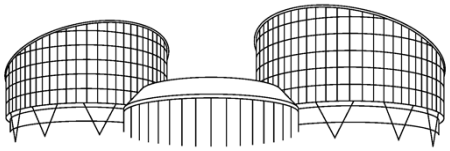

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF M.L. AND W.W. v. GERMANY

(Applications nos. 60798/10 and 65599/10)

JUDGMENT

STRASBOURG

28 June 2018

FINAL

28/09/2018

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

In the case of M.L. and W.W. v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 5 June 2018,

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

PROCEDURE

1. The case originated in two applications (nos. 60798/10 and 65599/10) 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 two German nationals, M.L. ("the first applicant") and W.W. ("the second applicant"), on 15 and 29 October 2010 respectively.

2. The applicants were represented by Mr Geipel, a lawyer practising in Munich. The German Government ("the Government") were represented by one of their Agents, Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicants alleged a violation of Article 8 of the Convention on account of the decision of the Federal Court of Justice not to prohibit various media outlets from making available on the Internet old reports – or transcripts thereof – concerning the applicants' criminal trial.

4. On 29 November 2012 the Government were given notice of the applications. The parties' observations were received during the course of 2013.

5. The three media outlets concerned by the applicants' requests, namely *Spiegel online*, *Deutschlandradio* and *Mannheimer Morgen*, were given leave to intervene in the written procedure in the form of a joint intervention (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 first and second applicants were born in 1953 and 1954 respectively. The first applicant lives in Munich and the second in Erding.

7. The applicants are half-brothers. On 21 May 1993, following a criminal trial based on circumstantial evidence, they were sentenced to life imprisonment for the 1991 murder of W.S, a very popular actor. They lodged an appeal on points of law which was dismissed in 1994. On 1 March 2000 the Federal Constitutional Court decided not to entertain their constitutional appeals (nos. 2 BvR 2017/94 and 2039/94) against the decisions of the criminal courts. An application to the Court lodged by the applicants concerning those proceedings (no. 61180/00) was rejected on 7 November 2000 by a three-judge committee on the grounds that the applicants had not lodged their constitutional appeals in accordance with the procedural rules laid down by the Federal Constitutional Court Act (unpublished decision).

8. The applicants lodged several applications for the reopening (*Wiederaufnahme*) of the proceedings, the most recent of which was submitted in 2004 and rejected in 2005. In the context of those proceedings the applicants contacted the press, providing them with documents connected to the reopening proceedings and other unspecified documents.

9. The first and second applicants were released on probation in August 2007 and January 2008 respectively.

A. The impugned proceedings

1. The first set of proceedings

(a) The reports complained of

10. On 14 July 2000 the radio station *Deutschlandradio* – a public-law entity – published a report entitled "W.S. murdered 10 years ago". The report stated as follows, giving the applicants' full names:

> "Following a six-month trial based on circumstantial evidence S.'s partner, W., and the latter's brother, L., were sentenced to life imprisonment. Both continue to this day to protest their innocence, and this year had their application for a retrial rejected by the Federal Constitutional Court."

11. The transcript of this report remained available on the archive pages of the radio station's website, in the section entitled "Older news items", under *Kalenderblatt*, until at least 2007.

(b) The Regional Court and Court of Appeal rulings

12. On an unspecified date in 2007 the applicants brought proceedings against the radio station in the Hamburg Regional Court, requesting that the personal data in files concerning them that had appeared on the station's website be rendered anonymous.

13. In two judgments of 29 February 2008 the Regional Court granted the applicants' requests, under Articles 823 § 1 and 1004 (by analogy) of the Civil Code (see "Domestic law", paragraphs 48-49 below). The Regional Court held in particular that the applicants' interest in no longer being confronted with their acts so long after their conviction outweighed the public's interest in being informed about the applicants' involvement in those acts.

14. By two judgments of 29 July 2008 the Hamburg Court of Appeal upheld the judgments, finding that the provision of these old news items had infringed the applicants' personality rights. In that regard it noted in particular that in 2007 the applicants, who were about to be released, had been entitled to special protection enabling them to no longer be confronted with their criminal acts in view of their aim of reintegrating into society. The court found that they were no longer required to accept these reports being made available to the public, given that they had been prosecuted and convicted of the crime and had thus been sanctioned by society, and that the public had been sufficiently informed of the case. Furthermore, the interference with the exercise of the radio station's right to freedom of expression had been minimal, as dissemination of the material had not been prohibited but had merely been made subject to the condition that the applicants should not be mentioned by name.

15. The Court of Appeal observed that the fact that material on the Internet was often made permanently available to users and that the information was visibly old did not alter that conclusion. It noted that, for the person requesting anonymity, whether the report in which his or her identity was disclosed was recent or old made no difference. On the other hand, what was decisive for the person's reintegration into society was whether or not the information mentioning his or her name was still accessible, even though material published on the Internet was generally less widely disseminated than that broadcast on television or radio or in the press. The Court of Appeal also noted the risk that other persons, such as a neighbour, an employer or co-workers, could identify the applicants' names and contribute to a further spread of old material about the applicants' involvement in the crime, thereby jeopardising their resocialisation.

16. The Court of Appeal further stated that the fact that the applicants had turned to the public during the most recent reopening proceedings in 2005 – thereby giving rise to reports on them and on those proceedings – did not alter its conclusions, as the applicants had acted in a specific context which had ended with the completion of the reopening proceedings. The

Court of Appeal added that the radio station was thus responsible for the interference with the applicants' rights and that it could not argue that the information in question was contained only in digital archives. In the court's view, the archived information was accessible in the same way as any other information available on the radio station's website. The Court of Appeal also noted that the obligation to render material anonymous would not result in falsifying the historical truth as it was only a question of omitting a detail from the report.

17. The Court of Appeal gave the radio station leave to appeal on points of law.

(c) The judgments of the Federal Court of Justice

18. In two leading judgments of 15 December 2009 the Federal Court of Justice upheld the appeals on points of law lodged by the radio station (nos. VI ZR 227/08 and 228/08), and quashed the decisions of the Court of Appeal and the Regional Court. The Federal Court of Justice began by observing that the provision of the impugned material constituted interference with the exercise of the applicants' right to protection of their personality (*allgemeines Persönlichkeitsrecht*) and their right to privacy under Articles 1 § 1 and 2 § 1 of the Basic Law and Article 8 of the Convention. Those rights had to be balanced against the right to freedom of expression and freedom of the press as guaranteed by Article 5 § 1 of the Basic Law and Article 10 of the Convention (see "Domestic law", paragraph 46 below). Owing to its particular nature, the scope of the right to protection of personality was not defined in advance but had to be assessed by weighing it against the divergent interests at stake; in order to do so the courts had to take into account, in particular, the specific circumstances of the case and the rights and freedoms protected by the Convention.

