[LT] Supreme Court finds that using filmed footage of an offence in a television show was not sufficient to justify the restriction of a person's right to privacy and protection of image

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The right to privacy is one of the fundamental human rights. As a general rule, a person cannot be filmed, recorded or photographed without their consent. However, these prohibitions do not apply to the recording of violations of the law, and private information and images may be published without a person's consent in cases where it helps to reveal violations of the law or criminal offences.

Taking into account this legal framework, the national broadcaster had a popular weekly show that was produced together with *Lietuvos Policija* (the Police), whereby a cameraman followed and recorded on-duty police officers responding to emergency calls.

In the present case, the claimant was filmed as a potential offender during an alleged violation of public order that had occurred near a casino. The claimant sought damages from the defendant (the producer of the show) on the ground that his right to an image had been infringed: the claimant had not only been filmed without his consent, but the footage had been shown twice on national television. According to the claimant, the publicly displayed video material had not only violated his image rights, but also his honour and dignity, and his health had also deteriorated due to the defendant's illegal actions. Therefore, the claimant requested compensation of EUR 500 000 for moral damages.

Both the court of first instance and the appellate court rejected the claim. The courts found that the claimant had been filmed on the scene through the making of a video of the police officers' work and that he had not objected to the filming or broadcasting of the filmed material, thus, in the courts' view, the claimant had agreed to be filmed and, consequently, had agreed to make the video public. In addition, the courts ruled that the claimant had been filmed and his image shown on the show on a legal basis – the claimant's own unlawful conduct in a public place.

The case reached Lietuvos Aukščiausiasis Teismas (the Supreme Court of Lithuania, hereinafter the Court), which adopted a final ruling on 28 October 2020 annulling both judgments of the lower courts. In the ruling, the Court ruled on two

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important aspects of the case – a person's consent and exemptions to the right to privacy and an image.

With respect to the principle of consent, the Court noted that a person's consent may be given in any form (orally, in writing or by implicit actions). However, consent to be filmed does not in itself mean consent to be shown on national television. The Court noted that if the person, seeing and perceiving that he is being filmed, does not express any objections to being filmed or to the filmed material being used on a television show, this does not constitute grounds for considering that consent has been given to broadcast the filmed material, especially as the person filmed does not know which content will be shown and how it will be used in the television show.

The Court once again pronounced that the burden of proof to demonstrate both consents (to being filmed and to the material being used in the TV show) lay with the producer. Taking into account the fact that no evidence had been presented to show that consent had been given, the Court found that the element restricting one's right to an image had not been established in the case at hand.

As regards the second question, the Court clarified that the conditions for restricting both the right to privacy and the right to freedom of expression are essentially the same: first, the possibility of restricting the right in question (ground) must be established by law; secondly, such a restriction must pursue a legitimate aim; thirdly, such a restriction must be necessary in a democratic society. In each case, it is necessary to strike a reasonable and fair balance between the two values protected by law, considering the facts of the individual case. And again, the burden of proof lies with the defendant.

In this case, the claimant had been filmed in a public place. However, this fact alone did not justify the finding that there were grounds for restricting the claimant's image rights. Moreover, in this case, the cause of the claimant's damages derives not from the fact of being filmed, but from the way he was portrayed on the TV show. Therefore, the courts had to assess whether these acts, and not the filming, had been performed without degrading the claimant's personal honour, dignity and reputation. It should be noted that filming may be objective and objectively reflect the reality of events (for example, the actual offence), but filmed material may be shown in a way that may not only degrade a person's honour and dignity, but also completely distort the overall context of the video.

Although the lower courts had emphasised the claimant's unlawful conduct, the Court noted that this was not sufficient to justify showing the footage with the recorded infringement in public. The lower courts had to determine whether there was a legitimate and reasonable public need to know the circumstances of the violation and/or other relevant information (personal data, factual details, etc.);

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this should be determined by taking into account the nature of the violation, the interests involved, the consequences, and any other aspects that would presuppose the conclusion that the case raised important issues. The courts did not assess or rule out the need for the public to know, nor did they analyse the main purpose of communication that was merely for economic gain or public curiosity.

Therefore, the Supreme Court concluded that the essence of the case had not been revealed by the lower courts. Consequently, both judgments of the lower courts were annulled, and the case was remitted to the court of first instance for re-examination. However, the court of first instance is bound to follow the rules set forth by the Court.

2020 m. spalio 28 d. Lietuvos aukščiausiojo teismo nutartis civilinėje byloje Nr. e3K-3-278-403/2020

http://liteko.teismai.lt/viesasprendimupaieska/paieska.aspx?card_id=B6C8684F-1240-45AB-B5D3-FFFFFDA20941

Ruling of the Supreme Court of Lithuania in civil Case no. e3K-3-278-403/2020 of 28 October 2020

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