



EGMR Urteil vom 15.1.2009, No. 1234/05 – *Reklos und Davourlis* ./.
Griechenland

- 1. Der Begriff des „Privatlebens“ („private life“) nach Art 8 Abs 1 MRK umfasst das Recht auf Identität sowie auf persönliche Entwicklung, sowohl in Bezug auf die eigene Persönlichkeit als auch die persönlichen Autonomie. Als Schutzrecht erfasst die Bestimmung auch die Abwehr des unbefugten Gebrauchs des Bildnisses einer Person durch Dritte.**
- 2. Versagen die nationalen Gerichte einem Neugeborenen den von seinen Eltern im Rahmen ihrer Obsorgebefugnis geltend gemachten Schadenersatzanspruch gegen ein Krankenhaus, weil dessen Personal die unbefugte Aufnahme zweier Fotos in einer abgeschlossenen Geburtsstation zugelassen hatte, so werden die Rechte des Minderjährigen auf ein faires Verfahren und auf Achtung seines Privatlebens verletzt.**
- 3. Hat der Abgebildete weder wissentlich noch versehentlich, z.B. durch sein Verhalten in der Öffentlichkeit, einen Anlass zur Bildaufnahme gegeben, so bedarf die Herstellung, Speicherung und Vervielfältigung der Fotografien seiner Zustimmung („consent“). Diese vorab einzuholende Zustimmung kann bei Minderjährigen auch durch die Eltern erteilt werden.**

Leitsätze verfasst von Dr. *Clemens Thiele*, LL.M.

In the case of *Reklos and Davourlis v. Greece*, the European Court of Human Rights (First Section), sitting as a Chamber composed of Nina Vajić, *President*, Christos Rozakis, Anatoly Kovler, Elisabeth Steiner, Dean Spielmann, Sverre Erik Jebens, George Nicolaou, *judges*, and Søren Nielsen, *Section Registrar*, having deliberated in private on 11 December 2008, delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1234/05) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Greek nationals, Mr Dimitrios Reklos and Ms Vassiliki Davourlis (“the applicants”), on 28 December 2004.
2. The applicants were represented by the first applicant, a lawyer practising in Athens. The Greek Government (“the Government”) was represented by their Agent’s delegates, Mr K. Georgiadis, Adviser at the State Legal Council, and Mrs S. Alexandridou, Legal Assistant at the State Legal Council.
3. The applicants alleged, in particular, that there had been a violation of Article 6 § 1 of the Convention on account of the length of the domestic proceedings in question, and a violation of Article 8.
4. By a decision of 6 September 2007 the Court declared the application admissible.
5. The applicants and the Government filed observations on the merits of the case (Rule 59 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are the parents of Anastasios Reklos, who was born on 31 March 1997 in a private clinic, I. Immediately after birth the baby was placed in a sterile unit under the constant supervision of the clinic’s staff. Only its doctors and nurses had access to this unit.
7. On 1 April 1997 two photographs of the new-born baby, taken face on, were presented to the second applicant. The photographs had been taken inside the sterile unit by a professional

photographer located on the first floor of the clinic. The clinic informed its clients that photography services were available.

8. The applicants complained to the clinic's management about the photographer's intrusion into a unit to which only the clinic's staff should have had access, adding that the new-born baby was likely to have been upset by the taking of photographs face on and, most importantly, that they had not given their prior consent.

9. Faced with the clinic's indifference to their protests and refusal to hand over to them the negatives of the photographs, on 25 August 1997 the applicants brought an action for damages before the Athens Court of First Instance, under Articles 57, 59 and 932 of the Civil Code. Acting on behalf of their child, they claimed the sum of 4,000,000 drachmas (about 11,739 euros) in respect of non-pecuniary damage for the alleged infringement of their child's personality rights.