19. In the view of the Federal Court of Justice, the Court of Appeal had not taken sufficient account of the radio station's right to freedom of expression and of the public's interest in being informed, which formed part of the radio station's mission. Referring to the criteria established in that regard by the Federal Constitutional Court and its own case-law, the Federal Court of Justice observed in particular that truthful reports could infringe personality rights where the damage they caused outweighed the public's interest in knowing the truth, for instance when dissemination had a significant impact or when the report stigmatised the person concerned and thus had the effect of isolating him or her socially. However, reports concerning criminal offences were part of contemporary history, which the media had a responsibility to report on. In that regard the Federal Court of Justice observed that the more a case went beyond the scope of ordinary criminal behaviour, the greater the public interest in being informed about it. In the case of reports on topical events, the public's interest in being informed generally took precedence over the right of the person concerned

to protection of his or her personality. In the Federal Court of Justice's view, anyone who broke the law and harmed others should expect not only to receive criminal sanctions, but also to be the subject of reports in the media.

20. The Federal Court of Justice went on to find that, over time, the interest of the person concerned in no longer being confronted with his or her wrongdoing acquired greater weight. Indeed, once the perpetrator of a crime had been convicted and the public had been sufficiently informed, repeated interference with the right to protection of personality could no longer be easily justified, in view of the interest of the person concerned in being reintegrated into society. Referring to the case-law of the Federal Constitutional Court and this Court's judgment in *Österreichischer Rundfunk v. Austria* (no. 35841/02, § 68, 7 December 2006), however, the Federal Court of Justice pointed out that even if offenders had served their sentence, they could not claim an absolute right no longer to be confronted with their wrongdoing. The courts were called upon to consider the seriousness of the infringement of the right to personality and the offender's interest in resocialisation; in that regard, account had to be taken of the way in which the person concerned was presented in the report and, in particular, the extent of its dissemination.

21. Applying these principles to the case before it, the Federal Court of Justice held that the applicants' right to protection of their personality should yield to the radio station's right to freedom of expression and the public's interest in being informed. It acknowledged that the applicants' interest in no longer being the subject of reports concerning their crime was considerable, since the crime had been committed a long time previously and they had been released from prison, the first applicant in August 2007 and the second in January 2008. However, in the view of the Federal Court of Justice, in the circumstances of the case the impugned passage from the report of 14 July 2000 did not affect the applicants' personality rights in a significant manner (*erheblich*), as it was not liable to cause them to be "pilloried for all time" or to draw them into the spotlight (*ins Licht der Öffentlichkeit zerren*) in a way that would stigmatise them again as criminals.

22. The Federal Court of Justice first noted that the impugned passage gave a truthful account of a murder – of a very popular actor – that had been the focus of public attention. It noted that the passage recounted, with restraint and objectivity, the circumstances of the crime, the applicants' conviction and the trial. In the view of the Federal Court of Justice, the passage in question did not stigmatise the applicants as the perpetrators of the crime or as murderers, but stated that the two brothers had been convicted of murder after a six-month criminal trial based entirely on circumstantial evidence and that they continued to protest their innocence; this left it open to the reader to conclude that they had been wrongly

convicted. The Federal Court of Justice found that there was therefore no doubt that, on the day on which the transcript of the report had been posted on the radio's website, the identification of the applicants in the radio programme had been justified in view of the seriousness of the crime, the fact that the victim had been well known, the considerable public attention the crime had received and the fact that the applicants had tried after 2000 to have their convictions quashed using all conceivable remedies (*alle denkbaren Rechtsbehelfe*).

23. The Federal Court of Justice added that the way in which the transcript of the report had been posted on the *Deutschlandradio* portal had resulted in limited dissemination. In its view, unlike the prime-time television report that had been the subject of a leading judgment by the Federal Constitutional Court of 5 June 1973 (no. 1 BvR 536/72 – the *Lebach* judgment), the impugned transcript could be found on the Internet portal only by Internet users actively seeking information on the subject in question. It would not have been found on the radio station's Internet pages devoted to news items that might be immediately obvious to Internet users; the latter would have had to search under the heading "Older news items" (*Altmeldungen*), and the transcript would have been marked as such in a clear and visible manner.

24. The Federal Court of Justice also pointed out that the public had a legitimate interest not only in being informed about current events, but also in being able to research past events. Hence, in exercising their freedom of expression the media fulfilled their task of informing the public and helping to shape democratic opinion, including when they made older material available to Internet users. This was particularly true in the case of the radio station in question – a legal entity governed by public law – whose mission included the creation of archives. The Federal Court of Justice considered that a blanket prohibition on access or an obligation to delete any reports concerning offenders named in an Internet archive would result in the erasure of history and in wrongly affording full immunity to the perpetrator in that regard. In the view of the Federal Court of Justice, offenders could not claim such a right.

25. Lastly, the Federal Court of Justice noted that a ban such as that sought by the applicants would have a chilling effect on freedom of expression and freedom of the press: if they were prohibited from making available to Internet users transcripts of old radio programmes whose legality had not been challenged, media outlets such as *Deutschlandradio* would no longer be able to fulfil their task of informing the public, a task entrusted to them under constitutional law. The resulting obligation for the radio station to regularly check all its archives would unduly restrict its freedom of expression and freedom of the press. In view of the time and personnel that such checks would entail, the Federal Court of Justice found that there was a real risk that *Deutschlandradio* would cease to archive its

reports or would omit information – such as the names of the persons concerned – that might subsequently make such reports unlawful, even though the public had an interest worthy of protection in having access to it.

26. The Federal Court of Justice added that the principles established by the data-protection legislation led it to the same conclusion. In that connection it observed that the provision of the impugned information fell within the scope of the media privilege enshrined in the second sentence of Article 5 § 1 of the Basic Law. Consequently, the provision of the information on the radio station's website was not subject to the consent of the person concerned or to express authorisation by law. If they were deprived of the possibility of collecting, processing and using personal data without the consent of the person concerned, neither the press nor radio stations would be able to carry out their work as journalists and would thus be unable to perform the tasks recognised and guaranteed by Article 5 § 1 of the Basic Law, Article 10 § 1 of the Convention and Article 11 of the Charter of Fundamental Rights of the European Union. Those tasks included not only posting reports online, but also ensuring their ongoing availability, notwithstanding the time that had elapsed since the transcript had first been posted (nine years in the present case). The Federal Court of Justice added that the radio station had posted the transcript of the report online solely for journalistic purposes and that it had therefore acted within the remit entrusted to it by constitutional law, namely to inform the public and help shape democratic opinion in the exercise of its freedom of expression.

(d) The Federal Constitutional Court ruling

27. On 6 July 2010 the Federal Constitutional Court decided not to entertain the constitutional appeals lodged by the applicants, not to grant them legal aid and not to appoint lawyers to represent them. It stated that it was not giving reasons for its decisions (nos. 1 BvR 535/10 and 547/10).

2. The second set of proceedings

(a) The impugned articles

28. The Internet portal of the weekly magazine *Der Spiegel* contained a file entitled "W.S. – hammered to death". The file included five articles that had appeared between 1991 and 1993 in the print and online editions of the magazine. Access to the file was subject to payment. The articles in the file gave a detailed account of the murder of W.S., his life, the criminal investigation and the evidence gathered by the prosecuting authorities, the criminal trial and, in the case of issue no. 49/1992 of 30 November 1992, certain details of the applicants' lives, including their full names. The article stated that the second applicant came from a broken (*zerrüttet*) family of six children from a named Bavarian village, that he had been placed in a home

at the age of five, where he had learned what it was to be homosexual and, especially, how best to sell himself. It was also reported that he had worked as a hairdresser and a taxi driver before being employed at a petrol station owned by Mrs W., a wealthy childless widow who was a friend of W.S.'s mother and who had adopted him when he was twenty-four years old. As to the first applicant, according to the article he worked for a modest salary in the brewery managed by his half-brother. The article also gave some details provided by the witnesses during their testimony, in particular regarding how the first applicant was viewed by his half-brother.

