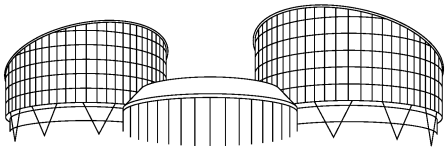

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SOUSA GOUCHA v. PORTUGAL

(Application no. 70434/12)

JUDGMENT

STRASBOURG

22 March 2016

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

In the case of Sousa Goucha v. Portugal,

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

András Sajó, *President,*
Boštjan M. Zupančič,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 1 March 2016,

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

PROCEDURE

1. The case originated in an application (no. 70434/12) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Mr Manuel Luís Sousa Goucha ("the applicant"), on 23 October 2012.

2. The applicant was represented by Mr A. Milagre, a lawyer practising in Lisbon. The Portuguese Government ("the Government") were represented by their Agent, Mrs M. F. da Graça Carvalho, Deputy Attorney-General.

3. The applicant alleged, in particular, that the unfavourable outcome of his defamation case before the Portuguese courts was discrimination on grounds of sexual orientation. He cited Article 14 of the Convention.

4. On 1 October 2014 the application was communicated to the Government.

5. The parties filed written observations. In addition, third-party comments were received from Alliance Defending Freedom ("ADF"), an association based in the United States of America dedicated to protecting fundamental freedoms including freedom of expression, represented by Mr R. Kiska, Mr P. Coleman and Mr R. Clarke, which had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1954 and lives in Fontanelas.

7. He is one of the most well-known television hosts in Portugal and is currently the host of a morning talk show. He has worked in the media for almost forty years.

8. He publicly declared his homosexuality in 2008.

A. Background

9. Between midnight and 1 a.m. on 28 December 2009, a live talk show, Five Minutes to Midnight (*5 Para a Meia-Noite*) was broadcast on one of the channels of the national television service, RTP2. The programme was presented by F.C. and featured two famous people from the media as guests.

10. In the course of the talk show, during a quiz, the guests were asked to answer the following question, which was identified as the most important by F.C.: "Who is the best Portuguese female TV host?" The possible answers to the question included the name of three female television hosts and the applicant's; the latter being the "correct" one. The transcript of the quiz reads:

> "F.C.: Who is the best female Portuguese TV host? Option A, F.C.; option B, C.V; option C, C.P. or option D, Manuel Luís Goucha.
>
> J.M.: This is a tough one.
>
> F.C:. J.M....
>
> J.M.: Oh boy. I will obviously exclude option A, definitely. From the other three, I think they are all gorgeous. I'll choose...
>
> F.C: We know that you are a Manuel Luís Goucha fan and [that] this is difficult for you. Goucha in the afternoons, mornings...
>
> J.M.: It's true.
>
> F.C.: Let's do this. What's your answer? We can't wait any longer.
>
> J.M.: Well, then I have to go for the pregnant one. Option B, C.V.
>
> F.C.: ... C.V. was J.M.'s extremely dishonest answer and clearly contrary to everything he believes.
>
> J.M.: C'mon, show me the answer.
>
> F.C.: Let's see the answer. J.M. cannot stand his excitement any longer. Let's see the answer. Manuel Luís Goucha!
>
> J.M.: I knew it, I knew it. That's what I was going to say. She was the one telling me not to say it, that it could be bad."

B. The proceedings at issue

11. On an unspecified date of 2010 the applicant lodged a criminal complaint for defamation and "insult" (*injúria*) with the Lisbon Criminal Department for Investigation and Prosecution against the State-owned television company RTP, the production company, the television presenter F.C. and the directors of programming and content. He complained that they had damaged his reputation and dignity by including his name in the list of possible answers to the question asked during the programme.

12. On 2 March 2011 a public prosecutor of the Lisbon Criminal Department discontinued the proceedings by adopting a decision which stated that the defendants had not intended to offend the applicant.

13. On an unspecified date the applicant sought to intervene in the proceedings as an assistant to the public prosecutor (*assistente*) and lodged private prosecution submissions (*acusação particular*) with the Lisbon Criminal Investigation Court (*Tribunal de Instrução Criminal*) against the defendants. They challenged his prosecution submissions by requesting that a judicial investigation be opened (*requerimento de abertura de instrução*).