10. On 24 June 1998 the Athens Court of First Instance dismissed their action as unfounded. It found as follows:

" ... it has not been possible to establish, from the circumstances in which the offending photographs were taken, that the photographer's conduct was unlawful. In any event, the personality rights of the new-born baby cannot have been affected because, just after birth, his psychological and emotional environment had not yet been formed and the recording of his face on a photograph cannot have had any negative consequences for his subsequent development." (decision no. 3049/1998)

11. On 22 September 1998 the applicants appealed. On 14 September 1999 the Athens Court of Appeal upheld the judgment of the court below. It found in particular as follows:

" ... according to the conclusions drawn from common practice, the personality, emotional environment and mental maturity of a new-born baby, only one day old, are not sufficiently developed for it to perceive an infringement of its personality rights, as has been alleged, or for its inner balance to be upset ...". (decision no. 7758/1999).

12. On 28 August 2002 the applicants, represented by the first applicant, lodged an appeal with the Court of Cassation. In their notice of appeal they pointed out their child's age at the material time and referred to all the considerations that had led the court below to dismiss their appeal. Their single ground of appeal on points of law concerned the Court of Appeal's interpretation of Articles 57 and 932 of the Civil Code. In their view, that interpretation ran counter to Article 2 of the Greek Constitution and to Article 8 of the Convention. In particular, the applicants claimed that the criterion used by the domestic courts in determining whether the image and, *a fortiori*, the personality of an individual, could be protected, had been incompatible with the rights to "dignity" and to "the protection of private life". In addition, the applicants argued that the criterion in question was also potentially dangerous, especially if it were to be applied to disabled children, as they might never reach the requisite level of "mental maturity" with the result that their image and, *a fortiori*, personality would not be protected.

13. On 8 July 2004 the Court of Cassation dismissed the appeal on points of law on the ground that it lacked precision. Relying on Articles 118 and 566 § 1 of the Code of Civil Procedure, the court found that the applicants "[had] not indicate[d] in their appeal the factual circumstances on which the Court of Appeal had based its decision dismissing their appeal" (judgment no. 990/2004).

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. Article 2 of the Greek Constitution provides as follows:

"1. Respect for and protection of the value of the human being constitute the primary duty of the State.

2. Greece, adhering to the generally recognised rules of international law, pursues the furtherance of peace and justice and the fostering of friendly relations between peoples and States.”

15. The relevant Articles of the Civil Code read as follows:

Article 34

“Everyone shall have the capacity to enjoy rights and assume duties.”

Article 35

“The person shall begin to exist at birth and cease to exist on death.”

Article 57

“Anyone whose personality is the object of unlawful interference shall be entitled to demand that such interference cease and also not be repeated in the future ...

In addition, claims for damages in accordance with the provisions relating to unlawful acts shall not be excluded.”

Article 59

“In the cases provided for in the two preceding Articles, the court may, in the judgment it gives upon the application of the injured party, and regard being had to the nature of the interference, also order the liable party to make reparation for non-pecuniary damage. Such reparation may consist in the payment of a sum of money, publication of the court’s decision and any other measure that is deemed appropriate in the circumstances of the case.”

Article 914

“Any person who, contrary to the law, causes damage to another person by his or her fault, shall make reparation for such damage”.

Article 919

“Any person who intentionally causes damage to another person by acting contrary to moral standards shall make reparation for such damage”.

Article 932

“Independently of any compensation due as a result of pecuniary damage caused by an unlawful act, the court may award reasonable monetary reparation, as it sees fit, for non-pecuniary damage. This provision shall enure in particular to the benefit of anyone who has sustained unlawful interference with health, honour or decency, or who has been deprived of liberty. In the event of death, the reparation may be awarded to the victim’s family by way of damages for pain and suffering”.

16. The relevant provisions of the Code of Civil Procedure provide as follows:

Article 118

“Notices of appeal served between parties or filed in the court shall indicate:

(4) the subject-matter of the appeal, stated clearly, precisely and succinctly ...”

Article 566 § 1

“Appeals on points of law shall contain the information required by Articles 118 to 120, cite the judgment appealed against, state the grounds of appeal, whether the appeal is against all or part of the impugned decision, and include a submission on the merits of the case.”

17. According to the case-law of the Court of Cassation, appeals on points of law must indicate the substantive rule that has been breached, must show how there has been a mistake of law, in other words where the breach can be found in the construction or application of the rule in question, and must also include a statement of the facts on which the Court of Appeal based its decision dismissing the appeal (Court of Cassation, nos. 372/2002 and 388/2002).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

18. The applicants complained that the dismissal by the Court of Cassation of their appeal on points of law on the ground that it was imprecise had breached their right of access to a court, as guaranteed by Article 6 § 1 of the Convention, of which the relevant part reads: “In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...”