29. Two of the articles in the file (published in issues nos. 39/1992 of 21 September and 49/1992 of 30 November 1992) were accompanied by photographs, one showing the two applicants in the courtroom of the criminal court, another showing the first applicant with a prison officer, and a third showing the second applicant with W.S.

(b) The rulings of the Regional Courts and the Court of Appeal

30. In 2007, on an unspecified date, the applicants made an application for legal aid to the Frankfurt am Main Regional Court with a view to bringing proceedings against the magazine *Der Spiegel*.

31. On 4 June 2007 the Frankfurt am Main Regional Court dismissed the application on the grounds that it did not have sufficient prospects of success.

32. The applicants then brought a similar application before the Hamburg Regional Court, which granted them legal aid.

33. In two judgments of 18 January 2008 the Hamburg Regional Court granted the applicants' request and ordered the magazine to put an end to the public's access to the impugned file in so far as it included photos of the applicants and named them.

34. On 29 July 2008 the Hamburg Court of Appeal upheld the judgments of the Regional Court on the same grounds as those set out in its other judgments of the same day (see paragraphs 14-16 above). It specified that the applicants had the right to bring proceedings against the magazine in the Regional Court in which their application was most likely to succeed.

(c) The judgments of the Federal Court of Justice

35. On 9 February 2010 the Federal Court of Justice allowed the appeals on points of law lodged by *Der Spiegel* (nos. VI ZR 244/08 and 243/08) and dismissed the applicants' claims.

(i) The reasoning regarding the articles

36. With regard to the press articles contained in the file at issue, the Federal Court of Justice adopted essentially the same reasoning as in its judgments of 15 December 2009 (see paragraphs 18-26 above). As to the content of the articles in question it observed that, contrary to the

applicants' claims, the articles did not characterise them as murderers in a provocative manner, but stated that the applicants had been accused of murder and that they had been convicted as charged. The Federal Court of Justice added that the articles in question reported on the applicants' attitude towards the acts of which they were accused and recalled certain circumstances that had not been elucidated; this left it open to readers to conclude that the applicants had been wrongly convicted. As to the extent of dissemination of the reports, the Federal Court of Justice pointed out that consultation of the file was subject to payment, which further restricted its accessibility. It reiterated that offenders were not entitled to obtain a blanket ban on viewing a report concerning named offenders or an obligation to erase such reports. This was especially true in the case of a serious capital crime that had attracted particular public attention.

(ii) The reasoning regarding the photos

37. On the subject of the impugned photos, the Federal Court of Justice pointed out that it had developed a concept of graduated protection (*abgestuftes Schutzkonzept*) based on sections 22 and 23 of the Copyright Act (see "Domestic law", paragraph 50 below), which it had clarified following the Court's judgment in *Von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI), in response to the reservations of principle which the Court had expressed in that judgment. It observed that, according to that concept of protection, the publication of images of persons who – on account of their importance in contemporary history – were in theory required, under section 23(1)(1) of the Copyright Act, to tolerate the publication of photos of themselves was nevertheless unlawful if the legitimate interests of the person concerned were infringed (section 23(2)). There could be no exception to the obligation to obtain the consent of the person in question unless the report concerned an important event of contemporary history (the court cited *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 29-35, ECHR 2012).

38. Applying these criteria to the case before it, the Federal Court of Justice noted that the photos showed, firstly, the applicants in the dock in the courtroom of the Regional Court; secondly, the first applicant accompanied by a prison officer; and, finally, the second applicant with W.S. It considered that the photos illustrated the articles and underlined the authenticity of the reports, and that, since they had been taken in the context of the event being reported on (the criminal trial), a fact which generally made their publication lawful, they did not affect the applicants more than a photo showing their profile and taken in a neutral context. The Federal Court of Justice observed that the photos in question did not portray the applicants unfavourably or intrude on their intimate sphere, and that their distribution did not "pillory [the applicants] for all time" or present them to the public in a way that stigmatised them again as criminals. The photos –

which dated back to 1992 and showed only the applicants' appearance as it had been at that time – accompanied articles that were clearly identified as old reports with a limited impact. The Federal Court of Justice concluded that, in view of all the circumstances of the case, the applicants had no legitimate interest, within the meaning of section 23(2) of the Copyright Act, in prohibiting the publication of the photos.

(d) The Federal Constitutional Court ruling

39. On 6 July 2010 the Federal Constitutional Court decided not to entertain the constitutional appeals lodged by the applicants, not to grant them legal aid and not to appoint lawyers to represent them. It stated that it was not giving reasons for its decisions (nos. 1 BvR 924/10 and 923/10).

3. The third set of proceedings

40. In 2007, on an unspecified date, the applicants brought proceedings against the daily newspaper *Mannheimer Morgen* in the Hamburg Regional Court. On the newspaper's Internet portal (www.morgenweb.de), under the heading "Older news items", was a news item dated 22 May 2001 which was available until 2007. Only persons with special access rights, such as subscribers and purchasers of certain other printed media, could access this section. However, all Internet users had access to a "teaser" indicating the subject matter of the items available in that section. The teaser referring to the news item of 22 May 2001 gave the full names of the applicants and read as follows:

> "The proceedings against the two convicted murderers of the very popular actor W.S. will not be reopened for the time being. The Augsburg Regional Court reportedly rejected an application for reopening by the brothers W.W. and M.L. They are expected to appeal against that decision to the Munich Court of Appeal."

41. In two judgments of 16 November 2007 the Regional Court granted the applicants' request.

42. On 19 August 2008 the Hamburg Court of Appeal upheld these judgments on the same grounds as those set out in its judgments of 29 July 2008 (see paragraphs 14-16 above).

43. On 20 April 2010 the Federal Court of Justice allowed the appeals on points of law lodged by the newspaper (nos. VI ZR 245/08 and 246/08) and dismissed the applicants' claims on the same grounds as those set out in its judgments of 9 February 2010 (see paragraphs 35-36 above).

44. On 23 June 2010 the Federal Constitutional Court decided not to entertain the constitutional appeals lodged by the applicants, not to grant them legal aid and not to appoint lawyers to represent them. It stated that it was not giving reasons for its decisions (nos. 1 BvR 1316/10 and 1315/10).

