axel Springer AG*, cited above, § 91).

51. As regards the subject of the impugned advertisement, the Court notes that it alluded to the applicant's scuffles, that is to say incidents which had been commented on in the press, the altercation in 2000 having led to a criminal conviction for him. It notes that the impugned advertisement merely drew attention to the existence of those incidents, without mentioning any details of the applicant's private life.

52. As far as the applicant's prior conduct is concerned, the Court considers, having regard – as the German courts did – to the degree to which the applicant was known to the public and his altercations as reported in the media, that his "legitimate expectation" that his private life would be effectively protected was henceforth reduced (see, *mutatis mutandis*, *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, § 53, 23 July 2009, and *Axel Springer AG*, cited above, § 101).

53. As regards the content, form and consequences of the advertisement, the Court observes that the German courts noted that it had been devoid of any offensive or degrading content in relation to the applicant (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 54), had not been disparaging simply because it was promoting a cigarette brand, and had not suggested that the applicant identified in any way with the product advertised. The Government pointed out in that connection that the advertisement had in no way suggested that the applicant personally wished to publicise the cigarettes or had any link with them.

54. The Court notes that the fact of linking a public figure's name with a commercial product without his or her consent may raise issues under Article 8 of the Convention, particularly where the product advertised is not socially accepted or raises serious ethical or moral questions. In the present case, however, the Court can accept the findings of the domestic courts, particularly in view of the satirical nature of the impugned advertisement, which was part of an advertising campaign run by the company where a humorous link was made between a picture of a packet of its brand of cigarettes and a current event involving a public figure (see, for example, *Bohlen v. Germany*, no. 53495/09, 19 February 2015). Moreover, as the Federal Court of Justice noted, only a limited number of people would have been able to make the connection between the advertisement and the applicant, namely those who had heard about the applicant's scuffles, especially as the latter were not mentioned in the advertisement but were hinted at in a clever way.

55. The applicant asserted in particular that the Federal Court of Justice had dismissed his claim primarily because the company's freedom of expression enjoyed a higher degree of legal protection than his right to respect for private life. This meant, in his submission, that it had failed to conduct a proper balancing exercise between the interests at stake. The Government submitted that the Federal Court had conducted such a balancing exercise when deciding whether there were any grounds for awarding the applicant the notional licence which he had sought.

56. The Court notes that some passages of the judgment of the Federal Court of Justice seem to suggest that in the present case the company's freedom of expression, simply because it was enshrined in constitutional law, carried more weight than the applicant's right to protection of his personality rights and to his own name, which were safeguarded only by ordinary law. It observes that the Federal Court of Justice appears to have applied this principle of different levels of protection to reject the Court of Appeal's finding that the right to protection of personality rights always prevailed over the advertiser's freedom of expression in such cases (see paragraph 25 above).

57. The Court reiterates that its task is not to review the relevant domestic law and practice *in abstracto*, but to examine the manner in which

they were applied in the applicant's specific case (see *Von Hannover (no. 2)*, cited above, § 116; *Karhuvaara and Iltalehti*, cited above, § 49; and, *mutatis mutandis*, *Elsholz v. Germany* [GC], no. 25735/94, § 59, ECHR 2000-VIII). It notes first of all that the Federal Court of Justice specified that only the pecuniary components of personality rights enjoyed protection under ordinary law, whereas the rights to protection of personality rights formed part of the fundamental rights protected by constitutional law inasmuch as they protected non-pecuniary interests. The Court further notes that the Federal Court of Justice took the circumstances of the case into consideration, that is to say the commercial and also humorous nature of the impugned advertisement, the applicant's high public profile thanks to his relationship with Princess Caroline von Hannover, and the absence of any degrading or offensive content in relation to the applicant or his brand image.

58. The Court therefore finds that the Federal Court of Justice conducted a thorough balancing exercise between the competing rights at stake and reached the conclusion that, in the circumstances of the case before it, there were grounds for giving priority to the company's freedom of expression and refusing to grant a notional licence to the applicant, who had already obtained an injunction from the Regional Court ordering the company to refrain from further publication of the advertisement.

59. In those circumstances, and having regard to the broad margin of appreciation available to the domestic courts in such matters (see paragraph 46 above) when weighing up divergent interests, the Court finds that the Federal Court of Justice did not fail to comply with its positive obligations in respect of the applicant under Article 8 of the Convention. There has accordingly been no violation of that provision.

...

FOR THESE REASONS, THE COURT

...

2. *Holds*, by six votes to one, that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 19 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zupančič is annexed to this judgment.

