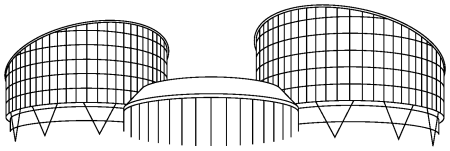

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF EGILL EINARSSON v. ICELAND

(Application no. 24703/15)

JUDGMENT

STRASBOURG

7 November 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Einarsson v. Iceland,

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

Julia Laffranque, *President,*
Robert Spano,
Ledi Bianku,
Işıl Karakaş,
Paul Lemmens,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 3 October 2017,

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

PROCEDURE

1. The case originated in an application (no. 24703/15) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Mr Egill Einarsson ("the applicant"), on 15 May 2015.

2. The applicant was represented by Mr Vilhjálmur H. Vilhjálmsson, a lawyer practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Agent, Ms Ragnhildur Hjaltadóttir, Permanent Secretary of the Ministry of the Interior.

3. The applicant complained, under Article 8 of the Convention, that the Icelandic Supreme Court's judgment of 20 November 2014 had entailed a violation of his right to respect for his private life.

4. On 19 May 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Kópavogur. At the material time he was a well-known person in Iceland who for years had published articles, blogs and books and appeared in films, on television and other media, under pseudonyms.

6. In November 2011, an 18-year-old woman reported to the police that the applicant and his girlfriend had raped her. In January 2012 another woman reported to the police that the applicant had committed a sexual offence against her a few years earlier. Upon the completion of the police investigation the Public Prosecutor, on 15 June and 15 November 2012, dismissed the cases in accordance with Article 145 of the Act on Criminal Procedures, because the evidence which had been gathered was not sufficient or likely to lead to a conviction. The applicant submitted a complaint to the police about allegedly false accusations made against him by the two women. This case was also dismissed.

7. On 22 November 2012 *Monitor*, a magazine accompanying *Morgunblaðið* (a leading newspaper in Iceland), published an interview with the applicant. A picture of the applicant was published on the front page and in the interview the applicant discussed the rape accusation against him. The applicant claimed several times that the accusations were false. He stated, *inter alia*, that it was not a priority for him for the girl's name to be exposed and that he was not seeking revenge against her. He accepted that having placed himself in the spotlight of the media he had to tolerate publicity which was not always "sunshine and lollipops" but criticised the way the media had covered his case. When asked about the girl's age, he responded that the girl had been in a club where the minimum age had been 20 years and that it had been a shock to find out later that she had been only 18 years old. When asked about his complaints against the girl for allegedly wrongful accusations, he stated again that he was not seeking revenge against those who had reported him to the police, but that it was clear that they had had ulterior motives. He hoped that the police would see that it was important to have a formal conclusion in the case and that the documents in the case were "screaming" conspiracy.

8. On the same day, X published an altered version of the applicant's front-page picture with the caption "Fuck you rapist bastard" on his account on Instagram, an online picture-sharing application. X had altered the picture by drawing an upside down cross on the applicant's forehead and writing "loser" across his face.

9. Apparently X had believed that only his friends and acquaintances, who were his "followers" on Instagram, had access to the pictures he published. However, his pictures were also accessible to other Instagram users.

10. On 23 November 2012 the newspaper *Vísir* published an online article about X's post, along with the altered picture and an interview with the applicant.

11. On 26 November 2012 the applicant's lawyer sent a letter to X requesting that he withdraw his statement, apologise in the media and pay the applicant punitive damages. By email the same day, X's lawyer submitted that X had not distributed the picture online; it had been posted

for a closed group of friends on Instagram and others had distributed it. Furthermore, the email stated that X was sorry and that the picture had been shared without his consent or knowledge.

12. On 17 December 2012, the applicant lodged defamation proceedings against X before the District Court of Reykjavík and asked for him to be sentenced to punishment, under the applicable provisions of the Penal Code, for altering the picture and for publishing it on Instagram with the caption "Fuck you rapist bastard". The applicant further requested that the statement "Fuck you rapist bastard" be declared null and void and that X be ordered to pay him 1,000,000 Icelandic *krónur* (ISK; approximately 8,800 euros (EUR)) in non-pecuniary damages under the Tort Liability Act, plus interest, ISK 150,000 (approximately 1,300 EUR) for publishing the judgment in the media under Article 241 of the Penal Code, and the applicant's legal costs.