14. On 24 June 2011 the investigating judge (*juiz de instrução*) responsible dismissed the case (*despacho de não pronúncia*). In relation to the individual defendants, the judge decided that there was insufficient evidence of any defamation and insults by them, thus the case was unable to be brought to trial. The relevant part of the decision reads:

> "Given the defendants' statements, it is clear that they did not intend to attack the [*assistente's*] honour. Nor did they anticipate this as possible. The subjective element of this criminal offence is therefore unverified.
>
> The [*assistente*] is a public figure and so must be used to having his characteristics captured by comedians in order to promote humour; it being public knowledge that [the applicant's characteristics] reflect behaviour that is attributed to the female gender, such as his way of expressing himself, his colourful [feminine] clothes, and the fact that he has always lived in a world of women (see, for example, the programmes he has always presented on television).
>
> The [*assistente*] has recently made his homosexuality public, and the defendants never intended to criticise his sexual orientation ..."

With regard to the two defendant companies, the proceedings were discontinued pursuant to Article 11 of the Criminal Code, which excludes "legal persons" from liability for defamation and insult.

15. The applicant appealed against the decision not to indict the natural defendants before the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*). In particular, he argued that the reason his name had been included in the list of possible answers had been his sexual orientation. On 17 April 2012 the appeal was dismissed. The court upheld the Criminal Investigation Court's decision. It stated that there was insufficient evidence to enable them to consider that there had been any defamation by the defendants. In

its decision, the court cited the above quotation from the investigating judge's decision of 24 June 2011 and further stated:

> "It should not be considered offensive to one's honour anything that the complainant considers as such, but what in the opinion of the majority of reasonable people should be considered an offence to the social and individual values of respect (judgment of the Coimbra Court of Appeal of 16 March 1993).
>
> ...
>
> And as the impugned decision noted, having balanced in a very sensible way the conflict of interests at hand and the context in which it unfolded:
>
> 'It should be taken into account that we have before us a comedy show, and that the moment at which the defendant asked her guest a question, referring to [*assistente*] Manuel Luís Goucha as 'one of the best female Portuguese hosts', was considered to be one of the many jokes said throughout the show, typical of such shows.
>
> The [*assistente*] is a public figure and so must be used to having his characteristics captured by comedians in order to promote humour; it being public knowledge that [the applicant's characteristics] reflect behaviour that is attributed to the female gender, such as his way of expressing himself, his colourful [feminine] clothes, and the fact that he has always lived in a world of women (see, for example, the programmes he has always presented on television).
>
> The [*assistente*] has recently made his homosexuality public, and the defendants never intended to criticise his sexual orientation. ..."

It further considered that:

> "... the expression used in a playful and irreverent context and in the normal style previously adopted by the television show under consideration, even though one may consider it as being in bad taste, does not reach the threshold required by law for the protection of honour and consideration."

II. RELEVANT DOMESTIC LAW

16. The offences of defamation and insult are defined in the Portuguese Criminal Code as follows:

Article 180

> "1. Anyone who, when addressing a third party, accuses another, even if the accusation takes the form of a suspicion, or makes a judgment that casts a slur on the honour or reputation of the other, even when reproducing the accusation or judgment, shall be liable on conviction to a maximum of six months' imprisonment or 240 day-fines."

Article 181

> "1. Anyone who insults another, by accusing him of something, even if the accusation takes the form of a suspicion, or by addressing them with words that cast a slur on their honour or reputation shall be liable on conviction to a maximum of three months' imprisonment or 120 day-fines."

III. RELEVANT INTERNATIONAL LAW MATERIAL

Case-law of the Court of Justice of the European Union

17. In the case of *Deckmyn v. Vandersteen* (Case C-201/13, 3 September 2014), the Court of Justice of the European Union was requested to interpret the meaning of parody in a preliminary ruling. It observed that:

> "1. Article 5(3)(k) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the concept of 'parody' appearing in that provision is an autonomous concept of EU law.
>
> 2. Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.
>
> However, the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).
>
> It is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/20, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves the fair balance."