A. The parties’ submissions

1. The Government

19. The Government alleged, first, that the appeal on points of law had been declared inadmissible on account of its imprecise nature. If the applicants had submitted their complaint in compliance with the admissibility rules governing the lodging of appeals on points of law, it would not have been dismissed. The Government thus claimed that the applicants had not validly exhausted the domestic remedies.

20. On the merits, the Government argued that the task of the Court of Cassation was not to re-examine the facts of the case but to assess the lawfulness of the decision appealed against. The Government added that the question whether or not the admissibility rule applied by the Court of Cassation was severe was purely theoretical. The important thing in the present case was that the Court of Cassation had simply applied its settled case-law as regards the conditions of admissibility of an appeal on points of law. In particular, according to that case-law, when an ordinary appeal had been dismissed as unfounded, that is to say after the gathering of evidence by the lower court, the Court of Cassation required the appellant to state in his appeal on points of law the facts of the case as admitted by the court below. In the Government’s view, such a statement was indispensable so that the Court of Cassation could subsequently exercise its right to review the construction of legal rules by the lower court. The Government considered that it was reasonable to expect the appellant on points of law to present the facts of the case as established by the Court of Appeal after the gathering of evidence. Otherwise it would be for the Court of Cassation itself to ascertain the facts that had led to an erroneous interpretation of domestic law by the Court of Appeal.

2. The applicants

21. The applicants replied that the rule applied by the Court of Cassation derived purely from case-law and not from any provision of domestic or international law. They added that their ground of appeal on points of law had been a legal ground that rendered superfluous any restatement of the facts of the case. They further alleged that all the requisite documents, namely those concerning their action and appeal before the domestic courts, together with copies of the corresponding judgments, had been included in the case file at the disposal of the Court of Cassation.

B. The Court’s assessment

22. The Court points out that, in its decision on the admissibility of the application, it joined to the merits the objection concerning the exhaustion of domestic remedies that had been raised by the Government in respect of the present complaint.

23. The Court considers that its task, in the present case, is to ascertain whether the manner in which the Court of Cassation dismissed the single ground of appeal on points of law submitted by the applicants deprived them *de facto* of their right to have their appeal examined on the merits. For that purpose the Court will look at the proportionality of the limitation imposed in relation to the requirements of legal certainty and the proper administration of justice.

24. The Court observes that the Greek Court of Cassation has judicially laid down a condition of admissibility based on the degree of precision of the grounds of appeal on points of law. That rule complies, in general terms, with the requirements of legal certainty and the proper

administration of justice. When the appellant before the Court of Cassation alleges that the Court of Appeal made a mistake in its assessment of the facts of the case in relation to the legal rule applied, it would seem reasonable to require the appellant to set out in his appeal the relevant facts that constitute the subject-matter of his submissions. Otherwise the Court of Cassation would not be in a position to exercise its right of review in respect of the judgment appealed against. It would be required to re-establish the relevant facts of the case and to interpret them itself in relation to the legal rule applied by the Court of Appeal. Such a hypothesis cannot be envisaged because it would mean requiring the Court of Cassation itself to formulate the grounds of appeal on points of law – grounds that it will then have to examine. In sum, the principle at issue is consonant with the specific role of the Court of Cassation, whose right of review is limited to the observance of the law (see, to that effect, *Brechos v. Greece* (dec.), no. 7632/04, 11 April 2006).

25. In the present case, however, the Court does not find that the applicants' appeal on points of law imposed on the Court of Cassation the burden of re-establishing the facts of the case. In the Court's view, three factors must be taken into account in this connection. First, the single ground of appeal on points of law related exclusively to the Court of Appeal's construction of the provisions applied in the case. Consequently, the simultaneous submission of the facts of the case, as established by the Court of Appeal, was not indispensable for the exercise by the Court of Cassation of its right of review (see *Efstathiou and Others v. Greece*, no. 36998/02, § 31, 27 July 2006).