4. Other proceedings brought by the applicants

45. The Federal Court of Justice subsequently reaffirmed its case-law in other proceedings instituted by the applicants (nos. VI ZR 345/09 and 347/09 of 1 February 2011, nos. VI ZR 114/09 and 115/09 of 22 February 2011, and no. VI ZR 217/08 of 8 May 2012 concerning the second applicant). In a judgment of 22 February 2011 concerning the second applicant and relating to an article published in the *Frankfurter Allgemeine Zeitung* daily newspaper on 14 January 2005, the Federal Court of Justice noted that, according to the findings of the Regional Court, the applicant had contacted the *Süddeutsche Zeitung* daily newspaper in August and November 2004 and requested it to continue reporting on him. The newspaper had responded to the request by publishing an article (containing text and photos) about the second applicant. The Federal Court of Justice concluded that, under these circumstances, the public's interest in being fully (*umfassend*) informed about the criminal act in question had not weakened or, at least, had resumed in the summer of 2004. This was further demonstrated by the numerous reports regarding the second applicant that could be found until June 2006 on the website of his criminal lawyer. Hence, the applicant had at that time been in the public eye and had not been unlawfully drawn into the spotlight by the publication of the article (no. VI ZR 346/09).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law

1. The Basic Law

46. The relevant provisions of the Basic Law read as follows:

Article 1 § 1

"The dignity of human beings is inviolable. All public authorities shall have a duty to respect and protect it."

Article 2 § 1

"Everyone shall have the right to the free development of his or her personality provided that he or she does not infringe the rights of others or violate the constitutional order or moral law (*Sittengesetz*)."

Article 5 §§ 1 and 2

"1. Everyone shall have the right to freely express and disseminate his or her opinion in speech, writing and images, and to gather information without hindrance from sources accessible to all. Freedom of the press and freedom to provide information through radio, television and cinema shall be guaranteed. There shall be no censorship.

2. These rights shall be limited by the provisions of general statutes, the statutory provisions on the protection of young people and the right to respect for personal honour (*Recht der persönlichen Ehre*)."

47. The Federal Court of Justice, in a judgment of 25 May 1954 (no. I ZR 311/53), recognised a general right to protection of personality under Articles 1 § 1 and 2 § 1 of the Basic Law.

2. The Civil Code

48. Article 823 § 1 of the Civil Code (*Bürgerliches Gesetzbuch*) states that anyone who, acting intentionally or negligently, unlawfully violates the rights to life, physical integrity, health, liberty, property or similar rights of others is required to afford redress for any damage arising in consequence.

49. Under Article 1004 § 1 of the Civil Code, where another's property is damaged otherwise than by removal or illegal retention the owner may require the perpetrator to cease the interference. If there are reasonable fears that further damage will be inflicted, the owner may seek an injunction.

3. The Copyright (Arts Domain) Act

50. Section 22(1) of the Copyright (Arts Domain) Act (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie – Kunsturhebergesetz*) provides that images representing a person may be distributed only with the express permission of the person concerned. The first paragraph of section 23(1) of the Act provides for exceptions to this rule where the images portray an aspect of contemporary history (*Bildnisse aus dem Bereich der Zeitgeschichte*), on condition that publication does not interfere with a legitimate interest (*berechtigtes Interesse*) of the person concerned (section 23(2)).

51. In a judgment of 30 November 2012 in a case similar to the present one, the Federal Court of Justice reaffirmed its case-law on the subject, adding that the technical possibilities of the Internet did not justify restricting access to original reports on particular events of contemporary history to persons who had access or sought access to traditional archives (no. VI ZR 330/11). A constitutional appeal lodged against that judgment by the person referred to in the archived articles is pending before the Federal Constitutional Court (no. 1 BvR 16/13).

B. Council of Europe texts

1. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

52. The relevant parts of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 read as follows:

Article 1 – Object and purpose

"The purpose of this Convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ('data protection')."

Article 3 – Scope

"1. The Parties undertake to apply this Convention to automated personal data files and automatic processing of personal data in the public and private sectors.

..."

Article 5 – Quality of data

"Personal data undergoing automatic processing shall be:

(a) obtained and processed fairly and lawfully;

(b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are stored;

(d) accurate and, where necessary, kept up to date;

(e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored."

Article 6 – Special categories of data

"Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions."

Article 9 – Exceptions and restrictions

"...

2. Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society:

...

(b) protecting the data subject or the rights and freedoms of others."

53. On 18 May 2018, at its 128th session in Elsinore, the Committee of Ministers adopted a new version of this Convention. The relevant parts of the new Article 9 read as follows:

"1. No exception to the provisions set out in this Chapter shall be allowed except to the provisions of Article 5 paragraph 4, Article 7 paragraph 2, Article 8 paragraph 1 and Article 9, when such an exception is provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society for:

a. the protection of national security ... and other essential objectives of general public interest;

b. the protection of the data subject or the rights and fundamental freedoms of others, notably freedom of expression ...”

2. Recommendation No. R (2000) 13 of the Committee of Ministers

54. The relevant parts of Recommendation No. R (2000) 13 of the Committee of Ministers to member States on a European policy on access to archives, adopted on 13 July 2000 at the 717th meeting of the Ministers' Deputies, are worded as follows:

“...

Considering that archives constitute an essential and irreplaceable element of culture;

Considering that they ensure the survival of human memory;

...

Taking account of the complexity of problems concerning access to archives at both national and international level due to the variety of constitutional and legal frameworks, of conflicting requirements of transparency and secrecy, of protection of privacy and access to historical information, all of which are perceived differently by public opinion in each country;

...

Recommends that the governments of member states take all necessary measures and steps to:

i. adopt legislation on access to archives inspired by the principles outlined in this recommendation, or to bring existing legislation into line with the same principles;

...

Appendix to Recommendation No. R (2000) 13

...

III. Arrangements for access to public archives

5. Access to public archives is a right. ...

7. The legislation should provide for:

a. either the opening of public archives without particular restriction; or

b. a general closure period.

7.1. Exceptions to this general rule necessary in a democratic society can, if the case arises, be provided to ensure the protection of:

...

b. private individuals against the release of information concerning their private lives.

10. If the requested archive is not openly accessible for the reasons set out in article 7.1, special permission may be given for access to extracts or with partial blanking. The user shall be informed that only partial access has been granted.

IV. Access to private archives

12. Wherever possible, *mutatis mutandis*, attempts should be made to bring arrangements for access to private archives in line with those for public archives."

3. Recommendation Rec(2003)13 of the Committee of Ministers

55. The relevant parts of Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information through the media in relation to criminal proceedings, adopted on 10 July 2003 at the 848th meeting of the Ministers' Deputies, are worded as follows:

"...

Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;

...

Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

...

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1. take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

...

Appendix to Recommendation Rec(2003)13

Principles concerning the provision of information through the media in relation to criminal proceedings

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

...

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

4. Recommendation CM/Rec(2012)3 of the Committee of Ministers

56. The Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted on 4 April 2012 at the 1139th meeting of the Ministers' Deputies, stresses the importance of search engines in facilitating access to Internet content and making the World Wide Web useful to the public. It considers it essential that search engines be free to explore and index information that is openly available on the Web and intended for mass outreach. It notes that the action of search engines can, however, affect freedom of expression and the right to seek, receive and impart information, and that it also has an impact on the right to private life and the protection of personal data because of the pervasiveness of search engines and their ability to penetrate and index content which, although in the public space, was not intended for mass communication (or mass communication in aggregate).

C. European Union law

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

57. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was designed to protect individuals' fundamental rights and freedoms (including their right to privacy) in the processing of personal data, while at the same time removing obstacles to the free flow of such data. In Article 9 of the Directive, the member States provided for exemptions and derogations for the processing of personal data solely for journalistic purposes or the purposes of artistic or literary expression.

2. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016

58. Articles 17 and 85 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (applicable from 25 May 2018) on the protection of natural persons with regard to the processing of

personal data and on the free movement of such data, which repealed Directive 95/46/EC (the General Data Protection Regulation), read as follows:

Article 17 – Right to erasure ("right to be forgotten")

"1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

...

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

...

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing ..."

Article 85 – Processing and freedom of expression and information

"1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations ... if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information."

3. The judgment of the Court of Justice of the European Union of 13 May 2014 (Google Spain and Google)

59. In its judgment of 13 May 2014 (Case C-131/12, EU:C:2014:317; *Google Spain SL and Google Inc.* – hereafter "*Google Spain*"), the Court of Justice of the European Union ("the CJEU") was called upon to define the extent of the rights and obligations arising out of Directive 95/46/EC. The case originated in a complaint lodged by a Spanish national with the Spanish Data Protection Agency against a Spanish daily newspaper and Google. The applicant had complained that, when an Internet user entered

his name in Google's search engine, the list of results displayed links to two pages of the newspaper mentioning his name in connection with an auction following attachment proceedings. He had requested the newspaper either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect his data. He had also requested Google to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to the newspaper. While the Spanish Agency had rejected the complaint against the newspaper, it had upheld the complaint against Google, which brought an action before the Spanish courts. It was in the context of this judicial dispute that the case was referred to the CJEU for a preliminary ruling.

60. The CJEU held that the operations carried out by operators of search engines should be classified as "data processing", for which they were "responsible" (Article 2 (b) and (d)), regardless of the fact that these data had already been published on the Internet and had not been altered by the search engine. It stated that, in so far as the activity of a search engine could be distinguished from and was additional to that carried out by publishers of websites and also affected the fundamental rights of the person concerned, the operator of the search engine had to ensure in particular that the guarantees laid down by the directive could have full effect. Moreover, given the ease with which information published on a website could be replicated on other sites, effective and complete protection of data users, and particularly of their right to privacy, could not be achieved if they had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites. The CJEU concluded that the operator of a search engine was obliged to remove links to web pages that were published by third parties and contained information relating to a person from the list of results displayed following a search made on the basis of that person's name, including in cases where the name or information had not been erased beforehand or simultaneously from those web pages and even, as applicable, when its publication on those pages was in itself lawful.

61. The CJEU added that even initially lawful processing of accurate data could, in the course of time, become incompatible with the directive where those data were no longer necessary in the light of the purposes for which they had been collected or processed. That was so in particular where they appeared to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that had elapsed. The CJEU concluded that, as the persons concerned had a right under Articles 7 and 8 of the European Union's Charter of Fundamental Rights to ensure that the information in question relating to them personally should no longer be linked to their name by a list of results, and they were thus entitled to request that the information in question no longer be made available to the general public on account of its inclusion in such a list of

results, those rights overrode, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information through a search relating to the names of the persons concerned. However, according to the CJEU, that would not be the case if it appeared, for particular reasons such as the role played by the persons concerned in public life, that the interference with their fundamental rights was justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

62. Regarding the difference in treatment between the publisher of a web page and the operator of a search engine, the CJEU found as follows:

> "85. Furthermore, the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page.
>
> 86. Finally, it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing of the interests at issue to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the directive may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same.
>
> 87. Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page."

4. Guidelines of the Article 29 Working Party

63. On 26 November 2014 the European data protection authorities, meeting within the Article 29 Working Party, adopted a set of guidelines designed to ensure harmonised implementation of the CJEU's judgment of 13 May 2014. The second part of the guidelines concerns common criteria which the data protection authorities were invited to apply in handling complaints following refusals of de-listing by search engines. The thirteenth criterion reads as follows:

"13. Does the data relate to a criminal offence?

EU Member States may have different approaches as to the public availability of information about offenders and their offences. Specific legal provisions may exist which have an impact on the availability of such information over time. DPAs will handle such cases in accordance with the relevant national principles and approaches. As a rule, DPAs are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis."

THE LAW

I. JOINDER OF THE APPLICATIONS

64. Given the similarity of the applications as to the facts and the substantive issues raised, the Court deems it appropriate to join them (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

65. The applicants complained of the Federal Court of Justice's refusal to prohibit the media outlets concerned from keeping on their respective Internet portals the transcript of the *Deutschlandfunk* radio programme broadcast at the time of the events and the written reports published in old editions of *Der Spiegel* and *Mannheimer Morgen* concerning the applicants' criminal trial and their ensuing conviction for murder. The applicants alleged an infringement of their right to respect for their private life under Article 8 of the Convention, the relevant parts of which 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 ... for the protection of the rights and freedoms of others."

66. The Government contested that argument.

A. Admissibility

67. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' observations

(a) The applicants

68. The applicants complained that they had been confronted again with their crime despite the fact that, following their conviction more than fifteen years previously, they had served their sentences and prepared for their reintegration into society. In their view, keeping the archives concerning them available to Internet users had the effect of stigmatising them afresh. In that connection they submitted that, as long as an article concerning a person's conviction, handed down years earlier, was available on an Internet portal, it would be read in the same way by a neighbour or an employer whether it had been written recently or at the time of the conviction. In both cases the person concerned would be branded as a murderer.

69. The applicants further complained that the Federal Court of Justice had failed to recognise the specific dangers of the Internet era, as demonstrated by its reference to the *Lebach* judgment, delivered by the Federal Constitutional Court in 1973. In their submission, the report at issue in the *Lebach* case had undoubtedly reached a significant level of dissemination as it had been shown on one of the three public channels existing at the time. However, a television programme was forgotten after a certain period of time, whereas Internet search engines allowed information on a specific event to be obtained at any time free of charge, rapidly, from anywhere and on a continuous basis. Dissemination on the Internet therefore amounted to a lasting breach of the right to respect for private life.

70. The applicants feared being permanently branded as murderers and were afraid that any new social ties would be tainted by the information – relating to the past but still accessible – concerning their conviction. In their view, it was not acceptable to warn of the dangers of erasing history, as the Federal Court of Justice and the Government had done, when the applicants' sole aim was to request anonymity for the persons referred to in a report on a given event. They added in that connection that they were seeking precisely to avoid being a part of contemporary history.

71. The applicants also rejected the argument of the Federal Court of Justice and the Government that any obligation for the press to regularly check all its archives would unduly restrict its freedom of expression. Their request was not intended to require the media to systematically check all their archives at regular intervals, but only to do so in the event of an express request for anonymity made by a person who was the subject of a report. A similar duty of verification existed in other spheres, and the costs engendered by such requests could be charged to the requesting party in order to mitigate any potential chilling effect on the press. Furthermore, the concept of a "chilling effect" to which the Federal Court of Justice referred

did not apply where two freedoms guaranteed by the Convention came into conflict.

72. The applicants further submitted that the media outlets' interest in disseminating the reports in question was slight. They questioned whether, twenty years after their conviction, there was still a particular public interest in being informed about the event. In their view, that interest would be satisfied in the same way if they remained anonymous in the reports, something that would require only minimal technical intervention.