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8

18. Relying on Article 14 of the Convention, the applicant complained that he had been discriminated against by the domestic courts because of his homosexuality which he had made public in 2008. In particular, he argued that the domestic courts' reasons for dismissing his defamation proceedings had been discriminatory.

19. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*,

19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). In the present case, it considers that the complaints fall to be examined under Article 8 and under Article 14 in conjunction with Article 8. Those provisions read:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national or social origin, association with a minority, property, birth or other status."

A. Admissibility

1. Applicability of Article 8

(a) The parties' submissions

(i) The Government

20. The Government contested the applicability of Article 8 in the present case. Referring to the case of *Axel Springer AG v. Germany* ([GC] no. 39954/08, 7 February 2012), they did not dispute that the right to protection of reputation fell within the notion of "private life" within the meaning of Article 8. However, they submitted that the applicability of Article 8 to such cases required that the attack on a person's reputation had to attain a certain level of seriousness and be in a manner causing prejudice to personal enjoyment of the right to respect for private life. They argued that in the present case, however, the attack on the applicant's reputation had not fulfilled the "certain level of seriousness" requirement established in the Court's case-law.

(ii) The applicant

21. The applicant submitted that he had suffered an attack on his reputation, which fell under "private life" within the meaning of Article 8. In particular, he argued that the impugned joke had made an association between his sexual orientation and the female gender.

(iii) The third-party

22. The third-party organisation, ADF, submitted that Article 8 would not necessarily be applicable where a private person speaks in such a way as to cause subjective offence to another. Referring to the cases of *Sentges v. the Netherlands* ((dec.), no. 27677/02, ECHR 2003), *Axel Springer AG* (cited above) and *A. v. Norway* (no. 28070/06, 9 April 2009), the third party alleged that for Article 8 to come into play in the context of speech, the attack on a person's reputation should attain a certain level of seriousness, and the prejudice caused to that person must also exceed a minimum threshold.

(b) The Court's assessment

23. The concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the moral 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 (see *E.B. v. France* [GC], no. 43546/02, § 43, 22 January 2008, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 95, ECHR 2012).

24. The Court reiterates that the right to protection of reputation is a right protected by Article 8 of the Convention as part of the right to respect for private life (see *Axel Springer AG*, § 83, and *A. v. Norway*, § 64, both cited above). The Court has also already held that a person's reputation, even if he or she was criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity (see *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007).

25. In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and be in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG*, cited above, § 83).

26. What is at issue in the present case is whether Article 8 is applicable to the joke made about the applicant in the context of a television comedy show.

27. The Court observes that the impugned joke included the applicant in a list of female hosts which, in the applicant's view, mixed his gender with his sexual orientation (see paragraph 10 above). The Court reiterates that sexual orientation is a profound part of a person's identity and that gender and sexual orientation are two distinctive and intimate characteristics. It notes, in this regard, cases which have been brought before the Court concerning gender identity revealing the intimate importance that one gives to it (see, among many other authorities, *Grant v. the United Kingdom*, no. 32570/03, ECHR 2006-VII; *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV; *P. v. Portugal* (dec.), no. 56027/09, *ECHR 2011)*; *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014; and *Y.Y. v. Turkey*,

no. 14793/08, ECHR 2015 (extracts)). Any confusion between the two will therefore constitute an attack on one's reputation capable of attaining a sufficient level of seriousness for touching upon such an intimate characteristic of a person. Article 8 therefore applies to the present case.

2. Conclusion

28. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

29. The applicant submitted that not everything could be written or said about public figures due to their reputation. He asserted that the Portuguese courts had wrongly considered the impugned joke to be non-discriminatory towards the applicant. He stressed that the television show creators and host had intentionally confused his gender with his sexual orientation with the aim of making people laugh.

30. The applicant argued that the domestic authorities were under an obligation to protect his right to reputation pursuant to Article 8 of the Convention. In his view, the rulings of the domestic courts were also incompatible with Article 14 of the Convention. In particular, he pointed out that the domestic courts had based their decision to dismiss his case on his sexual orientation. He further submitted that the wording of the domestic courts' decisions had been discriminatory.