26. Secondly, the crucial facts of the case for the Court of Cassation's examination were not particularly complex. Only one element was of real importance, namely the age of the baby at the time the offending photographs were taken, and that element was clear from the considerations of the Court of Appeal reproduced in the appeal on points of law (see *Zouboulidis v. Greece*, no. 77574/01, § 29, 14 December 2006).

27. Lastly, the impugned decision of the Court of Appeal had been appended to the appeal on points of law. It was thus easy for the Court of Cassation to consult the text of the judgment appealed against and to verify the accuracy of one simple fact already referred to in the appeal on points of law (see *Efstathiou and Others*, cited above, § 31).

28. In these circumstances, the Court takes the view that the Court of Cassation was apprised of the facts as established by the Court of Appeal. To declare the single ground of appeal inadmissible because the applicants "[had] not indicate[d] in their appeal the factual circumstances on which the Court of Appeal had based its decision dismissing their appeal" amounted to excessive formalism and prevented the applicants from having the merits of their allegations examined by the Court of Cassation (see, to this effect, *Běleš and Others v. the Czech Republic*, no. 47273/99, § 69, ECHR 2002-IX, and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 55, ECHR 2002-IX).

Accordingly, the Court dismisses the Government's preliminary objection that domestic remedies had not been exhausted and finds that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicants further complained that there had been an unlawful interference with their child's right to respect for his private life in view of the dismissal of their action for damages by the lower domestic courts. In particular, they disputed the reasoning given by those courts, namely that the mental maturity of their son, who was only one day old, was not sufficiently developed for him to perceive the alleged infringement of his personality rights. The applicants relied on Article 8 of the Convention, of which the relevant part reads as follows:

"1. Everyone has the right to respect for his private ... life, ...

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

A. The parties’ submissions

1. The Government

30. The Government argued at the outset that the applicants had not relied on a violation of Article 8, either expressly or in substance, during the proceedings before the domestic courts. They had not therefore given the national authorities an opportunity to remedy the alleged violation. The Government moreover contested the applicability of Article 8 in the present case, arguing that since the offending photographs had not been published the “private life” of the applicants’ son was not at issue.

31. On the merits, the Government alleged that the photographer’s intention was solely to sell the photographs of the new-born baby to its parents, without releasing them to the general public. In the present case there had thus been no commercial exploitation of the baby’s image. The Government concluded that, in these circumstances, there had been no interference with the applicants’ son’s right to respect for his private life. They added in this connection that it was self-evident that the mental maturity of the baby, at the age of only one day, was not sufficiently developed for it to sense any such infringement of its personality rights.

2. The applicants

32. The applicants argued that the approach taken by the domestic courts as regards the protection of their child’s personality was dangerous. In particular, they argued that if the perception by an individual of a potential interference with his image and, *a fortiori*, his personality were to be a prerequisite for his judicial protection, then the dignity and integrity of certain categories of persons could be at risk.

B. The Court’s assessment

1. Preliminary objections

33. The Court reiterates its previous finding, in its decision of 6 September 2007 on the admissibility of the application, that the applicants did invoke the right to protection of private life before the domestic courts and that they exhausted domestic remedies in respect of their complaint under Article 8 of the Convention. The Court also found that Article 8 was engaged in the present case. It does not therefore find it necessary to examine the Government’s objections a second time.

The objections in question should accordingly be dismissed.

2. Merits

(a) Scope of the case

34. The Court finds that it is necessary first to circumscribe the scope of the present case. It cannot address the general question raised by the applicants as to whether the recognition of a potential interference with the right to the protection of one’s image depends on the awareness of such interference by the individual concerned. The Court’s task is to ascertain whether the taking of the photographs in question without the parents’ prior consent, together with the retention of the negatives, was capable of interfering with the baby’s right to respect for its private life as guaranteed by Article 8 of the Convention. Consequently, the issue in the

present case is whether the domestic courts afforded sufficient protection to the private life of the applicants' son.

35. 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 an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI).

36. 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 (*ibid.*).

37. Moreover, the Court would emphasise that in the present case the applicants' son did not knowingly or accidentally lay himself open to the possibility of having his photograph taken in the context of an activity that was likely to be recorded or reported in a public manner. On the contrary, the photographs were taken in a place that was accessible only to the doctors and nurses of the clinic. I. and the baby's image, recorded by a deliberate act of the photographer, was the sole subject of the offending photographs.