13. By judgment of 1 November 2013, the District Court found against the applicant. The court stated, *inter alia*, that the applicant enjoyed the personal protection afforded by law, irrespective of which of his pseudonyms he was using. In the same way, the applicant had to take responsibility for material he issued, irrespective of the name he chose to use when doing so. The court further considered that the altered picture, along with the text, should be considered as a whole and that it contained X's opinion of the applicant's person, which indicated a strong dislike. As to the subject matter, the District Court found that the picture and the statement had been a part of general public debate because the applicant was a well-known person in Iceland and had to accept being the subject of public discussions. The court then described in detail his professional activities of writing online, publishing books and appearing on television, especially under pseudonyms, the subject matter of his work, the subsequent criticism of his work and his participation in public debates about it. The court noted that this had led to greater outcry and public debate about the accusations against him of sexual offences, a debate in which he had participated. The court concluded that the manner in which the words had been presented by X had been more invective than a factual statement, and should therefore be considered as a value judgment rather than a statement of fact. X's statement had been within the bounds of freedom of expression granted to him by law.

14. On 26 March 2014 the applicant appealed to the Supreme Court against the District Court's judgment. Before the Supreme Court the applicant reiterated his argument that X's Instagram account had been an "open" account, meaning that the picture had been accessible not only to his followers but to all Instagram users, over 100,000,000 people at the material time. He submitted further documents to support his argument.

15. By judgment of 20 November 2014 the majority of the Supreme Court (two out of three judges) upheld the District Court's conclusion. The

Supreme Court accepted that the altered picture had been accessible, not only to X's followers on Instagram, but to other users as well.

16. Furthermore, the judgment contained the following reasons:

> "[X] claims that his act of uploading the altered picture onto the picture-sharing application in question did not constitute the publication of the picture within the meaning of Article 236(2) of the Penal Code No 19/1940, as he had believed that only a limited number of people would have access to it. This cannot be accepted, as the act of making something accessible in electronic format to such a large number of people as stated above, irrespective of whether the persons in question are the friends and acquaintances of the person doing so, [...], is considered to be a publication according to the traditional definition of the term. It remains to be determined whether [X's] publication of the picture had, given the circumstances, constituted a defamatory allegation against the [applicant] under Article 235 of the Penal Code.
>
> The appealed judgment describes in detail that, before the complaints of sexual offences against him as described above had been reported, [the applicant] had been a well-known person, not least for his performance in public under the names of Gillz or Gillzenegger, the names under which he wrote on Internet, published books and pictures and presented himself in the media. The views of the [applicant] published there garnered some attention, as well as controversy; views which included his attitudes towards women and their sexual freedom. The documents of the case reveal that there were instances when his criticism had been directed towards named individuals, often women, and in some cases his words could be construed to mean that he was in fact recommending that they should be subjected to sexual violence. The [applicant] has often justified such conduct by stating that the material had been meant in jest and that those who criticised it lacked a sense of humour. The Supreme Court agrees with the District Court that the [applicant] enjoys the personal protection provided for by law, under Article 71 of the Constitution and Article 8(1) of the European Convention of Human Rights, cf. Act No 62/1994, irrespective of whether he was appearing under his own name or a pseudonym. In the same manner, he must take responsibility for the material he produces, irrespective of what name he chooses to use.
>
> When the [applicant] gave the aforementioned newspaper interview and employed provocative, if not derogatory, comments about others, including the girl who had accused him of sexual offences, he launched a public debate and should, moreover, have known that his comments would result in strong reactions from those who strongly disliked his abovementioned views. [X] enjoys freedom of expression according to Article 73(2) of the Icelandic Constitution and Article 10(1) of the European Convention on Human Rights, and the District Court reached the correct conclusion that under these circumstances he had enjoyed greater freedom to express himself about the [applicant] and his opinions.
>
> In assessing whether or not comments or other expressions can be considered a defamatory allegation according to Article 235 of the General Penal Code, taking into consideration the manner in which the provision of Article 10 of the [Convention] has been clarified by the European Court of Human Rights, it has to be decided whether the expression involved a value judgment or a factual statement. Although it can be agreed that by using the term 'rapist' about a named person, that person is being accused of committing rape, account must be taken of the context in which the term is set, cf. the ruling of the Supreme Court on 29 January 2009 in Case No 321/2008. If the altered picture and the comment 'Fuck you rapist bastard' are taken as a whole – as the parties agree should be the case – the Supreme Court agrees with the District

Court that this was a case of invective on the part of [X] against the [applicant] in a ruthless public debate, which the latter, as stated previously, had instigated. It was therefore a value judgment about the [applicant] and not a factual statement that he was guilty of committing rape. In this context, it makes a difference, even though this alone is not decisive for the conclusion, that [X] did not maintain that the [applicant] had thus committed a criminal offence against someone else, named or unnamed. Accordingly, and with reference to the conclusion of the appealed judgment, the conclusion that [X] expressed himself within the limits of the freedom to which he is entitled under Article 73(2) of the Constitution, must be upheld. As a result he is acquitted of all the [applicant's] claims.