(b) The Government

31. The Government maintained that Article 8 had not been violated. In their view, the domestic courts had struck a fair balance when protecting the values guaranteed by the Convention which could come into conflict with each other in this type of case, namely the right to protection of reputation under Article 8 on the one hand and freedom of expression protected by Article 10 on the other. The Government thus concurred with the domestic courts' finding that the aim of the joke had not been to attack the applicant's sexual orientation.

32. The Government further pointed out that humour was a form of freedom of expression, and that public powers could not impose limits on satirical discourse.

33. The Government emphasised that the domestic courts had not discriminated against the applicant on any grounds. They had noted that a public figure is more exposed to criticism and humour and that it was normal to highlight one's characteristics through parody and mockery. Public figures should be more tolerant to public scrutiny and criticism.

34. The Government considered the comments made by the domestic courts debatable and that their reasoning had extended to comments that could have been avoided. Nevertheless, those comments – which could be considered polemic – did not suggest the domestic courts had acted discriminatorily, given the context in which they were made.

(c) The third party

35. The organisation ADF submitted that the vast majority of cases in which the Court has had to reconcile the conflict of rights claimed under Articles 8 and 10 have been brought by an organisation prohibited from publishing or distributing the offending material. However, the approach should not differ where the application has been made by the offended person.

36. Given the fundamental nature of Article 10 and the importance of the rights guaranteed therein to a free and democratic society, they argued that regard should be had to the stifling effect of "hate speech" law. In particular, in evaluating a claim under Article 8, the Court should be slow to conclude that mere speech can fall within the scope of the private life protections. Furthermore, where it concludes that Article 8 is nonetheless applicable, the subsequent balancing exercise should take into account not only the individual impact on Article 10 rights, but the wider impact on society of criminalising, or otherwise deterring, speech which is merely subjectively objectionable.

37. ADF also observed that the Court of Justice of the European Union (in the judgment *Deckmyn v. Vandersteen*, Case C-201/13, 3 September 2014) and the Court had acknowledged the particularly wide margin of appreciation associated with parody in the context of artistic expression, noting that those who created parody contributed to the exchange of ideas and opinions, which are essential to a democratic society. Referring to the case of *Vereinigung Bildender Künstler v. Austria* (no. 68354/01, 25 January 2007), it submitted that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Referring to the case of *Nikowitz and Verlagsgruppe News GmbH v. Austria* (no. 5266/03, 22 February 2007), it submitted that the Court had cemented its case-law employing the standard of a reasonable reader when approaching satirical material, refusing to interfere with freedom of expression for the sake of protecting the reputation of others as relates to unfocussed readership.

2. The Court's assessment

(a) Article 8

38. The case essentially raises an issue of protection of honour and reputation as part of the right to respect for private life under Article 8 of the Convention.

39. The Court notes that the applicant did not complain about an action by the State but rather that the State had failed to protect his reputation against interference by third parties.

(i) General principles

40. The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI; and *Pfeifer*, cited above, § 37).

41. The Court also reiterates that, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection and respect for his or her private life. Thus, the fact that an individual belongs to the category of public figures cannot in any way, even in the case of persons exercising official functions, authorise the media to violate the professional and ethical principles which must govern their actions, or legitimize intrusions into private life (see *Von Hannover v. Germany (no. 2)*, cited above, § 97, and more recently, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 122, 10 November 2015).

42. In cases like the present one where the complaint is that rights protected under Article 8 have been breached as a consequence of the exercise by others of their right to freedom of expression, due regard should be had, when applying Article 8, to the requirements of Article 10 of the Convention (see, for instance and *mutatis mutandis*, *Von Hannover v. Germany*, cited above, § 58). Thus, in such cases the Court will need to balance the applicant's right to "respect for his private life" against the public interest in protecting freedom of expression, bearing in mind that no

hierarchical relationship exists between the rights guaranteed by the two Articles (see *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010).