(b) General principles

38. The Court notes that the Government focussed their arguments on the fact that in the present case the images in question were not published but simply reproduced with a view to being sold to the baby's parents. The Government thus alleged that, as there had been no publication of the offending images, there could not have been any infringement of the baby's personality rights. The Court must therefore ascertain whether, although the offending images were not published, there was nevertheless interference with the applicants' son's right to the protection of his private life. For that purpose it is necessary to examine the substance of the right to the protection of one's image, especially as in previous cases the Court has dealt with issues specifically involving the publication of photographs, whether of politicians or public figures (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002, and *Von Hannover*, cited above, § 50, respectively) or even of private persons (see *Sciacca v. Italy*, no. 50774/99, § 28, ECHR 2005-I).

39. In general terms, the Court observes that according to its case-law "private life" is a broad concept not susceptible to exhaustive definition. The notion encompasses the right to identity (see *Wisse v. France*, no. 71611/01, § 24, 20 December 2005) and the right to personal development, whether in terms of personality (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI) or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-..., and *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III).

40. A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case (see paragraph 37 above),

obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.

(c) Application of these general principles in the present case

41. In the present case the Court first observes that, as regards the conditions in which the offending pictures were taken, the applicants did not at any time give their consent, either to the management of the clinic or to the photographer himself. In this connection it should be noted that the applicants' son, not being a public or newsworthy figure, did not fall within a category which in certain circumstances may justify, on public-interest grounds, the recording of a person's image without his knowledge or consent (see *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002). On the contrary, the person concerned was a minor and the exercise of the right to protection of his image was overseen by his parents. Accordingly, the applicants' prior consent to the taking of their son's picture was indispensable in order to establish the context of its use. The management of the clinic I. did not, however, seek the applicants' consent and even allowed the photographer to enter the sterile unit, access to which was restricted to the clinic's doctors and nurses, in order to take the pictures in question.

42. In addition, the Court finds that it is not insignificant that the photographer was able to keep the negatives of the offending photographs, in spite of the express request of the applicants, who exercised parental authority, that the negatives be delivered up to them. Admittedly, the photographs simply showed a face-on portrait of the baby and did not show the applicants' son in a state that could be regarded as degrading, or in general as capable of infringing his personality rights. However, the key issue in the present case is not the nature, harmless or otherwise, of the applicants' son's representation on the offending photographs, but the fact that the photographer kept them without the applicants' consent. The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents (see, *mutatis mutandis*, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001-IX).

43. The Court notes that, during the examination of the case at issue, the domestic courts failed to take into account the fact that the applicants had not given their consent to the taking of their son's photograph or to the retention by the photographer of the corresponding negatives. In view of the foregoing, the Court finds that the Greek courts did not, in the present case, sufficiently guarantee the applicants' son's right to the protection of his private life.

There has therefore been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

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

A. Damage

45. The applicants claimed 36,000 euros (EUR) jointly in respect of the non-pecuniary damage they considered they had sustained in the present case.

46. The Government requested the Court to dismiss this claim and moreover submitted that any award should not exceed EUR 5,000.

47. The Court considers that the applicants certainly sustained non-pecuniary damage on account of the interference with their right of access to a court and with their child's private life, and that the finding of violations of the Convention does not constitute sufficient just satisfaction for such damage. Deciding on an equitable basis, the Court awards the applicants EUR 8,000 jointly under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

29. As the applicants did not submit any claim for costs and expenses, the Court considers that no award should be made to them under this head.

C. Default interest

30. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 15 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anmerkung*

I. Das Problem

Die späteren Beschwerdeführer waren die Eltern ihres am 31.3.1997 in einer Privatklinik bei Athen geborenen Sohnes, Anastasios Reklos, der zunächst in einer sterilen Frühgeburtensstation überwacht werden musste. Zu dieser abgesonderten Einheit des Krankenhauses hatten nur Ärzte und Klinikpersonal Zugang.