As is rightly stated in the appealed ruling, the modified picture and the comments of [X] attached thereto were indecent and tasteless with respect to the [applicant]. For this reason, and with reference to Article 130(3), cf. Article 166 of Act No 91/1991 on Civil Procedure, legal costs before both court instances will be cancelled."

17. In the minority's opinion, the statement "Fuck you rapist bastard", considered in the light of the content of the article published by *Monitor*, could not be considered a value judgment but rather a grave insinuation that the applicant had committed a serious criminal offence. The minority concluded that, considering that the criminal investigation had ended with the case against the applicant being dismissed, and even if the applicant was a public person who had expressed himself in a controversial way in public, he should not have to tolerate this kind of comment.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands*) reads as follows:

Article 71

"Everyone shall enjoy freedom from interference with privacy, home and family life.

...

Notwithstanding the provision of the first paragraph above, freedom from interference with privacy, home and family life may be otherwise limited by statutory provisions if this is urgently necessary for the protection of the rights of others."

19. The Penal Code No. 19/1940 (*Almenn hegningarlög*), Chapter XXV, entitled "Defamation of character and violations of privacy", sets out the following relevant provisions:

Article 194

"Any person who has sexual intercourse or other sexual relations with a person by means of using violence, threats or other unlawful coercion shall be guilty of rape and shall be imprisoned for a minimum of 1 year and a maximum of 16 years. 'Violence' here refers to the deprivation of independence by means of confinement, drugs or other comparable means."

Article 235

"If a person alleges against another person anything that might be harmful to his or her honour or spreads such allegations, he shall be subject to fines or to imprisonment for up to one year."

Article 236

"Anyone who, against his or her better knowledge, makes or disseminates a defamatory insinuation shall be liable to up to two years' imprisonment.

Where such an insinuation is published or disseminated publicly, even though the person publishing or disseminating it has no reason to believe it to be correct, the sentence shall be a fine or up to two years' imprisonment."

Article 241

"In a defamation action, defamatory remarks may be declared null and void at the demand of the injured party. A person who is found guilty of a defamatory allegation may be ordered to pay to the injured person, on the latter's demand, a reasonable amount to cover the cost of the publication of a judgment, its main contents or reasoning, as circumstances may warrant in one or more public newspapers or publications."

Article 242

"The offences referred to in the present Chapter shall be subject to indictment as follows:

...

3. Lawsuits on account of other offences may be brought by the injured party alone."

20. Section 26(1) of the Tort Liability Act No. 50/1993 (*Skaðabótalög*) reads:

"A person who

a. deliberately or through gross negligence causes physical injury or

b. is responsible for an unlawful injury against the freedom, peace, honour or person of another party may be ordered to pay non-pecuniary damages to the injured party."

21. Section 145 of the Criminal Procedure Act No. 88/2008 (*Lög um meðferð sakamála*) reads:

"When the prosecutor has received all the evidence in the case and made sure that the investigation has been completed, he/she examines whether or not the defendant should be indicted or not. If the prosecutor feels that what has already been gathered is not sufficient or likely to lead to a conviction, he/she takes no further action, but otherwise he/she initiates a criminal case against the defendant, according to Article 152, cf. however Article 146."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant alleged that the Supreme Court judgment of 20 November 2014 entailed a violation of his right to respect for his private life as provided in Article 8 of the Convention. The relevant parts read as follows:

> "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."

23. The Government contested that argument.

A. Admissibility

24. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 applicant

25. The applicant maintained that when X published the altered picture with the caption "Fuck you rapist bastard" he had been accusing the applicant of raping a specific person, even though X had known that the case against him had been dismissed by the prosecutor. In the applicant´s opinion this was a factual statement about him being a rapist which could have been proven.

26. The applicant submitted that it had been established that X had published the picture and the statement, in English, and made them accessible to over 100 million Instagram subscribers. Consequently, the picture had been published in the Icelandic media. The picture had given the impression that the person in the picture (the applicant) was a rapist.