43. In this context the Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society (see, amongst many authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Reinboth and Others v. Finland*, no. 30865/08, § 74, 25 January 2011). This freedom is subject to the exceptions set out in Article 10 § 2 which must, however, be strictly construed. The need for any restrictions must therefore be established convincingly (see, for example, *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, ECHR 2015).

44. Lastly, in cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention or under Article 10. Accordingly, the margin of appreciation should, in theory, be the same in both cases (see *Couderc and Hachette Filipacchi Associés*, cited above, § 91).

45. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see, *Axel Springer AG*, cited above, §§ 85-88).

(ii) Application of the general principles to the present case

46. The applicant claimed that the dismissal by the domestic courts of his defamation proceedings against the television show was in breach of his right to reputation under Article 8.

47. At the outset, the Court notes that the alleged violation does not stem from a civil judgment on the merits or a judgment of a trial court, but from the refusal of the authorities to prosecute in a criminal case. The main issue in the present case is thus whether the State, in the context of its positive obligations under Article 8, achieved a fair balance between the applicant's right to protection of his reputation, which is an element of his "private life", and the other parties' right to freedom of expression guaranteed by Article 10 of the Convention (see *Von Hannover*, cited above, § 58).

48. The Court firstly notes that the applicant was a well-known television host in Portugal and thus a "public figure" within the meaning of

the Court's case-law (see *Courdec and Hachette Filipacchi Associés*, cited above, §§ 117-123). In that respect and in line with its case-law, the Court has already stated that the extent to which an individual has a public profile or is well-known influences the protection that may be afforded to his or her private life (ibid., § 117).

49. The Court further notes that the disputed joke was made during the broadcast of a late-night comedy show on television. It allegedly played with his sexual orientation and gender by including him in the list of female hosts.

50. Having been required on numerous occasions to consider disputes involving humour and satire, the Court reiterates that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care (see *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 33, 25 January 2007, and *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009; see also, *mutatis mutandis*, *Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, § 48, 21 February 2012, and *Welsh and Silva Canha v. Portugal*, no. 16812/11, §§ 29-30, 17 September 2013). The Court further observes that in the judgment of *Nikowitz and Verlagsgruppe News* (cited above) it introduced the criterion of the reasonable reader when approaching issues relating to satirical material (§§ 24-26). Additionally, as also acknowledged by the Court of Justice of the European Union, a particularly wide margin of appreciation should be given to parody in the context of freedom of expression (see paragraph 19 above).

51. The Court then observes that in the cases in which it was confronted with a satiric form of expression, the artistic creations in question were made against a background of political critique and debate. For instance, in the case of *Alves da Silva*, it took into account the specific context of carnival festivities in Portugal in which citizens take the opportunity to, through satire and caricature, criticise politicians (cited above, §§ 28-29). In the case of *Welsh and Silva Canha*, it took into account the content of the article written by the journalists – the misuse of public money – in a satirist newspaper. In this regard, the instant case is distinguishable from previous cases where the right to respect for private life had to be balanced against the right to freedom of expression, as the joke was not made in the context of a debate of public interest and, as such, no matters of public interest were at stake (see, for example, *Axel Springer AG v. Germany* and *A. v. Norway*, both cited above).

52. In this context, the Court considers that a State's obligation under Article 8 to protect an applicant's reputation may arise where the statements go beyond the limits of what is considered acceptable under Article 10.

53. The Court observes that in the defamation proceedings brought by the applicant, the domestic courts had to decide whether the joke fulfilled the elements of the offence of defamation. The applicant's allegations that the statement in question damaged his reputation were analysed by the domestic courts, which dismissed his claims in respect of damage as ill-founded. They considered that for a reasonable person, the joke would not be perceived as defamation because it referred to the applicant's characteristics, his behavior and way of expressing himself (see paragraphs 14 and 15 above).

In their assessment, the domestic courts took into account the context in which the joke had been made, in particular by taking into account the playful and irreverent style of the television comedy show and its usual humour (see paragraphs 14 and 15 above). Additionally, they took into account the fact that the applicant was a public figure.

54. The Court also notes that in reaching the conclusion to dismiss the applicant's defamation proceedings, the authorities considered that the defendants had not intended to criticise the applicant's sexual orientation (see paragraphs 14 and 15 above).