Einen Tag nach der Geburt fertigte ein im Krankenhausgebäude sein Studio betreibender Fotograf mit Duldung der Krankenhausleitung zwei Fotografien des Neugeborenen an. Die Beschwerdeführer protestierten bei der Klinikleitung gegen das unbefugte Eindringen des Fotografen und hatten keinerlei Zustimmung dazu oder zur Bildaufnahme erteilt. Die Krankenhausverwaltung verwies auf den Fotografen und dessen Weigerung, die Negative der

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Fotos auszufolgen. Die Eltern, Rechtsanwalt Reklos und Frau Davourlis, brachten daraufhin im August 1997 namens ihres Kindes eine Schadenersatzklage gegen die Klinik ein und forderten wegen Verletzung der Persönlichkeitsrechte ihres Kindes einen Betrag von umgerechnet ca. 11.750,00 Euro.

Im Juni 1998 wies das Erstgericht die Klage mit der Begründung ab, die Persönlichkeitsrechte des Neugeborenen könnten schon deshalb nicht verletzt worden sein, da unmittelbar nach der Geburt das psychische und emotionale Umfeld eines Menschen noch nicht entwickelt wäre, und daher die von seinem Gesicht gemachten Fotografien keine negativen Auswirkungen auf seine spätere Entwicklung haben könnten. Das Berufungsgericht bestätigte diese Rechtsansicht und schloss eine Persönlichkeitsbeeinträchtigung bei einem erst einen Tag alten Menschen aus. Auch das wegen Verletzung der Privat- und Intimsphäre damit im Jahr 2004 befasste Griechische Kassationsgericht wies das außerordentliche Rechtsmittel aus formalen Gründen zurück ohne inhaltlich Stellung zu nehmen.

Aufgrund der im Dezember 2004 erhobenen Beschwerde hatte es sich der Europäische Menschenrechtsgerichtshof in Straßburg letztlich mit der Frage zu befassen, ob die Entscheidungen der griechischen Gerichte die Verfahrensgarantie nach Art. 6 MRK bzw. das nach Art. 8 MRK geschützte Privat- und Familienleben der Familie Reklos- Davourlis verletzt hätte?

II. Die Entscheidung des Gerichts

Die Straßburger Höchststrichter gaben der Beschwerde einstimmig Folge und stellten sowohl eine Verletzung von Art 6 MRK als auch von Art 8 MRK fest. Aufgrund dieser Konventionsverletzungen sprach der EGMR eine Gesamtschädigung in Höhe von € 8.000,00 an ideellen Schadenersatz zu.

Der vom griechischen Höchstgericht geübte „exzessive Formalismus“ hielt nämlich die Beschwerdeführer davon ab, eine inhaltliche Prüfung ihrer Ansprüche durchführen zu lassen. Da die Unterinstanzen alle wesentlichen Sachverhaltselemente erhoben hatten, wäre dem griechischen Kassationsgerichtshof eine rechtliche Auseinandersetzung mit den inhaltlichen Rechtsfragen ohne weiteres möglich und zumutbar gewesen. Die bloß formal begründete Zurückweisungsentscheidung verletzte daher das Recht auf eine **fairen Verfahren nach Art 6 Abs 1 MRK**.

Zur Verletzung von **Art 8 MRK** betonte der EGMR zunächst, dass diese Bestimmung auch zum Schutz des Bildnisses einer Person gegen den Missbrauch durch andere heranzuziehen war. Darüber hinaus hob der Gerichtshof hervor, dass sich im vorliegenden Fall der Sohn der Beschwerdeführer weder wissentlich noch versehentlich der Möglichkeit ausgesetzt hatte, fotografiert zu werden, da er sich weder in einer Situation noch bei einer Tätigkeit befand, dazu angetan wäre, öffentlich aufgezeichnet, berichtet oder in sonst öffentlichen Weise dargestellt zu werden. Im Gegenteil, die Fotografien wurden im gegenständlichen Fall an einen Ort gemacht, zu dem nur die Ärzte und Krankenschwestern der Klinik Zutritt hatten. Die Fotos des Neugeborenen wurden vielmehr durch eine absichtliche Handlung des Fotografen verschafft und stellten das Gesicht des Babys als den einzigen Gegenstand der beanstandeten Aufnahmen dar.