27. The applicant further argued that the conclusion of the Supreme Court had entailed that the applicant could be called a rapist without having been charged with or convicted of such a crime, and without being able to

defend himself. This was a violation of his rights under Article 8 of the Convention.

(b) The Government

28. Firstly, the Government pointed out that the facts of the current case differed from cases concerning the media publishing information about individuals and therefore the Court's principles in cases concerning the media could not be applied in the same way in the current case. Thus, for example, the criteria of the method of obtaining the information and its veracity did not apply in the present case. The information had been disseminated by one individual expressing a personal value judgment about the applicant and it had not been intended for the general public.

29. In the Government's opinion, the domestic courts applied standards that were in conformity with the principles embodied in Article 8 of the Convention as interpreted in the Court's case-law. The balancing test - between the competing rights protected under Articles 8 and 10 of the Convention - was based on principles developed in the Court's case-law. The domestic courts enjoyed a certain margin of appreciation in their assessment. The role of the Court should be in line with the principle of subsidiarity and the Court should only intervene where the domestic courts had considered irrelevant factors to be significant or where the conclusion reached had been clearly arbitrary or summarily dismissive of the interests at stake. The domestic courts were granted a wider margin in respect of positive obligations in relation to private parties where opinions within democratic society might differ significantly.

30. The Government noted that the domestic courts had analysed the material as a whole and concluded that the statement had been a value judgment. The topic, the justice system's handling of sexual violence, was a debate of general interest and the applicant's case had been high-profile. The applicant had been a well-known person in Iceland, with a clear incentive to maintain his place in popular culture, something he did by promoting his alter ego, often stirring up debates with controversial comments about women or minority groups. He had been aware that his methods were controversial and he had had long-standing public feuds with other well-known persons. He had made strongly-worded statements and declarations in the media while the investigation was ongoing. The material had been distributed by an ordinary person expressing a value judgment on a burning social topic at the time.

2. The Court's assessment

31. The Court notes that the present case requires an examination of whether a fair balance has been struck between the applicant's right to the protection of his private life under Article 8 of the Convention and the other

party's right to freedom of expression as guaranteed by Article 10. It therefore considers it useful to reiterate the relevant general principles.

(a) General principles

32. The notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which extends to a number of aspects relating to personal identity, such as a person's name or image, and furthermore includes a person's physical and psychological integrity (see *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI, with further references).

33. Furthermore, it has been accepted by the Court that a person's right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life. The Court has also concluded that a person's reputation is part of their personal identity and moral integrity, which are a matter of private life even if the person is criticised in a public debate (see *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-XII, and *Petrie v. Italy*, no. 25322/12, § 39, 18 May 2017). The same considerations apply to a person's honour (*A. v. Norway*, no. 28070/06, § 64, 9 April 2009, and *Sanchez Cardenas v. Norway*, no. 12148/03, § 38, 4 October 2007).

34. However, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see, *inter alia*, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012, *Delfi AS v. Estonia* [GC], no. 64569/09, § 137, ECHR 2015, and *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, 27 June 2017).

35. The Court notes that in cases such as the present one, it is for the Court to determine whether the State, in fulfilling its positive obligations under Article 8 of the Convention, has struck a fair balance between the applicant's right to respect for his private life and the right of the opposing party to freedom of expression protected by Article 10 of the Convention. Moreover, paragraph 2 of Article 10 recognises that freedom of expression may be subject to certain restrictions necessary to protect the rights and reputation of others.

36. The Court also points out that the choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Similarly, under Article 10 of the Convention, Contracting States have a certain margin of appreciation in assessing the necessity and extent of an interference with the freedom of expression protected by the Convention.

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 provisions of the Convention relied on (see, *inter alia*, *Petrie v. Italy*, cited above, § 40-41, with further references).

37. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention or under Article 10. Indeed, as a matter of principle these rights deserve equal respect. Accordingly, the margin of appreciation should in theory be the same in both cases (*Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, ECHR 2015 (extracts)).

38. Where the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts (*Bédat v. Switzerland* [GC], no. 56925/08, § 54, ECHR 2016, with further references).

39. Relevant criteria for balancing the right to respect for private life against the right to freedom of expression may be: the contribution to a debate of general interest; how well-known is the person concerned and what is the subject of the report; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanctions imposed (see, for example, *Axel Springer AG v. Germany*, cited above, § 89-95, and *Von Hannover v. Germany (no. 2)*, cited above, § 108-113).

40. Lastly the Court points out that, in order to assess the justification for an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (*see Do Carmo de Portugal e Castro Câmara v. Portugal*, no. 53139/11, § 31, 4 October 2016 and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, 17 December 2004).