73. Lastly, in reply to the Government's observations, the applicants argued that search engines did not regularly make copies of Internet content, which stored all information indefinitely, but merely provided caching mechanisms which saved and kept some content for a certain period of time. Even if complete anonymity were not possible, this did not mean that all attempts at anonymity should be abandoned. On the contrary, media outlets which made Internet archives available should be obliged to do everything in their power to limit the dissemination of material where a request had been made for it to be rendered anonymous.

74. The applicants further submitted that the fact of having exhausted all the remedies available in German law with a view to having the criminal proceedings against them reopened did not deprive them of their right to respect for their private life.

(b) The Government

75. The Government stressed the important role of digital archives for the collective memory, as they helped to document contemporary history by preserving printed materials and information published only in digital form. In their view, imposing an ongoing obligation on the media to verify their digital archives in order to make reports anonymous would constitute excessive interference. Contrary to the applicants' claims, such an obligation would require considerable efforts on the part of the media in terms of both personnel and technical resources, especially since the quantity of digital archives was increasing constantly.

76. The Government pointed out in that regard that introducing automatic deletion or anonymisation of reports after a certain period of time would not solve the issue raised by the present applications. In their view, the answer to the question whether any given report should be made anonymous on grounds of the right to protection of personality depended on a number of concrete circumstances specific to each report and on the degree of interference with the competing rights at stake. Such an examination could only be carried out by qualified persons who were competent to perform the necessary balancing exercise.

77. The Government further argued that accepting such requests would not only result in a rewriting of history, as the Advocate General had pointed out in his Opinion in the *Google Spain* case, but would also entail

the risk that, given the technical and human investment required, the media might have to restrict or even cease the use of digital archives and the publication of individualised reports affecting the right to protection of personality of the persons concerned.

78. The Government also drew attention to the fact that States were facing rapid technical developments in all areas of the Internet and that, in the absence of a common European standard, they therefore enjoyed a wide margin of appreciation in regulating the legal issues raised. No right to be forgotten was guaranteed as such. Directive 95/46/EC and the Federal Data Protection Act (which had transposed the Directive) merely laid down the conditions under which personal data had to be deleted.

79. In reply to the applicants' observations, the Government submitted that the fact that the search for information or for a name in the digital archives was very quick and easy was primarily due to the existence of search engines. Without them, searches would be just as laborious as "traditional" searches had been before the Internet era and would pose fewer problems in terms of fundamental rights. Once published on the Internet, information could always be found even if it had been deleted from the website that had originally put it online. Indeed, search engines copied Internet content at regular intervals and saved it on their servers. As a result, persons who were the subject of Internet content would have to contact a large number of stakeholders in order to obtain the deletion of the content itself or of their names.

80. In the Government's submission, the Federal Court of Justice had weighed the competing interests at stake in accordance with the criteria established by the Court's case-law. While acknowledging the applicants' interest in social reintegration, the Federal Court of Justice had held that the reports at issue provided truthful and objective information concerning a major event, namely the murder of a popular actor. The Federal Court of Justice had also found that, despite their location on the Internet, dissemination of the reports had been limited. They had been clearly marked as old reports and would therefore only have been identifiable by persons looking for them specifically, and nothing had been done to draw readers' attention to them. In addition, there was a charge for access to the articles in the *Spiegel online* archives. The Government added that the applicants had not adduced any evidence making it possible to assess the ease with which the reports could be found and the position in which they appeared, for example, on a Google search list.

81. Lastly, the Government argued that it was the applicants themselves who, thirteen years after the crime and ten years after their conviction, had generated renewed public interest by submitting applications for the reopening of the criminal proceedings against them and, especially, by taking the initiative to send documents to the press, in particular concerning their applications to reopen the proceedings, and continuing to do so until

2004. More specifically, in a letter dated 31 August 2004 to the weekly magazine *Der Spiegel*, the first applicant had expressly requested that the press inform the public. Hence, the media had had no reason to believe that the applicants no longer wanted anything to do with the press as their release date approached.

82. With regard to the photos, the Government maintained that the balancing exercise carried out by the Federal Court of Justice was also compatible with the Convention and the Court's case-law. The photos had shown the applicants in the courtroom of the criminal court and in the company of W.S. and a prison officer; they therefore had a direct link to the subject matter of the articles at issue, namely the criminal trial. Lastly, they had related contemporary historical truth in a neutral and objective manner.

2. The third parties' observations

83. The third parties submitted that the right to publish full names was an integral part of the media's freedom of expression and allowed them to fulfil their task of informing the public on matters of public interest. The third parties also stressed the importance for the press of being able to build up digital archives, which had largely replaced traditional archives and were virtually the only source for research in the field of contemporary history. The accuracy of archives was crucial for historical documentation, the collective memory and public debate.

84. The third parties also emphasised the impossibility for them to constantly examine their archived material for content that might be unlawful or have become unlawful. The obligation to perform such a task would be beyond their means and would hang over them like a sword of Damocles. For instance, the *Spiegel online* archives contained about one million documents and about 1,500 new documents were added every week; as to the *Deutschlandradio* archives, 220 audio files and 85 text files were added each day.

85. Lastly, the third parties submitted that the material at issue in the present cases could no longer be found on the Internet using search engines. Although two articles published by *Spiegel online* could indeed still be found when a search was made using the name of the murdered actor, the applicants' names were not included in full. Furthermore, the vast majority of the research results obtained related more to the procedural aspects than to the crime itself, and included reports on the requests for anonymity of the published articles. Finally, their statistical research suggested that Internet users' interest in the articles in question remained insignificant.

3. The Court's assessment

(a) General principles

86. 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 gender identification and sexual orientation, name or elements relating to a person's right to their image. The concept covers personal information which individuals can legitimately expect should not 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).

87. The Court further reiterates that where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private life considerations arise. It has recognised that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 136, 27 June 2017). In that judgment the Court further found that Article 8 of the Convention provided for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, were collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights might be engaged (ibid., § 137).

88. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. Moreover, Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

89. The Court notes that applications like the present one call for an examination of the fair balance to be struck between, on the one hand, the applicants' right to respect for their private life under Article 8 of the Convention and, on the other hand, the radio station's and publishers' freedom of expression and the public's freedom of information under Article 10. In examining this balance the Court must have regard, among other factors, to the State's positive obligations under Article 8 of the Convention (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Von Hannover (no. 2)*, cited above, § 98), and to the principles established in its settled case-law regarding the essential role played by the press in a democratic society, which includes reporting and commenting on

court proceedings. It is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Axel Springer AG*, cited above, §§ 79-81). Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Mosley v. the United Kingdom*, no. 48009/08, § 113, 10 May 2011).

90. In addition to this primary function, the press has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public. In that connection the Court stresses the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free (see *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, §§ 27 and 45, ECHR 2009, and *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 59, 16 July 2013; see also Recommendation No. R (2000) 13 of the Committee of Ministers, cited at paragraph 54 above).

91. The Court also emphasises in this connection that Internet sites are an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information, and that 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 *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015; *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts); and *Cicad v. Switzerland*, no. 17676/09, § 59, 7 June 2016), particularly on account of the important role of search engines.

92. 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 (no. 2)*, cited above, § 106; *Axel Springer AG*, cited above, § 87; and *Couderc and*

Hachette Filipacchi Associés v. France [GC], no. 40454/07, § 91, ECHR 2015 (extracts)).