Da die betreffende Person minderjährig war, oblag die Ausübung seines Rechts auf Schutz seines Bildnisses den beschwerdeführenden Eltern. Demgemäß war die vorherige Zustimmung durch die Eltern für die Bildaufnahme des Neugeborenen unverzichtbar für die weitere Verwendung der Lichtbilder. Teil der elterlichen Obsorge und Fürsorge war es auch, dass die Negative der Aufnahmen an die Eltern ausgefolgt würden. Ein Verbleib der Negative beim Fotografen führte nämlich dazu, dass die Babybilder in den Händen des Fotografen in identifizierbarer Form verblieben mit der Möglichkeit ihrer späteren Verwendung gegen den Willen der betroffenen Person und/oder seiner Eltern.

III. Kritische Würdigung und Ausblick

Das vorliegende Urteil des EGMR anerkennt zunächst den Bildnisschutz als Teil des von Art. 8 MRK erfassten Schutzes des Privat- und Familienlebens und liefert zugleich einen Beitrag zum Grundrechtsschutz von Minderjährigen.

Dass die fehlende Auseinandersetzung mit grundrechtlichen Fragen auch höchstgerichtliche Entscheidungen mit einer Konventionswidrigkeit belasten kann, stellt mittlerweile ständige Spruchpraxis der Straßburger Instanzen dar. Der Begründungsaufwand hat sich daher für die nationalen (Höchst-) Gerichte beträchtlich erhöht. Wollen sie sich dieser „grundrechtlichen Übung“ nicht unterziehen, laufen ihre Entscheidungen Gefahr, gegen Art. 6 MRK zu verstoßen.¹ Die österreichischen Gerichte haben sich dieser Herausforderung aus Straßburg mittlerweile gestellt.²

Bemerkenswert erscheinen auch die Ausführungen der Straßburger Richter zum Bildnisschutz á la MRK. Der Schutz des Art 8 MRK erfasst auch die missbräuchliche Verwendung eines Personenbildnisses durch Dritte.³ Damit anerkennt der EGMR ausdrücklich das Recht am eigenen Bild als Teil der schützenswerten Privatsphäre nach Art 8 Abs 1 MRK.⁴ Das „Privatleben“ im Sinne der vorgenannten Bestimmung stellt ein breites Konzept dar, das offenbar nicht abschließend definiert werden kann. Der Begriff umfasst das Recht auf Identität⁵ ebenso wie das Recht auf persönliche Entwicklung sowohl für die eigene Persönlichkeit⁶ als auch für die persönliche Autonomie.⁷

Ausdrücklich halten die Höchststrichter in Rz 40 ihres vorliegenden Urteils fest, dass das Bildnis einer Person eine der wichtigsten Eigenschaften ihrer Persönlichkeit darstellt weil es die einzigartigen Eigenschaften offenbart und zugleich die Person von anderen unterscheidet bzw. abhebt. Das Recht auf den Schutz des eigenen Bildes ist damit eine der wesentlichen Komponenten der persönlichen Entwicklung und setzt das Recht des Betroffenen auf Selbstbestimmung diesbezüglich voraus. Dieses Recht umfasst zunächst die Kontrollmöglichkeit des Individuums darüber, eine Veröffentlichung seines Bildes zu verweigern. Es umfasst auch das Recht des Einzelnen gegen eine Aufzeichnung, Speicherung oder Vervielfältigung des Bildnisses durch einen anderen vorzugehen und dieses zu untersagen. Da es sich beim Bildnis einer Person um ein Persönlichkeitsmerkmal handelt, erfordert dessen effektiver Schutz grundsätzlich aber auch besonders in Umständen wie den vorliegenden Fall, die Einholung der Einwilligung vom Betroffenen spätestens zum Zeitpunkt der Bildaufnahme und nicht bloß erst dazu, ob und wann es veröffentlicht wurde. Anderenfalls würde ein wesentliches Merkmal der Persönlichkeit in den Händen eines Dritten verbleiben und dem Betroffenen diesbezüglich keine Kontrolle über alle späteren Verwendungen des Bildes verbleiben.