(b) Application of those principles to the present case

41. The present complaint concerns an altered picture of the applicant which was published by X on an open Instagram account along with the caption "Fuck you rapist bastard". X had used a front page picture which had been published along with an interview with the applicant in an Icelandic magazine, *Monitor,* the same day.

42. In the circumstances of the present case, the Court considers it appropriate to consider the following applicable criteria, in this specific order: how well-known is the person concerned, the subject matter of the statement and the prior conduct of the person concerned; the contribution to a debate of general interest and the content, form and consequences of the publication, including the method of obtaining the information and its veracity.

(i) How well-known was the applicant, the subject matter and the applicant's conduct prior to the publication of the impugned statement

43. As noted above, the subject matter at issue was an altered picture of the applicant published on X's Instagram account along with the caption "Fuck you rapist bastard", shortly after two rape charges against the applicant had been dropped. The domestic courts, in their judgments, gave a detailed account about the applicant being a well-known person, and his prior conduct. They described his professional activities, *inter alia,* his online writing, publication of books, appearances on television and his way of presenting himself in the media. The courts noted that his views had attracted attention and controversy, including his attitudes towards women and their sexual freedom, and that he had participated in and explained his views in public discussions. Furthermore, the complaints against the applicant about sexual violence had led to public discussions in which he had participated.

44. In the light of the domestic courts' findings, the Court agrees that the limits to acceptable criticism must accordingly be wider in the present case than in the case of an individual who is not well-known (see, *inter alia*, *Erla Hlynsdóttir v. Iceland*, no. 43380/10, § 65, 10 July 2012, with further references). However, "while reporting on true facts about politicians or other public persons' private life may be admissible in certain circumstances, even persons known to the public have legitimate expectations of protection of, and respect for, their private life" (see *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05, § 53, 4 June 2009).

(ii) Contribution to a debate of general interest

45. The domestic courts concluded that the publication of the picture had been a part of general public debate in the light of the fact that the applicant was a well-known person in Iceland and had participated in public

discussions about his professional activities and the complaints against him of sexual violence. Furthermore, the Supreme Court stated: "When the [applicant] appeared in the aforementioned newspaper interview and employed provocative, if not derogatory, comments about others, including the girl who had accused him of sexual violence, he launched a public debate and should, moreover, have known that his comments would result in strong reactions from those who strongly disliked his abovementioned views". The Court agrees with the domestic courts that, in the light of the fact that the applicant was a well-known person and the impugned statement was a part of a debate concerning accusations of a serious criminal act, it was an issue of general interest. The Court will now examine whether, due to the content, form and consequences of the impugned publication the national courts struck a fair balance between the applicant's rights under Article 8 of the Convention and X's rights under Article 10.

(iii) Content, form and consequences of the impugned publication

46. The Supreme Court, in its judgment of 20 November 2014, stated that the altered picture along with the caption had been accessible not only to X's followers on Instagram, but to other users of the medium as well. The court concluded that, either way, it had been made available publicly and therefore came under Article 236 of the Penal Code. The Court sees no reason to disagree with the Supreme Court's assessment on this point. In that respect the Court deems important to recall its previous case-law where it has recognised that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see, inter alia, *Delfi AS v. Estonia*, § 133, cited above)."

47. The crux of the matter before the domestic courts was whether or not the statement "Fuck you rapist bastard" had been a statement of fact or a value judgment. The majority of the Supreme Court, in its judgment, stated: "Although it can be agreed that by using the term 'rapist' about a named person, that person is being accused of committing rape, account must be taken of the context in which the term is set, cf. the ruling of the Supreme Court on 29 January 2009 in Case No 321/2008. If the altered picture and the comment 'Fuck you rapist bastard' are taken as a whole – as the parties agree should be the case – the Supreme Court agrees with the District Court that this was a case of invective on the part of [X] against the [applicant] in a ruthless public debate, which the latter, as stated previously, had instigated. It was therefore a value judgment about the [applicant] and not a factual statement that he was guilty of committing rape. In this context, it

makes a difference, even though this alone is not decisive for the conclusion, that [X] did not maintain that the [applicant] had thus committed a criminal offence against someone else, named or unnamed" (see paragraph 16 above).

48. The Court reiterates that the classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. The Court may, however, consider it necessary to make its own assessment of the impugned statements (see, for example, *Brosa v. Germany*, no. 5709/09, 17 April 2014, §§ 43-50)."