93. 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 *Von Hannover (no. 2)*, cited above, § 105, and *Axel Springer AG*, cited above, § 86).

94. 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 (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Bédat v. Switzerland* [GC], no. 56925/08, § 54, 29 March 2016). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Delfi AS*, cited above, § 139; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 59, 2 February 2016; and *Fürst-Pfeifer v. Austria*, nos. 33677/10 and 52340/10, § 40, 17 May 2016).

95. The Court has already had occasion to lay down the relevant principles which must guide its assessment – and, more importantly, that of domestic courts – of necessity. It has thus identified a number of criteria in the context of balancing the competing rights. The relevant criteria have thus far been defined as: contribution to a debate of public interest, the degree to which the person concerned is well known, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where it arises, the circumstances in which photographs were taken (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 165, and the case-law cited therein).

96. The Court considers that the criteria thus defined may be transposed to the present case, although certain criteria may have more or less relevance given the particular circumstances of the case (ibid., § 166; see also *Falzon v. Malta*, no. 45791/13, § 55, 20 March 2018, and *Axel Springer and RTL Television GmbH v. Germany*, no. 51405/12, § 42, 21 September 2017).

(b) Application of those principles to the present case

97. The Court notes first of all that it is primarily because of search engines that the information on the applicants held by the media outlets concerned can easily be found by Internet users. Nevertheless, the initial interference with the applicants' enjoyment of their right to respect for their private life resulted from the decision of the media outlets to publish that

information and, especially, to keep it available on their websites, even without the intention of attracting the public's attention; the existence of search engines merely amplified the scope of the interference. However, because of this amplifying effect on the dissemination of information and the nature of the activity underlying the publication of information on the person concerned, the obligations of search engines towards the individual who is the subject of the information may differ from those of the entity which originally published the information. Consequently, the balancing of the interests at stake may result in different outcomes depending on whether a request for deletion concerns the original publisher of the information, whose activity is generally at the heart of what freedom of expression is intended to protect, or a search engine whose main interest is not in publishing the initial information about the person concerned, but in particular in facilitating identification of any available information on that person and establishing a profile of him or her (in this connection, see also the CJEU judgment of 13 May 2014, No C-131/12, paragraphs 59-62 above).

(i) Contribution to a debate of public interest

98. As regards the question of the existence of a debate of public interest, the Court observes that the Federal Court of Justice noted the considerable interest that the crime and the criminal trial had aroused at the time because of the seriousness of the facts and the high public profile of the victim. The Federal Court of Justice also noted that the applicants had tried up to and beyond the year 2000 to obtain the reopening of the criminal proceedings against them. It further stressed the truthful and objective nature of the reports. The Court can agree with this view, since the public has an interest in principle in being informed about criminal proceedings and in being able to obtain information in that regard, especially when the proceedings concern particularly serious judicial facts which attracted considerable attention (see, for instance, *Schweizerische Radio und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 56, 21 June 2012, and *Egeland and Hanseid v. Norway*, no. 34438/04, § 58, 16 April 2009). This not only concerns reports which appeared during the criminal trial in question but may also include, depending on the circumstances of the case, reports on an application for the proceedings to be reopened some years after the conviction.

99. The Court notes that the particular feature of the present applications is that the applicants are not calling into question the lawfulness of the reports when they first appeared or were made available on the Internet portals of the media outlets concerned, but rather the fact that those reports were accessible a long time afterwards and, in particular, as the date of the applicants' expected release from prison approached. It must therefore

examine whether the fact of making the reports in issue available continued to contribute to a debate of public interest.

100. The Court observes that, after a certain period of time has elapsed and, in particular, as their release from prison approaches, persons who have been convicted have an interest in no longer being confronted with their acts, with a view to their reintegration in society (see *Österreichischer Rundfunk v. Austria*, no. 35841/02, § 68, 7 December 2006; *Österreichischer Rundfunk* (dec.), cited above; and, *mutatis mutandis*, *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, §§ 90-91, ECHR 2006-VII). This may be especially true once a convicted person has been finally released. Likewise, the public's interest as regards criminal proceedings will vary in degree, as it may evolve during the course of the proceedings according to a number of factors such as the circumstances of the case (see *Axel Springer AG*, cited above, § 96).

101. Turning back to the present case the Court observes that the Federal Court of Justice, while acknowledging that the applicants had a very significant interest in no longer being confronted with their conviction, stressed that the public had an interest not only in being informed about a topical event, but also in being able to conduct research into past events. The Federal Court of Justice also pointed out that the media's task was to contribute to shaping democratic opinion by making old news items that were stored in their archives available to the public.

102. The Court fully agrees with this conclusion. It has consistently stressed the essential role played by the press in a democratic society (see The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30), including through its websites and the establishment of digital archives, which contribute significantly to enhancing the public's access to information and its dissemination (see *Times Newspapers Ltd (nos. 1 and 2)*, cited above, § 27, and *Węgrzynowski and Smolczewski*, cited above, § 65). Moreover, according to the Court's case-law, the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention (ibid.), and particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive (see Timpul Info-Magazin *and Anghel v. Moldova*, no. 42864/05, § 31, 27 November 2007, and *Times Newspapers Ltd (nos. 1 and 2)*, cited above, § 41).

103. In this context the Court observes that the Federal Court of Justice pointed to the risk of a chilling effect on the freedom of expression of the press if requests such as that of the applicants were to be granted, and in particular the risk that the media, owing to a lack of sufficient personnel and time to examine such requests, might no longer include in their reports identifying elements that could subsequently become unlawful.

104. The Court notes that the applicants did not request that the media check their archives systematically on an ongoing basis, but only that they

carry out such checks in the event of an express individual request. However, it cannot rule out the existence of the risk to the press referred to by the Federal Court of Justice. The obligation to examine the lawfulness of a report at a later stage, following a request from the person concerned, which implies – as the Government rightly pointed out – weighing up all the interests at stake, would entail a risk that the press might refrain from keeping reports in its online archives or that it would omit individualised elements in reports likely to be the subject of such a request. While recognising the importance of the rights of a person who has been the subject of content available on the Internet, these rights must also be balanced against the public's right to be informed about past events and contemporary history, in particular through the use of digital press archives. The Court observes in that regard that the most careful scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III, and *Times Newspapers Ltd (nos. 1 and 2)*, cited above, § 41).

105. In so far as the applicants stressed that they were not requesting that the impugned reports be deleted, but only that their names no longer appear in them, the Court notes that rendering a report anonymous is certainly less detrimental to freedom of expression than the deletion of an entire report (see, *mutatis mutandis*, *Times Newspapers Ltd (nos. 1 and 2)*, cited above, § 47). However, it reiterates that the approach to covering a given subject is a matter of journalistic freedom and that Article 10 of the Convention leaves it to journalists to decide what details ought to be published in order to ensure an article's credibility, provided that the choices which they make in that regard are based on their profession's ethical rules and codes of conduct (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 186). The Court considers, like the third-party media outlets, that the inclusion in a report of individualised information such as the full name of the person concerned is an important aspect of the press's work (see *Fuchsmann v. Germany*, no. 71233/13, § 37, 19 October 2017), especially when reporting on criminal proceedings that have attracted considerable interest. It concludes that, in the present case, the availability of the impugned reports on the media outlets' websites at the time the applicants' requests were lodged continued to contribute to a debate of public interest which had not been diminished by the passage of a number of years.

