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Facebook posts – balancing right to respect for privacy and family life with right to freedom of expression

GRAF ISOLA Rechtsanwälte GmbH | Litigation - Austria



CLAUDIA
CSÁKY



MAG. SARAH
KASSLATTER

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In a recent decision concerning a Facebook post,⁽¹⁾ the Supreme Court ruled that the personality right to respect for privacy and family life outweighs the right to freedom of expression if statements published on Facebook do not contribute to a debate of general social interest.

Facts

The case concerned a family matter. The procedural parties divorced in 2014 and shared joint custody of their children, who lived with their mother. In 2020, following an internal family dispute, the court of guardianship changed the children's main place of care to the residence of their father. Upset about the judgment, the children's mother uploaded a post on her public Facebook profile in which she complained about the guardianship proceedings, disclosing details of their family life and making accusations against the children's father and their paternal family. At least 15 people reacted to the post and left insulting comments directed against the children's father and their paternal grandparents.

The children's father, together with their paternal grandparents and the children themselves (the applicants), applied for an interim injunction under section 382d No. 7 of the Austrian Enforcement Act (a so-called "stalking injunction") to order the children's mother (the respondent) not to use a computer system to make facts relating to their most personal sphere of life perceptible to a large number of people on her Facebook account or in a comparable manner in such a way that the parties involved were identifiable. Furthermore, the applicants requested that the respondent be ordered to delete her post and the comments published on it, in which the applicants were named, on her Facebook page.

Decision

The first-instance court issued the interim injunction. The Court of Appeal confirmed the first-instance court's decision, but allowed for an appeal to the Supreme Court.

The Supreme Court confirmed the Court of Appeal's judgment. It found that the objective of a stalking injunction under section 382d of the Enforcement Act is to secure a claim for injunctive relief against interference with privacy. This provision covers, in particular, dissemination by means of telecoms or using a computer system, for example via social media on the Internet, but also "traditional" dissemination, such as via posters.

The Court further stated that the concept of "privacy" refers to the personal sphere of a person's life, which is typically not made accessible to the public. The distribution of obscene remarks or insults on social networks falls within this scope and therefore constitutes a violation of privacy.

The Court, however, also pointed out that while the applicants' rights to respect for private and family life under article 8 of the European Convention on Human Rights (ECHR) was affected, so was the respondent's right to freedom of expression under article 10 of the ECHR. The question as to which of the two absolute protected rights prevailed could only be determined based on a comprehensive balancing of interests.

The Court took the opinion that the respondent's sole aim had been to create a negative atmosphere against the applicants and the guardianship court. Since she had been unable to show why the post would be useful to enforce her custody rights, nor why it should serve a debate of public interest, the interest of the applicants to protect their privacy trumped the respondent's right to freedom of expression.

Comment

The "stalking" interim injunction to protect against invasions of privacy applies not only in family law cases, but in all cases of systematic harassment. With the introduction of the prohibition of (cyber)mobbing in 2019, the scope of protection now extends to all cases in which private information is published – in particular, via social media channels.

The present decision makes it (once again) clear that if insulting and intimate information relating to another person is published, the main factor for the balance of interest being in favour of the freedom of expression is whether the information published contributes to a debate of "general interest" – which, so far, has been acknowledged especially in relation to health issues, animal protection issues, environmental issues or issues of public safety. Generally, a private person enjoys a higher level of protection than a person of public interest.

If – unlike in the present case – the author of the infringing post is not known, claims can be directed against the social media platform (eg, Facebook). As a "service provider", Facebook or any other social media platform can be held accountable as soon as it is made aware of the infringement.

For further information on this topic please contact [Claudia Csáky](mailto:c.csaky@grafisola.at) or [Sarah Kasslatter](mailto:s.kasslatter@grafisola.at) at GRAF ISOLA by telephone (+43 1 401 170) or email (c.csaky@grafisola.at or s.kasslatter@grafisola.at). The GRAF ISOLA website can be accessed at www.grafisola.at.

Endnotes

(1) 7 Ob 197/21b.