M.V.
C.W.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I regret that I am unable to join the majority in this case. Indeed, I believe that the German courts below the Federal Court of Justice were largely right in their perception of the case.

I do not find the reversal of these lower decisions remotely persuasive.

At the centre of the controversy, as defined by the German Federal Court of Justice (see paragraph 24 of the majority judgment), is the balancing of the hierarchical position of Mr von Hannover's personality rights (*Persönlichkeitsrecht*) and the freedom of expression.

The German provisions governing Mr von Hannover's personality rights have their international equivalent in Article 8 of the Convention. To maintain, therefore, that the German legal order places them beneath the constitutional protection of the freedom of expression perhaps makes sense in the domestic legal order – although I find this an extremely formalistic opinion – but that is obviously not true at the international level. There can be no *a priori* predominance of the freedom of expression over the personality rights protected by Article 8 of the Convention.

True, the Federal Court of Justice referred to the pecuniary aspect, that is to say the damages for the violation of Mr von Hannover's personality rights. It held that it was this compensatory aspect which could not be maintained on a par with the constitutional protection of the freedom of expression. I find this surprising. How can the remedy (damages for the violation of personality rights) be divorced from the right? The right and the remedy are two sides of the same coin.

Also, the implication of the advertisement is clear enough. It insinuates that it was Mr von Hannover himself who had crumpled the box of "Lucky Strike" cigarettes. The message mockingly asks "Was it Ernst? Or August?", implying of course that this is the same person, namely Ernst August. The sarcastic suggestion is that Mr von Hannover is a violent person, responsible for the crumpled box of "Lucky Strike" cigarettes. The message is not even subliminal; it is assertive and suggestive.

Furthermore, we are speaking here of the freedom of expression of the British American Tobacco Company in mocking Mr von Hannover, for purely and recognisably commercial purposes.

Moreover, there is no redeeming value in the tobacconist's message. This is not a message serving a social purpose of any kind – unless cigarette smoking is considered to be that redeeming social value.

On the contrary, in the valued social context of the efforts to prevent smoking – a recognised social goal! – tobacco advertising is certainly not a field in which the freedom of expression should be protected. In my opinion, this would in principle be true even without Mr von Hannover's complaint.

Tomorrow we might encounter a case in which the limits imposed by the Contracting States on cigarette advertising will be raised as a matter of the freedom of expression. The cases of Mr Bohlen and of Mr von Hannover might be cited as the relevant precedents.

Understandably, Mr von Hannover felt offended and protested that his name had been abused in order to promote cigarette smoking.

As I wrote in my concurring opinion in *von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI), those who live in glass houses should not throw stones:

> "And while I find the distinctions between the different levels of permitted exposure, as defined by the German legal system, too *Begriffsjurisprudenz*-like, I nevertheless believe that the balancing test between the public's right to know on the one hand and the affected person's right to privacy on the other hand must be adequately performed. He who willingly steps onto the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians, etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.
>
> Here I intend to concentrate not so much on the public's right to know – this applies first and foremost to the issue of the freedom of the press and the constitutional doctrine concerning it – but rather on the simple fact that it is impossible to separate by an iron curtain private life from public performance. The absolute incognito existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people.
>
> Privacy, on the other hand, is the right to be left alone. One has the right to be left alone precisely to the degree to which one's private life does not intersect with other people's private lives. In their own way, legal concepts such as libel, defamation, slander, etc. testify to this right and to the limits on other people's meddling with it. The German private-law doctrine of *Persönlichkeitsrecht* testifies to a broader concentric circle of protected privacy. ... The *Persönlichkeitsrecht* doctrine imparts a higher level of civilised interpersonal deportment.
>
> It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.
>
> The question here is how to ascertain and assess this balance. ... I would suggest a different determinative test: the one we have used in *Halford v. the United Kingdom* (judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III), which speaks of '*reasonable expectation of privacy*'.
>
> The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in *Halford* do not prevent us from employing the same test in cases such as the one before us. The dilemma as to whether the applicant here was or was not a public figure ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case. ...
>
> Of course, one must avoid a circular reasoning here. The 'reasonableness' of the expectation of privacy could be reduced to the aforementioned balancing test. But reasonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones."

However, for the Federal Court of Justice to maintain that Mr von Hannover deserved the "particularly clever" (*pfiffig*) negative publicity on account of

his bellicose character (see paragraph 26 of the judgment), and simultaneously that because this was "only" a cigarette advertisement, it was not injurious to his personality rights, is going too far.