European Court of Human Rights (Grand Chamber): Macatė v. Lithuania

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The Grand Chamber of the European Court of Human Rights (ECtHR) has delivered a judgment concerning restrictions on literature about same-sex relationships written specifically for children. The ECtHR found that measures taken against a children's book of fairy tales had intended to limit children's access to information depicting same-sex relationships as essentially equivalent to different-sex relationships. According to the ECtHR, the fairy tales had not contained sexually explicit content, nor had they promoted same-sex families over others. On the contrary, the fairy tales in the book had advocated respect for, and acceptance of, all members of society in this fundamental aspect of their lives, namely a committed relationship. The Grand Chamber of the ECtHR found, unanimously, that restricting children's access to such information had not pursued any aim that could be accepted as legitimate to justify the interference with the author's right to freedom of expression and information as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The case of Macatė v. Lithuania concerned a children's book of six fairy tales, two of which depicted marriage between persons of the same sex. Following its publication, the distribution of the book was temporarily suspended, and was later resumed after the book had been marked with a warning label stating that its contents could be harmful to children under the age of 14. The author of the book complained about the measures imposed in respect of the book, relying on Article 10 ECHR in conjunction with Article 14 (prohibition of discrimination). After long and multiple judicial proceedings at domestic level which were finally unsuccessful, the author lodged a complaint with the ECtHR. The author subsequently died and her mother and legal heir expressed the wish to pursue the proceedings on her behalf. Jurisdiction was relinquished in favour of the Grand Chamber, as the case was considered to raise serious questions affecting the interpretation of the Convention. Written comments were submitted as third-party interventions by the Háttér Society and jointly by Professor David Kaye, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and ARTICLE 19. The judgment contains 30 pages of information about domestic law and practice in Lithuania, international material from the Council of Europe, the European Union and the United Nations and comparative law and practice.

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First the Government submitted that the author had not suffered a significant disadvantage and that the application should therefore be rejected under Article 35 § 3 (b) ECHR. The Government contended that the impugned measures had not precluded the author from disseminating her ideas or participating in public debate. In particular, the book had not been banned from distribution (only temporarily suspended by the first publisher) and the warning labels were only advisory, as children's parents, guardians or teachers could simply disregard them. Moreover, a second edition had been published and distributed without any restrictions. The ECtHR found that this objection could not be upheld, as the case concerned serious questions regarding respect for human rights as defined in the ECHR.

Next, the ECtHR explained why both the temporary suspension of the distribution of the book by the Lithuanian University of Educational Sciences, and its subsequent marking with warning labels, while the impugned measures were examined and endorsed by the domestic courts, were to be considered as interferences by public authorities with the right to freedom of expression and information, resulting directly from the domestic legislation as provided in the Minors Protection Act. The ECtHR observed that the distribution of the book had been suspended for one year, during which time it was recalled from bookshops. The fact that the book remained available in public libraries and, for some time, online, did not prevent that recalling the book from bookshops had certainly reduced its availability to readers. The ECtHR also explained why the warning labels, although only having an advisory function, were likely to have dissuaded a significant number of parents and guardians from allowing children under the age of 14 to read the book, especially in the light of the persistence of stereotypical attitudes, prejudice, hostility and discrimination against the LGBTI community in Lithuania. Therefore, the ECtHR considered that the marking of the book as being harmful to the age group for which it was intended affected the author's ability to freely impart her ideas. The restrictions imposed on a children's book depicting various minorities, in particular its labelling as harmful to minors under the age of 14, also affected the author's reputation and were liable to discourage her and other authors from publishing similar literature, thereby creating a chilling effect.