49. The Court notes at the outset that the Supreme Court in fact accepted that by using the term "rapist" about a named person, that person was being accused of committing rape. However, the Supreme Court considered that the statement in question was to be classified as a value judgment when viewed in "context" (see paragraph 16 above). The question before the Court is therefore whether, viewed as a whole and in context, as is required by the case-law of the Court (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV), the findings of the Supreme Court were within its margin of factual appreciation that must be afforded to the national courts as to the classification of the statement (see *Arnarson v Iceland*, no. 58781/13, § 45, 13 June 2017).

50. At the outset, the Court notes that the term "rapist" is objective and factual in nature. It directly refers to a person who has committed the act of rape, which is criminalised under the Icelandic Penal Code (see paragraph 18 above). The veracity of an allegation of rape can therefore be proven. It follows that, viewed on its face, the statement "Fuck you rapist bastard" included a statement of fact as it clearly assigns the status of "rapist" to the person who is the subject of the statement. Although the Court does not exclude the possibility that an objective statement of fact, such as the one impugned in the present case, can, contextually, be classified as a value judgment the contextual elements justifying such a conclusion must be convincing in the light of the objective and factual nature of the term "rapist" taken at face value. (see, *a contrario*, for example, *Karman v Russia*, no. 29372/02, 14 December 2006, § 41, and *Brosa*, cited above, §§ 43-50)."

51. In this regard, the Court considers it crucial that when describing the context of the statement in question, the Supreme Court relied primarily on the applicant's participation in a "ruthless debate" which he had "instigated". The Supreme Court failed to take adequate account of the important chronological link between the publication of the statement on 22 November 2012 and the discontinuance of the criminal cases of alleged rape against the applicant, the second only a week before, on 15 November 2012, both cases being the subject matter of the magazine interview on 22 November 2012 which prompted X to publish his statement. In other

words, although the Court has no reason to call into question the Supreme Court's findings that the statement was a part of a "ruthless public debate" prompted by the applicant's behaviour and public persona, the factual context in which the statement was made, and its allegation that the applicant was a "rapist", was the criminal proceedings in which the applicant had been accused of the very same criminal act to which the statement referred, proceedings which had been discontinued by the public prosecutor for lack of evidence (see paragraph 6 above).

52. In light of the above, and in particular the objective and factual nature of the term "rapist", when viewed on its face, the Court finds that the contextual assessment made by the Supreme Court did not adequately take account of relevant and sufficient elements so as to justify the conclusion that the statement constituted a value judgment. However, even assuming that the Court were to accept the Supreme Court's classification of the statement "rapist" as a value judgment, the Court recalls that under its settled case-law (see paragraph 40 above), even where a statement amounts to a value judgment there must exist a sufficient factual basis to support it, failing which it will be excessive. In the light of the discontinuance of the criminal proceedings against the applicant just prior to the publication of the applicant's newspaper interview, the Supreme Court failed to explain sufficiently the factual basis that could have justified assessing the use of the term "rapist" as a value judgment, the Supreme Court merely referring, as previously mentioned, to the applicant's participation in a "ruthless public debate" which he had "instigated" when he gave the interview in question. In short, Article 8 of the Convention must be interpreted to mean that persons, even disputed public persons that have instigated a heated debate due to their behaviour and public comments, do not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts. The Court therefore finds that the statement was of a serious nature and capable of damaging the applicant's reputation. It reached such a level of seriousness as to cause prejudice to the applicant's enjoyment of the right to respect for private life for Article 8 to come into play (see, *inter alia*, *A v. Norway*, cited above, § 64).

(iv) Conclusion

53. In the light of the above-mentioned considerations the Court finds that the domestic courts failed to strike a fair balance between the applicant's right to respect for private life under Article 8 of the Convention and X's right to freedom of expression under Article 10 of the Convention. The Court therefore finds that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

55. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

56. The Government argued that the finding of a violation by the Court would in itself constitute just satisfaction for any non-pecuniary damage claimed. However, if the Court were to find it appropriate to award the applicant non-pecuniary damages, the amount should be reduced significantly.

57. The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicant.

B. Costs and expenses

58. The applicant also claimed EUR 28,200 (ISK 3,413,640) for the costs and expenses incurred before the domestic courts and EUR 9,190 (ISK 1,112,280) for those incurred before the Court. The above amounts included value added tax ("VAT").

59. The Government left it to the Court to decide the appropriate amount of costs to be reimbursed.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 10.000 in respect of cost and expenses incurred before the domestic courts and EUR 7,500 for those incurred before the Court.