¹ Statt vieler *Grabenwarter*, Europäische Menschenrechtskonvention⁴ (2009) § 24 Rz 60 ff; vgl. auch VfGH 29.9.2009, B 367/09 – *Ironische Wappendarstellung*, jusIT 2009/106, 220 (zust *Thiele*) = ÖJZ VfGH 2009/116, 1083 = JUS Vf/4088 = ecolex 2010, 499.

² Vgl. *Griss* Entwicklungslinien der OGH-Judikatur zum Grundrechtsschutz in BMJ (Hg), Justiz- und Menschenrechte (2008), 187 ff mwN.

³ EGMR 24.6.2004, 59320/00 – *Caroline von Monaco*, MR 2004, 246 (*Ennöckl/Windhager*).

⁴ EGMR 28.1.2003, 44647/98 – *Peck gg. Vereinigtes Königreich*, ÖJZ MRK 2004/20, 651; ausführlich *Grabenwarter*, Medienfreiheit und Bildnisschutz nach der Menschenrechtskonvention, FS Georg Röss (2005), 979, 979 f mwN.

⁵ EGMR 20.12.2005, 716 N?1/01

⁶ EGMR 11.7.2002, 28957/95 – *Goodwin gg. Vereinigtes Königreich*, ÖJZ MRK 2003/34, 766.

⁷ EGMR 7.3.2006, 6339/05 – *Evans gg. Vereinigtes Königreich*, EuGRZ 2006, 389 (*Bernat*) = EF-Z 2008/48, 84 (*Riedl*); 29.4.2002, 2346/02 – *Pretty gg. Vereinigtes Königreich*, EuGRZ 2002, 234 (*Kneihls*) = ecolex 2003, 68 = ÖJZ MRK 2003/17, 311 = öarr 2003, 171.

Abschließend scheint bemerkenswert, dass die Straßburger Richter den die Beschwerde führenden Eltern aufgrund ihrer Obsorgeberechtigung auch das Recht zubilligen, die Bildnisschutzrechte ihres Kindes für dieses auszuüben. Um Missverständnissen vorzubeugen: Nachdem weder die Einzelgewährleistung des Art 8 MRK noch Art 34 MRK, der das Recht der Individualbeschwerde enthält, Einschränkungen auf das Alter des Grundrechtsträgers vornehmen, ist allgemein⁸ anerkannt, dass auch Minderjährige Träger der jeweiligen Grundrechte sind. Da sohin die Ausübung der Grundrechte für das Neugeborene durch die Eltern wahrgenommen wird, hätte der Fotograf vor Bildaufnahme die Eltern um Erlaubnis, genauer gesagt um Zustimmung im Sinne einer Einwilligung, ersuchen müssen.

Ausblick: Das vorliegende Urteil aus Straßburg hat die Entwicklung eines Bildnisschutzes europäischen Zuschnitts entscheidend vorangetrieben. Der Gewährleistungsumfang des Art 8 MRK umfasst demnach auch das Recht am eigenen Bild. Grundrechtsträger bleibt der Abgebildete, der durchaus minderjährig oder wie im konkreten Fall neugeboren sein kann. Die Abwehrrechte machen die Obsorgeberechtigten für ihr Kind geltend. Die Eltern sind darüber hinaus nach Ansicht des EGMR berechtigt, auch die Herausgabe der Negative zu verlangen, da nur dadurch sichergestellt werden kann, dass eine weitergehende Verwendung der Lichtbilder durch Kontrolle der Eltern bzw. in weiterer Folge des Kindes gesichert bleibt.

IV. Zusammenfassung

Der Schutz des Privat- und Familienlebens nach Art 8 MRK kommt auch Neugeborenen für die Abwehr von unbefugten Bildaufnahmen zu. Die Ausübung dieses Grundrechtes erfolgt durch die Eltern als Teil ihrer Obsorgeberechtigung. Die unbefugte Bildaufnahme in einem Krankenhaus durch einen dort tätigen Fotografen verpflichtet diesen zur Herausgabe der zugehörigen Negative, da nur dadurch sichergestellt ist, dass die grundrechtlich gebotene alleinige Verfügungsbefugnis des Abgebildeten effektiv wahrgenommen werden kann.

⁸ Statt vieler *Grabenwarter*, Menschenrechtskonvention⁴ § 22 Rz 3mwN.