After accepting that the measures against the children's book had a legal basis within the meaning of Article 10 § 2 ECHR, the ECtHR focussed on the question whether the measures based on the Minors Protection Act had had a legitimate aim. As regards, firstly, the allegedly sexually explicit nature of one of the two fairy tales, the Government referred to the findings of the Vilnius Regional Court, which had held that the passage about the princess and the shoemaker's daughter sleeping in each other's arms on the night after their wedding depicted carnal love too openly for children. The ECtHR however was unable to see how the passage in question could have been regarded as sexually explicit. Therefore the ECtHR could not subscribe to the Government's argument that the aim of the

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impugned measures was to protect children from information which was sexually explicit. The ECtHR also considered that the Government's allegation that the author was seeking to "insult", "degrade" or "belittle" different-sex relationships found no support in the text of the book. It observed that the children's book contained characters of diverse ethnicities, with different levels of physical and mental ability, living in various social and material circumstances, who were all depicted as caring and deserving of love. The ECtHR was of the opinion that the aim of the measures taken against the author's book was to bar children from information depicting same-sex relationships as being essentially equivalent to different-sex relationships.

The Grand Chamber fully endorsed the finding in Bayev a.o. v. Russia (20 June 2017) in which the third section of the Court had held that a legislative ban on "promotion of homosexuality or non-traditional sexual relations" among minors did not serve to advance the legitimate aims of protection of morals, health or the rights of others, and that by adopting such laws the authorities had reinforced stigma and prejudice and encouraged homophobia, which was incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. It observed however that the present case was the first one in which the ECtHR had been invited to assess restrictions imposed on literature about same-sex relationships aimed directly at children and written in a style and language easily accessible to them. On the basis of a more extensive analysis of the content of the book and the context of the case and being aware that in all decisions concerning children, directly or indirectly, their best interests were a primary consideration, the ECtHR found that the measures against the children's book had had no legitimate aim. According to the ECtHR there is no scientific evidence or sociological data suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children. In a similar vein, various international bodies, such as PACE, the Venice Commission, ECRI, the European Parliament and the UN Independent Expert on sexual orientation and gender identity, had criticised laws which sought to restrict children's access to information about different sexual orientations, on the grounds that there was no scientific evidence that such information, when presented in an objective and age-appropriate way, might cause any harm to children. On the contrary, the bodies in question had emphasised that it was the lack of such information and the continuing stigmatisation of LGBTI persons in society which was harmful to children. Moreover, the ECtHR observed that the laws of a significant number of Council of Europe member States either explicitly included teaching about same-sex relationships in the school curriculum, or contained provisions on ensuring respect for diversity and prohibition of discrimination on the grounds of sexual orientation in teaching. Legal provisions which explicitly restrict minors' access to information about homosexuality or same-sex relationships were present in only one member State (Hungary).

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Finally the ECtHR noted that it had repeatedly held that pluralism, tolerance and broadmindedness were the hallmarks of a democratic society. It made clear that equal and mutual respect for persons of different sexual orientations was inherent in the whole fabric of the ECHR. To depict, as the author had in her writings, committed relationships between persons of the same sex as being essentially equivalent to those between persons of different sex indeed advocated respect for and acceptance of all members of a given society in that fundamental aspect of their lives. Therefore the ECtHR found that where restrictions on children's access to information about same-sex relationships were based solely on considerations of sexual orientation – that was to say, where there was no basis in any other respect to consider such information to be inappropriate or harmful to children's growth and development – they did not pursue any aim that could be accepted as legitimate for the purposes of Article 10 § 2 ECHR, and were therefore incompatible with Article 10. On those grounds the Grand Chamber concluded, unanimously, that the measures taken against the author's book had sought to limit children's access to information depicting same-sex relationships as essentially equivalent to different-sex relationships, and that labelling such information as harmful had not pursued a legitimate aim under Article 10 § 2 ECHR. There had accordingly been a violation of Article 10 ECHR. A majority of twelve to five found that there was no need to examine separately the author's complaint under Article 14 ECHR, taken in conjunction with Article 10.

Judgment by the European Court of Human Rights, Grand Chamber, the case of Macatė v. Lithuania, Application no. 61435/19, 23 January 2023

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