C. Default interest

61. The Court has taken note of the applicant's invitation to apply default interest to its Article 41 award "equal to the monthly applicable interest rate published by the Central Bank of Iceland ... until settlement", that should run from 20 November 2014, the date of the Supreme Court's

judgment and that the interest should run from the date when the present judgement has become final.

62. However, the Court is of the view that the applicant's interest in the value of the present award being preserved has been sufficiently taken into account in its assessment above and in point 3(b) of the operative part below. In accordance with its standard practice, the Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

3. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*, by a majority,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 17,500 (seventeen thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Julia Laffranque
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Lemmens and Mourou-Vikström are annexed to this judgment.

J.L.
H.B.

DISSENTING OPINION OF JUDGE LEMMENS

1. The facts in this case are undisputed. X took a copy of the picture of the applicant as it appeared on the front page of a magazine in which an interview with him had been published, drew and wrote a comment on it, added the caption "Fuck you rapist bastard" (in English) in small letters under the picture, and posted the edited picture on his Instagram account (see paragraph 8 of the judgment).

The applicant brought defamation proceedings against X. His claim was rejected by both the District Court and the Supreme Court. The latter court examined whether the expression involved a value judgment or a factual statement. It held that, while the term "rapist" could refer to someone accused of having committed rape, in the context of the altered picture and the whole caption its use had to be understood as invective in a ruthless public debate, and therefore as a value judgment, not as a factual statement (see the quotation in paragraph 16 of the present judgment). Upon this basis it acquitted X.

2. The majority find that Article 8 of the Convention has been violated.

I respectfully dissent.

3. The majority are somewhat ambiguous on the importance of the classification of the expression as a statement of fact or a value judgment for the examination of the complaint. On the one hand, they deal with the issue of classification at length and criticise the Supreme Court for its conclusion that the expression was a value judgment (see paragraphs 48-52 of the judgment). On the other hand, they also discuss the hypothesis that the expression could be considered a value judgment (see paragraph 52 of the judgment).

Whether an expression is a statement of fact or a value judgment is important when domestic law requires the contents of the expression to be proven. As the majority rightly point out, the existence of facts can be demonstrated, while the truth of a value judgment is not susceptible of proof (see paragraph 40 of the judgment). But the domestic defamation proceedings did not – or at least did not explicitly – turn on the question whether X had proven what he wanted to express. Having regard to Article 235 of the Penal Code (quoted in paragraph 19 of the judgment), the question was whether X had alleged anything that might be harmful to the applicant's honour. In my opinion, the question whether the expression was a statement of fact or a value judgment is a relevant issue, but not a decisive one. Even the question whether or not there was a sufficient factual basis to support the expression is not decisive. The issue before our Court is whether the domestic courts struck a fair balance between the applicant's right to respect for his private life and X's right to freedom of expression.

4. I will nevertheless concentrate on the majority's discussion of the classification of the expression at hand.

The majority accept that it is in the first place for the national authorities, in particular the domestic courts, to classify a statement as a fact or as a value judgment (see paragraphs 40 and 48 of the judgment). They add, however, that the Court may make its own assessment of the impugned statement (see paragraph 48 of the judgment). I agree with these principles. It is indeed not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see, among other authorities, *F.G. v. Sweden* [GC], no. 43611/11, § 118, ECHR 2016, and *Bărbulescu v. Romania* [GC], no. 61496/08, § 129, ECHR 2017). In normal circumstances the Court requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Bărbulescu*, ibid.).

In the present case the Supreme Court examined whether X, when he used the word "rapist" in the expression "Fuck you rapist bastard", was referring to the applicant as someone who had committed rape, in the sense of the crime defined in the Penal Code. The Supreme Court admitted that "it [could] be agreed" that the term "rapist" referred to a person accused of committing rape. The majority state that the Supreme Court "in fact accepted" that the term referred to a person accused of committing rape (see paragraph 49 of the judgment). In my opinion, the Supreme Court was not so affirmative.

More importantly, the Supreme Court read the term in its context. An assessment of the meaning of a given word, read in its context, is typically one for which the domestic judge is better placed than the European Court. As I understand the Supreme Court's judgment, the relevant context was composed of the altered picture and the comment "Fuck you rapist bastard", taken as a whole. It is indeed the picture of the applicant, taken from the magazine in which he had given an interview, with the graphic and written comments by X, which was the subject of the expression. By using the picture as the "medium" for his message, X was manifestly reacting to the interview. By drawing a cross on the applicant's face and by writing the word "loser" across it, X was manifestly expressing his disapproval of what the applicant had stated about himself. Finally, under the altered picture, in small letters, appeared the words "Fuck you rapist bastard". I understand the Supreme Court's assessment as meaning that in this context the word "rapist" had lost its objective meaning and had to be understood as a swear word against the applicant. One may disagree with such an assessment, as the minority judge of the Supreme Court did, but I do not see anything unreasonable in it.