(ii) The degree to which the person concerned is well known and the subject of the report

106. As to how well known the applicants were, the Court notes that the German courts did not explicitly rule on this subject. However, it observes that the applicants' public profile was closely linked to the fact that they had

committed the murder and to the subsequent criminal trial. Therefore, while there is nothing to suggest that the applicants were known to the public before their crime, they nevertheless acquired a certain notoriety during the trial, which according to the findings of the civil courts attracted considerable public attention because of the nature and circumstances of the crime and the fame of the victim. While subsequently, with the passage of time, the public's interest in the crime – and, consequently, the applicants' notoriety – declined, the Court observes that the applicants returned to the limelight after making several attempts to have the criminal proceedings against them reopened and after addressing the press on the subject. The Court concludes from this that the applicants were not simply private individuals unknown to the public at the time their requests for anonymity were made.

107. As regards the subject matter of the reports, the Court notes that they related either to the conduct of the criminal trial at the relevant time or to one of the applicants' applications to have the proceedings reopened, both of which were capable of contributing to a debate in a democratic society. The Court refers in that regard to its findings at paragraph 111 below.

(iii) The prior conduct of the person concerned with regard to the media

108. As regards the applicants' conduct since their conviction, the Court observes, as noted by the Federal Court of Justice, that they tried all "conceivable" legal remedies to have the criminal proceedings reopened. In addition, as the Government pointed out, in the course of their most recent application for reopening in 2004, that is to say, two and a half and three years respectively before their release, the applicants contacted the press, to which they forwarded a number of documents partly related to their application for reopening, while inviting journalists to keep the public informed. It is also worth noting that, as the Federal Court of Justice pointed out in its judgment of 22 February 2011 concerning the second applicant (see paragraph 45 above), numerous reports on his client could be found until 2006 on the website of the second applicant's criminal lawyer.

109. In this context, while a convicted person – who, moreover, protests his or her innocence – cannot be criticised for using the judicial remedies available under domestic law to challenge his or her conviction, the Court notes that the applicants' attempts went far beyond the mere use of the remedies available under German criminal law. Specifically, as a result of their conduct towards the press in particular, the applicants' interest in no longer being confronted with their conviction through the information stored on the Internet portals of a number of media outlets was of less significance in the present case. The Court concludes that the applicants, even as their release approached, therefore had only a limited legitimate expectation (see, *mutatis mutandis*, Axel Springer AG, cited above, § 101) of obtaining anonymity in the reports or even a right to be forgotten online.

(iv) The content, form and consequences of the publication

110. The Court reiterates that the way in which the photo or report is published and the manner in which the person concerned is represented therein may also be factors to be taken into consideration. The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Von Hannover (no. 2)*, cited above, § 112, and the case-law cited therein).

111. As regards the subject matter, content and form of the files at issue, the Court sees no grounds for criticising the way in which the Federal Court of Justice assessed the reports by *Deutschlandradio* and *Mannheimer Morgen*. The texts in question were written by the media in the exercise of their freedom of expression. They reported objectively on a court decision and their veracity and lawful origin were at no time called into question (see, conversely, *Węgrzynowski and Smolczewski*, cited above, § 60). As to the *Spiegel online* file, the Court accepts that certain articles, and in particular the one published in the edition of 30 November 1992 (see paragraph 28 above), might be open to question owing to the nature of the information provided. However, it observes that the details of the accused's lives reported by the author of the articles form part of the information that criminal-law judges are regularly required to take into consideration in assessing the circumstances of the crime and the elements of individual guilt, and thus generally form part of the discussions during public hearings. Furthermore, these articles did not reflect an intention to present the applicants in a disparaging way or to harm their reputation (see *Lillo Stenberg and Sæther v. Norway*, no. 13258/09, § 41, 16 January 2014, and *Sihler-Jauch and Jauch v. Germany* (dec.), nos. 68273/10 and 34194/11, § 38, 24 May 2016).

112. As to the extent of dissemination of the reports, the Court notes the Federal Court of Justice's finding that, unlike the subject of a prime-time television broadcast, the information had had limited circulation owing to its limited accessibility and the fact that it did not appear on the news pages of the relevant media websites, but in sections clearly indicating that it was old news coverage. The applicants contested this reasoning and argued in particular that the Federal Court of Justice had misunderstood the realities of the Internet era and underestimated the dangers linked to the lasting nature of online information, owing especially to the existence of powerful and effective search engines.

113. The Court observes that, on account of their location on the Internet portals, the reports in issue were not likely to attract the attention of those Internet users who were not seeking information about the applicants (see, conversely and *mutatis mutandis*, *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 69, ECHR 2012 (extracts)). Furthermore, the Court sees no indication that maintaining access to the reports was intended to

re-disseminate information about the applicants. To that extent the Court can accept the conclusions of the Federal Court of Justice, according to which the extent of dissemination of the reports was limited (see *Fuchsmann*, cited above, § 52), especially since some of the information was subject to additional restrictions (paid access in the case of *Spiegel online* and subscriber-only access in the case of *Mannheimer Morgen*).

114. The applicants submitted that this way of measuring the extent of dissemination did not take into account the fact that the Internet amplified material and rendered it ubiquitous and hence the possibility that, irrespective of the initial extent of its dissemination, the information concerning them could be found permanently, particularly through the use of search engines. In that connection the Court, while aware of the lasting accessibility of any information once it is published on the Internet, notes that the applicants made no mention of any attempts to contact search-engine operators with a view to making the information concerning them less easy to find (see *Fuchsmann*, cited above, § 53, and *Phil v. Sweden* (dec.), no. 74742/14, 7 February 2017). Moreover, the Court considers that it is not called upon to rule on the possibility that the domestic courts could have ordered measures that were less restrictive of the media outlets' freedom of expression, given that these were not discussed before the courts in the domestic proceedings or, indeed, in the proceedings before the Court.

(v) The circumstances in which the photos were taken

115. Finally, with regard to the photos in question (see paragraphs 37-38 above), the Court notes that neither the applicants nor the civil courts expressed a view on the circumstances in which they were taken. However, it does not discern any compromising elements in those photos. It also observes, as the Federal Court of Justice correctly pointed out, that the images showed the applicants' appearance as it had been in 1994, that is, almost thirteen years before their release, a fact which reduced the likelihood of their being recognised by third parties on the basis of the photos.

(c) Conclusion

116. In view of the margin of appreciation available to the national authorities in such matters in weighing up diverging interests, the importance of maintaining access to reports whose lawfulness at the time of their publication is not contested, and the applicants' conduct towards the press, the Court considers that there are no substantial grounds for it to substitute its assessment for that of the Federal Court of Justice. It cannot therefore be said that by refusing to grant the applicants' request the Federal Court of Justice failed to fulfil the German State's positive obligation to protect the applicants' right to respect for their private life within the

meaning of Article 8 of the Convention. Accordingly, there has been no violation of that provision.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 28 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President