55. In the light of the above, the Court considers that the domestic courts did convincingly establish the need for placing the protection of the defendants' freedom of expression above the applicant's right to protection of reputation. It notes, in particular, that they took into account the defendants' lack of intent to attack the applicant's reputation and assessed the way in which a reasonable spectator of the comedy show in question would have perceived the impugned joke – rather than just considering what the applicant felt or thought towards the joke. A limitation on freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10 of the Convention.

56. Having regard to all the foregoing factors, and the margin of appreciation afforded to the State in this area, the Court concludes that the domestic courts struck a fair balance between the television show's freedom of expression under Article 10 and the applicant's right to have his reputation respected under Article 8. In sum, the Court is satisfied that this decision was in line with Convention standards, and finds no reason to substitute its view for that of the domestic courts.

There has, accordingly, been no violation of Article 8 of the Convention.

(b) Article 14 in conjunction with Article 8

57. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independence existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary

but also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, as a recent authority, *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008). In the present case, in view of its findings in paragraph 28 above, the Court holds that Article 14 applies to the present case.

(i) General principles

58. The Court has established in its case-law that in order for an issue to arise under Article 14, there must be a difference in treatment of persons in analogous or relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see, *inter alia*, *Schalk and Kopf v. Austria*, no. 30141/04, § 96, ECHR 2010, and *Burden*, cited above, § 60).

(ii) Application of these principles to the present case

59. The applicant complained that the domestic courts had based their decisions to dismiss his defamation proceedings on discriminatory grounds, namely his sexual orientation.

60. Faced with the applicant's complaint of a violation of Article 14, as formulated, the Court's task is to establish whether or not his sexual orientation was a causal factor in the domestic courts' refusal to prosecute, thus giving rise to a breach of Article 14 of the Convention taken in conjunction with Article 8.

61. The Court firstly observes that the domestic courts referred in their decisions to the fact that the applicant had made his homosexuality public. In assessing whether the joke had reached the defamation threshold, they noted that the applicant dressed himself in a "colourful way" and hosted television shows which were generally watched by women (see paragraphs 14 and 15 above).

62. In the applicant's view, the wording of the decisions clearly showed that the decisions to discontinue the defamation proceedings and consider the disputed joke not an attack on his reputation was based on his sexual orientation, which inevitably gave rise to discrimination against him.

63. The Government submitted that the decisions in question had not touched on the applicant's homosexuality. The domestic courts' considerations had been observations that had to be read in the context of the case. Even if the extracts of those decisions could arguably have been unfortunate expressions, they could not in themselves amount to a violation of the Convention.

64. In the instant case, the Court observes that the applicant himself had mentioned his sexual orientation in public and to the domestic courts. In this context, in the analysis of the case it would have been difficult for the domestic courts to avoid referring to it. In addition the domestic courts framed the impugned joke in the light of the applicant's external behaviour and the style of the talk show (see paragraphs 14 and 15 above) albeit, as submitted by the Government, through debatable comments. The Court takes further note that, in their decisions, the domestic courts considered that the television show and its host did not have any intention to attack the applicant's sexual orientation.

65. In this regard, and in the light of the above considerations concerning the domestic courts' analysis of the case, there is nothing to suggest that the Portuguese authorities would have arrived at different decisions had the applicant not been homosexual (contrast with *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, §§ 34-36, ECHR 1999-IX). The reason for refusing to prosecute seems rather to have been the weight given to freedom of expression in the circumstances of the case and the lack of intention to attack the applicant's honour. Consequently, in the absence of any firm evidence, it is not possible to speculate whether the applicant's sexual orientation had any bearing on the domestic courts' decisions.

66. Given the circumstances of the case, the Court is persuaded by the Government's argument that the relevant passages were "debatable" and "could have been avoided", but did not have discriminatory intent.

67. In the light of these findings, therefore, it cannot be said that the applicant was discriminated against on the grounds of his sexual orientation. There has, accordingly, been no violation of Article 14 taken together with Article 8.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Done in English, and notified in writing on 22 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	András Sajó
Deputy Registrar	President