5. The majority of our Court apparently read the Supreme Court's judgment as referring to a different context from the one identified above. According to them, "when describing the context of the statement in question, the Supreme Court relied primarily on the applicant's participation

in a 'ruthless debate' which he had instigated" (see paragraph 51 of the judgment; see also paragraph 52, *in fine*).

With all due respect, I am afraid that this is not how the Supreme Court's reliance on the "ruthless debate" context should be viewed. In my opinion, the Supreme Court referred to that debate primarily as the context for the invective on the part of X, not as the context for the assessment of the meaning of the word "rapist". That assessment was based, as explained above, on the features of the Instagram picture.

The choice of the relevant context is not without importance. On the basis of the existence of the "ruthless debate" as the context of the impugned expression, the majority blame the Supreme Court for disregarding the chronological link between the publication of the picture and the discontinuance of the criminal proceedings for alleged rape (paragraph 51 of the judgment). But when one reads the Supreme Court's assessment as based on the characteristics of the picture, the fact that the picture was published shortly after the discontinuance of the criminal proceedings becomes largely irrelevant[1], and in my opinion certainly not a reason to set aside the Supreme Court's assessment.

6. In conclusion, the Supreme Court enjoyed a certain margin of appreciation in its assessment of the meaning to be attributed to a term used in a given context. It found that, by using the term "rapist", X was not stating that the applicant had committed the crime of rape, but was merely expressing disapproval in the form of invective. Having regard to the subsidiary nature of the European Court's role, there is in my opinion no "cogent reason" to depart from this assessment.

On the basis of its characterisation of the impugned expression, the Supreme Court concluded that X had acted within the limits of his freedom of expression. In my opinion, the Supreme Court thus struck a fair balance between the competing rights at stake.

[1] At least irrelevant from the point of view of Article 8 of the Convention. It should be noted that the applicant did not complain of a violation of his right to be presumed innocent, guaranteed by Article 6 § 2.

DISSENTING OPINION OF JUDGE MOUROU-VIKSTRÖM

(Translation)

The majority found a violation of Article 8 of the Convention because, despite the fact that the word "rapist", accompanied by a picture published on Instagram, had been used to direct invective against the applicant, the domestic courts decided not to convict the author of the post.

The majority made two observations.

Firstly, the term in question referred to an offence strictly defined by criminal law, and corresponded to a factual allegation. Hence, in view of the fact that the criminal proceedings against the applicant for rape had been discontinued by the public prosecutor on 15 November 2012, the use of the word "rapist" to describe him a few days later infringed his right to respect for his private life.

Secondly, this lack of a factual basis meant that invective making specific allegations could not be published with impunity on social media, even where it was undisputed that the person targeted was a public figure who had made controversial remarks about women in particular.

My position is different because, although the timing of the decision to dismiss the rape case on 15 November 2012 and the publication of the impugned Instagram post on 22 November 2012 suggests that the decision to discontinue the proceedings was the event that triggered the post, the applicant's personality and past remarks nevertheless need to be taken into consideration.

The Supreme Court itself, in its reasoning, referred to documents produced in the case which could be construed to mean that the applicant was recommending that women should be subjected to sexual violence. These documents are essential, as their analysis and assessment as incriminating evidence fall within the State's margin of appreciation.

In those statements, which the domestic courts assessed at their own discretion, the applicant expressed his views on a subject specifically and directly linked to the invective directed against him. He put himself in a position in which the impugned term of "rapist" could be used to describe him, no longer as an allegation of a specific fact but as a value judgment. Accordingly, he could not claim the protection of Article 8 to the same degree as an accused person acquitted of rape who had made no remarks or controversial statements concerning women and sexual assault.

The applicant's public, controversial and provocative statements shifted the boundary between an allegation of fact and a value judgment. Thus, the domestic courts were entitled to consider that the impugned comments did not have a direct, clear and essential link to the decision taken a few days previously to discontinue the case, but referred more generally to the views aired by the applicant in the past.

Consequently, I am unable to find that there has been a violation of Article 8 of the Convention.